NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

GARDEN STATE EQUALITY; DANIEL WEISS and JOHN GRANT; MARSHA SHAPIRO and LOUISE WALPIN; MAUREEN KILIAN and CINDY MENEGHIN;SARAH KILIAN-MENEGHIN, a minor, by and through her guardians; ERICA and TEVONDA BRADSHAW; TEVERICO BARACK HAYES BRADSHAW, a minor, by and through his guardians; MARCYE and KAREN NICHOLSON-McFADDEN; KASEY NICHOLSON-McFADDEN, a minor, by and through his guardians; MAYA NICHOLSON-McFADDEN, a minor,by and through her guardians; THOMAS DAVIDSON and KEITH HEIMANN;MARIE HEIMANN DAVIDSON, a minor, by and through her guardians; GRACE HEIMANN DAVIDSON, a minor, by and through her guardians; ELENA and ELIZABETH QUINONES; DESIREE NICOLE RIVERA, a minor, by and through her guardian; JUSTINE PAIGE LISA, a minor, by and through her guardian; PATRICK JAMES ROYLANCE,a minor, by and through his guardian; and ELI QUINONES, a minor, by and through his guardians,

Plaintiffs,

v.

PAULA DOW, in her official capacity as Attorney General of New jersey; JENNIFER VELEZ, in her official capacity as Commissioner of the New Jersey Department of Human Services,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-MERCER COUNTY

DOCKET No.:MER-L-1729-11

CIVIL ACTION

OPINION

and MARY E. O'DOWD, in her official capacity as Commissioner of the New Jersey Department of Health and Senior Services, Defendants.	

Decided: February 21, 2012

Lawrence S. Lustberg and Jonathan Manes, for the plaintiffs (Gibbons,P.C., attorneys; Mr. Lustberg and Mr. Manes, on the joint brief)

Hayley J. Gorenberg, for the plaintiffs, admitted pro hac vice (Lambda Legal, attorneys; Ms. Gorenberg, on the joint brief).

Jeffrey S. Chiesa, Attorney General of New Jersey, for the defendants (complaint named former Attorney General Paula Dow as defendant) Kevin R. Jespersen, Assistant Attorney General, of counsel and on the brief and Jean P. Reilly, Deputy Attorney General, on the brief).

FEINBERG, A.J.S.C.

I.

BACKGROUND

On June 26, 2002, after being denied marriage licenses in their respective jurisdictions, seven same-sex couples ("Lewis plaintiffs"), in permanent committed relationships for more than ten years, filed a complaint in the Superior Court, Law Division, Hudson County. Plaintiffs also sought injunctive relief compelling State officials ("defendants" or "State"), to

grant them marriage licenses.[1] An amended complaint was filed on October 9, 2002 and by consent, on November 22, 2002, venue was transferred to Mercer County.

In challenging the State's denial of marriage licenses, plaintiffs argued they were deprived of statutory protections, benefits, and mutual responsibilities accorded to heterosexual couples in violation of the liberty and equal protection guarantees of Article I, Paragraph 1 of the New Jersey Constitution. Furthermore, plaintiffs asserted that third-party entities, including insurance companies and private employers, failed to accord benefits to same-sex couples.

Both parties moved for summary judgment. On November 5, 2003, this court granted summary judgment in the State's favor and dismissed the complaint. On the record, however, the court referred to pending legislation intended to extend healthcare, insurance coverage, and other benefits to same-sex couples: (1) the "Family Equality Act" that established domestic partnerships which was introduced on June 9, 2003; and (2) an act to establish "Civil Unions" was introduced in 2003 as well. See B. 3743, 210th Leg. (N.J. 2003); see also B. 3762, 210th Leg. (N.J. 2003).

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[1] The named defendants were Gwendolyn L. Harris, former Commissioner of the Department of Human Services, Clifton R. Lacy, former Commissioner of the Department of Health and Senior Services, and Joseph Komosinski, former Acting State Registrar of Vital Statistics.

As anticipated, the Legislature adopted the Domestic Partnership Act ("the DPA"), N.J.S.A. 26:8A-1 et seq., effective July 10, 2004. The DPA provided that "all persons in domestic partnerships should be entitled to certain rights and benefits that are accorded to married couples. . .." N.J.S.A. 26:8A-2.

In 2005, a divided panel of the Appellate Division in Lewis v. Harris, 378 N.J. Super. 168 (App. Div. 2005), held the State's marriage statutes did not contravene the substantive due process and equal protection guarantees of the State Constitution. N.J. Const. art. I, ¶ 1. Judge Skillman, writing for the majority, noted that only the Legislature could authorize same-sex marriage. Lewis, supra, 378 N.J. Super. at 194. Judge Collester, Jr., dissenting, concluded that substantive due process and equal guarantees of Article I, Paragraph 1 obligated the State to afford same-sex couples the right to marry on terms equal to those afforded to opposite-sex couples. Id. at 201.

On October 25, 2006, the Supreme Court of New Jersey, in Lewis v. Harris, 188 N.J. 415 (2006), affirmed in part and modified in part the judgment of the Appellate Division. In Lewis, the Court held:

> To comply with the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, the State must provide to same-sex couples, on equal terms, the full rights and benefits enjoyed by

> heterosexual couples. The State can fulfill that constitutional requirement in one of two ways. It can either amended the marriage statutes to include same-sex couples or enact a parallel statutory structure by another name, in which same-sex couples would not only enjoy the rights and benefits, but also bear the burdens and obligations of civil marriage. If the State proceeds with a parallel scheme, it cannot make entry into same-sex civil union any more difficult than it is for heterosexual couples to enter the state of marriage. It may, however, regulate that scheme similarly to marriage and, for instance, restrict civil unions based on age and consanguinity and prohibit polygamous relationships.
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> [Id. at 463.]

The Court's ruling firmly established that same-sex couples must be afforded the same rights and benefits enjoyed by opposite-sex couples in civil marriage. The Court determined, however, in the first instance, that it was the Legislature's prerogative to decide whether to open the institution of civil marriage to same-sex couples or to devise a parallel statutory scheme. A parallel statutory scheme, if selected, would be required to provide equal rights and benefits to same-sex couples as those enjoyed by heterosexual couples in civil marriage. Id. at 222-23.

In response to the Lewis opinion, the New Jersey Legislature enacted the Civil Union Act. N.J.S.A. 37:1-28 et seq.

On March 18, 2010, the Lewis plaintiffs filed a motion in aid of litigant's rights challenging the failure of the Civil Union Act to fulfill the Lewis Court's mandate. The complaint sought an order from the Court to compel the Legislature to open the institution of civil marriage to same-sex couples. On July 26, 2010, finding that the action should be heard in the Superior Court, the Court denied plaintiffs' motion to enforce litigant's rights, without prejudice.

On June 29, 2011, plaintiffs filed a four-count complaint in the Superior Court, Law Division, Mercer County. Plaintiffs are Garden State Equality, an organization with more than 82,000 members, which advocates for lesbian, gay, bi-sexual, and transgender ("LGBT") civil rights, seven same-sex couples who reside in New Jersey and ten of their children.

Defendants are named in their official capacities based on their respective roles in implementing and enforcing New Jersey's laws: Paula Dow, the Attorney General of the State of New Jersey, Jennifer Velez, the Commissioner of the New Jersey Department of Human Services, and Mary E. O'Dowd, the Commissioner of the New Jersey Department of Health and Senior Services.

Counts one through four, respectively, assert a denial of equal protection under Article I, Paragraph 1 of the New Jersey Constitution; a denial of the fundamental right to marry under

Article I, Paragraph 1 of the New Jersey Constitution; a denial of equal protection under the Fourteenth Amendment to the United States Constitution, in violation of 42 U.S.C. § 1983; and a denial of substantive due process under the Fourteenth Amendment of the United States Constitution in violation of 42 U.S.C. § 1983.

On August 10, 2011, defendants filed a motion to dismiss the complaint. On November 29, 2011, the court denied the motion to dismiss count one and granted the motion to dismiss counts two, three and four.[2]

On December 19, 2011, plaintiffs filed a motion for reconsideration to reinstate count three of the complaint. The State filed opposition and plaintiffs filed a reply.

Plaintiffs assert: (1) under Section 1983 it is not necessary to demonstrate that the right at issue is "well-established" or the existence of a fundamental right to same-sex marriage; (2) the court overlooked its role in enforcing Federal Constitutional Rights; (3) other courts have considered challenges to discriminatory state marriage practices based on Federal Constitutional grounds; and (4) the interests of justice warrant permitting plaintiffs to develop a full record for appellate review.

[2] The court heard oral argument on November 4, 2011.

In opposition to the motion for reconsideration, the State argues: (1) the Supreme Court's dismissal of the appeal in Baker v. Nelson, 409 U.S. 810 (1972), establishes that a state statute limiting marriage to heterosexual couples does not violate the Federal Equal Protection Clause; (2) this court must apply a rational basis test in evaluating the Federal Equal Protection claim because there is no fundamental right or suspect/quasi-suspect classification; (3) the limitation of the designation of "marriage" to heterosexual couples satisfies the rational basis test and is valid under the Federal Equal Protection Clause; and (4) the Federal Equal Protection claim fails in the absence of state action.

On January 30, 2012, the plaintiffs filed a reply. Plaintiffs argue: (1) Baker v. Nelson is not binding on their Federal Equal Protection claim; (2) heightened scrutiny applies to the Federal Equal Protection claim since sexual orientation is considered a suspect class; (3) heightened scrutiny applies to the Equal Protection claim because prohibiting same-sex couples from marrying also constitutes discrimination based on sex; (4) even based under a rational basis test, the Civil Union Act cannot survive as a matter of federal law; and (5) the State action alleged is sufficient to maintain a cause of action.

Without objection from the State, the court permitted plaintiffs to file a supplemental letter brief, dated February

10, 2012. The letter brief addresses the decision by the Ninth Circuit in Perry v. Brown, No. 10-16696 (9th Cir. Feb. 7. 2012). Plaintiffs assert the reasoning in Perry, despite its reference to specific circumstances present in California, supports their claim under the Federal Equal Protection clause.[3]

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ANALYSIS

Rule 4:49-2 provides "a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it." R. 4:49-2. The "motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred." Ibid.

"Reconsideration is a matter within the sound discretion of the court, to be exercised in the interest of justice". Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). In order to succeed, a litigant on a motion for reconsideration is required to establish that the court expressed its decision

[3] Consistent with this court's prior practice, the court provided counsel with a tentative decision the week before the return date. Counsel elected to waive oral argument.

on a "palpably incorrect or irrational basis," or did not properly consider "probative, competent evidence." D'Atria, supra, 242 N.J. Super. at 401.

"Alternatively, if a litigant wishes to bring new or additional information to the [c]ourt's attention which it could not have provided on the first application, the [c]ourt should, in the interest of justice (and in the exercise of sound discretion), consider the evidence. Nevertheless, motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the [c]ourt must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration." Cummings, supra, 295 N.J. Super. at 384 (quoting D'Atria, supra, 242 N.J. Super. at 401-02).

As a preliminary matter, here, the parties dispute whether Baker v. Nelson, supra, 409 U.S. at 810 is binding. For the reasons set forth herein, it is not.

In Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), two adult male residents of Hennepin County, Minnesota, sought and were denied a marriage license by the county clerk. Plaintiffs challenged a Minnesota statute which declared a lawful marriage to be only between "persons of the opposite sex" under both the

Equal Protection and Due Process guarantees of the Federal Constitution.[4] Ibid.

The Minnesota Supreme Court held the State's laws prohibiting same-sex marriage did not violate the Equal Protection Clause of the Fourteenth Amendment. Baker, supra, 191 N.W.2d at 187. The decision was appealed to the United States Supreme Court. The Supreme Court dismissed the appeal for want of a substantial federal question. Baker v. Nelson, supra, 409 U.S. at 810.[5]

A dismissal for want of a substantial federal question is a decision on the merits that is binding on lower courts. Hicks v. Miranda, 422 U.S. 332, 344-45 (1975). "The scope of the rule is narrow… It is dispositive only of 'the specific challenges presented in the statement of jurisdiction.'" Smelt v. County of Orange, 374 F. Supp. 2d 861, 872 (C.D. Cal. 2005) (citing Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam)), aff'd in part and vacated in part, 447 F. 3d 673 (9th Cir. Cal. 2006). "It prevents lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by the dismissal, but it does not affirm the reasoning or the opinion

[4] While plaintiffs challenged the statute under the First and Eighth Amendments, the claims were dismissed by the trial court.

[5] Until 1988, the Supreme Court had mandatory appellate jurisdiction under 28 U.S.C. § 1257(2) which was repealed.

of the lower court whose judgment is appealed." Id. at 872 (internal quotations omitted). "It remains a decision on the merits of the precise questions presented 'except when doctrinal developments indicate otherwise.'" Hicks, supra, 422 U.S. at 344 (quoting Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth., 387 F. 2d 259, 260 n.3 (2d Cir. 1967)).

Baker was decided forty years ago and both doctrinal and societal developments since Baker indicate that it has sustained serious erosion. The United States Supreme Court has decided several pertinent cases both contemporaneous with Baker and more recently which indicate that the issue of denying same-sex couples access to the institution of marriage would not be considered "unsubstantial" today.

One such development was the Supreme Court's invalidation of anti-miscegenation laws in Loving v. Virginia, 388 U.S. 1 (1967). While Loving was decided a decade before Baker, Loving is significant when considered in its historical context.

In Loving, the court considered whether a statutory scheme adopted by the Virginia Legislature to prevent marriages between persons solely based on racial classifications violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court concluded that "[t]here can be no doubt that restricting the freedom to marry solely because of racial

classifications violates the central meaning of the Equal Protection Clause." Loving, supra, 388 U.S. at 1823.

Today, a state law limiting an individual's right to marry based on racial classifications is patently repugnant to the Federal Constitution. However, at the time Loving was decided, the United State Supreme Court had never addressed whether a statute limiting marriages solely on the basis of race would be impermissible. For decades, many people considered marriage to be appropriately between persons of the same race. While surprising by today's standards, nonetheless, it took many years for the court to render a decision invalidating these laws based on the Federal Equal Protection Clause.

We are now at a point in history where same-sex couples face similar challenges. Courts are now presented with a new type of classification, namely, sexual orientation. Clearly, the denial of the title of marriage to same-sex couples' relationships has been likened by courts and scholars to other forms of discrimination once considered to be appropriate. As one scholar noted:

> Just as the official separation of races was a stimulant to racial prejudice and the denial of equal educational opportunities to women hinged on the message of inferiority, the official segregation of married heterosexual couples and civilly united same-sex couples smacks of discrimination founded upon traditional intolerance.

> [Matthew K. Yan, *"What's In A Name?" Why The New Jersey Equal Protection Guarantee Requires Full Recognition of Same-Sex Marriage*, 17 B.U. Pub. Int. L.J., 179, 195 (2007) (internal quotations omitted).]

This scholar's comment illustrates yet another form of discrimination once considered conventional; discrimination based on sex.

Another development contemporaneous with Baker was the United States Supreme Court's inclusion of classifications based on sex with those subject to heightened judicial scrutiny. See Frontiero v. Richardson, 411 U.S. 677 (1973). The question before the Court in Frontiero concerned the right of a female member of the uniformed services to claim her spouse as a "dependant" for the purpose of receiving certain benefits. While a serviceman could, at the time, claim his wife as a dependant, a servicewoman could not claim her husband as a dependant for the same purpose. Under a heightened scrutiny review, the Court found that this different treatment constituted unconstitutional discrimination under the Due Process Clause of the Fifth Amendment. Frontiero, supra, 411 U.S. at 678.

Even though it dealt with a different classification, Frontiero, like Loving, is relevant in its historical context. The Court noted in Frontiero that "our Nation has had a long and

unfortunate history of sex discrimination....” Frontiero, supra, 411 U.S. at 684. Further, the Court stated that American “statute books... [are] laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.” Id. at 685. Even though it was once common place, today, the idea that “[m]an is, or should be, woman’s protector and defender” is clichéd. Id. at 684 (internal quotations omitted).

Quite simply, Baker has been undermined by subsequent Supreme Court precedent, most notably the Court’s decision in Romer v. Evans, 517 U.S. 620 (1996) and Lawrence v. Texas, 539 U.S. 558 (2003). In Romer the court faced a challenge to “Amendment 2” to the Constitution of the State of Colorado which prohibited “all legislative, executive or judicial action at any level of state or local government designed to protect... homosexual persons or gays and lesbians.” Id. at 624.

The Court found that Amendment 2 violated the Equal Protection Clause of the Federal Constitution. The Court stated that it is not “within our constitutional tradition to enact laws... singling out a certain class of citizens for disfavored legal status or general hardships...” Id. at 634. The Supreme Court concluded that “*Amendment 2* classifies homosexuals not to

further a proper legislative purpose but to make them unequal to everyone else." Id. at 636.

Even more recently, the Court decided Lawrence, supra, 539 U.S. at 558. In Lawrence, the question before the Court was the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct. Id. at 562. The Court concluded that petitioners were free as adults to engage in private conduct in the exercise of liberty under the Due Process Clause of the Fourteenth Amendment. Id. at 564.

The Court placed its decision in Lawrence in context of the long history of discrimination that lesbians and gay men have endured in this country. Importantly, the Court noted that the very concept of "the homosexual as a distinct category of person did not emerge until the late 19th century." Lawrence, supra, 539 U.S. at 568. Perhaps that is why it "was not until the 1970's that any State singled out same-sex relations for criminal prosecution..." because same-sex relationships were not occurring in the public arena. See Lawrence, supra, 539 U.S. at 570. The Lawrence Court recognized that while "[f]or centuries there have been powerful voices to condemn homosexual conduct as immoral... [the Court's] obligation is to define the liberty of all, not to mandate [its] own moral code." Id. at 570.

It was succinctly stated by the Supreme Court of California in In Re Marriage Cases, 183 P.3d 384 (Cal. 2008) that:

> [E]ven the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions. It is instructive to recall in this regard that the traditional, well-established legal rules and practices of our not-so-distant past (1) barred interracial marriage, (2) upheld the routine exclusion of women from many occupations and official duties, and (3) considered the relegation of racial minorities to separate and assertedly equivalent public facilities and institutions as constitutionally equal treatment.
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> [Id. at 853-854].

The Baker case was brought at a time when "the history of systemic and harsh discrimination against lesbians and gay men had barely been challenged." Bennett Klein and Daniel Redman, Commenting: From Separate to Equal: Litigating Marriage Equality in a Civil Union State, 41 Conn. L. Rev. 1381, 1385 (2009). As late as 1971, "no state even prohibited discrimination on the basis of sexual orientation in basic aspects of life such as employment and housing... and the lives of lesbians and gay men were largely invisible in the nation's courts." Ibid. Incredibly, until the 1970s, much of the mental health community still regarded lesbians and gay men as mentally ill. Klein,

supra, 41 Conn. L. Rev. at 1395. Lesbians and gay men still face widespread discrimination and are "among the most frequent victims of hate crimes." Ibid.

Fortunately, the position of gays and lesbians in this country has markedly improved in recent decades. Importantly, New Jersey's Legislature has often been at "the forefront of combating sexual orientation discrimination and advancing equality of treatment towards gays and lesbians." Lewis, supra, 188 N.J. at 213. As the Court noted in Lewis, "discrimination against gays and lesbians is no longer acceptable in this State, as is evidenced by the various laws and judicial decisions prohibiting differential treatment based on sexual orientation." Id. at 438.

While in Baker the Supreme Court dismissed the appeal for want of a substantial federal question, based on the evolution set forth herein, subsequent developments support the conclusion that the issues raised in Baker would no longer be considered unsubstantial.[6] Accordingly, in today's legal arena, Baker is not controlling.

[6] See also Smelt, supra, 374 F. Supp. 2d at 873 (the court found that developments since Baker indicate that "the questions presented in the Baker jurisdictional statement would [not] still be viewed by the Supreme Court as 'unsubstantial.'"; see also, In re Marriage of J.B. and H.B., 326 S.W. 3d 654 (2010) (finding Baker was not dispositive in a challenge to Article I, section 32(a) of the Texas constitution and section 6.204 of the Texas Family Code under the Equal Protection Clause).

Recently, the Ninth Circuit affirmed the District Court's ruling from Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010). Perry v. Brown, supra, No. 10-16696. Originally, in their motion for reconsideration, plaintiffs cited Perry in support of the proposition that excluding same-sex couples from the institution of marriage violates the Equal Protection Clause of the Fourteenth Amendment.[7]

In Perry, plaintiffs challenged a voter-enacted amendment to the California state constitution, known as Proposition 8, alleging Due Process and Equal Protection violations contrary to the Fourteenth Amendment. Plaintiffs sought a finding that its enforcement by state officials violated 42 U.S.C. § 1983. Perry, supra, 704 F. Supp. 2d at 927.

Judge Walker, writing the opinion for the District Court noted:

> The trial record shows that strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation. All classifications based on sexual orientation appear suspect, as the evidence

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[7] Notably, the Circuit Court in Perry v. Brown, supra, No. 10-16696 gave only a cursory analysis of Baker, finding that it need not decide whether Baker was controlling or the effect of subsequent doctrinal developments because it was considering an entirely different issue, not addressed by Baker, and "squarely controlled by Romer." Perry v. Brown, supra, No. 10-16696 at n. 14.

> shows that California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation. Here, however, strict scrutiny is unnecessary. Proposition 8 fails to survive even rational basis review.
>
> Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause, as excluding same sex couples from marriage is simply not rationally related to a legitimate state interest.
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> [Id. at 978.]

On appeal to the Ninth Circuit, Judge Stephen Reinhardt, writing for the three judge panel, upheld the District Court's ruling that Proposition 8 violated the Fourteenth Amendment to the United States Constitution. Judge Reinhardt relied heavily on Romer in which the United States Supreme Court held Amendment 2 to the Colorado Constitution, prohibiting the enactment of any laws protective of gays and lesbians, violated the Equal Protection Clause because "'[i]t is not within our constitutional tradition to enact laws of this sort' – laws that 'singl[e] out a certain class of citizens for disfavored legal status', which 'raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.'" Perry v. Brown, supra, No. 10-16696, quoting Romer, supra, 517 U.S. at 633-34.

In conducting a rational basis review, after evaluating several rationales to support Proposition 8, the Circuit Court

found Proposition 8 was similar to Amendment 2 because it singled out a certain class of citizens for disfavored treatment. Further, the Circuit Court found that Proposition 8 has "no apparent purpose but to impose on gays and lesbians... disapproval of their relationships, by taking away from them the official designation of marriage with its societally recognized status." Perry v. Brown, supra, No. 10-16696 (internal quotations omitted). Further, "[a]bsent any legitimate purpose for Proposition 8, [the court was] left with the inevitable inference that the disadvantage imposed is born of animosity toward, or, as is more likely with respect to Californians who voted for the Proposition, mere disapproval of, the class of persons affected." Ibid (internal quotations omitted).

The Supreme Court has found that "[e]nacting a rule into law based solely on the disapproval of a group... is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." Perry v. Brown, supra, No. 10-16696 (citing Romer, supra, 517 U.S. at 635). The Perry Court noted that "[j]ust as a desire to harm… cannot constitute a *legitimate* governmental interest… neither can a more basic disapproval of a class of people. Perry v. Brown, supra, No. 10-16696 (internal quotations omitted). The Perry Court found that Proposition 8 violated the Fourteenth Amendment because it was a classification undertaken for its own sake.

Here, under the third count, plaintiffs assert the Civil Union Act violates the Equal Protection Clause of the Fourteenth Amendment by denying them access to marriage and relegating them to a separate and arguably second class status, while not serving any legitimate state interest. The Civil Union Act, unlike Proposition 8, was intended to confer more benefits on same-sex couples, rather then take any away. However, the Civil Union Act is arguably similar because it singles out a certain class of citizens, namely gays and lesbians, for allegedly disfavored treatment.

While the Civil Union Act does bestow certain benefits on same-sex couples, it also denies them the designation of marriage for their committed relationships and it allegedly does not bestow upon plaintiffs *all* of the same benefits enjoyed by their heterosexual counter parts.

For all the reasons set forth herein, the court grants the motion for reconsideration. Accordingly, the matter shall proceed to trial on counts one and three.

At this juncture, the court leaves open the question of what standard of proof is applicable. The Court in Lewis previously found that there is no legitimate governmental purpose for denying same-sex couples the same benefits and responsibilities afforded to their heterosexual counter parts. Plaintiffs will have the opportunity to develop a full and

complete trial record in an effort to substantiate allegations of unequal treatment under the Civil Union Act.

In Lewis, the Court noted that the New Jersey Legislature made sexual orientation a "protected category" by enacting legislation committed to the "goal of eradicating discrimination against gays and lesbians." Lewis, supra, 188 N.J. at 452. The Supreme Court concluded in Lewis that "denying to committed same-sex couples the financial and social benefits and privileges given to their married heterosexual counterparts bears no substantial relationship to a legitimate governmental purpose." Id. at 457.

As noted heretofore, the Court held it was the Legislature's prerogative to determine how to provide same-sex couples with equal benefits; whether to open the institution of marriage to same-sex couples or create a parallel statutory structure. Accordingly, the Civil Union Act was enacted to "bridge" the inequality gap left by the Domestic Partnership Act.[8] Id. at 448.

[8] Today, many states recognize same-sex marriages as the result of legislation or judicial mandate. These include: New York, Massachusetts, Connecticut, Vermont, New Hampshire, Iowa and Washington State. In addition, while the New Jersey Legislature recently adopted legislation to legalize same-sex marriage, Governor Chris Christie vetoed the legislation and there are insufficient votes to override the veto.

The Lewis plaintiffs challenged the Domestic Partnership Act under the Equal Protection provisions of the State constitution, not the Federal Equal Protection Clause. With regards to sexual orientation as a classification under Federal case law, "[t]he [United States] Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes." Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 866 (8th Cir. 2006); see also Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004).

As the Lewis Court noted, the "New Jersey Constitution not only stands apart from other state constitutions, but also 'may be a source of individual liberties more expansive than those conferred by the Federal Constitution.'" Lewis, supra, 188 N.J. 415 at 465 (citing State v. Novembrino, 105 N.J. 95, 144-45 (1987)).

For the most part, the justification offered by the State to support the distinction between heterosexual and same-sex couples in the Civil Union Act is "tradition." Since marriage has historically been defined as the union between a man and woman, the State argues this is a sufficient basis to distinguish between heterosexual and same-sex couples.

Not surprisingly, courts have held that tradition alone "never can provide sufficient cause to discriminate against a protected class, for '[neither] the length of time a majority

[of the populace] has held its convictions [nor] the passions with which it defends them can withdraw legislation from [the] [c]ourt's scrutiny.'" Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 479 (Conn. 2008)(citing Bowers v. Hardwick, 478 U.S. 186 (1986) (Blackmun, J., dissenting)). "If a simple showing that discrimination is traditional satisfies equal protection, previous successful equal protection challenges of invidious racial and gender classifications would have failed." Varnum v. Brien, 763 N.W.2d 862, 898 (Iowa 2009).

Finally, to state a claim for relief in an action brought under Section 1983, respondents must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999). "The ultimate issue in determining whether a person is subject to suit under [Section] 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'" Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982)(citing Lugar v. Edmondson Oil Co., 457 U.S. 922. 937 (1982)).

Defendants challenge the premise that alleged unequal treatment of same-sex couples, under the Civil Union Act, constitutes state action under the Fourteenth Amendment's Equal

Protection Clause. Defendants rely on Mentavlos v. Anderson, 249 F. 3d 301 (4th Cir. 2001), cert. denied, 534 U.S. 952 (2001).

In Mentavlos, the Fourth Circuit considered the question of whether two male cadets at The Citadel, a state-sponsored military college, acted under the color of state law. The Circuit Court found that because the cadets' actions were not "coerced, compelled, or encouraged by any law, regulation or custom of the State of South Carolina or The Citadel," the cadets' actions were not fairly attributable to the state and thus, not actionable under Section 1983. Id. at 323.

In Mentavlos, unlike in the present matter, there was no statute or regulation being challenged. Moreover, plaintiffs in the present matter do not seek to impose liability on the private actors discussed in the complaint.[9]

Plaintiffs allege the Civil Union Act and its enforcement by certain state officials, who are named defendants, violates the Equal Protection Clause of the Fourteenth Amendment. At this juncture, the court is satisfied there is sufficient state

[9] The United States Supreme Court has concluded that acts of private parties were fairly attributable to the state on certain occasions such as when the private party acted in concert with state actors. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 155-56 (1970) (finding that a restaurant acted under color of state law because it conspired with a town sheriff, a state actor, in depriving a teacher of federal rights).

action to permit the claim under the Federal Equal Protection Clause to proceed.

Accordingly, plaintiffs' motion for reconsideration is **GRANTED** and count three is hereby reinstated.