

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

Defendants-Respondents.

SUPREME COURT OF NEW JERSEY

CIVIL ACTION

DOCKET NO. 58, 389

**BRIEF OF PROSPECTIVE *AMICI CURIAE* GARDEN STATE EQUALITY, NATIONAL
ASSOCIATION OF SOCIAL WORKERS, NEW JERSEY CHAPTER, THE NEW
JERSEY CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS AND THE
PEDIATRIC COUNCIL ON RESEARCH AND EDUCATION, FAMILY EQUALITY
COUNCIL, COLAGE, AND PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND
GAYS (PFLAG - NATIONAL) IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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STATE CASES

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<i>In re Marriage Cases</i> , 183 P.3d 384 (Cal. 2008)	30, 31
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STATE STATUTES

<i>N.J.S.A. 37:1-28, et seq.</i>	1
--	---

OTHER AUTHORITIES

A.H. Faulkner & K. Cranston, <i>Correlates of same-sex sexual behavior in a random sample of Massachusetts high school students</i> , 88 AM. J. OF PUB. HEALTH 2, 262 (Feb. 1998).....	22
Anthony R. D'Augelli, et al., <i>Lesbian and Gay Youths' Aspiration for Marriage and Raising Children</i> , 1 J. OF LGBTI ISSUES IN COUNS. 4, 77 (Jan. 2008)	24
AMERICAN PSYCHOLOGICAL ASSOCIATION RESOLUTION ON SEXUAL ORIENTATION AND MARRIAGE (July 28, 2004), http://www.apa.org/news/press/releases/2004/07/gay-marriage.aspx	15
AMERICAN PSYCHIATRIC ASSOCIATION POSITION STATEMENT IN SUPPORT OF LEGAL RECOGNITION OF SAME-SEX CIVIL MARRIAGE (2005), archive.psych.org/edu/other_res/lib_archives/archives/200502.pdf	15
Connie R. Matthews, Eve M. Adams, <i>Using a Social Justice Approach to Prevent the Mental Health Consequences of Heterosexism</i> , 30 J. of Primary Prevention 1 (2009).....	15

D. Satcher, Surgeon General, U.S. DEP'T OF HEALTH & HUMAN SERVICES, THE SURGEON GENERAL'S CALL TO ACTION TO PROMOTE SEXUAL HEALTH AND RESPONSIBLE BEHAVIOR (Jul. 9, 2001)	30
Daniel B. Weddle, <i>When Will Schools Take Bullying Seriously?</i> TRIAL, 18 (Oct. 2003)	13
David Frost & Ilan H. Meyer, <i>Internalized Homophobia and Relationship Quality Among Lesbians, Gay Men, and Bisexuals</i> , 56 J. OF COUNS. PSYCHOL. 1 (2009)	15
ELLEN C. PERRIN, SEXUAL ORIENTATION IN CHILD AND ADOLESCENT HEALTH CARE (2002)	23
Gay, Lesbian and Straight Education Network ("GLSEN"), THE 2007 NATIONAL SCHOOL CLIMATE SURVEY (2008), http://www.glsen.org/cgi-bin/iowa/all/news/record/2340.html	viii, 23
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Gregory M. Herek, <i>Internalized Stigma Among Sexual Minority Adults: Insights From a Psychological Perspective</i> , 56 J. OF COUNS. PSYCHOL. 2 (Jan. 2009)	5, 6
Gregory M. Herek, <i>Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective</i> , AM. PSYCHOL. 607 (Sept. 2006)	6, 14, 15, 16, 17, 20, 21, 23
Ilan H. Meyer, <i>Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Population: Conceptual Issues and Research Evidence</i> , 129 PSYCHOL. BULL. OF THE AM. PSYCHOL. ASS'N 5, 674 (2003)	22, 23
James G. Pawelski, et. al, <i>The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children</i> , 118 PEDIATRICS 1 (Jul. 2006)	14, 17
John Blake, 'Gayby boom': <i>Children of Gay Couples Speak Out</i> , CNN (Jun. 29, 2009), available at, http://www.cnn.com/2009/LIVING/wayoflife/06/28/gayby/	13
John C. Culhane, <i>Beyond Rights and Morality: The Overlooked Public Health Argument for Same-Sex Marriage</i> , 17 J. L. & SEXUALITY 7 (2008)	20, 21
Ken Rigby, <i>Consequences of Bullying in School</i> , 48 CANADIAN J. PSYCHIATRY 583 (2003)	13
Kevin P. Brady, <i>Local School Officials' Legal Duty to Prevent Anti-Gay Student Harassment: The Impact of Nabozny and Flores</i> , 187 WEST'S EDUC. L. REP. 383 (2004)	23

Lydal Bond, et al., <i>Does Bullying Cause Emotional Problems? A Prospective Study of Young Teenagers</i> , 323 BMJ 480 (2001)	13
Marc Poirier, <i>Name Calling: Identifying Stigma in the "Civil Union"/ "Marriage" Distinction</i> , 41 CONN. L. REV. 1425 (Jul. 2009)	7, 12
Michael S. Wald, <i>Same Sex Couples: Marriage, Families and Children</i> , The Stanford Institute for Research on Women and Gender, The Stanford Center on Adolescents, (Dec. 1999)	5, 12
M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED, WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE (2009)	24
M.V. LEE BADGETT, ET. AL, THE WILLIAMS INSTITUTE, THE EFFECTS OF MARRIAGE EQUALITY IN MASSACHUSETTS: A SURVEY OF THE EXPERIENCE AND IMPACT OF MARRIAGE ON SAME-SEX COUPLES (May 2009)	18, 19, 20
Nalini Ambady, Margaret Shih, Amy Kim, and Todd L. Pittinsky, <i>Stereotype Susceptibility in Children: Effects of Identity Activation in Quantitative Performance</i> , 12 PSYCHOL. SCIENCE 5 (Sep. 2001).....	5
NATIONAL ASSOCIATION OF SOCIAL WORKERS, SAME-SEX MARRIAGE POSITION STATEMENT (Jun. 28, 2004), http://www.naswdc.org/diversity/lgb/062804.asp	ix
NATIONAL INSTITUTE FOR MENTAL HEALTH, <i>Adult Children of Depressed Parents Have Higher Risk of Mental and Physical Illness</i> (Jun. 21, 2006)	17
NEW JERSEY CIVIL UNION REVIEW COMMISSION, THE LEGAL, MEDICAL, ECONOMIC & SOCIAL CONSEQUENCES OF NEW JERSEY'S CIVIL UNION LAW: FINAL REPORT OF THE NEW JERSEY CIVIL UNION REVIEW COMMISSION (Dec. 10, 2008)	16, 18, 20, 22, 14
NEW JERSEY CIVIL UNION REVIEW COMMISSION, FIRST INTERIM REPORT OF THE NEW JERSEY CIVIL UNION REVIEW COMMISSION (Feb. 19, 2008).....	31
Pamela J. Lannutti, <i>The Influence of Same-Sex Marriage on the Understanding of Same-Sex Relationships</i> , 53 J. OF HOMOSEXUALITY 3, 135 (2007)	17
Patricia Leigh Brown, <i>For Children of Gays, Marriage Brings Joy</i> , N.Y. TIMES, A14 (Mar. 13, 2004)	19
R. BRADLEY SEARS ET AL., THE WILLIAMS PROJECT ON SEXUAL ORIENTATION LAW & PUBLIC POLICY, UCLA SCHOOL OF LAW, SAME-SEX COUPLES AND SAME-SEX COUPLES RAISING CHILDREN IN THE UNITED STATES: DATA FROM CENSUS 2000 (Sept. 2005), http://www.law.ucla.edu/williamsinstitute/publications/USReport.pdf	vii
REPORT OF THE VERMONT COMMISSION ON FAMILY RECOGNITION AND PROTECTION (Apr. 21, 2008)	32

Robert Garofalo, et al., <i>The association between health risk behaviors and sexual orientation among a school-based sample of adolescents</i> , 101 PEDIATRICS 5, 895 (Jan. 2, 1998).....	22, 23
Robert M. Kertzner et al., <i>Social and Psychological Well-Being in Lesbians, Gay Men, and Bisexuals: The Effects of Race, Gender, Age, and Sexual Identity</i> , 79 AM. J. OF ORTHOPSYCHIATRY 4, 500 (2009)	15
Rutter & Schwartz, <i>Same-sex couples: Courtship, Commitment, Context</i> . In A. E. Auhagen & M. von Salisch (Eds.) (Cambridge University Press 1996)	20
Thomas Healy, <i>Stigmatic Harm and Standing</i> , 92 IOWA L. REV. 417 (2007).....	5, 28
Transcript of the New Jersey Senate Judiciary Committee Meeting Regarding Senate Bill No. 1967 <i>Enacting the Freedom of Religion and Equality in Civil Marriage Act</i> (Dec. 7, 2009) (hereinafter “NJ Senate Judiciary Committee Meeting”).....	9, 10, 11, 14, 15
Transcripts of the New Jersey Civil Union Review Commission Public Hearings	x, 8, 9, 10, 11, 12, 13, 16, 18, 25, 26
Tumaini R. Coker, et al., <i>Perceived Racial/Ethnic Discrimination Among Fifth-Grade Students and Its Association With Mental Health</i> , 99 AM. J. OF PUB. HEALTH 5, 878 (May 2009).....	5
Vickie M. Mays & Susan D. Cochran, <i>Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States</i> , 91 AM. J. OF PUB. HEALTH 11, 1869 (Nov. 2001).....	14
Vito G. Guerra, Steve R. Asher, and Melissa DeRosier, <i>Effects of Children’s Perceived Rejection on Physical Aggression</i> , 32 J. OF ABNORMAL CHILD PSYCHOL. 5, 551 (Oct. 2004)	5
William Meezan & Jonathan Rauch, <i>Gay Marriage, Same-Sex Parenting, and America’s Children</i> , 15 MARRIAGE & CHILD WELL-BEING 2, 97 (Fall 2005)	10, 18, 20, 21
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STATEMENT OF INTEREST

Amici are organizations actively involved in addressing the psychological and social effects of discrimination against members of the LGBT (lesbian, gay, bisexual, and transgender) community, including (a) children of same-sex couples and (b) LGBT youth. Accordingly, *amici* have a particular interest in and experience with the effects of the New Jersey Civil Union Act on these children. Their specific interests and expertise are described in detail below.

- **Garden State Equality**

Garden State Equality is a New Jersey civil rights organization that advocates equality for the State's LGBT community. The Garden State Equality Educational Fund educates New Jersey citizens and leaders about challenges faced by the LGBT community when denied equality, and the need for marriage equality for same-sex couples. It also provides support services and referrals for members of the LGBT community and their families across the State. The Garden State Equality Action Fund is a lobbying organization. The Garden State Equality Continuing Political Committee is a political organization. These entities are referred to here collectively as "Garden State Equality."

Garden State Equality is New Jersey's largest organization advocating for LGBT civil rights. It has more than 70,000 members, both LGBT and straight.¹ Approximately 45 percent of its members are same-sex couples. Recent studies would suggest that 40 percent of those same-sex couples aged 22 to 55 are raising children.² In light of the large number of children

¹ See Garden State Equality, <http://www.gardenstateequality.org/about.html> (last visited April 19, 2010).

² R. BRADLEY SEARS ET AL., THE WILLIAMS PROJECT ON SEXUAL ORIENTATION LAW & PUBLIC POLICY, UCLA SCHOOL OF LAW, SAME-SEX COUPLES AND SAME-SEX COUPLES RAISING CHILDREN IN THE UNITED STATES: DATA FROM CENSUS 2000 (Sept. 2005), <http://www.law.ucla.edu/williamsinstitute/publications/USReport.pdf>. In fact, this percentage –

affected by marriage inequality, Garden State Equality has led initiatives to educate children and those who work with children about issues of fairness and equality. It sponsors an array of programs for children being raised by same-sex couples, as well as programs to help LGBT children and teens. First, the organization sponsors two statewide steering committees: Garden State Equality Children's Caucus, a group for LGBT parents and their children, and the Garden State Equality Youth Caucus, a group of LGBT youth. Both groups work to address the harmful impact that marriage inequality has on children's psychological well-being and sense of identity. Second, Garden State Equality spearheads a statewide campaign to address bullying in schools, which disproportionately impacts LGBT students.³ Third, Garden State Equality worked with state legislators in drafting New Jersey's 2008 anti-school bullying law. Fourth, Garden State Equality has sponsored individual events focused on the well-being of children of same-sex couples and LGBT youth, including: public town hall meetings and working meetings, empowerment trainings for high school Gay-Straight Alliances, and mentoring programs in which LGBT college students work with Gay-Straight Alliances. Finally, Garden State Equality provides referrals for children who require mental health services to address the negative impact that marriage inequality, and discrimination generally, has on their psychological well-being. These programs have put Garden State Equality in a unique position to understand the harm that

which is based on national averages – may be higher in New Jersey, given its quality of life and schools, which appeal to parents. For example, a 2004 report noted that Bergen and Passaic Counties have the second highest percentage of same-sex couples raising children, as compared to all metropolitan areas across the country.

See URBAN INSTITUTE FACT SHEET 3, http://www.urban.org/UploadedPDF/900695_GL_FactSheet.pdf (Newark-Essex County ranks sixth).

³ See generally Gay, Lesbian and Straight Education Network ("GLSEN"), THE 2007 NATIONAL SCHOOL CLIMATE SURVEY (2008), <http://www.glsen.org/cgi-bin/iowa/all/news/record/2340.html>.

the separate and inferior label of "civil union" inflicts on children being raised by same-sex couples and on LGBT youth who are deprived of the dream of one day getting married.

Garden State Equality was previously granted leave to participate as *amicus curiae* in *Lewis v. Harris*, 188 N.J. 415 (2006). The organization also appeared as *amicus* in the Iowa marriage equality case, which led to same-sex couples being afforded the right to marry in that state. See *Varnum v. Brien*, 763 N.W. 2d 862 (Iowa 2009).

- **National Association of Social Workers, New Jersey Chapter**

The National Association of Social Workers ("NASW") was founded in 1955, and is the largest association of professional social workers in the world. The organization has 145,000 members and chapters in every state, as well as internationally. The New Jersey chapter of NASW, has more than 7,500 members. The organization's goal is to develop and disseminate standards of social work practice, while strengthening and unifying the social work profession as a whole. To that end, NASW provides continuing education, enforces the *NASW Code of Ethics*, conducts research, publishes books and studies, promulgates professional standards and criteria, and develops policy statements on issues of importance to the social work profession. NASW members have long supported the expansion of civil rights for all people, including the LGBT community. NASW encourages the development of training and programs, and the dissemination of information, designed to end the physical and psychological violence aimed at lesbian, gay, bisexual, and transgender people. In 2004, the organization reaffirmed its support for marriage equality, issuing a policy statement which called for state legislation that would provide same-sex couples the right to marry.⁴ The organization's policies, more generally, also

⁴ See NATIONAL ASSOCIATION FOR SOCIAL WORKERS, SAME-SEX MARRIAGE POSITION STATEMENT (Jun. 28, 2004), <http://www.naswdc.org/diversity/lgb/062804.asp>

recognize that discrimination against the LGBT community undermines the well-being of same-sex parents and their children, and compromises the survival of their families.

NASW is active in advocating for the legal rights of the LGBT community. To that end, members of the New Jersey chapter of NASW testified before the New Jersey Civil Union Review Commission in support of marriage equality.⁵ That testimony, discussed *infra*, offers social workers' clinical perspectives on the negative impact that the discriminatory civil union structure has on children of same-sex couples and on LGBT youth. State chapters have also participated as *amicus curiae* in numerous cases involving challenges to discrimination against the LGBT community, including cases challenging marriage inequality. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003) (Texas chapter, joining *amicus* brief); *Varnum v. Brien*, 763 N.W. 2d 862 (Iowa chapter, joining *amicus* brief in case before Iowa Supreme Court challenging marriage inequality); *Perry v. Schwarzenegger*, No. C 09-2292, 2010 U.S. Dist. LEXIS 32499 (N.D. Ca. Mar. 10, 2010) (appearing as *amicus* in case challenging "Proposition 8," amendment making marriage of same-sex couples unconstitutional in California). The New Jersey chapter of NASW was granted leave to participate as *amicus* in *Lewis v. Harris*, 188 N.J. 415.

- **American Academy of Pediatrics, New Jersey Chapter**

The American Academy of Pediatrics is an organization of approximately 60,000 primary care pediatricians, pediatric medical sub-specialists, and pediatric surgical specialists dedicated to the health, safety, and well-being of infants, children, and adolescents. The New Jersey Chapter of the American Academy of Pediatrics ("AAP/NJ") has over 1,650 members. The Pediatric Council on Research and Education ("PCORE") is the charitable arm of AAP/NJ, and the two entities are referred to here collectively as "AAP/NJ." The mission of AAP/NJ is to be

⁵ Transcript of the New Jersey Civil Union Review Commission Public Hearing (hereinafter "CURC Public Hearing") at 65 (Apr. 16, 2008) (Testimony of Mary Jean Weston).

the leading authority, advocate, and voice for the health of New Jersey's children and for the profession of pediatrics generally. To that end, the organization seeks to anticipate and respond to critical issues that impact children, adolescents and healthcare professionals. State chapters of the American Academy of Pediatrics have been active in advocating for the rights of children in cases challenging the denial of same-sex couples' right to marry. *See, e.g., Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (2008) (Connecticut chapter appearing as *amicus* in case challenging marriage inequality in Connecticut); *Perry v. Schwarzenegger*, No. C 09-2292, 2010 U.S. Dist. LEXIS 32499 (N.D. Ca. Mar. 10, 2010) (California chapter appearing as *amicus* in case challenging "Proposition 8").

- **Family Equality Council**

Family Equality Council was founded in 1979 as a grassroots organization with the primary purpose of supporting local gay and lesbian parenting groups and advancing the cause of the lesbian and gay parenting community. Since then, Family Equality Council has become a national organization that works to achieve social and legal equality for LGBT-headed families through direct support, public education, and policy reform work aimed at ensuring their full protection under the law. Family Equality Council also serves as the national coordinator between LGBT-headed families and the over 200 local parents groups that support them. The organization has more than 50,000 supporters, thousands of whom reside in New Jersey. One of Family Equality Council's signature programs is "Family Week," an annual event held in Massachusetts for LGBT families, which draws hundreds of New Jersey LGBT families. Family Week activities include workshops and gatherings intended to create support networks and to enable attendees to learn how to make the world a better place for all loving families. Family Equality Council also publishes extensive resource materials intended to help LGBT families

address issues such as discrimination, the importance of marriage equality, and how to talk with children about and help them better understand their family structures. In furtherance of its belief that more information about LGBT-headed families must be disseminated, the organization publishes an “LGBTQ family friendly book list” and also works to ensure that books reflecting LGBT-headed families are not removed from school and public libraries. Through its work, Family Equality Council has gained vast experience with the unique issues facing LGBT parents and their children, and has seen first-hand the damage that is done by the denial of marriage equality. In keeping with its institutional commitment to mitigating that damage, Family Equality Council has participated as *amicus curiae* in support of plaintiffs seeking marriage equality for same-sex couples. *See Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (appearing as *amicus* in case challenging legality of “Proposition 8” in California).

• **COLAGE**

Founded in 1990, COLAGE is the only national youth-driven network of people with a lesbian, gay, bisexual, transgender or queer (LGBTQ) parent. COLAGE is headquartered in San Francisco, California, has 30 active chapters nationwide, and nearly 20,000 supporters -- including many who reside in New Jersey. The organization approaches its work with the understanding that living in a world that discriminates against and treats LGBTQ families differently can be isolating or challenging for children. It promotes the vision of a world in which all families are valued, protected, reflected, and embraced by society and all of its institutions. In order to achieve that vision, COLAGE facilitates community building, and works toward social justice through youth empowerment, leadership development, education, and advocacy. Its goal is to help the millions of children from LGBTQ families become strong advocates for themselves and their families, thereby gaining the rights, recognition, and respect

that every family deserves. Consistent with that mission, COLAGE sponsors a range of youth-focused programs and events, which includes co-sponsoring a New Jersey-based conference which gathers hundreds of LGBT families and their children for educational, leadership, and community-building activities. COLAGE also co-sponsors annual “Family Week” events, including empowerment programming for youth with LGBT parents that are entirely facilitated by adults who also are children of LGBT parents. Additionally, COLAGE provides one-day, weekend, and week-long programs and training for youth. In order to connect children of LGBT parents with one another, COLAGE also facilitates a Pen Pal program, online communities, and social networking sites to assist children in creating their own support networks.

Based on its direct experience in working with thousands of youth and adults with LGBTQ parents over the past 20 years, COLAGE can attest to the critical importance for children of having their parents’ relationship recognized and respected on every level — socially, institutionally, politically, and legally. The organization actively advocates for equal rights for LGBTQ-headed families and their children, including by participating as *amicus curiae* in cases challenging marriage inequality. See, e.g., *Perry v. Schwarzenegger*, No. C 09-2292, 2010 U.S. Dist. LEXIS 32499 (N.D. Ca. Mar. 10, 2010) (appearing as *amicus* in case challenging “Proposition 8”). As this Court is aware, COLAGE was granted *amicus* status in *Lewis v. Harris*, 188 N.J. 415.

- **Parents, Families and Friends of Lesbians and Gays (PFLAG - National)**

Parents, Families and Friends of Lesbians and Gays (PFLAG) is a national non-profit organization with more than 200,000 members and supporters in all 50 states. PFLAG has ten chapters in New Jersey, located in Bergen County, Collingswood, Hunterdon County, Jersey Shore, Morris County, North Jersey, Ocean City/Cape May County, Princeton, South Jersey, and

Sparta/Northwest New Jersey. The organization was founded in the early 1970s by a heterosexual mother who wanted equal rights for her gay son. Today, PFLAG promotes the health and well-being of all lesbian, gay, bisexual and transgender persons, as well as their families and friends, through support, education, and advocacy efforts that seek to end discrimination and secure equal rights. A core part of PFLAG's mission is to advocate for marriage equality for same-sex families.

The New Jersey PFLAG chapters provide peer-centered support for parents of LGBT people and LGBT-headed families, including through monthly meetings to help them cope with and respond to discrimination. The New Jersey chapters are also actively involved in educating school officials and training them to prevent bullying and harassment of LGBT students and students with an LGBT parent or parents. Moreover, New Jersey chapter members are consistent and passionate participants in statewide lobby days, town hall meetings and even as plaintiffs in *Lewis v. Harris*. Through its work, PFLAG has learned that denying same-sex couples the right to marry only serves to hurt families and children by relegating them to an inferior status. Accordingly, PFLAG National has been *amici* in several marriage equality cases, including in Massachusetts, New York, California, and Iowa -- and the organization was previously granted amicus status in *Lewis v. Harris*.

PRELIMINARY STATEMENT

Three and a half years ago, this Court ordered that same-sex couples be afforded a legal status which provides all the same rights and benefits as marriage.⁶ The *Lewis* decision expresses concern for the “inequities” that then existed under the domestic partnership system, including those “borne by the [] children [of same-sex couples].”⁷ This Court warned that there is no rational basis for “visiting on these children a flawed and inferior scheme directed at their parents.”⁸ Plaintiffs’ brief sets forth the events that followed, and *amici* incorporate by reference the recitation of the relevant factual and procedural history.⁹ The events most pertinent to this brief include the adoption of the Civil Union Act¹⁰ and the extensive testimony from families affected by the civil union structure, gathered by the Civil Union Review Commission and the Senate Judiciary Committee. As Plaintiffs’ brief describes, the collective testimony paints a disturbing picture, leaving no doubt that children of same-sex couples and LGBT youth are harmed by the denial of marriage equality. *Amici* write to amplify Plaintiff’s discussion and to demonstrate that the testimony gathered by these two elected and appointed bodies is fully consistent with recent social science literature and opinions offered by mental health experts.

As discussed in Section I, *infra*, burgeoning social science literature, as well as expert opinion from mental health professionals, establishes that unequal treatment of the LGBT community affects children in several ways, directly and indirectly. *First*, discrimination against

⁶ See *Lewis v. Harris*, 188 N.J. 415 (2006).

⁷ *Id.* at 451.

⁸ *Id.* at 453.

⁹ See Brief of Plaintiffs-Appellants in Support their Motion in Aid of Litigant’s Rights, at 2-16.

¹⁰ N.J.S.A. 37:1-28, *et seq.*

the LGBT community causes psychological and social harm to children of same-sex parents, making them feel inferior to their peers and insecure about the stability of their parents' relationship. *Second*, LGBT youth who, studies show, hope to marry when they grow up, are psychologically injured by the denial of marriage equality. *Third*, the denial of marriage equality causes increased stress for same-sex couples, which has an adverse effect on their children. *Finally*, there are a host of measurable benefits that flow from equal access to marriage, including the power to ameliorate the harm described above. Currently, these children enjoy none of those benefits.

When viewed in the context of social science literature and the body of mental health expert opinion discussed *infra*, the emotional harm expressed in the legislative testimony¹¹ is not isolated or anomalous. To the contrary, the harm to children caused by New Jersey's decision to exclude same-sex couples from the institution of marriage is predicted by social science literature and expert opinion. Moreover, the legislative record and the social science literature make clear that merely "enforcing" the civil union law cannot remedy the harm children are experiencing. The Civil Union Act can never serve as a legitimate vehicle toward equal protection because it perpetuates the impermissible message that same-sex couples and their children are somehow inferior to other families and, thus, unworthy of marriage.

Because this Court previously expressed concern for the effects that this issue has on children, it is essential to understand that children *are right now* suffering psychological and social harm and will continue to suffer harm as long as their families are relegated to a second-class status. Equal protection jurisprudence, discussed in Section II, prohibits this result. As

¹¹ The Civil Union Review Commission was established by the New Jersey Legislature pursuant to the Civil Union Act. Its duties are in accordance with legislative directive, and its reports must be prepared for the Legislature and the Governor.

discussed below, courts have long acknowledged that children require vigilant protection from such discriminatory classifications because they are especially vulnerable to harm associated with being made to feel inferior to their peers. Four state supreme courts -- Massachusetts, Connecticut, California, and Iowa-- have now acknowledged this equal protection principle, considered the harm marriage inequality inflicts upon children and, accordingly, ordered same-sex couples be afforded the right to marry. These courts invoked phrases such as “second-class citizenship,” “inferiority,” “harm,” and “deprivation of benefits” in describing how marriage inequality effects children, and found that no legitimate state purpose could justify this harm.

When this Court issued its decision in *Lewis*, it had no “crystal ball,” it could not have known what legislative scheme the State would enact nor whether it would harm children. But, faced with the social science literature, in conjunction with the testimony -- both expert and factual -- gathered in the intervening years regarding the effects of the separate civil union structure, the harm now cannot be ignored. Rather, experience now shows that the civil union law is a failed experiment that simply has not afforded, and can never, afford, equal protection of the law. *Amici* urge the Court to consider the social science literature and testimony described below, and to exercise its authority to protect children of same-sex couples and LGBT youth from further harm. As time passes, more children are harmed by marriage inequality, and the resulting harm to their sense of identity, self-esteem, and general psychological well-being will be lasting. For these children, whose emotional development is at a critical stage, justice delayed, is justice denied.

I. MARRIAGE INEQUALITY CAUSES PSYCHOLOGICAL AND SOCIAL HARM TO CHILDREN; THIS IS BORNE OUT IN TESTIMONY COLLECTED BY THE SENATE JUDICIARY COMMITTEE AND CIVIL UNION REVIEW COMMISSION, AS WELL AS SOCIAL SCIENCE LITERATURE.

Marriage is a highly visible and deeply important institution in American culture. Social scientists have termed marriage a “master status,”¹² while courts have called it an “esteemed” and “vital” institution, “the foundation of the family and of society.”¹³ In the years since the issue of marriage equality first came before the courts, social science literature and mental health experts have begun to shed light on the extent to which the exclusion of same-sex couples from the institution of marriage adversely impacts the psychological well-being of children. This literature and body of expert opinion, discussed below, demonstrate that the denial of marriage equality is experienced as a pervasive form of discrimination that causes psychological and social harm to children of same-sex parents, as well as to LGBT youth.¹⁴

A. Social Science Literature, Expert Opinion, and the Legislative Record Indicate That Children of Same-Sex Couples Are Harmed By The State’s Decision To Deny Their Parents The Right To Marry.

Children of same-sex couples are harmed by discrimination against the LGBT community, even though no greater proportion of those children are LGBT than the children of

¹² Gilbert Herdt & Robert Kertzner, *I Do, but I Can’t: The Impact of Marriage Denial on the Mental Health and Sexual Citizenship of Lesbians and Gay Men in the United States*, 3 SEXUALITY RES. & SOC. POL’Y: J. OF NAT’L SEXUALITY RES. CENTER, 1, 33-49 (2006).

¹³ See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 996 (Mass. 2003) (citations omitted); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (marriage is “the foundation of the family and of society”).

¹⁴ *Amici* recognize that children of same-sex parents, as well as LGBT youth, receive support from their existing, strong family relationships, tend to be incredibly resilient, often gain a strong sense of pride in watching their parents advocate for equal rights, and may themselves experience satisfaction in speaking out themselves against discrimination toward the LGBT community. But this resilience cannot excuse unequal treatment or completely eliminate the harm it causes.

straight parents. In fact, social science literature defines the group affected by stigma¹⁵ against the LGBT community to include “*anyone associated with non-heterosexual...relationships.*”¹⁶ Children of same-sex parents, who are visibly connected to their parents’ relationship, are thus squarely within the stigma group. This conclusion is consistent with opinions of mental health experts who conclude that children of same-sex couples do, in fact, feel stigmatized by bias against the LGBT community. For example, studies indicate that these children are aware that their parents’ sexual orientation is stigmatized and that they can personally internalize the stigma, including by feeling embarrassment and expressing concerns about teasing by their peers.¹⁷ And, recent social science literature, expert opinion, and testimony heard by the Civil

¹⁵ Social scientists define stigma as a “mark of disgrace the attaches to a characteristic or trait that society views as deeply discrediting.” Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 448 (2007) (hereinafter “Healy”). Accordingly, stigma is perpetuated, at least in part, by the social norms, which norms are often shaped by the law. *Ibid.* “A stigmatized person is thus ‘disfavored or dishonored’ in the eyes of others, ‘a kind of social outcast.’” *Ibid.*

¹⁶ Gregory M. Herek, *Internalized Stigma Among Sexual Minority Adults: Insights From a Psychological Perspective*, 56 J. OF COUNS. PSYCHOL., 2 (Jan. 2009) (hereinafter “Herek on Internalized Stigma”).

¹⁷ See, e.g., Michael S. Wald, *Same Sex Couples: Marriage, Families and Children*, The Stanford Institute for Research on Women and Gender, The Stanford Center on Adolescents, at 12 (Dec. 1999). Initial research indicates that children of same-sex parents are emotionally resilient, and many “learn[] to deal with the fact that society consider[s] their family different, just as children living in other minority families, for example religious minority or interracial families, learn to cope with community stigma based on their family’s difference.” *Id.* at 12, n. 52. This suggests that children of same-sex parents are harmed by discrimination against the LGBT community but manage to overcome the resulting emotional challenges. Other studies do indicate that children subjected to discrimination exhibit higher incidents of depression, attention-deficit hyperactivity disorder, oppositional defiant disorder and conduct disorder. See Tumaini R. Coker, et al., *Perceived Racial/Ethnic Discrimination Among Fifth-Grade Students and Its Association With Mental Health*, 99 AM. J. OF PUB. HEALTH 5, 878, 881 (May 2009), also available at, www.news-medical.net/2009/04/27/48915.aspx (in the context of discrimination based on membership in racial and ethnic minority groups); see also Vito G. Guerra, Steve R. Asher, and Melissa DeRosier, *Effects of Children’s Perceived Rejection on Physical Aggression*, 32 J. OF ABNORMAL CHILD PSYCHOL. 5, 551-563 (Oct. 2004) (showing increased physical aggression among young boys who perceive peer rejection); Nalini Ambady, Margaret Shih,

Union Review Commission and the Senate Judiciary Committee indicate that children are harmed by marriage inequality in many of the same ways children are harmed when exposed to other forms of discrimination. The specific ways in which children experience the stigma associated with civil unions are discussed in detail below.

1. The Civil Union Structure Harms Children of Same-Sex Couples Because it Makes it Difficult or Impossible to Explain Their Parents' Relationship, Thereby Perpetuating the Psychological Harm Associated with Being Relegated to a Different and Inherently Inferior Legal Status.

Dr. Gregory M. Herek, of the Department of Psychology at the University of California, Davis, has conducted significant analysis of the psychological harm caused by marriage inequality. He notes that one way in which the LGBT community experiences that harm is that their non-marital relationships “requir[e] explanation.”¹⁸ He concludes that psychological harm is perpetuated when children must explain that their parents are “civil unionized” and how a civil union differs from marriage – rather than being able to simply say “my parents are married.”¹⁹ The Civil Union Act thus perpetuates the discriminatory message that these families are inferior, and reinforces psychological harm that children feel by being relegated to a little known status that requires explanation.²⁰

Amy Kim, and Todd L. Pittinsky, *Stereotype Susceptibility in Children: Effects of Identity Activation in Quantitative Performance*, 12 PSYCHOL. SCIENCE 5, 385-390 (Sep. 2001) (in context of gender stereotyping of Asian girls). The fact that many children of same-sex parents overcome the effects of discriminatory treatment cannot, of course, excuse the discriminatory treatment.

¹⁸ See Herek on Internalized Stigma, *supra* note 16, at 2; Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, AM. PSYCHOL. 607, 616-17 (Sept. 2006) (hereinafter “Herek on Legal Recognition”).

¹⁹ See generally Herek on Legal Recognition, *supra* note 18, at 617.

²⁰ See generally Herek on Internalized Stigma, *supra* note 16, at 2.

Professor Mark Poirier of Seton Hall University School of Law has, through his scholarship, concretized the psychological harm caused by having to continuously explain the civil union status. His work starts with the indisputable premise that the term “civil union” is not generally recognized and, when recognized, is often not understood.²¹ Thus, the denial of marriage equality, by necessity, forces a child to explain that her parents are not married, but instead in a “civil union.” This explanation immediately draws attention to the facts that (a) the child’s family is different from everyone else’s parents due to their separate legal status, and (b) her parents are gay or lesbian.²² Poirier concludes that, by requiring same-sex couples and their families to engage in the laborious process of explaining their unfamiliar status, the civil union structure forces people to continue drawing distinctions between opposite-sex couples (*i.e.*, those who are allowed to marry) and same-sex couples (*i.e.*, those who are not).²³ Moreover, Poirier notes that the process of drawing these distinctions typically prompts the listener to cognitively rehearse whatever associations she may have with the words “gay or lesbian” -- thereby reinforcing existing biases.²⁴

In testimony before the Civil Union Review Commission, Dr. Mary Jean Weston, Assistant Executive Director of the New Jersey Chapter of the National Association of Social Workers, expressed a similar concern. Like Poirier, Dr. Weston concluded that “marriage

²¹ See Marc Poirier, *Name Calling: Identifying Stigma in the “Civil Union”/ “Marriage” Distinction*, 41 CONN. L. REV. 1425, 1443 (Jul. 2009).

²² *Id.* at 1480. The plaintiffs’ brief describes the difficulties they have faced when trying to explain their civil union status to other adults. Children face even greater challenges explaining civil union status because they and their peers will often lack the legal knowledge, sophistication, and vocabulary to explain and understand the concept. See, *e.g.*, footnotes 29, 30 *infra*, and accompanying text.

²³ *Id.* at 1482.

²⁴ *Id.* at 1480.

equality would allow children being raised by same-sex couples to call their parents married rather than to be forced to understand and, worse yet, explain the stigmatizing and cumbersome label of civil union.”²⁵ She then expressed concern that forcing children to draw attention to the “differentness” of their parents’ unequal legal status would have adverse psychological consequences because “fitting in and being like others is an important component of [children’s] good mental health.”²⁶ Of course, this concept is not new in equal protection jurisprudence. The caselaw discussed in Section II demonstrates that courts have long recognized that children are particularly vulnerable to pressure to conform to social norms and, thus, are uniquely harmed by classifications that draw attention to the fact that the law treats them differently from their peers.²⁷

The Senate Judiciary Committee and the Civil Union Review Commission heard extensive testimony about the indignities experienced by those who must constantly explain the civil union status. For example, a minister observed that it is difficult for children in his church to explain their parents’ civil union status to classmates or neighbors.²⁸ This harmful effect was personalized by the testimony of 10 year-old Kasey Nicholson-McFadden, who bravely described to the Senate Judiciary Committee the difficulty of having to explain his parents’ legal status:

²⁵ Transcript of CURC Public Hearing at 65 (Apr. 16, 2008) (Testimony of Mary Jean Weston).

²⁶ *Id.*

²⁷ See discussion *infra* Section II (discussing for example, *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972) (in the context of “illegitimacy” laws); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (same, school segregation); see also *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309-310 (2000) (school prayer burdens children in religious minority by making them feel like outsiders, visibly different from their peers)).

²⁸ Transcript of CURC Public Hearing at 30-31 (Nov. 4, 2008) (Testimony of Rev. Charles Stephens).

I would love for my parents to be able to get married, but they're not and it's unfair for our family, mainly my sister and I at school, at soccer, at swim team, whatever. Kids, they find out we have two moms, and they ask questions like, "How are they legally your parents? They're not married." And when we try to explain to them what a civil union is, they look at us like we're from Mars. And then we have to explain to them what a civil union is, but most kids just don't get it.²⁹

Another piece of testimony poignantly illustrates how little the term "civil union" means to children -- even those who actually have family members who are civil union partners. A gay man related that his young nephew (his partner's sibling's son) did not believe that the man was the boy's "uncle" because he was not married to the boy's biological uncle. The boy said, "You're not really my uncle...[b]ecause you're just Uncle Larry's friend." The boy fully understood the word "married," but the term "civil union" simply had no meaning to him.³⁰ In light of this testimony, one can only imagine how difficult it is for children to explain their parents' civil union status to their peers, who likely have never even heard the term.

2. The Civil Union Structure Harms Children of Same-Sex Couples by Causing Feelings of Inferiority and Insecurity.

Burgeoning expert opinion suggests that children of same-sex couples face significant emotional challenges when they are forced to cope with discrimination. For example, Dr. Judith Glassgold, a licensed psychologist who has treated children and LGBT individuals for seventeen years, communicated this concern in testimony presented to the Civil Union Review Commission. She testified that, in her clinical experience, children carry a "psychological burden" caused by feelings that their parents' civil union is being "judg[ed]" by society, that it is

²⁹ Transcript of the New Jersey Senate Judiciary Committee Meeting Regarding Senate Bill No. 1967 *Enacting the Freedom of Religion and Equality in Civil Marriage Act*, at 113 (Dec. 7, 2009) (hereinafter "NJ Senate Judiciary Committee Meeting") (Testimony of Kasey Nicholson-McFadden)

³⁰ Transcript of CURC Public Hearing at 86-88 (Oct. 24, 2007) (Testimony of Dwight Grogan).

“inherently different and potentially inferior to heterosexual relationships,” and that their parents are “inherently less deserving than heterosexual couples of society’s full recognition.”³¹ Meredith Fenton, former National Program Director of COLAGE testified similarly, reporting that many children with whom she has worked have had their peers “question[] the validity of their families because their parents aren’t able to get married.”³²

For many children of same-sex couples, the psychological harm that flows from marriage inequality often manifests in insecurity about the stability of their parents’ relationship. For example, the former Program Director of COLAGE told the Civil Union Review Commission that some children with whom she works have shared their sense of worry about their parents’ relationship status, including fear that “somebody is going to come and break up their family.”³³ This is problematic because the perceived durability of the parental relationship is “of vital importance” to children’s emotional well-being.³⁴

Other children express a profound sense of inferiority as a result of the unequal civil union structure, which is borne out in personal testimony before the Commission. As the lesbian mother of a 10 year-old boy testified, “My son will never be able to say his parents are married. That is an important thing in our culture. Marriage is the gold standard....Our children know that our relationship is viewed second-class.”³⁵ Collectively, the testimony presented before

³¹ Transcript of CURC Public Hearing at 45 (Apr. 16, 2008) (Testimony of Dr. Judith Glassgold).

³² Transcript of CURC Public Hearing at 38 (Apr. 16, 2008) (Testimony of Meredith Fenton).

³³ Testimony of Meredith Fenton, CURC Public Hearing at 38 (Apr. 16, 2008).

³⁴ William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America’s Children*, 15 MARRIAGE & CHILD WELL-BEING 2, 97, 108 (Fall 2005).

³⁵ Transcript of NJ Senate Judiciary Committee Meeting at 111 (Testimony of Karen Nicholas-McFadden).

elected and appointed bodies of this State only begins to capture the profound feelings of inferiority that children experience as a result of the discriminatory civil union structure. For example:

- A minister at a Unitarian Church related that children of same-sex parents in his congregation feel “confused” about the fact that their parents cannot marry, and that it sends the message that their civil union is something less than and not as meaningful as marriage.³⁶
- A father testified that his child asked why he and his partner could not get married, given that “all men are created equal.” The child queried why someone who “has murdered someone can get married but you and Poppy cannot get married.”³⁷ The man wondered how anyone could explain to their children that it is okay with the State of New Jersey that same-sex couples are treated as “second best.”³⁸
- The mother of two children testified about the burden that marriage inequality places on her children, stating that even if her child’s peers understood what a civil union is, “it connotes second class. It connotes difference. So even if we enforced and we educate, my son and my daughter still have to say, ‘Our family is different than your family. It’s less than.’”³⁹

If the unequal civil union structure is maintained, the children of same-sex couples will never experience an affirmation of their family’s equal status under the law. Rather, they will be forced to continue to bear the psychological burden associated with the destructive message – communicated through the separate civil union structure – that their families must be relegated to a separate status because society deems them unworthy of marriage.

³⁶ Transcript of CURC Public Hearing at 30-31 (Nov. 5, 2008) (Testimony of Reverend Charles Stephens).

³⁷ Transcript of CURC Public Hearing at 58 (Sept. 26, 2007) (Testimony of Charles Paragian).

³⁸ Transcript of CURC Public Hearing at 15 (Oct. 24, 2007) (Testimony of Charles Paragian).

³⁹ Transcript of NJ Senate Judiciary Committee Meeting at 112 (Testimony of Marcye Nicholson-McFadden).

3. The Unequal Civil Union Structure Harms Children of Same-Sex Parents by Depriving them of the Right to Decide Whether and When to Disclose their Parents' Sexual Orientation.

Plaintiffs' brief addressed the harm that same-sex couples experience when they are forced to "out" themselves simply by identifying their civil union status.⁴⁰ Their children inevitably experience the same harm. As Professor Poirier noted in his work, discussed *supra*, the enactment of a separate structure means that those who identify themselves as being in a "civil union" are effectively forced to declare, "I am gay" or "I am a lesbian."⁴¹ Likewise, the child who identifies her parents' civil union status is forced to effectively say, "My parents are gay or lesbian."

This "forced outing" -- unavoidable under the civil union structure -- is problematic for children on several levels. First, it may expose children to teasing, bullying, or social rejection by their peers, who might not otherwise be aware of the child's association with the LGBT community. For example, a study conducted by GLSEN, with contributions from COLAGE and Family Equality Council, reported that 43% of students with one or more LGBT parent experienced verbal harassment from their peers on a regular basis.⁴² Forcing children to disclose their parents' sexual orientation simply by identifying their legal status thus "gives more fodder

⁴⁰ See Brief of Plaintiffs-Appellants in Support their Motion in Aid of Litigant's Rights, at 33.

⁴¹ See Poirier, *supra* note 21, at 1480.

⁴² Transcript of CURC Public Hearing at 38 (Apr. 16, 2008) (Testimony of Meredith Fenton). See also Wald, *supra* note 17 (discussing studies indicating many children of same-sex couples report being teased about their parents' relationship); Richard E. Redding, *It's Really About Sex: Same-Sex Marriage, Lesbian Parenting, and the Psychology of Disgust*, VILLANOVA UNIVERSITY SCHOOL OF LAW WORKING PAPER SERIES, 160-61 (2007) (noting that some parents can express their own prejudice by keeping their children away from LGBT parents).

to those bullies who can say ‘Your family is not a real family, your parents can’t get married.’”⁴³ By mandating a separate legal structure for same-sex couples, the State thus emboldens and enables bullies in a way that is not only unjust, but patently unlawful.⁴⁴ To the extent that children of same-sex parents do experience higher incidents of bullying, this would be troubling from a mental health perspective, since bullying is “one of the most pervasive and damaging threats that exist in schools” and can produce general unhappiness, low self-esteem, feelings of sadness and depression, and suicidal ideations in children.⁴⁵ Second, for those children who may be uncomfortable exposing their parents’ sexual orientation (or are concerned about the possible serious ramifications of doing so, such as concerns about their family’s safety and security), the civil union structure forces them to choose between revealing their parents’ sexual orientation or concealing their parents’ legal status, which engenders a sense of shame about their family.⁴⁶

⁴³ Transcript of CURC Public Hearing at 38 (Apr. 16, 2008) (Testimony of Meredith Fenton). Dr. Judith Glassgold offered similar testimony before the Commission, warning that children of same-sex couples can become the targets of teasing by their peers. See Transcript of CURC Public Hearing at 44-45 (Apr. 16, 2008) (Testimony of Dr. Judith Glassgold).

⁴⁴ See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect”).

⁴⁵ Daniel B. Weddle, *When Will Schools Take Bullying Seriously?* TRIAL, 18 (Oct. 2003); Lydal Bond, et al., *Does Bullying Cause Emotional Problems? A Prospective Study of Young Teenagers*, 323 BMJ 480, 483 (2001) (“victimization raised levels of subsequently self reported symptoms of anxiety or depression”); Ken Rigby, *Consequences of Bullying in School*, 48 CANADIAN J. PSYCHIATRY 583, 587 (2003) (bullied children experience distress that can manifest as anxiety, depression and suicidality.”).

⁴⁶ See John Blake, ‘Gayby boom’: Children of Gay Couples Speak Out, CNN (Jun. 29, 2009), available at, <http://www.cnn.com/2009/LIVING/wayoflife/06/28/gayby/index.html> (reporting that some children of same-sex couples chose to keep their parents’ sexual orientation a secret to avoid harassment at school).

Finally, although beyond the scope of this brief, the forced disclosure of sexual orientation effectively prompted by the Civil Union Act implicates serious privacy interests.⁴⁷

4. Denial Of Marriage Equality Negatively Impacts Same-Sex Couples' Mental Health, Which Also Inflicts Derivative Psychological and Social Harm on Their Children.

In addition to the direct harm they suffer from the Civil Union Act, children of same-sex couples suffer derivative psychological and social harm as well. It is well-established that a child's psychological well-being relies on a mix of factors, including her parents' mental health.⁴⁸ According to research conducted by Dr. Gregory M. Herek, a child's well-being is so directly tied to her parents' psychological health that the child suffers when her parents manifest higher levels of stress.⁴⁹

That New Jersey same-sex couples would experience heightened stress as a result of being denied marital equality is predicted by ample social science findings. A widely-accepted body of research has identified higher incidence of stress-related conditions in the LGBT community (e.g., social isolation, lower self-esteem, and higher incidents of depression and anxiety disorder) and attributes this to their comparatively frequent exposure to discrimination.⁵⁰

⁴⁷ See generally *Sterling v. Borough of Minersville*, 232 F.3d 190, 197 (3d Cir. 2000) (finding that sexual orientation is "entitled to [constitutional] privacy protection...[and must be] safeguarded against unwarranted disclosure;" even the mere threat to disclose a person's sexual orientation "suffices as a violation of [a person's] constitutionally protected privacy interest").

⁴⁸ Herek on Legal Recognition, *supra* note 18, at 616.

⁴⁹ *Id.*; accord James G. Pawelski, et. al, *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 PEDIATRICS 1, 349, 357 (Jul. 2006) (hereinafter "Pawelski"). By contrast, a child's well-being is enhanced when a parent's own well-being improves. See discussion *infra* Section I.B.

⁵⁰ Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 AM. J. OF PUB. HEALTH 11, 1869, 1874 (Nov. 2001) ("our findings and those of others clearly indicate that lesbian, gay, and

Experts now commonly refer to the causal link between discrimination and adverse psychological impacts as the “minority stress model.”⁵¹ Based on research consistent with the minority stress model, both the American Psychological Association and the American Psychiatric Association each called for marriage equality – citing concern about the adverse psychological impact that marital inequality has on the LGBT community.⁵² Two years later, Dr. Herek’s article in the *American Psychologist* concluded that the denial of the rights associated with marriage causes same-sex couples to experience higher levels of stress, which can have adverse mental health consequences.⁵³ Dr. Marshall Forstein, Associate Professor of Psychiatry at Harvard Medical School, testified similarly before the Civil Union Review

bisexual persons are [] more likely than heterosexual individuals to report experiencing discrimination...whether discrimination is measured in discrete lifetime events, such as being fired from a job, or in day-to-day interactions with others who treat them poorly”).

⁵¹ Robert M. Kertzner et al., *Social and Psychological Well-Being in Lesbians, Gay Men, and Bisexuals: The Effects of Race, Gender, Age, and Sexual Identity*, 79 AM. J. OF ORTHOPSYCHIATRY 4, 500, 501 (2009); David Frost & Ilan H. Meyer, *Internalized Homophobia and Relationship Quality Among Lesbians, Gay Men, and Bisexuals*, 56 J. OF COUNS. PSYCHOL. 1, 97, 98, 105 (2009); Connie R. Matthews, Eve M. Adams, *Using a Social Justice Approach to Prevent the Mental Health Consequences of Heterosexism*, 30 J. of Primary Prevention, 1, 4 (2009); AMERICAN PSYCHOLOGICAL ASSOCIATION RESOLUTION ON SEXUAL ORIENTATION AND MARRIAGE at 2 (July 28, 2004) (hereinafter “AM. PSYCHOL. ASS’N RES.”), <http://www.apa.org/news/press/releases/2004/07/gay-marriage.aspx> (follow “Resolution on Sexual Orientation and Marriage” hyperlink) (calling for marriage equality, in part, because “[d]iscrimination and prejudice detrimentally affects psychological....well-being”) (citations omitted).

⁵² See AM. PSYCHOL. ASS’N RES. at 2; AMERICAN PSYCHIATRIC ASSOCIATION POSITION STATEMENT IN SUPPORT OF LEGAL RECOGNITION OF SAME-SEX CIVIL MARRIAGE (2005), archive.psych.org/edu/other_res/lib_archives/archives/200502.pdf.

⁵³ Herek on Legal Recognition, *supra* note 18, at 616 (by contrast, removing this stress would “enhance the well-being of [the children of same-sex couples] because “children benefit when their parents are ... psychologically healthy, and not subjected to high levels of stress”).

Commission. He advised that depriving same-sex couples of the right to marry contributes to increased anxiety and depression in the LGBT community.⁵⁴

Plaintiff's principal brief, and the findings of the Civil Union Review Commission more generally, capture the extent to which New Jersey's same-sex couples experience tremendous stress from discriminatory events, large and small, under the civil union regime. From denial of health insurance and the right to make medical decisions;⁵⁵ to the endless frustration of having to repeatedly explain their legal status;⁵⁶ to being "outed" simply by declaring their civil union status; to the anxiety experienced at the very idea of traveling to other jurisdictions where civil unions do not exist and mean nothing to government officials or medical providers;⁵⁷ to the injustice of being excluded from an institution to which every heterosexual citizen may freely enter -- same-sex families endure profound stress under the unequal civil union structure. Given the undisputed connection between the well-being of parents and their children, this heightened

⁵⁴ Transcript of CURC Public Hearing at 33 (Testimony of Dr. Marshall Forstein).

⁵⁵ See NEW JERSEY CIVIL UNION REVIEW COMMISSION, THE LEGAL, MEDICAL, ECONOMIC & SOCIAL CONSEQUENCES OF NEW JERSEY'S CIVIL UNION LAW: FINAL REPORT OF THE NEW JERSEY CIVIL UNION REVIEW COMMISSION, 11-15 (Dec. 10, 2008) (hereinafter "CURC FINAL REPORT").

⁵⁶ *Id.* at 15 (citing testimony of Gary Konecky: "In times of crisis, it is unfair and unreasonable to ask people in a state licensed relationship . . . to explain why they are legally entitled to hospital visitation rights"); *id.* at 24 (describing testimony of a gay man who, like his partner, always carries with him a flash drive containing his living will, advanced health care directives and powers of attorney, fear being "unable to adequately explain their relationship to emergency room personnel during a medical crisis").

⁵⁷ See, e.g., Herek on Legal Recognition, *supra* note 18, at 617 (examining this consequence of marriage inequality, and concluding that the challenges associated with travel could limit the mobility of same-sex couples and their families or, if they do travel, subject them to "heightened levels of uncertainty, anxiety, and stress").

stress that New Jersey same-sex couples experience as a result of marriage inequality would have negative psychological ramifications for their children as well.⁵⁸

B. Children Of Same-Sex Couples Are Denied The Measurable Benefits Associated With Being Raised By Married Parents.

In contrast to the psychological and social harm that flows from marriage inequality, available research indicates that allowing same-sex couples to marry would improve the psychological well-being of their children by conferring benefits associated with the institution of marriage.

First, studies show that not having to explain their parents' relationship (but being able to just call it "marriage") helps to remove the stigma children of same-sex couples feel, since the word "married" requires no explanation. The validation children feel when their parents are permitted to marry is illustrated in the results of two studies conducted after marriage equality was afforded in Massachusetts. In the first such study, conducted two months after marriage equality was implemented, recently-married same-sex couples reported that: (a) being able to use the well-known label of "marriage" instead of having to explain their relationship made other people "more open" to talking with them about their relationship; (b) the couples felt more socially included; and (c) their relationship was "more real to others."⁵⁹ A study conducted five years later by the Williams Institute identified similar results: some participants reported that

⁵⁸ See Pawelski, *supra* note 49, at 357; Herek on Legal Recognition, *supra* note 18, at 616; see also NATIONAL INSTITUTE FOR MENTAL HEALTH, *Adult Children of Depressed Parents Have Higher Risk of Mental and Physical Illness* (Jun. 21, 2006), <http://www.nimh.nih.gov/science-news/2006/adult-children-of-depressed-parents-have-higher-risk-of-mental-and-physical-illness.shtml> (long-term studies linking children's negative health consequences to their parents' poor mental health).

⁵⁹ Pamela J. Lannutti, *The Influence of Same-Sex Marriage on the Understanding of Same-Sex Relationships*, 53 J. OF HOMOSEXUALITY 3, 135, 140-43 (2007).

being married “made it easier for other people to understand their families.”⁶⁰ The study also identified the positive impact this had on children, in that the “common social understanding of marriage gave children a way to describe their parents’ relationship to their friends ... [and to others] who affected their children’s daily lives.”⁶¹ This research suggests that the harm children experience as a result of having to explain their parents’ different and inferior legal status can only be mitigated if the inherently unequal civil union structure is replaced with marriage equality.

Second, additional literature and expert opinion indicate that marriage equality helps to improve children’s overall emotional well-being. For example, an article by William Meezan, Dean of the College of Social Work at Ohio State University, and Jonathan Rauch of the Brookings Institute, supports such a conclusion. Specifically, they conclude that “the very existence of same-sex marriage may reduce the stigmatization or perceived peculiarity of same-sex families, which would presumably reduce the social pressure on children.”⁶² Likewise, Dr. Marshall Forstein, Associate Professor of Psychiatry at Harvard Medical School, testified before the Civil Union Review Commission that “[s]ame-sex marriage provides...legitimacy for the children being raised by gay and lesbian parents,” which improves their “self esteem [and] sense of being validated in the eyes of the community....”⁶³ These observations are borne out in the

⁶⁰ M.V. LEE BADGETT, ET. AL, THE WILLIAMS INSTITUTE, THE EFFECTS OF MARRIAGE EQUALITY IN MASSACHUSETTS: A SURVEY OF THE EXPERIENCE AND IMPACT OF MARRIAGE ON SAME-SEX COUPLES, 9 (May 2009) (hereinafter, the “WILLIAMS INSTITUTE SURVEY ON THE EFFECTS OF MARRIAGE EQUALITY”).

⁶¹ *Id.*

⁶² Meezan & Rauch, *supra* note 34, at 109.

⁶³ Transcript of CURC Public Hearing at 33-34 (Apr. 16, 2008) (Testimony of Dr. Marshall Forstein), *see also* CURC FINAL REPORT, *supra* note 55, at 16 (quoting Testimony of Dr. Marshall Forstein). Dr. Michael Lamb, former head of the National Institute of Child Health and

Williams Institute study, which concluded that children seemed to “gain[] a sense of security” once their parents were permitted to marry.⁶⁴ Moreover, 93% of participants “agreed or somewhat agreed” that their children were generally “happier” and “better” after their parents were able to legally marry.⁶⁵ Many participants also reported that their children felt more “secure and protected...and saw their families validated by society as a result of their marriage.”⁶⁶ The profound de-stigmatizing effect that legalized marriage can have was illustrated by a 2004 *New York Times* article which profiled several children whose same-sex parents had recently married. One thirteen-year-old noted the difference in people’s reactions to her parents’ relationship: “Before it was ‘Oh, your parents are just partners’.... Now they’re spouses. So it’s a bigger way of thinking about them.”⁶⁷ Another eleven-year child described the longing she felt for a time that her parents could marry: “It is something I always wanted. I’ve always been around people saying, ‘Oh my parents [sic] anniversary is this week.’ It’s always been the sight of two parents, married, with rings. And knowing I’d probably never experience it ever...I felt so happy I wanted to scream....It’s something I felt I needed to

Human Development Section on Social and Emotional Development in Washington, and current head of the Department of Social and Developmental Psychology at the University of Cambridge in England, presented similar testimony in a trial over the legality of California’s “Proposition 8,” a constitutional amendment prohibiting same-sex marriage. Dr. Lamb testified that a marital relationship between same-sex couples improves the likelihood that their children will achieve a good adjustment outcome “because it allows those children to benefit from ... advantages that accrue to marriage, including the fact that its a recognized social institution.” Transcript of Record at 13:19-14:6, *Perry v. Schwarzenegger*, No. C 09-2292, 2010 U.S. Dist. LEXIS 32499 (N.D. Ca. Mar. 10, 2010) (Jan. 15, 2010).

⁶⁴ WILLIAMS INSTITUTE SURVEY ON THE EFFECTS OF MARRIAGE EQUALITY, *supra* note 60, at 1.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Patricia Leigh Brown, *For Children of Gays, Marriage Brings Joy*, N.Y. TIMES, A14 (Mar. 13, 2004).

experience.”⁶⁸ Testimony before the Civil Union Review Commission delivered a similar message. Peter Hams-Shepherd, who was raised by two mothers who were allowed to marry in Massachusetts, testified about the emotional benefits he felt as a result of his mothers’ marriage: “part of it, too, I think was I felt like finally I was protected. My parents’ fears [had] probably crept into my subconscious mind too as a kid, that they would lose me for some reason.”⁶⁹

Third, social science research indicates that marriage offers significant psychological benefits.⁷⁰ For example, a study conducted by The Williams Institute five years after same-sex couples were permitted to marry in Massachusetts reported that almost 70% of LGBT participants in that state felt that their well-being improved after being allowed to marry, describing themselves as feeling more “accepted” by their communities.⁷¹ These findings are consistent with the aforementioned research which shows that marriage is associated with better mental health generally, and specifically with improved self-esteem and lower stress.⁷² This research suggests that allowing same-sex couples to marry would decrease their heightened stress levels (and associated conditions), with concomitant psychological benefits to their children. Furthermore, researchers who acknowledge the link between marriage and positive

⁶⁸ *Id.*

⁶⁹ CURC FINAL REPORT, *supra* note 55, at 23.

⁷⁰ See John C. Culhane, *Beyond Rights and Morality: The Overlooked Public Health Argument for Same-Sex Marriage*, 17 J. L. & SEXUALITY 7, 24 (2008) (explaining the well-established findings that marriage is associated with longer life spans and better mental health outcomes, including “lower levels of depression, anxiety, and other forms of mental health distress, with higher rates of self-reported happiness”).

⁷¹ WILLIAMS INSTITUTE SURVEY ON THE EFFECTS OF MARRIAGE EQUALITY, *supra* note 60, at 1.

⁷² See, Culhane, *supra* note 70 at 24; see also Herdt & Kertzner, *supra* note 12, at 4 (citing Rutter & Schwartz, *Same-sex couples: Courtship, Commitment, Context*. In A. E. Auhagen & M. von Salisch (Eds.) (Cambridge University Press 1996)); Herek on Legal Recognition, *supra* note 18, at 614-15; Meezan & Rauch, *supra* note 34 at 108.

psychological outcomes likewise acknowledge the derivative psychological benefits for children raised by married parents.⁷³ Based on this research, it appears that, in denying marriage equality, the State is depriving children of same-sex couples of important psychological benefits that are associated with marriage and are enjoyed by children of married, opposite-sex couples.⁷⁴

* * *

Taken together, the above discussion demonstrates that children of same-sex couples experience psychological and social harm that flows from the State's decision to deny their parents the right to marry. As described herein, the social science literature, expert opinion, and factual evidence currently available demonstrate that children are harmed by the State's refusal to provide their families with the same legal status others readily access. Likewise, the unequal civil union structure denies children the psychological benefits associated with marriage equality, including the tendency of marriage to ameliorate psychological harm that children of unmarried same-sex parents experience. Continuing to subject children to this psychological harm, and denying them the benefits of marriage, is not only unjust, it also raises serious equal protection concerns, which are discussed in Section II.⁷⁵ The psychological impact children continue to experience every day cannot be mitigated until New Jersey permits their parents to marry.

⁷³ See Meezan & Rauch, *supra* note 34, at 108 (concluding that stress is reduced by the benefits associated with marriage, which alleviates stress on parents and increases the well-being of their children); Culhane, *supra* note 70, at 27; Herek on Legal Recognition, *supra* note 18, at 616.

⁷⁴ See discussion *supra* Section II.

⁷⁵ See, e.g. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (segregated law schools unconstitutional, despite equal facilities, because of intangible benefits that flowed to white students, but not black students, including "standing in the community, traditions, and prestige."); see also *McCreary County*, 545 U.S. at 860 (law that creates "insider" and "outsider" groups is unconstitutional); *Santa Fe Independent School Dist.*, 530 U.S. at 309-310 (same); *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) (law that deprives children of undocumented immigrants of significant rights is unconstitutional); *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (same); *Weber*, 406 U.S. at 175-76 (law that stigmatizes "illegitimate" children is unconstitutional); *Brown*, 347 U.S. 483.

C. Similarly, the Deprivation of Marriage Equality Harms LGBT Youth.

Like the children of same-sex couples, LGBT youth are also harmed by New Jersey's refusal to grant marriage equality. Indeed, the Civil Union Review Commission heard extensive testimony from LGBT youth, as well as members of their family, who explained the psychological harm these young people experience as a result of knowing they will not be allowed to marry when they reach adulthood. In describing this testimony, the Commission concluded that "deep psychological harm" is being inflicted upon LGBT youth as a result of the civil union law.⁷⁶

As an initial matter, LGBT youth experience the same kind of "minority stress" that their adult counterparts experience as a result of being subjected to discrimination and bias based on their sexual orientation.⁷⁷ In fact, the emotional harm LGBT youth endure is likely more acute, since research suggests they are more likely than even LGBT adults to be victimized by antigay prejudice or violence and that the psychological impact can be more severe.⁷⁸ A 2007 nationwide study by the Gay, Lesbian, Straight Education Network (GLSEN) reported that 86.2% of LGBT students – or nearly nine out of ten – have experienced verbal harassment at school in the past year because of their sexual orientation, while 22.1% reported being physically

⁷⁶ CURC FINAL REPORT, *supra* note 55, at 15.

⁷⁷ See discussion *supra* Section I.A.4.

⁷⁸ Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Population: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. OF THE AM. PSYCHOL. ASS'N 5, 674, 680 (2003) (hereinafter "Meyer on Prejudice, Social Stress and Mental Health") (citing A.H. Faulkner & K. Cranston, *Correlates of same-sex sexual behavior in a random sample of Massachusetts high school students*, 88 AM. J. OF PUB. HEALTH 2, 262-266 (Feb. 1998); and Robert Garofalo, et al., *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-based Sample of Adolescents*, 101 PEDIATRICS 5, 895-902 (Jan. 2, 1998)).

assaulted.⁷⁹ As a result of this high incidence of abuse, 60.8% of LGBT youth reported feeling unsafe at school because of their sexual orientation, and nearly 33% reported missing at least one day of school in the previous month alone because of fears about their safety.⁸⁰ These results are consistent with a wealth of data demonstrating that LGBT youth are disproportionately the victims of bullying at school.⁸¹ The seriousness of the psychological impact cannot be overstated: available data indicates that at least 47% of LGBT teens have seriously considered suicide, and 36% have actually attempted suicide.⁸² This data suggests that LGBT students are three times more likely to report a suicide attempt than their heterosexual peers.⁸³

Subjecting LGBT youth to the knowledge that they will never be afforded the right to marry deals yet another powerful blow to their already fragile emotional well-being. That is so, in part, because so many LGBT youth *want* to get married one day. A 2001 study by the Kaiser Family Foundation reported that 74% of LGBT youth reported that they would like to marry when they reach adulthood.⁸⁴ That rate was higher in a study that broke out the data for girls

⁷⁹ GLSEN, THE 2007 NATIONAL SCHOOL CLIMATE SURVEY, *supra* note 3.

⁸⁰ *Id.*

⁸¹ See, e.g., Kevin P. Brady, *Local School Officials' Legal Duty to Prevent Anti-Gay Student Harassment: The Impact of Nabozny and Flores*, 187 WEST'S EDUC. L. REP. 383 (2004). Indeed, this Court recognized the insidiousness of school bullying in a case involving LGBT youth. *LW ex rel. LG v. Toms River Regional School Board of Education*, 189 N.J. 381, 401-02 (2007).

⁸² ELLEN C. PERRIN, SEXUAL ORIENTATION IN CHILD AND ADOLESCENT HEALTH CARE (2002).

⁸³ Meyer on Prejudice, Social Stress and Mental Health, *supra* note 78, at 684 (citing Robert. Garofalo, et al., *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-based Sample of Adolescents*, 101 PEDIATRICS 5, 895-902 (Jan. 2, 1998)).

⁸⁴ Herek on Legal Recognition, *supra* note 18, at 617 (discussing 2001 Kaiser Family Foundation study).

alone, with close to 80% expressing a desire to get married.⁸⁵ The numbers are almost certainly higher nine years later, now that same-sex couples are afforded the right to marry in five states and the District of Columbia-- thus making the discriminatory nature of New Jersey's civil union structure all the more apparent, and all the more unjustifiable. Even for those who do not currently envision themselves marrying as adults, the discriminatory civil union structure deprives them of the right to make that choice in the future. By depriving LGBT youth the right to be married as adults, New Jersey sends the message that they are simply not equal to their straight peers, and will never be so. This legal imprimatur on unequal treatment of LGBT youth reinforces the discrimination they in their day-to-day lives and negatively impacts their emotional well-being.

The testimony presented to the Civil Union Review Commission and Senate Judiciary Committee illustrates the destructive feelings of inferiority and "otherness" that LGBT youth experience as a result of marriage inequality:

- A 17 year-old gay teen called civil unions "totally different" from marriage. He described the pain of feeling like a "second class citizen" in comparison to his two straight brothers, who "can be married and have their relationship with their ... wife be called a 'marriage.'" He described the "emotional damage" he feels as a result of being deprived of the equal rights his brothers will enjoy, including feeling "confused" "upset" and "angry."⁸⁶
- A 16 year-old gay high school sophomore described the agony of being bullied and harassed based on his sexual orientation. He testified as follows: "It's not easy walking down the hallway, having names and derogatory terms hurled at you like you are some kind of animal being brutally stoned to death. 'Faggot, queer, homo' – they all hurt my self-esteem and made me feel worthless. And what's even worse is knowing that our State government also views me just like those bullies in school viewed me. In New

⁸⁵ M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED, WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE (2009) (citing Anthony R. D'Augelli, et al., *Lesbian and gay youths' aspiration for marriage and raising children*, 1 J. OF LGBTI ISSUES IN COUNS. 4, 77-98 (Jan. 2008)).

⁸⁶ CURC FINAL REPORT, *supra* note 55, at 19 (citing testimony of Tom O'Brien).

Jersey, I am a second-class citizen, someone who does not have equal rights, someone whom it is perfectly okay to treat differently according to the State government. "I've endured more discrimination and hatred than anyone should ever have to deal with in a lifetime. Marriage equality is extremely important to me, because one day I do hope to get married and make a life together with one very special person, just as my two wonderful parents have done. And although many things can happen in the future, and I cannot say for sure that I will marry, I certainly do not want to have one road completely blocked from me: the road to a happy and lifelong marriage."⁸⁷

- A mother related a conversation she had with her gay son when he was sixteen: "He said to me, 'you know, all I really want is to get married and have children.' And, I said to him, well, you know, you have several friends whose parents are gay, [and] Montclair is a nice place to be gay....He kind of stared at me [and] said, 'but they're not married.' And suddenly I got it. In a flash I knew my son is acutely and perpetually aware of the fact that he is a second class citizen and that he cannot attain the status that the rest of us treasure. [H]e's [] enduring the fact that the government of the state in which he lives, to which his parents pay taxes, is the same one trying to discriminate against him."⁸⁸

Allowing these young people the dream of one day marrying the person they love would alleviate some of the psychological harm they experience. The American Psychiatric Association has recognized the government's power to improve the lives of LGBT youth, concluding that: "[s]ame sex marriage would signal to these adolescents that emotionally fulfilling, same sex relationships are not only possible, but validated by society."⁸⁹ This conclusion was echoed in testimony presented by two mental health experts before the Civil Union Review Commission. According to Mary Jean Weston, Assistant Executive Director of the New Jersey Chapter of the National Association of Social Workers, "enabl[ing] gay children to grow up knowing that they can marry like their peers ... would reduce the many stressors that [they] already face in a society that continues to threaten their safety and challenge their right to

⁸⁷ Transcript of NJ Senate Judiciary Committee Meeting at 105-06 (Testimony of John Otto).

⁸⁸ Transcript of CURC Public Hearing at 60-61 (Sept. 26, 2007) (Testimony of Lucille O'Brien).

⁸⁹ AMERICAN PSYCHIATRIC ASSOCIATION, SAME-SEX MARRIAGE RESOURCE DOCUMENT 3 (Nov. 2004), http://www.psych.org/MainMenu/EducationCareerDevelopment/Library/BernsteinReferenceCenter/ResourceDocuments_1.aspx (follow "2004 Same-Sex Marriage" hyperlink).

a normal life.”⁹⁰ Dr. Marshall Forstein, Associate Professor of Psychiatry at Harvard Medical School, agreed, testifying that marriage equality has the potential for reducing LGBT youth’s “isolation [and] sense of stigma.”⁹¹ The State’s decision to relegate the LGBT community - including LGBT youth -- to a permanent second-class status is particularly unjust, given that this Court has recognized the importance of protecting LGBT youth from discrimination based on their sexual orientation.⁹²

II. COURTS INVALIDATE LAWS THAT CAUSE PSYCHOLOGICAL AND SOCIAL HARM, INCLUDING LAWS IN THE CONTEXT OF MARRIAGE FOR SAME-SEX COUPLES.

Having shown that the Civil Union Act causes psychological and social harm to both children of same-sex couples and LGBT youth, the question remains: what is the legal consequence of this unfortunate reality? In fact, courts routinely invalidate government action that separates people, especially children, into “insider groups” and “outsider groups.”⁹³ Statutes that treat an outsider group as separate and inferior generally do not survive an equal protection analysis because no legitimate state purpose can justify the harmful effects of such a classification, particularly where children are concerned.⁹⁴

⁹⁰ Transcript of CURC Public Hearing at 65 (Apr. 16, 2008) (Testimony of Mary Jean Weston).

⁹¹ Transcript of CURC Public Hearing at 33-34 (Apr. 16, 2008) (Testimony of Dr. Marshall Forstein).

⁹² *L.W. v. Toms River Reg. Schools Bd. of Educ.*, 189 N.J. 381 (2007).

⁹³ See *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (striking sodomy law, which “demeans the lives of homosexual persons”); *Weber*, 406 U.S. at 175-76 (same, “illegitimacy” laws that stigmatized children born outside of marital relationships); *Brown*, 347 U.S. 483 (same, school segregation); see also *Santa Fe Independent School Dist.*, 530 U.S. at 309-310 (school prayer burdens children in religious minority by making them feel like outsiders).

⁹⁴ See *Brown*, 347 U.S. at 494 (recognizing stigmatizing effect of school segregation, which made black children feel inferior); *Weber*, 406 U.S. at 175-76 (striking law which branded “illegitimate” children as inferior; impact on children was “illogical and unjust”).

While stigma can be attributable strictly to private bias in certain circumstances, it is well-settled that the government becomes impermissibly implicated when the challenged classification reinforces or perpetuates bias – thereby placing the government’s imprimatur on prejudice.⁹⁵ Thus, courts have invalidated discriminatory classifications that reinforce and/or perpetuate the stigmatization of minority groups, including, for example, members of the LGBT community, racial minorities, women, and children born outside of a marital relationship.⁹⁶ Laws have likewise been deemed impermissible when they deprive minority groups of certain benefits, even when those benefits are intangible.⁹⁷

Not surprisingly, courts are particularly hostile toward laws which cause psychological harm in children, recognizing the unique psychological and social harm they experience as a result of being made to feel inferior to their peers.⁹⁸ *Brown v. Board* is the case which most

⁹⁵ See, e.g. *Palmore*, 466 U.S. 429 (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect”).

⁹⁶ See *Lawrence*, 539 U.S. at 575 (sodomy law was “an invitation to discrimination against homosexuals in both the public and private spheres” and is “demean[ing]”); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (excluding blacks from juries placed “a brand upon them, affixed by the law,” was “an assertion of their inferiority,” and a “stimulant” to racial prejudice”); *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973) (rejecting assumption that women, never men, are dependents; cautioning that statutory distinctions between the sexes...invidiously relegate...females to inferior legal status”); *Weber*, 406 U.S. at 175-76 (status of illegitimacy expresses “society’s condemnation of [] liaisons beyond the bonds of marriage. But visiting this condemnation on ... an infant is illogical and unjust....Courts are powerless to prevent [] social opprobrium...but the Equal Protection clause does enable us to strike down discriminatory laws”).

⁹⁷ See *Sweatt*, 339 U.S. at 634 (segregated law schools unlawful, despite their equal facilities, because black students were deprived of certain intangible benefits that flowed to white students, i.e., “standing in the community,” and “prestige”).

⁹⁸ See, e.g., *Brown*, 347 U.S. at 49 (“separating [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone”); *Weber*, 406 U.S. at 175-76 (withholding benefits from children born outside of marriage impermissibly brands them as inferior); see also *Lee v. Weisman*, 505 U.S. 577 , 592-93 (1992) (school prayer

famously recognizes the adverse psychological impact that discrimination has on children. Of course, there the Court declared school segregation unconstitutional because such unequal treatment of children “generates feelings of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁹⁹ The so-called “illegitimacy” cases also illustrate courts’ hostility toward classifications that stigmatize children, simply by accident of their birth. For example, in *Levy v. Louisiana*,¹⁰⁰ the United States Supreme Court invalidated a statute which prohibited “illegitimate” children from bringing wrongful death actions on behalf of their parents. The Court admonished that these children were not “non-persons,” but “humans,” invoking Shakespeare to reject the notion that children born out of wedlock should be “brand[ed] ... [w]ith baseness []... Bastardy....”¹⁰¹ The

harms religious minority students, forcing them to conform to social norms or be noticeably different; discussing research demonstrating children are uniquely “susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”); accord *Tudor v. Bd. of Ed. of the Borough of Rutherford*, 14 N.J. 31, 50-52 (1953) (relying on testimony of mental health experts, in school prayer context, to find that government’s apparent preference for one group over another enhances pressure to conform, which has harmful effect on children).

Although outside the equal protection context, the school prayer cases evidence judicial hostility toward state action which sends a message that the government favors one group over another. See Healy, *supra* note 15, at 448 (placing prayer cases in same doctrinal context as equal protection cases that cause stigma harm to groups subject to discriminatory classifications).

⁹⁹ *Brown*, 347 U.S. 483.

¹⁰⁰ 391 U.S. 68, 69-70 (1968).

¹⁰¹ *Id.* at 68, 70-72 n. 6 (quoting WILLIAM SHAKESPEARE, KING LEAR, Act I, Scene 2); accord *Jimenez*, 417 U.S. 628 (same, Social Security Act); see also *Weber*, 406 U.S. at 175-76 (same, workers’ compensation laws).

Court has reached similar conclusions where children are subjected to discriminatory classifications, *e.g.*, based on their immigration status, simply because of their parents' status.¹⁰²

Here, the social science literature and testimony (both expert and anecdotal) discussed in Section I demonstrate that the Civil Union Act causes psychological and social harm to children by sending the message that their families are inferior and unworthy of being included in the institution of marriage. When viewed in the context of the above case law, the psychological and social harm perpetuated by the Civil Union Act offends core equal protection principles. In fact, four state supreme courts have reached precisely this same conclusion after considering, *inter alia*, evidence of the psychological harm caused by marriage inequality.

In *Goodridge v. Dep't. of Public Health*, the Massachusetts Supreme Court held that marriage inequality "works a deep and scarring hardship on a very real segment of the community for no rational reason."¹⁰³ In discussing the nature of the harm, the court paid particular attention to the harm suffered by the children of same-sex parents, warning that "[e]xcluding same-sex couples from civil marriage will ... prevent [their] children...from enjoying the immeasurable advantages that flow from the assurance of a stable family structure."¹⁰⁴ This decision resulted in marriage equality for same-sex couples in the state of Massachusetts.

The Connecticut Supreme Court weighed in five years later. In *Kerrigan v. Commissioner of Public Health*, the court invalidated Connecticut's civil union law, concluding

¹⁰² See *Plyler*, 457 U.S. at 223-24 (invalidating law that excluded children of undocumented immigrants from receiving education benefits because it "imposed a lifetime hardship on a discrete class of children," and there was no rational basis for visiting this kind of condemnation upon "innocent children").

¹⁰³ *Goodridge*, 798 N.E.2d at 968.

¹⁰⁴ *Id.* at 962-63

that the separate structure would perpetuate the idea that same-sex couples are ““second-class citizens.””¹⁰⁵ The *Kerrigan* court focused heavily on the harm that children experience as a result of the separate civil union structure, finding marriage inequality likely has “an especially deleterious effect on the children of same-sex couples.”¹⁰⁶ The source of this harm, the court concluded, was the message of inferiority sent by the separate structure, *i.e.*, the “official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples.”¹⁰⁷ In reaching this conclusion, the court cited a Surgeon General report, which concluded that stigma toward the LGBT community is associated with “greater incidents of depression and suicide, and lower-self acceptance.”¹⁰⁸ The court also recognized the personal stories of those involved in the case, citing to a plaintiff’s affidavit which expressed concern that her children were “forced to explain to their friends and others why their parents cannot marry.”¹⁰⁹ As a result of *Kerrigan*, Connecticut became the second state to afford same-sex couples the right to marry.

The following year, 2008, the Supreme Court of California rendered its first decision on the issue of marriage equality. The Court held, in the *In re Marriage Cases* case, that a separate status for same-sex couples was inherently unequal to marriage, and therefore

¹⁰⁵ See *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 475 (Conn. 2008).

¹⁰⁶ *Id.* at 474.

¹⁰⁷ *Id.* at 475.

¹⁰⁸ *Id.* at 433 (discussing D. Satcher, Surgeon General, U.S. DEP’T OF HEALTH & HUMAN SERVICES, THE SURGEON GENERAL’S CALL TO ACTION TO PROMOTE SEXUAL HEALTH AND RESPONSIBLE BEHAVIOR (Jul. 9, 2001)).

¹⁰⁹ *Id.* at 475.

unconstitutional.¹¹⁰ The court expressed particular concern for the children of same sex couples who, it recognized, may struggle with the difficulties of being part of a legal status that is unfamiliar to the public, instead of enjoying the benefits associated with marriage, a status that “is well understood.”¹¹¹ As the Massachusetts and Connecticut Supreme Courts did in *Goodridge* and *Kerrigan*, the California Supreme Court concluded that depriving same-sex couples of the right to marry imposed on their children the “mark of second-class citizenship.”¹¹² Only through marriage, the court concluded, could same-sex couples’ families be “accorded dignity and respect equal to that conferred upon the family relationship of opposite-sex couples.”¹¹³

Just over one year ago, the Supreme Court of Iowa issued the latest marriage equality decision, in *Varnum v. Brien*.¹¹⁴ Although Iowa is hardly considered a bastion of liberalism, the court nonetheless adopted the reasoning set forth in the decisions above and declared the state’s civil union statute unconstitutional.¹¹⁵ Like *Goodridge*, *Kerrigan* and *In re Marriage Cases*, the *Varnum* decision acknowledged the psychological harm that children of same-sex couples experience as a result of marriage inequality.¹¹⁶

¹¹⁰ *In re Marriage Cases*, 183 P.3d 384, 446 (Cal. 2008). Note that subsequently, California enacted Proposition 8 and as a result, same-sex couples cannot get married in California.

¹¹¹ *Id.* at 446 (citing the FIRST INTERIM REPORT OF THE NEW JERSEY CIVIL UNION REVIEW COMMISSION, 6-18 (Feb. 19, 2008)).

¹¹² *Id.* at 452.

¹¹³ *Id.* 446.

¹¹⁴ 763 N.W. 2d 862 (Iowa 2009).

¹¹⁵ *Id.* at 873.

¹¹⁶ *Id.* (noting plaintiffs’ inability to obtain “for themselves and their children the personal and public affirmation that accompanies marriage.”).

Stigma. Inferiority. Second-class citizenship. Harm. Deprivation of benefits. Four state supreme courts have invoked these words in ordering that same-sex couples be afforded the right to marry.¹¹⁷ These decisions were motivated, in part, by the psychological and social harm that marriage inequality does to children by perpetuating their family's inferior status. But, these decisions are not truly "ground breaking" in a doctrinal sense; they simply extend the same principle articulated in cases such as *Sweatt*, *Brown*, *Frontiero*, *Levy*, and *Lawrence*, that children may not be burdened by discriminatory classifications that set them apart, make them feel different and inferior, and cause them to be psychologically harmed. *Amici* respectfully contend that if this Court were to apply this basic equal protection principle, the only reasonable outcome would be to require the State of New Jersey to afford same-sex couples the right to marry, and thereby ensure that their children, and LGBT youth, do not continue to experience the harm that flows from the discriminatory Civil Union law.

CONCLUSION

Based on the social science literature, expert opinion, and factual testimony described above, *amici* respectfully submit that it is beyond dispute that thousands of New Jersey's children are suffering psychological and social harm as a result of marriage inequality. It is equally clear that the unequal civil union structure deprives the children of same-sex couples the measurable benefits that are readily enjoyed by children of married couples. In light of the evidence that has been gathered since this Court issued its decision in *Lewis v. Harris*, it is now clear that there is simply no lawful basis for this unequal treatment. To the contrary, our core equal protection principles require that this cycle of harm be stopped, so that children are no

¹¹⁷ Notably, even in the states where marriage equality was afforded through legislative action, the impact of marriage inequality on children was a motivating factor behind granting equal access to marriage. *See, e.g.*, REPORT OF THE VERMONT COMMISSION ON FAMILY RECOGNITION AND PROTECTION (Apr. 21, 2008) (noting negative impact on children of same-sex couples).

longer subjected to the government-sanctioned message -- inherent in the discriminatory civil union structure -- that they and their families are somehow "not good enough" to enjoy the institution of marriage. Since this destructive, discriminatory message is inherent in the Civil Union Act, *amici* respectfully submit that anything short of full marriage equality would be legally impermissible.

Respectfully submitted,

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