MARK LEWIS, et al.,	:	Docket No. 58389
Plaintiffs-Appellants,	:	On Appeal from: Appellate Division Docket No. A-2244-03T5
v.	:	Sat Below: Hon. Stephen Skillman
GWENDOLYN L. HARRIS, et al.,	:	Hon. Donald G. Collester, Jr. Hon. Anthony J. Parrillo
Defendants-Respondents.	:	

SUPREME COURT OF NEW JERSEY

BRIEF OF THE PROFESSORS OF THE HISTORY OF MARRIAGE, FAMILIES, AND THE LAW AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

ATTORNEY OF RECORD
Adam N. Saravay, Esq.
Sydney E. Dickey, Esq.
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
Tel: (973) 622-4444
Fax: (973) 624-7070

OF COUNSEL
Suzanne B. Goldberg, Esq.
Rutgers School of Law-Newark
123 Washington Street
Newark, New Jersey 07102
Tel: (973) 353-3177
Fax: (973) 353-1445

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

INTEREST OF AMICI CURIAE

We are professors of history and family law specializing in the history of marriage, families, and the law, at universities throughout the United States.[1] We have written leading books and articles analyzing the history of marriage and marriage law in the United States. This brief is submitted to assist the Court's deliberations by offering an analysis of the history of marriage law and practice based on our scholarship. Our names, institutional affiliations, and brief biographies are set out in an Appendix to this brief.

We adopt the Statement of the Case and Statement of Facts in the brief of the Petitioners.

SUMMARY OF ARGUMENT

The history of marriage in New Jersey is a history of change. Since the State's earliest days, marriage has undergone continuous reexamination and revision. Today, marriage – a partnership between two adults who are equal in the eyes of the law – bears little resemblance to marriage as it existed at the State's founding or even a few decades ago.

The relevant history demonstrates that all marriage rules remain subject to meaningful judicial review and that a rule's

[1] The Amici Curiae were granted leave to appear as such in this matter by the Appellate Division, see Lewis v. Harris, 378 N.J. Super 168 (App. Div. 2004), and appear in this Court pursuant to the second to last sentence of R. 1:13-9.

vintage is not, by itself, sufficient justification for its retention. Indeed, the historical record documents the transformation or invalidation of many traditional features of marriage. More specifically, the historical record shows that New Jersey has invalidated rules requiring different treatment of men and women in marriage, and that the State has never treated procreation as essential to marriage.

Further, the ongoing evolution of marriage throughout New Jersey's history renders implausible the suggestion that marriage, which has survived so many changes, is too frail to endure the revision of the anachronistic different-sex eligibility rule. To the contrary, the State continues to recognize a substantial set of rights and responsibilities of couples as "marriage," even as that set has shed elements that were considered fundamental to marriage earlier in our history. Nor have the changes to marriage deterred inhabitants of New Jersey, who continue to embrace marriage overwhelmingly as the mechanism for achieving state recognition of their relationships. In the wake of significant transformation, marriage has survived, all the while remaining true to its core purpose of recognizing committed, interdependent partnerships between consenting adults.

ARGUMENT

The Legal Definition And Scope Of Marriage In New Jersey Has Never Been Static; Features Of Marriage Once Thought Essential Have Been Revisited And Rejected Consistently Over Time.

By suggesting that "our nation's history and traditions" justify the exclusion of New Jersey's same-sex couples from marriage, Lewis v. Harris, 378 N.J. Super. 169, 190 n.4 (App. Div. 2005); id. at 187 (characterizing State's argument as "grounded on historical tradition"), the Appellate Division incorrectly assumed that marriage is a fixed status with certain foundational elements that cannot be changed except, perhaps, by the Legislature.[2] As legal developments throughout New Jersey's history demonstrate, the State's courts and legislature have continuously adjusted or abandoned elements once thought to represent the foundations of marriage.

I. The Shift Away From The Common Law Coverture Regime Transformed The Meaning Of Marriage In New Jersey In The 19th And Early 20th Centuries.

A. Marriage Under Coverture Meant That Wives Lacked A Legal Identity Independent Of Their Husbands.

Until well into the 19th century, marriage meant the virtually complete merger of a woman's legal identity into that

[2] In its brief to the Appellate Division, the State likewise treated marriage as having a fixed historical meaning and depended on that fixed history to defend the marriage rule challenged here. See, e.g., Defendants-Respondents Brief to the Appellate Division ("D-R Brief") at 2 (arguing that the "historic definition of marriage" justifies rejection of plaintiffs' legal challenge).

of her husband.[3] As the Chancery Court put it in 1831, "the effects of the marriage are, that the husband and the wife are accounted one person, and he hath power over her person as well as estate, and he is bound to support and maintain her in a suitable manner, according to his circumstances." Miller v. Miller, 1 N.J. Eq. 386, 391 (Ch. 1831). See also Wyckoff v. Gardner, 20 N.J.L. 556, 559 (Sup. Ct. 1846) ("the husband and wife, being considered one person in law"). See also Nancy F. Cott, Public Vows: A History of Marriage and the Nation 11-12 (2000) (describing the sudden change in a woman's rights upon marriage under the coverture regime); Hendrik Hartog, Man & Wife in America: A History 106 (2000) (describing American marriage law at the turn of the 19th century).

For both men and women, negating a married woman's independent legal capacity, including her capacity to own property in her own right, was understood as an indispensable

[3] Early models of marriage were influenced by both religious tradition and civil law. See Michael Grossberg, Governing the Hearth: Law and Family in Nineteenth-Century America 65-66 (1985) (observing that during the medieval period, the Catholic Church declared marriage a religious sacrament, and church-controlled governments oversaw the lives of their constituents through ecclesiastical laws) and id. at 66 (noting that in post-Reformation England, the Church of England rejected the Catholic doctrine that marriage was a sacrament). However, in New Jersey, since colonial times, the State's government has overseen the recognition and solemnization of marriages, with the colonial government holding the same power as English officials to provide marriage licenses. See William Nelson, New Jersey Marriage Records, 1665-1800 lxxvi-lxxvii (1982).

element of marriage. As the court explained in Miller, "[b]y marriage with a woman, the husband is entitled to an absolute or qualified right to all her estate, real and personal; . . . The wife, by marriage, has parted with her property, placed herself under the control of her husband, and looks to him for support." Miller, 1 N.J. Eq. at 391. See also Mulford v. Allen, 2 N.J. Eq. 415, 420 (Ch. 1841) ("Personal chattels, such as household goods and things moveable, vest in the husband absolutely at the marriage, without the intervention of any court or any act on his part to establish his claim to it."); Newman v. Chase, 70 N.J. 254, 260 n.4 (1976) (describing the "then prevailing rule," before the passage of the Married Women's Act of 1852, that "a husband was entitled to the possession and enjoyment of his wife's real estate during their joint lives").

The collapse of women's legal identity upon marriage extended far beyond the loss of independent property ownership rights. Marriage meant that a woman's labor belonged to her husband as well. In Skillman v. Skillman, the court declared that, "[a]t common law, the husband is entitled not only to all the personal property which the wife owns at the time of her marriage, but to all that she acquires by her skill or labor during the coverture. His right to her services and to the proceeds of her skill and industry is absolute." 13 N.J. Eq. 403, 406 (Ch. 1861).

Marriage also meant that wives lost their ability to contract. "By the common law, the legal existence of a married woman is merged in that of her husband, so that, as a general rule, she can make no contract without his consent. A contract so made by her is absolutely void." Den ex dem. Rake v. Lawshee, 24 N.J.L. 613, 616 (Sup. Ct. 1854).

This gendered concept of marriage emerged from the view that the colonial family was a "little commonwealth" whose members were bound together by a well-defined set of reciprocal duties and the shared aims of domestic tranquility. Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 5 (1985) (quoting John Demos, A Little Commonwealth, Family Life in Plymouth Colony (citation omitted) (1970)). The husband was, by legal entitlement and informal social code, the "governor" of this colonial household. Id. The wife and children, in turn, were dependents within the husband's domain. See Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody in the United States 6-13 (1994) (discussing colonial fathers' rights and responsibilities); see also Hartog, supra, at 99-101 (explaining the husband's duty to oversee the family as an economic unit).

Against this background, a woman's "civil death" upon marriage was seen as both natural and essential to the healthy continuation of marriage and the broader society. See Peggy A.

Rabkin, Fathers to Daughters: The Legal Foundations of Female Emancipation 19 (1980) (discussing married women's legal status prior to 1848; Hartog, supra, at 102-03 (describing the 19th century's perception of coverture "as a simple and sincere expression of human natures," and "based on unchanging scriptural truth"). Consequently, coverture was understood as necessary "to preserve the harmony of the marriage relationship." See Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947, 996 (2002).

B. The Meaning Of Marriage Changed Fundamentally As Coverture Eroded.

By the latter part of the 19th century, the institution of marriage had been transformed. Marriage no longer meant the absolute legal subordination of women to their husbands. With the passage of the Married Women's Property Act, women were entitled to own property as independent individuals. The Act provided in part

> that the real and personal property, and the rents, issues, and profits thereof, of any female now married shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were a single female.

Act of March 25, 1852, ch. 171, 1852 N.J. Laws 407.[4] See also Buttlar v. Rosenblath, 42 N.J. Eq. 651 (E. & A. 1887) (holding that after the passage of the Act, the wife became entitled to the possession and enjoyment of her one-half interest in this joint estate).

Not surprisingly, the opponents of these changes proclaimed that removing the husband from his role as the "ultimate locus of power within the home" would lead to domestic chaos and the destruction of the nation. Grossberg, supra, at 282. See also E.J. Graff, What is Marriage For? The Strange Social History of Our Most Intimate Institution 30-31 (1999) (quoting an 1844 New York legislative committee's observation "that allowing married women to control their own property would lead 'to infidelity in the marriage bed, a high rate of divorce, and increased female criminality,' while turning marriage from 'its high and holy purposes' into something arranged for 'convenience and sensuality.'").

Despite these concerns, the element of legal unity of spouses, which had been thought of as essential to marriage since statehood, continued to change, with courts, in addition to the legislature, playing a significant role in determining the elements of marriage. Early in the 20th

[4] The Act provided similar rights to retain independent ownership of property for women who married after the Act took effect. See id.

century, for example, the Court of Errors and Appeals reversed a Chancery Court ruling and held that a wife could maintain an action to recover wages owed to her by a partnership that included her husband. Turner v. Davenport, 63 N.J. Eq. 288, 292 (E. & A. 1901) ("We think that the wages due the wife for services to the co-partnership became, by our statute, . . . her sole and separate property, and that she is entitled to enforce her claim in equity against the assets of the firm in which her husband is a member.").

Marriage also was transformed when women were granted the right to sue in tort in 1906, something inconceivable just a few decades earlier. See An Act for the protection and enforcement of the rights of married women, ch. 248, 1906 N.J. Laws 525. This led to the creation of tort remedies for injured wives that previously would have been thought impossible. In Sims v. Sims, 79 N.J.L. 577 (E&A 1910), for example, the court recognized a woman's claim for alienation of affection even though a wife could not have brought such a claim under the common-law coverture regime. "Keeping in mind the old law and the existing mischief," the court found that allowing the wife to bring that claim was necessary to "remedy the inequality to which she was subjected by the common law." Id. at 582. Even further, in 1931, while formally retaining the common law doctrine of

interspousal immunity, the Court of Errors and Appeals nonetheless found that a husband's employer could be liable to a wife in tort for injuries caused to the wife by her husband. Hudson v. Gas Consumers' Ass'n, 123 N.J.L. 252, 255 (E. & A. 1939) ("[T]he trespass by a husband against the person of his wife does not lose its unlawful quality even though the husband is not answerable in damages for it, but this exemption or immunity, which the husband has, does not extend to his employer . . . .").

II. Since The Mid-Twentieth Century, New Jersey Has Continued To Change Elements Of Marriage Once Considered Unalterable.

Having endured the transformations just described, marriage neither collapsed as a legal or social entity nor became so immutably fixed as to ward off further evolution. To the contrary, change continued to reshape elements once thought of as core to marriage. These changes reached, inter alia, rules regarding interspousal immunity, liability for conspiracy, joint liability for individual expenses, loss of consortium, and sexual relations between spouses. Both individually and together, the alterations to these basic rules of marriage demonstrate, again, that the law governing marriage has been and continues to be in a constant state of change, reflecting the imperatives of a changing social order.

A. Interspousal Immunity.

The doctrine of interspousal immunity was long understood as fundamental to marriage. That one spouse might be able to sue another struck many as contrary to the very essence of the marital bond. As Justice Proctor observed in Immer v. Risko, 56 N.J. 482 (1970), although the "metaphysical concept" of "legal identity of husband and wife . . . cannot be seriously defended today," the "disruptive effect upon the harmony of the family" was relied upon often to justify the doctrine's retention. Id. at 488 (citations omitted).

Yet the Court did not find the interspousal immunity doctrine's deep roots in traditional conceptions of marriage, or the important policy concerns with familial harmony, sufficient to warrant the rule's retention. Instead, the Court concluded that the doctrine, as applied to negligence suits arising from automobile accidents, "cannot be fairly sustained." Id. at 490. See also Small v. Rockfield, 66 N.J. 231, 238 (1974) ("The common law's interspousal immunity was largely grounded on concepts which admittedly have no place in current thinking."). In altering its position regarding this once-essential feature of marriage, the Court emphasized that "[t]he nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further

application of it the instrument of injustice." Immer, 56 N.J. at 487 (citation and internal punctuation omitted).

In Merenoff v. Merenoff, 76 N.J. 535 (1978), the New Jersey Supreme Court broadened the abrogation of the interspousal immunity doctrine yet again to reach all suits in tort. With reasoning that would have been unthinkable to marriage law experts of an earlier era, the Court concluded that "the choice to sue, or not to sue, should be that of the parties to the marriage, who as individuals are entitled to seek their personal happiness according to their own lights." Id. at 552.

B. Liability For Conspiracy.

The courts similarly cast aside a longstanding presumption that marriage precluded spouses from being criminal co-conspirators. In State v. Pittman, 124 N.J. Super. 334, 336 (Law Div. 1973), the Superior Court observed that prior judicial decisions had sustained the view that spouses could not be co-conspirators because of the "oneness of the marital relationship." Indeed, in State v. Struck, 44 N.J. Super. 274, 279 (Cty. Ct. 1957), the court had earlier found that "the fiction of unity of spouses still is a very real part of our law in this State." But Pittman, 124 N.J. Super. at 337, reached "the obvious conclusion that as of 1973, by reason of events occurring in recent years, the common law concept of oneness has been vitiated in this State and other States in many instances."

Id. at 337-38 (citing, inter alia, New Jersey's initial abolition of the interspousal immunity doctrine in Immer). It concluded that "New Jersey should wait no longer in conforming to the modern commonsense view." Id. at 340.

C. Joint Liability For Individual Expenses.

Likewise, with respect to joint liability for individual expenses within a marriage, the New Jersey Supreme Court refused to endorse the traditional "rule imposing liability on husbands, but not wives," calling it "an anachronism that no longer fits contemporary society." Jersey Shore Med. Ctr-Fitkin Hosp. v. Estate of Baum, 84 N.J. 137, 147 (1980). Explicitly acknowledging the changed purpose of marriage, the Court reasoned that the "rule must yield to the evolving interdependence of married men and women and to the reality that a marriage is a partnership." Id. at 141. In a related vein, in Shanley v. Nuzzo, 160 N.J. Super. 436, 441 (J. & D.R.Ct. 1978), the court observed that the husband's traditional role as sole provider had given way to "the changing values and lifestyles in contemporary society" to the point that a woman "likely . . . may be the breadwinner for her family." As a result, financial support responsibilities may no longer be allocated according to sex. Id. at 442.

D. Loss Of Consortium.

The meaning of marriage changed, as well, through the evolution of doctrine regarding loss of consortium claims. "At common law, the right of a husband to the consortium of his wife was well established. . . . The common law recognized no corresponding cause of action for a wife." Susan Demidovich, Loss of Consortium: Should Marriage Be Retained as a Prerequisite?, 52 U. Cin. L. Rev. 842, 843 (1983). This refusal to recognize a wife's consortium claim fit neatly within historical views about the nature of marriage. As the New Jersey Supreme Court observed, the common law position "was understandable in the light of its medieval concept that, during the marriage, the legal existence of the wife was suspended or incorporated into that of the husband." Ekalo v. Constructive Serv. Corp., 46 N.J. 82, 86 (1965) (citing 1 Blackstone, Commentaries §442). Yet in 1965, the New Jersey Supreme Court refused to embrace this longstanding view, concluding instead that a married woman could maintain a loss of consortium claim in her own right. Id. at 90.

E. Sexual Relations.

Finally, the treatment of sexual relations between spouses as an element of marriage has also undergone significant change. The New Jersey Supreme Court has explained that "the nature of marriage at a particular time in history" supported "an implied

matrimonial consent to intercourse which the wife could not retract." State v. Smith, 85 N.J. 193, 201 (1981). That presumptive consent had long been considered fundamental to the marriage right. Nonetheless, in Smith, the Court recognized that the traditional understanding of marriage had become "outdated and doubtful." Id. at 211. As a result, the Court concluded, a defendant accused of raping his wife could not "avoid prosecution for rape simply because he was still legally married to his victim." Id.

Cries of danger to the institution of marriage have accompanied each set of changes to marriage, as illustrated above in the objections raised to the Married Women's Property Act. They were raised in this case below by the arguments of respondents' amici. See, e.g., Brief Amici Curiae of The New Jersey Coalition to Preserve and Protect Marriage, et al. to the Appellate Division at 61 (arguing that the sex-based marriage restriction is needed "for the benefit of society and its children"). As the Massachusetts Supreme Judicial Court observed, "[a]larms about the imminent erosion of the 'natural' order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of no-fault divorce." Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 967 (Mass. 2003) (footnote omitted). But, that court added, "[m]arriage has survived all

of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution." Id.

Likewise, in New Jersey, the historical record demonstrates that marriage has remained both viable and desirable as the State's most comprehensive formal mechanism for recognizing adult partnerships, even as its familiar, longstanding rules have been rejected over time.

III. Interdependence Comprises The Essential Element Of Marriage Today In New Jersey; Alleged State Interests In The Sex Of The Marriage Partners And The Capacity To Procreate Do Not Justify The Exclusion Of Same-Sex Couples From Marriage.

A. New Jersey's Jurisprudence And Statutes Identify Interdependence As the Essence Of Civil Marriage.

Reflecting the significant historical shift in the nature of marriage, recent judicial commentary on the nature of marital relationships reinforces that no acceptable connection exists between the different-sex marriage rule and the state's legitimate interests in the marriage relationship.

Just three years ago, the New Jersey Supreme Court identified mutual support and commitment as the essential element of a relationship akin to a marriage.

> A marital-type relationship 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, 392-93 (2002). The State also embraced this focus on interdependency in its brief to the Appellate Division, describing "economic support and dependency" as "primary concerns of the State." D-R Brief at 35, quoting Torres v. Torres, 144 N.J. Super. 540, 543 (Ch. Div. 1976). See also Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004) (describing civil marriage as "a wholly secular and dynamic legal institution, the governmental aim of which is to encourage stable adult relationships for the good of the individual and of the community, especially its children" and concluding that "[t]he very nature and purpose of civil marriage . . . renders unconstitutional any attempt to ban all same-sex couples, as same-sex couples, from entering into civil marriage").

Roccamonte's recognition that the vital element of marriage is the mutual caring of the spouses is not new to the 21st century. In granting a petition to annul a marriage in which the spouses were capable of procreation but not sexual intercourse, for example, the Chancery Court explained that "[h]ealth and happiness appear to be the touchstone" of marriage. T. v. M., 100 N.J. Super. 530, 538 (Ch. Div. 1968). Likewise, in addressing itself directly to the "essentials" of marriage, the court in V.J.S. v. M.S.B., 249 N.J. Super. 318,

320 (Ch. Div. 1991), recognized that "a determination of whether a fraud goes to the essentials of the marriage must be decided on a case-by-case basis." As the court explained, "[w]hat is essential to the relationship of the parties in one marriage may be of considerably less significance in another." Id. See also Patel v. Navitlal, 265 N.J. Super. 402, 409-10 (Ch. Div. 1992) (same).

The legislature also has reinforced that interdependency lies at the core of civil marriage through its statutes that insure the consent of the parties to the marriage and promote the partners' commitment to each other. See, e.g., N.J.S.A. 2A:34-1(d)-(e) (providing that a marriage can be nullified in the event of lack of capacity due to mental condition, influence of intoxicants, lack of consent or duress, or lack of sufficient maturity as reflected by age); N.J.S.A. 2A: 34-23.1(h) and (o) (including as conditions for determining alimony and maintenance awards the "contribution by each party to the education, training or earning power of the other," and the "extent to which a party deferred achieving their career goals").

B. The Rule Limiting Marriage To Men and Women Emerged From An Earlier Era Of Gendered Roles For Husbands And Wives; Current Law Does Not Treat The Sex Difference Between Marital Partners As Important Or Relevant.

The decline of the state's interest in enforcing gender roles in marriage can be seen not only in the demise of the sex-

based rules for husbands and wives discussed above but also in the evolution of child custody and visitation standards post-marriage. The changes in this area – from a preference for fathers to a preference for mothers to a sex-neutral position – reveal the rule limiting marriage to male-female couples to be an outgrowth of an earlier view, since rejected, that marriage involved naturally and legally distinct roles for men and women.

Early on in custody disputes, New Jersey courts embraced the "general rule . . . that the claim of father to the persons of his infant children, is paramount to those of the mother." Baird v. Baird, 21 N.J. Eq. 384, 388 (E. & A. 1869). "This rule is so entirely axiomatic," the court explained, "that it would be idle to cite authorities in its support." Id. See also In the Matter of Van Houten, 3 N.J. Eq. 220, 226 (Ch. 1835) ("[T]he natural right of the mother must yield to the will of the father. It is paramount and is considered a continuation of the father's authority."); Grossberg, supra, at 235 ("Prerepublican Anglo-American law granted fathers an almost unlimited right to the custody of their minor legitimate children. Moored in the medieval equation of legal rights with property ownership, it assumed that the interests of children were best protected by making the father the natural guardian and by using a property-based standard of parental fitness.").

The absolute, seemingly "natural" rule favoring fathers gave way, however, to a maternal presumption in child custody disputes, particularly where young children were involved. See, e.g., Bennet v. Bennet, 13 N.J. Eq. 114, 116 (Ch. 1860) (referencing an 1860 act mandating that children under seven remain in the custody of their mother upon parental separation); Rossell v. Rossell, 64 N.J. Eq. 21, 23 (Ch. 1903) ("[I]n dealing with the custody of an infant of tender years, especially if the infant be a daughter, under the general jurisdiction of the court, the chancellor would, in general, award the custody to the mother (if not restrained by proofs of unfitness) . . . ."). This maternal preference remained in force even after both the judiciary and legislature replaced the tender years rule with the "best interests of the child" standard in the 1940s. See Mayer v. Mayer, 150 N.J. Super. 556, 562 (Ch. Div. 1977) ("The 'best interests' standard was authoritatively announced in New Jersey in 1944 by the Armour decision [Armour v. Armour, 135 N.J. Eq. 47, 51 (E. & A. 1944)] and has since been followed by our courts."). In Mayer, the court explained that "[t]his statutory grant of equal rights in both parents to custody effectively reversed the holding of the common law wherein the father had the preferred right to custody of his minor . . . ." Id. at 564. The move to a best interests standard had not been aimed, in other words, to eradicate the maternal preference

expressed through the tender years doctrine. In Esposito v. Esposito, 41 N.J. 143, 145 (1963), decided well after the overt shift to the "best interests" standard, the New Jersey Supreme Court reiterated that "[c]ustody of a child of tender years is normally placed with the mother, if fit."

Eventually, however, the state's courts concluded that the maternal presumption was not essential after all, marking yet another shift to gender roles that once had been considered inevitable in marriage. In Beck v. Beck, 86 N.J. 480, 485 (1981), the Court reexamined the background presumptions in place to guide conflicting rights of parents and embraced a sex-neutral approach, concluding that both mothers and fathers are entitled to "full and genuine involvement in the lives of their children following a divorce." The Chancery Division addressed the maternal preference even more directly, recognizing that neither parent should be presumed best solely on the basis of sex. See Mayer, 150 N.J. Super. at 563-64. As the court explained,

> Where both parents are suitable persons to have the custody of their children and are devoted to them, they should be given as nearly equal rights to the custody of the children as is practical and compatible with the convenience, education and welfare of the children, since it is against public policy to destroy or limit the relation of parent and child and the child is entitled to the love and training of both parents.

Id. at 564 (quoting 2 Nelson, Divorce and Annulment (2d ed. 1961) §§ 15, 17, at 256-57). See also Alan M. Grossman, New Jersey Family Law § 13-1 (LEXIS 2004) ("The law of child custody has undergone significant changes in recent years. The dramatic social changes of the past half century have resulted in an upsurge in custody disputes, in an increasing number of which fathers have been awarded physical custody and increased time-sharing. Whereas in earlier years it was generally a foregone conclusion that the mother would be awarded custody of the children and that the father would be granted reasonable rights of visitation, that is no longer true in cases in which the father seriously pursues custody.").[5]

These shifts in custody rules and in the doctrine and law that constitute marriage underscore that conventional understandings cannot alone justify the continued enforcement of an otherwise discriminatory law or doctrine. As Justice Holmes remarked, dissenting in Lochner v. New York, 198 U.S. 45 (1905), "the accident of our finding certain opinions natural and

[5] In contexts further afield from marriage, the United States Supreme Court has illustrated repeatedly this same inclination to revisit gendered rules and values once thought unquestionable. For example, in the jury service context, in 1961, the Court sustained Florida's law exempting women from jury service against an equal protection challenge on the grounds of women's "special responsibilities." Hoyt v. Florida, 368 U.S. 57, 62 (1961) (describing women as "the center of home and family life"). Id. at 61-62. Yet not quite fifteen years later, the Court reversed itself in Taylor v. Louisiana, 419 U.S. 522 (1975), maintaining that "[i]f it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed." Id. at 537.

familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." Id. at 76 (Holmes, J., dissenting).[6] That is certainly the case here, where the different-sex eligibility requirement reflects the view of marriage as a gendered status that has been long rejected by both the courts and legislature. *The present focus of both the courts and the legislature is now trained instead on the spouses' commitment to each other, a factor that has no legitimate connection to the sex of the marital partners.*

---

[6] The U.S. Supreme Court has affirmed in numerous cases that while history is a useful starting point for analysis, the past alone cannot justify retention of a discriminatory, exclusionary rule into the future. See, e.g., Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) ("'[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . .'" (alteration in original) (quoting Williams v. Illinois, 399 U.S. 235, 239 (1970)); Marsh v. Chambers, 463 U.S. 783, 790 (1983) ("Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . . ."); Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."). Perhaps Justice Holmes put the point best, writing in 1897 that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if [its foundation has] vanished long since, and the rule simply persists from blind imitation of the past." Justice Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

C. The Capacity To Procreate Has Never Been Treated As Essential To Marriage In New Jersey.

In the last several decades, courts in New Jersey have reinforced that procreation is *not* the essence of marriage. In T. v. M., 100 N.J. Super. 530 (Ch. Div. 1968), for example, the court observed that while procreation is an important end of marriage, it is not an essential element of the relationship. "If the begetting of children were the chief end of marriage" the court wrote, "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." Id. at 538. See also Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) ("While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage."); William M. Hohengarten, Note, Same-Sex Marriage and the Right of Privacy, 103 Yale L.J. 1495, 1512 (1994) ("[L]aws governing domestic relations do not treat the ability to procreate as a precondition of marriage. The marital relationship is valued in its own right as a legal commitment between two intimately related adults, not because it is sometimes connected with procreation."); cf. Lawrence v. Texas,

539 U.S. 558, 605 (2003) (Scalia, J., dissenting) (stating that "encouragement of procreation" could not justify excluding same-sex couples from marriage).

Even further, where a spouse brought an action alleging fraud because her husband "*insist[ed]* on having children, contrary to the express agreement of the parties prior to marriage that they would *not* have children," the court annulled the marriage for fraud. V.J.S. v. M.J.B., 249 N.J. Super. 318, 319-20 (Ch. Div. 1991) (applying N.J.S.A. 2A:34-1(d)'s authorization of nullification for "fraud as to the essentials of marriage") (emphasis in the original). The authority to determine the role of procreation within the marriage rested, the court found, with the marital partners. Id.

The statutory framework confirms that procreation is not considered an essential element of marriage. In N.J.S.A. 2A:34-1, the legislature has set forth grounds for nullification of a marriage. None of the six grounds suggests that either a refusal or inability to procreate would render a marriage invalid as lacking an essential element. The provision that speaks most closely to the intimate relationship of the marital partners, N.J.S.A. 2A:34-1(c), provides that impotence of the marital partners may be grounds for annulment. The Chancery Court has explained that impotence concerns not procreation but rather "want of power for copulation." Godfrey v. Shatwell, 38

N.J. Super. 501, 506 (Ch. Div. 1955). See also Fehr v. Fehr, 92 N.J. Eq. 316, 317 (Ch. Div. 1920) (granting annulment because of husband's impotence and distinguishing infertility from impotence). Consistent with the State's law and jurisprudence, the Attorney General in this case "disclaims reliance upon promotion of procreation and creating the optimal environment for raising children as justifications for the limitation of marriage to members of the opposite sex." Lewis v. Harris, 378 N.J. Super. 169, 185 n.2 (App. Div. 2005).

Although procreation was sometimes characterized in dicta as foundational to marriage in the 19th and early 20th centuries, in none of these cases was procreation actually considered essential to marriage, contrary to the suggestion of the court below. Cf. Lewis, 378 N.J. Super. at 185 n.2 (characterizing procreation as "essential" to marriage); id. at 197 (Parrillo, J., concurring) (asserting that "procreative heterosexual intercourse is and has been historically through all times and cultures an important [and fundamental] feature" of marriage). For example, the Chancery Court opined in 1909 that "[t]he controlling purpose of marriage is to enable the sexes to gratify lawfully the natural desire for procreation which has been implanted in them, that the race may be preserved

upon the earth." Raymond v. Raymond, 79 A. 430, 431 (Ch. 1909).[7] Yet Raymond itself had nothing to do with procreation. Instead, the court was asked to, and did, invalidate a marriage because of the husband's refusal to be sexually intimate with his wife. Likewise, in Turney v. Avery, 92 N.J. Eq. 473, 474 (Ch. Div. 1921), the court declared procreation to be "the most important object of matrimony, for without it the human race itself would perish from the earth." Yet the decision whether to annul the marriage in Turner turned not on whether the marital partners could procreate but rather whether the wife had concealed her sterility from her husband in a fraudulent manner. Id. Had the wife discovered her infertility during the marriage, the court intimated that the annulment petition would not have been granted. Id. (distinguishing post-marriage discovery of infertility from the case at bar).

Notably, the only New Jersey cases relied on by the concurrence below to support its characterization of procreation as essential to marriage (the majority opinion cited no New Jersey support for this point) did not hold that marriage and procreation are linked. See J.B. v. M.B., 170 N.J. 9 (2001), cited by Lewis, 378 N.J. Super. at 197 (Parrillo, J., concurring). Instead, J. B. involved the disposition of

[7] The court continued: "If either party may refuse to consummate the marriage, and still hold the other in the bond of matrimony, it is apparent that licentiousness would be encouraged and promoted, and we would become a race of bastards." Raymond, 79 A. at 431.

cryopreserved preembryos after divorce and found that a woman's right not to procreate trumped her former husband's claimed right to utilize the preembryos. Id. at 30. Likewise, Lindquist v. Lindquist, 130 N.J. Eq. 11 (E. & A. 1941), cited by Lewis, 378 N.J. Super. at 197 (Parrillo, J., concurring), notwithstanding its dicta linking procreation with marriage, did not hold that procreation was essential to marriage. To the contrary, the court found that no cause existed for annulment where the wife had become pregnant after pre-marital sexual relations with a man who was not her husband. Id. at 20. And, nearly thirty years ago in M.T. v. J.T., 140 N.J. Super. 77 (App. Div.), certif. denied, 71 N.J. 345 (1976), the Appellate Division held that a husband was obliged to support his former wife, notwithstanding that she had had sex reassignment surgery and was physically incapable of procreating. While the Court in dicta affirmed the different-sex rule in marriage, it hinged its recognition of the couple's marriage not on the couple's ability to procreate but on their ability to engage in sexual relations. See id. at 90 (finding that the wife was "fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy" and sustaining the marriage on that ground).

The federal cases relied on by the Lewis majority and concurrence also did not rule on the relationship between

procreation and marriage. Skinner v. Oklahoma, 316 U.S. 535 (1942), for example, rejected sterilization as punishment for particular crimes. Zablocki v. Redhail, 434 U.S. 374 (1978), invalidated a law restricting marriage rights for individuals with child support obligations. And Turner v. Safley, 482 U.S. 78 (1987), struck down a restriction on the rights of inmates to marry. The question whether procreation was fundamental to marriage was neither presented to nor decided by the Court.

As the history and current law regarding the elements of marriage demonstrate, neither procreation nor gendered roles for the marital partners is essential to marriage today. Instead, taken together, they reveal the different-sex eligibility rule to have no legitimate connection to the standards for marriage that are currently in place.

CONCLUSION

As illustrated above, the history of marriage has been one of evolution, not of static immutability, with marriage surviving innumerable changes to its core rules over the last two centuries. These changes to the institution of marriage over time have rendered the current rule excluding same-sex couples from marriage inconsistent with New Jersey law, which has repudiated gendered marriage rules and has never held procreation to be an essential element of marriage. The State's gender- and procreation-related defenses thus lack any legitimate relationship to the concerns of equality and interdependence that are marriage's now-settled underpinnings.

Respectfully submitted,
Attorneys for Amici Curiae[8]
Professors of the History of
Marriage, Families, and the Law

Adam N. Saravay, Esq.
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102

and

Suzanne B. Goldberg, Esq.
Rutgers School of Law-Newark
123 Washington Street
Newark, New Jersey 07102

Date: October 6, 2005

[8] Amici are grateful for the research assistance provided by Todd Anten, Columbia Law School, Class of 2006.

APPENDIX:
BIOGRAPHIES OF AMICI

Peter W. Bardaglio, Ph.D., is Professor of History at Ithaca College. He is the author of Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South (University of North Carolina Press, 1995), which won the 1996 James Rawley Prize from the Organization of American Historians for best book published on the history of race relations in the United States. He has also published numerous articles and essays on race and gender in the nineteenth-century South as well as on families and public policy in the United States.

Norma Basch is Professor Emerita at Rutgers University. She has written extensively on marriage and domestic relations in nineteenth-century American law, including a recent book on the history of divorce published by the University of California Press. She taught courses on gender history, women's history, and American legal history in both the undergraduate and doctoral programs at Rutgers.

George Chauncey is Professor of History at the University of Chicago. He is the author of Why Marriage? The History Shaping Today's Debate Over Gay Equality (Basic Books, 2004) and Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940 (Basic Books, 1994), which won the Organization of American Historians' Merle Curti Award for the

best book in social history and the Frederick Jackson Turner Award for the best first book in any field of history. He is also the author of numerous articles and the coeditor of three books and special journal issues on the history of gender and sexuality in the United States.

Richard H. Chused is Professor of Law at Georgetown University, where he teaches, among other subjects, Family Law and Gender and Law in American History. He has published Private Acts in Public Places: A Social History of Divorce in the Formative Era of American Family Law (University of Pennsylvania Press, 1994), and numerous articles on the history of women's property law and other aspects of legal history.

Stephanie Coontz teaches history and family studies at The Evergreen State College in Olympia, Washington, and is the Director of Research and Public Education for the Counsel on Contemporary Families. She is the author of Marriage, A History: From Obedience to Intimacy, or How Love Conquered Marriage (Viking, 2005), The Way We Never Were: American Families and the Nostalgia Trap (Basic Books, 2000), The Way We Really Are: Coming to Terms with America's Changing Families (Basic Books, 1997), and The Social Origins of Private Life: A History of American Families (Verso, 1988). She also edited American Families: A Multicultural Reader (Routledge, 1999), and has contributed to numerous anthologies and journals.

Nancy F. Cott is the Jonathan Trumbull Professor of American History at Harvard University and the Pforzheimer Foundation Director of the Schlesinger Library on the History of Women in America at the Radcliffe Institute for Advanced Study. Her research and teaching concentrate on the history of women and of gender relations in the United States. Her interests have ranged from family structures, women's rights, and feminism, to the role of gender in political institutions and citizenship. She is the author or editor of seven books, the most recent of which is Public Vows: A History of Marriage and the Nation (Harvard University Press, 2000).

Peggy Cooper Davis is the John S.R. Shad Professor of Lawyering and Ethics at New York University School of Law. She is a former family court judge and has published widely on family and child welfare issues. Her book, Neglected Stories: The Constitution and Family Values (Hill and Wang, 1997), was a pathbreaking analysis of the constitutional position of the family.

John D'Emilio, Ph.D., is Professor of History and Gender and Women's Studies at the University of Illinois at Chicago. A Guggenheim and National Endowment for the Humanities fellow, he has authored several books and articles on the history of sexuality, civil rights, and gay and lesbian history, including The World Turned: Essays on Gay History, Politics, and Culture

(Duke University Press, 2002), Intimate Matters: A History of Sexuality in America (2d expanded edition, University of Chicago Press, 1997) (co-authored with Estelle Freedman), and Sexual Politics, Sexual Communities (2d edition, University of Chicago Press, 1998).

Nancy E. Dowd is Chesterfield Smith Professor of Law at the University of Florida Levin College of Law, where she teaches in the areas of family law, constitutional law, and gender and the law. She is the author of many articles in the area of family law and two books, Redefining Fatherhood (New York University Press, 2001) and In Defense of Single Parent Families (New York University Press, 1997). She is also Co-Director of the Center for Children and Families, Levin College of Law, University of Florida.

Ariela Dubler is Associate Professor of Law at Columbia University, where she teaches legal history and family law. She holds a JD and Ph.D. in history from Yale University. Her research and writing focus on the history of marriage and nonmarital relations.

Estelle Freedman, Ph.D., is Edgar E. Robinson Professor of United States History at Stanford University, specializing in women's history and feminist studies. Freedman has authored several books and articles including "The History of Family and the History of Sexuality," in The New American History (Temple

University Press, 1997) and Intimate Matters: A History of Sexuality in America (2d expanded edition, University of Chicago Press, 1997) (co-authored with John D'Emilio).

Sally F. Goldfarb is Associate Professor at Rutgers University School of Law - Camden, where she teaches Family Law. She has also taught at the Harvard, New York University and University of Pennsylvania law schools. A graduate of Yale College and Yale Law School, she writes and lectures on the law of marriage, domestic violence, and sex discrimination.

Linda Gordon is Professor of History at New York University and Vilas Distinguished Research Professor Emeritus at the University of Wisconsin. She is the author of three books and the editor of two books on the history of social policies regarding work, family, and gender. In addition, her most recent book, The Great Arizona Orphan Abduction (Harvard University Press, 1999), won the Bancroft prize for best book in U.S. history and the Beveridge prize for best book on the history of the Americas.

Michael Grossberg is Professor of History and Law at Indiana University, Bloomington and Editor of the *American Historical Review*. His research focuses on the relationship between law and social change, particularly the intersection of law and the family. He has written a number of books and articles on legal and social history. His 1985 book, Governing

the Hearth: Law and the Family in Nineteenth-Century America (University of North Carolina Press, 1983), won the Littleton-Griswold Prize in the History of Law and Society in America given by the American Historical Association. He also served as a consultant on Studies in Scarlet: Marriage and Sexuality in the United States and the United Kingdom, 1815-1914, a digital collection of legal materials produced by the Research Libraries Group.

Hendrik Hartog is the Class of 1921 Bicentennial Professor of the History of American Law and Liberty at Princeton University. He is the author of Man and Wife in America: A History (Harvard University Press, 2000) and other works on the legal history of marriage and the family.

Martha Hodes, Ph.D., is Associate Professor of History at New York University. She is the author of White Women, Black Men: Illicit Sex in the Nineteenth-Century South (Yale University Press, 1997) and the editor of Sex, Love, Race: Crossing Boundaries in North American History (New York University Press, 1999). She has served several terms as the Director of the Program in the History of Women and Gender at New York University. She won the Berkshire Conference on the History of Women article prize for "The Mercurial Nature and Abiding Power of Race: A Transnational Family Story," *American*

Historical Review (Feb. 2003). The book-length version of this article is forthcoming from W.W. Norton.

Nancy Isenberg, Ph.D., is Associate Professor of History and Co-holder of the Mary Frances Barnard Chair in Nineteenth-Century American History at the University of Tulsa. She has written and edited books and published many articles on legal and gender issues. Her book Sex and Citizenship in Antebellum America (University of North Carolina, 1998) was awarded the 1999 book prize from the Society for Historians of the Early Republic.

Linda K. Kerber is May Brodbeck Professor in the Liberal Arts and Professor of History at the University of Iowa. She also holds an appointment as Lecturer in Law at the University of Iowa College of Law. Her most recent book, No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship (Hill and Wang, 1998), won the Littleton-Griswold Prize of the American Historical Association for the best book in U.S. Legal History. She President-Elect of the American Historical Association and a fellow of the American Academy of Arts and Sciences; she is also a past president of the American Studies Association and of the Organization of American Historians.

Isabel Marcus is Professor of Law at the University of Buffalo Law School. Her research interests are in the area of family law, domestic violence, and international women's human

rights. She is one of the founders and former Director of the Institute for Research and Education on Women and Gender at the University of Buffalo. She is also on the board of directors of the Network of East-West Women, an international non-governmental organization. Her publications include several articles on the intersection of divorce law reform and women's rights.

Elaine Tyler May is Professor of American Studies and History at the University of Minnesota. She has served recently as President of the American Studies Association and as the Distinguished Fulbright Chair in American History at University College, Dublin, Ireland. She has published several books and articles on marriage and divorce, the Cold War era, women and the family in the United States, the history of sexuality and reproduction, and the relationship between private life, politics and public policy.

Linda McClain is Rivkin Radler Distinguished Professor of Law at Hofstra University School of Law. She is a former faculty fellow in ethics at the Harvard University Center for Ethics and the Professions. She teaches and writes in the areas of family law, jurisprudence, property, and welfare law, and is the author of the forthcoming book, The Place of Families (Harvard University Press, 2005).

Martha Minow is Professor of Law at Harvard University, where she teaches family law and other courses. She is the co-editor of a casebook on women and the law, the author of numerous articles and book chapters on the history of family law, and a supervisor of numerous doctoral and masters degree students working on family law and its history in the United States and elsewhere.

Steven Mintz is John and Rebecca Moores Professor of History at the University of Houston and National Co-Chair of the Council on Contemporary Families, a nonprofit group of leading academics and clinicians dedicated to enhancing public conversation about American families and how their needs can best be met. His books include Domestic Revolutions: A Social History of American Family Life (Free Press, 1989) and Huck's Raft: A History of American Childhood (Harvard University Press, 2004).

Peggy Pascoe is Associate Professor and Beekman Chair of Northwest and Pacific History at the University of Oregon, where she is completing a book on the history of miscegenation law in the United States from 1860 to 1967. Among the articles she has written on the topic of marriage law is "Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth-Century America" (*Journal of American History*, June 1996).

Elizabeth H. Pleck, Ph.D., is Professor of History and Human Development and Family Studies at the University of Illinois at Urbana-Champaign. She teaches undergraduate and gradate courses in U.S. family history. She is the author of four scholarly monographs on American family history.

Carole Shammas is the John R. Hubbard Chair of History at the University of Southern California. She has published numerous articles in history and legal history journals concerning family law. Her new book, A History of Household Government in America (University of Virginia Press, 2002), discusses the changes in marriage law in the United States.

Mary Lyndon (Molly) Shanley is Professor of Political Science and the Margaret Stiles Halleck Chair at Vassar College, Poughkeepsie, New York. She is the author of Feminism, Marriage and the Law in Victorian England (Princeton University Press, 1989); Making Babies, Making Families (Beacon Press, 2001), which concerns ethical issues in contemporary family law; Just Marriage (Oxford University Press, 2004); and two anthologies on political theory. She teaches courses in the history of political philosophy and contemporary political and feminist theory. She served as Chair of the American Political Science Association's Committee on the Status of Women and as President of the Women's Caucus for Political Science.

Reva Siegel is Nicholas deB. Katzenbach Professor of Law at the Yale Law School. Professor Siegel writes in the fields of constitutional law, antidiscrimination law, and legal history, with special focus on questions of gender and the institution of marriage.

Amy Dru Stanley, Ph.D., is Associate Professor of History at the University of Chicago. A historian of nineteenth-century American history, she has written extensively on law, marriage, gender, and the household. She is the author of From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Slave Emancipation (Cambridge University Press, 1998), which won several academic awards, including the Frederick Jackson Turner Award for the best first book in American History.

Sandra F. VanBurkleo, Ph.D., is Associate Professor of History and Adjunct Professor of Law at Wayne State University. She specializes in constitutional and legal history, and early American history. She has authored several articles on the history of women's rights; her books include Belonging to the World: Women's Rights and American Constitutional Culture (Oxford University Press, 2001). VanBurkleo also authored several sections for the upcoming Encyclopedia of the United States in the Nineteenth Century (Scribners, forthcoming), including "Gender and the Law" (sole authorship) and "Republican Motherhood" (with Erika Hansinger). In December of 2003, she

presented "Marital Contracts, Constitutional Limitations, and the Transition from Legislative to Judicial Divorce in 19th Century America" as part of the 2003-04 Ohio Legal History Seminar series. She is also the senior editor for the prize-winning anthology, Constitutionalism and American Culture: Writing the New Constitutional History (U. Kansas Press, 2002).

CERTIFICATION OF SERVICE

On this day I caused two copies of the Brief of the Professors of the History of Marriage, Families, and the Law as Amici Curiae in Support of Plaintiffs-Appellants (the "Brief") to be served via U.S. Mail on the following:

David S. Buckel, Esq.
Lambda Legal Defense and Education Fund, Inc.
120 Wall Street, Suite 1500
New York, New York 10005

Lawrence S. Lustberg, Esq.
Jennifer Ching, Esq.
Gibbons, Del Deo, Dolan, Griffinger & Vecchione
A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102-5496
Attorneys for Plaintiffs/Appellants
Mark Lewis and Dennis Winslow,
Saundra Heath and Clarita Alicia Toby,
Craig Hutchison and Chris Lodewyks,
Maureen Kilian and Cindy Meneghin,
Sarah and Suyin Lael,
Marilyn Maneely and Diane Marini and
Karen and Marcye Nicholson-McFadden

Peter C. Harvey, Attorney General
Patrick DeAlmeida, Assistant Attorney General
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey
08625-0970
Attorneys for Defendants/Respondents
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;
Joseph Komosinski, in his official capacity as Acting State Registrar of Vital Statistics of the New Jersey State Department of Health and Senior Services

Messina & Laffey, P.C.
961 Holmdel Road
Holmdel, New Jersey 07733
Attorneys for amicus curiae
New Jersey Catholic Conference,
New Jersey Coalition to Preserve and Protect Marriage,
New Jersey Family Policy Council and
Mr. and Mrs. David C. Heslington

Dennis M. Caufield, Esq.
70 Glen Avenue
Roseland, 07068
Attorney for amicus curiae
Family Research Council

Levow & Costello, P.A.
1415 Route 70 East
Cherry Hill, New Jersey 08034
Attorneys for amicus curiae
Legal Momentum

Stephen M. Orlofsky, Esq.
Blank Rome, LLP
210 Lake Drive East, Suite 200
Cherry Hill, New Jersey 08002-1164
Attorneys for amicus curiae
National Association of Social Workers and National Association of Social Workers New Jersey Chapter

Edward Barocas, Esq.
American Civil Liberties Union of New Jersey
89 Market Street
P.O. Box 32159
Newark, NJ 07102
Attorneys for amicus 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,
National Organization for Women of New Jersey, and National Organization for Women Legal Defense
and Education Fund

Howard M. Nashel, Esq.
Nashel, Kates, Nussman, Rapone & Ellis, LLP
190 Moore, Suite 306
Hackensack, New Jersey 07601
Attorneys for amicus curiae
American Psychological Association and
New Jersey Psychological Association

Alan E. Kraus, Esq.
Latham & Watkins, LLP
One Newark Center
Newark, New Jersey 07101
Attorneys for amicus curiae
Human Rights Campaign,
Human Rights Campaign Foundation,
Children of Lesbians and Gays Everywhere (COLAGE),
Family Pride Coalition,
Freedom to Marry,
Gay & Lesbian Advocates & Defenders (GLAD),
National Center for Lesbian Rights,
National Gay and Lesbian Task Force,
New Jersey Lesbian and Gay Coalition (NJLGC) and
Parents, Families and Friends of Lesbians and Gays (PFLAG)

Douglas S. Eakley, Esq.
Lowenstein Sandler P.C.
65 Livingston Avenue
Roseland, New Jersey 07068-1791
Attorneys for amicus curiae
City of Asbury Park

Demetrios K. Stratis, Esq.
Law Offices of Demetrios K. Stratis, LLC
201 Willowbrook Boulevard
Wayne, New Jersey 07470
Attorneys for amicus curiae
Monmouth Rubber & Plastics Corp. and
John M. Bonforte, Sr.

Donald D. Campbell
Campbell & Campbell
599 Avenue C
Bayonne, New Jersey 07220
Attorneys for amicus curiae
United Families International and
United Families New Jersey

David R. Oakley
Anderl & Oakley, P.C.
20 Nassau Street, Suite 208
Princeton, New Jersey 08542
Attorneys for amicus curiae
Alliance for Marriage

Also on this day, I caused the original and ten copies of the Brief to be forwarded via U.S. Mail to Stephen W. Townsend, Clerk of the Supreme Court.

I hereby certify that the foregoing statements are true. I am aware that if any of the foregoing statements are willfully false, I may be subject to punishment.

McCARTER & ENGLISH, LLP
Attorneys for Amici Curiae
Professors of the History of
Marriage, Families, and the Law

By: _____
Adam N. Saravay
A Member of the Firm

Dated: October 6, 2005