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

Plaintiffs-Appellants,

v.

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

Defendants-Respondents.

SUPREME COURT OF NEW JERSEY

Docket No. 58,389

CIVIL ACTION

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-2244-03T5

**BRIEF OF MADELINE MARZANO-LESNEVICH AS AMICUS CURIAE IN SUPPORT
OF PLAINTIFFS-APPELLANTS**

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INTEREST OF THE AMICUS

The amicus curiae is an attorney whose clients include gay and lesbian families who, like plaintiffs-appellants, have been denied the societal recognition and economic benefits of marriage.¹ The same-sex couples that this attorney represents are no different from other couples in every way that matters: they love one another, are committed to one another, and many are raising children together. However, New Jersey has denied these same-sex couples the right to marry, and has done so for one reason alone -- because allowing same-sex couples to marry is purported to be an affront to the "traditional" notion of marriage as between people of different genders. In failing to permit same-sex couples to marry, the State of New Jersey has demeaned same-sex couples and their children and has doomed them to second-class citizenship with more limited societal recognition and economic benefits than different-sex couples. New Jersey's Domestic Partnership Law (the "NJDPL") provides only eight rights to same-sex couples, and does little to remedy the second-class treatment of same-sex couples and their children, having been founded on the ill-advised notion that separate can be equal -- a tried and true formula for abysmal failure.

The amicus curiae is thus concerned about the fate of same-sex couples and their children should New Jersey fail to accord same-sex couples the right to marry, and is interested in

¹ A brief description of the amicus curiae is attached at Tab A.

responding to those who would deny appellants and those like them the fundamental right to marry.

PRELIMINARY STATEMENT

The Appellate Division of the New Jersey Superior Court failed to recognize the right of same-sex couples to marry because of its misguided concern that the traditional notion of marriage be preserved:

the right to marry is a fundamental right that is subject to the privacy protections of article I, paragraph 1, of the New Jersey Constitution. However, this right extends only to marriages between members of the opposite sex. Plaintiffs' claim of a constitutional right to State recognition of marriage between members of the same sex has no foundation in the text of the Constitution, this Nation's history and traditions or contemporary standards of liberty and justice.

Lewis v. Harris, 378 N.J. Super. 168, 188, 875 A.2d 259, 271 (2005). This rationale is nothing new. Indeed, it is akin to the arguments that were made in opposition to interracial marriage, and is as rooted in discrimination as were those arguments. As the Massachusetts Supreme Court stated in permitting same-sex couples to marry: It is time for "history [to] . . . yield to a more fully developed understanding of the invidious quality of [this] . . . discrimination." Goodridge v. Department of Pub. Health, 798 N.E.2d 941, 958 (Mass. 2003). It is time for New Jersey to allow same-sex couples to marry.

Opponents of allowing same-sex couples to marry can do nothing more than attempt to rationalize their prejudice. However, the arguments they raise only expose that prejudice. They contend that: (1) the domestic partner benefits offered to same-sex couples by the State are an adequate substitute for what different-sex couples can access through marriage and (2) marriage in its bare essence is merely biological procreation.

First, New Jersey's newly-enacted domestic partnership law is a political compromise, not an answer to the unequal treatment of same-sex couples and their children. The NJDPL provides only eight rights to same-sex couples, and serves to promote the illusion that separate can be equal. In fact, nobody could reasonably deny that the NJDPL falls short in crucial areas. For example, it fails to extend the presumption of parenthood to the non-biological parent in a same-sex relationship, fails to allow for joint adoption, fails to require private employers to offer health insurance to domestic partners, fails to provide for inheritance rights in the event of intestacy, fails to protect against disinheritance, fails to permit recovery for loss of consortium, fails to create custody rights for a non-biological parent, fails to create child support obligations, and fails to provide for equitable distribution. The list goes on and on.

Defendants-Respondents cannot deny that same-sex couples do not have all of the rights of those who are married. But, even if every single right in the NJDPL were identical to every single right afforded by marriage, that would still be insufficient

because it would proclaim to the world that same-sex couples and their children were different -- and less worthy -- than different-sex couples and their children. The notion of relegating interracial couples to domestic partner status is unthinkable, and, so, too, should be the notion of relegating same-sex couples to this second-class status.

Second, latching onto the one definition of marriage that could exclude same-sex couples, the opponents of marriage for same-sex couples contend that the defining feature of marriage is biological procreation. This attempt to find a rational basis for excluding same-sex couples from marriage easily falls apart since many different-sex couples cannot or choose not to procreate, and the ability to procreate has never been required to get a marriage license in New Jersey or any other state. Surely, marriage is about more than the ability to procreate or actual procreation -- love and commitment figure into most definitions of marriage. The children of same-sex couples, however conceived, deserve the same rights as the children of different-sex couples.

It is unconstitutional to treat same-sex couples and their children as second class citizens.² The amicus curiae herein respectfully requests that the Court remove the unlawful barrier to same-sex couples' freedom to marry.

² This brief does not address constitutional arguments. It relies on Plaintiffs-Appellants' brief for those arguments.

ARGUMENT

A. This Court Should Recognize that the Fundamental Right to Marriage Extends to Same Sex Couples

This Court has recognized that marriage is a fundamental right. See J.B. v. M.B., 170 N.J. 9, 23-24, 783 A.2d 707, 715-16 (2001); In re Baby M., 109 N.J. 396, 447, 537 A.2d 1227, 1253 (1988). The Appellate Division, however, suggested that "absent legislative action, there is no basis for construing the New Jersey Constitution to compel the State to authorize marriages between member of the same sex." Lewis, 378 N.J. Super. at 194, 875 A.2d at 274. This judicial indifference, however, is unwarranted. As discussed more fully below, the NJDPL is deficient on its face and relegates gay and lesbian domestic partnerships to second-class status. This Court has aptly noted that "[w]hen 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." Robinson v. Cahill, 69 N.J. 133, 147, 351 A.2d 713, 720 (1975). Since the NJDPL fails to provide the benefits of marriage, this Court is obligated to provide relief. Cf. Cooper v. Nutley Sun Printing Co. Inc., 36 N.J. 189, 196, 175 A.2d 639, 643 (1961) ("[J]ust as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence. . . . The judicial obligation to protect the rights of individuals is as old as this country.") (internal citation omitted).

B. The New Jersey Domestic Partnership Law Is Inadequate

According to the 2000 census, there are some 16,604 same-sex couples in this State. See Married-Couple and Unmarried-Partner Households 2000, Census 2000 Special Reports (February 2003) at <http://www.census.gov./prod/2003pubs/censr-5.pdf>. These couples are being denied the rights that stem from being involved in marriages, despite the fact that their relationships are exactly like a marriage, save for the fact that they are homosexual. The NJDPL does almost nothing to bring the legal rights of same-sex couples on a par with married couples. Indeed, the New Jersey statutes make over 850 references to various rights, obligations, privileges, and benefits that come solely with marriage, while the NJDPL provides essentially eight to non-state employees. See N.J.S.A. 26:8A et. seq. The few rights and obligations created under the NJDPL are:

- 1) the right to sue employers, landlords, lenders or others for discrimination;
- 2) the right to hospital visitation even if the couple has not registered as a domestic partnership;
- 3) the power to make medical decisions on behalf of the partner in the event of incapacitation;
- 4) the right of domestic partners to file joint state tax returns and the ability to claim a partner as a dependent;
- 5) the right to inherit joint property without being subject to the New Jersey inheritance tax;
- 6) an obligation to support each other financially during the course of the domestic partnership (although not after);

7) the right to a divorce-like proceeding before a Superior Court judge in order to terminate the partnership; and

8) an obligation that insurance companies include domestic partners in their coverage plans but only if employers voluntarily agree to offer domestic partner benefits.³

On one level, what is missing is the panoply of rights associated with marriage. On another level, even if domestic partnership rights were entirely coextensive with marriage rights, the mere creation of a separate category for gay and lesbian relationships smacks of prejudice. Separate can never be equal.

1. The Failings of the NJDPL

a) Rights That Inure to Children

Many of the same-sex couples living together in New Jersey have children. In fact, it is estimated that there are at least ten thousand children in New Jersey being raised by same-sex couples.⁴ See Gary Gates and Jason Ost, A Demographic Profile of New Jersey's Gay and Lesbian Families (July 1, 2004) at <http://www.urban.org/url.cfm?ID=411031>. There can be no dispute

³ State employees are basically granted three additional rights: 1) the right to claim a partner as a dependent under a state health plan; 2) the right to qualify as a "widow" or "widower" for certain state pension plans; and 3) the right to be considered a "surviving spouse" under the New Jersey Police statute. N.J.S.A. 26:8A et. seq.

⁴ The American Bar Association, Family Law Section estimates that nationally there are 4 million gay and lesbian parents raising 8-10 million children. The American Civil Liberties Union estimates that 8-13 million children are being raised by gay or lesbian American parents. Lambda Legal Defense & Education Fund estimates there are from 6-10 million lesbian and gay parents raising an estimated 6-14 million children. See Parenting Options for Same-Sex Couples in the U.S. (July 23, 2004) at <http://www.buddybuddy.com/parent.html>.

that these children deserve the protection and security that marriage provides -- the same protection and security afforded to their counterparts being raised by different-sex couples. See, e.g., Goodridge, 798 N.E.2d at 964 ("[i]t cannot be rational . . . to penalize children . . . because the State disapproves of their parents' sexual orientation"). However, the NJDPL fails to place children of same-sex couples on a par with those of different-sex couples. For instance, New Jersey creates a presumption that a husband is a "parent" to a child born by his wife in order to immediately establish that the child will be taken care of by two loving adults. See N.J.S.A. 9:17-43; In re Trust Created By Agreement Dated Dec. 20, 1961, 166 N.J. 340, 352, 765 A.2d 746, 753 (2001) (noting legislative intent reflects well-established common-law principle that a child born in wedlock is presumed to be the legitimate offspring of the husband and wife). The NJDPL does not provide any protection for children who are either conceived or adopted during a domestic partnership. By limiting the presumption of parenthood to married couples, children born into a domestic partnership are disadvantaged because the law does not create joint responsibility for their welfare.

While married couples can adopt children jointly, same-sex couples must go through the adoption process as single individuals, which generates more time and more expense. See N.J.S.A. 9:3-43 (noting that only a married couple can file a

joint action for adoption). As one appellant describes her experience:

At the time of their births, we were not presumed to be the legal parents, so we have spent a great deal of time and money on second-parent adoptions, living through home studies by social workers, fingerprinting, and an FBI background check, which felt degrading. Kasey's legal status with one parent was up in the air for many months, but now each of us is his legal parent. Maya's legal status with one parent is currently up in the air, hopefully to resolve soon.

[Ja113a (Karen Nicholson-McFadden Aff., ¶ 4)]

See Ja50a-51a (Meneghin Aff., ¶ 8) ("when our children were born there was no presumption that we were both legal parents. We had to spend a lot of money on cross adoptions, and in the meantime the children's legal status with one parent was up in the air").

Furthermore, when a married couple has divorced or otherwise separated, under New Jersey law, "the rights of both parents [are] equal," and a court can order joint custody, sole custody, or any other arrangement pursuant to the best interests of the child." N.J.S.A. 9:2-4. Not so for gay and lesbian couples who have children together. In cases where an adoption has not been completed, under the current case law, a former domestic partner must qualify as a "parent" by proving "psychological parenthood," a long, arduous and uncertain process. V.C. v. M.J.B., 163 N.J. 200, 223-71, 748 A.2d 539, 551-54(2000) (detailing elements of "psychological parenthood").

Indeed, under V.C., a same-sex partner must prove all of the following elements of "psychological parenthood":

1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; 2) that the petitioner and the child lived together in the same household; 3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial consideration; and 4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

[163 N.J. at 223, 748 A.2d at 551]

The V.C. Court allowed V.C. to qualify as a "psychological parent." However, the Court declined to grant V.C. legal custody as a joint decision-maker, instead allowing only visitation. 163 N.J. at 230, 748 A.2d at 555. The Court reasoned that during the four year legal process, V.C. had not been involved in decision-making, and to permit her input now would be disruptive -- a Pyrrhic victory after a long and difficult struggle. See id.

In addition, while a husband has equal legal rights to the custody of his children, a non-gestational same-sex partner is disadvantaged because the "legal parent's status is a significant weight in the best interest balance." Id. As a result, a non-gestational partner who may have been more involved as primary caretaker -- albeit lacking the legal status of a "parent" -- may not be granted joint custody.

Recognizing marriages of same-sex couples benefits the thousands of children currently living with parents in a same-sex partnership in New Jersey by legally ensuring their access to the

resources of both adults, guaranteeing stability in caretaking if something should happen to the biological parent, and making them feel safe and accepted in the view of their community.

Conversely, by forbidding their parents to marry, the children of same-sex parents are only made to suffer:

I'll never forget the day that Zenzali came home to ask why another child told her that "your parents can't get married." Zenzali said that she thought we were married. We explained that family is built on love, support, and faithfulness, rather than what others, or our government, may think. But this little girl still had that seed of doubt and concern planted in her young mind. This is painful because we do not want her to feel that her family is any less than any other family, or that she is any less than another child because her parents are not allowed to marry.

[Ja69a (Suyin Lael Aff., ¶ 9)]

"If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against." Baker v. State, 744 A.2d 864, 882 (1999). As the Massachusetts Supreme Court held: "Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurances of a 'stable family structure in which children will be reared, educated, and socialized.'" Goodridge, 798 N.E.2d at 964.

b) Post-Dissolution Benefits

Married couples have responsibilities to one another that continue even after a divorce or a separation. Under New Jersey law, courts "may make such order[s] as to alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just. . ." N.J.S.A. 2A:34-23. In contrast, the NJDPL does not create post-dissolution responsibilities between domestic partners or to their children.

Moreover, property gained during a marriage is not the property of the purchaser, but is shared community property. Thus, should a marriage end because of separation or legal divorce, courts perform an "equitable distribution" of the property acquired during the marriage. See Heller-Loren v. Apuzzio, 371 N.J. Super. 518, 530, 853 A.2d 997, 1004 (App. Div. 2004). However, the NJDPL does not provide for any equitable distribution upon the dissolution of a domestic partnership. Pursuant to the NJDPL, in a proceeding to terminate a domestic partnership, "the court shall in no event be required to effect an equitable distribution of property, either real or personal, which was legally and beneficially acquired by both domestic partners or either domestic partner during the domestic partnership." N.J.S.A. 26:8A-10(a)(3).

Similarly, while all debts incurred during a marriage are shared debts, debts incurred during the course of a domestic

partnership are strictly the responsibility of the partner that incurs them, irrespective of whether they were used for the benefit of the domestic partnership. See N.J.S.A. 26:8A-6(g).

c) Rights Upon Death

New Jersey also grants married couples a number of rights to protect a surviving spouse should the other spouse die. For example, New Jersey law provides various inheritance rights that automatically protect a surviving spouse and any surviving children in the event a spouse dies intestate. Under those circumstances, New Jersey law provides that the surviving spouse automatically inherits the decedent's entire estate if he or she is not survived by a parent or child. See N.J.S.A. 3B:5-3(a). Even if the decedent is survived by a parent or a child, a surviving spouse is entitled to at least one-half of the estate depending on the circumstances. See N.J.S.A. 3B:5-3(b)-(d). New Jersey also protects a spouse from being totally disinherited by the decedent spouse by allowing the spouse to elect against the dispositions in a will. Thus, a surviving spouse is entitled to a minimum share of one-third of the decedent's estate. See N.J.S.A. 3B:8-1.

In contrast, under the NJDPL, a domestic partner whose partner dies intestate is not automatically entitled to the deceased partner's estate. The NJDPL does allow for property held jointly to avoid the inheritance tax. See N.J.S.A. 54:34-1(f). However, only married couples enjoy the benefit of a presumption that property acquired during the marriage is jointly

held as a tenancy by the entirety. See N.J.S.A. 46:3-17.4. Same-sex couples must spend additional resources to ensure that their property is held jointly. Since domestic partners are not automatically entitled to receive any property that is not held jointly, a will must be drafted before the death occurs. Should a domestic partner die without a will, the rules of intestate succession would rigidly apply and could easily lead to an unfair result. For example, a domestic partner that has spent a lifetime caring for and loving his or her partner could be left with nothing. Further, the NJDPL does not create a right to an elective share of the partner's estate. As a result, surviving domestic partners are left with no legal remedy should they be intentionally or inadvertently left out of a will. Children are similarly disadvantaged because unless a same-sex couple has drafted a will or engaged in a costly second-parent adoption proceeding, they will be entirely disinherited. Cf. In re the Adoption of a Child By N.E.Y., 267 N.J. Super. 88, 630 A.2d 835 (Ch. Div. 1993) (holding that New Jersey does not recognize "equitable adoptions").

d) Benefits

The economic benefits available through marriage are about more than just dollars and cents. They affect opportunities and often directly impact the quality of life enjoyed by children. As appellants recount:

I could have been a stay-at-home mom if we had been married, because we'd have family health insurance through Cindy's workplace, and could afford to have me stay at home. We

can't afford private insurance. So I took a job in order to ensure the family had full health care coverage.

[Ja55a-56a (Killian Aff., ¶ 5)]

When we decided I would go back to school for an advanced degree, I needed to find full-time work, in part because I did not have the spousal status to go on Suyin's health plan. I had to turn down part-time jobs that paid me much higher hourly rates, because those jobs did not offer health insurance.

[Ja73a (Lael Aff., ¶ 9)]

Indeed, marriage brings a number of economic benefits that are designed to further economic sharing and to help stabilize lifelong commitments. For example, married couples are automatically entitled to family health insurance as well as other benefits that come from being classified as a "family unit." Access to family health insurance benefits a child directly by saving resources that can be used for his or her immediate benefit. Moreover, family health insurance can allow one spouse to stay at home to handle child-rearing duties without having to worry about health insurance coverage. Married couples are also automatically entitled to various pension plans. Furthermore, under the Family Leave Act, married couples have a statutory right to take a leave of absence from work upon the birth of a child or serious illness of a family member without the risk of termination of employment. See N.J.S.A. 34:11B-1 et. seq.

Again, in contrast, the NJDPL does not provide for these benefits. While the NJDPL requires insurance companies to

provide coverage for domestic partnerships, private employers are the gatekeepers: it is only when employers decide to offer domestic partnership benefits that the obligation on the part of the insurance company is triggered. Importantly, private employers are under no obligation to provide domestic partner benefits.⁵ Same-sex couples are also excluded from taking a leave of absence in the event their domestic partner becomes seriously ill because the statute defines "family member" as "a child, parent, or spouse." N.J.S.A. 34:11B-3(j).

e) Loss of Consortium

The NJDPL does not appear to provide for domestic partners to recover for loss of consortium under the New Jersey Wrongful Death Act. Cf. Sykes v. Zook Enterprises, Inc., 215 N.J. Super. 461, 521 A.2d 1380 (Law Div. 1987) (holding unmarried surviving partner could not bring wrongful death claim because she was not an intestate beneficiary). Not only does this lead to a lack of economic recovery, but it reinforces the prejudice that same-sex relationships are not legitimate and that the loss experienced by a same-sex partner is not worthy of societal sympathy.

2. Separate Cannot Be Equal

Opponents of marriage equality argue that the NJDPL ameliorates many of the harms alleged by plaintiffs-appellants. This is a gross overstatement. To be sure, a few issues such as

⁵ It also appears that local public employers are at liberty to rescind their adoption of the NJDPL, at least with respect to its pension provisions. See http://www.state.nj.us/treasury/pensions/dp_page.htm. This creates uncertainty for affected employees as they attempt to plan their futures.

the right to make medical decisions and the right to hospital visitation appear remedied by the NJDPL, but as discussed above, the vast majority of the unequal distinctions remain. Moreover, even if the NJDPL granted all the rights of marriage, the mere fact that same-sex couples are given a different status is inherently unequal.

Same-sex couples are treated as second-class citizens based solely on their sexual orientation. In the landmark case In re the Adoption of a Child by J.M.G., which recognized the right of a lesbian to adopt her partner's biological child without terminating the biological mother's rights, the court noted:

This case arises at a time of great change and a time of recognition that, while the families of the past may have seemed simple formations repeated with uniformity (the so called "traditional family") families have always been complex, multifaceted and often idealized. This court recognizes that families differ in both size and shape within and among the many cultural and socio-economic layers that make up this society. We cannot continue to pretend that there is one formula, one correct pattern that should constitute a family in order to achieve the supportive, loving environment we believe children should inhabit.

[267 N.J. Super. 622, 631, 632 A.2d 550, 554-55 (Ch. Div. 1993)]

The opportunity to publicly and legally commit to share one's life with another person is a central aspect of human experience. See, e.g., Goodridge, 798 N.E.2d at 955. New Jersey marriage law generally reflects the judgment that society as a whole, as well as the individuals themselves, benefit when people commit to sharing their lives through marriage. The commitment, love, and

support in same-sex marriages is as real and as important as in opposite-sex relationships:

We are an authentic family, loving and supporting each other, experiencing together all the important things in life, including birthdays, anniversaries, holidays with our extended families, serious illnesses, school plays, family video nights, and those small but all-important times together driving in the car or having meals at home or telling bedtime stories.

[Ja69a (Suyin Lael Aff., ¶ 11)]

The NJDPL promotes the illusion that second class citizenship is acceptable, and only serves to cloak the prejudice inherent in denying same-sex couples the right to marry. Gay and lesbian Americans are no less entitled to be called and treated as married than anyone else. The NJDPL is a political solution that manifests compromise. But there should be no compromising when it comes to the fundamental right to marry.

C. Marriage Is Diminished By a Definition Pinned to the Ability to Procreate

Opponents of the right of same-sex couples to marry further seek to exclude same-sex couples from marriage by defining marriage by the ability of the couple to biologically procreate: "[t]he 'marriage is procreation' argument singles out the one bridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage." Goodridge, 798 N.E.2d at 962. Indeed, the Appellate Division broadly states that: "our society considers marriage between a man and woman to play a vital role in propagating the

species and in providing the ideal environment for raising children." Lewis, 378 N.J. Super. at 185, 875 A.2d at 269.

The United States Supreme Court has long recognized that couples marry for many important non-procreative reasons. For example, in Turner v. Safley, the U.S. Supreme Court recognized the following four non-procreative "important attributes" of marriage: (i) it represents an opportunity to make a public statement of commitment and love to another person, and an opportunity to receive public support for that commitment; (ii) it has for many people an important spiritual or religious significance; (iii) it offers the prospect of physical "consummation;" and (iv) it is the "precondition" for a vast array of protections and benefits with significant impact on people's lives. 482 U.S. 78, 95-96, 107 S. Ct. 2254, 2265, 96 L. Ed. 2d 64, 83 (1987). Same-sex couples should be entitled to these "attributes" of marriage.

Further, the United States Supreme Court has explicitly and consistently recognized the right of couples not to procreate in marriage. See Griswold v. Connecticut, 381 U.S. 479, 485, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510, 515-16 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S. Ct. 1029, 1038, 31 L. Ed. 2d 349, 362 (1972). In both Griswold and Eisenstadt, the Supreme Court ruled that the government could not interfere with married or unmarried couples' decisions about procreation, sex, and the use of contraception. Id. "If the right of privacy means anything, it is the right of the individual, married or single, to be free

from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt, 405 U.S. at 453, 92 S. Ct. at 1038, 31 L. Ed. 2d at 362.⁶ Thus, as the Dissent concludes, "[t]here is not, nor could there be, a threshold requirement to marriage of the intention or ability to procreate." Lewis, 378 N.J. Super. at 211; 875 A.2d at 285.

The New Jersey statutes governing the formation of marriage are void of any reference to procreation, reproduction or fertility, as either the purpose, intent or prerequisite to marriage. See N.J.S.A. 37:1-4 et. seq. Couples who wish to have their marriages recognized under New Jersey law are not required to demonstrate that they are capable of having children or intend to do so. "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.... But no statute in this state permits annulment in such cases.... Health and happiness appear to be the touchstone." T. v. M., 100 N.J. Super. 530, 538, 242 A.2d 670, 674 (Ch. Div. 1968).

⁶ Moreover, a ban on same-sex marriage would not advance the State's or society's interest in furthering procreation. As recently as last year, Supreme Court Justice Antonin Scalia opined, in his dissent to Lawrence v. Texas, that the promotion of procreation is a very weak argument for maintaining bans on gay people's freedom to marry. Lawrence v. Texas, 539 U.S. 558, 605, 123 S.Ct. 2472, 2498, 156 L. Ed. 2d 508, 543 (2003) ("what justification could there possibly be for denying the benefits of marriage to homosexual couples.... Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry").

New Jersey and other states recognize that couples can become parents through adoption or a number of other approaches to child-bearing, including donor insemination and surrogacy. See Evan Wolfson, Why Marriage Matters, America, Equality, And Gay People's Right To Marry 81 (Simon & Schuster 2004).⁷ New Jersey not only allows non-procreative couples to marry and stay married, but also permits gay and lesbian parents to adopt. New Jersey further has a strong public policy of supporting children, no matter who their parents are or what their family configuration is. See V.C., 163 N.J. at 232, 748 A.2d at 556 (Long, J., concurring) ("we should not be misled into thinking that any particular model of family life is the only one that embodies 'family values.' Those qualities of family life on which society places a premium -- its stability, the love and affection shared by its members...are merely characteristics of family life that, except for its communal aspect, are unrelated to the particular form a family takes"); J.M.G., 267 N.J. Super. at 631-32 (court finding "beyond all other issues" that "providing a secure, stable, and nurturing environment for the child" is paramount in granting same-sex adoption).

It is clear that procreation is not a legal requirement of marriage in this country, or specifically in the state of New Jersey. Many opposite sex couples enter into the union of marriage legally without the intention to procreate, or without

⁷ The number of assisted reproductive technology procedures performed in New Jersey alone was 6,011 in 2001. See Assisted Reproductive Technology Surveillance -- United States (2001) at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5301a1.htm>.

the physical ability to procreate. Indeed, states routinely issue marriage licenses to elderly, sterile, and impotent couples.⁸ As the Massachusetts Supreme Court found: "[i]f procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible boundary of nonmarital child-bearing and the creation of families by noncoital means." Goodridge, 798 N.E.2d at 962.

Ultimately, defining away marriage between people of the same gender by focusing on biological procreation only exposes the prejudice against same-sex relationships that lurks in this dispute. See Goodridge, 798 N.E.2d at 962. Such an exclusionary definition is neither rational nor supportable, and should be rejected.

D. The Court's Comparison of Same-Sex Marriage To Polygamy Is Baseless

The Appellate Division erroneously reasoned that if same-sex couples were permitted to marry, polygamist marriages could be permissible as well. See Lewis, 378 N.J. Super. at 187-88, 875 A.2d at 270. However, as the Dissent notes, a ruling recognizing same-sex marriages would create no obligation for New Jersey to abandon any limitation on the form of marriage. 378 N.J. Super. at 216; 875 A.2d at 288. Such a ruling would have no impact on New Jersey statutes banning bigamous marriages, N.J.S.A. 20:24-1, common law marriages, N.J.S.A. 37:1-10, incestuous marriages,

⁸ According to the National Center for Health Statistics, the number of married couples that are infertile is 2.1 million. See Infertility Data for U.S. (1995) at <http://www.cdc.gov/nchs/fastats/fertile.htm>.

N.J.S.A. 37:1-1, or marriages to persons adjudged to be mentally incompetent or with a venereal disease in a communicable stage.

N.J.S.A. 37:1-9. See 378 N.J. Super. at 217, 875 A.2d at 288.

Moreover, marriage between two people of the same gender is easily distinguishable from polygamous relationships, which tend to be marked by violence. See, e.g., The Primer: Helping Victims of Domestic Violence and Child Abuse in Polygamous Communities, July 2005, available at http://attorneygeneral.utah.gov/polygamy/The_Primer.pdf. (discussing the sex abuse and coercion of young people, women in particular, that often goes on in the polygamous communities of Arizona and Utah). In these communities, "fundamentalists use power, control, domination and fear to control their members or partners." Id. at 37. To the contrary, here, the record below demonstrates over and over again that plaintiffs-appellants are in stable, loving, binary relationships. [See generally Ja33a-129a].

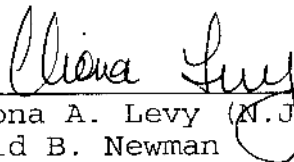
Ultimately, the Appellate Division's reasoning hinges on nothing more than its own normative judgment that marriage between couples of the same sex does not fit within the "traditional" concept of marriage. It is time to stop hiding behind "tradition" in order to rationalize discrimination -- New Jersey should permit same-sex couples to marry.

CONCLUSION

For the foregoing reasons, the amicus curiae herein respectfully requests that the Court reverse the decision of the lower court and permit same-sex couples the right to marry.

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Respectfully submitted,



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