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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 the Acting
State Registrar of Vital
Statistics of the New Jersey
State Department of Health and
Senior Services,

Defendants-Respondents.

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION

Docket No. A-002244-03T5

ON APPEAL FROM:

MERCER COUNTY,
LAW DIVISION
Docket No. MER-L-15-03

Sat Below:

Hon. Linda R. Feinberg,
A.J.S.C.

**BRIEF OF AMICI CURIAE HUMAN RIGHTS CAMPAIGN, HUMAN RIGHTS
CAMPAIGN FOUNDATION, CHILDREN OF LESBIANS AND GAYS EVERYWHERE
(COLAGE), FAMILY PRIDE COALITION, FREEDOM TO MARRY, GAY &
LESBIAN ADVOCATES & DEFENDERS (GLAD), NATIONAL CENTER FOR
LESBIAN RIGHTS, NATIONAL GAY AND LESBIAN TASK FORCE, NEW JERSEY
LESBIAN AND GAY COALITION (NJLGC), and PARENTS, FAMILIES AND
FRIENDS OF LESBIANS AND GAYS (PFLAG) IN SUPPORT OF PLAINTIFFS-
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DRAFT

This amicus brief is filed in support of petitioners.

INTEREST OF AMICI

Human Rights Campaign ("HRC"), the largest national lesbian, gay, bisexual and transgender ("LGBT") political organization, envisions an America where lesbian, gay, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. Among those basic rights is equal access for same-sex couples to marriage and the related protections, rights, benefits and responsibilities. HRC has 600,000 members, including more than 11,000 in the State of New Jersey, all committed to making this vision of equality a reality.

Human Rights Campaign Foundation ("HRCF") is the educational arm of the Human Rights Campaign. The Foundation develops web-based resources and print publications on the many issues facing LGBT individuals.

One Foundation program, FamilyNet, is the most comprehensive and up-to-date resource for and about LGBT families. It provides legal and policy information about family law, including marriage and relationship recognition, as well as public education in those areas. FamilyNet provides valuable information to a broad constituency, including over 10,000 people who subscribe to a bi-weekly email newsletter on the

latest developments affecting LGBT families and tens of thousands more who use the FamilyNet area of the combined HRC/HRCF website (www.hrc.org) to get critical information about family issues.

Founded in 1990, **COLAGE** (Children of Lesbians and Gays Everywhere) engages, connects and empowers people to make the world a better place for children of LGBT parents and families. As a national youth-driven and constituent-based organization with nearly 10,000 member contacts, 40 chapters in 28 states (including one in Newark, New Jersey), and 15 years of expertise in LGBT family matters, COLAGE provides peer support, public education and policy advocacy with and for the millions of people in the U.S. who have same-gender loving and/or transgender parents and guardians. We envision a world in which all families are valued, protected, reflected, and embraced by society and all of its institutions; in which all children grow up loved and nurtured by kinship networks and communities that teach them about, connect them to, and honor their unique heritage; and in which every human being has the freedom to express sexual orientation, gender identity and self.

Founded in 1979, the **Family Pride Coalition** is the only national non-profit organization exclusively dedicated to securing equality for LGBT parents and their families. With a

strong focus on advocacy, education and support, the Family Pride Coalition represents tens of thousands of LGBT-headed household across the country. The Family Pride Coalition works in close partnership with local parenting groups, including one of the largest and most effective parenting groups in the country, Lambda Families of New Jersey.

Freedom to Marry is the gay and non-gay partnership working for marriage equality nationwide. Founded in 2003 and based in New York, Freedom to Marry brings together organizations -- national and local, non-gay and gay, secular and religious -- doing their part to end discrimination in marriage and assure equal protections and responsibilities for committed same-sex couples and their loved ones.

Founded in 1978, **Gay & Lesbian Advocates & Defenders** ("**GLAD**") is New England's leading legal rights organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD has a long history of working to end government discrimination against same-sex couples. Among its other efforts, GLAD was counsel in Goodridge v. Department of Public Health, in which the Massachusetts Supreme Judicial Court ruled that excluding gay and lesbian couples from marriage is unconstitutional.

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of LGBT people and their families through a program of litigation, public policy advocacy, free legal advice and counseling, and public education. Since its founding in 1977, NCLR has played a leading role in protecting and securing fair and equal treatment of LGBT parents and their children. NCLR is currently lead counsel in the California marriage equality case, Woo v. Lockyer, and is counsel in the Florida case, Higgs v. Kohlage.

The National Gay and Lesbian Task Force, founded in 1973, is the oldest national LGBT civil rights and advocacy organization. With members in every U.S. state, and 544 active members in New Jersey alone, the Task Force works to build the grassroots political strength of the LGBT community by conducting research and data analysis; training state and local activists and leaders; and organizing broad-based campaigns to advance pro-LGBT legislation and to defeat anti-LGBT referenda. As part of a broader social justice movement, the Task Force works to create a world in which all people may fully participate in society, including the full and equal participation of same-sex couples in the institution of civil marriage.

The **New Jersey Lesbian and Gay Coalition** ("NJLGC"), in conjunction with the Personal Liberty Fund ("PLF"), is committed to fighting discrimination based on sexual or affectional orientation or gender identification, and to enhancing the quality of the lives of New Jersey's LGBT and intersex people through education, public advocacy, political action, and legal reform. NJLGC has over 300 individual members and 25 organizational members, including: African American Office of Gay Concerns, AIDS Benefit Committee of New Jersey, Alice Paul South Jersey, American Civil Liberties Union of New Jersey, BiZone, GABLES of Cape May County, Gay and Lesbian Youth in New Jersey, Gay Activist Alliance in Morris County, Gender Rights Advocacy Association of New Jersey, Hyacinth AIDS Foundation, Jersey City Lesbian and Gay Outreach, Jersey Pride, Inc., Lambda Families of New Jersey, Log Cabin Republicans, National Association of Social Workers - New Jersey Chapter's Gay, Lesbian, Bisexual and Transgender Issues Committee, The NAMES Project Foundation - Central New Jersey Chapter, The New Jersey Gay Calendar of Events, New Jersey Stonewall Democrats, New Jersey's Lesbian & Gay Havurah, Out in Jersey Magazine, PFLAG of Bergen County, PFLAG of North Jersey, Pride Center of New Jersey, Trenton Gay and Lesbian Civic Association.

Parents, Families and Friends of Lesbians and Gays

(PFLAG) is a national non-profit organization with over 250,000 members and supporters in all 50 states and the Commonwealth of Puerto Rico. PFLAG promotes the health and well-being of LGBT persons, their families and their friends through: support, to cope with an adverse society; education, to enlighten an ill-informed public; and advocacy, to end discrimination and to secure equal civil rights.

As a family-based organization, PFLAG supports marriage equality for same-sex couples. To discriminate against same-sex couples by denying them the right to marry only serves to hurt families and children. Same-sex committed relationships deserve to be honored with the same rights and responsibilities that are granted to heterosexual couples.

SUMMARY OF ARGUMENT

This case raises the question whether the State of New Jersey, by excluding persons from the institution of marriage solely because they are in same-sex relationships, impermissibly denies them the protections of Article I, paragraph 1 of the New Jersey Constitution, which guarantees liberty and equality under the law to "all persons in the State." Amici believe that it does. The State's marriage exclusion violates the New Jersey Constitution's broad equality guarantee by depriving gays and

lesbians of the fundamental right to live in a marital relationship with the person of their choice as well as by depriving them of the critical protections and benefits that flow from marriage. In so doing, the State puts thousands of families in New Jersey at an enormous legal, financial, and social disadvantage. Approximately 16,000 same-sex couples reside in New Jersey, many with children.¹ As part of the nearly 1.2 million individuals in the United States who have reported living in same-sex relationships,² these couples face the same issues associated with building a life and supporting a family as do different-sex married couples. Barring these same-sex couples from marriage harms them and their children. No legitimate reason exists to deny these same-sex couples the same tangible and intangible benefits that accrue to different-sex couples through marriage. For this reason, jurisdictions throughout the United States, Canada, and Europe, as well as community leaders and other sectors of the American public, have begun to recognize the right to marry the partner of one's choice that exists for all individuals regardless of sexual

¹ See Gary J. Gates & Jason Ost, A Demographic Profile of New Jersey's Gay and Lesbian Families (Urban Inst. 2004).

² Gary J. Gates, Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households (Urban Inst. 2001); E. Todd Bennett & James D. Milko, Gay and Lesbian Rights in Family Law: A Demographic Inevitability, 35-Jun Md. B.J. 24, 29 (May-June 2002).

orientation, and the propriety of recognizing the marriage rights of same-sex couples. Consistent with this emerging awareness, and pursuant to the New Jersey Constitution's liberty and equality guarantees to all citizens, this Court should hold that the right to marry in New Jersey includes the right to marry a person of the same sex.

ARGUMENT

I. NEW JERSEY'S CATEGORICAL EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE INJURES TENS OF THOUSANDS OF NEW JERSEY CITIZENS, THEIR CHILDREN, AND THEIR FAMILIES.

New Jersey's marriage exclusion inflicts tangible and intangible harm on tens of thousands of individuals throughout New Jersey who live in committed same-sex relationships and, in many cases, are raising children. These couples form part of a significant and increasing number of same-sex couples throughout the United States who are building lives and families like any other couple. Consequently, just as married different-sex couples in New Jersey and across the nation, same-sex couples in New Jersey face numerous challenges in this regard. Marriage is the familial institution that the state recognizes and supports. This institution provides hundreds of important benefits and protections. Same-sex couples and their children need and deserve those benefits and protections the same as married different-sex and their children do.

A. New Jersey's Prohibition on Marriage for Same-Sex Couples Denies At Least 30,000 Residents, Including 12,000 Children, the Benefits and Protections of Marriage.

According to the 2000 Census, of nearly 600,000 couples nationwide who identify as living in same-sex relationships, roughly 16,000 of these couples reside in New Jersey.³ These couples live in 548 of the State's 566 cities,

³ Gates & Ost, A Demographic Profile of New Jersey's Gay and Lesbian Families, *supra*, at 2 (showing that 16,604 same-sex couples reside in New Jersey). The following demographic portrait is drawn from empirical analyses of the 1990 and 2000 Census data conducted by Gary J. Gates and Jason Ost. See Gary J. Gates & Jason Ost, The Gay and Lesbian Atlas (Urban Inst. 2004). The 1990 Census was the first to offer people the option of declaring themselves unmarried partners. Researchers believe that only one-third of gay couples who shared a household identified themselves as gay couples for the 2000 Census. See D'Vera Cohn, Census Shows Big Increase in Gay Households, *Wash. Post*, June 20, 2001, at A1. Other researchers posit that the 2000 data reflect an undercount based on other data showing that 13% of same-sex couples did not use the unmarried-partner designation on the census form to describe themselves. *Ibid.*; see also Gates & Ost, A Demographic Profile of New Jersey's Gay and Lesbian Families, *supra*, at 2 (suggesting that the true count is 10% to 50% higher than 2000 Census data indicate); M. V. Badgett & Marc A. Rogers, Left Out of the Count: Missing Same-sex Couples in Census 2000 (2003) (noting that there are several reasons to suspect that Census 2000 data undercount same-sex couples, including that couples may have declined to report their relationship due to concerns about confidentiality or may have felt that the options "unmarried partner" or "husband-wife" did not accurately describe their relationship); Lawrence v. Texas, Brief for Amici Curiae American Psychological Ass'n, *et al.* at 17, available at 2003 WL 152338 (Jan. 16, 2003) ("A preliminary analysis of the census data reported that same-sex couples head more than 594,000 households in the United States These findings . . . represent a low estimate of the number of same-sex couples in the United States.")

towns, and boroughs.⁴ This represents a 366% increase in the number of same-sex households in New Jersey since 1990, compared to a 314% increase nationwide during the same period.⁵ Moreover, nearly a third of same-sex couples in New Jersey are raising children.⁶ New Jersey's marriage prohibition thus harms tens of

(citing U.S. Census Bureau, United States Census 2000, Unmarried-Partner Households by Sex of Partners, Table PCT 14, available at <http://www.factfinder.census.gov>).

- ⁴ Lambda Legal, Facts & Figures About Marriage, Family and Same-Sex Couples, available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/131.pdf. The dispersion of same-sex couples throughout approximately 97% of New Jersey's cities, towns and boroughs is consistent with national statistics derived from Census 2000 data which indicate that same-sex couples reside in over 99% of all counties in the United States. See E. Todd Bennett & James D. Milko, Gay and Lesbian Rights in Family Law: A Demographic Inevitability, supra, 35-Jun Md. B.J. at 29.
- ⁵ See Gates, Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households, supra, at 3; Lambda Legal, Facts & Figures About Marriage, Family and Same-Sex Couples, supra, available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/131.pdf.
- ⁶ Gates & Ost, A Demographic Profile of New Jersey's Gay and Lesbian Families, supra, at 2. Four of the seven plaintiff couples in this case are raising children. Cindy Meneghin and Maureen Kilian have two children: Josh (age 10 when summary judgment papers were filed) and Sarah (then age 8). Ja50a (Cindy 7). Sarah and Suyin Lael are the parents of three girls: Zenzali (age 6 when summary judgment papers were filed), Tanaj (then age 4) and Danica (then age 3). Ja67a-68a (Suyin 4-5). At the time of the filings below, Karen and Marcye Nicholson-McFadden had a 4-year-old son named Kasey and a newborn daughter, Maya. Jall2a (Karen 3). Marilyn Maneely and Diane Marini have raised five children together, the youngest of whom recently left home for college. Ja92a-93a (Diane 3, 6). Alicia Toby and Saundra Heath are now grandparents. Ja36a-37a (Saundra 7).

thousands of the State's residents by denying them the significant economic and non-economic benefits that flow from marriage. Statistics related to same-sex households in New Jersey bear out this point.

1. Same-Sex Couples in New Jersey Are More Likely to Raise Children Than Same-Sex Couples in Other States.

Census data indicate that same-sex couples in New Jersey are considerably more likely to raise children than same-sex couples nationally. According to data for New Jersey, 35% of lesbian couples and 26% of gay male couples in the State are raising children.⁷ Children growing up in same-sex households in New Jersey number approximately 12,400.⁸ In comparison, nationwide, 21.6% of lesbian couples and 5.2% of gay male couples are raising an estimated 8 to 10 million children.⁹

⁷ Approximately 30% of same-sex couples residing in New Jersey have children living in their homes, compared to approximately 47% of different-sex households. See Gates & Ost, The Gay and Lesbian Atlas, supra.

⁸ See Gates & Ost, A Demographic Profile of New Jersey's Gay and Lesbian Families, supra, at 2.

⁹ See Gay and Lesbian Adoptive Parents: Resources For Professionals and Parents, Adoption Family Center (Apr. 2000), available at <http://www.naic.acf.hhs.gov/pubs/f-gay/f-gay.pdf> (citations omitted) (noting that, as of 1990, between 8 to 10 million children nationwide were being raised in same-sex households); Charlotte J. Patterson & Lisa V. Friel, Sexual Orientation and Fertility, in Infertility in the Modern World: Biosocial Perspectives 238 (G. Bentley & N. Mascie-Taylor eds., 2000) (suggesting that

Although generally lesbian couples are more likely to have children, in-state gay male couples with children have a higher average number of children than lesbian couples. In addition, same-sex couples in New Jersey are twice as likely as their different-sex counterparts to raise adopted children. The State's current ban on marriage between same-sex couples denies these children the benefits that having two married parents provides to marital children.

2. Same-Sex Couples in New Jersey Who Are Raising Children Are More Likely to Suffer Financial Hardship Than Other In-State Couples.

One of the things that marriage confers is financial resources and related stability for families. Families headed by same-sex couples in New Jersey possess a demonstrated need for these protections that marriage offers.

In New Jersey, same-sex couples with children have significantly lower median household incomes than different-sex couples with children. The average household income for same-sex couples with children is \$59,200. The average household income for married different-sex couples with children, on the other hand, is \$18,800 greater, or \$78,000. Moreover, the average income of \$59,200 for same-sex households with children is \$14,200 lower than the average household income of \$73,400

children of gay and lesbian parents in the United States number in the millions).

for same-sex households without children. In contrast, the average income of \$78,000 for married different-sex couples with children is \$5,700 higher than that of childless married different-sex couples -- \$72,300.

Education levels and other factors, such as race, go only so far in explaining the disparities in these numbers. Of New Jersey's different-sex couples with children, for instance, 48% include at least one spouse with a college degree. On the other hand, in only 33% of the State's same-sex couples is there at least one partner with a college degree. Additionally, 68% of different-sex couples raising children in New Jersey are Caucasian; 54% of same-sex couples raising children in the State are Caucasian. Increased racial diversity among childless same-sex couples, however, did not cause the median income of that group to fall below the median income of their different-sex counterparts.¹⁰ Consequently, one can draw only limited conclusions based on educational or racial differences between same-sex and different-sex couples with children.

What remains clear is that same-sex households with children in New Jersey stand at a financial disadvantage. Approximately 4,800 of the State's 16,000 same-sex couples are

¹⁰ See Gates & Ost, A Demographic Profile of New Jersey's Gay and Lesbian Families, supra, at 3.

raising 12,400 children, notwithstanding that their average annual household income falls \$18,800 below that of married different-sex couples with children, \$13,100 below that of married different-sex couples without children, and \$14,200 below that of same-sex couples without children. If the number of same-sex couples in New Jersey continues to grow at the current rate, the number of children they raise undoubtedly will increase as well. Today's numbers, however, suggest that at least 22,000 New Jersey residents (the number of same-sex parents raising children in addition to the number of those children) lack, and could clearly benefit from, the financial advantages and protections that marriage provides. Nothing justifies denying these families the greater opportunity for protections and stability that marriage confers.

B. New Jersey's Marriage Ban Serves No Legitimate State Purpose; Rather, It Imposes Harm on an Increasing Number of Children by Denying Them Legal Protections.

Given the increasing number of same-sex households in New Jersey, including those with children, no legitimate argument exists to support excluding same-sex couples from marriage based on any possible interest in minimizing the number of children raised in same-sex households.¹¹ Such an argument

¹¹ Amici do not concede, and there is no evidence, that a different-sex household is the optimal environment for raising children as compared to a same-sex household.

remains untenable, both legally and factually. The marriage ban, in fact, harms rather than helps children in this State.

First, New Jersey has clearly rejected any interest in minimizing the number of children raised by same-sex couples. The law in New Jersey unquestionably facilitates, not frustrates, child-rearing in same-sex households. Both adoption and parent visitation law make this clear. See, e.g., In re Adoption of Two Children by H.N.R., 285 N.J. Super. 1, 4, 12 (App. Div. 1995) (permitting woman to adopt her same-sex partner's biological child, for whom the couple planned during their relationship); In re Adoption of Child by J.M.G., 267 N.J. Super. 622, 625-26 (Ch. Div. 1993) (permitting woman to adopt

Studies indicate that children of gay and lesbian parents suffer no detrimental effects from growing up in such households. See, e.g., Judith Stacey & Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter?, 66 Am. Soc. Rev. 159-183 (2001); Ellen C. Perrin et al., Technical Report: Coparent or Second-parent Adoption by Same-Sex Parents, 109 Pediatrics 341, 342 (2002) (report of American Academy of Pediatrics, Committee on Psychosocial Aspects of Child and Family Health); G. Dorsey Green & Frederick W. Bozett, Lesbian Mothers and Gay Fathers, in Homosexuality: Research Implications for Public Policy 197 (John C. Gonsiorek & James D. Weinrich eds., 1991); see also Charlotte J. Patterson, Children of Lesbian and Gay Parents, 63 Child Dev. 1025 (1992); Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *10 (Wash. Sup. Ct. Aug. 4, 2004) (attached hereto in Appendix of Unpublished Cases at A-1, A-9 ("[T]here are no scientifically valid studies tending to establish a negative impact on the adjustment of children raised by an intact same-sex couple as compared with those raised by an intact opposite-sex couple.")).

her same-sex partner's biological child); In re J.S. & C., 129 N.J. Super. 486, 492 (Ch. Div. 1974) (finding that granting gay father visitation rights with his child served the child's best interest), aff'd, 142 N.J. Super. 499 (App. Div. 1976); see also V.C. v. M.J.B., 163 N.J. 200, 229 (2000) (determining that woman was "psychological parent" to the children of her former same-sex partner and, thus, granting her visitation rights with children). Likewise, the recently enacted provisions of the New Jersey Domestic Partnership Act¹² encourage the formation of families headed by same-sex couples by giving such couples, for example, the right to claim joint tax status and providing hospital visitation rights.¹³

Moreover, as a practical matter, denying same-sex couples the right to marry will not counteract current trends and limit the number of children raised in same-sex households. Data show that same-sex households have increased dramatically in the last ten-plus years, both in New Jersey¹⁴ and in the

¹² See N.J.S.A. 26:8A-1 et seq.

¹³ See Joanne Grossman, The New Jersey Domestic Partnership Law: Its Formal Recognition of Same-Sex Couples, and How It Differs From Other States' Approaches, (Jan. 13, 2004) available at <http://writ.news.findlaw.com/grossman/20040113.html> (site last visited Oct. 6, 2004).

¹⁴ The 2000 Census reported a 366% increase in the number of same-sex households in New Jersey over the previous ten years and a 314% increase nationwide. See Lambda Legal, Facts & Figures About Marriage, Family and Same-Sex

nation.¹⁵ Consistent with these trends, same-sex parents will raise a growing number of children in the future. See Andersen v. King County, No. 04-2-04964-4 SEA, 2004 WL 1738447, at *10 (Wash. Super. Ct. Aug. 4, 2004) (attached hereto in Appendix of Unpublished Cases ("App.") at A-1, A-8 ("Many, many children are going to be raised in the homes of gay and lesbian partners. Present social trends will undoubtedly continue.")).¹⁶ New

Couples, supra, available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/131.pdf.

¹⁵ See E. Todd Bennett & James D. Milko, Gay and Lesbian Rights in Family Law: A Demographic Inevitability, 35-Jun Md. B.J. 24, 25 (May-June 2002) ("The most recent census reveals a dramatic growth in the number of same-sex households."); D'Vera Cohn, Census Shows Big Increase in Gay Households, Wash. Post, June 20, 2001, at A1 ("The 2000 Census is showing huge increases in the number of same-sex couples sharing households in . . . the nation.").

¹⁶ See also Baker v. Vermont, 744 A.2d 864, 881-82 (Vt. 1999):

[I]ncreasing numbers of children are being conceived by such parents through a variety of assisted-reproductive techniques. See D. Flaks, et al., Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children, 31 Dev. Psychol. 105, 105 (1995) (citing estimates that between 1.5 and 5 million lesbian mothers resided with their children in United States between 1989 and 1990, and that thousands of lesbian mothers have chosen motherhood through donor insemination or adoption); G. Green & F. Bozett, Lesbian Mothers and Gay Fathers, in Homosexuality: Research Implications for Public Policy 197, 198 (J. Gonsiorek et al. eds., 1991) (estimating that numbers of children of either gay fathers or lesbian mothers range between six and fourteen million); C. Patterson, Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex Role Identity, in Lesbian and Gay Psychology (B. Greene et al. eds., 1994)

Jersey's exclusion of same-sex couples from the right to marry will not eliminate or even reduce the number of children being raised by same-sex couples.

In addition, the marriage exclusion results in denying these children many important protections and benefits, while providing no additional benefits to children being raised by different-sex couples. See Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 963 (Mass. 2003) ("[P]eople in same-sex couples . . . have children for the reasons others do -- to love them, to care for them, to nurture them. But the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws."); id. at 964 ("Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of 'a stable family structure in which children will be reared, educated, and socialized.'") (citation omitted); New York v.

(observing that although precise estimates are difficult, number of families with lesbian mothers is growing); E. Shapiro & L. Schultz, Single-Sex Families: The Impact of Birth Innovations Upon Traditional Family Notions, 24 J. Fam. L. 271, 281 (1985) ("[I]t is a fact that children are being born to single-sex families on a biological basis, and that they are being so born in considerable numbers.").

Greenleaf, 780 N.Y.S.2d 899, 903 (New Paltz Just. Ct. 2004)
("Excluding same-sex couples from civil marriage makes these children less, not more, secure."). The many tangible and intangible benefits and protections that New Jersey's marriage exclusion denies same-sex couples and their families include, for instance, comprehensive survivorship and intestacy rights, such as the right to priority in guardianship of an incapacitated spouse, see N.J.S.A. 3B:12-25; numerous economic advantages for family finances, such as a tuition credit and scholarships for spouses of those in public service, see N.J.S.A. 18A:62-25, 18A:71-78.1, 18A:71B-23; protections to care for children and one another, including, for example, the legitimization of children conceived through insemination, see N.J.S.A. 9:17-44; and workplace and private sector safety nets, such as coverage under family health insurance plans and family medical leave to care for an ill spouse, see N.J.S.A. 34:11B-3.

Recognizing same-sex couples' rights to marriage and its attendant benefits and protections, therefore, will only enhance their ability to care for and raise their children by bringing these families under the equal protection of New Jersey's laws. All New Jersey children deserve the opportunity for their parents to have access to marriage with its attendant rights and benefits.

II. JURISDICTIONS THROUGHOUT THE UNITED STATES, CANADA, AND EUROPE HAVE BEGUN TO AFFIRM THE PROPRIETY OF RECOGNIZING THE MARRIAGE RIGHTS OF SAME-SEX COUPLES.

Both within and outside the United States, jurisdictions have begun to affirm the marriage rights of same-sex couples to remedy the tangible and intangible harms that the marriage exclusion inflicts on countless same-sex couples, their children, and their families. Recent developments indicate an awareness in these jurisdictions, and emerging in others, that no state interest justifies denying a significant segment of society the protections and benefits that flow from marriage.¹⁷ In the United States, for instance, Massachusetts has established full marriage rights for same-sex couples, and

¹⁷ As recent editorials illustrate, a growing segment of New Jersey's population shares this view. See, e.g., Editorial, Causing Confusion: Asbury Park's 'Gay Marriage' Helps Nobody, *The Record* (Bergen County, N.J.), Mar. 10, 2004, at L8 ("We support gay marriage not only because we are against intolerance and discrimination, but also because the children of gays are best served when their parents have legal unions with the benefits and protections that legally married couples enjoy."); Editorial, Allow Same-Sex Couples to Wed, *Herald News*, Dec. 28, 2003 ("Increasingly, laws are changing to bring gays and lesbians into the mainstream of society. Civil marriage is the necessary final step. . . . New Jersey courts should rule as did the Massachusetts high court: 'We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.' Anything less denies a segment of citizens the right to wed the partner of their choice."); Editorial, Pioneering for Gay Rights, *The Star-Ledger* (New Jersey), June 21, 2003, available at 2003 WL 18708102 ("Seven homosexual couples have filed suit [in New Jersey], seeking full marriage rights. . . . Our hope is that . . . the homosexual couples win their court case.").

courts in Washington and Oregon have recognized that same-sex couples should receive the same protections and benefits that marriage affords to different-sex couples. Likewise, the Canadian provinces of Ontario, British Columbia, Quebec, Manitoba, and Nova Scotia as well as the Yukon Territory have all legalized marriage for same-sex couples, as have the Netherlands and Belgium. Spain recently moved in this direction as well. The Spanish Parliament is currently considering a bill that would revise the country's civil code to permit same-sex couples to marry and to adopt children.¹⁸

A. U.S. Courts Increasingly Recognize That Excluding Same-Sex Couples From Marriage Violates the Principles of Equal Protection.

Consistent with this trend in providing the benefits and protections of marriage to same-sex couples and their families, jurisdictions in the United States increasingly recognize that the right to marry encompasses same-sex couples. Indeed, as these jurisdictions affirm, the right to marry belongs to the individual, not the different-sex couple, and is defined, in part, by the individual's liberty to choose whether and whom to marry, regardless of gender. See, e.g., Goodridge, supra, 798 N.E.2d at 959 ("Whether and whom to marry . . . these

¹⁸ See Spain Moves Closer on Gay Marriage, CNN.com, Oct. 1, 2004, available at <http://www.cnn.com/2004/WORLD/europe/10/01/spain.gays/> (site last visited Oct. 6, 2004).

are among the most basic of every individual's liberty and due process rights."); Andersen, supra, 2004 WL 1738447, at *11 (App. A-9) (holding that "[t]he denial to the [same-sex couple] plaintiffs of the right to marry constitutes a denial of substantive due process"); New York v. West, 780 N.Y.S.2d 723, 725 (New Paltz Just. Ct. 2004) (holding that none of the reasons stated in opposition to marriage equality is paramount to the equal protection guarantees enshrined in the state and federal constitutions); Greenleaf, supra, 780 N.Y.S.2d at 905 (citing Justice Scalia's dissent in Lawrence v. Texas, 539 U.S. 558, 605, 123 S. Ct. 2472, 2498, 156 L. Ed. 2d 508, 543 (2003), for the proposition that constitutional protections of personal decision-making regarding marriage also belong to gays and lesbians).

1. Massachusetts

The Commonwealth of Massachusetts recognizes that every individual has a liberty interest in choosing whether and whom to marry, regardless of sex. See Goodridge, supra, 798 N.E.2d 941. In Goodridge, the Supreme Judicial Court of Massachusetts held that the state's marriage licensing statute, which implicitly excluded same-sex couples, violated the state constitution's equality and due process guarantees. See id. at 953. The court's analysis turned on its broad conception of the

right at issue as one concerning each individual's "right to marry -- or more properly, the right to choose to marry." Id. at 957. According to the court, the "right to marry" clearly is "part of the fundamental right of privacy implicit in the Fourteenth Amendment's Due Process Clause.'" Ibid. (quoting Zablocki v. Redhail, 434 U.S. 374, 384, 98 S. Ct. 673, 680, 54 L. Ed. 2d 618, 629 (1978)). That right belongs to the individual, not to couples, or to racial groups. See id. at 957 n.15 (citing Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 1824, 18 L. Ed. 2d 1010, 1018 (1967) ("Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."); Perez v. Sharp, 198 P.2d 17, 20 (Cal. 1948) ("The right to marry is the right of individuals, not of racial groups.")); see also Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S. Ct. 1029, 1038, 31 L. Ed. 2d 349, 362 (1972) ("If the right of 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.").

The court further explained this liberty or due process interest in terms of limited government intrusion: "The liberty interest in choosing whether and whom to marry would be

hollow if the [state] could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage." See Goodridge, supra, 798 N.E.2d at 959. The court noted the U.S. Supreme Court's relatively recent affirmation that "the core concept of common human dignity . . . precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner" as well as the "central role that decisions whether to marry or have children bear in shaping one's identity." Id. at 948 (citing Lawrence v. Texas, supra, 539 U.S. at 573-74, 123 S. Ct. at 2481, 156 L. Ed. 2d at 522-23).

Having concluded that the Commonwealth failed to proffer even a legitimate government interest to justify the exclusion of same-sex couples from the right to marry, the Goodridge court held that by denying same-sex couples the right to marry, the Commonwealth had violated its constitution's equality and liberty guarantees. See id. at 961 ("[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection."). As a result, the

Commonwealth of Massachusetts began allowing same-sex couples to marry in May 2004.¹⁹

Since the Goodridge court issued its ruling in November 2003, two courts in Washington State and two courts in New York, all construing their respective state constitutions, similarly concluded that their governments may not exclude same-sex couples from the right to marry.

2. Washington State

A recent state court decision in Washington acknowledged the fundamental right of individuals to marry a partner of the same sex. See Andersen v. King County, supra, 2004 WL 1738447, at *11 (App. A-9) (holding that Washington's marriage statutes, which expressly prohibit same-sex couples from marrying, violated the state constitution by denying gays and lesbians the fundamental right to marry). Central to the

¹⁹ The Goodridge court stayed its judgment for 180 days to give the state legislature time to devise an appropriate remedy. The Senate subsequently requested an advisory opinion from the Supreme Judicial Court as to the constitutionality of a dual system that reserves civil marriage to different-sex couples and recognizes civil unions for same-sex couples. The court rejected the scheme on equal protection and due process grounds, reasoning that it would single out same-sex couples solely for the purpose of denying them entry into civil marriage and thereby relegate them to second-class citizenship. See Opinions of the Justices to the Senate, 802 N.E.2d 565, 569-70 (Mass. 2004). The court's holding took effect in May 2004 upon expiration of the 180-day stay.

court's analysis was its conclusion that the right to marry constitutes a fundamental right. See id. at *5-6 (App. A-5 to A-6) (rejecting the state's position that the right at stake was a "right to marry someone of the same sex," in part, because the sine qua non of the marital relationship is a mutual, exclusive, and permanent commitment, not procreation). The court so concluded by first considering what makes a fundamental right "fundamental." See id. at *6-7 (App. A-6). As described in Lawrence v. Texas, fundamental rights involve matters closely linked to personal autonomy and self-definition. See ibid. (citing Lawrence, 539 U.S. at 573-74, 123 S. Ct. at 2481, 156 L. Ed. 2d at 522-23). Next, the court looked to the U.S. Supreme Court's characterization of the right at issue -- marriage -- as "the most important relation in life." Id. at *7 (App. A-6) (citing Maynard v. Hill, 125 U.S. 190, 211, 8 S. Ct. 723, 729-30, 31 L. Ed. 654, 659 (1888)). Because the statutes at issue implicated an "autonomous right" to have a "most important relation" in life, they implicated the fundamental right to marry. See ibid.

Having determined that a fundamental right was at stake, the court would have reviewed the marriage exclusion under strict scrutiny. It concluded, however, that the state's marriage statutes did not rationally relate to a legitimate

government purpose, thus obviating the need for heightened review. See id. at *11 (App. A-9). The court rejected three proffered justifications for the exclusion of same-sex couples from marriage. See id. at *7-9 (App. A-6 to A-8). With respect to the "morality" justification, the court noted that "the moral views of the majority can never provide the sole basis for legislation." Id. at *8 (App. A-7) (citing Lawrence, supra, 539 U.S. at 582-83, 123 S. Ct. at 2486, 156 L. Ed. 2d at 528-29 (O'Conner, J., concurring)). As to the "tradition" rationale, the court agreed with the Massachusetts Supreme Judicial Court that "'it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.'" Ibid. (quoting Goodridge, supra, 798 N.E.2d at 961 n.23).

Finally, in response to the argument that a proscription against marriage for same-sex couples promotes procreation and a healthy environment for raising children, the court stated "[t]here is no logical way" that "barring committed same-sex couples from the benefits of civil marriage . . . serves the interest of encouraging procreation." Id. at *9 (App. A-8). Indeed, "[t]here is no reasonable expectation that, should [the state sanction same-sex relationships], married fathers and mothers will abdicate their parental

responsibilities or young would-be parents will defect from the ranks of heterosexuals.” Id. at *10 (App. A-8). Not only does the marriage exclusion do nothing to encourage procreation or protect “traditional” families, the court reasoned, it deprives children of same-sex couples from the enhanced family stability and social adjustment that marriage provides. See ibid. Thus, the court concluded that Washington’s same-sex exclusion was not rationally related to a legitimate state interest, much less narrowly tailored to a compelling state interest. See id. at *11 (App. A-9).

Along similar lines, another Washington State court recognized that all individuals, including those in same-sex relationships, possess a fundamental right to marry. In Castle v. Washington, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004) (App. A-12), the court concluded that Washington’s Defense of Marriage Act (“DOMA”), which limits civil marriage to different-sex couples, violated that state’s constitution.

As an initial matter, the court determined that it should examine the state’s DOMA under a heightened review standard, in part, because the issue involved a fundamental right. 2004 WL 1985215, at *13 (App. A-25) (“This court holds that . . . marriage is a fundamental right and that our state

constitution guarantees more protection to citizen's rights than what is protected under the Equal Protection clause."). In analyzing whether the statute was narrowly drawn to serve a compelling state interest, the court noted that other state courts have held that a ban on marriage for same-sex couples "is not rationally related to any legitimate state interest, either using a federal equal protection analysis or a similar analysis under their own state constitutions." Ibid. The court then considered and rejected the state's justification for the statute. The legislature's stated purpose for the law was to "reaffirm its historical commitment to the institution of marriage as a union between a man and woman as husband and wife.'" Id. at *14 (App. A-26) (quoting Laws of 1998, ch. 1, § 1). The court reasoned that "if a historical commitment is the protected thing then such a bald justification would always prevent any change in any state law." Ibid. Next, the court rejected the "core" justifications that the State and amici provided -- to encourage procreation and family stability. See ibid. As to these, the court stated:

If the compelling state interest is to encourage procreation and stable environments for children then these statutes under scrutiny sweep too broadly and are not narrowly tailored for that purpose. They work to invalidate forms of family that the community recognizes and supports. Especially they weaken forms of

family that provide stability for children. Surely these broad forms of family merit support of the community.

The children of same sex couples, a form of family already approved by the community which approves of same sex couples adopting, or otherwise having children, should not carry the stigma of coming from less than a family -- a government approved family. The private vows of an opposite sex couple that can be crystallized into a government approved contract are not less stable if the private vows of a same sex couple can be crystallized into a government approved contract. In both cases there is more stability in the community.

[Id. at *16 (App. A-27).]

The court thus determined that the marriage exclusion lacked a rational relationship to any state interest in encouraging family stability or otherwise "protecting" the institution of marriage. Accordingly, the court determined that the exclusion of same-sex couples from marriage was unconstitutional. See ibid.

3. New York

Likewise, two New York state courts have interpreted that state's constitution to require marriage equality. In both New York v. West, 780 N.Y.S.2d 723 (New Paltz Just. Ct. 2004), and New York v. Greenleaf, 780 N.Y.S.2d 899 (New Paltz Just. Ct. 2004), the court held that New York's prohibition of marriage rights for same-sex couples was not rationally related to a legitimate state interest and, therefore, violated the New York

Constitution. See West, supra, 780 N.Y.S.2d at 725 (dismissing criminal charges against the mayor of New Paltz for solemnizing marriages between same-sex couples); Greenleaf, supra, 780 N.Y.S.2d at 905 (dismissing criminal charges against Unitarian ministers for solemnizing marriages for same-sex couples).

In West and Greenleaf, the New Paltz Justice Court dismissed criminal charges against the defendant mayor and defendant ministers, respectively, for solemnizing marriages for same-sex couples who did not present marriage licenses as required by New York's Domestic Relations Law § 1 et seq. (2004) ("DRL"). West, supra, 780 N.Y.S.2d at 723, 725; Greenleaf, supra, 780 N.Y.S.2d at 900, 905. The defendants argued that, as applied, the DRL violated the state constitution because it precluded state officials from issuing marriage licenses to same-sex couples, which, in turn, denied same-sex couples the right to marry. See Greenleaf, supra, 780 N.Y.S.2d at 900.

In both cases, the court evaluated whether the statute rationally related to a legitimate government purpose, and concluded that it did not pass muster. See West, supra, 780 N.Y.S.2d at 725 ("This equal protection analysis is governed by the 'rational basis standard.'"); Greenleaf, supra, 780 N.Y.S.2d at 900. The West court, for instance, found that the record contained no evidence of a legitimate state purpose for

preventing same-sex couples from marrying. West, supra, 780 N.Y.S.2d at 725. Nevertheless, the court evaluated the reasons generally stated in opposition to marriage rights for same-sex couples and found them to be unavailing. See ibid. ("I am familiar with the arguments raised in the cases from other states addressing this issue . . . but find that none of the reasons stated in opposition to same-sex marriage is paramount to the equal protection guarantees enshrined in the state and federal constitutions.").

The Greenleaf court reached the same conclusion on grounds that the stated purposes for the statute were either not legitimate or not rationally related to the statutory classification. See Greenleaf, supra, 780 N.Y.S.2d at 900-01. Specifically, the court held that the State's interest in preserving the tradition of marriage as solely between one man and one woman did not constitute a legitimate state interest. See id. at 901 ("Tradition does not justify unconstitutional treatment."). Additionally, the court held that religious reasons for prohibiting marriage of same-sex couples likewise did not amount to a legitimate state interest, explaining that "a lawful marriage that is subject to the laws of the state remains a civil contract, appropriately free of religious beliefs." Id. at 903.

The court rejected proffered justifications based on the state's interest in providing a favorable environment for procreation and child-rearing because the marriage exclusion did not rationally relate to such goals. First, "[n]o inquiry is ever made into the sexual activities or sexual preferences of a prospective opposite-sex couple before a marriage license is issued," and "[m]any same-sex couples raise children, adopted or conceived by one of the partners." Ibid. Moreover, the court noted that marriage confers significant economic and legal benefits, but "[t]here can be no constitutional rationale for denying same-sex couples the right to receive the benefits that are so lavishly bestowed on mixed-sex couples." Ibid.

In addition, the New York Attorney General also has affirmed the legitimacy of same-sex relationships. In an informal opinion, the Attorney General analyzed whether the New York Domestic Relations Law permits same-sex couples to marry and whether New York must honor marriages of same-sex couples performed in other jurisdictions. See 2004 N.Y. Op. Atty. Gen. No. 1, 2004 WL 551537 (Mar. 3, 2004). While the opinion concluded that the New York legislature did not intend to permit same-sex couples to marry through the DRL, it stressed that the exclusion of same-sex couples from marriage "presents serious constitutional concerns." Id. at *3.

The opinion also determined that New York essentially must recognize marriages between same-sex couples validly executed in other jurisdictions: “[W]e note that the issue of recognizing same-sex unions from other jurisdictions presents a distinct legal question. Consistent with the holding of the only state court to have ruled on this question, New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law.” Id.; cf. Langan v. St. Vincent’s Hosp. of N.Y., 196 Misc. 2d 440 (N.Y. Sup. Ct. 2003) (holding that the surviving same-sex partner of a Vermont civil union was the deceased person’s “spouse” entitled to bring a wrongful death suit under New York law).

4. Oregon

The Oregon Constitution may ultimately compel that state to grant same-sex couples full marriage rights. Earlier this year, an Oregon trial court concluded that denying same-sex couples the rights and benefits of marriage violates the Oregon Constitution. See Li v. Oregon, No. 0403-03057, 2004 WL 1258167, at *8 (Or. Cir. Ct. Apr. 20, 2004) (App. A-29, A-35) (holding that Oregon’s marriage statute acted to deprive a certain class of people benefits granting by the Oregon Constitution). The court also held that the state was required to register and treat as valid the hundreds of marriage licenses

that Multnomah County, Oregon, issued to same-sex couples until the county was ordered to stop. See id. at *9 (App. A-36).

In reaching that decision, the court in Li noted that Oregon's marriage statute discriminates on the basis of gender and sexual orientation, both of which constitute suspect classes under state law. See id. at *5-6 (App. A-33) (citing Hewitt v. State Accident Ins. Fund Corp., 653 P.2d 970, 977-78 (Or. 1982) (holding that classifications based on gender are suspect); Tanner v. Or. Health Scis. Univ., 971 P.2d 435, 446-47 (Or. Ct. App. 1998) (holding that same-sex couples belong to a suspect class)). In addition, the statute denies same-sex couples the right to marry, barring them from the tangible and intangible benefits of marriage. See id. at *5 (A-32 to A-33) (recognizing intangible benefits incident to marriage, such as social benefits, and noting that "[i]t is not clear how [Oregon] appellate courts would . . . resolve the issue" of providing these benefits to same-sex couples). For these reasons, the court held that "the effect of [Oregon's marriage statute] [was] to impermissibly classify on the basis of sexual orientation, the repercussions of which deny same-sex couples certain substantive benefits." Id. at *7 (App. A-34). It thus found that Oregon's marriage statute violated the Privileges or Immunities clause of the state constitution because it "act[ed]

as a barrier to certain domestic partners and not to others. This barrier deprives those who cannot obtain a license which will be acknowledged by the State Registrar from some very basic and fundamental rights" Id. at *10 (App. A-37). Although the court left the matter to the legislature, it ordered the State to register the marriages of same-sex couples who had received valid licenses from Multnomah County prior to the court's injunction. Ibid.

In sum, many courts across the United States have begun to recognize same-sex couples' equal right to marry, as well as society's interest in providing same-sex couples, their children, and their households the same legal protections and economic and financial stability that marriage confers on different-sex couples and their families. As under the statutes and constitutions construed by the courts identified above, under the laws and constitution of New Jersey, no legitimate reason exists to withhold from same-sex couples and their families in this State the freedom to marry and the security, obligations, protections, and dignity it brings.

B. Five Canadian Provinces and One Territory Have Recognized Marriage Rights for Same-Sex Couples.

Consistent with the awareness emerging in the United States, marriage laws in other jurisdictions increasingly recognize that same-sex couples deserve equal access to the

institution of marriage and its attendant rights, benefits, and responsibilities. Indeed, like the right to privacy in matters of intimacy at stake in Lawrence v. Texas, to the extent that laws prohibiting same-sex couples from marrying "rel[y] on values we share with a wider civilization," Lawrence v. Texas, 539 U.S. 558, 576, 123 S. Ct. 2472, 2483, 156 L. Ed. 2d 508, 524 (2003), the view of marriage as reserved exclusively for different-sex couples is no longer universally accepted as valid. As in Lawrence with respect to other individual liberties, "[t]he right the petitioners seek in the case has been accepted as an integral part of human freedom in many other countries." Id. at 577, 123 S. Ct. at 2483, 156 L. Ed. 2d at 524.

Over the past two years, for instance, Canada -- which has a national definition of who may marry -- has taken significant steps toward equal marriage rights for all Canadian citizens. Five provincial courts and one territorial court have held independently that § 15(1) of the Canadian Charter of Rights and Freedoms secures for all Canadians the right to marry whomever they choose.

1. Ontario

Same-sex couples in Ontario gained the right to marry on October 9, 2003. See Halpern v. Canada, [2003] S.C.C.A. 337

(allowing attorney general's motion to cancel intervenor Interfaith Coalition on Marriage and Family's motion for leave to appeal ruling in Halpern v. Toronto, 172 O.A.C. 276 (Ont. Ct. App. 2003)). The Ontario Court of Appeal determined that the common law definition of marriage excluded the plaintiffs, seven same-sex couples, and thus denied them equal marriage rights. See Halpern v. Toronto, 172 O.A.C. 276, ¶¶ 9-16 (Ont. Ct. App. 2003). To assess whether the plaintiffs had suffered a violation under § 15(1) of the Charter,²⁰ the court framed the inquiry broadly in terms of "whether excluding same-sex couples from another of the most basic elements of civic life -- marriage -- infringes human dignity and violates the Canadian Constitution." Id. ¶ 8.

²⁰ Section 15(1) of the Canadian Charter of Rights and Freedoms (available at <http://laws.justice.gc.ca/en/charter>) states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability." Section 1 provides, "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

According to the court's analysis,²¹ a definition of marriage that excludes same-sex couples impinges individual liberty because it restricts a person's ability to make fundamental choices with regard to his or her life. See id. ¶ 87. Indeed, the exclusion denies individuals in same-sex relationships "a fundamental choice - whether or not to marry their partner." Ibid. (emphasis added). The availability of pseudo-marriage alternatives, such as domestic partner arrangements, proved insufficient to remedy the complete exclusion of gays and lesbians from a fundamental societal institution. See id. ¶¶ 101-07. Affirming the Superior Court's conclusion that the common law definition of marriage violated the plaintiffs' equality rights based on sexual orientation, the Court of Appeal for Ontario reformulated the definition of

²¹ A finding that § 15(1) has been violated requires a three-pronged inquiry: (i) does the impugned law draw a formal distinction based on personal characteristics or fail to account for the claimant's disadvantaged position in society; (ii) is the claimant subject to differential treatment based on one or more enumerated or analogous grounds; and (iii) does the differential treatment discriminate by imposing a burden or withholding a benefit in a manner that reflects stereotyping. See Halpern ¶¶ 59-61.

In the event the court finds a section 15(1) violation, it proceeds with a § 1 inquiry to determine whether the impugned law is a reasonable limit on a Charter right. See Halpern ¶ 113. Pursuant to § 1 inquiry, the state bears the burden of proving that the objective of the impugned law is pressing and substantial and that the means chosen to achieve the objective are reasonable and demonstrably justifiable. See id.

marriage as the "'voluntary union for life of two persons to the exclusion of all others.'" Halpern v. Canada, [2003] S.C.C.A. 337, ¶ 108 (citation omitted).

2. British Columbia

British Columbia followed Ontario and became the second Canadian province where same-sex couples could marry. On May 1, 2003, the British Columbia Court of Appeal concluded that the common law definition of marriage excluded same-sex couples in violation of the Canadian Charter. See EGALE Canada Inc. v. Canada, 2003 BCCA 251. To remedy this deficiency, the court recognized marriage as constituting "the lawful union of two persons to the exclusion of all others." See id. ¶ 159. The court's holding took effect on July 8, 2003. See EGALE Canada Inc. v. Canada, 2003 BCCA 406, ¶ 8 (lifting suspension of its May 1, 2003 decision with the explicit consent of the Attorney General of Canada and no opposition from the Attorney General of British Columbia).

In reaching its decision, the British Columbia Court of Appeal explained that the former definition of marriage no longer fit the current institution of marriage. See EGALE, supra, 2003 BCCA 251, ¶ 86 (noting that "'marriage is not a static institution within any society' but 'evolves as society changes'" (citation omitted); see also id. ¶ 178 ("Since the

decriminalization of homosexual relationships in Canada in 1969, there has been a steady expansion of the rights of gay, lesbian and bi-sexual persons [T]his evolution cannot be ignored. Civil marriage should adapt to contemporary notions of marriage as an institution in a society which recognizes the rights of homosexual persons to non-discriminatory treatment."). The court thus altered the definition to conform to modern-day realities. Id. ¶ 159.

3. Quebec

Quebec became the third Canadian province to issue marriage licenses to same-sex couples. On September 6, 2002, the Superior Court of the District of Montreal recognized the basic right of same-sex couples to marry in Quebec. See Hendricks v. Quebec, [2002] R.J.Q. 2506. The court declared inoperative the statutory source of Quebec's proscription against marriage for same-sex couples on grounds that it contravened the guarantees of equal protection and benefit that § 15(1) of the Canadian Charter provides. On March 19, 2004, the Court of Appeal in Quebec cleared the way for same-sex couples to marry, affirming the Superior Court's judgment and the principle that "homosexuality is not a valid ground for opposition [to solemnization of marriage]." Hendricks v. Quebec, [2004] R.J.Q. 851, ¶ 56.

4. The Yukon Territory

Same-sex couples may now marry in the Yukon Territory. The Supreme Court of the Yukon Territory recently ruled that an individual's right to choose the person whom he or she will marry does not depend on the sex of the chosen partner. On July 14, 2004, the Supreme Court of the Yukon Territory adopted the reasoning of the courts in Ontario, British Columbia, and Quebec in concluding that the common law definition of marriage impermissibly contravened § 15(1) of the Charter and could not be justified pursuant to § 1. See Dunbar v. Yukon Territory, 2004 YKSC 54, ¶ 22.

5. Manitoba

Manitoba now permits same-sex couples to marry as well. On September 16, 2004, the Manitoba Court of Queen's Bench ordered the common law definition of marriage in Manitoba to be amended to include same-sex couples. See EGALE Canada, Court Extends Equal Marriage to Manitoba, Sept. 16, 2004. Referring to the decisions in Ontario, British Columbia, Quebec, and the Yukon Territory, Justice Yard noted that "[t]he cumulative effect and the overwhelming effect of that judicial authority is . . . that the traditional definition of marriage is no longer constitutionally valid in view of the provisions of the Charter of Rights and Freedoms." Id.

6. Nova Scotia

Most recently, on September 24, 2004, Nova Scotia became the sixth Canadian province or territory to recognize the rights of same-sex couples to marry, and to begin issuing marriage licenses to same-sex couples. See N.S. Judge Okays Same-Sex Marriage, CBC, Sept. 24, 2004, available at http://novascotia.cbc.ca/regional/servlet/View?filename=ns_samesex20040924 (site last visited Oct. 7, 2004). Although Nova Scotia had already recognized the legitimacy of same-sex relationships by establishing a domestic partnership registry in 2001, the provincial Supreme Court conferred full marriage equality when it ruled that banning same-sex couples from marriage violated the Canadian Charter of Rights and Freedoms. See id.

The evolution of the Canadian definition of marriage to include same-sex couples represents a logical step toward equality for all citizens, and results from "a sea-change in laws and attitudes relating to marriage and the family." EGALE Canada Inc. v. Canada, supra, 2003 BCCA 251, ¶ 86 (citation omitted). Prior to the September 2002 decision of the Montreal court granting same-sex couples marriage rights in Quebec, Canada's gay and lesbian couples were absolutely shut out from the institution of civil marriage. See EGALÉ Canada, Court

Extends Equal Marriage to Manitoba, Sept. 16, 2004. Now, slightly more than two years later, Canadian regional governments have recognized the marriage rights of same-sex couples in five provinces and one territory, such that 82% of Canada's population now enjoys full marriage equality. As marriage equality has improved in Canada, so has public opinion regarding the issue. A July 1, 2004 survey by the Centre for Research and Information on Canada and Environics indicated that the percentage of Canadians who agree that gays and lesbians should be permitted to marry is 57% -- the highest it has reached since a similar survey two years ago. See id.

C. European Countries Have Established Full Marriage Rights for Same-Sex Couples.

This emerging recognition that same-sex couples deserve equal access to the institution of marriage and its attendant rights, benefits, and responsibilities is not unique to North America. In fact, formal recognition of each individual's right to marry first occurred in Europe in the Netherlands. Soon after, Belgium followed suit. Most recently, Spain embarked on a similar path toward full marriage equality.

1. The Netherlands

On April 1, 2001, the Netherlands became the first country in the world to provide citizens in committed same-sex

relationships full access to marriage.²² The Dutch Parliament altered the definition of "marriage" by amending Article 30 of Book 1 of the Dutch Civil Code to provide that "[a] marriage can be contracted by two persons of different sex or of the same sex."²³ With few exceptions, same-sex couples receive through marriage the same benefits and privileges that married different-sex couples receive.²⁴ The legal prerequisites for same-sex and different-sex marriage are identical.²⁵

2. Belgium

On January 30, 2003, Belgium became the second country in the world to offer legal, economic, and social equality to

²² Partners Task Force for Gay & Lesbian Couples, Netherlands Offers Legal Marriage (June 2, 2004), available at <http://www.buddybuddy.com/mar-neth.html>.

²³ De Wet Openstelling Huwelijk, Dec. 21, 2000, published in the Official Journal of the Kingdom of the Netherlands, Stb. 2001, at 9, available at <http://www.overheid.nl/op/index.html>.

²⁴ Only two differences exist between same-sex and different-sex marriages with respect to benefits or privileges: (1) same sex couples may not take part in inter-country adoptions due to concerns that other countries would react negatively to sending children to the Netherlands for inter-country adoption, and (2) the presumption of paternity applies exclusively to different-sex couples. See Kees Waaldijk, Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries, 38:3 N.E.L.R. 570, 574 (2004).

²⁵ See Waaldijk, supra, at 576 ("Marriage is restricted to two persons, and the same rules of consanguinity apply equally to both. The same conditions with respect to capacity to marry in terms of citizenship or residence also apply equally to same-sex and different-sex couples.").

same-sex couples by providing marriage rights to them. The Belgian Parliament amended Article 143 of the Belgian Civil Code to provide that two persons of different or the same sex may enter into a marriage contract.²⁶ As amended, Belgium's marriage provisions provide same-sex couples all of the rights and benefits incident to marriage, with the exception of certain adoption rights,²⁷ while the prerequisites of marriage for either different- or same-sex couples are identical.²⁸

3. Spain

Spain has stepped on a similar path toward full marriage equality for same-sex couples. On October 1, 2004, Spain's cabinet members approved a bill revising the country's civil code to permit same-sex couples to marry and to adopt children.²⁹ The bill also provides same-sex couples other rights currently available only to different-sex couples, such as

²⁶ Waaldijk, supra, at 582.

²⁷ Waaldijk, supra, at 582. Earlier this year, the Belgian Parliamentary Committee for Public Well-Being, Health and Equal Opportunities approved a new adoption decree which will permit homosexual couples to adopt children. The decree will take effect as of January 1, 2005. See Belgian News Digest, Belgian Parliament Approves New Adoption Decree, 2004 WL 60912642 (Feb. 13, 2004).

²⁸ See Waaldijk, supra, at 582.

²⁹ See Spain Moves Closer on Gay Marriage, CNN.com, Oct. 1, 2004, available at <http://www.cnn.com/2004/WORLD/europe/10/01/spain.gays/> (site last visited Oct. 6, 2004) ("Spain Moves Closer").

inheritance rights and those related to securing bank credit.³⁰ The reform, which the Spanish Parliament must now approve, is expected to pass easily.³¹ If it does, marriage for same-sex couples may be a reality in Spain by the early part of 2005.³²

Spain, Belgium, and the Netherlands are not the only nations in Europe that recognize the legitimacy of same-sex relationships. Others have taken steps toward officially acknowledging that same-sex couples deserve equal access to the institution of marriage and its attendant rights, benefits, and responsibilities.³³ Denmark, Norway, Sweden, Finland, and Iceland, for example, all recognize same-sex relationships through registered partnerships modeled after each jurisdiction's marriage laws.³⁴ "Same-sex couples in all five . . . countries gain approximately the same array of legal rights and obligations by entering into a registered partnership as do same-sex couples in Belgium by entering marriage."³⁵ As in the Netherlands and Belgium, it may simply remain a matter of

³⁰ See Spain Moves Closer, supra.

³¹ See Spain Moves Closer, supra.

³² See Spain Moves Forward With Gay Marriage, GayWired.com, October 4, 2004, available at <http://www.gaywired.com/article.cfm?section=9&id=4309> (site last visited Oct. 6, 2004).

³³ See Waaldijk, supra, at 571.

³⁴ See Waaldijk, supra, at 586.

³⁵ Waaldijk, supra, at 586.

time before these other countries follow suit and recognize that same-sex couples have fully equal rights to marriage.

CONCLUSION

New Jersey's marriage exclusion violates the state constitution's broad equality guarantee by depriving same-sex couples of equal access to marital relationships and withholding from those couples and their children the critical protections and benefits that flow from marriage. The State thus places tens of thousands of New Jersey citizens, their children, and their families at a significant legal, financial, and social disadvantage for no legitimate reason. None of the reasons put forward by the state for perpetuating this discriminatory exclusion -- concerns about procreation or child-raising, adherence to tradition, deferring to the laws or practices of other jurisdictions -- justify denying committed couples the freedom to marry.

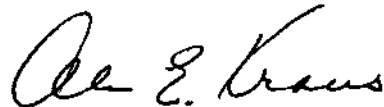
The freedom to marry is deeply important to committed couples and their children, including same-sex couples and their children. Because no legitimate, non-discriminatory reason exists for denying same-sex couples their equal right to marry, as affirmed by courts and developments in the United States, Canada, and Europe, we respectfully request that this Court find

that, under the New Jersey Constitution, the State must end the exclusion of same-sex couples from marriage.

Respectfully submitted,

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