IN THE

Supreme Court of New Jersey

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,** *Plaintiffs-Appellants,* *v.* **GWENDOLYN L. HARRIS, i***n her official capacity as Commissioner of the New Jersey Department of Human Services*; **CLIFTON R. LACY**, *in his official capacity as the Commissioner of the New Jersey Department of Health and Senior Services*; and **JOSEPH KOMOSINSKI**, *in his official capacity as Acting State Registrar of Vital Statistics of the New Jersey State Department of Health and Senior Services,* *Defendants-Respondents.*	**DOCKET NO. 58,389** **BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ANTI-DEFAMATION LEAGUE, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, GARDEN STATE BAR ASSOCIATION, HISPANIC BAR ASSOCIATION OF NEW JERSEY, LEGAL MOMENTUM, NATIONAL ORGANIZATION FOR WOMEN OF NEW JERSEY, IN SUPPORT OF PLAINTIFFS' MOTION IN AID OF LITIGANTS' RIGHTS**

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INTRODUCTION

The undersigned amici curiae respectfully submit this brief in support of Plaintiffs' motion in aid of litigants' rights. Amici, organizations that advocate for the needs of various constituencies who have themselves historically been the objects of discrimination, believe that they present to the Court a distinct perspective as it considers whether the Civil Unions Act of 2006, P.L. 2006, c.103, satisfies this Court's command that the State "provide to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples." Lewis v. Harris, 188 N.J. 415, 463 (2006). Amici submit this brief to provide historical context to the equal protection questions presented in this case, including how courts have dealt with the existence of separate systems and structures that were intended to provide functional equality of treatment but that, in application, did not.

Gay and lesbian couples comprise a significant minority in New Jersey. According to the 2000 Census, there are at least 16,000 same-sex couples living in the State. See Gary J. Gates and Jason Ost, A Demographic Profile of New Jersey's Gay and Lesbian Families, p.2 (Urban Institute 2004) (available at http://www.urban.org/UploadedPDF/411031_gay_nj.pdf). Over 12,000 children were being raised in those households. Id. As

the Court is aware, Plaintiffs in this action are seven same-sex couples who have been in committed loving relationships for many years and to whom the State has denied access to civil marriage.

Previously, this Court ruled that Plaintiffs have a right to equal treatment regarding the benefits and responsibilities of marriage. While the Court held that the legislature could theoretically still exclude same-sex couples from the title of "marriage," that latitude was not absolute. The Court held that the State could attempt to create a separate, parallel legal system of rights based on citizens' sexual orientation, but it cautioned that such a system would only be constitutional if the separate system provided actual equality, i.e., if it "provide[s] to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples." Lewis, 188 N.J. at 463. Further, the Court presumed that, if the Legislature chose the route of creating a separate parallel system of rights, the Legislature would provide a reason for doing so.

Plaintiffs' brief and the briefs of fellow amici (see Amicus Curiae Brs. of New Jersey State Bar Association and of Garden State Equality, et al.) provide evidence that the separate system of rights that the Legislature created has failed to provide "on equal terms . . . rights and benefits enjoyed by heterosexual couples." Lewis, 188 N.J. at 463. The

evidence establishes that, with the continuation of the exclusion of same-sex couples from the title of marriage and with the creation of a separate system of rights, actual disparity still exists in ways both mundane and profound.

Moreover, as noted in the First Interim Report of the New Jersey Civil Union Review Commission (Feb. 18, 2008) (available at http://www.state.nj.us/lps/dcr/downloads/1st-InterimReport-CURC.pdf), testimony indicated that the Civil Union Review Act had a "particularly disparate impact on people of color." Id. at 15. As explained therein, people of color make up a disproportionate percentage of poor and low income persons, who cannot afford attorneys to draft wills, powers of attorneys, and health care proxies in order to clear up uncertainties created by the law. Id. at 15-16. Testimony also supported the fact that minorities disproportionately did not have health insurance and are therefore disproportionately affected based on the fact, as presented in Plaintiffs' brief, that the exclusion from marriage results in fewer employers offering access to a partner's health insurance benefits. Id.

INTERESTS OF AMICI

The participation of amici curiae will assist this Court in the resolution of the issues of public importance raised in this case by providing the legal context in which to analyze them.

The participation of amici curiae is particularly appropriate in cases with "broad implication[]," Taxpayers Assoc. of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 17 (1976), cert. denied sub nom., Feldman v. Weymouth Twp., 430 U.S. 977 (1977), or in cases of "general public interest." Casey v. Male, 63 N.J. Super. 255, 259 (Essex County Ct. 1960). This is just such a case.

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

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

The ACLU-NJ is a private non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution. Founded in 1960, the ACLU-NJ has approximately 15,000 members in the State of New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of over 500,000 members nationwide.

ACLU-NJ strongly supports ensuring equal protection for all persons. ACLU-NJ has handled, and is currently handling, numerous court cases raising claims of discrimination either under the United States Constitution, New Jersey Constitution, or the New Jersey Law Against Discrimination. It has also participated in numerous cases before this Court on equal protection claims. See, e.g., Sojourner A. v. New Jersey Dep't of Human Servs., 177 N.J. 318 (2003); Planned Parenthood of

Cent. New Jersey v. Farmer, 165 N.J. 609 (2000); V.C. v. M.J.B., 163 N.J. 200 (2000); Boy Scouts of Am. v. Dale, 160 N.J. 562 (1999), rev'd, 530 U.S. 640 (2000). It has further participated as direct counsel or amicus curiae in countless other New Jersey Supreme Court cases involving constitutional rights.

2. American-Arab Anti-Discrimination Committee ("ADC")

ADC is the national association of Arab Americans that works in every sphere of public life to promote and defend the interests of the Arab-American and Arab immigrant community. Arab-Americans are an ethnic group who trace their roots to the Arabic-speaking countries of the Middle East and North Africa. Currently, there are Arab Americans living in all 50 of the United States, with nearly three million in the country as a whole. ADC is a grassroots civil rights organization that welcomes people of all backgrounds, faiths, and ethnicity as members. Since its founding in 1980 by former United States Senator James Abourezk, ADC has grown into the largest non-sectarian, non-partisan civil rights organization in America dedicated to protecting the civil rights of Americans of Arab descent. As an active member of the Leadership Conference on Civil Rights and the Detention Watch Network national coalitions, ADC works with many other civil rights organizations and coalitions on a multitude of issues that affect constitutional freedoms. Headquartered in Washington D.C., ADC

also has offices in New York, Michigan, California and Ohio, and 42 membership chapters nationwide. As the representative of a culturally diverse group of Americans and a staunch defender of human rights and civil liberties, ADC is resolutely committed to freedom of thought, conscience and religion. ADC has been, and currently is, involved in numerous cases involving discrimination and civil rights, and ADC is dedicated to ensuring that courts not forego their obligation to address constitutional issues involving fundamental rights.

3. Anti-Defamation League

The Anti-Defamation League was founded in 1913 to advance goodwill and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment for all. Today, it is one of the world's leading civil and human relations organizations combating anti-Semitism, all types of prejudice, discriminatory treatment and hate. The League is committed to protecting the civil rights of all persons, and to assuring that each person receives equal treatment under law.

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

AALDEF, founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian-Americans nationwide through litigation, legal advocacy and dissemination of public information. AALDEF has throughout its

long history fought for the right to equal treatment for all persons, including lesbian and gay couples. AALDEF takes the position that discrimination on the basis of sexual orientation should be prohibited on the same basis as discrimination based on race and that it is incumbent upon the courts to ensure that discrimination laws and fundamental constitutional rights are upheld.

5. Garden State Bar Association

Founded in 1975, the Garden State Bar Association assists African-Americans and other ethnic minorities in becoming an effective part of the judicial and legal systems. It seeks to advance the science of jurisprudence, improve the administration of justice, support initiatives designed to improve economic condition of all individuals, and work to eliminate discrimination and inequality based on racial, ethnic or sexual considerations. The Association seeks to enhance, improve, and the status of the African American attorney as well as all minority attorneys in the State of New Jersey, and forcefully advocates against all forms of discrimination.

6. Hispanic Bar Association of New Jersey

The Hispanic Bar Association of New Jersey has been in existence for approximately twenty years. Its purpose is to serve the public interest by cultivating the art and science of

jurisprudence, by proposing reform in the law, by facilitating the administration of justice, by fostering respect for the law among Hispanics, by advancing the standing of the legal profession, by preserving high standards of integrity, honor and professional courtesy among Hispanic lawyers, by establishing a close relationship among Hispanic lawyers, and by cooperating with other Hispanic bar organizations, other legal organizations, and other Hispanic community, business, civic, charitable and cultural organizations in the furtherance of the aforementioned purposes. The Hispanic Bar Association takes a strong stance against all forms of discrimination.

7. Legal Momentum

Legal Momentum (formerly the NOW Legal Defense and Education Fund) is a leading national not-for-profit civil rights organization with a forty-year history of advocating for women's rights and promoting gender equality. Among Legal Momentum's major goals is securing economic justice for all. Throughout its history, Legal Momentum has used the power of the law to advocate for the rights of all women. It has appeared before the Supreme Court of the United States in a wide variety of gender discrimination, reproductive rights, and welfare cases, and has advocated for protection of reproductive and employment rights, women's economic and personal security, increased access to childcare, and reduction of domestic violence and sexual

assault. Legal Momentum opposes gender or sexual stereotyping in the law and in countless cases and public forums has advocated for the right of privacy and individual autonomy in making personal decisions with respect to reproductive and marital choices, including the right of gay and lesbian couples to marry.

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

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

SUMMARY OF ARGUMENT

This Court has consistently recognized its authority, as well as its responsibility, to correct legislative action that fails to comply with a constitutional mandate previously articulated by the Court. (Part I.A.) Even when courts have

initially permitted legislatures to attempt to provide functional equality of treatment through the use of parallel systems or structures for different classes of people, they have nevertheless closely monitored the success of those structures in achieving full equality, including how the parallel system functions in practice compared to the dominant system. (Part I.B.) When empirical inquiry demonstrates that parallel structures of rights have not actually achieved equality, they have discarded those parallel structures in favor of a unitary system. (Part I.C.)

Additionally, this Court's stated expectation that the New Jersey Legislature would explain why it chose to create a separate statutory structure for same-sex couples by a name other than marriage has not been met, and mere reliance on the existence of a history of exclusion of an affected minority group cannot provide a valid reason for continuing that exclusion. (Part II.)

ARGUMENT

Rights cannot exist merely in theory or on paper; they must exist in reality or they are meaningless. See Cooper v. Nutley Sun Printing Co., 36 N.J. 189, 197 (1961) (New Jersey Constitution does not "embod[y] rights in a vacuum, existing only on paper."). And where rights are not equal in application

or practice, then the promise and guarantee of equal rights remains unfulfilled.

As presented in Plaintiffs' briefs and the briefs of fellow amici, by creating a separate system of rights and by injecting language and titles not understood or easily incorporated into existing real-life events and transactions, the Civil Unions Law has failed to fulfill its promise of equality. (Pls.' Br. at 21-22.) Not only in a practical sense, but in a very real legal and economic sense, the Civil Unions Law not only denies same-sex couples the right _to_ marriage, but the equal rights _of_ marriage. (_Id._ at 55.) In short, they demonstrate that the disparity this Court would not presume would occur under a separate system and title other than marriage (_see_ _id._ at 69-70.) has in fact come to pass.

Consistent with the history of equal protection jurisprudence, it is the duty of the Court, upon a finding of continued disparity, to disallow a separate and unequal system of rights, and to order a unified system that ensures complete equality.

I. HISTORICALLY, WHEN COURTS DISCOVER THAT THEIR ORIGINAL REMEDIAL SCHEMES FOR ACHIEVING EQUALITY THROUGH PARALLEL STRUCTURES HAVE NOT ACHIEVED THE INTENDED RESULTS, THEY HAVE ORDERED THAT THE SYSTEM OF SEPARATE RIGHTS OR PRIVILEGES BE DISCARDED.

As this Court has recently noted, it has a commendable practice of recognizing when "one of our decisions has consequences that were not fully anticipated." Pinto v. Spectrum Chems. & Lab. Prods., 200 N.J. 580, 598 (2010). Logically, that axiom is equally applicable when one of its decisions has not had the remedial consequences that the Court anticipated would result. Such is the case here.[1]

A. This Court Has Historically Corrected Legislative Action that Was Insufficient to Address Constitutional Requirements.

In Lewis, this Court mandated that the Legislature "provide to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples." Lewis, 188 N.J. at 463. Plaintiffs, through their Motion in Aid of

[1] Reaching this conclusion does not necessarily imply that the Court's articulation of the substantive legal right was incorrect, but rather that the consequences of the potential remedy were either unanticipated or did not achieve the expected outcome. Indeed, this Court recognized the possibility that a separate statutory system (i.e., civil unions) might not ultimately meet the Court's mandate: "We will not presume that a separate statutory scheme, which uses a title other than marriage, contravenes equal protection principles. . . ." Lewis v. Harris, 188 N.J. at 423 (emphasis added).

Litigants' Rights, submit to this Court that the actions taken by the Legislature have failed to meet that mandate.

This Court has consistently recognized its authority, as well as its responsibility, to correct legislative action that fails to comply with a constitutional mandate previously articulated by the Court. See Robinson v. Cahill, 69 N.J. 133 (1975) (enjoining the distribution of public school funding under a statutory scheme that failed to satisfy the Court's mandate that the State afford equal educational opportunity to all students); Abbott v. Burke, 149 N.J. 145 (1997) ("Abbott IV") (holding the Comprehensive Educational Improvement and Financing Act of 1996 to be unconstitutional as applied because it failed to comply with the Court's mandate that public school students in "special needs districts" be assured constitutionally adequate education); Oakwood v. Twp. of Madison, 72 N.J. 481 (1977) (partially invalidating a municipal zoning ordinance for failure to conform with the Court's mandate that municipalities provide a fair share of low and moderate income housing).

In both of these seminal lines of cases dealing with two of the most significant issues before this Court in recent history – financing of public schools and opportunities for affordable housing – this Court invited the Legislature to act as the primary drafter of the appropriate remedy. See, e.g., Abbott

IV, 149 N.J. at 157 ("Implementation of the remedy for the constitutional violation was left to the Legislature"); S. Burlington County NAACP v. Mt. Laurel, 92 N.J. 158, 352 (1983) ("we have always preferred legislative to judicial action in this field"). But the Court recognized in these cases that even when a "matter is better left to the Legislature," the Court must act to protect constitutional rights when "the Legislature has not protected them." Mt. Laurel II, 92 N.J. at 212.

Thus, in Abbott IV, the Court was tasked with assessing whether the Comprehensive Educational Improvement and Financing Act ("CEIFA") complied with its general mandate that the educational funding for poorer urban districts be substantially equal to the educational funding for property-rich districts. 149 N.J. at 156. The Court concluded that CEIFA was "incapable of providing a substantive educational opportunity to public school children in the poorer urban districts," and concluded also that this "continued deprivation of the constitutional right to a thorough and efficient education necessitate[d] a remedy." Id. at 188. Holding CEIFA to be constitutionally insufficient as applied to the poorer urban districts, Abbott IV concluded that it must provide a more specific interim remedy

than previously set forth in order for the constitutional mandate to be satisfied, and did so. Id. at 189.[2]

In Oakwood, in addressing a township's unsatisfactory response to the Court's Mount Laurel "fair share" mandate, the Court similarly noted that, when legislative action (or inaction) fails to satisfy the Court's mandate, the Court must clarify its mandate and provide more explicit direction. 72 N.J. at 552. This Court wrote: "Considerations bearing upon the public interest, justice to plaintiffs and efficient judicial administration preclude another generalized remand for another unsupervised effort by the defendant to produce a satisfactory ordinance." Id.

In the present matter, the chosen course of action by the Legislature has failed to meet this Court's general mandate of providing Plaintiffs with actual equal rights and benefits. When the Legislature was presented with (and individual members

[2] The Abbott IV Court noted that even its more specific mandate was "necessarily incomplete" because of further need for government action. 149 N.J. at 189. In contrast, the motion in aid of litigants' rights presently before the Court does present the Court with the ability and opportunity to provide a complete remedy for the vindication of Plaintiffs' constitutional rights. In light of the Legislature's failure to provide the Court with any justification for denying Plaintiffs access to the word and institution of "marriage," and the resultant continuing deprivation of Plaintiffs' constitutional rights, the Court should now simply order that the marriage statutes be amended to include same-sex couples.

acknowledged) the failures of its chosen course, it refused to correct it. (See Pls.' Br. at 15.)

After affording the Legislature the time and opportunity to rectify the documented inequalities, this Court is again faced with a "constitutional obligation . . . to act." Robinson, 69 N.J. at 139.

> Having previously identified a profound violation of constitutional right, based upon default in a legislative obligation imposed by the organic law in the plainest of terms, we have more than once stayed our hand, with appropriate respect for the province of other Branches of government. In final alternative, we must now proceed to enforce the constitutional right involved.

Id. at 139-40. See also Taylor v. Bd. of Ed. of Hoboken, 187 N.J. Super. 546, 554 (App. Div. 1983) (although "holding an act of the Legislature even partially unconstitutional . . . is a sensitive ruling . . . [n]evertheless, there comes a time when the disagreeable judicial venture arises.").

B. Where Prior Parallel Structures Intended to Create Equality of Treatment Were Found to Be Factually Insufficient, Courts Have Rejected Them and Required a Unitary Structure.

In those situations where courts have initially or generally approved of parallel and separate structures as an attempt to provide equal treatment to distinct classes, they have also been alert to the danger that equality in theory might not turn out to be equality in practice. And when they have found that parallel structures do not provide true equality in

fact, they have been quick to discard those dual systems in favor of a unitary one. Several case studies demonstrate this proposition.

1. The Virginia Military Institute ("VMI") Case.

Since distinctions based on gender are subject to intermediate scrutiny under the federal constitution, there may be instances when parallel institutions or programs theoretically satisfy the Equal Protection clause. Thus, in United States v. Virginia, 976 F.2d 890 (4th Cir. 1992), cert. denied, 508 U.S. 946 (1993), the Fourth Circuit initially found that single-gender education at the state-supported Virginia Military Institute could be justified by a legitimate and relevant institutional mission which favors neither sex. But since the Commonwealth of Virginia had not provided sufficient justification for limiting the benefits of its program to men, and since it found that the Commonwealth was thereby denying women those benefits, it held that "VMI's continued status as a state institution is conditioned on the Commonwealth's satisfactorily addressing the findings we affirm and bringing the circumstances into conformity with the Equal Protection Clause of the Fourteenth Amendment." 976 F.2d at 900.

Like this Court in Lewis, the Fourth Circuit resolved "to give to the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth

Amendment are satisfied."[3] 976 F.2d at 900. The course chosen by the Commonwealth of Virginia was to create a "Virginia Women's Institute for Leadership" at Mary Baldwin College ("VWIL"), a nearby private liberal arts women's college.

A renewed challenge to the constitutionality of this arrangement went back before the Fourth Circuit, and eventually reached the Supreme Court. United States v. Virginia, 518 U.S. 515 (1996). The Court found that, despite the fact that the government created a separate institute that provided military training to women, as an empirical matter, the treatment afforded women in this alternate scheme was not equal to the treatment afforded men at Virginia Military Institute. Virginia, 518 U.S. at 551. The Court explained: "In myriad respects other than military training, VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history,

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[3] [T]he Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution. While it is not ours to determine, there might be other more creative options or combinations.

Virginia, 976 F.2d at 900.

the school's prestige, and its influential alumni network.” Id..

It is particularly significant that, in addition to objective measurements of curricular offerings, financial resources and faculty qualifications,[4] the Court included factors such as school prestige and the power of alumni networking among the indicia to be considered in determining whether women were afforded equal treatment. Id. While these factors were referred to as “intangibles,” Id. at 547, the Court highlighted the significance of their very “tangible” impact:

> The VWIL student does not graduate with the advantage of a VMI degree. Her diploma does not unite her with the legions of VMI "graduates [who] have distinguished themselves" in military and civilian life. [VMI] alumni are exceptionally close to the school," and that closeness accounts, in part, for VMI's success in attracting applicants. A VWIL graduate cannot assume that the network of business owners, corporations, VMI graduates and non-graduate employers . . . interested

[4] Specifically, among the factors noted by the Court:

- The average combined SAT score of entrants at Mary Baldwin is about 100 points lower than the score for VMI freshmen.
- Mary Baldwin's faculty holds significantly fewer Ph.D.'s than the faculty at VMI.
- Mary Baldwin's faculty receives significantly lower salaries than the faculty at VMI.
- Mary Baldwin offered only bachelor of arts degrees, while VMI offers degrees in liberal arts, the sciences, and engineering.

Virginia, 518 U.S. at 526.

> in hiring VMI graduates, will be equally responsive to her search for employment, see 44 F.3d at 1250 (Phillips, J., dissenting) ("the powerful political and economic ties of the VMI alumni network cannot be expected to open" for graduates of the fledgling VWIL program).

Id. at 552-53 (internal citations and quotation marks omitted). Thus, the negative reactions of third party observers to the diminished reputational and associational value of belonging to the separate and purportedly equal legal structure persuaded the Court to find that the parallel structure was not, in fact, equal.

As a result of its factual review, the Court found that the parallel structure did not afford equal treatment to women, and struck down VMI's men only admissions policy. Id. at 556-57. Noting that the State bore the burden of persuasion, the Court found that in "[f]ocusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.'" Id. at 531. Moreover, the Court required that the "justification must be genuine, not hypothesized or invented post hoc in response to litigation." Id. at 533. In effect, the Court placed the burden on the State to explain its reasons for maintaining a separate program for women, which burden the state failed to discharge.

Indeed, in response to the Court's ruling, today VMI admits both men and women.

2. Racial Segregation Cases Prior to Brown v. Board of Education.

It is well known that before Brown v. Board of Education, federal constitutional law permitted the regime of "separate but equal" under federal constitutional doctrine, and thus permitted segregated public education systems. Brown v. Bd of Educ., 347 U.S. 483 (1954). But even before this doctrine was abandoned, courts engaged in meaningful inquiry into whether the separate structure did in fact provide equal treatment. Where they did not provide equality in practice, the courts recognized their duty to strike down the unequal, segregated systems.

In the well-known case of Sweatt v. Painter, plaintiff was refused admission to the School of Law of the University of Texas, on the grounds that the Texas State Constitution prohibited integrated education. 339 U.S. 629, 631 (1950). At the time, no law school in Texas would admit blacks. The Texas trial court delayed the case for six months, allowing the state time to create a separate law school only for blacks, which it quickly established in Houston, rather than in Austin where the rest of the University of Texas was located. Id. at 632.

The United States Supreme Court struck down this arrangement, saying that the separate school failed to satisfy

constitutional muster even under the now obsolete "separate but equal" doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896). Id. at 636. The Court examined both the quantitative differences in facilities and resources, and also intangible factors, such as its isolation from most of the future lawyers with whom its graduates would interact. Regarding the measurable factors, the Court identified the following differences between the white and black facilities:

- the University of Texas Law School had 16 full-time and 3 part-time professors, while the black law school had 5 full-time professors.
- the University of Texas Law School had 850 students and a law library of 65,000 volumes, while the black law school had 23 students and a library of 16,500 volumes.
- the University of Texas Law School had moot court facilities, an Order of the Coif affiliation, and numerous graduates involved in public and private law practice, while the black law school had only one practice court facility and only one graduate admitted to the Texas Bar.

Sweatt, 339 U.S. at 632-34.

But significantly, the Court also looked beyond the quantitative measurements of resource allocation to determine whether the requirement of substantial equality had been met. Id. at 635. It focused particularly on -- and indeed appeared to give more dispositive weight to -- factors that gauged comparatively the value and effect of the respective diplomas,

i.e., how the separate school would be perceived within the traditional social structure of the bench and bar:

> What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

Sweatt, 339 U.S. at 634.

The Court therefore observed that "The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts." Id. (emphasis added). The Court therefore found that the societal isolation created by the separate structure itself exacerbated, rather than ameliorated, the equal protection concerns.

> Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

Id.

Of course, in response to the Court's ruling, today the University of Texas Law School admits qualified students of all races.[5]

Similarly, in Parker v. Univ. of Delaware, Vice-Chancellor (later United States Circuit Judge) Collins J. Seitz held that, while a parallel institution in itself did not automatically

[5] Sweatt notably quoted from Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351 (1938), in which the Court found that the State deprived a black student equal protection of the laws when it denied him admission to the state law school, even though it was willing to pay tuition and fees to attend law school in another state. The Court roundly rejected that device:

> The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

Id. at 349-350. The Court therefore ordered the applicant admitted to the previously "whites only" University of Missouri Law School.

violated the Equal Protection clause under then prevailing doctrine, where the parallel institution was "inferior," a remedy must be pursued. 75 A.2d 225 (Del. Ch. 1950). In Parker, the University of Delaware refused to admit black students to the arts and science undergraduate school where a state college for black students (Delaware State College, now Delaware State University) existed with courses that would lead students to the degrees they sought at the University of Delaware. Id. at 226. However, Judge Seitz found that the College for the black students was "markedly inferior" to the University after engaging in a methodical and painstaking inquiry.[6] Based on

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[6] Among other things, Judge Seitz observed:

- The campus at the University was "a thing of beauty," whereas the campus at the College left one with the feeling that there was no particular plan behind the positions of the various buildings and were inferior to nearly all of the comparable buildings at the University.

- The University offered students an opportunity to concentrate in 18 fields and in 5 related subjects in the School of Arts and Science, and the educational opportunities offered by the College were "vastly inferior to those offered at the University."

- An analysis of the faculty at the two institutions demonstrated that the faculty was "vastly inferior" at the College.

- The University had more than 140,000 volumes, housed in a magnificent structure which was well lighted and beautifully situated, whereas the College library contained 16,000 volumes, insufficient to meet even minimum requirements for a college of this type, and

these measurements, therefore, Vice-Chancellor Seitz found that the facilities at the College did not provide equal treatment for black students, and ordered appropriate relief. Id. at 234. The Vice-Chancellor’s initial commentary, however, is worthy of special mention:

> Preliminarily, it is necessary to point out that while the Supreme Court test of separate but equal facilities sounds fine in theory, it is most difficult to apply in practice. The difficulty comes principally from the fact that the separate facilities invariably have marked degree of differences arising from the respective sizes of the institutions compared. Also, many intangible factors help to make up an educational institution in its totality. The United States Supreme Court has not only so recognized but has indicated that such factors are highly pertinent. However, these intangible factors, such as the reputation of the school, the prestige of the faculty, the beauty of the campus, etc., are difficult to measure on the scales of justice.

Id. at 230-31.

Two years later, Vice-Chancellor Seitz issued a similar ruling with regard to Delaware’s public school system in Belton v. Gebhart, 87 A.2d 862 (Del. Ch. Ct.), aff’d, 91 A.2d 137 (Del.

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many of the volumes were piled on the floor because there apparently was inadequate space to house them.

- The University was accredited whereas the College was not.
- The administration of the University was so far superior to that existing at the College that “it almost defie[d] comparison.”

75 A.2d at 233-34.

1952), aff'd sub nom. Brown v. Bd. of Educ., 349 U.S. 294 (1955). Of course, today the University of Delaware and the Delaware public school system admit qualified students of all races.

C. A Finding of Continued Disparity in the Current Case Would Necessitate Abolishing the Dual System of Rights.

Like the courts in Virginia, Sweatt, and Parker, this Court is now faced with a renewed equal protection challenge based on a dual system of rights established by the state, which "leaves untouched" the continued exclusion, for one minority group, from the predominant system. See Virginia, 518 U.S. at 547 ("Virginia chose not to eliminate, but to leave untouched, VMI's exclusionary policy. For women only, however, Virginia proposed a separate program."). As in those cases, the law permits the parallel systems so long as the government provided actual "rights and benefits enjoyed . . . [on] equal terms." Lewis, 188 N.J. at 463.

Plaintiffs and fellow amici in this case explain, however, that, both in pure legal and economic senses, as well as in how civil unions are perceived and thus treated in practical and transactional senses, there is a continued lack of equality. Particularly with regard to the more "intangible" side, Plaintiffs and fellow amici explain how persons with whom the same sex couples will have interactions will not "be equally

responsive" (Virginia, 518 U.S. at 552-53) to a civil union when compared to a marriage. And as in Sweatt, civil union licenses simply do not provide the "standing in the community" sufficient to allow same-sex couples the equal ability to conduct even daily transactions with the same ability as if they were permitted to obtain marriage licenses. (Pls.' Br. at 44.) The evidence thereby demonstrates the tangible results of these inequalities.

Based on these factors, "[i]t is difficult to believe that one who had a free choice between [civil unions licenses or marriage licenses] would consider the question close." Sweatt, 339 U.S. at 634. Assuming therefore that the Court acknowledges the continued disparity, it is then the duty of the Court to reject the unequal dual system, and to prohibit the State's policy of continuing exclusion of a minority group from the dominant system of rights and privileges.

II. THE LEGISLATURE HAS FAILED IN ITS RESPONSIBILITY TO PROVIDE A FACIAL EXPLANATION FOR ITS DECISION TO CREATE SEPARATE LEGAL STRUCTURES AFFECTING THE FUNDAMENTAL RIGHT OF MARRIAGE, AND THE MERE EXISTENCE OF A HISTORY OF EXCLUSION IS NOT A VALID JUSTIFICATION TO CONTINUE THAT EXCLUSION.

This Court has long construed the language of Article I, Paragraph 1, of the New Jersey Constitution to embrace an expansive definition of the fundamental guarantee of equal protection of law. See Sojourner A. v. N.J. Dep't of Human

Servs., 177 N.J. 318, 332 (2003). This definition rejects the rigid tiered scrutiny approach of federal equal protection jurisprudence in favor of a flexible test that balances three factors: "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985).

Applying New Jersey's more dynamic version of equal protection, however, is a collaborative task among the branches of state government. The Legislature, as well as the courts, has an important responsibility in implementing the equal protection guarantee, and thus it also has a key and non-delegable role in articulating the factual basis undergirding each of the three factors, and in particular the third factor, i.e. weighing the "public need for the restriction." The Legislature's function in articulating and then establishing the public need for the restriction, therefore, is not only a prerogative as the principal policy-making body, but also an obligation in order that this Court may discharge its ultimate role of guaranteeing the protections of the New Jersey Constitution.

> Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State

> to demonstrate the existence of a sufficient public need for the restraint or the denial.

Robinson, 62 N.J. at 492 (emphasis added).

The desire to adhere to this collaborative process was at the heart of this Court's original decision in Lewis. The Court deferred to the Legislature in choosing between full marriage equality or separate civil unions, in order to give it the opportunity to make and then explain its choice:

> Although we do not know whether the Legislature will choose the option of a civil union statute, the dissenters presume in advance that our legislators cannot give any reason to justify retaining the definition of marriage solely for opposite sex couples. A proper respect for a coordinate branch of government counsels that we defer until it has spoken.

Lewis, 188 N.J. at 460 (emphasis added). Thus, emphasizing the importance of deference to the legislative branch, as well as latitude in legislative decision-making, the Lewis Court respectfully and patiently awaited the Legislature's pronouncement:

> If the Legislature creates a separate statutory structure for same-sex couples by a name other than marriage, it probably will state its purpose and reasons for enacting such legislation. To be clear, it is not our role to suggest whether the Legislature should either amend the marriage statutes to include same-sex couples or enact a civil union scheme.

Id. at 459-60 (emphasis added). The majority thus concluded that the Court should "defer until [the Legislature] has spoken" to ensure that "our democratically elected representatives . . .

be given a chance to address the issue under the constitutional mandate set forth in this opinion." Id. at 460. The Court declined to "short-circuit the democratic process from running its course." Id. at 461.

Allowing the Legislature to take the lead in fashioning the appropriate remedial scheme to address a constitutional imperative is an admirable exercise of judicial restraint. But it also requires the cooperation of the Legislature. The legislative process has now run its course, and the Legislature has been afforded every opportunity to explain its reason to justify retaining the definition of marriage solely for opposite sex couples. Despite this Court's entreaty, it has failed to do so.

The legislative findings that introduce the Civil Unions Act proclaim lofty goals. They declare: "Promoting . . . stable and durable relationships as well as eliminating obstacles and hardships these [same-sex] couples may face is necessary and proper and reaffirms this State's obligation to insure equality for all the citizens of New Jersey." N.J.S.A. § 37:1-28(b). They announce that "It is the intent of the Legislature to comply with the constitutional mandate set forth by the New Jersey Supreme Court in the recent landmark decision of Lewis v. Harris." N.J.S.A. § 37:1-28(e). And they quote this Court's ruling as providing two alternatives: amend the

marriage statutes to include same-sex couples or enact a parallel statutory structure by another name. Id.

But the Legislature then declared without explanation that:

> The Legislature has chosen to establish civil unions by amending the current marriage statute to include same-sex couples. In doing so, the Legislature is continuing its longstanding history of insuring equality under the laws for all New Jersey citizens by providing same-sex couples with the same rights and benefits as heterosexual couples who choose to marry.

N.J.S.A. § 37:1-28(f). Thus, the explanation that the Court assumed would accompany a legislative choice to construct a statutory structure by another name than marriage has not been forthcoming.

The Legislature has therefore effectively stood mute, and left this Court bereft of any basis upon which it could defer to legislative discretion, since it refuses to articulate the reasoning behind the exercise of that discretion. This Court wrote in Lewis: "Unless the public need justifies statutorily limiting the exercise of a claimed right, the State's action is deemed arbitrary." Lewis, 188 N.J. at 443-44. But where the Legislature declines even to describe the "public need" at issue, then it is difficult to see how the Court can conclude that such a "need" justifies a statute limiting the claimed right -- in this case the right to full marriage equality.

The requirement that a legislature explain the basis for its action as a prerequisite to determining its

constitutionality is not uncommon, especially when it is exploring the outer boundaries of its constitutional prerogatives. For instance, the United States Supreme Court has found that "for Congress to invoke § 5 [of the Fourteenth Amendment], it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999) (striking down Congressional attempt to abrogate state sovereign immunity). Thus, "Congress must establish a 'history and pattern' of constitutional violations to establish the need for § 5 by justifying a remedy that pushes the limits of its constitutional authority." Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2525 (2009). And once Congress has articulated the interest to be protected, it is ultimately up to the Court to determine whether there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." City of Boerne v. Flores, 521 U.S. 507 (1997).

Likewise, in justifying differential treatment based on gender, the United States Supreme Court has required that a state provide a "tenable justification" that describes "actual state purposes, not rationalizations for actions in fact differently grounded." Virginia, 515 U.S. at 535-36. And "mere

recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975). Appropriate deference to the Legislature does not require that the courts blindly assume that it must have a good, albeit unarticulated, reason for what it does.

> All of this does not mean that a court will not carefully examine the technique and scheme prescribed and determine the matter of their rational relation to the evil and the legislative objective, within the basic principles just expressed. Nor does it mean that a challenger may not meet his burden by reliance on the face of the act or on facts of which judicial notice may be taken, or at least shift to the defender the obligation to come forward with an affirmative factual presentation in support of rationality.

Indep. Electricians & Elect. Contractors' Ass'n of the State of New Jersey v. New Jersey Bd. of Exam'rs of Elec. Contractors, 48 N.J. 413, 424 (1967) (remanding due process and equal protection challenge to licensing statute when factual record was too sparse to sustain rationality of statute). Thus, "the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial." Robinson, 62 N.J. at 492.

Since the Legislature did not explain why it chose civil unions over full marriage equality, the Court is necessarily

left to speculate on what its reasons might have been.[7] In defending the status quo in its various pleadings leading up to the Lewis decision, the gist of the State's argument has consistently been that same-sex couples historically have always been excluded from the institution of marriage, thus leading to the logical circularity that the mere existence of a history of exclusion provides a basis for continuing the exclusion of that affected minority group.

The explanation "twas ever thus. . ." does not fulfill the New Jersey Constitution's requirement that the public need is sufficiently weighty to justify statutorily limiting the exercise of a claimed right. Lewis, 188 N.J. at 443. It is hardly a revelation that there is a long history of discrimination against gay persons.

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[7] Of course, now that the Legislature has chosen silence, no other person or entity can reliably act as its interlocutor and explain its intent or reasons. This Court should thus reject after-the-fact proffers of evidence of "legislative intent" that may be made by individual legislators or advocacy groups. "In interpreting the law, 'statements of individual legislators are not generally considered to be a reliable guide to legislative intent.'" Bedford v. Riello, 392 N.J. Super. 270, 279 (App. Div. 2007) (quoting State v. Yothers, 282 N.J. Super. 86, 104 (App. Div. 1995) (Skillman, J., dissenting). "Even the most ardent academic defenders of the use of legislative history in statutory interpretation are quick to disavow cherry-picking from floor speeches." Szehinskyj v. AG of the United States, 432 F.3d 253, 256 (3d Cir. 2005). This observation is especially accurate with regard to post hoc statements that are tailor-made to respond to an issue that the Legislature itself failed to address.

> [G]ay persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation. For centuries, the prevailing attitude toward gay persons has been "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment."

Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 432 (Conn. 2008) (quoting R. Posner, Sex and Reason (Harvard University Press 1992) c.11, p.291; see also Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 Harv. L. Rev. 1285, 1302 (1985) ("It is . . . uncontroversial that gays as a group suffer from stigmatization in all spheres of life. The stigma has persisted throughout history, across cultures, and in the United States.").

But as the United States Supreme Court noted: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." Lawrence v. Texas, 539 U.S. 558, 577-78 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting), and citing Loving v. Virginia, 388 U.S. 1 (1967)); see Weinberger, 420 U.S. at 643 (rejecting historical assumption that men are primary income earners in household as "archaic and overbroad generalization not . . . tolerated under the Constitution . . . .").

Far from justifying continuation of exclusion, a history of purposeful discrimination of an identifiable group is a factor calling for heightened scrutiny in federal equal protection analysis. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985). That history of discrimination is also of at least persuasive value under the New Jersey Constitution's Equal Protection doctrine. Particularly when the Legislature has not even seen fit to embrace this reasoning in the relevant statute, to hold that a long history of discrimination justifies maintaining the status quo is repugnant to this Court's longstanding expansive interpretation of the New Jersey constitutional doctrine. Indeed, if the mere history of exclusion in itself legitimized setting up separate, parallel schemes of rights when remedying discrimination in the past, our state would be legally fragmented based on race, religion, gender, and numerous other harmful distinctions. Constitutional doctrine, however, cannot be based on tautologies.

CONCLUSION

"A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." Virginia, 518 U.S. at 557. For the foregoing reasons, and for the reasons expressed in Plaintiffs' Brief and those of Amici in Support of Plaintiffs, Amici Curiae respectfully urge this Court to grant Plaintiffs' Motion in Aid of Litigants' Rights.

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Respectfully submitted,

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