
)	SUPERIOR COURT OF NEW JERSEY,
)	APPELLATE DIVISION
MARK LEWIS, <i>et al.</i> ,)	Docket No. A-2244-03T5
Plaintiffs-Appellants)	
)	
<i>versus</i>)	ON APPEAL FROM:
)	Mercer County, Law Division
GWENDOLYN L. HARRIS, <i>et al.</i> ,)	Docket No. MER-L-15-03
Defendants-Respondents)	
)	SAT BELOW:
)	Hon. Linda R. Feinberg, AJSC

BRIEF *AMICI CURIAE* OF
THE NEW JERSEY COALITION TO PRESERVE AND PROTECT MARRIAGE,
THE NEW JERSEY FAMILY POLICY COUNCIL,
THE NEW JERSEY CATHOLIC CONFERENCE,
AND MR. AND MRS. DAVID C. HESLINGTON

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INTEREST OF AMICI

The New Jersey Coalition to Preserve and Protect Marriage (formerly referred to in the trial court as the New Jersey Coalition for Traditional Marriage) is a coalition of individuals and organizations dedicated to the preservation of marriage as a key social institution which benefits adults, children, and society at large. The Coalition believes that redefining marriage to include same-gender couples will undermine the public purposes and benefits of marriage. The Coalition was an amicus in the proceedings below.

The New Jersey Family Policy Council (NJFPC) is a nonprofit organization established with a mission "to intervene and respond to the breakdown of the traditional family." The NJFPC pursues this mission through a variety of community initiatives, including Marriage Builders and Father Builders Programs. NJFPC believes that the union of a man and woman in marriage establishes a unique human community in which children are naturally conceived and raised. The NJFPC seeks to assist individuals, houses of worship, and businesses in efforts to preserve marriage between one man and one woman, believing that union to be vitally important to the wellbeing of our society. The NJFPC was an amicus in the proceedings below.

David C. Heslington and Linda K. Heslington are a married couple, married in 1974 and residents of New Jersey. They were

amici in the proceedings below.

The New Jersey Catholic Conference is the public policy voice for the Roman Catholic Church in New Jersey, representing the views of the Catholic Church and of the New Jersey Bishops in matters of marriage, family, health, education, welfare, and civil rights. The Catholic Church has long advocated for the civil rights of all individuals, while also articulating the importance of marriage as the union of a man and a woman for the wellbeing of family and society. See, e.g., Congregation for the Doctrine of the Faith. Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons (July 2003) (available at www.vatican.va); U.S. Conference of Catholic Bishops, Between Man and Woman: Questions and Answers about Marriage and Same-Sex Unions (November 2003) (available at www.usccb.org). The Catholic Conference seeks to join this brief, believing that the outcome of this litigation will have broad and significant implications for the wellbeing of society.

SUMMARY OF ARGUMENT

Marriage - the publicly sanctioned union of a man and a woman - is a universal social institution, appearing in some form in every known human society. Unlike purely private relationships, marriage is a uniquely public union, recognized and regulated by law.

Marriage is recognized in law because of the biological

reality that sex between men and women often produces children, and because of the twin social realities that societies need to reproduce themselves and children need mothers and fathers. No other relationship fulfills the same public purposes or requires the same legal regulation. The marriage of a man and a woman is the only relationship which both provides children with a mother and father and requires legal regulation because of the potential of reproduction.

Recent developments with respect to contraception, adoption and domestic partnerships further highlight the ongoing significance of marriage as society's means of encouraging men and women to form permanent sexual unions which will produce the next generation and provide the ideal environment for the raising of children. Redefining marriage without an alternative theory of its public purposes will divorce marriage from these important social functions, undermining any legal justification for the regulation of marriage and leading ultimately to the abolition of marriage altogether.

New Jersey laws recognizing marriage as the union of a husband and wife reflect the shared wisdom of the United States Congress, the United States Supreme Court, and 48 sister states. With little explanation rooted in New Jersey case law, Plaintiffs would have this Court reject the national consensus as irrational, urging instead the example of Massachusetts, the

lone American state to have had same-sex marriage thrust upon it. New Jersey courts have declined to follow the example of Massachusetts in other related areas, and should similarly reject the Massachusetts example here.

Amici have strived to present arguments that will assist the Court in its decision of this case, but without repeating arguments that have been made by the parties or other amici.

ARGUMENT

Plaintiffs-Appellants are seven same-sex couples. They also are "gay and lesbian" couples.¹ In June of 2002, each of these seven couples presented themselves to county or municipal

¹ These terms are not interchangeable. The Plaintiffs-Appellants' "affectional or sexual orientation" (to use the term employed by the Law Against Discrimination (LAD), N.J. Stat. Ann. § 10:5-5hh) has no necessary relevance to this case. If Plaintiffs-Appellants win this lawsuit, persons of the same sex will be able to "marry" in New Jersey irrespective of their "affectional or sexual orientation." It is safe to assume that the first same-sex "marriages" in New Jersey would be between homosexuals, but it is naïve to suppose that only homosexuals will take advantage of a radical redefinition of marriage. New Jersey's taxpayers and estate planners are more ingenious than that.

officials and applied for a marriage license. Their applications were denied. They then sued, alleging that "this governmental discrimination in marriage" (as they call it) violates Article I, paragraph 1 of the Constitution of New Jersey. (Pb1.) Plaintiffs-Appellants lost at the trial court, and they should lose again on appeal, because each of them was treated exactly the same as every other person who applies for a marriage license but fails to meet its essential requirements.

In the first paragraph of their brief to this Court, Plaintiffs-Appellants say they are "challeng[ing] the State's denial of each plaintiff's right to marry the person he or she loves." (Pb1.) With all respect, the State does not know (or ask) whom an applicant loves; nor does it know (or ask) about an applicant's affectional or sexual orientation or preferences. The State does ask if one applicant is a man and the other is a woman because that question goes to the heart of what marriage means. If the answer is "no," then no marriage is possible.

Marriage is, and always has been, the uniting of the sexes, male and female. Every marriage ever solemnized under the laws of New Jersey has united one man and one woman. This Court should affirm that no couple has the capacity to marry unless one-half of that marital union is male and the other half is female.²

² If Plaintiffs-Appellants are successful, they will triple

The marital union is unique, and it is for reasons unique to marriage that governments, including the government established by the people of New Jersey, sanction, regulate and (sometimes) promote marriage. New Jersey has no obligation to extend marriage to other kinds of couples, irrespective of how devoted those other couples are to one another or their children.

When considering constitutional challenges to a legislative enactment, it is well established that, "[t]he Legislature is presumed to have a valid classification in mind," and in identifying this valid classification, "the court is not limited to the stated purpose of the legislation, but should seek any conceivable rational basis." Mahwah Twp. v. Bergen County Bd. Of Taxation, 98 N.J. 268, 286 (1985) (emphasis in original). This presumption of constitutionality may be overcome "only by proofs that preclude the possibility that there could have been any set of facts known to the legislative body . . . which would rationally support a conclusion that the enactment is in the

(not merely double) the possible combinations for marriage. There will be male-female couples; female-female couples; and male-male couples. These combinations are not identical or interchangeable. Only the sexually integrated union of a man and a woman has, or can have, the essential attributes of a marriage.

public interest.” Hutton Pk. Gardens v. West Orange Town Council, 68 N.J. 543, 565 (1975); see also Caviglia v. Royal Tours of America, 178 N.J. 460, 472 (2004) (“If the statute is founded on some conceivable rational basis to promote a public purpose, it will survive constitutional scrutiny.”).

As noted by the Attorney General on behalf of the Defendants-Appellants, “The State’s interest in preserving the long-accepted definition of marriage . . . is substantial,” (Db 42) and may be established in a variety of ways, including “by reference to studies . . . legislative history, consensus, and even common sense.” Hamilton Amusement Center v. Verniero, 156 N.J. 254, 271 (1998), cert denied 527 U.S. 1021 (1999). In this brief, we further articulate several of the substantial interests which justify the legal definition of marriage and the Legislature’s chosen approach for expanding legal recognition of same-sex unions.

I. MARRIAGE IN NEW JERSEY AND ELSEWHERE IS NEITHER IRRATIONAL NOR INVIDIOUS, BUT RATHER IS ABSOLUTELY ESSENTIAL TO THE CONTINUING WELL-BEING OF MEN AND WOMEN, OF CHILDREN, AND OF SOCIETY AND THE STATE.

Adults have many kinds of close personal relationships that are highly valued and respected. Among these varied and diverse relationships, marriage is the one kind of relationship that gives rise to extensive state involvement. Why does government burden marriage with regulations as well as surround it with

benefits? The answer to this question bears not only upon the present litigation, but upon the continued vitality of any marriage law or regulation.

A. Marriage regulates sexual relationships between the sexes, providing a context in which procreation may be embraced.

Marriage is a virtually universal human institution. Virtually every known human society has some form of marriage.³ While the structure of marriage in a particular culture varies considerably, it always has something to do with creating a public (not private) sexual union between a man and woman so that socially-valued children have both a mother and a father, and so that society has the next generation it needs.

Why does the marriage idea arise again and again in widely varying societies? Because sexual relationships between men and women create children. Every society must find some way to regulate these relationships, to channel the sexual and

³ William J. Doherty, et al., Why Marriage Matters: Twenty-One Conclusions from the Social Sciences 8-9 (New York, Institute for American Values 2002) ("Marriage exists in virtually every known human society. . . . At least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution. As a virtually universal human idea, marriage is about the reproduction of children, families, and society. . . . marriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce."); see also Peter Lubin & Dwight Duncan, Follow the Footnote or The Advocate as Historian of Same-sex Marriage, 47 Cath. U. L. Rev. 1271 (1998).

reproductive energies of men and women attracted to the opposite sex into the kind of sexual union where (a) childbearing is acceptable because (b) children and society's interests are protected.

The law presumes that a marriage will produce children, regulating and affording benefits on the basis of that presumption: "The state has an interest in all opposite-sex couples because all are theoretically capable of procreation." William C. Duncan, The State Interests in Marriage, 2 Ave Maria L. Rev. 153, 166 (Spring 2004). That childbearing opportunities inherent in the male/female marital union are occasionally unrealized (i.e., exceptions to the general pattern) does nothing to undermine the basis for the rule of recognition of the special status of traditional marriage.

By affirming a particular kind of relationship as the social ideal, the state attempts to both discourage unmarried childbearing and to encourage sufficient childbearing within marriage to reproduce the population. As the three dissenting justices in Goodridge v. Dept. of Public Health wrote, "the reasons justifying the civil marriage laws are inextricably linked to the fact that human sexual intercourse between a man and a woman frequently results in pregnancy and childbirth." Goodridge v. Dept. of Public Health, 798 N.E.2d 941, 979, n.1 (Mass. 2003) (Sosman, J. dissenting).

1. New Jersey courts have long recognized procreation as one of the "most important objects of the institution of marriage."

For most of our history, this link between marriage, procreation, and the raising of children was uncontroversial, not only as a matter of demographic fact, but also as a legal justification for laws regulating the institution of marriage. The state's interest in this regard is not merely one of increasing the fertility rate (though a minimal fertility level is necessary to maintain any civil polity), but rather of promoting an optimal context for procreation.

As articulated by the Court of Errors and Appeals in 1873 (and again in 1941), "One of the leading and most important objects of the institution of marriage under our laws is the procreation of children, who shall with certainty be known by their parents as the pure offspring of their union." Carris v. Carris, 24 N.J. Eq. 516 (N.J. Err & App. 1873) (quoting Reynolds v. Reynolds, 85 Mass. 605, 610 (1862)); also quoted in Lindquist v. Lindquist, 130 N.J. Eq. 11, 21 (Err. & App. 1941)). Though the Court's terminology appears today somewhat outmoded, it touches upon the heart of the state's interest in marriage - with marriage as the framework within which society naturally reproduces itself, one family at a time.

Virtually every New Jersey case which has considered the public (legal) purposes of marriage has deemed the link between

marriage and procreation as central to the state's justification for marriage laws and regulations. See Raymond v. Raymond, 79 A. 430, 431 (N.J. Ch. 1909) ("The Massachusetts cases cannot be regarded as authority here. The relation of marriage cannot exist between man and man, or between woman and woman. The human race was created male and female with the manifest purpose of perpetuating the race. . . . The controlling purpose of marriage is to enable the sexes to gratify lawfully the natural desire for procreation which has been implanted in them, that the race may be preserved upon the earth"); Davis v. Davis, 90 N.J. Eq. 158, 161 (Ch. Div. 1919) ("Procreation, if not the sole, is at least an important, reason for the existence of the marriage relation."); Bolmer v. Edsall, 90 N.J. Eq. 299, 106 A. 646, 648 (N.J. Ch. 1919) (describing the ends of marriage as "the procreation of children and the pleasures and enjoyments of matrimony"); Turney v. Avery, 92 N.J. Eq. 473, 474 (Ch. Div. 1921) ("Lord Penzance has observed that the procreation of children is one of the ends of marriage. I do not hesitate to say that it is the most important object of matrimony, for without it the human race itself would perish from the earth."); Kreyling v. Kreyling, 20 N.J. Misc. 52 (Ch. Div. 1942) (quoting Turner, Raymond and Davis); Melia v. Melia, 94 N.J. Super. 47, 50 (Ch. Div. 1967) (speaking of the public purposes of marriage: "First among these purposes is procreation of the human race, as

the fruit of a consensual, libidinal and instinctual relationship"); Williams v. Witt, 98 N.J. Super. 1, 3 (App. Div. 1967) ("[S]ince procreation is considered to be an essential element of the marriage, there exists an implied promise at the time of the marriage to raise a family. An undisclosed contrary intention, therefore, constitutes a fraud going to an essential of the marriage."); Costello v. Porzelt, 116 N.J. Super. 380, 385 (Ch. Div. 1971) ("The cases confirm the proposition that any physical or mental condition or behavior which strikes against the central purpose of marriage, namely its sexual aspect culminating in procreation, goes to the essence of the marital relation.").

2. The Legislature, other courts and legal scholars agree that the link between marriage, procreation and childrearing remains an important governmental interest today.

Some have suggested that marriage and procreation have been delinked in recent decades through the widespread use of contraceptives, high out-of-wedlock birth rates, and court decisions such as Griswold v. Connecticut, 381 U.S. 479 (1965). The Massachusetts Supreme Court in Goodridge acknowledged the historical link between marriage, procreation and childrearing, yet rejected any ongoing connection, stating:

It is hardly surprising that civil marriage developed historically as a means to regulate heterosexual conduct and to promote child rearing, because until

very recently unassisted heterosexual relations were the only means short of adoption by which children could come into the world, and the absence of widely available and effective contraceptives made the link between heterosexual sex and procreation very strong indeed But it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been. As one dissent acknowledges, in "the modern age," "heterosexual intercourse, procreation, and child care are not necessarily conjoined."

Goodridge v. Dept. of Publ. Health, 798 N.E.2d 941, 961, n.23 (Mass. 2003) (quoting portions of Justice Cordy's dissenting opinion).

Is it really true that there is no surviving relationship between "heterosexual sex, procreation, and child care"? Id. Despite the widespread availability and use of contraceptives over the past forty years, recent reports indicate that almost a third of all births between 1990 and 1995 were unintended, including 56% of all births to unmarried women. In contrast, just 19% of births to married women were unintended. J. Abma, et al., Fertility, family planning, and women's health: New data from the 1995 National Survey of Family Growth, National Center for Health Statistics. Vital Health Stat 23(19) at 25 (table 14) (1997). The number of unintended pregnancies (as opposed to births) is even higher. According to a study by the Alan Guttmacher Institute, 49% of all pregnancies in 1994 were unintended. Stanley K Henshaw, Unintended Pregnancies in the United States, 30 Family Planning Perspectives at 26 (1998). By

their late 30's, 60 percent of American women have had at least one unintended pregnancy. Id. at 28.

Whatever the theoretical impact of contraception, heterosexual sex continues to produce children, with significant impact for the government. In 1997, the New Jersey Legislature found that: "Out-of-wedlock adolescent births are a serious problem facing the State of New Jersey and the nation," proceeding to list various "serious social consequences" which flow from out-of-wedlock births to young women. N.J. Stat. Ann. § 26:2-170 (2004).

The availability of contraceptives has done little to reduce the impact of out-of-wedlock births, and cannot be seen to reduce the state's interest in encouraging men and women to enter marital unions. The vast majority of children born to a married couple will have the benefit of being raised by their own mother and father - children conceived in nonmarital unions seldom receive this birthright.

It is thus reasonable for, and indeed incumbent upon, government to urge men and women in a sexual relationship to accept both the recognition and regulation of marriage. As one scholar stated, "Society has compelling interests in protecting the social institution that has best furthered social interests in procreation, in maintaining the clear social identity of that institution, and in preserving the linkage that institution

forges among sex, procreation, and child rearing.” Lynn D. Wardle, “Multiply and Replenish”: Considering Same Sex Marriage in Light of State Interests in Marital Procreation, 24 Harv. J.L. & Pub. Pol’y 771 at 784 (2001). The dissenting justices in Goodridge echoed this theme, “Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized.” Goodridge at 995.

Numerous courts have also recognized that the state purpose of furthering procreation where both parents are present to raise the child is at least rational, if not compelling. Adams v. Howerton, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), aff’d 673 F.2d 1036 (9th Cir. 1982) (“state has a compelling interest in encouraging and fostering procreation of the race”); Dean v. District of Columbia, 653 A.2d 307, 337 (D.C. 1995) (finding that this “central purpose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples”); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), appeal dismissed for want of a substantial federal question, 409 U.S. 810 (1972) (“The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis”).

Even the United States Supreme Court has recently supported this justification, describing two "important governmental objectives" which reinforce the link between marriage and procreation. The first interest articulated by the Supreme Court in Nguyen v. I.N.S., 533 U.S. 53 (2001), is the role of marriage in "assuring that a biological parent-child relationship exists." While admittedly less than perfect, marriage is the most reliable indicator (absent intrusive genetic testing) of a biological tie between parent and child. With the legal presumption of paternity under both New Jersey and federal law, 42 U.S.C. § 666(a)(5)(G), N.J. Stat. Ann. § 9:17-43 (2004), together with the marital expectations of monogamy and fidelity, marriage provides a basis for the legal and factual assumption that a married man is the father of his wife's child. Extending the definition of marriage to include same-sex couples would not only fail to advance this "important governmental interest," but would actively undermine the signaling function of marriage with respect to any real connection between marriage and biological parenting.⁴

⁴ A state's desire to protect the biological relationship between parents and children does not require a state to outlaw adoptions or otherwise to prevent parents from raising children to whom they are not biologically related. It does, however, allow the State to express a preference for biological parents

The second important governmental interest articulated by the Supreme Court "is the determination to ensure that the child and citizen parent have some demonstrated opportunity to develop a relationship that consists of real, everyday ties providing a connection between child and citizen parent." Nguyen v. I.N.S., 533 U.S. 53, 54 (2001). As the Supreme Court noted, this connection between mother and child is inherent in birth, but the connection between father and child is more tenuous. More than any other relationship, marriage connects fathers to their children, both in a legal sense and also in terms of the "real, everyday ties" that give meaning to parent-child relationships. Conversely, children raised by same-sex couples are denied the opportunity to develop "real, everyday ties" with at least one of their biological parents. Id. at 64. In this way, same-sex marriages "generally do not advance the social interest in responsible procreation; rather, they impair the integrity of the institution that has best been able to further the social interests in responsible procreation." Lynn D. Wardle, "Multiply and Replenish": Considering Same Sex Marriage in Light of State Interests in Marital Procreation, 24 Harv. J.L. & Pub. Pol'y 771

"whom our society . . . [has] always presumed to be the preferred and primary custodians of their minor children." Reno v. Flores, 507 U.S. 292, 310 (1993).

at 797 (2001).

Even as Justice Sandra Day O'Connor recently joined the United States Supreme Court's decision striking down anti-sodomy laws in Lawrence v. Texas, she gave as an example of a "legitimate state interest" "preserving the traditional institution of marriage." 123 S.Ct. 2472, 2487-88 (2003) (O'Connor, J., concurring).

Society needs children, and it is because sexual relationships between husbands and wives often produce children that we regulate such relationships through marriage. Consistently recognized by New Jersey courts for over a century, the potential for procreation distinguishes sexual relationships between men and women from other personal relationships (both sexual and non-sexual). Marriage provides the optimal context in which procreation and childrearing can occur, maximizing benefit to the child and minimizing the need for state intervention.

3. Legislation providing benefits to domestic partners and judicial decrees authorizing second-parent adoption do not undermine the State's compelling interest in marriage and do not affect the State's constitutional power to define and protect marriage uniquely.

(1) The Domestic Partner Act

Recently adopted legislation has made New Jersey one of just five states with a statewide structure for providing marriage-like benefits to same-sex couples. N.J. Stat. Ann. §

26:8A-2. Whatever the independent merits of this policy may be, it cannot be read as a constitutional mandate to redefine marriage. To the contrary, as was noted by the trial court, such statutory advances clearly indicate that "the legislature is prepared to tackle the difficult social issues surrounding same-sex relationships in this State." Trial Ct. Op. at 65.

The Domestic Partnership Act is intended to address financial and intangible needs of couples who have chosen an alternative family form. See N.J. Stat. Ann. § 26:8A-1 et seq. (2004). In adopting the Domestic Partnership Act, the Legislature acknowledged that many unmarried individuals live together in "important personal, emotional and economic committed relationships with another individual," and that these relationships benefit the state in providing a "private network of support for the . . . health of their participants." N.J. Stat. Ann. § 26:8A-2 (2004). Based upon the stated public benefit of these relationships, the Legislature granted formal recognition and statutory benefits to domestic partnerships. Id.

In adopting the Domestic Partnership Act, the Legislature expressed concern for the needs of individuals who live in alternative family forms. Such policy, however, is not inconsistent with state laws preferring marriage as the ideal structure for producing and raising the next generation. Certainly the Legislature need not denigrate gays and lesbians

in order to justify the legal recognition of marriage.

To the contrary, the Legislature's obvious concern for the well-being of gay and lesbian couples undermines the Plaintiffs' suggestion that the marriage laws are rooted in animus against homosexuals. Public policy is often faced with a tension between promoting an ideal and providing for real-life needs. The Legislature's recognition and protection of the needs of alternative families is not, and should not be construed as, a repudiation of the marriage ideal.

(2) Second-Parent Adoptions

Since the early 1990's, New Jersey courts have interpreted the adoption statutes dealing with step-parent adoption as permitting an unmarried individual to adopt his or her partner's children where such adoption is in the best interests of the child. In the Matter of the Adoption of a Child by J.M.G., 267 N.J. Super. 622 (App. Div. 1993); see also In the Matter of the Adoption of Two Children by H.N.R., 285 N.J. Super. 1 (App. Div. 1995).

Unlike marriage, adoption does not exist to affirm a social ideal, or to widen the choice of adults in establishing family relationships. Adoption (like foster care) exists in law to give homes to children whose biological parents are unable or unwilling to meet their obligations as parents. See, e.g., Lofton v. Sec'y of the Dep't of Children and Family Services, 358 F.3d

804 (11th Cir. 2004).

Adoptions are determined on a case-by-case basis, with a court assessing the best interests of each individual child. Where a child's own biological parents are either unwilling or unable to adequately care for the child, family courts have the responsibility to identify the next best alternative for that child. When a child has only one parent, the state may decide it is in the child's best interest to give him or her a second parent, even if those parents are not married. But in that case, the child has already been deprived of his or her own married mother and father, and the state is making judgments about what, given this absence, is in the child's best interests. Such decisions are modeled after the natural family structure - hence children are adopted by individuals and couples, not by parental trios or quartets, and children living with their own mother and father do not gain additional parents by adoption.

Marriage is the state's ideal way of providing children with mothers and fathers. Adoption is the way we provide for the best interests of children who have been denied that ideal. The judicial interpretation given to New Jersey adoption laws, even if that decision were given the weight of legislative policy, does nothing to undermine the independent judgment of the Legislature with respect to marriage.

B. Marriage promotes optimal child rearing, fosters our obligations to and devotion for children, helps

minimize the number of fatherless or motherless households, and helps protect the most vulnerable members of society—especially young children and their caregivers.

Marriage is a key social institution, intimately involved with how committed we as a society are to two key ideas: that children need mothers and fathers and that marriage is the main way that we create stable, loving mother-father families for children. To date, we know very little about the outcomes of children raised in unisex households, justifying (if not strongly urging) the Legislature's cautious, incremental steps in the legal recognition and sanction of such households. In light of the Legislature's obvious concern and attentiveness to this important issue, this Court should not interfere with the reasoned approach which has been adopted by the Legislature.

1. The social science consensus recognizes that married mothers and fathers are most likely to provide the optimal environment for child well-being.

Forty years of social experimentation has led to a broad consensus across ideological lines that family structure matters for child wellbeing. All things being equal, children do better when their own mothers and fathers get and stay married. Not just any two adults can provide these same benefits. Both adults and children are better off living in communities where more children are raised by their own married mother and father. William J. Doherty, et al., Why Marriage Matters: Twenty-One

Conclusions from the Social Sciences 8-9 (New York, Institute for American Values 2002). Both adults and children live longer, have higher rates of physical health and lower rates of mental illness, experience poverty, crime, and domestic abuse less often, and have warmer relationships, on average, when their mothers and fathers get and stay married. See Maggie Gallagher, What is Marriage For? The Public Purposes of Marriage Law, 62 La. L.Rev. 773 (2002).

Recent reports from several mainstream child welfare and research organizations illustrate this consensus. A recent Child Trends research brief summed up the scholarly consensus:

Research clearly demonstrates that family structure matters for children, and the family structure that helps the most is a family headed by two-biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes.... There is thus value for children in promoting strong, stable marriages between biological parents.⁵

A Center for Law and Social Policy (CLASP) Brief concludes, "Research indicates that, on average, children who grow up in

⁵ Kristin Anderson Moore, et al., "Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?" Child Trends Research Brief (Washington, D.C., Child Trends) (June 2002) at 1 (available at <http://www.childtrends.org/PDF/MarriageRB602.pdf>). This research brief on family structure does not compare outcomes for children in same-sex couple households to children in other types of families. See also Robert I. Lerman, Impacts of Marital Status and Parental Presence on the Material Hardship of Families with Children (Washington, D.C., Urban Institute) (July 2002) at 27.

families with both their biological parents in a low-conflict marriage are better off in a number of ways than children who grow up in single-, step-, or cohabiting-parent households." Mary Parke, Are Married Parents Really Better for Children? What Research Says About the Effects of Family Structure on Child Well-Being, CLASP Pol'y Br. No. 3 (May 2003) at 6; See also, Matthew D. Bramlett & William D. Mosher, First Marriage Dissolution, Divorce, and Remarriage: United States, CDC Advance Data No. 323 (May 31, 2001).

With a broad research consensus showing that children are best served when raised in a family "with both their biological parents in a low-conflict marriage," the state has a legitimate interest in recognizing and promoting unions which can provide this environment for a child.

2. Very little is known regarding the outcomes of children raised in unisex households, justifying legislative caution.

Despite frequent claims that children raised by two parents of the same sex do as well as children raised by a mother and father, social scientists have begun to note significant limitations in the body of research supporting such claims. Perhaps the most thorough critique was prepared by Steven Nock, a sociologist at the University of Virginia, who was asked to review several hundred studies as an expert for the Attorney General of Canada in Halpern et al. v. Attorney General of

Canada, Case No. 684/00 (Ont. Super. Ct. of Justice 2000). After reviewing the studies, Professor Nock concluded:

Through this analysis I draw my conclusions that 1) all of the articles I reviewed contained at least one fatal flaw of design or execution; and 2) not a single one of those studies was conducted according to general accepted standards of scientific research.

Nock Aff. ¶ 3, Halpern v. Attorney General of Canada, Case No. 684/00 (Ont. Sup. Ct. of Justice) (available at http://marriagelaw.cua.edu/cases/Canada/ontario/halpern/aff_nock.pdf).

Even scholars who are enthusiastic about same-sex parenting concede that "there are no studies of child development based on random, representative samples of [same-sex couple] families." Judith Stacey and Timothy Biblarz, (How) Does the Sexual Orientation of Parents Matter?, 66 Am. Soc. Rev. 159, 166 (2001). Charlotte Patterson, perhaps the most prominent researcher on gay and lesbian parenting, acknowledges that "most studies have compared children in divorced lesbian mother-headed families with children in divorced heterosexual mother-headed families," providing no basis of comparison between children raised by their own mother and father and children raised by two parents of the same sex. Charlotte J. Patterson et al., "Children of Lesbian and Gay Parents: Research, Law and Policy," in Children and the Law: Social Science and Policy 10-11 (Bette L. Bottoms et al., eds. 2000).

While Plaintiffs-Appellants rely heavily on the majority

opinion in Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003), neither the Plaintiffs-Appellants here nor the Goodridge opinion itself addressed the concerns raised by three of the court's seven members:

Conspicuously absent from the court's opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results. Notwithstanding our belief that gender and sexual orientation of parents should not matter to the success of the child rearing venture, studies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples. . . . Even in the absence of bias or political agenda behind the various studies of children raised by same-sex couples, the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. Gay and lesbian couples living together openly, and official recognition of them as their children's sole parents, comprise a very recent phenomenon, and the recency of that phenomenon has not yet permitted any study of how those children fare as adults and at best minimal study of how they fare during their adolescent years. The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes? Our belief that children raised by same-sex couples should fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief. The Legislature is not required to share that belief but may, as the creator of the institution of civil marriage, wish to see the proof before making a fundamental alteration to that institution.

Id. at 979-80 (Sosman, J., dissenting).

C. Marriage Secures the Basic Unit of Society; It Fosters Civic Virtue, Democracy, Social Order, and Liberty by Allowing Individuals to Flourish in the Most Important of Life's Mediating Institutions

The idea that marriage is somehow closely linked with the future of a civilization has long been recognized in the American legal system. As one scholar put it, "regulation of marital status has always been a fundamental element in helping human society induce the behavior needed for social as well as individual survival." Bruce C. Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463, 470 (1983).

Justice Holmes observed that "some form of permanent association between the sexes" is one of the rudimentary characteristics of civilization. Oliver Wendell Holmes, Jr., Natural Law, 32 Harv. L. Rev. 40, 41 (1918). Our own Supreme Court in 1979 recognized that "the structure of society itself largely depends upon the institution of marriage The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." Kozlowski v. Kozlowski, 80 N.J. 378, 386 (1979) (quoting Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976)).

In 1888, the U.S. Supreme Court described marriage as "the foundation of the family and of society, without which there

would be neither civilization nor progress." Maynard v. Hill, 125 U.S. 190, 211 (1888). In Skinner v. Oklahoma, the Court acknowledged that marriage "and procreation are fundamental to the very existence and survival of the race." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). In Reynolds v. United States, the Court acknowledged that the legal redefinition of marriage (in the context of polygamy) would significantly impact the social structure of the nation, emphasizing the authority of the legislature to choose one form of marriage over another: "there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." Reynolds v. United States, 98 U.S. 145, 166 (1878).

The cultural significance of redefining marriage is not limited to the context of polygamy. Already in Massachusetts, just months after the first same-sex marriage licenses have been issued there, numerous questions have arisen. As Massachusetts Governor Mitt Romney recently testified before the United States Senate Judiciary Committee, these questions involve not only questions of employment and governmental benefits, but also deep cultural issues such as the legal replacement of "mothers" and "fathers" with "Parent A" and "Parent B." Preserving Traditional Marriage: A View from the States, 108th Cong. Senate Judiciary

Comm. (June 22, 2004) (written testimony of Governor Mitt Romney).

Throughout the history of Western civilization, and certainly since the founding of the United States more than 200 years ago, the marriage-based familial structure has provided the basis of civil society, as parents infuse their own children with the education, values and training necessary for continued self-government. As described by one scholar, "the family in a democratic society not only provides emotional companionship, but is also a principal source of moral and civic duty." Hafen, supra, at 477.

The health of marriage in a society in turn bears a very immediate connection to societal health and welfare. High rates of family fragmentation also generate substantial taxpayer costs. According to a report by over one hundred family scholars and civic leaders released in 2000:

Divorce and unwed childbearing create substantial public costs paid by taxpayers. Higher rates of crime, drug abuse, education failure, chronic illness, child abuse, domestic violence, and poverty among both adults and children bring with them higher taxpayer costs in diverse forms: more welfare expenditure; increased remedial and special education expenses; higher day-care subsidies; additional child-support collection costs; a range of increased direct court administration costs incurred in regulating post-divorce or unwed families; higher foster care and child protection services; increased Medicaid and Medicare costs; increasingly expensive and harsh crime-control measures to compensate for formerly private regulation of adolescent and young-adult behaviors; and many other similar costs. While no

study has yet attempted precisely to measure these sweeping and diverse taxpayer costs stemming from the decline of marriage, current research suggests that these costs are likely to be quite extensive.

The Marriage Movement: A Statement of Principles (New York, Institute for American Values 2000); see also N.J. Stat. Ann. § 26:2-170 (describing "serious social consequences" of out-of-wedlock adolescent pregnancy, including poverty, educational failure, and unemployment).

Marriage is a normative social institution. Marriage is not primarily a way of expressing approval for infinite variety of human affectional or sexual ties; it consists, by definition, of isolating and preferring certain types of unions over others. By socially defining and supporting a particular kind of sexual union, the state defines for its young - as it is constitutionally entitled to do - what the preferred relationship is and what purposes it serves.

II. REDEFINING MARRIAGE WILL CUT OFF THE RATIONAL CONNECTION BETWEEN MARRIAGE AND MANY OF THE PUBLIC GOODS WHICH MARRIAGE CURRENTLY PROVIDES.

Once we acknowledge the gravity of the marriage crisis we now face, and the importance of marriage as a social institution, the single most important question on unisex marriage becomes: will this legal transformation strengthen or weaken marriage as a social institution? Marriage is not just a legal construct; it is socially and culturally a child-rearing

institution, the place where having children and creating families is actually encouraged, rather than merely tolerated.

A. Redefining marriage will undermine the message that mothers and fathers both matter to their children.

In endorsing same-sex marriage, law and government will be making a powerful statement: our government no longer believes children deserve mothers and fathers. Two fathers or two mothers are not only just as good as a mother and a father, they are just the same.

The government promotion of this idea will likely have some effect even on people who are currently married, who have been raised in a particular culture of marriage. But this new idea of marriage, sanctioned by law and government, will certainly have a dramatic effect as the next generation's attitudes toward marriage, childbearing, and the importance of mothers and fathers are formed. If two mothers are just the same as a mother and a father, for example, why can't a single mother and her mother do just as well as a married mom and dad? Why are dads relevant at all?

Two ideas are in conflict here: one is that children deserve mothers and fathers and that adults have an obligation to at least try to conduct their sexual lives to give children this important protection. That is the marriage idea.

The other idea is that adult interests in sexual liberty

are more important than "imposing" or preferring any one family form, even for the benefit of children: all family forms must be treated identically by law if adults are to be free to make intimate choices. This latter idea is at the heart of the idea that same-sex marriage is a civil right. And it is the core idea that must be rejected if the state's interest in marriage is to be sustained.

B. Personal commitments to love, self-expression, self-realization, or long-term relationships cannot alone justify the state's involvement in marriage.

Marriage is separated from other kinds of relationships by law and government as well as society because it is not merely a private, individual good, but a public, common good. Even people who do not marry depend on a healthy marriage culture in order to carry society into the next generation.

While many courts continue to articulate this public understanding of the reasons for state involvement in marriage, see, e.g., Standhardt v. Super. Ct. of Arizona, 77 P.3d 451 (Ariz. Ct. App. 2003); Morrison v. Sadler, 2003 WL23119998 (Ind. Super. May 7, 2003), appeal pending Ind. Ct. App. No. 49A02-0305-CV-447, Plaintiffs-Appellants articulate a private conception of marriage as an individual right to (a) express certain emotions or values and (b) acquire certain legal benefits. These two competing visions of the purposes of marriage lead the law in dramatically opposing directions.

1. Marriage as a "close relationship."

If marriage is an essentially private, intimate, emotional relationship created by two people to enhance their own personal well-being, it is wrong, discriminatory, as well as counterproductive for the state to favor certain kinds of intimate relations over others. Marriage has a legal form but no specific content. Each person has the right to express socially his or her own preferred inner vision of family, sexuality and intimacy, on an equal basis. There is no rational reason, therefore, to withhold these benefits from any couple, cohabiting, same-sex, or other, who wishes to claim them on behalf of themselves or (especially) their dependents.

From this perspective, marriage is no longer a social institution regulated by law in order to support important public objectives, but is reduced to an emotionally laden ceremony which confers various legal benefits. As one family scholar has stated:

There are many problems with this vision of marriage and its relationship to law. It reduces marriage to a creature of the state. By emphasizing the rights of adults, it intrinsically devalues the interest of children and the community in marriage. By reducing marriage to an individual right, it undermines the very norms of commitment it rhetorically upholds. It logically calls into question the notion of family law itself. If the

purpose of marriage and family law is to affirm neutrally the multiplicity of adult emotional choices, because individual declarations of intimacy are sacred matters in which the state has no right to interfere, then the question becomes: why do we have laws about marriage at all?

Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?* 18 *Notre Dame J.L. Ethics & Pub. Pol'y* 225, 231 (2004).

2. Marriage as a social institution.

The alternative vision of the nature of marriage and its relationship to law, is that marriage is not merely a civil right or a private commitment, but a social institution. "Marriage arises in every known society out of the need to manage the biological reality that sex between men and women produces children, together with the twin social realities that societies need babies in order to survive, and babies need mothers and fathers." *Id.* at 232. In every complex society governed by law, marriage exists as a public legal act and not merely a private romantic declaration or religious rite. While marriage systems differ, marriage across societies is a "publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce." William J. Doherty, et al., Why Marriage Matters: Twenty-One Conclusions

from the Social Sciences 8-9 (New York, Institute for American Values 2002).

C. In rejecting shared, public justifications for marriage, Plaintiffs-Appellants offer no alternative theory of marriage sufficient to justify continued state regulation.

Plaintiffs-Appellants argue that traditional state regulation of marriage is unjustified "governmental discrimination" insofar as it does not include same-sex couples. (Pbl.) In proposing to redefine the centuries-old legal institution of marriage, however, Plaintiffs offer no alternative theory of marriage which would justify recognition (and regulation) of intimate relationships between same-sex and opposite-sex couples, but not other intimate relationships. Absent such a theory, Plaintiffs-Appellants' argument becomes not an argument for same-sex marriage, but an argument for the abolition of marriage as a legal status.

Any legal recognition of marriage requires some rational public justification for the distinction between marital and nonmarital relationships. If, as the Massachusetts court stated, marriage is only about "encouraging stable relationships over transient ones," "identif[ying] individuals," "provid[ing] for the orderly distribution of property," "ensur[ing] that children and adults are cared for and supported whenever possible from private rather than public funds," and "track[ing] important

epidemiological and demographic data," the state is left with precious little justification for laws limiting polygamy and endogamy. Arguably, larger family groups (of 3 or more adults) would provide an even stronger private support network than the two-adult model. Marriage between close relatives would minimize the number of legal heirs, potentially minimizing disputes over property distribution upon death. At minimum, there is nothing inherent in polygamous or endogamous relationships which makes such unions less worthy of state recognition under such criteria.

There is no principled basis for recognizing a legality of same-sex marriage without simultaneously providing a basis for the legality of consensual polygamy and endogamy. A "right to sexual autonomy," for example, is a legal concept that knows no natural boundary and may legitimate undesirable conduct as well. George W. Dent, Traditional Marriage: Still Worth Defending, 18 *BYU J. Pub. L.* 419, 443 (2004) (stating that "judicial approval of same-sex marriage would have to be based on some principle, such as a right to sexual autonomy, which would also require the approval of adultery and of other forms of marriage"). Hadley Arkes correctly states, "Every argument for gay marriage is an argument that would support polygamy." *One Man, One Woman*, *Washington Watch*, Jan. 26, 1998, at 1.

More fundamentally, when limited to the criteria described

by the Goodridge court, the state has little justification for recognizing marital relationships at all - certainly not with the broad scope of legal incidents which currently attach to marriage. A state's interest in promoting stable, long-term relationships would be equally furthered by a regime which extends benefits on the basis of long-term cohabitation rather than a wedding ceremony. Once marriage has been divorced from any real presumption of natural parentage, marriage has lost much of its enduring benefit in identifying individuals or tracking epidemiological data. Even the preference for private support and orderly distribution of property can be promoted through less intrusive means than the broad state regulation of marriage.

Plaintiffs-Appellants, meanwhile, advance only private interests in marriage, which may be of great interest to individual couples, but which cannot alone justify extensive state regulation and preference of one state-sanctioned relationship over alternative relationship forms.

Simply put, Plaintiffs-Appellants' claims, rooted as they are in broad descriptions of private liberty interests, argue not for state regulation of their relationships through marriage, but for governmental endorsement of all adult lifestyle choices. If such claims of individual autonomy result in the redefinition of marriage here, they will leave in their

wake little justification for other defining characteristics of the marriage relationship.

III. THE FUNDAMENTAL LAWS AND TRADITIONS OF MARRIAGE IN NEW JERSEY ARE IDENTICAL TO THOSE OF THE UNITED STATES AND 49 OF THE 50 STATES OF THE UNION; ALL OF THESE LAWS AND TRADITIONS ARE FULLY CONSISTENT WITH THE MODERN AMERICAN CONCEPTS OF EQUALITY, PRIVACY, AND DUE PROCESS OF LAW -- AND MASSACHUSETTS IS BUT AN ANOMALY

A. The Congress and the President of the United States firmly believed that DOMA was a legitimate affirmation of a fundamental social institution, and they believed DOMA was constitutional.

In 1996, the Congress of the United States passed the Defense of Marriage Act (DOMA). It passed both the House of Representatives and the Senate by overwhelming, bipartisan margins: The vote in the House was 342 to 67 (11 of New Jersey's 13 Representatives voted for it); the vote in the Senate was 85 to 14 (Senators Bradley and Lautenberg voted for it). The bill was signed by President Bill Clinton. Pub. L. 104-199.

The Defense of Marriage Act has two parts. One part deals with interstate recognition of marriages,⁶ and the second part defines marriage for purposes of Federal law. That second part

⁶ "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." 28 U.S.C. § 1738C.

of DOMA says, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. §7. This is the very definition of marriage that Plaintiffs-Appellants seek to have declared unconstitutional under the New Jersey Constitution.⁷

The report of the House Judiciary Committee said,

Nothing in the [U.S. Supreme] Court's recent decision [in Romer v. Evans, 116 S. Ct. 1620 (1996)] suggests that the Defense of Marriage Act is constitutionally suspect. It would be incomprehensible for any court to conclude that traditional marriage laws are . . . motivated by animus toward homosexuals. Rather, they have been the unbroken rule and tradition in this (and other) countries primarily because they are conducive to the objectives of procreation and responsible child-rearing.

H. Rpt. No. 104-664 at 33, 104th Cong., 2d Sess. (1996).

When the U.S. Department of Justice was asked to give its opinion about the constitutionality of DOMA it said it "believe[d] that [DOMA] would be sustained as constitutional."

⁷ The Defense of Marriage Act was built upon the government's interests in (1) responsible procreation, (2) responsible child-rearing, (3) preserving scarce resources, (4) protecting sovereignty and democracy, and (5) morality. H. Rpt. No. 104-644, 104th Cong., 2d Sess. 12-18 (1996). When these same rationales were advanced in support of the Massachusetts laws on marriage, the Goodridge majority found them irrational and bigoted. 798 N.E.2d at 968.

Id. at 33-34. After Romer v. Evans was handed down, the Department was asked if it had changed its mind, and it said no. Id. at 34 ("the Supreme Court ruling in Romer v. Evans does not affect the Department's analysis (that H.R. 3396 is constitutionally sustainable").

B. The State Legislatures Agree with Congress and the President.

Meanwhile, the States of the Union also have been acting to protect and defend marriage. It is often reported that 38, 39, or 40 States have passed their own "Defense of Marriage Acts," but a recent report from the Congressional Research Service shows that 49 of the 50 States have laws that either define marriage, or refuse to recognize same-sex "marriage," or both. Congressional Research Service, The Library of Congress, "CRS Report for Congress: Same-Sex Marriages: Legal Issues," order code no RL31994, updated April 7, 2004, reprinted at "Legal Threats to Traditional Marriage: Implications for Public Policy," Hearings before the Subcomm. on the Constitution of the Comm. on the Judiciary, U.S. House of Representatives, Serial No. 76, 108th Cong., 2d Sess. 79-82 (2004).

A State that allows same-sex "marriage" is creating serious rifts with its sister states, but the issue of nonrecognition of New Jersey marriages is not the point we are making here. Our point is that the Government of the United States and the vast

majority of the states of the Union have acted within the past few years to protect marriage - and they have done so after concluding that the marriage of one man and one woman is fully consistent with today's constitutional requirements of equality, liberty, privacy, and due process of law.

C. The Supreme Court of the United States Has Held That the Constitution of the United States Does Not Require States To Give Marriage Licenses to Same-Sex Couples

While relying extensively on federal jurisprudence in making their arguments under the New Jersey Constitution, Plaintiffs-Appellants have given only a partial and inaccurate account of the constitutional law of marriage as it has been developed by the United States Supreme Court. They rely heavily upon many of the important federal cases, e.g., Turner v. Safley, 482 U.S. 78 (1987), Zablocki v. Redhail, 434 U.S. 374 (1978), and Loving v. Virginia, 388 U.S. 1 (1967), to articulate their claim that the New Jersey Constitution requires recognition of same-sex marriage, but they omit entirely the one case that is directly on point and controlling.

In 1972, the United States Supreme Court ruled that a state law defining marriage as the union of a man and a woman raises no issues of equal protection or substantive due process under the United States Constitution. Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), appeal dismissed for want of a substantial

federal question, 409 U.S. 810 (1972). Unless or until Baker is overruled, other federal precedent cannot be relied upon for the proposition that state marriage laws either discriminate unconstitutionally or infringe upon an individual's freedom to marry. To the contrary, the Supreme Court's holding that a state's marriage law did not implicate any federal constitutional claims suggests a similar finding under the New Jersey Constitution, even before getting to the unique balancing test applied by New Jersey courts.⁸

In Baker v. Nelson, the plaintiffs appealed an adverse ruling from the Minnesota Supreme Court. 191 N.W.2d 185 (Minn. 1971). On appeal, in a memorandum decision, the "appeal was dismissed for lack of a substantial federal question," 409 U.S. 810 (1972). An appeal that is dismissed for lack of a substantial federal question is a decision on the merits by the Nation's highest court. Hicks v. Miranda, 422 U.S. 332, 343-45 (1975).⁹

⁸ If the court finds plaintiffs to have successfully made an equal protection or due process claim, we expect the Court to apply the balancing test articulated in Soujourner A. v. N.J. Dept. of Human Services, 177 N.J. 318 (2003), Greenberg v. Kimmelman, 99 N.J. 552 (1985), Right to Choose v. Byrne, 91 N.J. 287 (1982), State v. Saunders, 75 N.J. 200 (1977), and Robinson v. Cahill, 62 N.J. 473 (1973).

⁹ Hicks v. Miranda did not announce a new rule, but restated an old one. In Hicks, the Court cited a 1959 opinion of Justice Brennan ("votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case"); the 1969 edition of the leading treatise on Supreme Court practice ("The Court is,

The rule of Hicks v. Miranda has some twists and turns - and plenty of nuance - but it is still good law and binding on lower courts. The leading treatise on Supreme Court practice summarizes the rule this way:

The Supreme Court's pronouncements that its summary dispositions have some precedential value but not as much as dispositions by full opinions relate to the weight that the Supreme Court accords to its own prior summary dispositions, not to the weight that lower courts should give them.

Hicks v. Miranda establishes that lower courts are to grant such decisions the same respect as other holdings of higher tribunals - that is, such decisions are binding until the Supreme Court directly or by new 'doctrinal developments' decides otherwise. . . .

Stern, Gressman, Shapiro, & Geller, Supreme Court Practice 281

(8th ed. 2002) (citation omitted).¹⁰

In determining if a summary disposition for want of a substantial federal question is binding in a subsequent

however, deciding a case on the merits when it dismisses for want of a substantial question"); and the 1970 edition of perhaps the leading treatise on procedure in federal courts ("Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits"). 422 U.S., at 344.

¹⁰ In Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 500 (1981) (plurality op.), the Supreme Court of the United States said "the California Supreme Court *was quite right* in relying on our summary decisions as authority for sustaining the San Diego ordinance," but the Court went on to give the ordinance full constitutional consideration because "summary actions do not have the same authority *in this Court* as do decisions rendered after plenary consideration." (Emphasis added.)

proceeding, lower courts look to the jurisdictional statement that was filed with the U.S. Supreme Court to see precisely which constitutional questions were presented to the High Court. Summary action is binding only with respect to decisions on those same questions. In Baker v. Nelson, the following three questions were appealed to the High Court:

1. Whether appellee's [the State of Minnesota's] refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.

2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.

3. Whether the appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Appellants' Jurisdictional Statement at 3, Baker v. Nelson, No. 71-1027, U.S. Supreme Court (filed Feb. 11, 1971).

Insofar as any subsequent case raises these same questions, the U.S. Supreme Court already has spoken, and lower courts are bound by its decision until it decides otherwise. A few years after Baker v. Nelson, the United States Court of Appeals for the 8th Circuit acknowledged the binding authority of the Supreme Court's summary disposition when the Baker plaintiffs brought another lawsuit attempting to compel the Federal

Government to grant additional veterans' benefits to one of the men because he was claiming the other man as his "dependent spouse." The litigants lost again. The U.S. Court of Appeals for the Eighth Circuit said,

. . . The Minnesota Supreme Court explicitly held that marriages between persons of the same sex are prohibited and that the applicable Minnesota statute did not offend the First, Eighth, Ninth, or Fourteenth Amendments to the Constitution [of the United States]. Baker v. Nelson, *supra*, 191 N.W.2d, at 186, 187. The appellants [here] were plaintiffs in that state action which settled the issues adversely to their present claim. In addition, the Supreme Court's dismissal of the appeal for want of a substantial federal question constitutes an adjudication of the merits which is binding on the lower federal courts. See Hicks v. Miranda, 422 U.S. 332-343-345 (1975). The appellants have had their day in court on the issue of their right to marry under Minnesota law and under the United States Constitution. They, therefore, are collaterally estopped from relitigating these issues once more.

McConnell v. Nooner, 547 F.2d 54, 55-6 (8th Cir. 1976) (per curiam) (citations omitted) (emphasis added).

There have, of course, been important constitutional developments since Baker v. Nelson was decided,¹¹ but none of the subsequent cases has raised the questions that were presented to the court - and answered - in Baker v. Nelson. Therefore, those

¹¹ In addition to the post-1972 marriage cases cited earlier in this section, the U.S. Supreme Court has decided Lawrence v. Texas, 539 U.S. 558 (2003), Romer v. Evans, 517 U.S. 620 (1996), and other cases.

answers to those questions are still binding. See, e.g., Lockyer v. City and County of San Francisco, 17 Cal.Rptr.3d 225, 278-280 (Cal. 2004) (Kennard, J., concurring and dissenting).

Here, the Plaintiffs-Appellants cite various U.S. Supreme Court cases on marriage, but fail to point out that the very questions which they bring to this Court already have been answered by the U.S. Supreme Court with respect to the Fourteenth Amendment. The U.S. Supreme Court's cases on marriage do not apply to persons of the same-sex who seek to compel the State to give them a license to marry, and should not be construed as support for that proposition in state courts.

D. Courts of Sister States Have Agreed that Marriage is Consistent with Constitutional Guarantees of Privacy and Equality.

As the Court knows, the Plaintiffs-Appellants are especially enamored of the law of Massachusetts. They cite the Goodridge cases, Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003) , and Opinion of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004), numerous times. They fail, however, to demonstrate how or why the Massachusetts court's interpretation of the Massachusetts Constitution should inform this court's ruling under Article I, section 1 of the New Jersey Constitution. Nor do Plaintiffs acknowledge the body of cases from sister states which have found marriage laws consistent with constitutional guarantees of privacy and equality.

Goodridge is without precedent in the United States of America. The older U.S. cases are all against the result in Goodridge. See, e.g., Jones v. Hallahan, 501 S.W.2d 588 (Ky. App. 1973); Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974), review denied, 84 Wash.2d 1008 (1974); Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982), cert. denied, 458 U.S. 1111 (1982); DeSanto v. Barnsley, 476 A.2d 952, 955-56 (Pa. Super. 1984); Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995).

The newer U.S. cases are also all against Goodridge. See Morrison v. Sadler, 2003 WL 23119998 (Ind. Super. May 7, 2003) (on appeal); Standhardt v. Superior Court, 77 P.3d 451, 463-64 (Ariz. Ct. App, Oct. 8, 2003); Lewis v. Harris, docket no. MER-L-15-03, (N.J. Super. Ct., Mercer Co., the decision from which Plaintiffs-Appellants are taking their appeal) (decided Nov. 5, 2003).

The U.S. cases from Hawaii, Alaska, and Vermont, where one might think Goodridge could find some support, also are against the Massachusetts result because none of them accepted the law or rationale that the Massachusetts court used in Goodridge. Also, in each case, either the people or the legislature "reversed" or otherwise responded to the judicial decision. Baehr v. Lewin, 583, 852 P.2d 44, 68 (Haw. 1993) (plurality op.) ("reversed" by Haw. Const., Art. I, Sec. 23 (added 1998)); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998

WL 88743 (Alaska Super. Ct., 1998) ("reversed" by Alaska Const., Art. I, Sec. 25 (effective 1999)); and Baker v. State, 744 A.2d 864 (Vt. 1999) (resulting in a far-ranging civil unions law passed by the Legislature, Vt. Stat. Ann. Title 15, §§1201-1207 (Supp. 2001)).

Just six weeks before Goodridge was decided, a three-judge Arizona appellate court upheld that state's marriage law, saying:

. . . Petitioners have failed to prove that the State's prohibition of same-sex marriage is not rationally related to a legitimate state interest. We hold that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest. Even assuming that the State's reasoning for prohibiting same-sex marriages is debatable, or arguably unwise, it is not 'arbitrary or irrational'. Consequently, [the statutes] do not violate Petitioners' substantive due process or explicit privacy rights and must be upheld."

Standhardt v. Superior Court, 77 P.3d 451, 463-64, ¶ 41 (Ariz. Ct. App, 2003) (citations omitted) (review denied, May 25, 2004) (The appeals court rejected the equal protection argument on similar grounds.).

This Court should follow the precedents of this State, and Congress, and Arizona, and the near-unanimous examples of all other American jurisdictions. Let Massachusetts continue to stand alone - not because it was courageous but because it was

wrong.

IV. PLAINTIFFS-APPELLANTS ARE SEEKING A RADICAL AND UNPRECEDENTED CHANGE IN A CONSTITUTION THAT IS GENERATIONS OLD, AND SUCH A FUNDAMENTAL BREACH WITH THE PAST MUST BE MADE BY THE PEOPLE THEMSELVES AND NOT BY OTHERS

New Jersey has a venerable heritage. Our earliest colonial charters date from the 1660's, and the first New Jersey Constitution was adopted on July 2, 1776 - the same day that the Second Continental Congress declared that the American colonies "are, and of right ought to be, free and independent states." The New Jersey Constitution of 1776 and the Declaration of Independence share some common roots, J. Boyd, Fundamental Laws and Constitutions of New Jersey 22-31 (D. Van Nostrand Co., 1964), but the conjunction of those two documents ought first to remind us of the courage and wisdom of forebears who adopted a Constitution before they had won their independence.

The Constitution of 1776 has been superseded. The Constitution that is now in force in New Jersey (and which this Court has been asked to interpret in this case) was adopted in 1947, but it, in turn, was based in large part on the Constitution of 1844. The very provision that Plaintiffs-Appellants invoke in this case, Article I, paragraph 1,¹² was

¹² "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring,

written before the Civil War (with but one word changed in 1947¹³).

The generations that debated and enacted New Jersey's three Constitutions and its many marriage-related statutes would be flabbergasted by the arguments of the Plaintiffs-Appellants - not because our forebears were bigots or ignoramuses but because they understood that marriage requires a person of each sex, a man and a woman. When those who wrote New Jersey's laws used the word "marriage," they meant something like the following, which is the definition from the highly influential 19th Century dictionary of Mr. Noah Webster:

Marriage, n. 1. The act of uniting a man and woman for life; wedlock; the legal union of a man and woman for life. Marriage is a contract both civil and religious, by which the parties engage to live together in mutual affection and fidelity till death shall separate them. Marriage was instituted by God himself, for the purpose of preventing the promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children.

An American Dictionary of the English Language (published by George and Charles Merriam, revised and enlarged 1851) (written by Noah Webster, and first published in 1828).

possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const., Art. I, para. 1.

¹³ The 1844 provision said that "all men" have the rights specified in the text. In 1947, the word "men" was changed to "persons". See also, Article X, paragraph 4.

Webster used an openly religious idiom that has fallen into disuse, but we can confidently say that our forebears had this sort of definition in mind whenever they used the word "marriage."

We do not doubt that meanings can, and do, change over time. This year, dictionaries will be published that reflect the changing laws in Massachusetts and elsewhere. Today's dictionaries will show how words are being used today, even if the usage is quirky, contrary to long convention, or just "wrong" (such as when dictionaries say that a "disinterested" jurist and an "uninterested" jurist are the same thing). Similarly, older dictionaries show how words were being used when New Jersey's laws were written.

Plaintiffs-Appellants are deeply concerned about the use of "dictionary definitions" of "marriage." Pb18-26. Their concern is well founded, because (1) if words have meanings, and (2) if the authors of New Jersey's laws intended to incorporate those meanings into their laws, then this lawsuit is doomed - unless we no longer care about the intentions and purposes of New Jersey's lawmakers.

Thirty years ago a Kentucky court was faced with a lawsuit from a same-sex couple that had been denied a marriage license. In upholding the denial, the court said that the women were "prevented from marrying, not by the statutes of Kentucky or the

refusal of the County Clerk of Jefferson County to issue them a license, but rather by their own incapacity of entering into a marriage as that term is defined." Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky App. 1973). The Kentucky court added that the couple was not entitled to a license "because what they propose is not a marriage." Id. at 590.

This Court should affirm that under New Jersey law no one has the capacity to marry a person of the same sex. Persons of the same sex can be a great many things to one another, but they cannot be the other's spouse in marriage.

Amici do not argue that there is no role for the courts in this case, a charge that Plaintiffs-Appellants like to make against the State. E.g., Pb16-18. To the contrary, the State and the Amici recognize that judicial review is firmly established in this State. One source says that judicial review first arose in New Jersey in 1804 when Federalist judges successfully asserted their right to overturn the constitutional judgments of the Republican-controlled legislature (even though at the time the legislature was clearly the constitutionally predominant branch of government). R.J. Pasler & M.C. Pasler, The New Jersey Federalists 39-40 (Fairleigh Dickinson Univ. Press, 1975).

The sovereign power in New Jersey resides with the people of New Jersey. The New Jersey Constitution acknowledges and

adopts this elemental principle of American self-government.¹⁴ If the Plaintiffs-Appellants want the New Jersey Constitution to protect a right to same-sex "marriage" (and they do), then they must persuade the people to amend the Constitution.

There is a constitutional distinction between the judicial function and the law-making functions. In this regard, Amici merely echo the express provisions of the New Jersey Constitution on the separation of powers,¹⁵ the legislative power,¹⁶ the executive power,¹⁷ and the judicial power.¹⁸

¹⁴ "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it." N.J. Const. Art. I, para. 2.

¹⁵ "The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution." N.J. Const., Art. III, para. 1. See also, N.J. Const., Art. IV, sec. 5, para. 4, and Art. VI, sec. 6, para. 7.

¹⁶ "The legislative power shall be vested in a Senate and a General Assembly." N.J. Const., Art. IV, sec. 1, para. 1. "The Legislature shall enact all laws necessary to make this Constitution fully effective." N.J. Const., Art. XI, sec. 1, para. 2. All members of the Legislative Branch are sworn to "support the Constitution of the United States and the Constitution of the State of New Jersey. . . ." N.J. Const., Art. IV, sec. 8.

¹⁷ "The executive power shall be vested in a Governor." N.J. Const., Art. V, sec. 1, para. 1. The Governor must approve laws before they become effective, although it is possible to override his veto by a vote of two-thirds of both houses of the Legislature. N.J. Const., Art. V, sec. 1, para. 14.

If Plaintiffs-Appellants can persuade the people of New Jersey of the wisdom and justice of their cause, they can have their amendment added to the Constitution in less time than it will take to litigate this case. Instead, Plaintiffs-Appellants have turned to the courts. They want the courts to rewrite New Jersey law as it has been enacted, construed, practiced, and intended for generations. Plaintiffs-Appellants have taken their case to the wrong forum; they should take their case to the people of the State.

A. Plaintiff's Analogy to Anti-Miscegenation Laws is Inapt; Indeed, the People of New Jersey and Their Elected Representatives Have Long Taken the Lead in Providing Equality for Minority Groups.

Throughout their brief, Plaintiffs-Appellants compare this case to prior cases involving marriage and race, especially Loving v. Virginia, 388 U.S. 1 (1967), and Perez v. Lippold, 198 P.2d 17 (Calif. 1948).¹⁹ In those cases, the United States Supreme Court and the California Supreme Court, respectively, struck down laws prohibiting intermarriage between men and women of different racial or ethnic groups. Amici strongly object to this attempted analogy involving two vastly different legal,

¹⁸ "The judicial power shall be vested in a Supreme Court, a Superior Court, and other courts of limited jurisdiction. . . ." N.J. Const., Art. VI, sec. 1.

¹⁹ This case is called Perez v. Sharp in the California State law reporter.

moral, social, and biological circumstances.²⁰ Anti-miscegenation laws were about segregation and inequality between the races. Marriage is about the integration and equality of the sexes, and the importance of mothers and fathers for children.

Plaintiffs-Appellants want to merge (and, in our judgment, to confuse) the issues of race and sexual orientation because they desire courts to act in same-sex "marriage" cases as the Loving and Perez courts did in the miscegenation cases. However, Plaintiffs-Appellants ignore the historical context of Perez and Loving and so they miss what is perhaps the most important lesson taught by those cases and others.

It is highly ironic that any New Jersey litigant would point a New Jersey court to the California case of Perez v. Lippold. Why ironic? Because, unlike California, New Jersey has never had a statute forbidding interracial marriage. K. Mumford, "After Hugh: Statutory Race Segregation in Colonial America, 1630-1725," 43 American Journal of Legal History 280, 300 (1999). Plaintiffs-Appellants invoke a case decided by a narrowly divided California court even though a far better

²⁰ New Jersey law recognizes that race-based discrimination is not always to be compared with other kinds of discrimination. For example, while the Law Against Discrimination requires both equal opportunity and affirmative action with regard to race, no affirmative action is required with respect to affectional or sexual orientation. See, e.g., § 10:5-27 (remedies), § 10:5-32 (public works contracts), and § 10:5-34 (bids). See also, N.J. Stat. Ann. § 11A:7-1 (nondiscrimination in civil service employment).

example of racial nondiscrimination and enlightened morality can be found right here in New Jersey where no such law ever existed. Similarly, when the U.S. Supreme Court decided Loving v. Virginia in 1967 the Court announced a constitutional rule that was consistent with the policy judgment made in New Jersey, which had never sanctioned such a law at all.

Like much of the rest of the country, New Jersey does have a history of racial animosity and intolerance. Nevertheless, on racial issue after racial issue, the wisdom and righteousness of the people of New Jersey and their elected representatives far surpassed the work of the courts.

In 1881, nearly three quarters of a century before Brown v. Board of Education, 347 U.S. 483 (1954), the New Jersey Legislature officially ended legal segregation in the public schools, enacting a statute that provided, "no child between the ages of five and eighteen years of age shall be excluded from any public school in this state on account of his or her religion, nationality, or color." Douglas, The Limits of Law in Accomplishing Racial Change: School Desegregation in the Pre-Brown North, 44 UCLA L. Rev. 677, 689 n. 31 (1997). While it was not until the 1940's that "integrated schools became a reality in much of New Jersey for the first time," id. at 721, New Jersey was moving in the right direction. The New Jersey Constitution of 1947 expressly prohibited discrimination, and

specifically outlawed segregation in the public schools, making New Jersey the first state in the country to constitutionally outlaw segregation in the public schools. Id. at 724.

If the people of this State agree with Plaintiffs-Appellants about same-sex marriage and civil rights, they can make the constitutional change that the Plaintiffs-Appellants seek. In a democratic republic, the people rule.²¹ We do not doubt that a majority can rule foolishly or malevolently, but we do question the alternatives to majority rule, and the history of New Jersey shows that the people have been out in front of the courts. The judgment of the people of New Jersey can be trusted.

B. New Jersey's Experience With Sex-Based Classifications Demonstrates The Virtues of Flexibility, Commonsense, and Custom, and That New Jersey Has Rejected the Ideological (and False) Idea That There Are No Differences Between the Sexes

As a result of the decision of four judges in Goodridge v.

²¹ John H. Hallowell, *THE MORAL FOUNDATION OF DEMOCRACY* 120-21 (Univ. of Chicago Press, 1954) ("What is demanded by the democratic form of government is not submission to the will of the majority because that will is numerically superior but rather submission to the reasoned judgment of the majority. We are obligated to submit to the decision of the majority, not because that decision represents a numerically superior will, but because it represents the best judgment of society with respect to a particular matter at a particular time. It is founded not upon the principle that the will of the many should prevail over the will of the few but rather upon the principle that the judgment of the many is likely to be superior to the judgment of the few.").

Dept. of Public Health, maleness and femaleness is today irrelevant in Massachusetts marriages (the terms "husband" and "wife" are outmoded).²² That same Massachusetts court earlier held that sex must be irrelevant on the sports teams of public high schools. Attorney General v. Massachusetts Interscholastic Athletic Association, 378 Mass. 342, 393 N.E.2d 284 (1979) (under the strict judicial scrutiny required by the Commonwealth's equal rights amendment, boys had to be permitted to play on girls' sports teams, such as field hockey). This is still the law in Massachusetts.

It is not the law in New Jersey, however. New Jersey courts have adopted a more flexible and reasoned approach to sex considerations.

In New Jersey, sex may sometimes be taken into account on high school athletic teams. New Jersey rightly prides itself on its leadership against sex discrimination, but New Jersey has not abandoned common sense, nor does it ignore relevant differences between the sexes. In B.C. v. Bd. of Ed., Cumberland Regional School District, 220 N.J. Super. 214 (A.D. 1987), the Appellate Division permitted a school district to exclude a boy from one of its all-girl field hockey teams even though the boy

²² Indeed, Massachusetts Governor Mitt Romney recently testified before the United States Senate that the terms "mother" and "father" are at risk of being eliminated from official state documents. Preserving Traditional Marriage: A View from the States, 108th Cong. Senate Judiciary Comm. (June 22, 2004) (written testimony of Governor Mitt Romney).

was otherwise-qualified to play. The boy and his parents had challenged the exclusion on various statutory and constitutional grounds (and they had some success in administrative proceedings), but the court "conclude[d] that the Athletic Association's regulation excluding males from female teams is constitutionally permissible under both the State and Federal Constitution and is not violative of the New Jersey Law Against Discrimination or the statute prohibiting gender discrimination in education." 531 A.2d 1066-67.²³

Also in New Jersey, it is lawful for the government to interview and hire only males or only females for certain types of jobs. For example, in In the Matter of Juvenile Detention Officer, Union County, 364 N.J. Super. 608 (App. Div. 2003), the court approved Union County's request to interview and hire only males for eight positions as Juvenile Detention Officers (JDOs) in the boys' wing of its juvenile detention center (where the detainees are between ages 11 and 17). In upholding the county's request to restrict hiring to males only, the court said:

²³ Separating boys and girls is not automatically approved; indeed, it is disfavored - but it is not precluded. Rules or practices that separate boys and girls on athletic teams are given close judicial scrutiny, and often fail to pass. For example, E.B. et al. v. North Hunterdon Bd. of Ed. (Agency Docket No 282-85/85, OAL Docket No. EDU 5187-85) cited at B.C. at page 1066, the Commissioner permitted a girl to play on a boys football team at high school. See also, National Organization for Women v. Little League Baseball, 127 N.J. Super. 522, 318 A.2d 33 (App. Div. 1974).

Laws forbidding discrimination in hiring on the basis of sex do not purport to erase all differences between the sexes. These laws recognize that there are jobs for which one sex is inherently and biologically more qualified than those of the opposite sex. The biological difference between men and women which in turn produce psychological differences are the facts that justify limited personal contact under intimate circumstances to those of the same sex.

Id. at 620.

Similarly, New Jersey's Law Against Discrimination prohibits discrimination on the basis of sex, but recognizes valid sex-based distinctions in the areas of bona fide occupational qualifications (N.J. Stat. Ann. § 10:5-2.1; § 10:5-12a, -12b; single-sex institutions, § 10:5-12f(1); and single-sex rentals, § 10:5-12g(3), h(3)).

New Jersey also takes sex into account on its public beaches, New Jersey v. Vogt, 341 N.J. Super. 407 (App. Div. 2001) (neither Federal nor State equal-protection provisions are violated by an ordinance that prohibits women, but not men, from appearing topless on a public beach), and New Jersey allows sex to be taken into account in private casinos, Rivera v. Trump Plaza Hotel & Casino, 305 N.J. Super. 596 (App. Div. 1997) (employer's appearance policy that prohibited pony tails for men but not for women did not violate the LAD).

Plaintiffs-Appellants want to abolish the requirement for maleness and femaleness in marriage. In doing so, they urge this Court to follow the lead of Massachusetts, despite the fact that

New Jersey courts have repeatedly rejected Massachusetts' undiscerning model of sex equality. In New Jersey, sex matters sometimes, and of all the cases in which sex must matter, it is essential in marriage where husbands and wives are intrinsic to the state's interests.

CONCLUSION

Marriage is society's way of recognizing that the sexual union of a man and a woman is unique, and laws governing marriage recognize the need to regulate this union for the benefit of society and its children. Despite the personal fulfillment of intimate adult relationships, marriage laws are not primarily about adult needs for approbation and support, but about the well-being of children and of society. Adults are free to live as they choose, but the New Jersey Legislature is constitutionally entitled to prefer marriage as the ideal context for childrearing. This Court should affirm the judgment below.

Respectfully submitted,

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