SUPREME COURT OF NEW JERSEY
Docket No. 58,389

MARK LEWIS, et al., Plaintiffs-Appellants, v. GWENDOLYN L. HARRIS, et al., Defendents-Appellees.	Appellate Division Docket No. A-2244-03T5 Sat Below: Hon. Skillman, P.J.A.D., Collester, J.A.D., and Parrillo, J.A.D.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

The constitutional promises of liberty and equality are antidotes to overbearing majority norms, not servants of them. Yet the State's brief makes one overarching plea to the Court: Find a way to abandon your usual methodology because the majority finds it unthinkable to allow same-sex couples to marry. Even were the State's poll-gazing correct, the Court should reject the State's invitation to abandon established methods and principles when applying Article I, paragraph 1 of the New Jersey Constitution of 1947 ("Article I"), *especially* in order to avoid a supposedly "unthinkable" result. The greater danger for any court is in crafting a different set of standards to avoid the inevitable controversy generated by vindicating any long-denied constitutional right.

The State's brief argues that the marriage laws are shielded by a special set of analytical rules that keep plaintiff couples at bay. These troubling "rules" depart fundamentally from established legal analysis under Article I and would represent a substantial retreat in constitutional protection. Thus, the State asks the Court to conclude that:

- marriage is a mixed-gender institution at its core and this definition is so ingrained as to be uniquely beyond constitutional reach, see infra Part I;

- the Court's balancing test, while concededly applicable to both of plaintiffs' Article I claims,

should not actually be applied to either, see, e.g., infra pp. 9-10;

- the fundamental right to marry has nothing to do with freedom of partner choice and is irrelevant to ***this*** case and ***these*** couples, see infra Part II.A;

- plaintiffs already enjoy the equal right to marry even though they may not marry anyone from the group of people to whom they are innately attracted, see infra pp. 23-4 and note 9;

- because plaintiffs can fight in the legislature and courts for each tangible marriage-related benefit given to others, marriage itself may be denied, notwithstanding the dignitary and other harms that denial would perpetuate, see infra p. 26 and Part II.C;

- appeasing majority discomfort is a sufficient public need to justify denying liberty and equality to a minority, see infra p. 29 and note 14.

For their part, presumably in hopes that the logic of their arguments need not amount to much, the State's key amici also take it as a given that this Court will apply the most deferential form of federal rational basis review rather than its settled balancing test. Article I, however, requires a reality-based assessment of whether asserted interests truly underlie or are sufficiently substantial to permit such a gross invasion of plaintiffs' protected liberty interest in marriage. It is a false notion that gay and lesbian individuals can be denied this right on tenuous theories such as that more heterosexuals might fail at the marriage ideal if they know gay couples are allowed to marry. Nor can plaintiffs be excluded on grounds that otherwise do not

exclude heterosexuals, such as procreative ability or intent, or that rest on recycled group-based stereotypes. Indeed, amici's arguments would fall short under any standard, state or federal.

Marriage remains a dream for many Americans, including for plaintiffs, a vision of what can be for two people and their family, with commitment, love and patience. The particulars of that vision vary with the personalities involved and the culture of our times. Far from variety posing a ***threat*** to marriage, liberty would not have it any other way. Article I's central concern is the right of ***every individual*** to liberty in charting their life's course toward happiness, and to equal treatment by the State along that journey. What is truly "unthinkable" is that plaintiffs would be denied their freedom in a realm so personal and life-altering as choosing a mate for life. After all, marriage is not a private club. It is a public institution, with a legislatively defined gateway to enormous social and economic benefits. Plaintiffs rightly expect that they and their children will no longer be left watching that gate swing shut.

ARGUMENT

Plaintiffs share the same birthright to liberty and equality as all other New Jerseyans. "All persons are by nature free and independent, and have certain natural and

unalienable rights, among which are those of enjoying . . . liberty." N.J. Const., Art. I, par. 1. Article I protects each person's interest in personal development, intimate choices, and integrity in who they truly are. State v. Saunders, 75 N.J. 209, 213 (1977).

For the gay and lesbian plaintiffs, exercise of these interests innately propelled them toward intimate relationships with same-sex partners, and toward a desire to marry those partners for reasons in common with heterosexual couples. To make the guarantees of liberty and equality in Article I equally meaningful to them, the State Constitution requires that the legislated right to marry and all of its attendant benefits and obligations be made available to plaintiffs on terms equal to those for plaintiffs' heterosexual neighbors and co-workers.

I. THE HISTORY OF MARRIAGE AS A DIFFERENT-SEX INSTITUTION DOES NOT INSULATE THE LEGISLATURE'S EXCLUSIONARY MARRIAGE LAWS FROM CONSTITUTIONAL CHALLENGE; THE COURT CAN AND MUST APPLY ITS ARTICLE I JURISPRUDENCE TO DETERMINE THE CONSTITUTIONALITY OF THE EXCLUSION.

Like others before them, plaintiffs are asking the Court to open up a socially and economically significant, but historically exclusionary, institution and make it available on equal terms to them. Plaintiffs want to marry their unique partners, to have and to hold them, under the shelter of New

Jersey's marriage laws, until death do they part. Everyone knows what that means.

The State, however, pretends it does not, insisting that what plaintiffs seek is some new, intrinsically different and less valued right of "same-sex marriage." In tandem, the State deploys the "definitional" defense that marriage:

> by its very essence includes only the union of persons of different genders. Thus, a prohibition on same-sex marriage is ***not so much a limitation on the right to marry, but a defining element of that right*** accepted for generations as an essential characteristic of marriage.
>
> [Db24 (emphasis added).]

But no matter how embedded in traditional assumptions, religious views, or positive law the legislature's definition of marriage may be, the State's continuing refusal to include committed same-sex partners within its protections still must answer to the dictates of the New Jersey Constitution. The State's references to an "essence" of marriage cannot immunize the legislative exclusion from the Court's review.

History offers trenchant lessons why justifications for inequities in marriage rights warrant searching review. The Court need only consider the legacy of deeply-held assumptions and traditions concerning the traits of race and sex in marriage to see the flaw in the State's position. It was once widely argued that the essence of marriage required that two spouses be of the same race because "[i]mpurity of races is

against the law of nature . . . which forbids consanguineous amalgamation." Brief of Amicus Curiae and Appendix on Behalf of the National Black Justice Coalition at 5.[1] It was further assumed that the essence of marriage required that a wife be in a "natural" state of subordination to her husband. Brief of Legal Momentum as Amicus Curiae at 24. The Court should not allow the State to lead it to the repeatedly discredited conclusion that marriage is an institution with an essential form that places it beyond the reach of the constitutional values of liberty and equality.

Moreover, marriage in New Jersey has been a dynamic, ever-updated institution, through both the courts and the legislature, and in its very basic elements. "The history of marriage in New Jersey is a history of change." Brief of the Professors of the History of Marriage, Families, and the Law as Amici Curiae at 1. "[T]he State's courts and legislature have continuously adjusted or abandoned elements once thought to represent the foundations of marriage," including the

[1] Both the State and the Appellate Division mistakenly distinguish the interracial marriage cases like Loving on the grounds of race. Db29; Lewis v. Harris, 378 N.J. Super. 168, 191 (App. Div. 2005). But the United States Supreme Court itself has addressed this mistake in explaining that "[Loving] could have rested solely on the ground that the statutes discriminated on the basis of race. . . . [but] prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for ***all*** individuals." Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978).

elimination of coverture, which merged a woman's legal identity into her husband's, id. at 3, and changes in the rules for interspousal immunity and joint liability for individual expenses, id. at 10. Change occurred despite fearful cries of "domestic chaos and the destruction of the nation." Id. at 8. Thus, the State's underlying premise that marriage is so culturally central in its current form as to be beyond reach is deeply flawed. The State's erroneous argument about the essence of marriage will rise and fall at different junctures in the discussion to follow. At the threshold the Court should reject the notion that a legislated definition can be put beyond constitutional review.

The State repeatedly uses its false distinction between efforts to "redefine" a right and efforts to "remove a barrier to exercise of a right" in an attempt to avoid constitutional review under accepted standards governing liberty and equality claims. Db26 ("*same-sex marriage* is not a recognized fundamental right") (emphasis added); Db51 (distinction "render[s] their equal protection argument void"); Db55 (fundamental question is whether case is about redefining right or removing a barrier to its enjoyment). This would turn constitutional history and methodology on its head. Pb18-23. Stanley v. Illinois, 405 U.S. 645, 649-52 (1972) ("'To say that the test of equal protection should be the

'legal' [definition of parent, excluding unwed fathers] . . . is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses.'" Id. at 652, quoting Glona v. Amer. Guar. & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968).[2]

In the application of its test to date, the Court simply has not dwelled at all on the State's perceived distinction as to whether, in Saunders for example, the defendant was seeking to "redefine" the exclusive right of marital sexual privacy to include unmarried persons or to "lift a barrier to unmarried persons' ability to exercise" existing rights of sexual privacy previously reserved to married persons. Saunders, supra, 75 N.J. at 209. The State's semantic distinction makes no constitutional difference.

History has repeatedly taught that, when passions and short-term political goals fade, what had been cast to courts as "unthinkable" becomes well-accepted. Often the only thing that remains "unthinkable" is that equal treatment was ever

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[2] See also Levy v. Louisiana, 391 U.S. 68, 71 (1968) ("In applying the Equal Protection Clause ***. . . we have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side . . . .*** [T]he illegitimate child . . . certainly is subject to all the responsibilities of a citizen, ... How under our constitutional regime can he be denied correlative rights which other citizens enjoy?") (citations omitted; emphasis added).

denied. Many of today's broadly accepted realities were cast as unthinkable not so long ago in many states – that women may enter the workforce as equals, have sexual freedom and be equal and separate members of a marital union; that contraception is available to married and even unmarried people; that members of one race may marry members of a different race -- and the list goes on and on. "[P]ersons in every generation can invoke [constitutional] principles in their own search for greater freedom." Lawrence v. Texas, 539 U.S. 558, 579 (2003).

II. THE BALANCING TEST REQUIRES THE COURT TO CONSIDER PLAINTIFFS' INTERESTS IN MARRIAGE, THE STATE'S INTRUSION ON THEM AND ITS PUBLIC NEEDS TO DO SO; THE STATE'S *AD HOC* BYPASS OF THE BALANCING TEST SHOULD NOT BE FOLLOWED.

The Court applies a three-part balancing test to liberty and equality claims under Article I that considers: (1) the nature of the affected interest; (2) the extent to which the governmental restriction intrudes upon it, and (3) the public need for the restriction. Pb12-13. In applying the liberty guarantee, the State instead would have the Court assess the prohibition against any marriage to a person of the same sex under standards governing a minor regulation creating only a "slight imposition" on plaintiffs' right to marry. Db32-33, citing Greenberg v. Kimmelman, 99 N.J. 552, 579 (1985) (upholding prohibition against casino employment by judicial

spouses). The State baldly claims "[n]umerous restrictions on marriage have been upheld against challenges under the right to privacy," Db32, but follows with a discussion only of two New Jersey cases and one federal case, none arising under Article I, Db33.[3] As shown below, the State fails properly to apply any prong of the balancing test.

Likewise, the State acknowledges the balancing test applies to equality claims and that it is a "flexible" test that does not depend on labels such as "fundamental." Db48-9. Yet, in practice, it argues plaintiffs are not seeking equal access to a fundamental right and this "render[s] their equal protection argument void." Db50-51. Similarly, the State acknowledges the federal three-tier test is not controlling, but goes on to urge that plaintiffs be ruled out of any classification federally subject to heightened or strict scrutiny, and – as virtually all the State's key amici also urge -- that a highly deferential federal rational basis test be used instead. Db 53.

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[3] The cases involved: (1) denial of motion to annul a marriage contracted by proxy in Cuba, Torres v. Torres, 144 N.J. Super. 540 (Ch. Div. 1976); (2) a case from Utah rejecting the right to marry more than one person at a time, Potter v. Murray City, 760 F.2d 1065, 1070 (10th Cir. 1985), cert. denied, 474 U.S. 849 (1985); and, (3) whether to recognize an uncle's Italian marriage to a niece, Bucca v. State, 43 N.J. Super. 315 (Ch. Div. 1957). Db33.

The State cannot prevail under any proposed standard but its strategic choice to avoid the balancing test *sub silentio* is telling. The Court should not be diverted from its established methods of analysis under Article I.

A. Plaintiff's Interests In Directing The Course Of Their Private Lives In So Intimate A Matter As Marriage Are Extremely Weighty; Marriage Is A Fundamental Right For All And Historical Exclusions Do Not Justify Continuing Exclusion.

The State concedes that New Jersey's Constitution safeguards the right to marry as fundamental. Db24, 50 (citing Greenberg, supra, 99 N.J. at 567-68, 571-72). The State unsuccessfully tries to evade the effect of this precedent in two ways. First, the State seeks to foreclose analysis of the constitutional rights at issue by relying on its definitional defense, Db16, 21, 24, when it is the constitutionality of that limitation to different-sex couples that plaintiffs challenge through this suit. Second, the State misstates the proper role of history and tradition in analyzing fundamental rights and untenably urges that the past denial of a right to a group of people is sufficient reason under the Constitution to perpetuate that denial. Db26-27.

In its effort to lend constitutional support to its theory that the "redefinition of marriage" plaintiffs allegedly seek takes the case outside of Article I's protection for the right to marry, the State cites King v.

South Jersey Nat'l Bank, 66 N.J. 161, 178 (1974) and its quote from Griswold v. Connecticut, 381 U.S. 479 (1965) (Goldberg, J., concurring) that "[t]he standard to be applied in determining whether a fundamental constitutional right exists requires the reviewing court to look to the 'traditions and collective conscience of our people' to determine whether a principle is 'so rooted (there) . . . as to be ranked as fundamental.'" Db25. The State then argues that it cannot "be said that same-sex marriage is so rooted in the traditions of this State that it must be deemed to be a fundamental right." Db26.

The State misses the most important lesson of these cases. Griswold, of course, concerned access to birth control for married couples. Yet Justice Goldberg did not ask whether ***access to birth control*** was so rooted in the "traditions and collective conscience of our people," to be ranked as fundamental, but whether the overarching ***right to privacy*** and the values behind it guard intimate decisions about birth control use from government interference, which he determined that it did. Griswold, supra, 381 U.S. at 494-95. See also Lawrence, supra, 539 U.S. at 567 (issue is whether there is constitutional shelter for intimate relationships, not whether there is a "fundamental right of homosexual sodomy").

Likewise, the New Jersey Constitution protects the fundamental right to marry not because of its historic availability to only some couples but as an exercise of the constitutional right of privacy. *"As one of life's most intimate choices*, the decision to marry invokes a privacy interest safeguarded by the New Jersey Constitution." Greenberg, supra, 99 N.J. at 572 (recognizing there is no express right to marry in New Jersey Constitution but that the fundamental right to marry is guarded under the right of privacy) (emphasis added).

The privacy grounding of the right to marry clarifies that the underlying constitutional concern is with personal autonomy in directing one's intimate relationships and associations without being channeled by government or majoritarian expectations:

> Any discussion of *the right of privacy must focus on the ultimate interest which protection the Constitution seeks to ensure[:] the freedom of personal development. Whether one defines that concept as a "right to 'intimacy' and a freedom to do intimate things," or "a right to the 'integrity' of one's 'personality,'"* the crux of the matter is that governmental regulation of private personal behavior under the police power is sharply limited. As Mr. Justice Brandeis stated so eloquently []:
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> > *The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.* They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are found in material things.

> They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone the most valued by civilized men.
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> [Saunders, supra 75 N.J. at 213 (citations omitted).]

It would be antithetical to this anchoring to refuse to allow anyone but majority heterosexual couples to exercise the right to marry. Privacy interests are shared by all, and are no less fundamental for gay and lesbian people than for heterosexuals. See, e.g., In the Matter of Lee Ann Grady, 85 N.J. 235, 247-51 (1981) (right of privacy is right of individuals, and mentally impaired persons enjoy same autonomy as others under State and federal constitutions in choice as to sterilization; Court's duty is to protect right of meaningful choice among alternatives); Zablocki v. Redhail, 434 U.S. 374, 387 (1978) (striking down statute that required fulfillment of child support orders before one could marry without a judge's permission; "even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental."); Turner v. Safley, 482 U.S. 78 (1987) (protecting fundamental right of prisoners to marry).

While this Court has stated that history and tradition are important to determining whether a fundamental right

exists, see King, supra, 66 N.J. at 178, as the State concedes, this Court *already* has decided in Greenberg that what is rooted in history is the respect for the fundamental importance of individual autonomy in making an independent choice, free from undue governmental interference, in deciding whether and whom to marry. The question is whether those historically excluded from the exercise of the right will join those who have historically enjoyed the right.

The need for autonomy over this life-altering decision to marry triggers the New Jersey Constitution's guarantees of liberty and privacy, which protect individual autonomy in making "personal decisions" such as this against government meddling. See Saunders, supra, 75 N.J. at 213-14.[4] The history and tradition of privacy jurisprudence has been to reserve such profoundly intimate and significant decisions to all persons as exercises of their liberty to chart their own destiny, and no decision is more intimate and personal than whether to entwine one's life with another in marriage. This

[4] See also id. at 225 (Schreiber, J., concurring) (Article 1 of the New Jersey Constitution establishes that implementation of the intimate decisions two adults make together "in pursuit of . . . happiness manifests an exercise of human liberty."); Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 613 (2000) (the protections of "personal dignity and autonomy" are "imbedded in the liberties" found in the State Constitution); Matter of Quinlan, 70 N.J. 10, 39-40 (1976) (protecting liberty is a matter of respecting an individual's "choice" and "personal decision").

decision – with all of its sweeping legal, financial, social, and emotional consequences, see Pb35-44 – must be for all an "independent choice" that, absent strong justification, the government may not restrict, see Pb13-18, 29.

The State and certain of its amici try to convince this Court to repeat the error of the Appellate Division, which looked to history and tradition not to determine whether the right to marry is fundamental and thus available to all individuals, but to consider whether a fundamental right should be limited to those individuals who have had the historical ability to exercise the right. See Db12-13. The approach of evaluating whether groups were historically permitted to exercise a fundamental right is impossible to reconcile with the intent of Article I or this Court's precedents addressing other fundamental rights.

History can play a role in clarifying what aspect of liberty is protected, but not to limit who can exercise that liberty. Saunders, supra, 75 N.J. at 215. Thus, when the Court protected the decisions of unmarried individuals to have private consensual sex, even though that autonomy historically had been limited to married individuals, it ratified the equal importance to all individuals of being able to decide to engage in such intimate conduct free from government supervision or control. Id. Similarly, this Court

safeguarded the rights of the mentally impaired regarding sterilization, even though such individuals historically had suffered compulsory sterilization, because the right to make decisions relating to procreation is fundamental for all individuals. Grady, supra, 85 N.J. at 245. Likewise gay and lesbian people may exercise the freedom to marry a chosen partner as heterosexuals do.

The State's amici attempt to buttress the lower court's unprincipled argument about the role of history and tradition, Lewis, supra, 378 N.J. Super. at 181, by distorting federal precedent. Brief Amicus Curiae of United Families International et. al. ("UFIb") at 13-14. In Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997), the Supreme Court called for a careful description of the asserted "liberty interest" at stake in any federal substantive due process case. But, as the Supreme Court has made clear, Pb23, a careful description does not mean characterizing the liberty interest in the narrowest possible manner based on who it is that seeks such liberty. Lawrence, supra, 539 U.S. at 567.[5]

[5] Chief Justice John Roberts made this same point during his nomination hearings. In response to a question about the role of history in the assessment of a liberty interest, he testified that "you do not look at it at the narrowest level of generality, which is the statute that's being challenged because, obviously, that's completely circular." Nomination of J. John Roberts to the U.S. Supreme Court: Hearing Before the S. Judiciary Comm., 2005 WL 2237049, 109th Cong. 2-3

The Court in Glucksberg, for example, found it determinative that the liberty at issue there was not in advancing one's death by declining life-sustaining hydration or nutrition, as in Quinlan, supra, 70 N.J. 10, but seeking third party assistance in committing suicide. Both are profoundly personal decisions for ***all*** individuals, Glucksberg, supra, 521 U.S. at 723, but the Court found the decisions "quite distinct" for the purposes of the historical examination, id. at 725. This was in part because the first involved the decision to prevent the intrusion of unwanted medical treatment by a third party, for which there was a long legal tradition of protection, but the second involved the decision to enlist a third party's assistance in causing death, to which no such tradition attached. Id. In both scenarios, the Court's starting point was identifying a decision that might confront any free individual, and the call for a careful description related to the differences ***in the nature of the two decisions*** rather than the differences between individuals making those decisions.

In Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609 (2000), this Court illustrated its own analytical safeguards. The Court began "with an examination of the

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(2005) (statements of now Chief Justice John Roberts and Sen. Joseph Biden).

nature of the affected right" which it stated was the existing right to control one's body and one's future through reproductive autonomy. Id. at 631. The Court then carefully explored the extent of the government's restriction of that right, exploring differences between parental consent and notification statutes generally and the legal details and practical impacts of different types of judicial bypass and waiver procedures. Id. at 632-34. This permitted an informed application of the right of choice to the notification context at hand. The Court also closely evaluated asserted State interests relating to fostering family unity and preserving parental autonomy over minor children. Id. at 634-35. The Court was very clear, however, in rejecting the argument that the right of choice did not apply equally to minors, ruling that regardless of minority "the classification created by the Legislature burdens the 'fundamental right of a woman to control her body and destiny.'" Id. at 613.

Here, the fundamental right to marry is at issue and the undisputed evidence establishes that there is no distinction between same-sex couples and different-sex couples as to their interests in the profound decision to marry, or in exercising autonomy to make that decision. Because the legislative bar to marriage by same-sex couples denies plaintiffs any meaningful exercise of their fundamental right to marry,

plaintiffs' interest in exercising the right to marry has maximum weight in the balancing test.

B. The State Intrudes Profoundly On Plaintiffs' Dignitary, Tangible And Intangible Interests In Marriage, Causing Them Great Harm And Denying Them Equal Treatment That Only Access To Marriage Can Provide.

As an initial matter, the State has not disputed or, remarkably, even acknowledged the intangible and dignitary harms from plaintiffs' lack of access to marriage. Ja33a-129a; Pb37-44. The State excludes plaintiffs from perhaps the most cherished rite of passage in American family life, and the accepted means to demonstrate to others the depth and permanency of one's commitment to another person. Pb40-2. Plaintiffs further suffer profound dignitary harms from this government-imposed label of inferiority and unworthiness, a label that also invites others to treat gay and lesbian relationships and families as less worthy. Pb42-4. Such harms are highly consequential under Article I and cannot be ignored. The State also tries to obscure but does not dispute the myriad of tangible protections still denied plaintiffs by the exclusion from marriage, including in areas such as wrongful death, estates (elective share), tax, health care costs, worker's compensation and disability benefits, and access to divorce. Pb38-9.

Plaintiffs' claim for equality stands independent of their liberty claim, and succeeds even assuming there is no fundamental right to marry. Pb31. The State rests its equality defense largely on the Domestic Partnership Act, betting the Court will hold that plaintiffs should be content with a handful of tangible benefits for now and have patience for the future as to marriage itself. That is no answer to a claim for equality under Article I, and diminishes the very present harms and vast interests plaintiffs have in marrying as soon as possible.[6] As will be discussed more below, those interests cannot be denied no matter how far the State stretches the list of "domestic partnership" and common law protections.[7]

Having left the facts undisputed as to plaintiffs' interests and identified the balancing test as the guiding standard, the State then goes unaccountably astray in its

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[6] The unacceptability of the State's suggestion is highlighted by the experience of plaintiffs Diane Marini and Marilyn Maneely, the latter of whom died before the couple could fulfill their dream of getting married. Pb5,n.2.

[7] A constitutional deprivation is not permitted to continue simply because the individual might have a means, however costly, to be made whole in the end. Callen v. Sherman's, Inc., 92 N.J. 114, 129, 132 (1983). See also Stanley, supra, 405 U.S. at 647 (rejecting argument that Court could avoid central issue of denial of parental status because Stanley could seek relief of guardianship or adoption; "This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone. . . . [I]f there is delay between the doing and the undoing petitioner suffers . . . and the children suffer") (citation omitted).

equality analysis. As noted above, instead of applying the balancing test the State invites this Court either to place plaintiffs' interests beyond any test, or to abandon the test in favor of a (flawed) federal analysis. These alternatives share the goal of keeping the plaintiffs' interests out of view, contrary to this Court's settled principle that its goal is to seek a "full understanding of the clash between individual and governmental interests" through a balancing approach. Planned Parenthood, supra, 165 N.J. at 630.

The State first claims that because plaintiffs desire to marry a person of the same sex, they are set apart from the "historic understanding" of marriage and "sufficiently dissimilar" to different-sex couples as to void *any* equal protection claim. Db50-51. It is tautological to argue that same-sex couples have no claim to marriage because, for being denied the right, they are not similarly situated to those currently permitted to marry. That would gut New Jersey's guarantee of equality. The Court cannot abide the reasoning that one seeking entry into an historically exclusionary institution has no cognizable interests because his or her entry would change the status quo.[8]

[8] It would have made as much sense, for example, to argue that the Court could not hold women responsible for husbands' expenses because there was a contrary gender-based rule of long standing. Jersey Shore Med. Center-Fitkin Hosp. v.

The State next tries the "equal application" defense that plaintiffs "are in the same position as all other New Jerseyans" because they can marry persons of a different sex. Db52. That is an empty vision of what equality is, and the Court does not share it. Pb45-6. When an individual wants to marry someone from the group to whom he or she is innately drawn, a unique loved one with whom to form a lifetime union, it is "disingenuous, at best, to suggest that such an individual's right to marry has not been burdened at all, because he or she remains free to choose another partner, who is of the opposite sex." Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J, concurring); Mishlen v. Mishlen, 305 N.J. Super. 643, 648 (App. Div. 1997) (because defendant was "free to marry anyone she chooses," there was no direct interference with the right to marry). There is a terrible human price when individuals are "barred by law from marrying the person of [their] choice and that person to [them] may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them

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Estate of Baum, 84 N.J. 137, 148 (1980) (there is "insufficient reason to retain a gender based classification that denigrates the efforts of women who contribute to the finances of their families and denies equal protection to husbands").

as interchangeable as trains." Perez v. Lippold, 198 P.2d 17, 25 (Cal. 1948).[9]

When the State gets around to applying a test at all to plaintiffs' equality claim, it purports to apply federal rather than state standards. Only pages after conceding that this Court has "rejected the three-tiered approach used for claims of this nature under the federal constitution, instead relying on a flexible balancing test," Db47, the State argues that heightened or strict scrutiny is not available and twice

[9] In the related context of challenges to bans on interracial marriages, "[t]he decisive question . . . is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups." Perez, supra, 198 P.2d at 20. The U.S. Supreme Court also has rejected "the notion that the mere 'equal application' of a statute" drawn according to race allows it to satisfy the guarantee of equality. Loving v. Virginia, 388 U.S. 1, 8 (1967). Similarly, in a case involving peremptory challenges based on gender stereotypes, the Court emphasized that regardless of whether the government's practice was to stereotype ***both*** men and women, "individual jurors" of either gender had a right not to be discriminated against based on stereotypes. J.E.B. v. Alabama, 511 U.S. 127, 140-41 (1994). The Court rejected the dissenting view of Justice Scalia, id. at 141 n.12, that there could be no discrimination because members of both sexes and all groups are subject to peremptory challenge, id. at 159. Contrary to the arguments of the State and certain amici, rejection of the "equal application" defense is not limited to cases involving pernicious racial stereotypes, nor is it inappropriate to transfer key lessons from that context when examining other forms of discrimination. Id. at 141-42 (drawing upon authority on race discrimination); see also Brief of Amicus Curiae and Appendix on Behalf of the National Black Justice Coalition at 20 n.6. "[A]nalogy is the vessel that carries meaning from old to new in the law." Grady, supra, 85 N.J. at 247.

asserts that the lowest federal tier of "rational basis review" applies, Db53 and 54.[10] This approach again would leave the balancing test in the dust and circumvent its key purpose of providing the Court a full understanding of the clash between individual and governmental interests.[11]

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[10] The State misstates the federal standard that would apply. Rinier v. State, 273 N.J. Super. 135, 142 (App. Div. 1994) (under federal equal protection standard "where the regulation presents a 'direct obstacle' to marriage [] the court appl[ies] a strict scrutiny standard."), certif. denied, 138 N.J. 269 (1994), cert. denied, 514 U.S. 1016 (1995). The State also erroneously relies on Rutgers Council of AAUP Chapters v. Rutgers, 298 N.J. Super. 442 (App. Div. 1997). In dicta, the Rutgers court discussed the federal issue of whether sexual orientation gives rise to a suspect classification, but acknowledged and purported to apply the three-part state balancing test. Id. at 452-54. At bottom, the Rutgers plaintiffs challenged the State's different treatment of non-spouses, but did not seek spousal status, and the constitutional holding focuses on their challenge as framed. Id. at 454-55. By contrast, this case directly challenges the exclusion of plaintiffs from spousal status.

[11] Even if the federal rational basis test applied, the State and its amici fail to establish a rational connection between granting equal marriage rights to plaintiffs and any legitimate governmental interest. See infra, Section II(D). Moreover, where a law excludes a politically unpopular group the United States Supreme Court applies "a more searching form of rational basis review." Lawrence, supra, 539 U.S. at 580 (O'Connor, J., concurring). Further, that Court has "been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships." Id.; see also United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (invalidating a food stamp law discriminating against unrelated individuals under "rational basis" test). The bar to marriage does not survive a "rational basis test for either due process or equal protection," Goodridge, supra, 798 N.E.2d at 961, because of the "absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who

In a final attempt to avoid weighing plaintiffs' interests in the balance, the State adopts the suggestion of the concurrence below that plaintiffs, along with more than 16,000 other same-sex couples living in New Jersey, should be expected to litigate or lobby to seek to remedy each harm from the unconstitutional barrier to marriage on an ad-hoc basis. Db53. Of course that is what the unsuccessful plaintiffs did in Rutgers, a challenge limited to the denial of family health insurance benefits. More importantly, Article I's guarantee of equality does not compel New Jersey's citizens to go out and secure their equality by ad hoc means, but instead shields them from discriminatory impositions by government in the first instance.

C. The State's Intrusion Blocks *Any* Meaningful Exercise Of The Right To Marry; The Separate And Inferior Status Created By The Domestic Partnership Act Is Not A Substitute.

The State bars access to marriage rather than merely regulating that access, completely impinging on plaintiffs' interests. Pb45. It is undisputed that the State fences plaintiffs out of participation in a ritual of passage central to American family life and one of life's most "momentous acts of self-definition," and that the State, as a matter of law,

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wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare," id. at 968.

designates plaintiffs as belonging to a separate and inferior legal class. Pb41-2. E.g., Ja52a-54a ("We are getting this constant message that our family doesn't count, or isn't legitimate."); Ja69a ("[W]e do not want [our daughter] 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.").

The designation of "domestic partners" is a "considered choice of language that reflects a demonstrable assigning of same-sex . . . couples to second-class status. . . [and has] the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits." In re Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004) (finding inadequate a legislative proposal to assign "civil union" status to same-sex couples). "The marriage ban works a deep and scarring hardship on a very real segment of the community . . . ." Goodridge, supra, 798 N.E.2d at 968.[12]

[12] Taking an additional tack in its effort to discourage following New Jersey law where it leads, the State repeatedly characterizes the freedom to marry in Massachusetts as at risk of a constitutional amendment because of disgruntled groups' activity. E.g., Db43. But recently the Legislature of that state rejected an attempt to amend the state constitution to ban marriage for same-sex couples "after a largely conflict-free year in which some 6,600 same-sex couples got married and lawmakers who supported it got re-elected." Pam Belluck, Massachusetts Rejects Bill To Eliminate Gay Marriage, N.Y. Times, Sept. 15, 2005, at A14. One legislator said that "[w]hen I looked in the eyes of the children living with these

The State seeks to distract from its denial of marriage by trumpeting the claim that plaintiffs "enjoy a host of protections and benefits" under other laws. Db59. That does not suffice to remedy or permit the State to continue the profound deprivation of equal liberty wrought by the marriage exclusion. "Analysis begins with the indisputable premise that the deprivation suffered by the plaintiffs is no mere legal inconvenience." Goodridge, supra, 798 N.E.2d at 970 (Greaney, J., concurring). "Same-sex couples have been completely excluded from a fundamental societal institution. Complete exclusion cannot constitute minimal impairment." Halpern v. Toronto (City), 2003 CarswellOnt 2159, ¶ 139 (2003).[13] Pb46. The State's intrusion on plaintiffs' interests weighs heavily on the plaintiffs' side of the scales.

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couples . . . I decided that I don't feel at this time that same-sex marriage has hurt the commonwealth in any way. In fact I would say that in my view it has had a good effect for the children in these families." Id. In New Jersey, ***both*** candidates in the recent gubernatorial election opposed a state constitutional amendment barring same-sex couples from marrying. David Chen, Opponents Share Hour of Unkind Words, N.Y. Times, Sept. 21, 2005, at B1.

[13] The status of domestic partnership creates no "responsibilities toward children." N.J.S.A. 26:8A-1. The high costs and intrusiveness of adoptions, and the absence of the shelter created by marriage, "can be grave" for children born to same-sex couples. Brief of National Association of Social Workers and New Jersey Chapter as Amici Curiae in Support of Plaintiffs-Appellants ("NASWb") at 18.

D. The Public Needs Advanced By The State And Suggested By Others Are Either Illegitimate Or So Divorced From The Reality Of Marriage Laws In Practice As To Have Little Or No Weight.

The State seeks to justify the infringement of plaintiffs' rights to liberty and equality on the grounds that ending discrimination will "disrupt long-settled expectations and deeply held beliefs of the vast majority." Db44. But the vindication of constitutional rights is not subject to whether a minority is popular or change can be avoided. Pb48-9; see Brief of the Amici Curiae American Civil Liberties Union et. al. at 13.[14] The State's other purported public need relates to uniformity with other states' laws, Db45, but New Jersey's Constitution does not yield to discriminatory laws outside its borders, Pb52-3.[15] See also Deane v. Conaway, 2006 WL 148145

[14] "In 1948, when California became the first state to strike down a ban on interracial marriage, nine out of 10 Americans opposed such unions." Gail Mathabane, Gays Face Same Battle Interracial Couples Fought, USA Today, Jan. 26, 2004, at 13A. At the time of the Loving opinion nearly twenty years later, a poll showed seven out of 10 Americans disapproved such unions. 3 Dr. George H. Gallup, The Gallup Poll; Public Opinion, 1935 – 1971, at 2168 (William P. Hansen et al. eds., 1972). By comparison, a 2003 Zogby poll indicated that "the views of New Jersey voters on gay issues were indeed more liberal than those of voters nationwide . . . [and] a majority of New Jersey voters supported the right of gay couples to marry." Josh Benson, Welcome to the Rainbow State, N.Y. Times, Sept. 5, 2004, §14 (New Jersey), at 1.

[15] The State raises the specter that "significant legal issues" will arise under the Full Faith and Credit Clause. Db45. No doubt the effect of that Clause will be litigated in the context of same-sex couples' marriages, but one court has observed that the "Full Faith and Credit Clause does not

at *8 (Baltimore City Cir. Ct. Jan. 20, 2006) (rejecting the State's argument that the constitutionality of Maryland's bar to marriage of same-sex couples could turn on other states' laws). Neither of the public needs advanced by the State is legitimate or entitled to weight in a balancing test.

In light of scientific research and years of experience in child welfare, the State rightly "disclaims reliance upon promotion of procreation and creating the optimal environment for raising children as justifications [for the marriage ban]." Lewis, supra, 378 N.J. Super. at 185 n.2. The Court's balancing test case law on public needs examines closely whether the claimed government interests truly underlie the challenged statute and to what extent they are advanced in reality by the challenged restriction. Planned Parenthood, supra, 165 N.J. at 613 ("the insubstantial connection between the notification requirement and the interests expressed by the State is not sufficient to sustain the statute."). But several amici nonetheless advance these supposed justifications for discrimination against plaintiffs. They present and often distort a host of troubling data, some of it dubious in substance and virtually all of it in relevance,

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necessarily require acknowledgment of marriages that occur in other states." Citizens v. Bruning, 38 F.Supp.2d 980, 988 n.5 (D. Neb. 2005), (citing Patrick J. Borchers, The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate, 38 Creighton Law Rev. 353 (2005).

about the state of heterosexual marriages and cohabiting relationships, the persistence of heterosexual male irresponsibility in procreation, and the alleged failings of heterosexual remarriages, stepparent families, divorced and single parents. E.g., Brief Amici Curiae of James Q. Wilson, Et al., Legal and Family Scholars in Support of Respondents ("Wilsonb") at 5.

After presenting this depressing panoramic, having nothing to do with families of same-sex couples, amici ask the Court to conclude that plaintiffs' marriages would be some kind of "last straw" making matters unacceptably worse for heterosexual families.[16] To do so, they set aside the very

[16] Some amici rely on non-scientific publications to claim that "one can reasonably predict [that marriage of same-sex couples] will further disconnect marriage from childbearing in the broader culture." E.g., Wilsonb at 15. That leap of illogic is reflected elsewhere in amici's claim – based on popular magazines – that in countries where same-sex couples have the liberty to marry there is some connection to a decline in heterosexual marriages. Brief of Monmouth Plastics, Corp. as Amici Curiae in Support of Defendants-Respondents at 18. But "[n]o scientific evidence exists suggesting any causal relationship or correlation between recognition of marriage rights for same-sex couples and the prevalence of heterosexual marriage." APAb32n.58. An asserted governmental purpose must be capable of realization. Planned Parenthood, supra, 165 N.J. at 639. There is an "extreme logical disjunction" between excluding same-sex couples from marriage and the goal of "furthering the link between [heterosexual] procreation and child rearing," Baker v. Vermont, 744 A.2d 864, 884 (Vt. 1999). "Allowing same-sex couples to marry does not result in a corresponding deprivation to opposite-sex couples." Halpern, supra, 2003 CarswellOnt 2159 at ¶ 137.

panorama of varied family structures they illuminated, and present "marriage" as if it pertained only to their particular model of heterosexual marriages that are not only stable, loving, sexually exclusive and low-conflict but also involve individuals who neither cohabited nor divorced previously, adhere to conventional gender roles for men and women and have biologically shared children. It is these marriages – which, as the original panorama makes clear, are a distinct minority – that amici believe the State should privilege, at plaintiffs' expense. While these marriages undoubtedly include many happy, healthy families, especially given that some of their attributes are worthy of aspiration by all, they nonetheless represent a mere portion of today's successful marriages, let alone of marriages overall.[17]

While these broader facts are to be ignored in the approach that amici press upon this Court, in ***the Court's analysis under Article I*** the full picture of the right to marry in ***actual practice*** must be considered. In reality, the right to marry is wide open to all heterosexuals, who are

[17] This is true not only within the heterosexual married population but in the gay population as well. V.C. v. M.J.B., 163 N.J. 200, 232 (2000) (Long, J., concurring) ("[W]e should not be misled into thinking that any particular model of family life is the only one that embodies 'family values.'"); see also Troxel v. Granville, 530 U.S. 57, 63 (2000) ("The demographic changes of the past century make it difficult to speak of an average American family.").

subject to no selection criteria relevant to reaching amici's goals for ideal marriages (beyond sex and minimum age of the partners). Yet the Court is asked to reason that, because same-sex couples cannot realize amici's particular vision of the biologically procreative marriage, they alone should be precluded from pursuing marital happiness according to their own lights.

This Court should recognize this type of argument as "all too familiar" from the many cases in which discrimination is straining in search of a rationale, as when "certain claimed propensities of character were once invoked to advocate the subjugation of women." Dale v. Boy Scouts of America, 160 N.J. 562, 618 (1999). It is undeniable that the stated concerns for the institution of marriage are underinclusive for not holding heterosexuals to these standards, and overinclusive for assuming the marriages of all same-sex couples would thwart the State's true goals for marriage.

That "extreme logical disjunction," Baker v. Vermont, 744 A.2d 864, 884 (Vt. 1999), applies to the purported rationales relating to procreation, especially in view of New Jersey law on the role of procreation in marriage. Pb53-5. One variation on this unsupported rationale turns on the fact that heterosexuals can "accidentally" procreate. In the words of the dissent below, "[c]an there be a serious thought" that

banning marriages of same-sex couples furthers any goals regarding heterosexual procreation or heterosexual marriage? Lewis, supra, 378 N.J. Super. at 219 (Collester, J., dissenting).[18]

Based partly no doubt on its positive experiences in practice over the years with families of same-sex couples, the State has never suggested it would justify the barrier to marriage as serving its important interest in children. The State allows lesbian and gay parents to serve as foster care parents and/or to adopt the children they have fostered, as well as to adopt children through second-parent adoption. Db34-5; Ja50a-51a; Ja68a; Ja112a-113a. New Jersey recognizes that the stable presence of loving and nurturing parents provides the optimal setting for children, which can include "biological families, step-families, blended families, single parent families, foster families, families created by modern reproductive technology, and in families made up of unmarried

[18] That reflects the common sense observation of plaintiff Sarah Lael's mother: "I've been married for forty-three years, and I can't think of one way in which my marriage would be threatened or weakened by allowing my daughter's relationship strengthened through marriage." Ja81a. In accepting a similar "accidental procreation" rationale in Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005), the intermediate appeals court in Indiana was applying an Indiana-specific and inverted form of rational review to its marriage law, one that asks only for a link between the law's purposes and those who *can* marry rather than a link that rationally justifies why some people cannot.

persons." V.C., supra, 163 N.J. at 232 (Long, J., concurring). A positive parent-child bond is not the result of "sexual orientation" or "biology," but of the "daily toil parents engage in to keep their children healthy and safe from harm," and of parental "love and attention." Id. at 232-33.

New Jersey's position reflects that of leading national child welfare and mental health organizations:

> [T]he scientific research that has directly compared outcomes for children with gay and lesbian parents with outcomes for children with heterosexual parents has been remarkably consistent in showing that lesbian and gay parents are every bit as fit and capable as heterosexual parents, and their children are as psychologically healthy and well-adjusted as children reared by heterosexual parents.
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> [Brief of American Psychological Association et. al. as Amici Curiae ("APAb") at 36-37.]

Based on criteria for scientific validity in accordance with ethical rules, APAb5-8, there is a consensus among these experts, including the American Academy of Pediatrics, the American Psychological Association, the American Psychiatric Association, and the National Association of Social Workers, that:

> [C]hildren raised by lesbian or gay parents do not differ in any important respects from those raised by heterosexual parents. ***No*** credible empirical evidence research suggests otherwise. It is the quality of parenting that predicts children's psychological and social adjustment, not the parents' sexual orientation or gender.
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> [APAb44-45.]

Further, thousands of New Jersey children of same-sex parents will benefit from the greater security provided by marriage to their families. Pb55,n.21; APAb46. As the Massachusetts Supreme Judicial Court has recognized:

> Excluding same-sex couples from civil marriage will not make children of opposite-sex couples more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of "a stable family structure in which children will be reared, educated, and socialized."
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> [Goodridge, supra, 798 N.E.2d at 964 (citation omitted).][19]

In contrast, certain opposing amici continue their campaigns to stigmatize gay families with questionable science and distorted presentations of valid science. For example, amici misleadingly advance the governmental interest in avoiding "fatherlessness" and in creating households of two "biological" parents (by which in studies is usually meant biological ***and adoptive*** parents, and includes many same-sex couples, NASWb29). Further, much of the scientific literature

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[19] The continued maintenance of [a] caste-like system is irreconcilable with, indeed, totally repugnant to, the State's strong interest in the welfare of all children and its primary focus, in the context of family law where children are concerned, on "the best interests of the child." Id. at 972 (Greaney, J., concurring). The bar to marriage will "disproportionately harm" historically disadvantaged communities, including some families of African-American same-sex couples, who are "more likely to raise children" and "more likely to struggle economically." Rachel L. Swarns, Census Portrait of Gay Couples Who Are Black, N.Y. Times, Oct. 7, 2004, at A24.

that opposing amici employ is actually about the differences between children of two parents versus one parent, rather than assessing differences between two biological heterosexual parents and two gay parents. APAb36. To the extent any point could be made on the literature that amici distort, it is that two parents may provide an advantage over one parent, an interest that is ***served*** by plaintiff's claims. For those professionals with expertise in child welfare:

> It is disheartening and intellectually dishonest for opposing amici to take a position against marriage of same-sex couples and to do so based on research that tells nothing but the tale of woe experienced disproportionately by children who lack one of their two parents . . . .
>
> [NASWb30.]

As explained above, there is "***no*** credible empirical evidence" to suggest any important differences between children of gay and heterosexual parents.

In a final example of discrimination in search of a rationale, certain opposing amici attempt to draw conclusions about the fidelity and stability of the relationships of gay and lesbian individuals ***denied*** access to marriage with heterosexuals who married. Brief of Family Research Council as Amicus Curiae in Support of Defendants-Respondents at 33-37. Experts in the pertinent scientific field conclude that given the government's bar to marriage, "plus the legal and

prejudicial obstacles that same-sex partners face, the prevalence and durability of same-sex relationships are striking." APAb28. Contrary to the stereotype reinforced by this amicus, "gay men and lesbians form stable, committed relationships that are equivalent to heterosexual relationships in essential respects." APAb16. Just as the high divorce rate does not constitutionally disqualify any heterosexuals from marrying, neither can the relationship problems experienced alike by gay and heterosexual couples justify a ban on marriages by same-sex couples.

This Court should reject amici's "all too familiar" effort to preserve discrimination against a disfavored minority. There are no legitimate public needs remotely served by the exclusion of plaintiffs from marriage and these purported interests carry little or no weight on the scales of the balancing test.

III. THE REMEDY SHOULD END THE CONSTITUTIONAL VIOLATION ONCE AND FOR ALL.

Taking into account the obligation to construe statutory provisions in order to save them, Pb57-8, this Court should issue an order directing the trial court to grant plaintiffs' prayer for relief, Ja11a, as follows:

- declare that 1) plaintiffs' state constitutional rights to marry and to equality have been violated; and, 2) all of New Jersey's law relating to

marriage be read as neutral regarding the sexes of individuals in a couple; and,

- enjoin defendants 1) to grant marriage licenses to plaintiffs and otherwise no longer to infringe upon plaintiffs' right to marry; and, 2) to treat plaintiffs no differently than other couples regarding access to marriage and to the rights and responsibilities that flow from marriage.[20]

This Court employed a similar equitable remedy in Tomarchio v. Township of Greenwich, 75 N.J. 62, 73 (1977) (construing the workers' compensation statute as neutral regarding surviving spouse's sex). Such a remedial decree is proper because it "aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future," and puts plaintiffs "in the position they would have occupied in the absence of discrimination." Brief of Asian Equality et. al. as Amici Curiae at 19 (quoting United States v. Virginia, 518 U.S. 515, 547 (1996) (rejecting remedy in the form of a parallel military school for women).[21]

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[20] This clarity is important in part to avoid the experience in Massachusetts with "attempt[s] to circumvent the court's decision" to end discrimination in marriage against same-sex couples. In re Opinions, supra, 802 N.E.2d at 1208.

[21] EGALE Canada Inc., 2003 CarswellBC 1006, ¶ 156 ("This Court should not be asked to grant a remedy which makes same-sex couples 'almost equal', or to leave it to governments to choose amongst less-than-equal solutions."); In re Opinions, supra, 802 N.E.2d at 1209 ("Maintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage is the constitutional infirmity at issue.").

CONCLUSION

Plaintiffs do not request that this Court create a new right, but instead that it fulfill its mandate to enforce existing rights to equality and liberty guaranteed by the New Jersey Constitution's Article I, paragraph 1. Plaintiffs respectfully request that this Court lift the barrier to their freedom to marry, and end the State's discrimination against individuals in committed same-sex couples who wish to make their own choice of whom to marry rather than have government restrict their choice to a category of individuals that does not include the persons whom they are drawn to love.

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Respectfully submitted,

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