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

Plaintiffs-Appellants,

v.

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

Defendants-Respondents.

SUPREME COURT OF NEW JERSEY

Docket No. 58,389

CIVIL ACTION

BRIEF OF LEGAL MOMENTUM AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Legal Momentum ("Legal Momentum" or "*Amicus*") submits this brief as *amicus curiae* in support of Plaintiffs-Appellants Mark Lewis et al.

Legal Momentum, the new name of NOW Legal Defense and Education Fund, is a leading national non-profit civil rights organization that for thirty-five years has used the power of the law to advance the rights of women and girls. Legal Momentum is dedicated to protecting the right of all women and men to live and work free of government-enforced gender stereotypes. Legal Momentum has consistently supported the right of lesbians and gay men to be free from discrimination.

Amicus submits this brief in order to share with the Court its expertise concerning the issues of fundamental privacy rights and sex stereotyping, which are at the core of this case and at the core of Legal Momentum's mission. As a leader in defending the fundamental right to privacy secured by the Due Process Clause in the federal Constitution and by the New Jersey Constitution, Legal Momentum has an interest in protecting the fundamental right to marry for all individuals, including gay and lesbian individuals. *Amicus* has also consistently identified and debunked legal constructs based on gender stereotypes. Accordingly, Legal Momentum has an interest in

exposing the way in which restricting marriage to different-sex couples relies on outmoded, stereotypical, and constitutionally impermissible conceptions of gender.

SUMMARY OF ARGUMENT

This Court has consistently demonstrated a commitment to identifying and defending the fundamental rights of liberty and privacy that are guaranteed by the New Jersey Constitution. This Court has never been reluctant to find greater protection of such rights under the New Jersey Constitution than under the federal Constitution; this is particularly true when confronting issues relating to reproductive rights. This Court has found that, regardless of religious or political considerations, a woman's right to make individual choices regarding her own body is undeniably safeguarded by the state constitutional interests in liberty and privacy.

The right to marry, like reproductive rights, derives from the right to privacy guaranteed under Article I, paragraph 1 of the New Jersey Constitution. Indeed, this Court has found the right to marry to be fundamental. Yet despite the fundamental nature of the right to marry, the State has deprived access to this right, in wholesale fashion, to Plaintiffs and to other same-sex couples across the state. As it has done in the realm of reproductive rights, this Court should continue its tradition

of protecting fundamental rights, and in so doing, should acknowledge and defend the fundamental right of Plaintiffs to make individual decisions regarding whom they wish to marry by declaring unconstitutional the law's wholesale deprivation of that right to same-sex couples.

Plaintiffs argue, and *amicus* agrees, that whether the right to marry is deemed fundamental or not, Plaintiffs' interest in that right must be recognized as extremely weighty. This brief, however, attempts to demonstrate to the Court why in fact the interest at issue - the right to marry - should be deemed fundamental.

Furthermore, this Court has time and again struck down legal constructs based on a classic form of sex discrimination -- sex or gender stereotyping. Marital and parental rights are no longer determined with regard to gender norms, and instead this Court has attempted to strip marriage of its gender-normative presumptions. However, the Appellate Division's decision, as well as Judge Parrillo's concurrence, privileged the exact assumptions this Court has sought to eradicate, reflexively referring to and relying upon "natural" gender roles to uphold the State's denial of the right to marry to lesbians and gay men. This Court should maintain its commitment to ensuring that gender stereotypes are not permitted to influence

the course of the law, and should avoid the preservation of gender stereotypes in the law. In line with its steadfast commitment to ending the use of the law to perpetuate gender stereotypes, this Court should recognize that excluding same-sex couples from marriage is another example of gender stereotyping and, as such, unconstitutionally deprives same-sex couples of the fundamental rights of equality and privacy afforded under the New Jersey Constitution.

For these reasons, and as set forth in more detail below and in the Briefs for Plaintiffs-Appellants, the Court should reverse the judgment of the Appellate Division of the Superior Court.

ARGUMENT

I. When Considering Due Process And Equality Claims Under The New Jersey Constitution, New Jersey Courts Apply A Balancing Test

In assessing equality and due process claims brought under the New Jersey Constitution, this Court does not apply the tiered system of "rational basis," "intermediate scrutiny," and "strict scrutiny" that applies to equality and due process claims brought under the federal Constitution. Instead, this Court applies a balancing test to such claims. This balancing test considers (1) the nature of the affected interest, (2) the extent to which the governmental restriction intrudes upon that

interest, and (3) the public need for the restriction. Sojourner A. v. N.J. Dep't of Human Services, 177 N.J. 318, 332-33 (2003); see also Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 630 (2000); Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985) (citing Right to Choose v. Byrne, 91 N.J. 287, 308-09 (1982)).

Although in the Appellate Division's decision, Judge Skillman, writing for the court, properly acknowledged that the balancing test applied under the New Jersey Constitution, he ended the equal protection analysis after determining that plaintiffs did not claim a fundamental right. Specifically, Judge Skillman wrote that "only members of the opposite sex have a constitutionally protected right to marry [and] . . . for that reason the State is not required to show that the 'public need' for restrictions upon that right outweigh plaintiffs' interest in its exercise." Lewis v. Harris, 378 N.J. Super. 168, 189-90 (App. Div. 2005). Thus, Judge Skillman did not actually apply the balancing test. Even by its terms, the balancing test does not require the existence of a fundamental right. The New Jersey courts have made clear that even if a fundamental right or suspect classification is not implicated, a legislative restriction of rights must still rest upon a legitimate state interest. Greenberg, supra, 99 N.J. at 564. For instance, even

though the Court in Right to Choose defined the right of women entitled to Medicaid reimbursement for abortion expenses to be part of the fundamental right to choose whether to have an abortion, 91 N.J. at 305, the Court explained that the statute prohibiting such funding would fail even if a fundamental right were not at stake, because a legitimate state interest would be lacking. Id. at 307 n.6.

Furthermore, this Court's equality jurisprudence in the realm of sex discrimination makes clear that classifications based on gender must be evaluated under the constitutional balancing test regardless of whether they are deemed to challenge a fundamental right. The flaw in Judge Skillman's logic is clear: Under Judge Skillman's conceptualization, New Jersey's Constitution would abide many sex discriminatory classifications even though such classifications would clearly fall under the federal Constitution's equal protection clause. Such a rule could not stand, since Article I, paragraph 1 of the New Jersey Constitution "provides comparable or superior protection against unequal protection of the law" when compared to the federal equal protection clause. Jersey Shore Med. Ctr-Fitkin Hosp. v. Estate of Baum, 84 N.J. 137, 148 (1980). In Jersey Shore, the Court struck down on federal and state constitutional grounds the common law rule requiring husbands -

and not wives - to pay for the other's necessaries. Id. at 147-48. In doing so, the Court found that a common law rule based on outmoded gender stereotypes, namely that woman's role is in "the home and the rearing of the family" while man's is in "the marketplace and the world of ideas," cannot survive state constitutional scrutiny because it "is an anachronism that no longer fits contemporary society." Id. at 146-47. Thus, both precedent and logic dictate that New Jersey equality and due process jurisprudence does not depend solely upon the existence of a fundamental right, and the balancing test applies to all abridgements of rights, fundamental or otherwise. Yet Judge Skillman's reasoning risks reducing the analysis under the New Jersey Constitution to a single test--whether the right at stake is fundamental. This is not the law. Instead, even if the right to marry at stake in the instant case were not fundamental, the government's wholesale restriction on that right would need to be based on a legitimate interest, which as explained below, the State cannot supply.

II. On One Side Of The Scale, Plaintiffs Have Weighty Interests In The Fundamental Right To Marry And The Right To Be Free Of Government Imposed Gender Stereotypes

Applying the balancing test to the present case requires the Court to weigh the Plaintiffs' right to marry the spouse of one's choice, on one hand, with the State's meager interests in

preventing such marriages, on the other. On one side of the scale, the right to marry is guaranteed by Article I, paragraph 1 of the New Jersey Constitution, which guarantees the right to privacy, including within its scope the right to marry. This right has been found to be fundamental. Also on that side of the scale is the interest in not being subjected to restrictive and impermissible gender stereotypes by operation of the law. These interests are weighty, and they are being abridged by the State in wholesale fashion.

A. New Jersey Is A Leader In Protecting The Right Of Individuals To Make Decisions Regarding Private Matters Without Government Intrusion

Article I, paragraph 1 of the New Jersey Constitution provides:

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

This provision gives rise to a right of privacy under New Jersey law. See Right to Choose, supra, 91 N.J. at 303 ("By declaring the right to life, liberty and the pursuit of safety and happiness, *Art.* I, *par.* 1 protects the right of privacy, a right that was implicit in the 1844 Constitution."). This Court

has recognized that "in New Jersey, we have a long-standing history that begins even prior to Roe v. Wade, demonstrating a commitment to the protection of individual rights under the State Constitution." Planned Parenthood, supra, 165 N.J. at 629 (citation omitted). In fact, the protection of the right to privacy has been interpreted to be broader than that covered by the federal Constitution. See id. at 629 ("The language of that paragraph is 'more expansive . . . than that of the United States Constitution. . . .'") (quoting Right to Choose v. Byrne, supra, 91 N.J. at 303). As this Court concluded in Right to Choose, "[a]lthough the state Constitution may encompass a smaller universe than the federal Constitution, our constellation of rights may be more complete." Right to Choose, supra, 91 N.J. at 300.[1]

In Right to Choose, this Court held that where the state's Medicaid program funded the costs of pregnancy care and birth for indigent women, a statute that barred Medicaid funding for medically necessary abortion violated the state Constitution's guarantee of equality by "imping[ing] upon [a] fundamental

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[1] Unsurprisingly, New Jersey courts have afforded more expansive rights under the state Constitution than many other state courts have done under their own constitutions. New Jersey courts' reproductive rights jurisprudence is just one example.

right[.]" Id. at 306. The Court contrasted its ruling with that of the U.S. Supreme Court which, during the pendency of the Right to Choose litigation, upheld the constitutionality of a federal statute that barred federal Medicaid funding for medically necessary abortion, in Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). In Right to Choose, this Court articulated the principle that the "government must proceed in a neutral manner" regarding the people's exercise of their fundamental rights. Right to Choose, supra, 91 N.J. at 307. Thus, while the right to decide whether to terminate a pregnancy or continue it is deemed fundamental under both the federal and New Jersey Constitutions, the superior equality guarantee afforded by the New Jersey Constitution requires greater protection for the exercise of this fundamental right. The "more expansive language" of the New Jersey Constitution, Right to Choose, supra, 91 N.J. at 303, necessitated this result, in order to ensure equal treatment under the law for persons exercising a fundamental right. Id. at 305-06.

More recently, after canvassing numerous decisions under the U.S. Constitution that have approved parental notification or consent requirements for minors seeking abortions, this Court nonetheless invalidated a state law that required minors to notify a parent before obtaining medical abortion services.

Planned Parenthood, supra, 165 N.J. at 627-29, 642-43. The Court concluded that the statute could not be sustained under the New Jersey Constitution against the plaintiffs' equal protection challenge, and that a contrary result would violate the State's duty of neutrality in the exercise of a fundamental right. Id. at 612-13.

New Jersey's reproductive rights jurisprudence makes clear that the state's courts can afford greater protection of the fundamental right to privacy safeguarded by the New Jersey Constitution than either the U.S. Supreme Court does under the federal Constitution or other state courts do under their own constitutions. As both Right to Choose and Planned Parenthood demonstrate, the New Jersey Constitution requires a "'zone' of privacy protecting individuals from unwarranted governmental intrusion into matters of intimate personal and family concern." State v. Saunders, 75 N.J. 200, 216 (1977). Although much of the New Jersey courts' jurisprudence on the right to privacy relates to procreative issues and reproductive rights, the right to privacy undoubtedly protects much more than those realms. As this Court explained in Saunders, "[o]ur Quinlan decision [on the discontinuance of artificial life support] could not have been predicated on privacy grounds if the class of cognizable privacy interests was limited to personal decisions concerning

procreative matters." Id. at 213. As discussed in greater detail below, the fundamental privacy right explicitly protects the right to marry. See Greenberg, supra, 99 N.J. at 572 ("As one of life's most intimate choices, the decision to marry invokes a privacy interest safeguarded by the New Jersey Constitution.").

This Court must of course look toward cases decided under the New Jersey Constitution for primary, controlling law in adjudicating Plaintiffs' claims. Despite the unique standard applied to due process claims under the New Jersey Constitution, however, other jurisdictions' sources, including federal law and cases, and case law from other states, may provide valuable guidance. See Greenberg, supra, 99 N.J. at 568 ("In the future, as in the past, we shall continue to look to both the federal courts and other state courts for assistance in constitutional analysis. The ultimate responsibility for interpreting the New Jersey Constitution, however, is ours."). This Court has made clear that decisions interpreting the fundamental right of privacy under the federal Constitution may be instructive in understanding the scope of that right under the state Constitution. See Saunders, supra, 75 N.J. at 216. ("It is now settled that the right of privacy guaranteed under the

Fourteenth Amendment has an analogue in our State Constitution[.]").

Like this Court, the U.S. Supreme Court boasts a proud tradition of identifying and protecting the fundamental right of individuals to make personal decisions about private matters. See Roe v. Wade, 410 U.S. 113, 152, 93 S. Ct. 705, 726, 35 L. Ed. 2d 147, 176 (1973) ("personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy) (citation omitted); 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."); Griswold v. Connecticut, 381 U.S. 479, 485, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 515 (1965) (in striking down law prohibiting sale or use of contraceptives to or by married couples, Court opined that the case "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees").

More recently, in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), the Court stated that issues "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." Id. at 851, 112 S. Ct. at 2807, 120 L. Ed. 2d at 698. The Court continued: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Ibid. In this sense, the Court has been careful to articulate its mission, as an "obligation . . . to define the liberty of all, not to mandate our own moral code." Id. at 850, 112 S. Ct. at 2806, 120 L. Ed. 2d at 697. More recently, in line with its fundamental rights jurisprudence, the Court in Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), relied on Casey as "confirm[ing] that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." Id. at 573-74, 123 S. Ct. at 2481, 156 L. Ed. 2d at 522-23. In Lawrence, the Court made clear that the "liberty protected by the Constitution allows homosexual persons[,]" as it does all individuals, the right to make decisions regarding "personal bond[s]" with

another. Id. at 567, 123 S. Ct. at 2478, 156 L. Ed. 2d at 518-19. Lawrence, then, is grounded in the fundamental right to liberty and privacy announced in the Court's earlier decisions on intimate relations and reproductive rights. The line of Supreme Court cases from Griswold, Eisenstadt, and Roe to Casey and Lawrence evidences a deep-rooted commitment to protecting the right to privacy safeguarded by the Due Process Clause for all persons.

B. The Right To Marry Is A Fundamental Right That Must Be Made Available To All People

This Court has repeatedly recognized that "the decision to marry invokes a privacy interest safeguarded by the New Jersey Constitution." Greenberg, supra, 99 N.J. at 572. Indeed, the right to marry is a "fundamental" right under Art. I, para. 1 of the New Jersey Constitution. J.B. v. M.B., 170 N.J. 9, 23-24 (2001); see also In re Baby M., 109 N.J. 396, 447 (1988) ("They are the rights of personal intimacy, *of marriage*, of sex, of family, of procreation. Whatever their source, it is clear that they are fundamental rights protected by both the federal and state Constitutions.") (emphasis added).

Not only does New Jersey jurisprudence explicitly define the right to marry as a fundamental right included within the right to privacy afforded by the New Jersey Constitution, but

also several U.S. Supreme Court cases are instructive in making clear that the right to marry the spouse of one's choice is a fundamental right that may not be granted selectively, but is due to all persons regardless of race, creed, gender, or sexual orientation. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness of free men." That pronouncement from the Supreme Court came as the Court struck down the ban on interracial marriage at issue in Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). The Court's discussion echoed its previous celebrations of marriage. Id. at 12, 87 S. Ct. at 1824, 18 L. Ed. 2d at 1018 ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.") (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)). In Griswold, supra, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510, the Court had similarly described the significance of marriage:

> We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for 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.

[Id. at 486, 85 S. Ct. at 1682, 14 L. Ed. 2d at 516.]

The Loving Court held that access to the fundamental institution of marriage, this "basic civil right," cannot be "restricted by invidious racial discriminations." Loving, supra, 388 U.S. at 12, 87 S. Ct. at 1824, 18 L. Ed. 2d at 1018. Subsequent cases have made clear that this right must be made available to *all* individuals. "Cases subsequent to Griswold and Loving have routinely categorized the decision to marry as among the personal decisions protected by the right of privacy." Zablocki v. Redhail, 434 U.S. 374, 384, 98 S. Ct. 673, 680, 54 L. Ed. 2d 618, 629 (1978). Thus, as the Court explained in Zablocki, "[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 384, 98 S. Ct. at 679-80, 54 L. Ed. 2d at 629 (emphasis added). See also Turner v. Safley, 482 U.S. 78, 95-96, 107 S. Ct. 2254, 2265, 96 L. Ed. 2d 64, 83 (1987) (reiterating that "the decision to marry is a fundamental right" and ruling unconstitutional a restriction on inmate marriages).[2]

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[2] Judge Parrillo, in his concurring opinion at the Appellate Division, erroneously explained Loving and its implications for equality jurisprudence as limited to race-based classifications. Lewis, supra, 378 N.J. Super. at 198 (Parrillo, J., concurring). Judge Parrillo correctly asserted that "laws prohibiting

Logically, since New Jersey jurisprudence has historically been even more protective of the right to privacy than the U.S. Supreme Court has been, these Supreme Court cases are particularly instructive regarding the fundamental nature of the right to marry under New Jersey constitutional principles.

As this discussion of relevant New Jersey and U.S. Supreme Court case law demonstrates, Plaintiffs do not ask for the creation of a new right, nor do they question the importance and centrality of marriage. Instead, Plaintiffs seek recognition that they, like all individuals, enjoy the fundamental right to marry; that they, like all individuals, can participate in this timeless institution that binds individuals and stabilizes society; that they, like all individuals, are part of the enduring, unquestionable expression of love that marriage has forever signified.

As evidenced by Right to Choose and Planned Parenthood in the context of reproductive rights, New Jersey courts have not

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interracial marriages" must fail in light of the Equal Protection Clause, which "implicitly establishes racial equality as a constitutional value." Ibid. Judge Parrillo, however, failed to acknowledge that the Equal Protection Clause also "implicitly establishes [sex] equality as a constitutional value." Loving, and constitutional guarantees of equality, are certainly not limited to race-based restrictions.

been hesitant to go beyond the minimum protections afforded under federal law or that of other states. The state's fundamental rights jurisprudence appropriately reflects that courts, in protecting fundamental privacy rights, have (as the U.S. Supreme Court has characterized it) an "obligation . . . to define the liberty of all, not to mandate our own moral code." Casey, supra, 505 U.S. at 850, 112 S. Ct. at 2806, 120 L. Ed. 2d at 697. This Court has recognized that, like decisions regarding reproductive rights, "decisions such as whether to marry are of a highly personal nature; they neither lend themselves to official coercion or sanction, nor fall within the regulatory power of those who are elected to govern." Saunders, supra, 75 N.J. at 219. Acknowledging that lesbian and gay individuals have a right to make the "highly personal" decision to marry their same-sex partners would display a continued commitment by this Court to identify and safeguard fundamental rights -- the right to liberty, the right to privacy, and the right to marry.

C. Lesbians And Gay Men Cannot Constitutionally Be Denied Fundamental Rights

"As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." Lawrence, supra, 539 U.S. at 579, 123 S. Ct. at 2484,

156 L. Ed. 2d at 526. The U.S. Supreme Court recently made this pronouncement in the specific context of vindicating the Due Process rights of lesbian and gay individuals. In Lawrence, the Court applied the privacy principles it had set forth in Roe to its discussion of the personal bonds formed through sexual intimacy: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." Id. at 567, 123 S. Ct. at 2478, 156 L. Ed. 2d at 518-19. In Lawrence, the Court made clear that lesbian and gay individuals enjoy the same fundamental rights that have long been enjoyed by all others.

Lesbians and gay men cannot be denied the enduring, universal right to marry, just as the Lawrence Court found that lesbians and gay men cannot be denied the fundamental right to engage in consensual, adult intimate relations. A right cannot be fundamental to some but not to others; both the fundamental right to marry at stake here and the fundamental right to engage in intimate relations at stake in Lawrence are as fundamental to lesbians and gay men as they are to heterosexuals.

Lawrence, in overruling Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), warns against defining fundamental privacy rights too narrowly, so as to exclude an entire group of people from a long-recognized, fundamental right. "Bowers was not correct when it was decided, and it is not correct today." Lawrence, supra, 539 U.S. at 578, 123 S. Ct. at 2484, 156 L. Ed. 2d at 525. Rejecting the Bowers Court's narrow framing of the right at stake — "a fundamental right [for] homosexuals to engage in sodomy[,]" Bowers, supra, 478 U.S. at 190, 106 S. Ct. at 2843, 92 L. Ed. 2d at 145 — the Lawrence Court framed the liberty interest in a way consistent with its Due Process jurisprudence — the right "as free . . . adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." Lawrence, supra, 539 U.S. at 564, 123 S. Ct. at 2476, 156 L. Ed. 2d at 516.

In the present case, the right addressed is the right to marry, and in particular the right to marry the spouse of one's choice. To define the right more narrowly would be at odds with Lawrence's broad rights-defining policy and essentially carve out a unique class of citizens to whom the fundamental right to marry would be denied. As Judge Collester explained in dissent at the Appellate Division, "while Loving [supra, 388 U.S. 1]

rejected a prohibition of marriage based on race, the analysis is relevant to the instant case because Loving also rejected a definition of marriage foreclosing an individual's right to marry a person of one's choosing and addressed the issue of the constitutional viability of the restriction in terms of the fundamental right to marriage itself rather than to a separate right or different form of marriage." Lewis, supra, 378 N.J. Super. at 205 (Collester, J., dissenting). It is this fundamental right to marriage itself to which plaintiffs lay claim.

D. Denying Same-Sex Couples The Right To Marry Is Also An Example of Gender Stereotyping That The Law Has Moved To Eradicate

Not only is Plaintiffs' fundamental right to marry on one side of the scale, but added to that is the weighty interest, shared by all of the state's citizens, in being allowed to enter the institution of marriage free of government imposed gender stereotypes. As the above discussion demonstrates, marriage is a unique institution that evolves over time yet maintains its enduring status as one of the most significant bonds of love one individual can form with another. Accordingly, as courts have stripped marriage of its gendered past, they have been careful to affirm the status of marriage as an institution that binds society. In the instant action, this Court should do the same -

- recognize the exclusion of lesbian and gay individuals from marriage as yet another example of gender stereotyping and through that very recognition acknowledge the importance of marriage to the lives of Plaintiffs, all lesbian and gay individuals, and all citizens of New Jersey.

Throughout "volumes of history," United States v. Virginia, 518 U.S. 515, 531, 116 S. Ct. 2264, 2274, 135 L. Ed. 2d 735, 750 (1996) ("VMI"), the states and the federal government, with judicial approval, used the law to perpetuate rigid definitions of gender-appropriate behavior in a variety of contexts, including state laws relating to marriage. For example, in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 21 L. Ed. 442 (1872), the U.S. Supreme Court agreed with the state courts of Illinois that Illinois' exclusion of women from the practice of law passed constitutional muster under the Fourteenth Amendment of the federal Constitution. Id. at 137-39, 21 L. Ed. at 445. In a now-infamous concurrence, Justice Bradley articulated the "natural and proper" differences between men and women, solidified in the law, as a ground for denying women the right to practice law:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the

> female sex evidently unfits it for many of the occupations of civil life. . . . It is true that many women are unmarried . . . but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.
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> [Id. at 141-42, 21 L. Ed. at 446 (Bradley, J., concurring).]

Appealing to "the law of the Creator," Justice Bradley essentially asserted that the states could invoke a particular moral view to justify legislation mandating and perpetuating gender stereotypes. Marriage, for women, was an expected, "natural" state, and women's subordinate position in marriage was similarly deemed "natural." See Miller v. Miller, 1 N.J. Eq. 386, 391 (Ch. 1831) ("The wife, by marriage, has parted with her property, placed herself under the control of her husband, and looks to him for support."). "Morality" and "nature," however, are unsatisfactory justifications for state efforts to regulate adherence to traditional gender norms, as demonstrated by now-discredited decisions that relied on those grounds. See, e.g., Goesaert v. Cleary, 335 U.S. 464, 466, 69 S. Ct. 198, 200, 93 L. Ed. 163, 166 (1948) (upholding law prohibiting most women from bartending because "bartending by women may . . . give rise

to moral and social problems against which [the state legislature] may devise preventive measures").[3]

Gender-based restrictions embodied by the law, as demonstrated by Bradwell, Miller, Goesaert, and Hoyt, arose from, and in turn reinforced, traditional notions that "morality" and the "natural order" required women to accept and give primacy to the domestic role of wife and mother, and in turn reject any contrary idea of woman as existing outside the domestic sphere as breadwinner or altogether independent of the family. Such decisions explicitly embraced the now-outmoded concept that it was both constitutional and appropriate for the government to use law as a means of mandating adherence to

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[3] More recently, in Hoyt v. Florida, 368 U.S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118 (1961), the U.S. Supreme Court upheld a Florida statute requiring men to register for jury duty while making registration optional for women. In rendering its decision less than fifty years ago, the Court declared that "[d]espite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life." Id. at 61-62, 82 S. Ct. at 162, 7 L. Ed. 2d at 122. Consequently, the Court determined that it is constitutionally permissible "for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." Id. at 62, 82 S. Ct. at 162-63, 7 L. Ed. 2d at 122. Such a decision, it would now be admitted, is based on stereotypical conceptions of gender that have since been eschewed as obsolete and constricting.

traditional gender norms. See Esposito v. Esposito, 41 N.J. 143, 145 (1963) ("Custody of a child of tender years is normally placed with the mother, if fit.").

The Appellate Division relied on such gender stereotypes to support a restriction on marriage by explicitly preferring different-sex coupling and childrearing. For instance, Judge Skillman reflexively stated that "marriage between a man and woman" provides "the ideal environment for raising children," without acknowledging that such an assertion depends upon adherence to well-defined, stereotypical gender roles. Lewis, supra, 378 N.J. Super. at 185. Similarly, Judge Parrillo's concurrence relied almost entirely on assumptions about the differences between men and women, which he labeled "the fact of sexual difference." Id. at 197 (Parrillo, J., concurring). Judge Parrillo pointed to "the enormous tide of heterosexual desire," "the massive significance of male female bonding," "the unique social ecology of heterosexual parenting," and the "rich genealogical nature of heterosexual family ties." Ibid. To Judge Parrillo, differences between the sexes are inherent and natural. He simply assumed that women and men should, and actually do, perform different roles in marriage and family. To Judge Parrillo, it is not love, commitment, inter-dependence, and family that make marriage "meaningful;" instead, the

"specialness" of marriage derives from its "opposite-sex feature," a feature that relies on the stereotypical assumptions that women and men have well-defined, contrasting roles to play in marriage and family. Id. at 199. Judges Skillman and Parrillo's reliance on these "natural," stereotypical notions of gender are reminiscent of decisions rendered more than a century ago, decisions that have since been discredited.[4]

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[4] Both Judges Skillman and Parrillo relied in part on an article by Monte Stewart. Monte Neil Stewart, "Judicial Redefinition of Marriage" 21 Canadian J. Fam. L. 11 (2004). Judge Parrillo in particular pointed to Stewart's reliance on "sexual difference" to support, borrowing Stewart's term, "the 'deep logic' of gender as a necessary component of marriage." Lewis, supra, 378 N.J. Super. at 197, 200 (quoting Stewart at 81-82). Stewart hardly seems like a credible source upon which to rely. Stewart explains that the denial of the right to marry to lesbians and gay men may be based on the importance of "passionate man/woman intercourse" and the "optimal mode" of "mother/father child-rearing." Stewart, supra, at 47-48. Indeed, Stewart contends that "to deny the centrality of procreation to the institution of marriage is defensible . . . only if the powerful tide of heterosexual attraction and procreative power has been stilled." Id. at 48. Stewart's preservation of marriage as a discriminatory institution relies almost entirely on the "natural" differences between men and women, and the preservation of those differences through intercourse, marriage, and family. Furthermore, Stewart, and Judge Parrillo, fail to recognize that what makes marriage unique is not its different-sex feature but rather its commitment to healthy, enduring familial bonds, which has nothing to do with the gender of the participant. Stewart argues that allowing lesbians and gay men to marry would "transform the institution [of marriage] from the residence of the broad, rich, complex meanings comprising the communal and conjugal tradition into the exclusive residence of the 'close personal relationship' model of marriage," which gives primacy to the satisfaction of the individual participants. Id. at 81;

"The twentieth century . . . has produced dynamic social change." Gubernat v. Deremer, 140 N.J. 120, 137 (1995). "Specifically, 'progress toward marital and parental equality has accelerated in recent years,' and women have overcome the vast majority of the traditional forms of legal subordination." Ibid. (quoting In re Schiffman, 620 P.2d 579, 581 (Cal. 1980)). The U.S. Supreme Court has demonstrated a commitment to prohibiting as unconstitutional the enforcement of gender stereotypes through the law. See, e.g., VMI, supra, 518 U.S. at 550, 116 S. Ct. at 2284, 135 L. Ed. 2d at 762 ("generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description").

This Court has even more forcefully rejected gender stereotyping in the law, as part of an overall mission to combat inequality. See, e.g., Peper v. Princeton Univ. Bd. of Trs., 77

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see also Lewis, supra, 378 N.J. Super. at 196 (Parrillo, J., concurring). Stewart and Judge Parrillo ignore the fact that lesbians and gay men raise children and form families. They do not seek marriage merely to validate their "close personal relationship[s]." Instead, they seek marriage to participate in its "broad, rich, [and] complex meanings." Same-sex couples, just like the different-sex couples Stewart lauds, are invested in the promotion and protection of their relationships, their children, and their families.

N.J. 55, 80 (1978) ("New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types in our society."). This Court has in more recent years dismantled, as part of its equality jurisprudence, the definition of marriage as involving a woman being subordinated to a man. See, e.g., Jersey Shore, 84 N.J. at 147-48 ("common law rule imposing liability on husbands, but not wives, [for necessary expenses incurred by the other] is an anachronism that no longer fits contemporary society[,]" "denigrates the efforts of women who contribute to the finances of their families[,]" and violates Art I, para. 1 state constitutional guarantee of equality); Tomarchio v. Township of Greenwich, 75 N.J. 62, 75 (1977) ("archaic and overbroad" generalizations about the financial dependence of wives "ignore the present economic reality that most spouses are mutually dependent economically and suffer equally upon the economic dislocation resulting from the disruption of their union") (internal quotations omitted).

In Gubernat, supra, 140 N.J. 120, this Court found that the lower courts had erred in granting a father's request to change a child's surname to his own since his request was based on outmoded gender stereotypes about the roles of a married man and woman, and because aside from those stereotypes, the father's request did not align with the best interests of the child. Id.

at 141, 147. The Court first acknowledged the historical roots of gender stereotypes: "'Allowing the husband to determine the surname of their offspring was part of [a] system, wherein he was the sole legal representative of the marriage, its property, and its children.'" Id. at 130 (quoting In re Schiffman, supra, 620 P.2d at 581). The father's ability to name was deemed his "natural right." Gubernat, supra, 140 N.J. at 136 (internal quotations and citation omitted). In fact, such a right was confirmed by a New Jersey court less than forty years earlier. See Sobel v. Sobel, 46 N.J. Super. 284, 287 (Ch. Div. 1957) (referring to the father's "right to expect his kin to bear his name").

In Gubernat, this Court recognized the way in which historical assumptions about gender have been questioned and no longer support sex stereotyping:

> Until the latter part of this century, the assumption that children would bear their father's surnames was a matter of common understanding and the preference for paternal surnames was rarely challenged. But the historical justifications that once supported a tradition in the law for children to bear paternal surnames have been overtaken by society's recognition of full legal equality for women, an equality that is incompatible with continued recognition of a presumption that children must bear their father's surname.
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> [Gubernat, supra, 140 N.J. at 122-23.]

Based on the modern principle that "'the society in which we live today is purportedly neither maternal nor paternal[,]'" the Court celebrated the fact that "'gender neutrality is evident in the laws as administered by the courts of New Jersey and throughout the legal system[.]'" Id. at 137 (quoting K.K. v. G., 219 N.J. Super. 334, 337 (Ch. Div. 1987)). In keeping with this trend, the Court rejected a gender-based surname presumption.

Even earlier, in In re Gaulkin, 69 N.J. 185 (1976), New Jersey moved away from law-based policing of gender boundaries. There this Court rejected its previous order prohibiting a non-judicial spouse of a judge from running for public office. In doing so, the Court "focus[ed] first upon the trend of modern law which reflects society's realistic appreciation of the independence of both spouses in marriage and more specifically represents modern awareness and sensitivity to individual freedoms, rights, responsibilities and development." Id. at 193. In addition, the Court found that "the evolving recognition of individual spousal interests" has debunked the conception of "the male and his role as husband and father" and "relieved [men] of the consequences of being fitted into a stereotypic mold." Ibid. Gender stereotyping runs both ways. While it has been used as a way to subordinate women, there is

implicit in that stereotyping a "proper" role for men as well. Under a formal equality regime, both modes of stereotyping are incompatible with the Constitution's mandate of equal treatment.

Denying the right to marry to lesbian and gay individuals maintains an antiquated remnant of a legal regime based on gender stereotypes. Limiting marriage to different-sex couples reinforces the view that there is a "proper," "natural" role for a woman in a marriage, and a "proper," "natural" role for a man in a marriage. This Court has consistently eschewed "traditional" understandings of marriage as a domestic, dependent woman bound to a breadwinner, head-of-household man. See, e.g., Lepis v. Lepis, 83 N.J. 139, 155, 156 (1980) (requiring alimony statutes be applied free of "sexist stereotypes" because "[t]he law must be concerned with the economic realities of contemporary married life, not a model of domestic relations that provided women with security in exchange for economic dependence and discrimination"). Indeed, in New Jersey, "'great efforts have been generated to further [the] concept'" that the law not be allowed to perpetuate and enforce sex stereotypes. Gubernat, supra, 140 N.J. at 137 (quoting K.K. v. G., supra, 219 N.J. Super. at 337).

Restricting marriage to different-sex couples reinforces the division between the roles of mother and father, wife and

husband, and homemaker and breadwinner. Regardless of whether it was ever true in the past, today, clearly, marriage no longer necessitates two individuals living in separate "spheres" or filling contrasting roles, and accordingly, such rationales cannot justify the exclusion of same-sex couples from marriage. In fact, to maintain such an exclusion is to maintain the rigid, archaic gender norms that this Court has sought to eliminate. For, at its most basic level, a prohibition on marriage prescribes a gendered standard of behavior and proscribes deviation therefrom: men must not do what women are expected to do (marry a man), and women must not do what men are expected to do (marry a woman). Just as this Court has rejected other examples of sex stereotyping and has sought to end gender-based distinctions in marital and parental rights, it should continue that progress by opening the timeless, invaluable institution of marriage to lesbian and gay couples.

III. On The Other Side Of The Scale, The State Places No Public Need That Even Begins To Counterbalance The Burden On Plaintiffs' Weighty Interests

A. The Burden On Plaintiffs' Fundamental Right To Marry Could Not Be Greater

Moving to the second prong of the balancing test under the New Jersey Constitution, the Court must consider "the extent of the governmental restriction on [the] fundamental right." Planned Parenthood, supra, 165 N.J. at 632. It is a well-

settled principle that "[t]he greater the burden on the underlying right, the more difficult it is to sustain the State's classification." Ibid. Here, the burden on Plaintiffs' interest – the fundamental right to marry – could not be greater. The State's denial of the right to marry to lesbian and gay individuals is wholesale, as same-sex couples are wholly and unequivocally barred from the institution of marriage.

B. The State's Purported Public Need For The Restriction Has No Weight Because It Depends On (1) The Flimsy Logic That Inequality Is Warranted Merely By The Fact That It Is "Traditional," And (2) The Flawed Argument That The New Jersey Constitution Must Yield To The Discriminatory Laws Of Other States

Finally arriving at the third prong of the balancing test, it is necessary for the Court to weigh the State's purported public need for the restriction against the complete deprivation of Plaintiffs' fundamental interest in marrying their same-sex partners.

The State has advanced two justifications for denying lesbians and gay men the right to marry: first, that the definition of marriage traditionally has excluded lesbians and gay men from the ranks of those who may be married; and second, that New Jersey must abide by the discriminatory marriage laws of other states. Neither of these justifications holds up to meaningful analysis, and they certainly do not carry the weight

required to balance the wholesale deprivation of a fundamental right to a class of individuals.

(1) The State Cannot Rely On "Traditional" Definitions Of Marriage To Support The Perpetuation Of Inequality

First, it is clear that "traditional" definitions of marriage cannot simply justify themselves. As Judge Collester explained in dissent at the Appellate Division, "Tradition itself is not a compelling state interest. . . . To deprive plaintiffs of marrying the person of their choice, a right enjoyed by all others, on the basis of a tradition of exclusion serves only to unjustifiably and unconstitutionally discriminate against them." Lewis, supra, 378 N.J. Super. at 219 (Collester, J., dissenting). Similarly, numerous state courts considering claims analogous to that of Plaintiffs have rejected the tautological argument that defining marriage so as to exclude lesbians and gay men justifies that exclusion. See Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 958 (Mass. 2003) ("As it did in . . . Loving, history must yield to a more fully developed understanding of the invidious quality of the discrimination."); Baker v. State, 744 A.2d 864, 885 (Vt. 1999) ("history cannot provide a legitimate basis for continued unequal application of the law").

Not only is the State's logic flawed, but the State's argument based on "traditional" understandings of marriage neglects the fact that marriage has changed over time. As discussed above, supra Sections II.B. and II.D., New Jersey courts, as well as federal courts, have time and again struck down legislative attempts to perpetuate gender norms or racial discrimination embodied in state laws relating to marriage and the family. Just as it has done in the past, the Court should acknowledge that Plaintiffs' claims rest on merely another way in which the concept of marriage evolves, while the institution of marriage remains at the core of American society. Accordingly, the Court should strike down the denial of marriage to lesbian and gay individuals as an unlawful way to perpetuate a gender-stereotyped conception of marriage.

(2) The State's Purported Desire To Maintain Laws Consistent With Those Of Other States Is Illogical And Also Cannot Support The Perpetuation of Inequality

The State also contends that the deprivation of Plaintiffs' interest in marriage is justified by the State's interest in maintaining laws consistent with those of other states. But New Jersey has not been so constrained in other circumstances in which privacy and liberty rights were implicated, and should not be so constrained now. This Court has not hesitated to pull

ahead of other states and the U.S. Supreme Court when necessary to secure a fundamental right, specifically the fundamental right of reproductive choice. See, e.g., supra, Planned Parenthood, 165 N.J. at 631 (the New Jersey Constitution provides greater protection to a woman's right to reproductive choice than the federal Constitution); Right to Choose, supra, 91 N.J. at 303 (observing that Art. I, para. 1 of the New Jersey Constitution is "more expansive" than its federal analogue). In line with its reproductive rights jurisprudence, this Court should not hesitate to recognize Plaintiffs' fundamental right to marry, even if such recognition anticipates decisions of other courts.

Moreover, the State's argument presumes incorrectly that there is consistency among other states with regard to the rights of lesbians and gay men to marry. In fact, several state courts have recently struck down the denial of marriage rights to lesbians and gay men as unconstitutional. See Goodridge, supra, 798 N.E.2d at 968 (holding state's denial of marriage to same-sex couples "violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution"); Baker, supra, 744 A.2d at 886 (finding "a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides

opposite-sex married couples"); Hernandez v. Robles, 794 N.Y.S.2d 579, 604-05 (N.Y. Sup. Ct. 2005) (holding that refusal to grant marriage licenses to same-sex couples under New York Domestic Relations Law violates state constitutional due process and equal protection rights); Castle v. State, No. 04-2-00614-4, 2004 WL 1985215, at *10-16 (Wash. Super. Sept. 7, 2004) (finding state's ban on marriage between individuals of the same sex unconstitutional under Washington state constitution's Privileges and Immunities Clause); Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *11 (Wash. Super. Aug. 4, 2004) (holding state's ban on marriage between individuals of the same sex unconstitutional under Washington Privileges and Immunities Clause and Due Process Clause). This Court should feel free, as it has in the area of reproductive rights, to rule based on what is constitutional under the New Jersey Constitution rather than what may be consistent with other states' interpretations of their own state constitutions.

It would also be illogical to hold that the New Jersey Constitution must yield to the laws of other states that permit the wholesale exclusion of individuals from the fundamental right to marry. Not only is this argument inconsistent with basic principles of federalism and New Jersey fundamental rights jurisprudence, but it also is completely contradicted by efforts

of the New Jersey Legislature. The New Jersey Legislature has passed laws that benefit lesbian and gay individuals, such as the landmark Domestic Partnership Act. N.J.S.A. 26:8A. By passing such laws, New Jersey has made a conscious choice to break from the laws of numerous other states.

The decision of the Vermont Supreme Court in Baker, supra, 744 A.2d 864, is instructive on this point. Pointing out that "Vermont has sanctioned adoptions by same-sex partners notwithstanding the fact that many states have not[,]" the court concluded that "the State's argument that Vermont's marriage laws serve a substantial governmental interest in maintaining uniformity with other jurisdictions cannot be reconciled" with "relevant legislative choices which demonstrate that uniformity with other jurisdictions has not been a governmental purpose." Id. at 885 (citation omitted). Like Vermont, New Jersey has no public need for uniformity in this area, and the state was previously not deterred by such an (illusory) need in passing the Domestic Partnership Act.

Moreover, choice of law and comity principles are routinely applied by courts dealing with differences in state law in the area of domestic relations, as well as every other area of state law. These principles exist precisely so that states need not

mold their laws to the needs or standards (or whims) of other states, and they allow the legal systems of our nation to function despite dramatic inconsistencies between the laws of the states, and between state and federal laws. The courts have consistently demonstrated an ability to adjudicate claims implicating choice of law and comity doctrines, and there is no reason to believe they would not similarly do so when faced with differences based on the right to marry in New Jersey. Applying such principles when conflicts occur - not preemptively avoiding such potential conflicts - is the proper way of coping with inconsistencies between the laws of different states. Ensuring that the laws of all states remain uniform is particularly inappropriate when it would require New Jersey to set standards inconsistent with its own state Constitution merely to match the standard of another state. See Opinions of the Justices to the Senate, 802 N.E.2d 565, 571 (Mass. 2004) ("Indeed, we 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."); Hernandez, supra, 794 N.Y.S.2d at 610 ("that prejudice against gay people may still prevail

elsewhere cannot be a legitimate justification for maintaining it in the marriage laws of this State").

IV. Since The State's Wholesale Exclusion of Lesbian and Gay Individuals From The Fundamental Right To Marry Burdens Plaintiffs' Interest Without Any Countervailing Public Need, The Balancing Test Under The New Jersey Constitution Favors Plaintiffs; Therefore, This Court Should Recognize Plaintiffs' Right To Marry

Under the balancing test applied by the New Jersey courts under the New Jersey Constitution, Plaintiffs have demonstrated that the State's wholesale denial of marriage to lesbians and gay men is not outweighed by any public need. Indeed, Plaintiffs assert extremely weighty interests — the fundamental right to marry and the right to enter the institution of marriage free of government imposed gender stereotypes - that the State has withheld from them entirely. The only public needs that the State has identified — the maintenance of the "traditional" definition of marriage and uniformity with other states — provide no justification for the exclusion and do nothing to tip the scales even slightly. The balancing test thus clearly favors striking down as unconstitutional the State's wholesale exclusion of lesbians and gay men from the fundamental right to marry.

CONCLUSION

This Court boasts an historic record of identifying and defending fundamental rights for all citizens of the state. As the Court's reproductive rights jurisprudence demonstrates, the right to privacy guarantees individuals the ability to make intimate, personal decisions and to control their own destiny. Like the right to reproductive choice, the right to marry the spouse of one's choice is one of the intimate, personal decisions properly left to the individual. Accordingly, this Court has consistently safeguarded the right to marry under the New Jersey Constitution. Plaintiffs' action provides yet another instance in which the Court should declare that the right to marry is fundamental to all citizens of New Jersey, including lesbian and gay individuals.

For the foregoing reasons, as well as those stated in the Briefs for Plaintiffs-Appellants, this Court should reverse the judgment of the Appellate Division of the Superior Court.

Respectfully submitted,

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October 5, 2005