MARK LEWIS, et al., Plaintiffs, v. GWENDOLYN L. HARRIS, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MERCER COUNTY DOCKET NO. MER-L-15-03 Before: Honorable Linda R. Feinberg, A.J.S.C.

BRIEF OF PLAINTIFFS IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs, seven gay and lesbian New Jersey couples in long-term committed relationships, many of whom are raising children together, are denied the right to marry by the State's exclusionary law restricting marriage to different-sex couples only. This legislated limitation on who may marry fences plaintiffs out of a profoundly vital legal institution central to our society. Marriage represents a public and private commitment between intimately related adults and provides entry into countless legal benefits and protections granted to married heterosexuals in this State. Plaintiffs, for whom marriage would be every bit as meaningful and appropriate as for different-sex couples, suffer tremendous harm from the wholesale exclusion from this fundamental institution. As plaintiffs allege in their complaint, the State-erected barrier to marriage violates Article I, paragraph 1 of the New Jersey Constitution of 1947, which "in a broader way than ever before in American constitutional history" expresses ideals of liberty that include the guarantees of the fundamental right to marry and to equal protection. Right to Choose v. Byrne, 91 N.J. 287, 303 (1982) (citation omitted).

Plaintiffs assert a claim for relief under each of these guarantees of the State Constitution. The State, by contrast, has offered no sufficient justification for dismissing plaintiffs' significant constitutional claims out of hand. Accordingly, the State's motion should be denied as a matter of law. At a minimum, discovery should be allowed to probe the State's justifications. The State principally argues that the extraordinary step of dismissal at the very threshold of the case is warranted simply because marriage has traditionally been defined by the New Jersey legislature as

the union of a man and a woman. But this circular argument ignores the central question posed by the complaint – whether this exclusionary statutory definition of marriage runs afoul of the Constitution's protections of the liberty and equality of all. New Jersey's marriage laws are the product of legislative action, not divine fiat, no matter how rooted in "tradition" or "historic assumptions" about marriage. These laws must comply with the dictates of the New Jersey Constitution, and it is the proper role of the courts to ensure that they do.

Through many chapters of our nation's history, equal marriage rights were denied to interracial couples and on the basis of gender in deference to legislative definitions of marriage premised on purported received natural law, tradition, and prejudice. But when presented with legal challenges to these laws, the judiciary in this State and around the nation has ultimately fulfilled its fundamental duty to review the constitutionality of legislative enactments and to protect the rights of all individuals. Plaintiffs ask this Court too to fulfill its duty as the "last-resort guarantor of the Constitution's command," Robinson v. Cahill, 69 N.J. 133, 154 (1975), and to permit plaintiffs to seek redress for a wrong of constitutional dimension.

PROCEDURAL HISTORY

Plaintiffs filed their Complaint on June 26, 2002, in the Superior Court (Law Division, Hudson County). On October 10, 2002, plaintiffs filed an Amended Complaint for Injunctive and Declaratory Relief and In Lieu of Prerogative Writs (the "Complaint"). On November 22, 2003, the Court transferred venue to Mercer County on consent. On February 24, 2003, the State defendants (the "State") filed a Motion to Dismiss the Amended Complaint. On March 31, 2003,

the Court denied motions to intervene by three movants and instead designated them as *amici*, with leave to file *amicus* submissions by May 28, 2003.[1]

[1] Plaintiffs respectfully request leave to respond to any new issues that may be raised by *amici* on this motion.

ALLEGATIONS IN THE COMPLAINT

The Complaint alleges two claims under Article I, paragraph 1 of the New Jersey Constitution of 1947[2] arising out of the State's denial of access to marriage to plaintiff same-sex couples. In their first claim for relief, plaintiffs contend that their statutory exclusion from civil marriage in New Jersey violates the fundamental right to marry protected by that provision. (Complaint ¶¶ 54-57) In their second claim, plaintiffs assert that the government's discrimination in access to marriage violates the right to equal protection guaranteed under the same constitutional provision. (Complaint ¶¶ 58-61) The defendants, all sued in their official capacities, include Commissioner of the New Jersey Department of Human Services Gwendolyn Harris, who implements the State's statutory requirements relating to marriage; Commissioner of the New Jersey Department of Health and Senior Services Clifton Lacy, who oversees the office and duties of the State Registrar of Vital Statistics; and Acting State Registrar of Vital Statistics of the New Jersey State Department of Health and Senior Services Joseph Komosinski, who supervises local registrars and the registration of vital records relating to marriage. (Complaint ¶¶ 26-28)

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[2] Article I, paragraph 1 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.
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> [N.J. Const. art. I, par. 1.]

Plaintiffs are seven same-sex couples who reside in counties throughout New Jersey. (Complaint ¶¶ 5-25) These couples enjoy long-term committed relationships ranging from 10 to 30 years. Id. A number of these couples are raising children together. (Complaint ¶¶ 9, 18, 21, 24) The plaintiffs are employed in occupations typical of many New Jerseyans, including, for example, pastor, nurse, speech therapist, educator, administrator, and small business owner. (Complaint ¶¶ 5-25) All the plaintiffs wish to enter into civil marriage with their committed life partners, for the same mix of reasons that different-sex couples wish to marry. (Complaint ¶¶ 1, 5-25) Except for the fact that they are of the same sex, plaintiff couples are all legally qualified to marry under the laws of New Jersey. (Complaint ¶ 29) Their requests for marriage licenses were denied by county or municipal officials acting for the State when each of the plaintiff couples sought to enter into marriage. (Complaint ¶¶ 29-37) As the complaint alleges, and as the State itself concedes on this motion, New Jersey's marriage law expressly and as applied excludes these couples entirely from civil marriage. (Complaint ¶ 1; Brief of Defendants in Support of Their Motion Pursuant to R. 4:6-2(e) to Dismiss the Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted ("Defs.' Brief") at 10-13)

As the complaint asserts, the right to marry is an extraordinarily significant, core personal privacy interest protected by the New Jersey Constitution. (See, e.g., Complaint ¶¶ 2-3, 55-56.) As the complaint also alleges, a vast array of harms flows from the State's exclusion of same-sex couples from marriage. By denying plaintiffs access to marriage, the State forbids them from making the public legal commitment to one another that marriage entails and deprives them of the comprehensive legal structure for couples that marriage provides. (Complaint ¶¶ 38-39) This is

apparent from just a sampling of the specific harms that the complaint alleges are caused by the denial of access to marriage for the plaintiff couples.

For example, the State's bar for plaintiff same-sex couples denies them the statutory protections conferred on spouses upon a partner's incapacitation or death. See Complaint ¶¶ 43-44. See also N.J.S.A. 3B:12-25 (right to priority in guardianship of incapacitated spouse); 3B:5-3, 5-4 (survivorship and intestacy rights); 2A:31-4 (ability to file wrongful death suit when spouse is killed limited to those entitled under intestacy law); 3B:8-1 (spouse's elective share of estate); 52:4B-2, 4B-10 (compensation for spouses of victims of homicide); 8A:5-18 (right to priority in disposition and burial of spouse's remains); 34:11-4.5, 34:15-13f, 43:21-42(b) (Worker's Compensation, disability benefits, and owed wages to surviving spouse). It denies them numerous supports for family finances afforded through marriage, including favorable educational benefits and tax treatment. See Complaint ¶¶ 45-46. See also N.J.S.A. 18A:62-25, 71-78.1, 71B-23 (tuition credit and scholarships for spouses of those in public service); 54A:1-2 (spouse may be declared as dependent); 54A:3-3 (deduction of spouse's medical expenses), 54:34-1 (exemption from tax on deceased spouse's property transfer), 54:8-3.1 (spousal election of joint filing). It deprives plaintiffs of important workplace and private sector safety nets that are contingent upon the State's conferral of marriage and "spousal" status, see Complaint ¶¶ 41, 47-49, such as coverage under family health insurance plans, family medical leave to care for a spouse (N.J.S.A. 34:11B-3), and the ability to make healthcare decisions for and to visit in the hospital with an ill spouse. And it denies plaintiffs access to the responsibilities to each other and to third parties that come with marriage. See Complaint ¶¶ 50-51; see, e.g., N.J.S.A. 2A:34-2,

23, 23.1 (legal structure governing parenting matters, alimony and maintenance, and division of assets in event of divorce).

These allegations make out violations of the right to marry and to equal protection under Article I, paragraph 1. By denying same-sex couples access to marriage, the State denies plaintiffs the fundamental right to marry protected for "all persons" under the New Jersey Constitution. See Article I, paragraph 1; Complaint ¶ 55. And, by doing so, the State also discriminates against plaintiffs and all other lesbian and gay couples, thereby denying them their right to the equal protection of the laws. (Complaint ¶ 61)

Based on these allegations, plaintiffs seek declaratory and injunctive relief entitling them to access to marriage on the same terms and conditions that apply to different-sex couples. (Complaint, Prayer for Relief, ¶¶ 1-2)

ARGUMENT

I. A Motion To Dismiss Is Granted In Only The Rarest Of Circumstances, Not Present Here

Defendants have moved to dismiss this action pursuant to R. 4:6-2(e). The Supreme Court has cautioned trial courts to grant motions to dismiss only in the "rarest" of instances:

> The importance of today's decision lies . . . in its signal to trial courts to approach with great caution applications for dismissal under *Rule* 4:6-2(e) for failure of a complaint to state a claim on which relief may be granted. We have sought to make clear that such motions, almost always brought at the very earliest stage of the litigation, should be granted in only the rarest of instances.
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> [Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 771-72 (1989).]

The test for determining the adequacy of a pleading is whether even a "fundament of a cause of action may be gleaned even from an obscure statement of claim . . . " Id. at 746. For the purpose of that test, the court is not concerned with the ability of plaintiffs to prove the allegations contained in the complaint, but instead accepts as true all allegations and gives plaintiffs the benefit of every reasonable inference. Id.; F.G. v. MacDonell, 150 N.J. 550, 556 (1997); Craig v. Suburban Cablevision, 140 N.J. 623, 625-26 (1995). "If a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion." MacDonell, supra, 150 N.J. at 556.

The courts have exercised particular care when asked to dismiss at the threshold claims raising questions of "first impression," Cusseaux v. Pickett, 279 N.J. Super. 335, 342 (App. Div. 1994), or "evolving legal doctrine," Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002). Caution in entertaining a motion to dismiss should be nowhere greater than when the complaint calls for consideration of the constitutionality of legislation infringing on protected rights, for "[a]lthough the Legislature, in exercising its powers, may incidentally affect the natural and unalienable rights of individuals to liberty and the pursuit of happiness which have been recognized in Article I, the validity of any statute directly limiting those rights should be carefully scrutinized in light of its legislative purposes." State v. Saunders, 75 N.J. 200, 226 (1977) (Schreiber, J., concurring).

This case does not present "the rarest of circumstances" warranting dismissal of the complaint at the earliest stage. Indeed, the State's arguments fail as a matter of law. Accordingly, because the complaint asserts weighty claims for relief under the State Constitution, the motion to dismiss should be denied. Plaintiffs should, at the very least, be allowed discovery into the State's purported "legislative purposes" for depriving plaintiffs access to marriage, and to prove their claims through the ordinary mechanisms of litigation.

II. A Marriage Law That Excludes Same-Sex Couples Is A Legislative Choice That, Like All Legislative Choices, Must Answer To The Requirements Of The New Jersey Constitution

A. Marriage Law Is Not Immune From Constitutional Scrutiny

Much of the State's brief is devoted to the contention that, as a matter of law, the Court cannot review the constitutionality of a marriage statute that applies only to a male-female couple simply because the legislature has chosen to define this legal institution so. (See, e.g., Defs.' Br. at 6-7, 10-16,19-23, 30-31, 36-38.) The State argues that the Constitution "'is not a charter for restructuring' fundamental understandings 'by judicial legislation.'" Defs.' Br. at 21 (quoting

Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971)). Indeed, the State suggests that marriage is an immutable institution that stands above the requirements of the Constitution and beyond the power

and responsibility of the court to review. According to the State, this is so self-evident that plaintiffs' claims do not warrant consideration on the merits and the complaint must be dismissed.

But it is precisely the legislature's legal limitation of marriage as reserved to different-sex couples only that violates the New Jersey Constitution's bedrock guarantees and that must, therefore, be scrutinized by this Court. Civil marriage, the institution to which plaintiffs seek access, is a legal construct – albeit a vital and fundamental one – created not by divine fiat but by the New Jersey legislature. See, e.g., N.J.S.A. 37:1-27, 37:2-41 (N.J.S.A. Title 37, "Marriages and Married Persons"). The legal structure of this institution, which plays so central a role in our legal system and culture, may not exclude same-sex couples in defiance of constitutional standards, even if for generations this constitutional infirmity has gone unchallenged.

Nor should the Court be persuaded by the State's circular argument that because the legislature historically has chosen to define marriage as limited to different-sex couples, that limitation must be constitutional. This argument simply begs the central question posed by plaintiffs' complaint – whether this legislative exclusion of same-sex couples from the civil institution of marriage violates the State Constitution's fundamental guarantees of the right to marry and of equal protection.

> Just as a court cannot simply cite the fact that a legislature had passed a particular statute to establish the statute's constitutionality, a court cannot simply cite a definition to establish a statute's constitutionality, unless that definition has independent and significant weight. Neither the fact that a legislature passed a statute nor the fact that a statute incorporates a particular definition saves the statute from constitutional infirmity.

[Mark Strasser, Family, Definitions, and the Constitution: On the Antimiscegenation Analogy, 25 Suffolk U. L. Rev. 981, 984 (1991).]

Likewise, the Court should not be sidetracked by the State's contention that any remedy for plaintiffs' unconstitutional exclusion from state-sanctioned marriage must await a political response by the legislature, for to do so would be to abdicate the vital function of the courts to protect the rights of individuals. "When there occurs . . . a legislative transgression of a right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts. . . . However delicate that duty may be, [the courts] are not at liberty to surrender, or ignore, or to waive it." Robinson, supra, 69 N.J. at 147 (quotations omitted). "It cannot be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it the solemn duty to interpret the laws in the last resort." Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 12 (1960). The courts play a profoundly important role in our system of constitutional government, a role that does not give way because the constitutionality of legislative acts are at stake. Even if the court's "constitutional mandate" may "encroach in areas otherwise reserved to other Branches of government," the court remains "the designated last-resort guarantor of the Constitution's command, [and] possesses and must use power equal to its responsibility." Robinson, supra, 69 N.J. at 154.

B. The State May Not Rely On "History" Or "Tradition" To Perpetuate An Unconstitutional Wrong

The State argues that plaintiff same-sex couples are not as a matter of law entitled to access to marriage given that "an historic understanding of marriage as a union of a man and a woman is 'as old as the book of Genesis.'" Defs.' Br. at 21, quoting Baker, 191 N.W.2d at 186. But no matter how embedded in traditional assumptions, religious views, or prejudices about marriage and sex roles, the legislature's definition of marriage to exclude committed same-sex

partners still must answer to the dictates of the New Jersey Constitution. The State's references to "tradition" and "historic assumptions" about the institution of marriage cannot immunize from the court's review the legislative exclusion at issue here. Far from teaching that marriage inflexibly must be limited to different-sex partners, history instead offers trenchant lessons why justifications for inequities in marriage rights rooted in claims of "tradition" warrant especially careful scrutiny. The Court need only consider the legacy of deeply-held assumptions and traditions concerning the roles of race and gender in marriage to see the flaw in the State's position.

Throughout our nation's history countless laws governing marriage were based on firmly-ingrained assumptions about strictly circumscribed roles played by traits like race and gender in a presumably immutable natural order. But our laws governing the institution of civil marriage have been substantially modified over time in response to society's deepened appreciation of the civil rights of all people. When presented with legal challenges, the judiciary in New Jersey and around the nation has fulfilled its constitutional duty to ensure that civil marriage and its benefits and responsibilities are extended without unlawful discrimination premised on unthinking tradition. At crucial points in our history, courts have rejected longstanding assumptions and stereotypes relied on by legislatures to deny individuals access to equal marriage rights. For "[a] prime part of the history of" constitutional law "is the story of the extension of constitutional rights and protections to people once ignored or excluded." United States v. Virginia, 518 U.S. 515, 557, 116 S. Ct. 2264, 2287, 135 L. Ed. 2d 735, 766 (1996) ("VMI"). Plaintiffs ask only that the court in this case be open to such claims as well.

1. The Courts Have Rejected As Unconstitutional Legislative Definitions Of Who May Marry That Historically Barred Interracial Marriages

The right to marry has been long understood as fundamental.[3] Yet, throughout history, this fundamental right has been selectively denied to some individuals on the basis of their race. The legacy of challenges to laws banning marriage between whites and non-whites stands as a forceful refutation of the State's claim that courts are powerless to intervene while legislatures perpetuate an exclusionary legal definition of marriage based on longstanding prejudices and assumptions.

Anti-miscegenation laws have had a particularly lengthy and ignoble history in the United States. In 1664, Maryland became the first colony to prohibit interracial marriages.[4] By 1750, all the southern colonies, along with Massachusetts and Pennsylvania, made such marriages illegal.[5] By the 1960's, at least 41 states had enacted anti-miscegenation statutes.[6] As with challenges in the more recent past to the exclusion of same-sex couples from civil marriage, numerous challenges to the exclusion of interracial couples from marriage were defeated in the name of "long-accepted definition[s]" and "deeply-held beliefs" (Defs' Br. at 30), until finally anti-

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[3] See Point III infra.; Greenberg v. Kimmelman, 99 N.J. 552, 572 (1985) ("As one of life's most intimate choices, the decision to marry invokes a privacy interest safeguarded by the New Jersey Constitution."); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042, 1045 (1923) (the right to marry is part of the liberty guaranteed by the due process clause and "essential to the orderly pursuit of happiness" by those who are free); Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655, 1660 (1942) (right to marry is "one of the basic civil rights of man").

[4] John D'Emilio and Estelle B. Freedman, Intimate Matters: A History of Sexuality in America, 35-36 (2d ed.1988).

[5] Id. at 36.

[6] Laurence C. Nolan, The Meaning of Loving: Marriage, Due Process and Equal Protection (1967-1990) as Equality and Marriage, from Loving to Zablocki, 41 How. L.J. 245, 248 (1998). New Jersey is one of the handful of states never to have adopted a legislative ban on interracial marriage. Kevin Mumford, After Hughe: Statutory Race Segregation in Colonial America, 1630-1725, 43 Am. J. Legal Hist. 280, 300 (1999).

miscegenation statutes were declared unconstitutional in the latter half of the twentieth century. The reasoning supporting these laws, now recognized as an affront to fundamental rights and equal protection, echoes the State's contentions here.

In case after case legislation prohibiting racial inter-marriage was justified as unbending tradition rooted in received natural law. For example, in upholding Georgia's anti-miscegenation law, the Georgia Supreme Court intoned that

> moral or social equality between the different races . . . does not in fact exist, and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it. There are gradations and classes throughout the universe. From the tallest arch angel in Heaven, down to the meanest reptile on earth, moral and social inequalities exist, and must continue to exist through all eternity.
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> [Scott v. State, 39 Ga. 321 (1869).]

The Indiana Supreme Court relied on the "undeniable fact" that the "'distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold.'" State v. Gibson, 36 Ind. 389 (1871). According to the Indiana court, the laws requiring separation of the races derive not from "'prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.'" Id., quoting Philadelphia and West Chester R.R. Co. v. Miles, 2 Am. L. Rev. 358 (Pa. Sup. Ct. 1867). The North Carolina Supreme Court justified that state's anti-miscegenation law because "the policy of prohibiting the intermarriage of the two races is so well established, and the wishes of both races so well known." State v. Hairston, 63 N.C. 451 (1869).

Long into the twentieth century, it was a well-worn axiom that laws excluding interracial partners from marriage were beyond constitutional reproach. The sheer weight of cases accepting the constitutionality of bans on interracial marriage was deemed justification in itself to perpetuate these discriminatory laws, just as the State argues here. See, e.g., Blake v. Sessions, 94 Okla. 59

(1923) (quoting Georgia's 1869 decision in Scott v. State to justify Oklahoma anti-miscegenation law); Jones v. Lorenzen, 441 P.2d 986, 989 (Okla. 1965) (following Blake v. Sessions and upholding Oklahoma anti-miscegenation law "[i]n view of this court's traditional practice of upholding its former decisions which involve questions of constitutional law, and in view of the fact that the great weight of authority holds such statutes constitutional"); Jackson v. City and County of Denver, 124 P.2d 240, 241 (Colo. 1942) (rejecting equal protection challenge to Colorado's anti-miscegenation scheme given that "[i]t has generally been held that such acts are impregnable to the attack here made."); Naim v. Naim, 87 S.E.2d 749, 753 (Va. 1955) ("With only one exception," – the Perez decision, discussed below – the nation's anti-miscegenation statutes "have been upheld in an unbroken line of decisions in every State in which it has been charged that they violate" constitutional guarantees). See also Perez v. Lippold, 198 P.2d 17, 39-41 (Cal. 1948) (Shenk, J., dissenting) (citing 19 decisions around the nation upholding anti-miscegenation laws).

Not until 1948, nearly 300 years after anti-miscegenation laws took root in the new American colonies, did any court reject the reigning doctrine that laws limiting marriage to partners of the same race reflected a divinely-ordained scheme impervious to constitutional challenge. That year the California Supreme Court held in Perez, supra,198 P.2d 17, that the state's anti-miscegenation law violated the federal rights to due process and equal protection. The Perez decision was controversial and courageous. Today it is recognized as clearly correct.

The Perez majority acknowledged that such laws were based on the age-old "assumed" view that such marriages were "unnatural." Id. at 22. But rather than accept this label unthinkingly, the court upheld its responsibility to ensure that, no matter how strongly tradition or public sentiment might support such laws, legislation infringing the fundamental right to marry

"must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection . . . ." Id. at 19. The majority rejected the notion that the legislature's authority to regulate the institution of marriage conferred unchecked power to define who may marry and who may not. See, e.g., id. at 33, 37, 42 (Schenk, J., dissenting). The court also understood that, under the Constitution, such deference to legislative judgments – the cornerstone of the State's argument here – is neither appropriate nor permissible when fundamental rights or discrimination is at stake. Id. at 21. The Perez majority was undeterred by the dissent's contention that, given their long pedigree and the unbroken string of cases upholding them, anti-miscegenation laws could not "now [be] unconstitutional under the same constitution . . .." Id. at 35. The majority understood that the long duration of a wrong cannot justify its perpetuation. Id. at 26. Nor, the majority understood, had the Constitution changed; rather, its mandates had become more clearly understood. Id. at 19-21 (tracing development of equal protection doctrine), 32 (Carter, J., concurring) ("the statutes now before us never were constitutional").

Even after the Perez court's groundbreaking decision in 1948, state courts elsewhere in the nation continued to cling to traditional assumptions that marriage between the races would defy a natural order that should not be disturbed by judges through enforcement of the constitutional rights of individuals to choose their marital partners. See Naim v. Naim, 87 S.E.2d 749 (Va. 1955) (upholding anti-miscegenation law); Jones v. Lorenzen, 441 P.2d 986 (Okla. 1965) (same); Loving v. Virginia, 147 S.E.2d 78 (Va. 1966), rev'd, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (same).

Not until1967, nineteen years after Perez, did the United States Supreme Court in Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), unanimously follow the California high court's result and declare Virginia's anti-miscegenation statute in violation of the

fundamental right to marry and the guarantee of equal protection. Like the Perez majority, the Supreme Court was not deterred by the lengthy historical roots of such laws, 388 U.S. at 7, 10, 87 S. Ct. at 1821, 1823, 18 L. Ed. 2d at 1014-15, 1016-17[7]; their continued prevalence, 388 U.S. at 6 n. 5, 87 S. Ct. at 1821 n. 5, 18 L. Ed. 2d at 1015 n. 5; or continued popular opposition to interracial marriage. The Court also was unswayed by justifications for the laws based on an asserted natural order defining who is fit to marry whom. 388 U.S. at 3, 11, 87 S. Ct. at 1819, 1823, 18 L. Ed. 2d at 1013, 1017-18. Instead, the Court concluded that constitutional guarantees require that the "freedom of choice to marry not be restricted by invidious racial discrimination . . . and cannot be infringed by the State." 388 U.S. at 12, 87 S. Ct. at 1824,18 L. Ed. 2d at 1018.

This history teaches that, just as state legislatures and courts ultimately could not defeat the fundamental right of mixed-race couples to marry simply by conclusorily defining marriage as a union of two persons of the same race, so too the State here may not negate the right of same-sex couples to marry by defining the institution as a union between two persons only of the opposite sex. Moreover, this history also teaches that the Court should be unpersuaded by the complacency of other states' legislatures and courts that have accepted unquestioningly the exclusion of same-sex couples from marriage just as they accepted for hundreds of years the exclusion of interracial couples. The State's reliance on traditional limitations on who may marry thus provides no permissible basis to dismiss plaintiffs' claims.

2. The Courts Also Have Rejected Outmoded Definitions Of The Role Of Gender In The Institution Of Marriage

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[7] Though the statutory scheme at issue in Loving dated from 1924, penalties for miscegenation were common in Virginia since the first colonial enactment in 1691. See Loving, supra, 388 U.S. at 6, 87 S. Ct. at 1824; Nolan, supra note 6, at 251 n. 41.

The history of the legal treatment of gender in the institution of marriage further illustrates why the State's motion should be denied. As with legal restrictions on marriage based on race, throughout "volumes of history," VMI, supra, 518 U.S. at 531, 116 S. Ct. at 2274, 135 L. Ed. 2d at 750, legislative and common law schemes have maintained rigid definitions of gender-appropriate roles, and nowhere more than in shaping the institution of marriage. Yet ultimately courts have met the challenge to look beyond age-old assumptions about marriage and gender, and have fulfilled their constitutional mandate to ensure equal treatment and respect for the fundamental rights of all. In recent generations, claims asserting unequal treatment in marriage on the basis of gender have received careful consideration from the courts, and have resulted in the vindication of vital constitutional principles. Plaintiffs' claims challenging their exclusion from the institution of marriage deserve the same careful consideration.

Assumptions about a fixed natural order dictating gender roles, reminiscent of those now relied on by the State, justified a legal structure that confined married women to the home under the legal dominion of their husbands. Under the doctrine of "coverture," which evolved in England and was adopted into American law, including that of New Jersey, married women were stripped of independent legal rights and were instead absorbed into, or "covered" by, the legal identity of their husbands.[8] The now-infamous concurrence in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 21 L. Ed. 442 (1872) (Bradley, J., concurring), voiced long-prevailing assumptions about the "nature of things" that must inexorably dictate the legal structure of marriage and the roles of parties to it:

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[8] See Hendrik Hartog, Man & Wife in America: A History 115-17 (2000); William Blackstone, Commentaries on the Laws of England (1765), 442 ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything . . ."); Mary Story v. A.D. Baird, 14 N.J.L. 262 (1834).

> the 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. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state. . . .
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> [83 U.S. (16 Wall) at 141.]

This "maxim of . . . jurisprudence" was deemed supreme to the constitutional guarantee of equal protection in Bradwell, which upheld Illinois's exclusion of women from the practice of law.[9]

In the mid-nineteenth century, New Jersey's and other states' legislatures began the gradual process of freeing the legal and political institution of marriage from rigid gender norms by revising the coverture scheme to grant married women the right to maintain ownership in property and some of their earnings, and the right to enter into some contracts. See Eckert v. Reuter, 33 N.J.L. 266 (1869); Wilson v. Herbert, 41 N.J.L. 454 (1879); Merenoff v. Merenoff, 76 N.J. 535, 539-40, 543 (1978); Romeo v. Romeo, 84 N.J. 289, 295-96 (1980); Nancy F. Cott, Public Vows: A History of Marriage and the Nation 52-54 (2000). These reforms reflected the reality glossed over by the State here: "Far from being an institution fixed by God, marriage was

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[9] Illinois was not alone in deeming women unfit by definition and tradition to practice law. In the Application of Mary Philbrook to an Examination as an Attorney at Law, 17 NJLJ 202 (1894), the New Jersey court denied a woman's application for a license to practice. The court expressly adopted the reasoning of a Massachusetts case, which had held that by custom and tradition it would be inappropriate to include women in the definition of "citizen" entitled to apply for admission to the bar. See Robinson's Case 131 Mass. 376 (1881).

in the hands of the legislature . . . '[R]ightful and formal' marriage was political, rather than simply natural or God-given." Id. at 54. And in generations to follow, where legislatures were slow to reform oppressive legal definitions of the institution of marriage and proper gender roles within it, the courts fulfilled their constitutional mandate to enforce rights to fundamental liberty and equality.

For example, the courts have disdained as "barbarism" the doctrine of chastisement, State v. Oliver, 70 N.C. 60, 60 (1874), an "incident[] of the marriage relation from the beginning of the human race" through which the law gave "the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place." Joyner v. Joyner, 59 N.C. (6 Jones Eq.) 322, 325 (1862). Similarly, the "marital exemption" to the crime of rape – which once applied in nearly all states and dated back centuries – has been struck down by numerous courts. See People v. Liberta, 474 N.E.2d 567, 572-73, 575 (N.Y. 1984) (marital exemption violates equal protection); State v. Smith, 85 N.J. 193 (1981) (justifications for marital exemption were rooted in now discarded assumptions about the role of gender in marriage). See also Merenoff, supra, 76 N.J. at 539 (rejecting interspousal tort immunity doctrine that had been rooted in "historical, legal identity of husband and wife").

Courts likewise have rejected long traditions and have reinterpreted common law principles to allow married women the right to use their maiden names, Application of Lawrence, 133 N.J. Super. 408 (App. Div. 1975)[10]; State v. Taylor, 415 So. 2d 1043 (Ala. 1982); and to eliminate the rule granting the father automatic right to confer his surname on his offspring.

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[10] Lawrence reversed a lower court decision that had denied a married woman's petition to resume use of her maiden name because "the tradition of a woman adopting her husband's surname upon marriage is deeply imbedded in the common law . . . and is almost universally followed to this day." Application of Lawrence, 128 N.J. Super. 312, 326 (Bergen County Ct. 1974), rev'd, 133 N.J. Super. 408 (App. Div. 1975).

Gubernat v. Deremer, 140 N.J. 120 (1995). The courts also have dismantled, on equal protection grounds, economic benefit and compensation schemes premised on outmoded assumptions about gender-differentiated roles and capacities of spouses. For example, the New Jersey Supreme Court has held that requiring widowers but not widows to file proof of dependency requirements to receive benefits under the Workers' Compensation Act violates the guarantee of equal protection. Tomarchio v. Township of Greenwich, 75 N.J. 62 (1977). The Court held that "'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." Id. at 75 (quoting Califano v. Goldfarb, 430 U.S. 199, 217, 97 S. Ct. 1021, 1032, 51 L. Ed. 2d 270, 283 (1977) (social security provision allowing benefits to widower only if he had received half his support from wife violates equal protection), and Weinberger v. Weisenfeld, 420 U.S. 636, 643, 95 S. Ct. 1225, 1231, 43 L. Ed. 2d 514, 522) (1975) (social security law providing that survivors' benefits are paid to surviving wives but not to surviving husbands is unconstitutional)). See also Jersey Shore Med. Ctr-Fitkin Hosp. v. Estate of Baum, 84 N.J. 137, 147-48 (1980)(common law rule making husband but not wife liable for necessary expenses incurred by the other is based on "an anachronism that no longer fits contemporary society" and violates state constitution's guarantee of equal protection); Lepis v. Lepis, 83 N.J.139, 155 (1980)(gender-neutral alimony and support statutes must be applied free of "sexist stereotypes"); Orr v. Orr, 440 U.S. 268, 269 99 S. Ct. 1102, 1106, 59 L. Ed. 2d 306 (1979) (statute requiring husbands but not wives to pay alimony violates equal protection; "'[n]o longer is the female destined solely for the home and the

rearing of the family, and only the male for the marketplace and the world of ideas.'"), quoting Stanton v. Stanton, 421 U.S. 7, 14-15, 95 S. Ct. 1373, 1378, 43 L. Ed. 2d 688, 695 (1975); Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971) (reversing on equal protection grounds Idaho Supreme Court decision that statute preferring men as estate administrators was justified because "nature itself has established the distinction," Reed v. Reed, 465 P.2d 635, 638 (Idaho 1970)).

No longer may marriage in its legal and political dimension be premised on fixed "old notions" about the role of gender. "While the law may look to the past for the lessons it teaches, it must be geared to the present and towards the future if it is to serve the people in just and proper fashion." Paterson Tavern & Grill Owners Ass'n. v. Borough of Hawthorne, 57 N.J. 180, 189 (1970) (striking ban prohibiting taverns from employing women as bartenders). Indeed, if history teaches anything, it is that, contrary to the State's argument here, there is no fixed definition of the institution of marriage locked in an immutable natural order. Rather, the legal edifice that houses the intimate, fundamental relationship between marital spouses is built by legislatures, and must meet the requirements of the Constitution as enforced by the courts. This Court should ensure that plaintiffs are not unjustly excluded from this legal institution, and at a minimum should allow their claims at least to proceed to the merits.

C. Marriage Does Not Intrinsically Depend On The Sex Of The Spouses

In contemporary times, case after case has reiterated that race or gender-based roles may no longer define the institution of marriage. See Point II.B. supra. With the glaring exception of the legislated discrimination against same-sex couples in marriage, New Jersey's statutory and

common law regulating marriage is now free of vestiges of gender discrimination. "The principle of gender neutrality is evident in the laws as administered by the courts of New Jersey and throughout the legal system." Gubernat, supra, 140 N.J. at 137 (quotations omitted).

Liberated of impermissible, outmoded assumptions about the role of gender and race in marriage, what remains is a unique institution whose hallmarks are the choice of two intimately related adults to enter into a public legal commitment to share rights and responsibilities. See Complaint ¶ 1. It is a commitment between two people who forego "other liaisons and opportunities, doing for each other whatever each is capable of doing, providing companionship, and fulfilling each other's needs, financial, emotional, physical, and social, as best as they are able." Estate of Roccamonte, 174 N.J. 381, 392-93 (2002) (describing the functional characteristics of a "marital-type relationship" in context of a palimony action). As the New Jersey Supreme Court has recognized, "modern marriage is a partnership," Baum, supra, 84 N.J. at 147, in which "the parties to the marriage, . . . as individuals are entitled to seek their personal happiness according to their own lights." Merenoff, supra, 76 N.J. at 552.

In Turner v. Safley, 482 U.S. 78, 95, 107 S. Ct. 2254, 2265, 96 L. E. 2d 64, 83 (1987), its most recent decision addressing a federally-guaranteed fundamental right to marry, the U.S. Supreme Court described the "important attributes" of marriage in our era. As the Court's description makes clear, the essential attributes of this institution are as meaningful and appropriate to same-sex couples as to heterosexuals. According to the Court, marriages "[f]irst . . . are expressions of emotional support and public commitment." Id. For many, marriage holds "spiritual significance" as well as being "an expression of personal dedication." 482 U.S. at 96,

107 S. Ct. at 2265, 96 L. Ed. 2d at 83. Third, marriages also involve an expectation of physical intimacy between the partners. Id. And "finally, marital status often is a precondition to the receipt of government benefits . . ., property rights . . ., and other, less tangible benefits . . ." Id.

The essence of marriage thus does not require a union of a male and a female, but rather of two adults who choose to bind themselves legally in a committed, intimate relationship that carries all-encompassing rights and responsibilities structured by the state. Nothing about the purpose or functions of marriage requires different-sex couples only.[11]

That the essence and functions of marriage are intrinsically neutral as to the genders of the partners is even more evident when New Jersey's statutory framework for marriage, described in detail in the complaint, is considered. At the outset, marriage requires capacity and consent of the parties, reflecting the significance of the independent choice and personal commitment at the core of marriage. See, e.g., N.J.S.A. 2A:34-1(c)-(e) (provisions relating to capacity and consent to enter into marriage). It also contemplates physical intimacy between the partners, not for procreative ends, which are not a prerequisite or requirement of marriage, but rather for the "happiness"of the spouses. T. v. M, 100 N.J.Super. 530 (Ch. Div.1968).[12] See N.J.S.A. 2A:34-

[11] "Viewed functionally, legal marriage is essentially a binding commitment uniting two intimately related adults, a commitment which sustains the relationship between such adults by structuring their dealings with each other and with third parties. Conceived in this way, marriage is indifferent to the relative genders of its occupants." William M. Hohengarten, Note, Same-Sex Marriage and the Right of Privacy, 103 Yale L.J. 1495, 1496 (1994).

[12] In T.v.M. a husband sought an annulment of the marriage to his wife, who was capable of pregnancy but not fully capable of having conventional sexual relations. The Court determined that the capacity to become pregnant did not eliminate the husband's grounds for annulment. "If the begetting of children were the chief end of marriage it should follow that our public policy would favor annulling marriages in sterility cases where the fact of sterility is unknown to the parties at the time of the marriage. But no statute in this state permits annulment in such cases. . .

1(c) (spouses's impotence may be grounds for annulment). The State's laws further recognize the emotional support and public commitment intrinsic to marriage by, for example, providing spouses with rights relating to family medical leave to care for a spouse (see N.J.S.A. 34:11B-3), and to control disposition of the remains of a spouse after death (see N.J.S.A. 8A:5-18, 26:6-63). Much of the legal framework relates to the mutual financial support and significant government benefits that come with the choice to marry, providing, for example, for shared responsibility for debts and expenses, entitlement to an array of spousal benefits upon the incapacity or death of a spouse, benefits under the State's tax laws, and alimony and maintenance in the event of divorce. See "Allegations in Complaint," supra, and statutes cited therein. The statutory scheme also provides for the support and well-being of children parented by the spouses to a marriage (see N.J.S.A. 2A:34-23).

As the complaint alleges, all these and other features of marriage in New Jersey would serve and befit the committed relationships shared by the plaintiff couples every bit as much as the relationships of heterosexual couples presently entitled to marry in the State. (Complaint ¶¶ 1, 5-29, 38-51) Already gender-neutral as a matter of well-settled law, (see, e.g., Gubernat, 140 N.J. at 137; Point II.B.2. supra), nothing about these attributes of marriage, as it functions and is statutorily structured in contemporary times, is "by definition" exclusive to male-female couples.

Indeed, that civil marriage is fully appropriate for committed same-sex couples has already been recognized in other nations, undercutting the State's premise that granting marriage to same-sex partners would be unimaginable. In the past few years, the Netherlands and Belgium have

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. Health and happiness appear to be the touchstone." Id. at 538.

each revised their laws to extend the right to enter into civil marriage to same-sex couples.[13] These nations have acknowledged what the State refuses to admit here – that the only obstacle that has stood in the path of civil marriage for committed same-sex partners has been the simple fact that lesbian and gay couples were discriminatorily excluded from this state-created institution.

Moreover, the New Jersey Appellate Division already has recognized and the State has acknowledged in its brief that many same-sex couples already do solemnize their commitment in public or private ceremonies and "call their relationship a marriage," and that this is not "offensive to the laws or stated policies of this state." In re Application for Name Change by Bacharach, 344 N.J. Super. 126, 135 (App. Div. 2001). (See Defs.' Br. at 26-27.)

Contrary to the State's contention, plaintiffs thus do not seek "a fundamental change in the meaning of marriage itself," (Defs.' Br. at 2), but rather access to this institution whose fundamental meaning applies as much to their relationships as to those of their heterosexual neighbors. Plaintiffs have stated claims for relief for the unconstitutional denial of access to marriage, and should be afforded the opportunity to prove the elements of their claims.

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[13] See Parliament of the Netherlands "Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage)," Staatsblad 2001, No. 9, available at http://athena.leenumix.n1/rechten/meijers/ind ex.php3?m=10&c=69 (unofficial English translation); Chambre des Représentants de Belgique, "Ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil," 5e Session de la 50e Législature, Doc 50 2165/001, available at http://www1.deKamer.be/FLWB/pdf/ 50/2165/50K21650001.pdf (foreign language text of Belgium code provision granting right to marry to same-sex couples);

Agence France-Presse, "Belgium Passes Gay Marriage Law," January 30, 2003, available at http://www1.dekamer.be/FLWB/pdf/50/2165/50k21650001.pdf.

III. Plaintiffs State A Claim For The Violation Of Their Right To Marry Protected Under Article I, Paragraph 1 Of The New Jersey Constitution

The right to marry is solidly grounded in the New Jersey Constitution, as alleged in the complaint and conceded by the State. (Defs.' Brief at 18) The Constitution's protection attaches because the choice of whom and whether to marry is highly personal and central to the pursuit of happiness. Marriage is also an entry into a vast and profound legal institution that is fundamental to the lives of those who choose it. The plaintiff same-sex couples are denied the fundamental right to enter into marriage by the State's legal restriction of marriage to different-sex couples only. Plaintiffs have thus clearly stated a cause of action upon which relief may be granted, while the State has failed, as a matter of law, to identify any proper interest at all, let alone the compelling one required. This Court should therefore deny the State's motion to dismiss plaintiffs' claim for violations of their fundamental right to marry.

A. Article I, Paragraph 1 Of The New Jersey Constitution Guarantees The Right To Marry

It is settled law that Article I, paragraph 1 of the Constitution of 1947 guarantees a right to marry rooted in the constitutional guarantee of privacy. Greenberg v. Kimmelman, 99 N.J. 552, 571-72 (1985). In Greenberg, the Court described the right to marry as invoking "a privacy interest safeguarded by the New Jersey Constitution," and as "one of life's most intimate choices." Id. at 572. Indeed, the Supreme Court has recognized the right to marry as "a vital part of life in a free society." Id. at 570. This right is a "fundamental" one. In re Baby M., 109 N.J. 396, 447 (1988); J.B. v. M.B., 170 N.J. 9, 23-24 (2002). The fundamental right to marry is an aspect of the broader right to privacy guarded in Article I, paragraph 1's promise, to all citizens of the State, of liberty and the pursuit of happiness. This right to privacy safeguards individual

autonomy, free of interference by the State, in matters of intimate personal choice central to human experience. See Planned Parenthood of Cent. New Jersey v. Farmer, 165 N.J. 609, 632-33 (2000)("we are keenly aware of the principle of individual autonomy that lies at the heart of a woman's right to make reproductive decisions and of the strength of that principle as embodied in our own Constitution."); Right to Choose v. Byrne, 91 N.J. 287, 306 (1982)(the "right encompasses one of the most intimate decisions in human experience, the choice to terminate a pregnancy or bear a child."); In re Lee Ann Grady, 85 N.J. 235, 249-50 (1981)(the right to be sterilized involves "a choice that bears so vitally upon a matter of deep personal privacy that may also be considered an integral aspect of the 'natural and unalienable' right of all people to enjoy and pursue their individual well-being and happiness."); State v. Saunders, 75 N.J. 200, 220 (1977)("the liberty which is the birthright of every individual suffers dearly when the State can so grossly intrude on personal autonomy," upholding the right to engage in non-marital consensual sex without government interference); In re Quinlan, 70 N.J. 10, 40 (1976)(recognizing right of personal choice to refuse life-sustaining medical treatment).[14]

In Saunders, a challenge to a statutory prohibition on sexual relations outside marriage, the New Jersey Supreme Court underscored that Article I, paragraph 1's guarantee of privacy prohibits the State from interfering with personal choices regarding whether to marry. The Court cautioned that decisions central to the "very independent choice" of marriage lie beyond the "regulatory power" of the legislature:

> If we were to hold that the State could attempt to coerce people into marriage, we would undermine the very independent choice which lies at the core of the right of privacy. We do not doubt the beneficent qualities of marriage, both for individuals as well as for society as a whole. Yet, we can only reiterate that decisions such as whether to marry are of a highly personal nature; they neither lend themselves to

[14] Many of these landmark cases addressing privacy and equal protection rights guaranteed under Article I, paragraph 1 of the New Jersey Constitution also involved parallel claims and analysis under the federal Constitution. Plaintiffs in the present case bring only State constitutional claims, governed by the distinctive jurisprudence that has evolved for the guarantees broadly granted under Article I, paragraph 1.

> official coercion or sanction, nor fall within the regulatory power of those who are elected to govern.
>
> [Saunders, supra, 75 N.J. at 219.]

Significantly, the State constitutional guarantee of privacy and marriage is independent of the federal Constitution, based as it is on the unique text of Article I, paragraph 1 of the 1947 Constitution, and its express guarantees of the right to life, liberty, and the pursuit of safety and happiness:

> In more expansive language than that of the United States Constitution, *Art. I, par. 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." The state Bill of Rights, which includes that provision, has been described as expressing "'the social, political, and economic ideals of the present day in a broader way than ever before in American constitutional history.'"
>
> [Right to Choose, supra, 91 N.J. at 303 (citation omitted).]

Thus, the New Jersey Constitution of 1947 embodies a living expression of broad "ideals of the present day" for the meaning of liberty and happiness. Although the New Jersey Constitution affords an independent source of protection of the right to marry beyond the federal Constitution, and plaintiffs press only state constitutional claims here, a federally-protected right to marry is also well-recognized. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Loving, supra, 388 U.S. at 12, 87 S. Ct. at 1824, 18 L. Ed. 2d at 1018. "Although 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." Zablocki v. Redhail, 434 U.S. 374, 384, 98 S. Ct. 673, 679-80, 54 L. Ed. 2d 618, 629 (1978)(emphasis added)(striking as unconstitutional on

federal grounds a Wisconsin statute requiring any resident owing child support to obtain court approval before marrying); Turner, supra, 482 U.S. at 95, 107 S. Ct. at 2265, 96 L. Ed. 2d at 83 (striking as unconstitutional on federal due process grounds a prison regulation barring inmates from marrying unless the superintendent determined there was a compelling reason); Griswold v. Connecticut, 381 U.S. 479, 486, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510 (1965)(striking as unconstitutional on federal due process grounds a statute prohibiting the use of contraception by married partners); Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655, 1660 (1942) (right to marry is "one of the basic civil rights of man"); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 2d 1042, 1045 (1923) (right to marry is part of the liberty guaranteed by the due process clause and "essential to the orderly pursuit of happiness" by those who are free).

The well-settled federal right to marry sets only a floor, not a ceiling, on the right protected under the New Jersey Constitution. The New Jersey Supreme Court has declared that "[w]e have not hesitated, in an appropriate case, to read the broad language of Article I, paragraph 1, to provide greater rights than its federal counterpart." Planned Parenthood, supra, 165 N.J. 609, 633 (2000). See also Saunders, supra, 75 N.J. at 217. In addition to the unique and broader text of the New Jersey Constitution's Article I, paragraph 1, its application is not bound by the principles of federalism, permitting the court to require an even greater government justification for an infringement on a privacy right:

> the lack of constraints imposed by considerations of federalism permits this Court to demand stronger and more persuasive showings of a public interest . . . than would be required by the United States Supreme Court.
>
> [Saunders, supra, 75 N.J. at 216-17.]

Even beyond the federal Constitution, Article I, paragraph 1 of the New Jersey Constitution checks the power of the legislature to impinge on individual liberty and the pursuit of happiness:

> Unlike the United States Constitution, the New Jersey Constitution is not a grant of enumerated powers, but rather a limitation of the sovereign powers of the State vested in the Legislature. . . . That legislative authority is circumscribed by constitutional provisions . . . including those expressed in Article I, par. 1. Although the Legislature, in exercising its powers, may incidentally affect the natural and unalienable rights of individuals to liberty and the pursuit of happiness which have been recognized in Article I, the validity of any statute directly limiting those rights should be carefully scrutinized in light of its legislative purposes.
>
> [Id. at 225-26 (Schreiber, J., concurring).]

Plaintiffs' complaint thus asserts a claim premised on a right to marry that is a well-recognized guarantee of Article I, paragraph 1 of the New Jersey Constitution. Accordingly, the State's motion to dismiss should be denied.

B. There Is No Constitutional Exception To The Guarantee Of Fundamental Rights For Gay And Lesbian Citizens

Though it is settled law that the State Constitution protects a fundamental right to marry grounded in the interest in privacy surrounding core personal choices, the State nonetheless suggests in its motion to dismiss that this right should be withheld from gay and lesbian couples. But Article I, paragraph 1 extends its protections to "*All* persons," not just to those who are heterosexual or otherwise in the majority. Gay and lesbian citizens of the State have the same interest in access to marriage as their heterosexual neighbors (see Complaint ¶ 1 and Point II.C. supra), and are entitled to the same right to pursue personal happiness through marriage "according to their own lights." Merenoff, supra, 76 N.J. at 552. "[L]iberty . . . is the birthright of every individual . . . ." Saunders, supra, 75 N.J. at 220. The New Jersey Constitution does

not carve out an exception excluding gay and lesbian citizens from its guarantees of liberty and the pursuit of happiness.

As discussed in Point II above, much of the State's argument is premised on the *ipse dixit* that because same-sex couples have been long excluded from marriage by operation of law, the Constitution permits the law to so operate. According to this reasoning, citizens can be denied their rights because they have been denied their rights. But, as shown above, this tautology should have no more currency now than discredited justifications for denying marriage rights to interracial couples and on the basis of gender.[15]

Building on this tautology, the State weaves in the contention that "same-sex marriage is [not] so rooted in the traditions of this State that it must be deemed to be a fundamental right." (Defs.' Br. at 20-23) According to the State, the Court should dismiss the complaint because "[o]ne cannot reasonably conclude that the Framers of the 1947 Constitution intended to bestow on same-sex couples the fundamental right to marry." (Defs.' Br. at 20-21) But the State misstates the nature of the right at stake, erroneously narrowing it to repeat the very exclusion under challenge. Plaintiffs do not assert the right to a distinct institution called "same-sex marriage," any more than the plaintiffs in Perez and Loving asserted a fundamental right to enter into a distinct institution called "different-race marriage." Instead, plaintiffs assert the identical right to marry shared by all other persons in the State, a right that does not depend on one's sexual orientation, sex or race.

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[15] The authority cited by the State from other jurisdictions shares the same flaw, and in any event is not governed by the guarantees of the New Jersey Constitution and its expression "'in a broader way than ever before in American constitutional history'" of "'present day'" ideals about personal liberty. Right to Choose, supra, 91 N.J. at 303 (citation omitted). (See Defs.' Br. at 21-22).

Nor has the New Jersey Supreme Court followed the restrictive interpretive path, suggested by the State in its motion to dismiss, for evaluating a claimed constitutional right. In prior cases, the Court has not defined the interest at issue in terms so narrow as to evade the broader principles at stake. For example, in Saunders, supra, 75 N.J. at 216-17, the Supreme Court identified a fundamental right to privacy shielding the "sexual activities of adults," and held as unconstitutional a statute criminalizing fornication with an unmarried woman. Had the Court followed the approach now urged by the State, however, it could have defined the nature of the claim with such a degree of specificity as to obscure the constitutional magnitude of the interest at stake, as for example, a claimed fundamental right to "indiscriminate group fornicating . . . among complete strangers [in an] automobile." Id. at 228 (Clifford, J., dissenting). Likewise, the Court has recognized the right of a woman "to control her body and destiny," Planned Parenthood, supra, 165 N.J at 612; Right to Choose, supra, 91 N.J. at 306, and has not curtailed that right by conceiving of the claim as asserting a right to an "under-age"or "free government-funded" abortion.

Framed so narrowly, these claimed interests could be said not to have been deemed cloaked in constitutional protection by the Framers of the New Jersey Constitution of 1947, yet the fundamental privacy rights of the parties to these cases certainly have been well-recognized in this State. As the U.S. Supreme Court said of its analysis in Loving,

> Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*.
>
> [Planned Parenthood v. Casey, 505 U.S. 833, 847-48, 112 S. Ct. 2791, 2805, 120 L.E. 2d 674, 695-96 (1992)(citations omitted).]

As the history of assumptions about the proper roles of race and gender in marriage surely teach, excluding same-sex couples from the right to marry was as much a violation of fundamental rights to privacy and the pursuit of happiness in 1947 as today, regardless whether the Framers might yet have come to understand this at that time. Perez, supra, 198 P.2d at 32 ("the statutes now before us never were constitutional")(Carter, J., concurring). The New Jersey Constitution of 1947, safeguarding the "ideals of the present day . . . in a broader way than ever before in American constitutional history," Right to Choose, 91 N.J. at 303, encompasses plaintiff same-sex couples in the same right to marry guaranteed to "all persons" in the State.

C. As The Complaint Alleges, The State Precludes Plaintiff Same-Sex Couples From Exercising Their Constitutional Right To Enter Into Marriage

As the complaint alleges, and as the State concedes, plaintiffs are precluded by the State's legislative framework from exercising their right to marry the person of their choice, a right they hold as firmly and as dear as do any other persons in the State. Despite their life-commitments to one another, the families they have formed, and the children many of them raise, the plaintiff couples nonetheless are barred completely from the public recognition and substantial rights and protections that come with marriage.

This complete denial of the right to marry the spouse of each other's choosing is no less a constitutional deprivation because the State has seen fit in recent years to address through discrete legislative measures just some of the many harms same-sex couples suffer from wholesale exclusion from marriage and its extensive benefits. (See Defs.' Br. at 25-28) That the State has

recognized in other contexts that the denial of equality and other rights to its gay and lesbian citizens is contrary to constitutional requirements and sound policy does not exonerate the State from its full constitutional obligations under Article I, paragraph 1. If anything, to the extent the State has followed a public policy in some arenas "to protect the rights of same-sex couples," (Defs. Br. at 25), this demonstrates only that the State cannot now claim any legitimate, let alone compelling, public interest served by perpetuating the deprivation of marriage rights to these same couples. (See Point III.D. infra.)

The constitutional injury here is the blanket denial of the right to marry the person of one's choosing, "one of life's most intimate choices," Greenberg, supra, 99 N.J. at 572. This case is a far cry from the situation in Greenberg, in which a woman already married for 16 years to a New Jersey judge asserted that her right to marry was infringed by a newly-enacted State ethics law barring family members of judicial officers from casino employment. The Supreme Court held that the exclusion from casino employment posed only a "slight imposition" on this long-married woman's right to marry, Greenberg, supra, 99 N.J. at 579, and that this "imposition" was "but an indirect consequence" of the employment ban, id. at 578. This is far different from the enormous and direct imposition on the present plaintiffs' right to marry. The plaintiff couples here are prohibited from exercising their right to marry at all. Their government fences them out of a legal institution that profoundly affects the lives of those who choose it, legally, emotionally, financially, and socially, in their homes, neighborhoods, workplaces, children's schools, and every other context in which the identity of being married matters a great deal to citizens. As alleged in the complaint, the harms plaintiffs suffer from exclusion from marriage are vast, including not only the denial of a broad array of tangible economic and other benefits, but also the public recognition

of the depth and commitment of their relationship that comes with entry into this central institution. (See, e.g., Complaint ¶¶ 38-51) Plaintiffs thus state a particularly weighty claim for violation of their fundamental right to marry.

D. The State Must Justify Its Denial Of The Fundamental Right To Marry With A Compelling Government Interest, A Burden It Cannot Meet On This Motion To Dismiss

Though on the face of the complaint plaintiffs have made out a plainly colorable claim for deprivation of their fundamental right to marry, the State nonetheless contends that plaintiffs should not be permitted to proceed because the State believes that its purported interests outweigh the complete denial of plaintiffs' fundamental right to marry. Although its claimed interests are suggested in only the vaguest of terms, and go beyond the scope of a motion to dismiss for failure to state a claim, such interests, even if real, could not possibly justify depriving plaintiffs of the right to marry.

While the government may engage in "reasonable state regulation" of marriage, Greenberg, supra, 99 N.J. at 572, it may not deny a fundamental privacy right unless it can demonstrate a "compelling state interest." Saunders, supra, 75 N.J. at 217; State v. Baker, 81 N.J. 99, 114 n.10 (1979) ("Although this right is not absolute, it may be restricted only when necessary to promote a compelling government interest."). "The right to privacy found in Article I, paragraph 1 is a fundamental right. As such, governmental interference with the right can be justified only by a compelling state interest." Grayson Barber, Privacy and the New Jersey State Constitution 213 N.J. Law 15, 16-17 (Feb. 2002). "Although the Legislature, in exercising its powers, may incidentally affect the natural and unalienable rights of individuals to liberty and the pursuit of happiness which have been recognized in Article I, the validity of any statute directly limiting those rights should be carefully scrutinized in light of its legislative purposes." Saunders,

supra, 75 N.J. at 226 (Schreiber, J., concurring). Thus, where, as here, the State's impingement on a fundamental right goes far beyond an "indirect" and "slight imposition," Greenberg, supra, 99 N.J. at 578-79, and instead is a wholesale denial of the fundamental right to enter into marriage, the very heavy burden on the fundamental right can be outweighed only by a compelling government interest.[16]

Regardless of the truth or weight of the interests the State now asserts, which have not, of course, been subjected to discovery, it is apparent that even if accepted on their face these claimed interests are far from sufficient justification for denial of the plaintiffs' right to marry.

First, the State articulates an interest "in preserving the long-accepted definition of marriage." (Defs.' Br. at 30) This is merely a different way of saying that the statute should stay the law because it has been the law. (See Point II, supra.) It is no distinct government interest or purpose at all. The State further suggests an interest in averting "disrupt[ion] of long-settled expectations and deeply-held beliefs" of New Jersey's majority. (Defs.' Br. at 30) But, as asserted in Point II above, majoritarian "expectations" and "beliefs," without some grounding in a legitimate government purpose, cannot themselves justify the deprivation of fundamental rights. A statute that serves merely "as an official sanction of certain conceptions of desirable lifestyles, social mores or individualized beliefs . . . is not an appropriate exercise of the police power." Saunders, supra, 75 N.J. at 219 (striking statute "which has as its objective the regulation of

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[16] The State points to prohibitions on bigamous and incestuous marriages and marriages with persons adjudged mentally incompetent or with a communicable venereal disease as examples of reasonable government regulation of marriage, where the State has powerful interests, not present in this case, in the restriction. (Defs.' Br. at 24-25) That the State may have compelling interests justifying regulations that apply to entirely different circumstances has no bearing on any interest the State may claim to have in erecting a complete barrier to marriage for same-sex partners.

private morality"). See also Loving, supra, 388 U.S. at 11-12, 87 S. Ct. at 1823-24, 18 L. Ed. 2d at 1017-18. The Constitution protects rights in part *because* at times in history the majority may not support those rights. See, e.g., Department of Agriculture v. Moreno, 413 U.S. 528, 534, 93 S.Ct. 2821, 2826, 37 L.Ed.2d 782 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.") (emphasis in original); Perez, supra, 198 P.2d at 27 ("Certainly the fact alone that the discrimination has been sanctioned by the state for many years does not supply . . . justification.") Were this not the case, we would live in an era when states could justify anti-miscegenation laws parallel to the restriction at issue here merely to avoid "disrupting" the majority's deeply-held "expectations" and "beliefs" opposing interracial marriage.[17] This is not even a valid, much less a compelling, government interest.

The only other justification the State advances is a purported "interest in preserving uniformity among the States with respect to the definition of marriage." (Defs.' Br. at 31) The State claims that "significant issues" would arise if New Jersey ended discrimination before other states. But there is no articulation of what those issues are. If they have factual predicates, then they are inappropriate for review under a motion to dismiss. If they are legal, the State has failed to articulate what they might be. Indeed, it seems impossible that New Jersey could have a legitimate interest in subjugating its Constitution to the exclusionary laws of other states. The

[17] This asserted interest is reminiscent of the government justification to avoid "race tension" rejected in Perez, for "[i]t is no answer to say that race tension can be eradicated through the perpetuation by law of the prejudices that give rise to the tension." Perez, supra, 198 P.2d at 25.

State's rationale based on "uniformity" with other states is nothing more than a bald conclusory assertion, and the Court should reject it as justification for dismissal.

Plaintiff couples have stated a weighty claim for the wholesale deprivation of their fundamental rights. The State cannot even articulate a government interest sufficiently compelling to justify the deprivation, much less to warrant the extraordinary step of dismissing the complaint.

IV. Plaintiffs State A Claim For Violation Of Their Right To Equality Guaranteed Under Article I, Paragraph 1 Of The Constitution

Plaintiffs assert a claim for violation of their right to equal protection under the State Constitution based on the State's unlawful exclusion of same-sex couples from access to marriage. As alleged in the complaint, New Jersey's statutory framework allowing access to marriage only for different-sex couples bars all lesbian and gay couples from marriage, and thus discriminates against each of the plaintiffs who seek to marry their same-sex life partners. (Complaint ¶¶ 59-61) The State concedes that "[e]xcept for the fact that they are of the same gender, each couple is legally qualified to marry under New Jersey law." (Defs.' Br. at 3) The State's laws erect an impassable bar to marriage for plaintiff same-sex couples. In the absence of a public interest that necessitates this discriminatory exclusion and that outweighs the harms it causes, plaintiffs should prevail on their claim for equal treatment under Article I, Paragraph 1. As with plaintiffs' claim for violation of the right to privacy, the State relies on circular and conclusory arguments about historic definitions and assumptions that do not establish any legitimate public interest promoted by the conceded discrimination in the marriage statute, much less a public interest so important as to outweigh the enormous harms to the plaintiff couples. The State has failed to demonstrate that the extraordinary step of dismissal is warranted.

A. Article I, Paragraph 1 Of The New Jersey Constitution Grants A Broad Guarantee Of Equality

"New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society." Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 80 (1978). In addition to finding in Article 1, paragraph 1 of the New Jersey Constitution the basis for an independent jurisprudence regarding privacy, so too has the New Jersey Supreme Court developed an independent constitutional equal protection doctrine that is consistently more protective than its federal counterpart. See, e.g., Planned Parenthood, supra, 165 N.J. at 631-32; Greenberg, supra, 99 N.J. at 567-68; Saunders, supra, 75 N.J. at 216-17. "[A]rticle 1, paragraph 1, like the fourteenth amendment [to the federal Constitution], seeks to protect against injustice and against the unequal treatment of those who should be treated alike." Greenberg, supra, 99 N.J. at 568. Despite the similarity in purposes underlying the State and federal equality guarantees, as with the State's privacy jurisprudence, "[the] development of an independent analysis follows basically from [the State Supreme Court's] recognition that the two constitutions contain different texts." Id. at 567 (citing Right to Choose v. Byrne, supra, 91 N.J. at 300-01; State v. Hunt, 91 N.J. 338, 364 (1982) (Handler, J., concurring)). Article I, paragraph 1's text is more expansive than that of the federal Constitution's fourteenth amendment; the constraints of federalism may require a stronger and more persuasive showing of state interests under the federal Constitution; and the New Jersey Constitution as a whole is not a grant of enumerated powers but instead a limitation on the legislature's powers. Saunders, supra, 75 N.J. at 216-17; id. at 227-28 (Schreiber, J., concurring). See Point I.A. supra.

In interpreting the State Constitution to provide greater protections than the federal Constitution, the New Jersey Supreme Court has "rejected two-tiered [federal] equal protection analysis . . . , and employed a balancing test in analyzing claims under the state constitution." Greenberg, supra, 99 N.J. at 567 (citing Taxpayers Ass'n of Weymouth Township v. Weymouth Township, 80 N.J. 6, 43 (1976); Collingswood v. Ringgold, 66 N.J. 350, 370 (1975), appeal dismissed, 426 U.S. 901, 96 S. Ct. 2220, 48 L. Ed. 2d 826 (1976)). "In striking the balance, [the Court has] considered the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Greenberg, supra, 99 N.J. at 567 (citing Right to Choose v. Byrne, supra, 91 N.J. at 308-09; Robinson v. Cahill, 62 N.J. 473, 491-92 (1973)); see also Planned Parenthood, supra, 165 N.J. at 629; Barone v. Dep't of Human Servs., 107 N.J. 355, 368 (1987).

The State concedes that New Jersey has an independent "balancing-of-interests" equal protection jurisprudence, but erroneously asserts that this test is "less strict" than is the federal multi-tiered scrutiny. (Defs.' Br. at 35) In fact, New Jersey's Supreme Court has expressly concluded that this State's Constitution, and specifically its equal protection balancing of interests test, is more protective than its federal counterpart and proscribes statutory classifications that the United States Supreme Court has upheld under the federal equal protection clause. Right to Choose, supra, 91 N.J. at 300, 310; see also Planned Parenthood, supra, 165 N.J. at 625-27, 629-32, 642; Greenberg, supra, 99 N.J. at 567-68; Saunders, supra, 75 N.J. at 216-17.[18]

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[18] Thus, in analyzing plaintiffs' equality claim under the New Jersey Constitution, the State plainly errs in relying on "suspect" classifications and "tiers" of scrutiny, which relate to federal equal protection analysis and which the Supreme Court has expressly rejected with respect to State equal protection analysis. See Defs.' Br. at 33-35. Indeed, the State's citation to

B. The Complaint Makes Out A Claim Under The Balancing Of Interests Test For Violation Of The Guarantee Of Equality

The State's "balancing of interests" test considers the weight of the interest denied to same-sex couples, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction. See Greenberg, supra, 99 N.J. at 567 (citing Right to Choose, supra, 91 N.J. at 308-09; Robinson, supra, 62 N.J. at 491-92). Especially on a motion to dismiss, where the court accepts as true all allegations in the complaint and gives plaintiffs the benefit of every reasonable inference, see, e.g., MacDonell, supra, 150 N.J. at 556; Craig v. Suburban Cablevision, 140 N.J. 623, 625-26 (1995), application of these factors compels denial of defendants' motion.[19] Indeed, to the extent the State tries to introduce allegations about its interests, and to provoke a weighing by this Court, it goes beyond the proper issues on a motion to dismiss.

Turning first to the "nature of the asserted right," as discussed at length above, it is already well-settled that plaintiffs have a constitutionally-protected interest in marriage. See Point III.A. supra. Whether plaintiffs' interest here is, as it should be, recognized as a fundamental constitutional right to marry (see Point III.A-B supra), or described in other terms, there can be

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Robinson, supra, 62 N.J. 473 (1973), is particularly inapt, as the Supreme Court has identified Robinson as the decision in which "we began to develop an independent analysis of rights under article 1, paragraph 1." Greenberg, supra, 99 N.J. at 567. Regardless whether New Jersey's marriage ban is seen as discrimination on the basis of gender, sexual orientation, or some other basis, its burden on the plaintiffs' weighty interest in the right to marry is not outweighed by a sufficient government interest.

[19] The plaintiffs' weighty interest in marriage, the very heavy burden on that interest, and the meager interest the State has articulated in imposing the burden are extensively discussed in Point III above. Rather than repeat these factors again in detail, plaintiffs summarize that analysis here and respectfully direct the Court to the relevant sections of Point III.

no doubt from the allegations in the complaint and the holdings of countless courts that plaintiffs' interest in access to this "vital part of life in a free society," Greenberg, supra, 99 N.J. at 571, is extraordinarily weighty. (See, e.g., Complaint ¶¶ 1, 3, 38-51, 58-61.) This interest is defined by the central role marriage plays in our society, the personal and public legal commitment that marriage entails, and the comprehensive legal structure, benefits and protections that only marriage provides. See, e.g., Complaint ¶¶ 38-51; Point III.A-C supra.

In holding that the Common Benefits clause of the Vermont Constitution entitled same-sex couples to the same benefits and protections afforded to married different-sex couples, the Vermont Supreme Court recognized that "access to a civil marriage license and the multitude of legal benefits, protections, and obligations that flow from it significantly enhance the quality of life in our society." Baker v. Vermont, 744 A.2d 864, 883 (Vt. 1999); see also Baehr v. Lewin, 852 P.2d 44, 58-59 (Haw. 1993) (state's refusal to allow same-sex couples to marry deprives them of "a state-conferred legal status" and "a multiplicity of rights and benefits that are contingent upon that status."). In an analysis that applies with full force in this case, the Baker court discussed the unique importance of marriage in our society:

> [U]nique legal and economic ramifications flow[] from the marriage relation. . . . [A] marriage contract, although similar to other civil agreements, represents much more because once formed, *the law* imposes a variety of obligations, protections, and benefits. . . . [T]he rights and obligations of marriage rest not upon contract, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations . . . . In short, the marriage laws transform a private agreement into a source of significant public benefits and protections.

[744 A.2d at 883 (emphasis in original)(quotations omitted).]

See also Baehr, 852 P.2d at 58-59 (discussing unique benefits of marriage).

In the face of plaintiffs' extraordinarily weighty interest in access to marriage with their chosen partners, the State again raises its same shibboleths about "traditional" and "accepted understandings" of marriage that purportedly should prevent plaintiff same-sex couples even from asserting a claim to any interest in the institution. But for the same reasons the courts have rejected "assumptions" about interracial marriage and traditional gender roles in the face of equality challenges, so too should this Court reject the State's contentions as a basis to dismiss plaintiffs' claims. (See Point II supra.)

In a similar vein, the State argues that the marriage statute is "facially neutral" in that it has equal application to all men and women in New Jersey, and makes the same benefit – "mixed-gender marriage" – available to all on the same basis. (Defs.' Br. at 35-36) According to the State, "[a]ll men and all women, including plaintiffs, are able to marry . . . . It is the individual plaintiffs' desire to marry someone of the same sex, not plaintiffs' genders, that stands as a barrier to issuance of marriage licenses." Defs.' Br. at 34-35 But the virtually identical argument was thoroughly discredited in the cases declaring unconstitutional bans on interracial marriage. In Loving, the Court was presented with the contention "that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications[,] do not constitute an invidious discrimination based on race." Yet the Court "reject[ed] the notion that the mere 'equal application' of a statute containing [discriminatory] classifications is enough to remove the classifications from the [constitutional] proscription of all invidious . . . discriminations." Loving, supra, 388 U.S. at 8, 87 S. Ct. at 1822, 18 L. Ed. 2d at 1016. Likewise, in Perez, the court rejected the argument that the anti-miscegenation law did not discriminate since whites remained free to marry whites and

people of other races remained free to marry each other: "A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable." Perez, supra, 198 P.2d at 25. As the court recognized, the State's theory impermissibly treats marital partners as though they are "interchangeable as trains." Id. "[T]he essence of the right to marry is freedom to join in marriage with the person of one's choice . . ." Id. at 21.

No different from the plaintiffs in Loving and Perez, plaintiffs here have an enormous interest in access to marriage with their "irreplaceable" partner, regardless of the gender of that person. That these lesbian and gay individuals, already in long-term committed relationships, have the theoretical ability to enter into a heterosexual marriage in no way diminishes their vital interest in marriage with their chosen life partner. The State cannot define marriage in such a way as "to coerce people into marriage" with only those who receive "official . . . sanction." Saunders, supra, 75 N.J. at 219.

Turning to the second component of the balancing test, "[t]he greater the burden on the underlying right, the more difficult it is to sustain the State's classification." Planned Parenthood, supra, 165 N.J. at 633. As plaintiffs' allegations in the complaint assert, the burden on their weighty interest in marriage could not be greater. These plaintiff couples are completely denied access to marriage. See Complaint ¶¶ 29-37, 60; Point III.C. supra.

Finally, the third component of the inquiry calls for weighing the State's asserted public need for the exclusion against the total deprivation of plaintiffs' vital interest in marrying their same-sex partners. As discussed in Point III.D. supra, the purported public interests asserted by

the State fall far short of what would be required to justify depriving plaintiffs of the vital right to marry. Indeed, even if accepted on their merits, these interests could not as a matter of law answer the complete deprivation of rights wrought by the State's gender restriction on marriage. Neither the State's claimed interest in preserving tradition merely for tradition's sake, avoiding "disruption" to majoritarian beliefs, nor perpetuating a discriminatory restriction to maintain "uniformity among the states," presents a legitimate and persuasive, much less sufficiently compelling, interest warranting the tremendous burden on plaintiffs' marriage rights.

Plaintiffs have stated a claim for violation of the constitutional guarantee of equal treatment under the laws. They should be permitted to proceed with their claim for relief from this "last-resort guarantor of the Constitution's command." Robinson, 69 N.J. at 154.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court deny the State's motion to dismiss in its entirety, and permit plaintiffs to proceed with their claims for denial of the right to marry.

Respectfully submitted,

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