

-----x		SUPERIOR COURT OF NEW JERSEY
MARK LEWIS, et al.,	:	APPELLATE DIVISION
	:	DOCKET NO. A-2244-03T5
Plaintiffs-Appellants,	:	
	:	<u>Civil Action</u>
	:	
v.	:	On Appeal from a Final Judgment
	:	Of the Superior Court,
GWENDOLYN L. HARRIS, et al.,	:	Law Division
	:	
Defendants-Respondents.	:	Sat Below:
-----x		Hon. Linda R. Feinberg, A.J.S.C.

BRIEF AND APPENDIX OF DEFENDANTS-RESPONDENTS

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Defendants-Respondents
R.J. Hughes Justice Complex
P.O. Box 112
25 Market Street
Trenton, New Jersey 08625-0112
(609) 292-8576

Patrick DeAlmeida
Assistant Attorney General
Of Counsel and On the Brief

Mary Beth Wood
Deputy Attorney General
On the Brief

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS OF CASES AND AUTHORITIES	iii
PRELIMINARY STATEMENT	1
COUNTERSTATEMENT OF FACTS	4
PROCEDURAL HISTORY	4
ARGUMENT	13
THE TRIAL COURT CORRECTLY ENTERED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS BECAUSE PLAINTIFFS DO NOT HAVE A STATE CONSTITUTIONAL RIGHT TO ENTER INTO A SAME-SEX MARRIAGE	13
A. Plaintiffs Did Not Meet Their Heavy Burden To Overcome The Presumption That New Jersey's Marriage Laws Are Constitutional	14
B. The Trial Court Correctly Held That New Jersey's Marriage Statutes Do Not Permit Same-Sex Couples To Marry	18
C. The Federal Government And Forty-Nine States Do Not Recognize Same-Sex Marriage	20
D. The Trial Court Properly Held that Plaintiffs' Privacy Rights Are Not Violated By An Inability To Enter Into A Same-Sex Marriage	25
1) While The Right To Marry Is Protected By The State Constitution, That Right, By Definition, Does Not Encompass The Right To Marry Someone Of The Same Gender	27

2)	Even If The Ability To Marry Someone Of The Same Gender Is A Fundamental Right, New Jersey's Interest In Prohibiting Same-Sex Marriage Outweighs The Minimal Harms Visited Upon The Plaintiff Couples, Whose Relationships Enjoy Significant Statutory Protections	34
E.	Plaintiffs' Equal Protection Rights Are Not Violated By An Inability To Enter Into A Same-Sex Marriage	45
	CONCLUSION	60

APPENDIX INDEX

Kavan Peterson, <u>50 State Rundown on Gay Marriage Laws</u> , August 26, 2004, <u>Stateline.org</u>	Da001
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TABLE OF CITATIONS OF CASES AND AUTHORITIES

<u>Cases Cited</u>	<u>Page</u>
<u>Anderson v. King County</u> , 2004 <u>WL</u> 1738447 (Wash. Super. Ct. Aug. 4, 2004)	23
<u>Anonymous v. Anonymous</u> , 325 <u>N.Y.S.2d</u> 499 (Sup. Ct. 1971)	30-31
<u>Barone v. Department of Human Servs.</u> , 107 <u>N.J.</u> 355 (1987)	45, 50, 56
<u>Baehr v. Lewin</u> , 852 <u>P.2d</u> 44 (Haw. 1993)	passim
<u>Baker v. Nelson</u> , 191 <u>N.W.2d</u> 185 (Minn. 1971), <u>app. diss.</u> , 409 <u>U.S.</u> 810, 93 <u>S. Ct.</u> 37, 34 <u>L. Ed.</u> 2d 65 (1972)	30, 33
<u>Baker v. Vermont</u> , 744 <u>A.2d</u> 864 (Vt. 1999)	passim
<u>Bell v. Township of Stafford</u> , 110 <u>N.J.</u> 384 (1988)	16
<u>Ben-Shalom v. Marsh</u> , 881 <u>F.2d</u> 454 (7th Cir. 1989), <u>cert. denied</u> , 494 <u>U.S.</u> 1004, 110 <u>S. Ct.</u> 1296, 108 <u>L. Ed.</u> 2d 473 (1990)	32
<u>Borough of Collingswood v. Ringgold</u> , 66 <u>N.J.</u> 350 (1975), <u>app. diss.</u> , 426 <u>U.S.</u> 901, 96 <u>S. Ct.</u> 2220, 48 <u>L. Ed.</u> 2d 826 (1976)	50
<u>Brause v. Bureau of Vital Statistics</u> , 1998 <u>WL</u> 88743 (Alaska Super. Ct. 1998)	23, 31, 32
<u>Brill v. Guardian Life Ins. Co.</u> , 142 <u>N.J.</u> 520 (1995)	15
<u>Brown v. City of Newark</u> , 113 <u>N.J.</u> 565 (1989)	49
<u>Burton v. Sills</u> , 53 <u>N.J.</u> 86 (1968), <u>app. diss.</u> , 394 <u>U.S.</u> 812, 89 <u>S. Ct.</u> 1486, 22 <u>L. Ed.</u> 2d 748 (1969)	15

<u>City of Jersey City v. Farmer</u> , 329 <u>N.J. Super.</u> 27 (App. Div.), <u>certif. denied</u> , 165 <u>N.J.</u> 135 (2000)	16
<u>Cold Springs Indian Corp. v. Township of Ocean</u> , 154 <u>N.J. Super.</u> 75 (Law Div. 1977), <u>aff'd</u> , 81 <u>N.J.</u> 502 (1980)	28
<u>Constant A. v. Paul C.A.</u> , 496 <u>A.2d</u> 1 (Pa. Super. Ct. 1985)	30
<u>Dean v. District of Columbia</u> , 653 <u>A.2d</u> 307 (D.C. 1995)	21
<u>Doe v. Poritz</u> , 142 <u>N.J.</u> 1 (1995)	26
<u>Dunphy v. Gregor</u> , 136 <u>N.J.</u> 99 (1994)	40
<u>Gangemi v. Rosengard</u> , 44 <u>N.J.</u> 166 (1965)	48
<u>Goodridge v. Department of Public Health</u> , 798 <u>N.E.2d</u> 941 (Mass. 2003)	passim
<u>Goodridge v. Department of Public Health</u> , 2002 <u>WL</u> 1299135 (Mass. Super. 2002), <u>rev'd</u> , 798 <u>N.E.2d</u> 941 (Mass. 2003)	33
<u>Greenberg v. Kimmelman</u> , 99 <u>N.J.</u> 552 (1985)	passim
<u>Griswold v. Connecticut</u> , 381 <u>U.S.</u> 479, 85 <u>S. Ct.</u> 1678, 14 <u>L. Ed.</u> 2d 510 (1965)	28, 47-48
<u>Hamilton Amusement Center v. Verniero</u> , 156 <u>N.J.</u> 254 (1998), <u>cert. denied</u> , 527 <u>U.S.</u> 1021, 119 <u>S. Ct.</u> 2365, 144 <u>L. Ed.</u> 2d 770 (1999)	44
<u>Hennessey v. Coastal Eagle Point Oil Co.</u> , 129 <u>N.J.</u> 81 (1992)	26
<u>High Tech Gays v. Defense Indus.</u> <u>Sec. Clearance Off.</u> , 895 <u>F.2d</u> 563 (9th Cir. 1990)	32
<u>Holster v. Board of Trustees</u> , 59 <u>N.J.</u> 60 (1971)	16
<u>Hutton Pk. Gardens v. West Orange Town Council</u> , 68 <u>N.J.</u> 543 (1975)	44

<u>In re Adoption by H.N.R.</u> , 285 <u>N.J. Super.</u> 1 (App. Div. 1995)	36
<u>In re Adoption by J.M.G.</u> , 267 <u>N.J. Super.</u> 622 (Ch. Div. 1993)	20, 36
<u>In re Application for Name Change by Bacharach</u> , 344 <u>N.J. Super.</u> 126 (App. Div. 2001)	37
<u>In re Estate of Roccamonte</u> , 174 <u>N.J.</u> 381 (2002)	40
<u>In re Grady</u> , 85 <u>N.J.</u> 235 (1981)	26
<u>In re J. S. & C.</u> , 129 <u>N.J. Super.</u> 486 (Ch. 1974), <u>aff'd</u> , 142 <u>N.J. Super.</u> 499 (App. Div. 1976)	36
<u>In re Quinlan</u> , 70 <u>N.J.</u> 10, <u>cert. denied</u> , 429 <u>U.S.</u> 922, 97 <u>S. Ct.</u> 319, 50 <u>L. Ed.</u> 2d 289 (1976)	26
<u>In re Roche</u> , 296 <u>N.J. Super.</u> 583 (Ch. Div. 1996)	39
<u>Jersey Shore Medical Center v. Estate of Baum</u> , 84 <u>N.J.</u> 137 (1980)	49
<u>Jones v. Hallahan</u> , 501 <u>S.W.2d</u> 588 (Ky. 1973)	30
<u>Judson v. Peoples Bank and Trust</u> , 17 <u>N.J.</u> 67 (1954)	15
<u>King v. South Jersey National Bank</u> , 66 <u>N.J.</u> 161 (1974)	27, 28, 47
<u>Lawrence v. Texas</u> , 539 <u>U.S.</u> 558, 123 <u>S. Ct.</u> 2472, 156 <u>L. Ed.</u> 2d 508 (2003)	21
<u>Lee v. General Accident Ins. Co.</u> , 337 <u>N.J. Super.</u> 509 (App. Div. 2001)	29
<u>Li v. Oregon</u> , 2004 <u>WL</u> 1258167 (Or. Cir. Ct. Apr. 20, 2004)	23
<u>Lopez v. Santiago</u> , 125 <u>N.J. Super.</u> 268 (App. Div. 1973)	29
<u>Loving v. Virginia</u> , 388 <u>U.S.</u> 1, 87 <u>S. Ct.</u> 1817, 18 <u>L. Ed.</u> 2d 1010 (1967)	32, 33

<u>Matthews v. City of Atlantic City,</u> 84 <u>N.J.</u> 153 (1980)	48
<u>McCann v. Clerk, City of Jersey City,</u> 167 <u>N.J.</u> 311 (2001)	49
<u>McGovern v. Van Riper,</u> 137 <u>N.J. Eq.</u> 24 (Ch. Div. 1945), <u>aff'd</u> , 137 <u>N.J. Eq.</u> 548 (E. & A. 1946)	26
<u>M.T. v. J.T.,</u> 140 <u>N.J. Super.</u> 77 (App. Div.), <u>certif. denied</u> , 71 <u>N.J.</u> 345 (1976)	19, 20, 28
<u>New Jersey Sports & Exposition Auth. v.</u> <u>McCrane,</u> 119 <u>N.J. Super.</u> 457 (Law Div. 1971), <u>aff'd</u> , 61 <u>N.J.</u> 1 (1972)	16
<u>Newark Superior Officers Ass'n v. City of Newark,</u> 98 <u>N.J.</u> 212 (1985)	15, 16
<u>Paul Kimball Hosp. v. Brick Township Hosp.,</u> 86 <u>N.J.</u> 429 (1981)	15
<u>Planned Parenthood v. Farmer,</u> 165 <u>N.J.</u> 609 (2000)	passim
<u>Potter v. City of Murray City,</u> 760 <u>F.2d</u> 1065 (10th Cir.), <u>cert. denied</u> , 474 <u>U.S.</u> 849, 106 <u>S. Ct.</u> 145, 88 <u>L. Ed.</u> 2d 120 (1985)	35
<u>Prudential Property & Casualty Ins. Co. v.</u> <u>Boyland,</u> 307 <u>N.J. Super.</u> 162 (App. Div. 1998)	14
<u>Ransom v. Black,</u> 54 <u>N.J.L.</u> 446 (Sup. Ct. 1892), <u>aff'd</u> , 65 <u>N.J.L.</u> 688 (E. & A. 1900)	27
<u>Right to Choose v. Byrne,</u> 91 <u>N.J.</u> 287 (1982)	passim
<u>Robinson v. Cahill,</u> 62 <u>N.J.</u> 473, <u>cert. denied</u> <u>sub nom., Dickey v. Robinson,</u> 414 <u>U.S.</u> 976, 94 <u>S. Ct.</u> 292, 38 <u>L. Ed.</u> 2d 219 (1973)	46
<u>Roe v. Kervick,</u> 42 <u>N.J.</u> 191 (1964)	16

<u>Rutgers Council of AAUP Chapters v. Rutgers, the State Univ.</u> , 298 <u>N.J. Super.</u> 442 (App. Div. 1997), <u>certif. denied</u> , 153 <u>N.J.</u> 48 (1998)	passim
<u>Singer v. Harra</u> , 522 <u>P.2d</u> 1187 (Wash. Ct. App.), <u>rev. denied</u> , 84 <u>Wash.</u> 2d 1008 (1974)	30
<u>Sojourner A. v. Department of Human Servs.</u> , 177 <u>N.J.</u> 318 (2003)	45, 46
<u>Southern Burlington Cty. NAACP v. Township of Mount Laurel</u> , 92 <u>N.J.</u> 158 (1983)	48
<u>Standhardt v. Superior Court</u> , 77 <u>P.3d</u> 451 (Ariz. Ct. App. 2003)	21, 22
<u>State v. Hunt</u> , 91 <u>N.J.</u> 338 (1982)	17
<u>State v. Muhammad</u> , 145 <u>N.J.</u> 23 (1996)	16
<u>State v. Novembrino</u> , 105 <u>N.J.</u> 95 (1987)	17
<u>State v. Saunders</u> , 75 <u>N.J.</u> 200 (1977)	26
<u>State v. Stever</u> , 107 <u>N.J.</u> 543, <u>cert. denied</u> , 484 <u>U.S.</u> 954, 108 <u>S. Ct.</u> 348, 98 <u>L. Ed.</u> 2d 373 (1987)	17, 53
<u>State v. Williams</u> , 93 <u>N.J.</u> 39 (1983)	30
<u>Storrs v. Holcomb</u> , 645 <u>N.Y.S.2d</u> 286 (Sup. Ct. 1996), <u>diss. on other grounds</u> , 666 <u>N.Y.S.2d</u> 835 (App. Div. 1997)	30
<u>Taxpayers Ass'n v. Township of Weymouth</u> , 80 <u>N.J.</u> 6 (1976), <u>cert. denied</u> , 430 <u>U.S.</u> 977, 97 <u>S. Ct.</u> 1672, 52 <u>L. Ed.2d</u> 373 (1977)	49, 50
<u>Torres v. Torres</u> , 144 <u>N.J. Super.</u> 540 (Ch. Div. 1976)	35
<u>V.C. v. M.J.B.</u> , 163 <u>N.J.</u> 200, <u>cert. denied</u> , 531 <u>U.S.</u> 926, 121 <u>S. Ct.</u> 302, 148 <u>L. Ed.</u> 2d 243 (2000)	37

<u>Washington Nat'l Ins. Co. v. Board of Review,</u> 1 <u>N.J.</u> 545 (1949)	49
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Constitutional Provisions Cited

<u>U.S. Const.</u> art. IV, §1	21
<u>Alaska Const.</u> art. I, §25	23
<u>Haw. Const.</u> art. I, §23	22
<u>N.J. Const.</u> art. I, par. 1	passim

Statutes Cited

1 <u>U.S.C.</u> §7	21
28 <u>U.S.C.</u> §1738C	21
<u>Mass. Gen. Laws</u> , <u>c.</u> 207, § 11	24
<u>N.J.S.A.</u> 2C:24-1	35
<u>N.J.S.A.</u> 2C:25-17	37
<u>N.J.S.A.</u> 10:5-4	37
<u>N.J.S.A.</u> 10:5-12	11, 39
<u>N.J.S.A.</u> 26:2H-12.22	9, 38
<u>N.J.S.A.</u> 26:2H-32 (d)	10, 38
<u>N.J.S.A.</u> 26:2H-55	39
<u>N.J.S.A.</u> 26:2H-56	39
<u>N.J.S.A.</u> 26:5C-12 (b)	10, 38
<u>N.J.S.A.</u> 26:6-50	10, 38
<u>N.J.S.A.</u> 26:6-58 (b) (1)	10, 38
<u>N.J.S.A.</u> 26:8A-3	9, 11

<u>N.J.S.A.</u> 26:8A-4 (b)	9
<u>N.J.S.A.</u> 26:8A-4 (b) (5)	8
<u>N.J.S.A.</u> 26:8A-4 (b) (9)	9
<u>N.J.S.A.</u> 26:8A-6 (c)	12
<u>N.J.S.A.</u> 26:8A-6 (f)	10, 38
<u>N.J.S.A.</u> 26:8A-8	11
<u>N.J.S.A.</u> 26:8A-8 (c)	12
<u>N.J.S.A.</u> 26:8A-10 (a) (1)	12
<u>N.J.S.A.</u> 26:8A-10 (a) (2)	12
<u>N.J.S.A.</u> 37:1-1	18, 19
<u>N.J.S.A.</u> 37:1-2	18
<u>N.J.S.A.</u> 37:1-6	18
<u>N.J.S.A.</u> 37:1-8	18
<u>N.J.S.A.</u> 37:1-9	18
<u>N.J.S.A.</u> 37:1-10	37
<u>N.J.S.A.</u> 37:1-12	18
<u>N.J.S.A.</u> 37:1-12.1	18
<u>N.J.S.A.</u> 52:14-17.26 (d) (1)	11, 39
<u>N.J.S.A.</u> 52:14-17.26 (d) (2)	11, 39
<u>N.J.S.A.</u> 54:34-1 (f)	10, 38
<u>N.J.S.A.</u> 54:34-2 (a)	10, 38
<u>N.J.S.A.</u> 54:34-4 (j)	10, 38
<u>N.J.S.A.</u> 54A:1-2 (e)	10, 38
<u>N.J.S.A.</u> 54A:3-1 (b) (1)	10, 38

<u>L. 2004, c. 246</u>	passim
<u>L. 2004, c. 246, §§48-56</u>	11, 39
<u>L. 2004, c. 246, §60</u>	8
<u>Vt. Stat. Ann. tit. 15, §1201, et seq.</u>	23
<u>Vt. Stat. Ann. tit. 15, §1201(4)</u>	24

Rule Cited

<u>R. 4:46-2(c)</u>	7, 15
---------------------------	-------

Other Authorities Cited

David Orgon Coolidge & William C. Duncan, <u>Reaffirming Marriage: a Presidential Priority</u> , 23 <u>Harv. J.L. & Pub. Pol'y</u> 623 (Spring 2001)	22-23
William C. Duncan, <u>Whither Marriage in the Law?</u> , 15 <u>Regent U.L. Rev.</u> 119 (2003)	22
Kevin J. Worthen, <u>Who Decides and What Difference Does it Make? Defining Marriage in "Our Democratic Federal Republic"</u> , 18 <u>BYU J. Pub. L.</u> 273 (2004)	24

PRELIMINARY STATEMENT

This case presents the court with the question of whether the New Jersey Constitution demands that the long-standing definition of marriage in this State be changed by judicial fiat to grant plaintiffs a right that has never been recognized in our State: the ability to enter into a government-sanctioned, same-sex marriage. Defendants do not doubt the sincerity of plaintiffs' relationships. In fact, the State has taken many steps to protect the rights of gay men and lesbians in committed unions, including enacting a comprehensive domestic partnership act providing a host of important benefits and protections to same-sex couples. However, the State Constitution does not guarantee same-sex couples the right to marry.

Instead, the power to define marriage rests with the Legislature, the branch of government best equipped to express the judgment of the people on controversial social questions such as the recognition of same-sex marriage. The Legislature has always defined marriage as the union of persons of different genders. This definition, which has remained unchanged for as long as marriage has been legal in New Jersey, comports with the historic meaning of marriage throughout the centuries, and is consistent with the laws of the federal government and every State except Massachusetts, which currently is in the throes of a spirited effort to overturn a recent judicial decision decreeing that same-sex couples have the right to enter into

State-sanctioned marriages in that State despite the absence of legislation recognizing these relationships.

While it may be that society's understanding and acceptance of gay men and lesbians has changed dramatically in recent years, it is the historic definition of marriage that is incorporated in New Jersey's Constitution and marriage statutes. To effect the fundamental change in legal status that they seek, plaintiffs must pursue their goals in the halls of the Statehouse, and not before this court. Indeed, the gay and lesbian community scored an enormous victory earlier this year, when the Legislature enacted comprehensive legislation granting same-sex couples many of the rights and privileges of married couples. A desire for further change in this area must be addressed to the State's elected representatives, where the debate over the rights to be afforded to same-sex couples has been effectively engaged.

Because the accepted understanding of marriage has always been a union between people of different genders, it is inconceivable that the Framers of the New Jersey Constitution intended to guarantee people of the same sex the right to marry as an element of personal privacy. The notion of State-sanctioned, same-sex marriage was so foreign a concept at common law, in the early years of New Jersey's history, and at the time of the adoption of the 1947 Constitution, that it is impossible

that the right to enter into such a relationship is embodied in Article I, paragraph 1, or any other provision of the New Jersey Constitution.

In addition, because plaintiffs seek not equal access to marriage, but a fundamental change in the meaning of marriage itself, they do not allege a valid equal protection claim. Plaintiffs ask this court to redefine marriage, not eliminate an unreasonable barrier to its availability. Judicial authority does not extend this far. As the trial court correctly held, the drastic alteration to the definition of marriage sought by plaintiffs must be accomplished in the legislative arena, as no amount of good intentions can empower a court to write into the Constitution a right that so clearly could not have been within the intendment of the Framers.

Because the decision below is logically and legally unassailable, it must be affirmed. In light of the absence of a constitutional imperative that same-sex couples be permitted to enter into State-sanctioned marriages, this court should decline plaintiffs' invitation to enter the ongoing legislative debate in this area. As was demonstrated by the January 2004 enactment of comprehensive domestic partnership legislation, the other branches of government are well equipped to address the concerns raised by plaintiffs and represent the proper fora for resolution of their grievances.

COUNTERSTATEMENT OF FACTS

The facts that give rise to this matter are not in dispute. Plaintiffs are seven gay male and lesbian couples who live in New Jersey and wish to enter into a civil marriage recognized by the State. Each couple has been together in excess of 10 years and four of the couples have children. (Ja4 to Ja4) (Amended Complaint ¶¶6, 9, 12, 15, 18, 21, 24). Except for the fact that they are of the same gender, each couple is legally qualified to marry under New Jersey law. (Ja5) (Amended Complaint ¶29).

In June 2002, each couple appeared before the appropriate licensing officer in their respective municipalities and requested a marriage license. Their requests were denied based on the fact that the couples were of the same gender. (Ja5 to Ja7) (Amended Complaint ¶¶31-37).

PROCEDURAL HISTORY

On June 26, 2002, plaintiffs filed a Complaint in the Superior Court, Chancery Division, Hudson County. An Amended Complaint was filed on October 9, 2002. (Ja1 to Ja12). A November 22, 2002 Consent Order transferred venue in this matter to Mercer County. (Ja16).

Named as defendants in the Amended Complaint are Gwendolyn L. Harris, then-Commissioner of the Department of Human

Services, (Ja4 to Ja5) (Amended Complaint ¶26), Dr. Clifton R. Lacy, the Commissioner of the Department of Health and Senior Services, (Ja5) (Amended Complaint ¶27), and Joseph Komosinski, the State Registrar of Vital Statistics, (Ja5) (Amended Complaint ¶28). These defendants are named in their official capacities only because of their official responsibilities relating to implementation of the State's marriage licensing and vital records laws. (Ja4 to Ja5) (Amended Complaint ¶¶26-28).

Plaintiffs allege that the State's failure to permit them to marry deprives them of an array of statutory protections, benefits, and mutual responsibilities accorded to mixed-gender couples who marry. According to plaintiffs, they are being denied legally sanctioned rights and benefits that flow from marriage, including rights and benefits relating to taxation, (Ja8 to Ja9) (Amended Complaint ¶45), intestacy, (Ja8) (Amended Complaint ¶43), health insurance, (Ja9) (Amended Complaint ¶47), victim's rights, (Ja8) (Amended Complaint ¶43), education financing, (Ja9) (Amended Complaint ¶46), incapacitation, (Ja8) (Amended Complaint ¶43), tort remedies, (Ja8) (Amended Complaint ¶43), health care, (Ja8) (Amended Complaint ¶43), family medical leave, (Ja9) (Amended Complaint ¶47), hospital visitation, (Ja9) (Amended Complaint ¶48), spousal financial obligations, (Ja9) (Amended Complaint ¶50), workers' compensation, (Ja8) (Amended Complaint ¶44), burial rights, (Ja8) (Amended Complaint

¶43), and property, alimony, and parenting matters in the event that a same-sex couple terminates their relationship, (Ja9 to Ja10) (Amended Complaint ¶51).

In addition, plaintiffs allege that third-party entities, including insurance companies and private employers, accord certain benefits to individuals based on their marital status under State law and that these benefits are being denied to them. (Ja7, Ja9) (Amended Complaint ¶¶41, 49).

The Amended Complaint is grounded solely on Article I, paragraph 1 of the State Constitution. Plaintiffs allege that the failure to grant them access to marriage violates their State Constitutional rights to privacy, (Ja10) (Amended Complaint, First Count, ¶¶54-57) and equal protection, (Ja11) (Amended Complaint, Second Count, ¶¶58-61). Plaintiffs assert no federal constitutional or statutory claims.

The Amended Complaint seeks no monetary damages. (Ja4) (Amended Complaint ¶4). Plaintiffs request a declaration that their rights have been violated and that they are entitled to "treatment by Defendants equal to the treatment of other couples regarding access to marriage and to the rights that flow from marriage." (Amended Complaint, Prayer for Relief, ¶1). In addition, plaintiffs request that the Court enter an injunction requiring defendants to grant plaintiffs marriage licenses and access to marriage on the same terms and conditions as mixed-

gender couples. (Ja11) (Amended Complaint, Prayer for Relief, ¶2).

On February 24, 2003, defendants moved pursuant to R. 4:6-2(3) to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted. (Ja21 to Ja24). That motion was ultimately converted by the court to a motion for summary judgment. Thereafter, on September 30, 2003, plaintiffs cross-moved for summary judgment. (Ja25 to Ja129).

On November 5, 2003, the Hon. Linda R. Feinberg, A.J.S.C., issued a comprehensive opinion granting defendants' motion for summary judgment and denying plaintiffs' cross-motion for summary judgment. (Ja130a to Ja202). In her decision, Judge Feinberg correctly held that the State Constitution does not guarantee same-sex couples the right to enter into a State-sanctioned marriage. The trial court persuasively reasoned that plaintiffs do not have a fundamental right to marry someone of the same gender, (Ja142 to Ja162), that plaintiffs' right to privacy is not violated by the State's ban on same-sex marriage, (Ja162 to Ja171), and that plaintiffs have not established a violation of their equal protection rights, (Ja172 to Ja200). The trial court ended its analysis with the prescient observation that the Legislature was poised to address the rights of same-sex couples, and commended that body "to carefully examine and

consider the expanded rights afforded to same-sex couples in other jurisdictions." (Ja200).

On November 20, 2003, the trial court entered an Order memorializing its grant of summary judgment in favor of defendants. (Ja203 to Ja205).

On December 22, 2003, plaintiffs filed a Notice of Appeal establishing jurisdiction in this court. (Ja206 to Ja207).

Shortly after plaintiffs filed their Notice of Appeal, the New Jersey Legislature heeded Judge Feinberg's call for legislative action in this area. On January 12, 2004, the Domestic Partnership Act (the "Act") was enacted into law. L. 2004, c. 246. That law, which took effect on July 10, 2004, L. 2004, c. 246, §60, establishes the procedure for same-sex couples to enter into State-sanctioned relationships that are entitled to many of the protections and benefits accorded to married couples.*

Domestic partnerships are available to any two unmarried individuals of the same gender who are at least 18 years of age, share a common residence in the State and are otherwise jointly responsible for each other's common welfare, as

* The Domestic Partnership Act also permits two persons who are each 62 years of age or older and not of the same sex to establish a domestic partnership. N.J.S.A. 26:8A-4(b)(5). This provision of the Act is not at issue in this appeal.

evidenced by joint financial arrangements or joint ownership of real or personal property, and who have chosen to share each other's lives in a committed relationship of mutual caring. N.J.S.A. 26:8A-4(b).^{*} State residence is not required where one of the members of the domestic partnership is a member of a State-administered retirement system. N.J.S.A. 26:8A-3.

Domestic partners are provided with a myriad of protections and benefits provided to married couples. The denial of many of these protections and benefits prior to enactment of the Act was cited by plaintiffs as evidence of unequal treatment for same-sex couples. Thus, many of the harms alleged in the Amended Complaint have been ameliorated by the Legislature.

The Act provides numerous important protections related to the provision of health care that are available to married couples. Those protections include: (1) guaranteed visitation rights at all licensed health care facilities for a patient's domestic partner, the children of the patient's domestic partner, and the domestic partner of the patient's parent or child, unless certain conditions not related to domestic partnership status are present, N.J.S.A. 26:2H-12.22; (2) inclusion of a patient's domestic partner within the definition of "immediate family" for

^{*} Individuals who have been a partner in a domestic partnership may not enter into a new domestic partnership until at least 180 days after termination of the prior domestic partnership, unless of the prior domestic partnership was terminated by the death of one of the partners. N.J.S.A. 26:8A-4(b)(9).

purposes of the statutes regulating nursing, convalescent and boarding homes, N.J.S.A. 26:2H-32(d); (3) the ability to consent to the release of medical records relating to the death of a domestic partner with AIDS or HIV infection, N.J.S.A. 26:5C-12(b); (4) the ability to consent to the performance of an autopsy on the body of a domestic partner, N.J.S.A. 26:6-50; and (5) the power to permit donation of all or portions of a deceased domestic partner's organs for statutorily approved purposes, N.J.S.A. 26:6-58(b)(1).*

In addition, the Act provides domestic partners with valuable tax benefits available to married couples: (1) an exemption from the New Jersey transfer inheritance tax for property and pension contributions inherited by an individual from that person's deceased domestic partner, N.J.S.A. 54:34-2(a); N.J.S.A. 54:34-1(f); N.J.S.A. 54:34-4(j); (2) the inclusion of a domestic partner as a dependent for New Jersey gross income tax purposes, N.J.S.A. 54A:1-2(e); and (3) a \$1,000 personal exemption for New Jersey gross income tax purposes for a domestic partner that does not file a separate return, N.J.S.A. 54A:3-1(b)(1).

* In emergency medical situations, two adults who meet the criteria for domestic partnership, but who have not entered into a domestic partnership, must be treated as domestic partners by health care personnel for the certain purposes. N.J.S.A. 26:8A-6(f).

Importantly, the domestic partner of an individual who is a State-employee member of a State-administered retirement system is entitled to all of the benefits provided by that system to spouses of employees. N.J.S.A. 52:14-17.26(d)(1). An employer other than the State that is a participant in the State Health Benefits Program may adopt a resolution providing for benefits for the domestic partners of employees. N.J.S.A. 52:14-17.26(d)(2). Private insurance companies that provide dependant coverage for health, hospital, medical and dental expense benefits under a contract delivered, issued, executed or renewed in this State, or approved for issuance or renewal in this State by the Commissioner of Banking and Insurance, must provide such coverage for a covered person's domestic partner. L. 2004, c. 246, §§48-56. In addition, the Law Against Discrimination has been amended to outlaw discrimination on the basis of domestic partnership status. N.J.S.A. 10:5-12.

Entry into a domestic partnership is accomplished by filing with a Local Registrar of Vital Statistics a simple Affidavit of Domestic Partnership attesting that each member of the partnership satisfies the eligibility requirements of the statute, along with a filing fee. Immediately after filing of the Affidavit of Domestic Partnership, a Certificate of Domestic Partnership shall be issued to the partners. N.J.S.A. 26:8A-3; N.J.S.A. 26:8A-8. All Affidavits of Domestic Partnership and

Certificates of Domestic Partnership are forwarded each month by every Local Registrar of Vital Statistics to the State Registrar of Vital Statistics for filing and recordation. N.J.S.A. 26:8A-8(c).

The Superior Court has jurisdiction over all proceedings relating to the termination of a domestic partnership and the division and distribution of jointly held property of the domestic partners. N.J.S.A. 26:8A-10(a)(1). The grounds for termination are set forth in the Act. N.J.S.A. 26:8A-10(a)(2).*

Based on the allegations made in the Amended Complaint, it is apparent that each of the plaintiff couples would qualify to enter into a domestic partnership under the Domestic Partnership Act and enjoy the protections and benefits accorded by that statute.

* The Act provides that the State will recognize as valid a domestic partnership, civil union, or reciprocal beneficiary relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which the partnership was created. N.J.S.A. 26:8A-6(c).

ARGUMENT

**THE TRIAL COURT CORRECTLY ENTERED SUMMARY
JUDGMENT IN FAVOR OF DEFENDANTS BECAUSE
PLAINTIFFS DO NOT HAVE A STATE
CONSTITUTIONAL RIGHT TO ENTER INTO A SAME-
SEX MARRIAGE.**

The New Jersey Constitution does not guarantee same-sex couples the right to enter into a State-sanctioned marriage. While gay men and lesbians are free to form relationships, build households, have children, and hold themselves out to the world as couples, nothing in the Constitution requires that the State grant same-sex couples access to government-recognized marriage. To the contrary, the Constitution vests in the Legislature the authority to determine what rights and benefits will be provided by the State to same-sex couples. The elected representatives of the people of New Jersey have exercised their prerogative in this area and enacted a domestic partnership statute that defines the extent of protections and benefits to be accorded to same-sex unions. The Constitution requires no further extension of benefits to same-sex couples.

New Jersey's prohibition on same-sex marriage reflects the historic definition of marriage as the union between people of different genders. This understanding of marriage was certainly in the minds of the Framers of the 1947 Constitution, who could not possibly have intended to create the constitutional entitlement that plaintiffs seek. While the right to privacy

includes the right to marry, that right is necessarily limited to the union of persons of different genders. In addition, to the extent that plaintiffs claim they are being denied equal access to marriage, they misstate the true nature of the relief they seek. Marriage is available to all New Jersey residents, including plaintiffs, on the same terms. The fact that plaintiffs do not wish to enter into the type of marriage sanctioned by New Jersey, does not render the State's marriage laws invalid.

What plaintiffs seek is not access to marriage, as it has been defined by the Legislature, but a new, and unique type of marriage, which has never been recognized by New Jersey or authorized by the Legislature. Their request for judicial creation of State-sanctioned, same-sex marriage was properly rejected by the trial court in a decision that should be affirmed on appeal.

A. Plaintiffs Did Not Meet Their Heavy Burden To Overcome The Presumption That New Jersey's Marriage Laws Are Constitutional.

This court employs the same standards as a trial court when reviewing summary judgment decisions. Prudential Property & Casualty Ins. Co. v. Boyland, 307 N.J. Super. 162, 167 (App. Div. 1998). Summary judgment shall be granted where "there is no genuine issue as to any material fact . . . and . . . the moving party is entitled to a judgment or order as a matter of law." R.

4:46-2(c). The movant bears the "burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact" regarding the claims asserted. Judson v. Peoples Bank and Trust, 17 N.J. 67, 74 (1954) (citation omitted). As the Supreme Court explained, "a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill v. Guardian Life Ins. Co., 142 N.J. 520, 529 (1995) (quoting R. 4:46-2(c)). Moreover, "when the evidence is so one-sided that one party must prevail as a matter of law the trial court should not hesitate to grant summary judgment." Id. at 540 (quotations omitted).

As a threshold matter, plaintiffs face the difficult task of overcoming the presumptive validity that attaches to all acts of the Legislature. The Supreme Court has cautioned courts to remain "mindful of the strong presumption in favor of constitutionality, and the traditional judicial reluctance to declare a statute void, a power to be delicately exercised" Paul Kimball Hosp. v. Brick Township Hosp., 86 N.J. 429, 447 (1981) (citation omitted). "[C]ourts do not act as a super-legislature." Newark Superior Officers Ass'n v. City of Newark, 98 N.J. 212, 222 (1985) (citing Burton v. Sills, 53 N.J. 86, 96 (1968), app. diss., 394 U.S. 812, 89 S. Ct. 1486, 22 L. Ed. 2d 748 (1969)). Out of respect for the democratic process and in

recognition of the Legislature's status as a coequal branch, statutes under attack are thus "entitled to great weight by the courts." New Jersey Sports & Exposition Auth. v. McCrane, 119 N.J. Super. 457, 474 (Law Div. 1971), aff'd, 61 N.J. 1 (1972) (quoting Roe v. Kervick, 42 N.J. 191, 229-230 (1964)).

Every possible presumption in favor of the constitutionality of legislative action must be extended by this court. See Holster v. Board of Trustees, 59 N.J. 60, 66 (1971). Hence, any litigant who attacks a statute must demonstrate that "there is no reasonable basis for sustaining it." McCrane, supra, 119 N.J. Super. at 476. Only those legislative acts that are "clearly repugnant to the Constitution" should be invalidated. Newark Superior Officers, supra, 98 N.J. at 222; accord State v. Muhammad, 145 N.J. 23 (1996). Where a statute's constitutionality is "fairly debatable, courts will uphold" the law. Newark Superior Officers, supra, 98 N.J. at 227. If "alternative interpretations of a statute are equally plausible, the view sustaining the statute's constitutionality is favored." City of Jersey City v. Farmer, 329 N.J. Super. 27, 38 (App. Div.) (quotations omitted), certif. denied, 165 N.J. 135 (2000).

"[O]rdinarily, legislative enactments are presumed to be valid and the burden to prove invalidity is a heavy one." Bell v. Township of Stafford, 110 N.J. 384, 394 (1988). But, "when legislation impinges on a constitutionally protected right,

[the Court has] looked more closely at the State's purported justification" for the statute. Planned Parenthood v. Farmer, 165 N.J. 609, 619-620 (2000). This more scrutinizing standard, however, must be tempered by the "caution [that] is required when we extend the protection of our State Constitution beyond the limits set by the United States Supreme Court for parallel provisions in the Federal Constitution." Id. at 620.

Only matters of "'particular state interest'" afford an appropriate basis for expansion of a State constitutional provision beyond the protections afforded by its federal counterpart. State v. Novembrino, 105 N.J. 95, 146 (1987) (quoting State v. Hunt, 91 N.J. 338, 366 (1982) (Handler, J., concurring)). Even under the extraordinary circumstances in which particular State interests are implicated, extension of State constitutional provisions beyond their federal equivalents should take place only when justified by "'[s]ound policy reasons.'" See State v. Stever, 107 N.J. 543, 557, cert. denied, 484 U.S. 954, 108 S. Ct. 348, 98 L. Ed. 2d 373 (1987); see also State v. Williams, 93 N.J. 39 (1983). No court has found a federal constitutional right to enter into a same-sex marriage. Moreover, only one State court has found that same-sex couples have a constitutional right to enter into a State-sanctioned marriage, and its decision is the subject of a concerted popular effort to reverse the holding through amendment to the

Massachusetts Constitution. In light of the near uniformity of laws on the question of same-sex marriage throughout the country, this court should exercise particular caution before interpreting the State Constitution in the expansive and unique manner requested by plaintiffs.

B. The Trial Court Correctly Held That New Jersey's Marriage Statutes Do Not Permit Same-Sex Couples To Marry.

"Before a marriage can be lawfully performed in this state, the persons intending to be married shall obtain a marriage license from the licensing officer" N.J.S.A. 37:1-2. Persons applying must meet various requirements relating to their age, N.J.S.A. 37:1-6, health, and competency, N.J.S.A. 37:1-9. In addition, marriages between certain blood relatives are prohibited. N.J.S.A. 37:1-1. A witness of legal age must be present at the issuance of the license to verify the statements of the applicants attesting to the truth of the facts respecting the legality of the proposed marriage. N.J.S.A. 37:1-8. Finally, applicants must pay \$28 in fees. N.J.S.A. 37:1-12; N.J.S.A. 37:1-12.1. It is undisputed that plaintiffs meet the age, health, and competency requirements of the statute and that they were accompanied by a witness and prepared to proffer the required fees at the time that they applied for a marriage license. (Ja5) (Amended Complaint ¶¶29, 30). In addition, apart from the fact that each couple was of the same gender,

plaintiffs' proposed marriages would otherwise be legal. (Ja5) (Amended Complaint ¶29).

Marriage is nowhere expressly defined in New Jersey statutes as a union between a man and a woman. In addition, N.J.S.A. 37:1-1, which delineates which persons may not marry each other, does not expressly provide that a person may not marry someone of the same gender. The absence of an express statutory prohibition on same-sex marriage, however, is evidence not of the acceptance of such unions, but of the fact that same-sex marriage was so foreign a concept to lawmakers in 1912, when N.J.S.A. 37:1-1 was enacted, that a ban hardly needed mention. As then Judge and later Justice Handler succinctly explained, "[t]here is not the slightest doubt that New Jersey follows the overwhelming authority" and "historic assumption" that marriage can only take place between a man and a woman. M.T. v. J.T., 140 N.J. Super. 77, 84 (App. Div.), certif. denied, 71 N.J. 345 (1976).

This presumption is reflected in various statutes that refer only to a "husband" and a "wife" when discussing the rights and obligations of a married couple. See N.J.S.A. 37:1-1, et seq. That only persons of different genders can marry in New Jersey "is so strongly and firmly implied from a full reading of the statutes that a different legislative intent, one which would sanction a marriage between persons of the same sex, cannot be

fathomed." M.T., supra, 140 N.J. Super. at 84-85; accord In re Adoption by J.M.G., 267 N.J. Super. 622, 628 (Ch. Div. 1993) ("[S]ame-sex marriages are not legal in this state.").

Plaintiffs accept M.T.'s holding that New Jersey's marriage statutes do not permit same-sex couples to marry. (Ja2) (Amended Complaint ¶1) ("New Jersey's marriage law expressly . . . excludes these same-sex couples, barring them from access" to marriage). Indeed, the interpretation and application of New Jersey's marriage statutes in a fashion that precludes the plaintiff couples from marrying one another is the premise of the Amended Complaint. The trial court correctly applied the holding in M.T. and this court should follow suit. Plaintiffs provide no convincing argument that New Jersey's marriage statutes allow couples of the same gender to marry.*

C. The Federal Government And Forty-Nine States Do Not Recognize Same-Sex Marriage.

The United States Constitution has never been interpreted to guarantee same-sex couples the right to marry. A Due Process Clause challenge to a same-sex marriage ban under the

* Presently pending in the Legislature is a bill, Assembly No. 460, that expressly prohibits same-sex marriage, declares same-sex marriage to be against public policy in New Jersey, and prohibits recognition of same-sex marriages performed in other States and countries. Also pending in the Legislature is Assembly Resolution No. 179 which calls upon Congress to propose a constitutional amendment defining marriage in the United States as the union between one man and one woman.

federal Constitution was rejected in Dean v. District of Columbia, 653 A.2d 307, 333 (D.C. 1995). Moreover, Congress has unequivocally stated that federal law does not recognize the right that plaintiffs seek and that the federal Constitution should not be interpreted to embrace same-sex marriage. In 1996, Congress enacted the Defense of Marriage Act ("DOMA"), which provides that all Acts of Congress that refer to "marriage" or "spouse" shall be interpreted to apply only to mixed-gender couples. 1 U.S.C. §7. In addition, DOMA states that no State shall be required to give effect under the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV, §1, to any other State's law that recognizes same-sex marriage. 28 U.S.C. §1738C.*

This provision of DOMA is in conformity with the laws of forty-nine of the States. A large majority of States have affirmatively prohibited the recognition of same-sex marriages. Between 1995 and 2001 alone, thirty-three States enacted legislation that both defined marriage as the union of a man and a woman and provided that their States would not recognize a

* The United States Supreme Court decision in Lawrence v. Texas, 539 U.S. 558, 578, 123 S. Ct. 2472, 2484, 156 L. Ed. 2d 508 (2003), does not address the question of "whether the government must give formal recognition of any relationship that homosexual persons seek to enter." Thus, its holding that States cannot criminalize acts of sodomy between consenting adults has no bearing on the issues before this court. See Standhardt v. Superior Court, 77 P.3d 451, 454-460 (Ariz. Ct. App. 2003).

same-sex marriage performed in another jurisdiction. William C. Duncan, Whither Marriage in the Law?, 15 Regent U.L. Rev. 119, 121 & n. 9 (2003). That number has recently been raised to thirty-nine. Kavan Peterson, 50 State Rundown on Gay Marriage Laws, August 26, 2004, Stateline.org (Da3)*. Four states, Alaska, Missouri, Nebraska and Nevada, now have bans against same-sex marriage written into their State Constitutions. Id. (Da2). The Court of Appeals of Arizona rejected arguments that the federal and Arizona Constitutions require State-recognition of same-sex marriages. Standhardt, supra. The Arizona court found that no equal protection or privacy violation arises from a ban on government-sanctioned same-sex unions. 77 P.3d at 460 to 464.

Indeed, in two instances in which courts have threatened the validity of prohibitions on same-sex marriage, those judicial decisions were quickly reversed by public mandate. In Hawaii, a State Supreme Court ruling that a prohibition on same-sex marriage would violate the Hawaii Constitution in the absence of a showing of a compelling State interest, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), was overturned by a Constitutional amendment adopted by popular referendum shortly thereafter. See Haw. Const. art. I, §23; David Orgon Coolidge &

*<http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058>

William C. Duncan, Reaffirming Marriage: a Presidential Priority, 23 Harv. J.L. & Pub. Pol'y 623, 628 (Spring 2001). A similar decision by an Alaska trial court, Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Super. Ct. 1998), also triggered the rapid adoption of a constitutional amendment barring same-sex marriage in that State. See Alaska Const. art. I, §25; Coolidge, supra, 23 Harv. J.L. & Pub. Pol'y at 628.*

In addition, although the Vermont Supreme Court, in Baker v. Vermont, 744 A.2d 864 (1999), held that a ban on same-sex marriage violated the Common Benefits provision of that State's Constitution, the court stayed its decision to give the Vermont Legislature the opportunity to either amend the Vermont marriage statutes or provide same-sex couples with a set of rights equivalent to marriage. The Vermont Legislature did not provide same-sex couples with the right to marry. Instead, that State enacted laws that allow for "civil unions" between people of the same gender effective July 1, 2000. Vt. Stat. Ann. tit.

* Two recent unpublished trial court decisions hold that a ban on same-sex marriage constitutes a deprivation of constitutional rights. See Li v. Oregon, 2004 WL 1258167 (Or. Cir. Ct. Apr. 20, 2004) (allowing State Legislature to craft legislation that grants same-sex couples rights equivalent to marriage); Anderson v. King County, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004) (staying decision invalidating ban on same-sex marriage pending review by Washington Supreme Court). Because these decisions are unpublished and subject to appellate review, their precedential value is severely limited. In addition, the decisions are too recent to accurately gauge the public and legislative response to their holdings.

15, §1201, et seq. (2001). The Vermont Legislature specifically retained the definition of marriage as “the legally recognized union of one man and one woman.” Vt. Stat. Ann. tit. 15, §1201(4).

Only one high State court has held that same-sex couples have a State constitutional right to enter into a State-sanctioned marriage. In Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003), the Supreme Judicial Court of Massachusetts held that the equal protection provisions of that State’s Constitution were violated by statutes limiting marriage to persons of different genders. The court’s unprecedented decision created a firestorm of protest, triggering both a legislative drive to amend the Massachusetts Constitution and an effort to amend the United States Constitution to prohibit same-sex marriages. Kevin J. Worthen, Who Decides and What Difference Does it Make? Defining Marriage in “Our Democratic Federal Republic”, 18 BYU J. Pub. L. 273, n. 135 (2004). The continued validity of the Massachusetts decision remains in doubt.*

It is apparent, therefore, that plaintiffs seek a right that is not firmly established anywhere in this country and which

* Massachusetts law does not permit same-sex couples who are not residents of that State to marry if their marriage would be unlawful in their State of residence. Mass. Gen. Laws, c. 207, § 11. Thus, plaintiffs, who are residents of New Jersey, are ineligible to marry in Massachusetts.

is the subject of ongoing political debate. In such circumstances, courts wisely exercise caution before short-circuiting the proper deliberation and consideration of controversial social issues by the elected branches of government. Such caution should be exercised here, given that plaintiffs can point to no convincing legal authority for the rights they seek and have already made a major gain towards realization of their goals in the Legislature.

D. The Trial Court Properly Held that Plaintiffs' Privacy Rights Are Not Violated By An Inability To Enter Into A Same-Sex Marriage.

The State Constitution does not guarantee same-sex couples the right to enter into a government-sanctioned marriage. Article I, paragraph 1 of the State Constitution provides that

[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

[N.J. Const. art. I, par. 1.]

The language of that paragraph "incorporates within its terms the right of privacy and its concomitant rights" Planned Parenthood, supra, 165 N.J. at 629; Right to Choose v. Byrne, 91 N.J. 287 (1982). Our courts have defined the right of privacy as "the right of an individual to be . . . protected from any wrongful intrusion into his private life which would outrage

or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 94 (1992) (quoting McGovern v. Van Riper, 137 N.J. Eq. 24, 32 (Ch. Div. 1945), aff'd, 137 N.J. Eq. 548 (E. & A. 1946)). Essentially, the New Jersey Constitution provides citizens with a "zone of privacy" to conduct their affairs without government interference, unless such interference promotes a valid State interest. Doe v. Poritz, 142 N.J. 1, 77-78 (1995).

The State Constitutional right to privacy embraces an array of personal freedoms, including the right to make procreative decisions, Right to Choose, supra, 91 N.J. at 303-10, the right of adults to engage in consensual sexual conduct, State v. Saunders, 75 N.J. 200, 224-28 (1977) (Schreiber, J., concurring), the right to decide whether to be sterilized, In re Grady, 85 N.J. 235, 249 (1981), and the right to terminate one's life in certain circumstances, In re Quinlan, 70 N.J. 10, 40-41, cert. denied, 429 U.S. 922, 97 S. Ct. 319, 50 L. Ed. 2d 289 (1976). As Judge Feinberg correctly held, the scope of protection afforded by Article I, paragraph 1, however, does not extend to the right to enter into a State-sanctioned, same-sex marriage.

1) **While The Right To Marry Is Protected By The State Constitution, That Right, By Definition, Does Not Encompass The Right To Marry Someone Of The Same Gender.**

Although the Supreme Court has recognized that "the decision to marry invokes a privacy interest safeguarded by the New Jersey Constitution," Greenberg v. Kimmelman, 99 N.J. 552, 572 (1985), that right by its very essence includes only the union of persons of different genders. Thus, a prohibition on same-sex marriage is not so much a limitation on the right to marry, but a defining element of that right accepted for generations as an essential characteristic of marriage. The right to marry has always been understood in law and tradition to apply only to couples of different genders. A change in that basic understanding would not lift a restriction on the right, but would work a fundamental transformation of marriage into an arrangement that could never have been within the intendment of the Framers of the 1947 Constitution and which contradicts the well-settled, and universally accepted, legal precept that marriage is the union of people of different genders.

Article I, paragraph 1 encompasses a "general recognition of those absolute rights of the citizen which were a part of the common law." King v. South Jersey National Bank, 66 N.J. 161, 178 (1974) (quoting Ransom v. Black, 54 N.J.L. 446, 448 (Sup. Ct. 1892), aff'd, 65 N.J.L. 688 (E. & A. 1900)). Recognition of a particular right as fundamental is limited and

"cannot be based on the social importance of the interest." Cold Springs Indian Corp. v. Township of Ocean, 154 N.J. Super. 75, 107 (Law Div. 1977), aff'd, 81 N.J. 502 (1980).

Courts "must take care not to read the constitution to embrace subjects never thought to be within its reach." Rutgers Council of AAUP Chapters v. Rutgers, the State Univ., 298 N.J. Super. 442, 464 (App. Div. 1997) (Baime, J.A.D., concurring), certif. denied, 153 N.J. 48 (1998). "The standard to be applied in determining whether a fundamental constitutional right exists requires the reviewing court to look to the 'traditions and (collective) conscience of our people' to determine whether a principle is 'so rooted (there) . . . as to be ranked as fundamental.'" King, supra, 66 N.J. at 178 (quoting Griswold v. Connecticut, 381 U.S. 479, 493, 85 S. Ct. 1678, 1686, 14 L. Ed. 2d 510, 520 (1965) (Goldberg, J., concurring)).

The historic limitation of marriage to individuals of different genders demands the conclusion that same-sex marriage is not a recognized fundamental right in New Jersey. The concept of same-sex marriage certainly was not recognized at common law. As the Appellate Division explained:

The historic assumption in the application of common law and statutory strictures relating to marriages is that only persons who can become "man and wife" have the capacity to enter marriage.

[M.T., supra, 140 N.J. Super. at 84 (citations omitted).]

The court recently reiterated that, under New Jersey law, the "commonplace meaning of marriage [which] envisions a man and a woman joined in wedlock" remains the only marriage entitled to statutory recognition. Lee v. General Accident Ins. Co., 337 N.J. Super. 509, 514 (App. Div. 2001) (citing Lopez v. Santiago, 125 N.J. Super. 268, 270 (App. Div. 1973)); accord Rutgers Council, supra, 298 N.J. Super. at 455.

Nor can it be said that same-sex marriage is so rooted in the traditions of this State that it must be deemed to be a fundamental right. Indeed, the concept of two individuals of the same gender entering into a marriage was inconceivable to the vast majority of people, including gay men and lesbians, until well into the latter half of the twentieth century. The Framers of the New Jersey Constitution of 1947 could not possibly have fathomed same-sex marriage at all, let alone as a fundamental right cloaked in constitutional protection. Prior to the organized gay rights movement in this country, which began with the 1968 Stonewall uprising in New York City, the concept of even minimal legal protections for homosexuals was foreign to American law. One cannot reasonably conclude that the Framers of the 1947 Constitution intended to bestow on same-sex couples the fundamental right to marry.

The courts in other States have recognized the historic understanding that marriage includes only the union of persons of

different genders. For example, in Baker v. Nelson, 191 N.W.2d 185 (1971), app. diss., 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972), the Supreme Court of Minnesota rejected a challenge to that State's marriage statute by two men who wished to marry. In reaching its decision, the court reasoned that an historic understanding of marriage as a union of a man and a woman is "as old as the book of Genesis," and that "[t]he due process clause . . . is not a charter for restructuring" fundamental understandings "by judicial legislation." Id. at 186; see also Storrs v. Holcomb, 645 N.Y.S.2d 286 (Sup. Ct. 1996) (declining to identify a new fundamental right to same-sex marriage because the long tradition of marriage, understood as a union of male and female, testifies to a contrary political, cultural, religious and legal consensus), diss. on other grounds, 666 N.Y.S.2d 835 (App. Div. 1997); Constant A. v. Paul C.A., 496 A.2d 1, 6 (Pa. Super. Ct. 1985) (homosexual marriages are not permitted and the relationship is not to be equated with heterosexual relations); Singer v. Harra, 522 P.2d 1187, 1197 (Wash. Ct. App.), rev. denied, 84 Wash. 2d 1008 (1974) (an historical definition of marriage is deeply rooted in our society and does not include a constitutionally protected right to same-sex marriage); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973) (finding no constitutional sanction or protection of the right of marriage between persons of the same sex); Anonymous v. Anonymous, 325

N.Y.S.2d 499 (Sup. Ct. 1971) (the law makes no provision for a "marriage" between persons of the same sex because marriage is and always has been a contract between a man and a woman).

The decision of the Alaska trial court in Brause is not persuasive precedent for a contrary conclusion. As an initial matter, the opinion has been overturned by a popularly enacted amendment to the Alaska Constitution declaring no constitutional right to same-sex marriage. Its continuing validity as precedent, therefore, has ended. In addition, the rationale employed by the court is fatally flawed.

In Brause, the court found a fundamental right "to choose one's life partner" under the Alaska Constitution. 1998 WL 88743 at *6. This unusual holding transforms the recognized contours of marriage, as they have always been understood, into an amorphous and limitless right to government sponsorship of all relationships. While defendants would agree that adults are free to decide which person to "partner" with for life, there is no basis for the erroneous conclusion in Brause that the State must, by constitutional dictate, accord marriage rights to every such "partnership." Rather than anchoring its decision in the long-standing and widely-accepted notions of privacy embedded in the fabric of our society, the Brause court creates, from whole cloth, a right never before recognized in American jurisprudence and declares that right to be fundamental. The creation of new

rights, however, is properly delegated to the legislative branch of government. The path forged by the Brause decision is too undisciplined to warrant serious consideration by this court.

The Supreme Court's decision in Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1878, 18 L. Ed 2d 1010 (1967), is predicated entirely on the Fourteenth Amendment's prohibition of racial classifications and does not, therefore, provide support for plaintiffs' position. As the Court explained, the "racial classifications embodied" in the Virginia statute that banned interracial marriage were "directly subversive of the principle of equality at the heart of the Fourteenth Amendment" Id., 388 U.S. at 12, 87 S. Ct. at 1824, 18 L. Ed 2d 1010.

No similar constitutional provision accords heightened protection to individuals who claim that statutes discriminate on the basis of sexual orientation. As the Appellate Division explained in Rutgers, supra, 298 N.J. Super. at 453, in rejecting an equal protection challenge to a statute that does not provide health insurance coverage to the same-sex partners of employees in the State Health Benefits Plan:

Our courts . . . have not addressed classifications based on marital status or sexual orientation. However, the federal courts have held that sexual orientation classifications are not suspect. Ben-Shalom v. Marsh, 881 F.2d 454, 465-66 (7th Cir. 1989) cert. denied, 494 U.S. 1004, 110 S. Ct. 1296, 108 L. Ed. 2d 473 (1990); High Tech Gays v. Defense Indus. Sec. Clearance Off., 895 F.2d 563, 573-574 (9th Cir. 1990).

We have not created suspect classifications where the federal courts have refused to do so, and therefore, have no reason to view sexual orientation or marital status as deserving of heightened scrutiny.

The comparison plaintiffs seek to draw between New Jersey's statute limiting marriage to mixed-gender couples and Virginia's law prohibiting interracial marriage is flawed as a matter of legal principle. Numerous courts have rejected the analogy advanced by plaintiffs in this regard. See Baker v. Vermont, supra, 744 A.2d at 880 n.13; Baker v. Nelson, supra, 191 N.W.2d at 187; Harra, supra, 522 P.2d at 1187.

Nor did the ban on interracial marriage at issue in Loving reflect the overwhelming view of the nation. "By contrast, statutory restrictions on interracial marriage, such as that struck down in Loving v. Virginia . . . did not have such deep historic roots. (Unlike most of the restrictions on marriage, the racial prohibition was an American innovation without English precedent.) Goodridge v. Department of Public Health, 2002 WL 1299135 at *10 n.22 (Mass. Super. 2002), rev'd, 798 N.E.2d 941 (Mass. 2003) (citing Loving, supra, 388 U.S. at 6, 87 S. Ct. at 1821, 18 L. Ed. 2d 1010 (Virginia's anti-miscegenation law was not enacted until 1924)). Nor were racial limitations uniformly imposed on the right to marry. By 1967, only 16 States imposed such restrictions. Ibid. Thus, while plaintiffs make a sympathetic case for government recognition of

their relationships, they lack the significant legal foundation that was available to the plaintiffs in Loving to demand judicial recognition of the rights they seek.

2) Even If The Ability To Marry Someone Of The Same Gender Is A Fundamental Right, New Jersey's Interest In Prohibiting Same-Sex Marriage Outweighs The Minimal Harms Visited Upon The Plaintiff Couples, Whose Relationships Enjoy Significant Statutory Protections.

It has always been recognized that the right to marry is not absolute. "Although constitutionally based, the right to marry remains subject to reasonable state regulation. Indeed, that right traditionally has been subject to pervasive regulation." Greenberg, supra, 99 N.J. at 572. Thus, even if the court were to determine that the fundamental right to marry includes the ability to marry someone of the same gender, New Jersey's prohibition on same-sex marriage can withstand judicial scrutiny because of the legitimate State purpose furthered by the ban and its minimal intrusion on plaintiffs.

The test for determining whether a restriction on marriage will survive a constitutional challenge is straightforward: the effect of the challenged statute on the right to marry is weighed "in light of the state interest" furthered by the law. Id. at 579. Numerous restrictions on marriage have been upheld against challenges under the right to privacy.

New Jersey statutes ban bigamous marriages, N.J.S.A. 2C:24-1, common law marriages, N.J.S.A. 37:1-10, incestuous marriages, N.J.S.A. 37:1-1, and marriages to persons adjudged to be mentally incompetent or with a venereal disease in a communicable stage, N.J.S.A. 37:1-9. The governmental interest in these restrictions have been repeatedly recognized. The ban on common law marriage has been found to discourage "unions which are marked by [a] lack of commitment and which . . . may dissolve at any moment. The uncertainty as to economic support and dependency are the primary concerns of the State." Torres v. Torres, 144 N.J. Super. 540, 543 (Ch. Div. 1976). The government has been found to have a compelling interest in banning polygamy because "[m]onogamy is inextricably woven into the fabric of our society" and is "the bedrock upon which our culture is built." Potter v. City of Murray City, 760 F.2d 1065, 1070 (10th Cir.), cert. denied, 474 U.S. 849, 106 S. Ct. 145, 88 L. Ed. 2d 120 (1985). The State's interest in a ban on incestuous marriages is self-evident: preventing the dilution of the genetic makeup of the offspring of the marriage. In addition, protection of mentally incompetent persons from manipulation and the prevention of the spread of disease support the limitations that address those circumstances. These total bans on certain marriages are all valid exercises of government authority. The same conclusion

is true with respect to New Jersey's prohibition on same-sex marriage.

Plaintiffs overstate the effect on them of the State's prohibition on same-sex marriage. While it is true that plaintiffs cannot marry one another, the Legislature and the courts have taken significant steps to protect the rights of same-sex couples. The diminished impact on plaintiffs' ability to maintain their same-sex relationships, militates in favor of the State's ban on same-sex marriage.

Although plaintiffs allege that their familial rights are effected by the ban on same-sex marriage, over the past three decades, New Jersey has strengthened the protections afforded to same-sex couples. Nearly 30 years ago, it was established in New Jersey that the parental rights of an unmarried gay person are constitutionally protected. In re J. S. & C., 129 N.J. Super. 486, 489 (Ch. 1974), aff'd, 142 N.J. Super. 499 (App. Div. 1976). In addition, in this State members of same-sex couples are permitted to adopt their partner's biological children. In re Adoption by H.N.R., 285 N.J. Super. 1, 6 (App. Div. 1995) (allowing lesbian to adopt biological child of her partner conceived with mutual planning during same-sex relationship); In re J.M.G., supra, 267 N.J. Super. at 625-26 (same). Recently, our Supreme Court held that a lesbian was a "psychological parent" to the children of her former partner, with whom she

lived in a "familial setting," and accorded her visitation rights. V.C. v. M.J.B., 163 N.J. 200, 224, cert. denied, 531 U.S. 926, 121 S. Ct. 302, 148 L. Ed. 2d 243 (2000). In a 1997 case that did not generate a published opinion, a Bergen County Judge, with the consent of the State, allowed a gay male couple to adopt a child who was not related to either man but for whom they were State-authorized foster parents. See <http://archive.aclu.org/news/n121797a.html>.

In addition, a gay person may change their last name to that of their same-sex partner to announce their relationship to the world. In re Application for Name Change by Bacharach, 344 N.J. Super. 126, 134 (App. Div. 2001). As the court correctly observed, same-sex couples

can exchange rings, proclaim devotion in a public or private ceremony, call their relationship a marriage, use the same surname, adopt and rear children. All these actions may be taken in full public view. None are offensive to the laws or stated policies of this state.

[Id. at 135.]

Furthermore, the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17, affords the same protection to victims in same-sex relationships as in other relationships covered by the Act. And, more generally, the Law Against Discrimination, N.J.S.A. 10:5-4, protects individuals from discrimination in employment, and access to public accommodations and housing based

on "marital status, affectional or sexual orientation, [and] familial status"

As discussed at length above, the newly enacted Domestic Partnership Act provides same-sex couples with an array of legal protections and benefits accorded to married couples. Many of the harms alleged in plaintiffs' Amended Complaint have been addressed. Same-sex couples have been provided with important rights concerning health care, including visitation, control of medical records, the ability to consent to organ donation and autopsies when a domestic partner dies, and access to a partner during emergency medical treatment. See N.J.S.A. 26:2h-12.22; N.J.S.A. 26:2h-32(d); N.J.S.A. 26:5C-12(b); N.J.S.A. 26:6-50; N.J.S.A. 26:6-58(b)(1); N.J.S.A. 26:8A-6(f).

In addition, valuable tax benefits have been granted to same-sex couples. Those benefits include an exemption on transfer inheritance tax with respect to property that passes between domestic partners after a death, the right to declare a domestic partner as a dependent on gross income tax returns in certain circumstances, and a gross income tax personal exemption for domestic partners equivalent to that afforded to married couples. See N.J.S.A. 54:34-2(a); N.J.S.A. 54:34-1(f); N.J.S.A. 54:34-4(j); N.J.S.A. 54A:1-2(e); N.J.S.A. 54A:3-1(b)(1).

Domestic partners of individuals who are members of a State-administered retirement system are entitled to all the

benefits accorded to spouses. N.J.S.A. 52:14-17.26(d)(1). Non-State public entities that participate in the State Health Benefits Program may elect to provide benefits to the domestic partners of employees. N.J.S.A. 52:14-17.26(d)(2). Private insurance companies that offer spousal coverage for medical, hospital, health, and dental expenses in this State must offer such benefits to the domestic partners of covered persons. L. 2004, c. 246, §§48-56. Finally, the Law Against Discrimination has been amended to outlaw discrimination on the basis of domestic partnership status. N.J.S.A. 10:5-12.

In addition, plaintiffs can take steps available to any persons to ameliorate the harms they allege to suffer with respect to property rights, and health care decision making. The Advance Directives Act authorizes any competent adult to execute an advanced directive designating any individual as a legal representative to make health care decisions in the event the declarant subsequently lacks decision making capacity. N.J.S.A. 26:2H-55 and -56; see also In re Roche, 296 N.J. Super. 583 (Ch. Div. 1996). In addition, same-sex partners can execute wills to control the inheritance of their property upon death, purchase property as joint tenants with a right of survivorship, and enter into agreements with respect to the distribution of property upon the termination of their relationships. An agreement between unmarried adults to provide lifetime support after cohabitation

may be enforceable for same-sex couples. See generally In re Estate of Roccamonte, 174 N.J. 381 (2002). In addition, the Supreme Court of New Jersey has recognized that in some circumstances the "familial relationship" to an injured party necessary to allege certain tort claims need not be based on marriage or blood. See Dunphy v. Gregor, 136 N.J. 99 (1994).

Without question, the New Jersey Legislature has made significant gains with respect to the provision of protections and benefits to same-sex couples. Granted, same-sex couples do not enjoy all of the rights of those who are married. However, to the extent that plaintiffs suffer inequity because statutory benefits available to spouses are not available to them, the appropriate avenue of redress is to seek a legislative response. As a general proposition, the Legislature is accorded vast deference in determining eligibility for statutory benefits. The Legislature is the body most responsive to the will of the people and best suited to forge the practical compromises necessary to preserve unity in a changing and pluralistic society. Gay men and lesbians have already demonstrated the effectiveness of the legislative process. Since issuance of the trial court decision in this matter, plaintiffs have gained the right to secure numerous significant legal protections and benefits. Nothing prevents plaintiffs from seeking further gains from the Legislature.

Thus, the prohibition on same-sex marriage is similar to the statute affecting marital rights upheld by the Supreme Court in Greenberg, supra. In that case, plaintiff challenged on privacy grounds a statutory amendment that prohibited her from casino employment because she was the spouse of a judge. 99 N.J. at 578. The Court was not persuaded by her argument that the statute interfered with her State Constitutional right to marry:

The amendment, which was adopted sixteen years after her marriage, could not have affected plaintiff's decision to marry, and she does not intimate that her inability to obtain casino employment might affect her decision to remain married. Any interference with her marital rights is but an indirect consequence of the ban on the employment of judicial spouses.

[Ibid.]

Having found that plaintiff's right to marry was only indirectly affected by the challenged statute, the Court went on to uphold the law because it bore a rational relationship to the valid governmental objective of preserving the public confidence in casino gambling by preventing the appearance of casino influence on the Judiciary. Ibid. Granted, the ban on same-sex marriage is a more significant limitation on the right to marry than the statute examined in Greenberg. However, in light of the statutory protections afforded to same-sex couples and their ability to protect their rights through the methods described above, New Jersey's ban on same-sex marriage has, at most, a

minimal effect on the ability of these couples to maintain their relationships.

The State's interest in preserving the long-accepted definition of marriage, on the other hand, is substantial. It is entirely rational for the Legislature to conclude that the rights of gay men and lesbians can be protected in ways other than alteration of the traditional understanding of marriage. The institution of marriage has played a unique role in the formation of our society. Its status as the union of people of different genders has remained unchanged throughout history. While the Legislature has demonstrated its desire to recognize the rights of individuals in same-sex relationships, it is not unreasonable for the Legislature to conclude that a fundamental change in the centuries-old meaning of marriage is not necessary to protect same-sex couples.

A sea change of the sort sought by plaintiffs will necessarily disrupt long-settled expectations and deeply-held beliefs of the vast majority of New Jersey's residents. It is entirely reasonable for the Legislature to enact legislative changes to protect gay and lesbian couples without disturbing the marriage statute. An impatience with the scope or pace of change is an insufficient basis upon which to justify the judicial creation of a new constitutional right, particularly in the

absence of any judicial precedent suggesting that the right sought is embodied in our Constitution.

Moreover, it is reasonable for the Legislature to conclude that this State has an interest in preserving uniformity among the States with respect to the definition of marriage. This rationale for New Jersey's ban on same-sex marriage has particular resonance given the fact that such unions are valid only in one State (where their continued validity is in question) and that New Jersey's recognition of same-sex marriage would raise significant legal issues under the Full Faith and Credit Clause regarding the validity of those marriages in other States. It is no small matter for the New Jersey Legislature to sanction a form of marriage that is expressly prohibited in either the statutes or Constitutions of forty-eight of its sister States, as well as in the laws enacted by Congress.

While New Jersey may well take the role of national trailblazer when the circumstances for such a bold move are right, the decision to stand virtually alone among the States in recognizing a right belongs to the Legislature. But, where history, common law, and the nearly uniform laws of the United States all reach the conclusion that marriage does not extend to same-sex couples, it is entirely reasonable for the New Jersey Legislature to decide that the rights of gay men and lesbians can

be protected short of creating the unique right to enter into a same-sex marriage.

The Supreme Court has held that legislative bodies are presumed to act on the basis of adequate factual support and that "[t]his presumption can be overcome only by proofs that preclude the possibility that there could have been any set of facts known to the legislative body or which could reasonably be assumed to have been known which would rationally support a conclusion that the enactment is in the public interest." Hutton Pk. Gardens v. West Orange Town Council, 68 N.J. 543, 565 (1975). The "government does not have a heavy burden to satisfy" this test. Hamilton Amusement Center v. Verniero, 156 N.J. 254, 270-271 (1998), cert. denied, 527 U.S. 1021, 119 S. Ct. 2365, 144 L. Ed. 2d 770 (1999). Therefore, the Court has held that the Legislature may establish adequate support for its enactments by pointing to United States Supreme Court decisions on the subject, the decisions of New Jersey courts, the decisions of federal courts, the decisions of courts in other states, the legislative findings set forth in the statute itself, other State laws and "simple common sense." Ibid. As discussed throughout this brief, New Jersey's marriage statutes plainly have overwhelming support in all of these areas.

E. Plaintiffs' Equal Protection Rights Are Not Violated By An Inability To Enter Into A Same-Sex Marriage.

Article I, paragraph 1 of the Constitution protects "against the unequal treatment of those who should be treated alike." Greenberg, supra, 99 N.J. at 568. In analyzing equal protection claims, our Supreme Court has rejected the three-tiered approach used for claims of this nature under the federal constitution, instead relying on a flexible balancing test. Barone v. Department of Human Servs., 107 N.J. 355, 368 (1987); Right to Choose, supra, 91 N.J. at 305, 309. The balancing test weighs the nature of the affected right, the extent to which it has been restricted and the need for the restriction. Greenberg, supra, 99 N.J. at 567.

The Supreme Court recently provided a cogent explanation of the interplay between the federal three-tier approach to equal protection claims and the more fluid analysis appropriate for similar claims raised under the New Jersey Constitution. As the Court explained in Sojourner A. v. Department of Human Servs., 177 N.J. 318, 332 (2003), "[t]hirty years ago, Chief Justice Weintraub rejected '[m]echanical approaches to the delicate problem of judicial intervention under either the equal protection or due process clauses'" of the New Jersey Constitution[:]"

[A] court must weigh the nature of the restraint or the denial against the apparent

public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.

[Robinson v. Cahill, 62 N.J. 473, 491, cert. denied sub nom., 414 U.S. 976, 94 S. Ct. 292, 38 L. Ed. 2d 219 (1973).]

"Later . . . the Court reaffirmed that approach, finding that it provided a more flexible analytical framework for the evaluation of equal protection and due process claims." Sojourner A., supra, 177 N.J. at 333 (citing Greenberg, supra; Right to Choose, supra.)

"In keeping with Chief Justice Weintraub's direction, we 'consider[] the nature of the affect right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.'" Id. at 333 (quoting Planned Parenthood, supra, 165 N.J. at (2000) (internal quotations omitted)). "By deviating from the federal tiered model, we are able to examine each claim on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction." Ibid. The Court pointed out, however, "that although our mode of analysis differs in form from the federal tiered approach, the tests weigh the same factors and often produce the same result." Id. at 333.

Thus, New Jersey's equal protection analysis does not impose wooden categories on the rights asserted under the State

Constitution. Under Article 1, whether a right is characterized as "fundamental," "substantial," "important," or in some other category, is not determinative of the strength of the State interest necessary to establish the validity of a statute restricting that right. However, a qualitative analysis of the nature of the right asserted in an equal protection case is essential because the further a right is from being fundamental the greater the leeway the State has to place restrictions on the right through statutory enactments. "[T]he nature of the right is the crucial consideration in characterizing the right" for equal protection analysis. Greenberg, supra, 99 N.J. at 567.

Indeed, the Supreme Court has never invalidated a statute on equal protection grounds under the State Constitution where the plaintiffs assert a right that has not been characterized by the Court as fundamental. Overall, the instances in which the Court has struck down a statute on equal protection grounds are few. On the rare occasion in which a statute failed to survive equal protection scrutiny, it cannot be seriously disputed that the right asserted qualifies as a fundamental right under the State Constitution. That is, the right vindicated has been so rooted in the "'traditions and (collective) conscience of our people' . . . as to be ranked as fundamental.'" King, supra, 66 N.J. at 178 (quoting Griswold v.

Connecticut, 381 U.S. 479, 493, 85 S. Ct. 1678, 1686, 14 L. Ed. 2d 510, 520 (1965) (Goldberg, J., concurring)).

For example, in Planned Parenthood, supra, a statute requiring parental notification prior to the administration of an abortion to minors was struck down to protect "the importance of a woman's right to control her body and her future, a right we as a society consider fundamental to individual liberty" and which is "embodied in our own Constitution." 165 N.J. at 631-32. The same right served as the basis for the decision in Right to Choose, supra, to invalidate a Medicaid funding statute that did not provide reimbursements for certain abortions. 91 N.J. at 305 (the "right to choose whether to have an abortion . . . is a fundamental right of all pregnant women . . ."). The Supreme Court's renowned Mount Laurel doctrine is designed to protect the fundamental right to affordable housing. Southern Burlington Cty. NAACP v. Township of Mount Laurel, 92 N.J. 158, 208 (1983). And, in Matthews v. City of Atlantic City, 84 N.J. 153 (1980) and Gangemi v. Rosengard, 44 N.J. 166 (1965), the Court struck down statutes that imposed residency requirements on candidates for elective office because of the intrusion those statutes imposed on the voters' freedom of choice. No other Supreme Court case squarely invalidated a State statute on equal protection grounds under the State Constitution. Thus, while classification of a right as fundamental is not essential to a successful equal

protection claim under the State Constitution, a failure to establish that the State has trespassed on a fundamental right is, in effect, fatal.*

On the other hand, the Supreme Court repeatedly has rejected equal protection challenges to statutes that limit rights which fall below the fundamental threshold. See e.g. McCann v. Clerk, City of Jersey City, 167 N.J. 311, 328 (2001) (rejecting equal protection challenge to statute limiting right to be candidate for public office after conviction of a crime involving moral turpitude); Greenberg, supra, 99 N.J. at 561 (rejecting equal protection challenge to statute alleged to interfere with "property and liberty interest in obtaining casino employment, as well as . . . right to marry and right to familial association"); Brown v. City of Newark, 113 N.J. 565, 574 (1989) (rejecting equal protection challenge to statute that limited peddlers' right "to engage in . . . business"); Taxpayers Ass'n v. Township of Weymouth, 80 N.J. 6, 44 (1976) (rejecting equal protection challenge to ordinance that limited "right to

* The Court has been less reluctant to rely on equal protection concerns when eliminating a classification in a common law rule. Jersey Shore Medical Center v. Estate of Baum, 84 N.J. 137, 147-49 (1980) (abrogating on equal protection grounds common law rule that wife is not liable for necessary medical expenses of husband's final illness). In addition, in 1949, the Supreme Court struck down under Article I a provision of the State's unemployment statute that excluded certain insurance agents from receiving benefits without a rational basis for doing so. Washington Nat'l Ins. Co. v. Board of Review, 1 N.J. 545, 554-45 (1949).

decent housing" by permitting age-based restrictions on residency in trailer park), cert. denied, 430 U.S. 977, 97 S. Ct. 1672, 52 L. Ed.2d 373 (1977).

The evaluation of the right asserted, and its placement on the continuum from fundamental to trivial, is the responsibility of the court. The federal three-tier system, while not controlling, provides an appropriate guideline for judicial inquiry in this area. The truth of this proposition is established without question in the Supreme Court decisions from Greenberg to Sojournour A. in which the Court, for decades, when deciding Article I equal protection claims, has referred to and relied upon United States Supreme Court precedents interpreting the federal Constitution.

The crucial issue under New Jersey law is "whether there is an appropriate governmental interest suitably furthered by the differential treatment." Borough of Collingswood v. Ringgold, 66 N.J. 350, 370 (1975), app. diss., 426 U.S. 901, 96 S. Ct. 2220, 48 L. Ed. 2d 826 (1976). A "real and substantial relationship between the classification and the governmental purpose which it purportedly serves" must be shown to sustain the classification. Barone, supra, 107 N.J. at 368 (internal quotations omitted).

The holding in Rutgers Council, supra, illustrates why the Hawaii Supreme Court's decision in Baehr, supra, should not

be considered persuasive precedent by this court. Of course, the holding in Baehr was overturned by a constitutional amendment adopted through popular referendum. Its precedential value, therefore, has been extinguished. Putting its reversal aside, however, the reasoning of Baehr is out of sync with New Jersey law. The Court in Baehr held that that State's ban on same-sex marriage amounted to a classification based on gender. 852 P.2d at 64. Under Hawaii law, gender-based classifications are suspect and warrant strict scrutiny. Id. at 65. Both of these propositions are inapplicable here.

New Jersey's marriage statute does not contain a gender-based classification. All men and all women, including plaintiffs, are able to marry. Gender alone is not a qualifying statutory requirement for a marriage license. The crux of plaintiffs' allegations is that they may not marry the person of their choosing because of that person's gender. It is the individual plaintiffs' desire to marry someone of the same sex, not plaintiffs' genders, that stands as a barrier to issuance of marriage licenses. Thus, if the limitation on same-sex marriage in New Jersey is to be viewed as a classification, that classification is correctly characterized as one based on sexual orientation, as the Appellate Division concluded in Rutgers Council. The Rutgers Council opinion unequivocally holds that classifications based on sexual orientation are not subject to

strict scrutiny in New Jersey, but may be upheld under the less strict balancing-of-interests test. Thus, the rationale in Baehr simply is inapplicable to the issues before this court.

Moreover, when a statute is facially neutral, even if it has a disparate impact on a class of individuals, an equal protection challenge will succeed only if the Legislature intended to discriminate against the class. Greenberg, supra, 99 N.J. at 580. Here, New Jersey's marriage statutes are facially neutral in that they apply with equal force to all men and all women in the State. Plaintiffs, like anyone else in the State, may receive a marriage license, provided that they meet the statutory criteria for marriage, including an intended spouse of the opposite gender. Plaintiffs are, in that sense, in the same position as all other New Jerseyans. The State makes the same benefit, mixed-gender marriage, available to all individuals on the same basis. Whether or not plaintiffs wish to enter into a mixed-gender marriage is not determinative of the statute's validity. It is the availability of the right on equal terms, not the equal use of the right, that is central to the constitutional analysis. Plaintiffs seek not to lift a barrier to marriage, but to change its very essence. This objective is legislative in nature and finds no support in the equal protection provisions of the State Constitution.

For the same reasons, the embattled decision of the Massachusetts Supreme Judicial Court is unpersuasive precedent. The Goodridge decision is predicated on the notion that the "Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution," that it may "demand broader protection for fundamental rights" and is "less tolerant of government intrusion into protected spheres of private life." 798 N.E.2d at 948-949. New Jersey's Supreme Court, on the other hand, has cautioned against expanding the State Constitution beyond its federal counterpart. See State v. Stever, supra, 107 N.J. at 557. Moreover, the Massachusetts decision was reached in the absence of any significant statutory rights in that State for same-sex couples. Unlike the expansive protections now in place in New Jersey for same-sex couples that enter into a State-sanctioned domestic partnership, the plaintiffs in Goodridge enjoyed no concentrated set of statutory rights.

Moreover, the rationale offered by Massachusetts for its ban on same-sex marriage -- the promotion of procreation, the creation of an optimal setting for child rearing and the preservation of State financial resources -- are not offered in defense of New Jersey's marriage statutes. See id. at 961. The Massachusetts Court did not consider the State's interest in maintaining the traditional notion of marriage, particularly when

a corollary set of rights have been provided to same-sex couples through enactment of a comprehensive domestic partnership statute. This important justification for New Jersey's marriage statutes simply was not considered in Goodridge.

Finally, this court should reject the Goodridge decision for a simple reason: it is wrongly decided. The Goodridge Court undervalued the reasonableness of a legislature's decision to attempt to preserve uniformity in the laws of the United States. Moreover, the Goodridge Court overstated the effect on same-sex couples of a ban on marriage, perhaps because of the absence of significant statutory protections for same-sex couples in that State. The Goodridge Court embarked on a unprincipled mission to rewrite the Massachusetts Constitution, free from the moorings of the decisions of the Massachusetts Legislature. This court should not follow suit.

The New Jersey Legislature has spoken on the issue of State recognition of same-sex couples. Those couples enjoy a host of protections and benefits covering some of the most important aspects of their relationships. Should same-sex couples seek additional protections and benefits, the legislative arena is available to them to secure those additional protections and benefits through their elected representatives.

Rights are defined by the Legislature, not the Judiciary. Plaintiffs must take their request for an alteration

in the definition of marriage to the elected officials responsible for drafting the marriage statutes. Judicial intervention is warranted only where the Legislature has placed an unreasonable restriction on access to the legislatively-defined right. That is not the case here.

In addition, plaintiffs cannot establish that they are similarly situated to those individuals who wish to enter into a mixed-gender marriage, and, therefore, should be accorded the same access to marriage as their counterparts. Because the universally accepted understanding reflected in the laws of this country is that marriage is between a man and a woman, plaintiffs cannot establish that the Constitution demands that they and individuals seeking to enter into mixed-gender marriages "should be treated alike." See Greenberg, supra, 99 N.J. at 568. Plaintiffs' desire to enter into a same-sex marriage sets them apart from the historic understanding of the institution of marriage. This distinction renders plaintiffs sufficiently dissimilar to individuals who wish to enter into a mixed-gender marriage to render their equal protection argument void. The class of individuals who wish to enter into mixed-gender marriage seek access to the historically defined concept of marriage. Plaintiffs, on the other hand, are in a class of individuals who wish to alter the fundamental nature of marriage itself. From a legal standpoint, the differences between these classes of

individuals are stark, fully justifying the Legislature's determination that marriage in New Jersey shall take the same form that has long been accepted under the laws of this and every other State in the Union.

Finally, the holding of the Vermont Supreme Court in Baker, supra, is not a persuasive precedent for plaintiffs' equal protection claims. As a threshold matter, the New Jersey Constitution does not have a "common benefits" provision similar to that upon which the Court's decision in Baker was based. The Vermont provision "differs markedly from the federal Equal Protection Clause in its language, historical origins, purpose, and development." Baker, supra, 744 A.2d at 870. New Jersey's Equal Protection Clause is more closely analogous to the like-named federal counterpart, even though the analytical tests under the two Constitutions differ. Barone, supra, 107 N.J. at 368. In addition, "the principal purpose" advanced by Vermont in defense of its ban on same-sex marriages was the State's interest "in promoting a permanent commitment between couples who have children to ensure that their offspring are considered legitimate and receive ongoing parental support." Baker, supra, 744 A.2d at 881.

The more fundamental question, and the one advanced by defendants in this case, of whether the plaintiffs in Baker were seeking to change the very nature of marriage as opposed to

eliminating a barrier to its enjoyment, was simply not before the Baker Court. In Baker, the Court undertakes no meaningful analysis of the historic, and universally accepted understanding of marriage as justification for Vermont's law. In fact, the Baker Court mistakenly supports its holding with what it describes as a recent trend in enactment of legislation favoring same-sex relationships. Id. at 885. While it is true, as the Baker Court notes, that gay men and lesbians have benefitted from an increasing number of statutes designed to outlaw discrimination, for several reasons that trend does not support the conclusion that same-sex marriage is a constitutional entitlement.

First, a legislative determination to prohibit discrimination against gay men and lesbians does not equate to a governmental endorsement of same-sex marriage. There is no logical inconsistency in the Legislature declaring that gay men and lesbians are entitled to statutory protection from discrimination, while also declaring that marriage shall comport to its historic definition. It is perfectly reasonable for the Legislature to declare that gay men and lesbians are free to establish relationships with one another, create homes and families, pursue housing, educational and career opportunities without suffering discrimination. However, it is also reasonable for the Legislature to conclude that this grant of rights does

not translate to an imperative that the State sanction same-sex marriage. The fact that the Legislature has decided to extend certain rights to plaintiffs does not mean that the fundamental understanding of marriage must be changed.

Second, the enactment of legislation according protections to gay men and lesbians is powerful evidence that the legislative branch of government is the appropriate forum for the relief that plaintiffs seek. In recent years, there has been a remarkable expansion of statutory protection to gay men and lesbians in New Jersey and elsewhere. The fact that those protections have been gained through the political process with the consent of the elected representatives of the people convincingly demonstrates that the dramatic alteration of the long-held understanding of marriage by judicial fiat is unwarranted and inappropriate. The extension of statutory rights to individuals in same-sex relationships has begun in the democratic process. This trend should be allowed to continue without judicial interference. The Baker Court misread the significance of these developments.

And, finally, the recent trend in legislative enactments in this country with respect to same-sex marriage has been overwhelmingly against plaintiffs' position. As explained in greater detail above, in just the past seven years or so, thirty-nine States have expressly enacted statutes declining to

recognize same-sex marriage. And, where judicial decisions have hinted at recognizing same-sex marriage, popular initiatives were spurred to amend State Constitutions to ensure that marriage remains true to its historic definition. If this court looks to recent trends in legislation for guidance on the proper resolution of this matter, one message is clear: a national debate is underway in State legislatures over the extension of statutory rights to gay men and lesbians, but when the question is whether the definition of marriage should be changed to encompass same-sex couples, the unmistakable national consensus is that it should not. The Baker Court failed to consider this crucial distinction.*

While plaintiffs have convinced the Legislature to sanction their relationships through legislation, a Constitutional entitlement to the relief they seek cannot be established. Social change of the type sought by plaintiffs is accomplished in the legislative arena. Great strides have already been made in protecting gay men and lesbians in New Jersey, these legislative enactments are evidence that tangible accomplishments can be ascertained by plaintiffs through the

* Plaintiffs report that foreign courts have granted same-sex couples the right to marry. However, plaintiffs cite no legal authority for the proposition that the decisions of foreign courts are relevant to the interpretation of New Jersey's Constitution or the fundamental understanding of marriage in this State.

appropriate avenue of government redress for social change: the Legislature.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the judgment of the Law Division be affirmed.

Respectfully submitted,

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

By: _____/s/_____
Patrick DeAlmeida
Assistant Attorney General

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