
MARK LEWIS, et al.)	
)	SUPREME COURT OF NEW JERSEY
Plaintiffs-Appellants,)	
)	DOCKET NO. 58,389
v.)	
)	CIVIL ACTION
GWENDOLYN L. HARRIS, et al.,)	
)	
Defendants-Respondents.)	

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY, AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION
FUND, HISPANIC BAR ASSOCIATION OF NEW JERSEY, AND THE
NATIONAL ORGANIZATION FOR WOMEN OF NEW JERSEY**

Edward Barocas, Legal Director
American Civil Liberties Union of New Jersey Foundation
P.O. Box 750
Newark, New Jersey 07101
Tel: (973) 642-2086
Attorney for *Amici Curiae*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTERESTS OF AMICI	1
ARGUMENT	6
I. THIS COURT HAS A DUTY TO ADDRESS AND RESOLVE PLAINTIFFS' CONSTITUTIONAL CLAIMS AND MUST NOT PERMIT PLAINTIFFS' RIGHTS TO BE SUBJECT TO MAJORITY VOTE OF THE LEGISLATURE.	9
A. The New Jersey Courts Have an Unflagging Obligation to Address Claims Involving Fundamental Rights Under the State Constitution.	10
B. Constitutional Rights Cannot Be Subjected to Majority Vote.	13
II. THE CONSTITUTIONAL RIGHT TO PRIVACY CANNOT BE PARSED SO AS TO EXCLUDE A PARTICULAR MINORITY FROM ITS PROTECTION.	17
CONCLUSION	23

TABLE OF AUTHORITIES

<u>Case Cited</u>	<u>Page</u>
<u>Asbury Park v. Wooley</u> , 33 N.J. 1, 12 (1960)	9, 10, 11, 15
<u>Bell v. Township of Stafford</u> , 110 N.J. 384 (1988)	11
<u>Boy Scouts of America v. Dale</u> , 160 N.J. 562 (1999), <u>rev'd</u> , 530 U.S. 640 (2000)	2, 12
<u>Bowers v. Hardwick</u> , 478 U.S. 186, 106 S.Ct. 2841 (1986)	20
<u>Casey v. Male</u> , 63 N.J. Super. 255 (Co. Ct. 1960)	1
<u>Cooper v. Nutley Sun Printing Company</u> , 36 N.J. 189 (1961)	9, 17
<u>Doe v. Poritz</u> , 142 N.J. 1 (1995)	2, 17, 18
<u>Greenberg v. Kimmelman</u> , 99 N.J. 552 (1985)	8, 18, 19
<u>In re Estate of Roccamonte</u> , 174 N.J. 381, 392-93 (2002)	22
<u>Joye, et al. v. Hunterdon Central Regional High School Brd. Of Ed.</u> , 353 N.J. Super. 600 (App. Div. 2002), appeal pending in N.J.S.Ct., Dkt. No. 53,546	2
<u>Lawrence v. Texas</u> , 539 U.S. 558, 123 S.Ct. 2472 (2003)	20
<u>Marbury v. Madison</u> , 1 Cranch 137 (1803)	14
<u>Lewis v. Harris</u> , 378 N.J. Super. 163 (App. Div. June 14, 2005).	7, 8, 15, 20
<u>Mulhearn v. Federal Shipbuilding Dry Dock Co.</u> , 2 N.J. 356 (1949)	12-13
<u>Olmstead v. United States</u> , 277 U.S. 438 (1928)	17
<u>Peper v. Princeton University Bd. of Trustees</u> , 77 N.J. 55 (1978)	14, 21

<u>Planned Parenthood, et al. v. Farmer, et al.</u> , 165 N.J. 609 (2000)	2, 11, 17, 18, 19
<u>Right to Choose v. Byrne</u> , 91 N.J. 287 (1982)	17, 18, 19
<u>Robinson v. Cahill</u> , 69 N.J. 133 (1975)	9, 17
<u>Rutgers Council of AAUP Chapters v. Rutgers</u> , 298 N.J. Super. 442 (App. Div. 1997), <u>certif. denied</u> , 153 N.J. 48 (1998)	2
<u>State v. Allah</u> , 170 N.J. 269 (2002)	2
<u>State v. Cameron</u> , 100 N.J. 586 (1985)	11
<u>State v. Carty</u> , 170 N.J. 632 (2002)	2
<u>State v. Hempele</u> , 120 N.J. 182 (1990)	17
<u>State in Interest of J.G.</u> , 151 N.J. 565 (1997)	2
<u>State v. Loftin</u> , 157 N.J. 253 (1999)	11
<u>State v. Novembrino</u> , 105 N.J. 95 (1987).	2
<u>State v. Ravotto</u> , 169 N.J. 227 (2001)	2
<u>State v. Rogers</u> , 56 N.J.L. 480 (Sup.Ct. 1894)	10
<u>State v. Saunders</u> , 75 N.J. 200 (1977)	18, 19
<u>State v. Schmid</u> , 84 N.J. 535 (1980)	14
<u>Sojourner, et al. v. New Jersey Dep't of Human Services</u> , 350 N.J. Super 152, <u>cert. granted</u> 174 N.J. 194 (2002)	2
<u>Taylor v. Bd. of Ed. Of Hoboken</u> , 187 N.J. Super. 546 (App. Div. 1983)	13

<u>Taxpayers Assoc. of Weymouth Twp. v. Weymouth Twp.</u> , 80 N.J. 6 (1976), <i>cert. denied</i> , 430 U.S. 977 (1977)	1
<u>Thornburgh v. American College of Obstetricians & Gynecologists</u> , 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986)	14
<u>V.C. v. M.J.B.</u> , 163 N.J. 200 (2000)	2
<u>Village of Ridgefield Park v. Bergen Co. Br. Of Taxation</u> , 31 N.J. 426 (1960)	16
<u>West Virginia State Bd. of Elections v. Barnette</u> , 319 U.S. 624 (1943)	13, 15
<u>Whalen v. Roe</u> , 429 U.S. 589 (1977)	17

INTERESTS OF AMICI

The participation of *amici curiae* will assist this Court in the resolution of the issues of public importance raised in this case by providing the legal context in which to analyze them. The participation of *amici curiae* is particularly appropriate in cases with “broad implication,” Taxpayers Assoc. of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6 (1976), *cert. denied*, 430 U.S. 977 (1977), or in cases of “general public interest.” Casey v. Male, 63 N.J. Super. 255 (Co. Ct. 1960). This is just such a case.

Amici are civil rights organizations established to protect the rights of all citizens, including the rights of minorities:

1. American Civil Liberties Union of New Jersey (“ACLU-NJ”)

The ACLU-NJ is a private non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution. Founded in 1960, the ACLU-NJ has nearly 15,000 members in the State of New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of over 450,000 members nationwide.

ACLU-NJ strongly supports ensuring equal protection for all persons and protection against undue government interference upon privacy rights. ACLU-NJ has participated in numerous cases raising privacy or equal

protection claims. See, e.g., Joye, et al. v. Hunterdon Central Regional High School Brd. Of Ed., 176 N.J. 568 (2003); Sojourner, et al. v. New Jersey Dep't of Human Services, 177 N.J. 318 (2003); Planned Parenthood, et al. v. Farmer, et al., 165 N.J. 609 (2000); V.C. v. M.J.B., 163 N.J. 200 (2000); Boy Scouts of America v. Dale, 160 N.J. 562 (1999), rev'd, 530 U.S. 640 (2000); Rutgers Council of AAUP Chapters v. Rutgers, 298 N.J. Super. 442 (App. Div. 1997), certif. denied, 153 N.J. 48 (1998). It has also participated as direct counsel or *amicus curiae* in numerous other state court cases involving constitutional rights. See e.g. State v. Carty, 170 N.J. 632 (2002) (State Constitution requires reasonable suspicion of criminal activity prior to police seeking consent to search lawfully stopped motor vehicle); State v. Allah, 170 N.J. 269 (2002) (Sixth Amendment rights violated based on ineffective assistance of counsel where trial counsel failed to assert a meritorious double jeopardy claim); State v. Ravotto, 169 N.J. 227 (2001) (police used unreasonable force in obtaining a blood sample from a DWI suspect where suspect had consented to breathalyzer test); State in Interest of J.G., 151 N.J. 565 (1997); Doe v. Poritz, 142 N.J. 1 (1995) (challenging disclosure of information pertaining to sex offenders based in part on right to privacy); State v. Novembrino, 105 N.J. 95 (1987) (holding that there is no good faith exception to the exclusionary rule under the State Constitution).

2. American-Arab Anti-Discrimination Committee (“ADC”)

ADC is the national association of Arab Americans that works in every sphere of public life to promote and defend the interests of the Arab-American and Arab immigrant community. Arab Americans are an ethnic group who trace their roots to the Arabic-speaking countries of the Middle East and North Africa. Currently, there are Arab Americans living in all 50 of the United States, with nearly three million in the country as a whole.

ADC is a grassroots civil rights organization that welcomes people of all backgrounds, faiths, and ethnicity as members. Since its founding in 1980 by former United States Senator James Abourezk, ADC has grown into the largest non-sectarian, non-partisan civil rights organization in America dedicated to protecting the civil rights of Americans of Arab descent. As an active member of the Leadership Conference on Civil Rights and the Detention Watch Network national coalitions, ADC works with many other civil rights organizations and coalitions on a multitude of issues that affect constitutional freedoms. Headquartered in Washington D.C., ADC also has offices in New York, Michigan, California and Ohio, and 42 membership chapters nationwide. As the representative of a culturally diverse group of Americans and a staunch defender of human rights and civil liberties, ADC is resolutely committed to freedom of thought, conscience and religion.

ADC has been and currently is involved in numerous cases involving discrimination and civil rights, and ADC is dedicated to ensuring that courts not forego their obligation to address constitutional issues involving fundamental rights.

3. Asian American Legal Defense and Education Fund ("AALDEF")

AALDEF, founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through litigation, legal advocacy and dissemination of public information. AALDEF has throughout its long history fought for the right to equal treatment for all persons, including lesbian and gay couples. AALDEF takes the position that discrimination on the basis of sexual orientation should be prohibited on the same basis as discrimination based on race and that it is incumbent upon the courts to ensure that discrimination laws and fundamental constitutional rights are upheld.

4. Hispanic Bar Association of New Jersey

The Hispanic Bar Association of New Jersey has been in existence approximately twenty years. Its purpose is to serve the public interest by cultivating the art and science of jurisprudence, by proposing reform in the law, by facilitating the administration of justice, by fostering respect for the law among Hispanics, by advancing the standing of the legal profession, by

preserving high standards of integrity, honor and professional courtesy among Hispanic lawyers, by establishing a close relationship among Hispanic lawyers, and by cooperating with other Hispanic bar organizations, other legal organizations and other Hispanic community, business, civic, charitable and cultural organizations in the furtherance of the aforementioned purposes. The Hispanic Bar Association takes a strong stance against all forms of discrimination.

5. National Organization for Women of New Jersey ("NOW-NJ")

NOW-NJ is a civil rights organization with over 10,000 members and is dedicated to the full and equal participation of women in society. As such, NOW-NJ has consistently opposed gender stereotyping and discrimination. Further, NOW-NJ advocates for the right of privacy and individual autonomy in making personal decisions with respect to reproductive and marital choices. NOW-NJ accomplishes its goals by educating lawmakers and the public, testifying at the State House in Trenton, and working in coalition with other civil rights organizations.

ARGUMENT

Gay and lesbian couples comprise a significant minority in New Jersey. According to the 2000 Census, there are at least 16,000 same-sex couples living in the State. See “For gays and lesbians, a question of equity,” Star Ledger, May 4, 2003. These couples, on average, are financially less secure than other couples in New Jersey but, at the same time, have larger families to support. See Human Rights Campaign Report entitled “New Jersey Census Data Shows Average New Jersey Same-Sex Couple Is Less Financially Secure than Other State Couples,” at http://www.hrc.org/template.cfm?Section=Press_Room&Template=/ContentManagement/ContentDisplay.cfm&ContentID=18764.¹ Nevertheless, same-sex couples, due to their inability to obtain civil marriages, are denied numerous financial and non-financial benefits that would assist and strengthen their families.

Plaintiffs in this action are seven same-sex couples who have been in committed loving relationships for many years and who desire to enter into civil marriage and to obtain the legal rights, recognition, and responsibilities

¹ While the median income of same-sex couples (\$64,000) is nine thousand dollars *less* than that of other couples (\$73,800), same-sex couples on average care for *more* children than other couples (2.08 for same-sex couples; 1.89 for other couples). Id.

attendant thereto. All have been denied this most basic and personal right by the government based solely on the fact that the sex of each plaintiff's choice of marital partner is the same as his or her own. Plaintiffs therefore filed this action seeking vindication of their rights to privacy and equal protection under the New Jersey Constitution.

Amici -- organizations formed in part or in whole to protect the rights of minorities -- write to address the troubling and fundamentally-flawed approach of two of the Appellate Division panel judges, who engaged in the parsing and compartmentalization of a constitutional right so as to specifically exclude a particular minority group from its protection. This error in constitutional analysis led to an overarching mischaracterization that permeated the judges' opinions -- that plaintiffs are requesting recognition of a "new" constitutional right, that of *same-sex* marriage. Lewis v. Harris, 378 N.J.Super. 168, 183-184 (App. Div. June 14, 2005); id. at 199 (Parillo, J.A.D., concurring).

As discussed further below, the right to marriage -- here, the right not to have one's choice of marital partner limited by the government, unless that burden is otherwise justified under the Court's balancing test -- is neither a "new" right nor a "gay and lesbian" right. It is a fundamental

privacy right arising from Article 1, section 1 of the New Jersey Constitution.

Indeed, the right to independent decision-making in the marital context is clearly established under the New Jersey Constitution. Greenberg v. Kimmelman, 99 N.J. 552 (1985). That the decision-making right is being applied herein in the context of plaintiffs' choices of same-sex partners neither voids the constitutional right nor shields the government's limitation thereof from being subjected to constitutional review.

In seeking to shield from constitutional scrutiny its decision to deny civil marriage rights to plaintiffs, the State requests that "controversial social questions" such as the recognition of same-sex marriage be left solely to the legislature. Defendant's Appellate Division Brief (hereinafter "DbAD") at 1. Its request is shrouded in language that seeks to persuade the Court to stay its hand so as to simply not 'rock the boat' or upset some members of the legislature or the public. See, e.g., DbAD at 1, 25, 40. This was an invitation the Appellate Division improvidently accepted. See Lewis v. Harris, 378 N.J.Super. at 194; id. at 199-200 (Parrillo, J.A.D., concurring).

Yet constitutional rights are not mere "social questions" and no minority group should be denied their constitutional rights because acknowledgement of such rights by the courts would be controversial or

could arouse an adverse reaction by certain legislators or segments of the citizenry. Indeed, citing to the adverse reaction by legislators or members of the public to court decisions in other states, DbAD at 17 and 22-24, and citing to the belief that this is a “delicate” issue around which “compromises” are required, DbAD at 25 and 40, the State seeks for this Court to grant unfettered discretion regarding this issue to legislators, who can then determine the extent to which this particular minority group can exercise its rights. Neither jurisdictional nor providential interests support the State’s radical suggestion that political concerns mandate either inaction or a particular result from the Court on constitutional claims.

I. THIS COURT HAS A DUTY TO ADDRESS AND RESOLVE PLAINTIFFS’ CONSTITUTIONAL CLAIMS AND MUST NOT PERMIT PLAINTIFFS’ RIGHTS TO BE SUBJECT TO MAJORITY VOTE OF THE LEGISLATURE.

“The judicial obligation to protect the rights of individuals is as old as this county.” Robinson v. Cahill, 69 N.J. 133, 147 (1975), quoting Cooper v. Nutley Sun Printing Company, 36 N.J. 189, 196 (1961).

Contrary to that well-established precedent, defendants propose that this court forego its “obligation of interpreting the Constitution and of safeguarding the basic rights granted thereby to the people,” (Asbury Park v. Wooley, 33 N.J. 1, 12 (1960)), and, instead, grant the State legislature unfettered discretion to determine the extent of plaintiffs’ constitutional

rights and the extent to which plaintiffs should be permitted to exercise those rights. Defendants' request controverts fundamental principles of constitutional law that are so firmly established "as not to be debatable," (id., citing State v. Rogers, 56 N.J.L. 480 (Sup.Ct. 1894)), and must therefore be rejected.

A. The New Jersey Courts Have an Unflagging
Obligation to Address Claims Involving Fundamental
Rights Under the State Constitution.

In unequivocal terms, this Court has consistently recognized that it is its obligation to protect individual rights and to adjudicate cases properly before it. As explained by the Court in Asbury Park Press, Inc., 33 N.J. at 10, adjudication of the constitutionality of government actions or enactments "is not only within the constitutional authority of the courts, but represents one of their duties as well." The Court explained:

The judicial branch of the government has imposed upon it the obligation of interpreting the Constitution and of safeguarding the basic rights granted thereby to the people. In this sphere of activity the courts recognize that they have no power to overturn a law adopted by the legislature within its constitutional limitation, even though the law may be unwise, impolitic or unjust. But when legislative action exceeds the boundaries of the authority delegated by the constitution, and transgresses a sacred right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts. [Id.]

The Court added: “It cannot be forgotten that ours is a government of law and not of men, and that the judicial department has imposed upon it the solemn duty to interpret the laws in the last resort. *However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it.*” Id. (emphasis added).²

The underpinning for the judiciary’s role as final arbiter of constitutional questions and protector of individual rights was expressed in State v. Loftin, 157 N.J. 253 (1999). The Court, explaining its power and function, quoted Governor Driscoll’s address at the 1947 Constitutional Convention:

It is, as you know, the courts that have traditionally been the guardians of our constitutions, to whom the meanest citizen may appeal for protection against a wayward executive or capricious legislature. Without independent courts, the whole republican system must surely fail. Our primary, our basic purpose in the drafting of a new Constitution is to secure beyond any question a strong, competent, easily functioning, but always independent, judiciary, and, therefore, be in a position to curb any tendency on the part of the other two

² Indeed, while “ordinarily legislative enactments are presumed to be valid and the burden to prove invalidity is a heavy one,” “[n]evertheless, if an enactment directly impinges on a constitutionally protected right, the presumption of validity disappears.” Bell v. Township of Stafford, 110 N.J. 384, 394-95 (1988). See also Planned Parenthood v. Farmer, 165 N.J. at 619 (“when legislation impinges on a constitutionally protected right, we have looked more closely at the State’s purported justification”); State v. Cameron, 100 N.J. 586, 592 (1985) (“Courts are far more demanding of clarity, specificity and restrictiveness with respect to legislative enactments that have a demonstrable impact on fundamental rights”).

branches of government to exceed their constitutional authority.
[Id. at 281.]

See also Mulhearn v. Federal Shipbuilding Dry Dock Co., 2 N.J. 356, 364 (1949) (characterizing the separation of powers doctrine as “the great contribution of Anglo-American lawyers to the prevention of absolutism and the preservation of the rights of the individual against the state”).

Recognizing the specific hardship of minority individuals in the political realm, this Court has in fact acknowledged a heightened need for the judiciary to act when the equal rights of minority citizens are at stake, as is the case herein. As stated in Dale v. Boy Scouts, 160 N.J. at 619:

The sad truth is that excluded groups and individuals have been prevented from full participation in the social, economic, and political life of our country. The human price of this bigotry has been enormous. At a most fundamental level, adherence to the principle of equality demands that our legal system protect the victims of invidious discrimination. [Id.]

This Court cannot now ignore its constitutional duty and deny the minority individuals before it their right to seek redress in the legal system against discrimination and violations of their fundamental rights. Plaintiffs brought suit because the State’s actions “directly impinge[] on a constitutionality protected right” – namely, the right to privacy and the right to equal protection. It is therefore the obligation and function of this court to determine whether plaintiffs’ claims are valid. Cf. Marbury v. Madison, 1

Cranch 137 (1803) (“It is emphatically the province of the judicial department to say what the law is.”). Indeed, although “holding an act of the Legislature even partially unconstitutional ...is a sensitive ruling...[, nevertheless, there comes a time when the disagreeable judicial venture arises.” Taylor v. Bd. of Ed. Of Hoboken, 187 N.J.Super. 546, 554 (App. Div. 1983).

B. Constitutional Rights Cannot Be Subjected to Majority Vote.

The legislature is not only an improper venue for assessing plaintiffs’ claims based upon the hardships alluded to in Dale but, more fundamentally, based upon the inalienable nature of fundamental rights. As held by the United States Supreme Court: “One’s right to life, liberty, and property, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote....” West Virginia State Bd. of Elections v. Barnette, 319 U.S. 624, 638 (1943) (based on right to freedom of speech, enjoining enforcement of statute requiring children in public schools to salute the American flag). Indeed, the very purpose of the provision of individual constitutional rights is “to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” Id. See also Thornburgh v. American College of

Obstetricians & Gynecologists, 476 U.S. 747, 772, 106 S.Ct. 2169, 2184, 90 L.Ed.2d 779 (1986) ("Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government").

As such, forcing plaintiffs to make their case for the existence of, and right to exercise, their constitutional rights before the state legislature is wholly repugnant to constitutional principles. No individual or minority group should be required to plead to the majority for permission to exercise rights to which they are already constitutionally guaranteed. As expressed previously by this Court, "the State Constitution, as a wellspring of individual rights and liberties, may be directly enforceable, its protections not dependent even upon implementing legislation." State v. Schmid, 84 N.J. 535, 558 (1980), citing Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. at 76-77.

Defendants' argument in support of referring plaintiffs' claims to the legislature underscores the inappropriateness of such action. The State argued before the Appellate Division that "[t]he Legislature is the body most responsive to the will of the people and best suited to forge the practical *compromises* necessary to preserve unity in a changing and pluralistic society." DbAD at 40 (emphasis added). The Appellate Division

improperly accepted that argument and suggested there be a continuation of political negotiations regarding plaintiffs' rights. Lewis v. Harris, 378 at 194; id. at 199 (holding that plaintiffs must seek marital rights through "democratic persuasion"). As explained above, however, constitutional rights "may not be submitted to vote", Barnette, 319 U.S. at 638, and no individual or minority group should have their constitutionally-guaranteed rights become the subject of negotiations or compromise.

This Court should also reject the argument apparently suggested by defendants (and potentially by other *amici*) that the court should stay its hand for fear of creating disunity or a backlash by particular members of the legislature or the public. See DbAD at 17, 22-25 (discussing the reaction to court decisions on same-sex marriage in other states); DbAD at 40 (citing to a need to "preserve unity"). "A judiciary, conscious of the sacrosanct quality of its oath of office to uphold the Constitution, cannot accept an *In terrorem* argument...." Asbury Park Press, Inc., 33 N.J. at 15. As noted by Judge Collester: "[W]e must interpret our Constitution to uphold individual rights, liberties and guarantees for all citizens even though our conclusions may disappoint or offend some earnest and thoughtful citizens." Lewis v. Harris, 378 N.J.Super. at at 201 (Collester, J.A.D., dissenting).

This Court must also reject the State's argument for deference to the legislature based on the fact that the State has granted plaintiffs certain limited rights to this point and that plaintiffs can attempt to obtain additional such rights currently denied to them by lobbying for further legislative action. Defendant ultimately seeks for the Court to accept the conclusion that judicial review of plaintiffs' claims for equality is not justified by plaintiffs' "[i]mpatience with the scope or pace of change...." DbAD at 42. However, that a legislature might one day "come around" to plaintiffs' position and thus eventually come into constitutional compliance is not an acceptable reason to permit a current violation of constitutional rights to continue. As previously noted, no minority group should have to wait for majority approval to effectuate their constitutional rights. In the present case, justice delayed would truly be justice denied for the seven plaintiff couples. And as stated by Chief Justice Weintraub in Village of Ridgefield Park v. Bergen Co. Br. Of Taxation, 31 N.J. 420, 426 (1960), when the jurisdiction of the court is rightfully invoked the court cannot "properly look the other way....It is the singular situation of the judiciary that issues before it must be met and decided when presented." Id.

In sum, the courts have an unflagging obligation to adjudicate plaintiffs' alleged constitutional violations and to not permit fundamental

rights to be subject to a majority vote. “To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper.”

Robinson v. Cahill, 69 N.J. at 147, quoting Cooper v. Nutley Sun Printing Co., Inc., 36 N.J. at 197. This Court, as the “guarantor of the Constitution's command, possesses and must use power equal to its responsibility.”

Robinson v. Cahill, 69 N.J. at 154.

II. THE CONSTITUTIONAL RIGHT TO PRIVACY CANNOT BE PARSED SO AS TO EXCLUDE A PARTICULAR MINORITY FROM ITS PROTECTION.

The right to privacy confers, as against the government, “the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.” State v. Hempele, 120 N.J. 182, 225 (1990), quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see also Doe v. Poritz, 142 N.J. at 100 (same); State v. Saunders, 75 N.J. 200, 213 (1977) (same). Most notably, this right protects individual “independence in making certain kinds of decisions.” Doe v. Poritz, 142 N.J. at 77, citing Whalen v. Roe, 429 U.S. 589, 599 (1977). Under the New Jersey Constitution, this right emanates from Article I, paragraph 1. Right to Choose v. Byrne, 91 N.J. 287, 303 (1982) (“By declaring the right to life, liberty and the pursuit of safety and happiness, Art. I, par. 1 protects the right of privacy”); see also Planned Parenthood v. Farmer, 165 N.J. at 629;

State v. Saunders, 75 N.J. at 216. Indeed, the language of Article I, paragraph 1 is "more expansive ... than that of the United States Constitution...." Planned Parenthood, 165 N.J. at 629, quoting Right to Choose v. Byrne, 91 N.J. at 303. Specifically, "New Jersey's Constitution has been read more expansively than the federal Constitution in the area of right to privacy...[specifically, in the contexts of] *marriage and familial association*, refusal of medical treatment, consensual adult sexual relations, and procreative rights." Doe v. Poritz, 142 N.J. at 147 (Stein, J., dissenting) (emphasis added).

In determining whether a privacy right is implicated by a government action, the focus is on the area of decision-making affected, not upon the individual claiming the interest. In other words, it is the "zone" of privacy that is protected from government intrusion. Greenberg v. Kimmelman, 99 N.J. at 563. As the defendants have recognized: "[T]he New Jersey Constitution provides citizens with a 'zone of privacy' to conduct their affairs without government interference, unless such interference [is constitutionally justifiable]." DbAD at 26, citing Doe v. Poritz, 142 N.J. at 77-78.

Once it has been established that an individual's right to privacy under the New Jersey Constitution is implicated, courts then employ a balancing

test to analyze whether the governmental infringement of that right is permissible. Planned Parenthood v. Farmer, 165 N.J. at 630; Right to Choose v. Byrne, 91 N.J. at 308-9; Greenberg v. Kimmelman, 99 N.J. at 567. In striking the balance, the Court considers “the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.” Planned Parenthood v. Farmer, 165 N.J. at 630, citing Greenberg, 99 N.J. at 567. Significantly, the balancing test (like the analysis as to whether a right to privacy in a certain decision-making area exists) focuses on the affected right itself, without reference to the individual claiming the right. Therefore, the status of a plaintiff as a member of a particular subsection of society is not germane to this balancing of interests analysis.

“As one of life’s most intimate choices,...” the decision regarding whom one should marry undoubtedly “invokes a privacy interest safeguarded by the New Jersey Constitution.” Greenberg, 99 N.J. at 572. See also State v. Saunders, 75 N.J. at 219 (“we can only reiterate that 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”).

The Appellate Division did not deny the existence of this privacy right. Instead, the two-judge majority inappropriately parsed and compartmentalized that privacy right in such a way as to effectively negate the general right to independent decision-making that the constitution meant to protect. Essentially, the judges limited the application of the privacy right to make independent decisions about one's marital status such that it only applies to the heterosexual segment of the population. Lewis v. Harris, 378 N.J.Super. at 183; id. at 199 (Parrillo, J.A.D., concurring). They did so by declaring that plaintiffs seek to invoke not a right to marriage but, rather, the right to *same-sex* marriage. Id. That sort of "parsing of rights" was conducted in Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), and has since been rejected. Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 2478 (2003) (holding that the Bowers Court "misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy..." and, as such, failed to properly analyze the more general liberty interests implicated). See also id., 123 S.Ct. at 2482 ("Persons in a homosexual relationship may seek autonomy for these purposes [of decision-making relating to marriage, procreation, contraception, family

relationships, child rearing, and education], just as heterosexual persons do. The decision in Bowers would deny them this right.”).

Whatever the particular characteristics of an individual and his or her chosen marital partner -- whether it be a Jew choosing to marry a Christian, a Caucasian choosing to marry an African-American, a gay man or lesbian woman choosing to marry another gay man or lesbian woman, or any other of the infinite permutations of what makes one couple distinct from others -- each situation involves simply a specific context within which the right to independent choice of marital partner is exercised. As such, the “right to *same-sex* marriage” can no more be parsed out of the overarching right to privacy in the area of marriage than could the “right to *interracial* marriage” or the “right to *inter-religious* marriage.” Simply put, none of the situations described above invoke “new” rights but, rather, all are encompassed within the existent right to privacy (i.e., “zone” of privacy) in the marital realm. “Since Art. I, para. 1 specifically protects the rights of *all persons*..., the necessity of permitting [plaintiffs] to vindicate this basic right is self-evident.” Peper v. Princeton University Bd. of Trustees, 77 N.J. 55, 79 (1978) (emphasis added).³

³ Indeed, the Appellate Division’s analyses were based on outdated assumptions, previously rejected by this Court, of marriage (e.g., that it should be procreation-based) and family (e.g. that having opposite-sex

Finally, the fact that a privacy right is implicated should not be obfuscated by the question which must thereafter be asked as to whether or not the State has an overriding interest in limiting or prohibiting the plaintiffs' right to choose a same-sex partner for marriage.⁴ Even in the numerous contexts wherein the State has permissibly limited marital decision-making based upon an overriding state interest (e.g., limitations on marrying a minor or closely-related relatives), the constitutional privacy right to independent decision-making is nevertheless infringed upon (albeit, in those situations, justifiably so based upon overriding valid state interests, such as in public health and the protection of minors). As such, regardless

parents as opposed to same-sex parents is in the best interest of a child). Lewis v. Harris, 378 N.J.Super. at 183 ("our society considers marriage between a man and a woman as the appropriate and desirable forum for procreation and the rearing of children"); id. at 197 (Parrillo, J.A.D., concurring) (declaring "procreation's centrality to marriage"). In assessing what creates a marital-type relationship, this Court has held:

It is...the undertaking of a way of life in which two people commit to each other, foregoing 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. And each couple defines its way of life and each partner's expected contribution to it in its own way.

In re Estate of Roccamonte, 174 N.J. 381, 392-393 (2002).

⁴ *Amici* believe defendants do not have any legitimate overriding interest for such a limitation and concur with the arguments presented in plaintiffs' brief.

of proffered justifications in the present case, the existence of the privacy right and the need for constitutional review cannot be denied.

CONCLUSION

For the reasons stated above, the decision of the Appellate Division should be reversed.

Dated: Oct. 19, 2005

A handwritten signature in black ink, appearing to read 'Ed Barocas', written over a horizontal line.

Ed Barocas
Legal Director, ACLU-NJ
On behalf of *amici curiae*

CERTIFICATION OF SERVICE

I, Edward Barocas, hereby certify that two copies of *amici curiae*'s brief were sent via overnight delivery to the following:

Lawrence Lustberg, Esq.
Gibbons, Del Deo, Dolan, Griffinger & Vecchione
1 Riverfront Plaza
Newark, New Jersey 07102

David Buckel, Esq.
Lambda Legal Defense
120 Wall Street, Suite 1500
New York, New York 10005-3904

Patrick DeAlmeida
Deputy Attorney General
Department of Law & Public Safety
Division of Law
R.J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625-0112

and by regular mail to:

Demetrios K. Stratis, Esq.
Mack-Cali Willowbrook Center
201 Willowbrook Boulevard
Fourth Floor
Wayne, New Jersey 07470

Joseph A. Dorta, Esq.
79 Oak Hill Road
Suite B
Red Bank, New Jersey 07701

Gregory J. Sullivan, Esq.
Hartsough, Kenny & Chase
3812 Quakerbridge Road
Hamilton, New Jersey 08619

David R. Oakley, Esq.
Anderl & Oakley
20 Nassau Street, Suite 208
Princeton, New Jersey 08542

Vincent P. McCarthy, Esq.
The Center for Marriage Law, Inc.
8 South Main Street
P.O. Box 1834
New Milford, Connecticut 06776

Donald D. Campbell, Esq.
Campbell & Campbell
599 Avenue C
Bayonne, New Jersey 07002

Date: Oct 19, 2005


Edward Barocas