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SAUNDRA HEATH and CLARITA  
ALICIA TOBY; CRAIG HUTCHISON  
and CHRIS LODEWYKS; MAUREEN  
KILIAN and CINDY MENEGHIN;  
SARAH and SUYIN LAEL; MARILYN  
MANEELY and DIANE MARINI; and  
KAREN and MARCYE NICHOLSON-  
MCFADDEN,

Plaintiffs,

vs.

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

Defendants,

**SUPREME COURT OF NEW JERSEY**  
**DOCKET NO. 58,389**

**APPEAL FROM THE SUPERIOR**  
**COURT OF NEW JERSEY,**  
**APPELLATE DIVISION**  
**(DOCKET NUMBER A-002244-03T5)**

**SAT BELOW:**

**HON. STEPHEN SKILLMAN**  
**HON. DONALD G. COLLESTER, JR.**  
**HON. ANTHONY J. PARRILLO**

**Civil Action**

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**BRIEF AND APPENDIX OF *AMICI CURIAE*, CLERGY OF NEW JERSEY  
IN SUPPORT OF DEFENDANTS-RESPONDENTS**

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## **INTERESTS OF AMICI CURIAE**

*Amici* are citizens of New Jersey and members of the clergy of various religious traditions representing over 185,000 adherents. Each affirms a sincerely held belief in the sanctity of marriage, and its exclusive design and definition as the union of one man and one woman. This brief addresses the concern that a radical redefinition of marriage will create new and unnecessary conflicts between church and state for *amici* and their faith communities.

These conflicts give the undersigned an important interest in the outcome of the present case. The names and institutional affiliations of *amici* are set forth in the attached Appendix. They submit this brief in support of the Defendants-Respondents, and hereby adopt the Statement of the Case and Statement of the Facts presented in that principal brief.

## **SUMMARY OF ARGUMENT**

If the New Jersey Constitution were interpreted to mandate a redefinition of marriage, the decision would have far-reaching, negative ramifications for religious liberty and create significant new conflicts between church and state. Thereafter, persons and organizations that teach and promote the importance of marriage as the union of a man and a woman, as mandated by their sincerely held religious beliefs, would find themselves at odds with new legal obligations. The numerous references to

marriage in various state laws show that the implications of redefining marriage would extend far beyond domestic relations, and into the realms of employment, education, parental authority, religious autonomy, and free speech.

Creating such a quandary for religious organizations and believers could only be justified by the most clear and compelling constitutional justification. Such a justification is not present here.<sup>1</sup>

The Court should further decline the invitation by opposing *amici* to completely separate the "civil" and "religious" components of marriage in New Jersey. Segregating the two components would contradict millennia of legal history and anthropology, and defy common sense.

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<sup>1</sup> For further discussion on this point, see Brief of *Amici Curiae* New Jersey Family Policy Council, *et al.*

## ARGUMENT

The undersigned *amici* recognize that secular interests, rather than religious beliefs, will determine the civil definition of marriage. However, *amici* respectfully suggest that their particular voice in this matter is important because of the inevitable and beneficial interaction that exists between religion, the state, and the institution of marriage. Statistically, *amici* represent the views of a large number of New Jersey citizens, and the issues addressed in this brief transcend the concerns of just the faith community.

### **I. CHANGING THE DEFINITION OF MARRIAGE WOULD POSE SERIOUS THREATS TO RELIGIOUS LIBERTY.**

The trial court below summarized that "plaintiffs seek not to lift a barrier to marriage, but to change its very essence." See *Lewis v. Harris*, 378 N.J.Super. 168, 176 (App.Div. 2005). As explained below, such a change would trigger unnecessary, negative effects for the entire state, and certainly for those citizens who hold a sincere religious belief that marriage is the union of a man and a woman.

#### **A. Many New Jersey Citizens and Churches Hold Sincere Religious Beliefs about the Nature and Significance of Marriage.**

The Appellate Division correctly noted that “[o]ur leading religions view marriage as a union of men and women recognized by God, and our society considers marriage between a man and a woman to play a vital role in propagating the species and in providing the ideal environment for raising children.” *Id.* at 184-85 (internal citations omitted). These are commonly and sincerely held beliefs, based upon the scriptural teachings on the topics of marriage and family. As an example, marriage between a man and a woman is an important theme of Judeo-Christian scripture from Genesis through the Christian New Testament.<sup>2</sup> Based upon these and similar scriptural texts and doctrinal teachings, the various religious traditions have for millennia affirmed the sanctity of marriage between a man and a woman.<sup>3</sup>

A survey of position statements on the definition of marriage among major religions of the world suggests that “very few religious bodies have endorsed same-sex marriage and those that have represent a very small fraction of believers in the

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<sup>2</sup> For Christians, the marital union of a man and a woman holds great theological symbolism, and mirrors the covenantal relationship between Christ and his church. *See, Ephesians* 5:31-32 (“‘For this reason a man will leave his father and mother and be joined to his wife, and the two will become one flesh.’ This is a great mystery, and I am applying it to Christ and the church.” (HOLY BIBLE, New Revised Standard Version)).

<sup>3</sup> For a collection of related statements from numerous religious organizations and faith traditions, *see* Marriage Law Project, *World Religions and Same-Sex Marriage* (July 2002), available at <http://marriagelaw.cua.edu/publications/wrr.pdf>.

world's five major religions: Christianity, Judaism, Islam, Hinduism, and Buddhism."<sup>4</sup> In the United States, 97.6 percent of the adherents of the five major religions "are in religious bodies that affirm the classical definition of marriage."<sup>5</sup> Here in New Jersey, the percentage of religious adherents who support one man/one woman marriage is probably even higher.<sup>6</sup>

**B. Redefining Marriage Would Lead to Unnecessary Legal Conflicts and Censorship of Citizens and Churches That Oppose the New Definition.**

A decision by this Court to redefine marriage would create new duties for religious organizations that would conflict with their sincerely held beliefs in various contexts. These tensions

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<sup>4</sup> *Id.*, at 1.

<sup>5</sup> *Id.*

<sup>6</sup> One estimate provided by the American Religion Data Archive suggests that the total number of religious adherents associated with religious denominations in the state is 4,734,822. See New Jersey report, available at <http://www.thearda.com> (last visited Dec. 22, 2005). (This number is a conservative estimate because it does not include membership data on historically African-American denominations and non-denominational congregations, both of which have many members and are an important part of New Jersey's religious life.) The same report indicates that residents belonging to denominations which have expressly endorsed a redefinition of marriage (Unitarian Universalist, United Church of Christ, Metropolitan Community Church) make up only 19,429 of the total adherents (or, **.01 percent**). *Id.* While the number of smaller and unaffiliated groups supporting same-sex marriage would undoubtedly increase that number, it is very likely to remain only a small percentage of religious adherents in New Jersey. By comparison, one denomination alone, the Catholic Church, makes up 3,403,020 adherents (72 percent) and they have joined another *amicus* brief endorsing marriage as the union of man and a woman.

between religious belief and legal obligation are not necessary since the New Jersey Constitution does not compel such a result. Moreover, as has been the experience in Massachusetts and foreign jurisdictions, the legalization of same-sex marriage is eventually accompanied by hostility and vigorous censorship of opposing views.

### **1. Legal Conflicts.**

The redefinition of marriage to include same-sex partners has a significant adverse impact on private third parties because it demands a radical realignment of the behaviors (and views) of individuals and groups in the workplace, marketplace, schools, and other settings. For example, if marriage is redefined in New Jersey, that decision would have implications for other areas of law through existing state discrimination statutes. N.J. Rev. Stat. § 10:5-1, *et seq.* These laws would presumably treat distinctions between same-sex and opposite-sex married couples as marital status and/or sexual orientation discrimination. Although the statutes contain very narrow exemptions for some of the activities of churches and religious organizations (*see, Id.*, at § 10:5-5(1)), they provide no exemptions or protection for *individuals* who act on their religious beliefs.<sup>7</sup> The religious

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<sup>7</sup> When churches and a pastor sought a declaratory judgment that amendments to the New Jersey Law Against Discrimination (LAD) including "sexual orientation" violated the plaintiffs' First Amendment rights to freedom of speech, the Third Circuit held

exemption only applies to "any educational facility operated or maintained by a bona fide religious or sectarian institution" (*Id.*), and thus potentially excludes religious organizations in their own activities and religious schools not specifically operated by an institution (such as non-sectarian schools operated by a board of parents).

**a.) Implications for the Workplace.**

In the only jurisdiction in this country to change the legal definition of marriage, "religious leaders have already expressed a concern that their hiring and employment practices will be affected."<sup>8</sup> A recent employment law publication suggests that "[a]n employer who refuses to extend spousal benefits to a spouse in a same-sex marriage may well face a charge of discrimination on the basis of sexual orientation, marital status, or gender depending on the jurisdiction in question."<sup>9</sup> The article also

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that the controversy was ripe with respect to the pastor because he "arguably alleges the statute threatens his right as an individual citizen to speak out against male and female homosexual acts and the state has expressly refused to offer any assurance it will not prosecute [the pastor] if he does so outside his church." *Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1457 (3<sup>rd</sup> Cir. 1994).

<sup>8</sup> See, Daniel Avila, *To Wed & Let Wed?: The Intrusive Impact on Dissenting Religious Belief & Practices Created by Same-Sex Marriages*, 38 NEW ENG. L. REV. 621, 622 (2004).

<sup>9</sup> Jeffrey M. Tannenbaum, Paul Byrne, Mark Foster, Varya Simpson & Michael Thomas, *The Impact of Same-Sex Marriage on the Workplace*, NIXON PEABODY LLP EMPLOYMENT LAW ALERT at 3 (February 2004).

concludes that “[s]ame-sex marriage is clearly a form of marital status.”<sup>10</sup>

In addition, some private and public employees who support the definition of marriage as the union of a man and a woman for religious reasons may be put into a position where certain job responsibilities would violate their religious beliefs. Perhaps the most obvious example is that of a local clerk who is required to issue marriage licenses as part of her job responsibilities.<sup>11</sup>

A similar challenge would be created for religious believers who belong to professional organizations that include sexual orientation and/or marital status within the nondiscrimination provisions of their codes of ethics (e.g., the American Counseling Association and the American Association of Marriage and Family Therapists).<sup>12</sup> Under these policies, the refusal to

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<sup>10</sup> *Id.*, at 4. *Cf.* Ontario Act to Amend Various Statutes in Respect of Spousal Relationships (Bill 171), 2005 (replacing “same-sex partnership status” with “marital status” in discrimination law).

<sup>11</sup> See, Elisabeth J. Beardsley, “Mitt: I’ll Uphold Law; Gov, JPs Brace for Gay Marriages,” *Boston Globe*, at 5 (Apr. 26, 2004) (“Justices of the peace who refuse to perform gay weddings will be asked to resign and could face formal discrimination charges if they don’t.”).

<sup>12</sup> See, *ACA Code of Ethics*, § A.2.a. (“Counselors do not condone or engage in discrimination based on age, color, culture, disability, ethnic group, gender, race, religion, sexual orientation, marital status, or socioeconomic status.”); *AAMFT Code of Ethics*, § 1.1 (“Marriage and family therapists provide professional assistance to persons without discrimination on the basis of race, age, ethnicity, socioeconomic status, disability, gender, health status, religion, national origin, or sexual

provide services (e.g., relationship counseling) to married same-sex couples may constitute an ethical violation and prevent professional certification or result in termination.<sup>13</sup>

Granted, marriage redefinition would not cause any great concern for many employers and employees in New Jersey. However, religious organizations and religiously-committed business owners may feel that the continued extension of marriage-related benefits would require them to endorse a legal status that contradicts their sincere religious beliefs. As legislatures create a new status of civil relations and/or a statutory program to provide benefits to unmarried couples, they can include recognition and provision for the beliefs and practices of religious persons and individuals through appropriate exemptions.<sup>14</sup> A decision that the Constitution mandates a redefinition of marriage would not include this kind of prudential balancing of interests.

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orientation.”)

<sup>13</sup> See, e.g., *Bruff v. North Ms. Hlth. Servs., Inc.*, 244 F.3d 495 (5<sup>th</sup> Cir. 2001)(A Mississippi counselor was fired for refusing to provide relationship counseling to unmarried couples. The counselor’s Title VII claim was denied after the court found that the accommodation of the employee’s religious beliefs would have worked an undue burden on the employer.)

<sup>14</sup> E.g., the New Jersey Legislature can act to specifically include such exemptions in its law of domestic partnerships. By enacting this alternative program of benefits, the Legislature affirmed its resolve to leave the institution of marriage unaltered.

**b.) Implications for the Marketplace.**

Other market transactions in which religious individuals and churches participate could be affected. For instance, a series of recent decisions have invoked marital status discrimination provisions against landlords who object on religious grounds to renting to cohabiting couples.<sup>15</sup> Other defendants have been successful in defeating such claims by arguing that cohabitation is conduct, not a form of "marital status."<sup>16</sup> This way of avoiding the discrimination claim, of course, would not be available in a case involving a marriage.

The religious beliefs of some individuals will prevent them from participating (even indirectly) in a same-sex wedding. For example, a business owner may, based on her religious beliefs, decline to print invitations or rent banquet facilities for a same-sex wedding. Legal redefinition of marriage would heighten the likelihood of such conflicts.

**c.) Implications for Schools and Academia.**

For educators at religious schools as well as religious parents with children in public or private schools, the

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<sup>15</sup> See, e.g., *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994); *Smith v. Fair Employment & Housing Commission*, 913 P.2d 909 (Cal. 1996); *Thomas v. Anchorage Equal Rights Commission*, 102 P.3d 937 (Alaska 2004).

<sup>16</sup> See, e.g., *State v. French*, 460 N.W.2d 2 (Minn. 1990); *Dane v. Norman*, 497 N.W.2d 714 (Wis. 1993); *Levin v. Yeshiva University*, 754 N.E.2d 1099 (N.Y. 2001).

redefinition of marriage would likely have significant ramifications for matters such as accreditation, housing, tax exemptions and curricula.

For instance, in colleges or universities, married same-sex couples might seek access to married student housing. Yeshiva University's failure to allow an unmarried same-sex couple to live in married student housing was challenged under state and federal law.<sup>17</sup> The court held that the refusal did not constitute "marital status" discrimination for purposes of state law (although, as noted above, this result would likely be different if the couple were married), but that it might constitute "sexual orientation" discrimination under the city law which allows for a finding of discrimination if a challenged policy has a "disparate impact" on homosexual individuals.<sup>18</sup> As in many jurisdictions, "Yeshiva's status as a private institution does not exempt it from the enactment" of the local Human Rights Law pertaining to housing accommodations.<sup>19</sup>

Potential relevant precedent on the matter of tax exemptions for private religious schools is found in *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 586 (1983), in which the Supreme Court held

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<sup>17</sup> *Levin, supra* at n.16.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*, at 491.

that "an institution seeking tax-exempt status must . . . not be contrary to established public policy." If an organization's acts are determined by the Internal Revenue Service and the courts to be contrary to the "public interest," the organization can have its tax exempt status revoked. It matters not that those acts may be based upon sincerely held religious beliefs.

In *Bob Jones*, the Supreme Court upheld an IRS decision to deny tax-exempt status for the university because the school maintained a policy which proscribed interracial dating. The Court concurred with IRS officials that "[r]acially discriminatory educational institutions cannot be viewed as conferring a public benefit within the 'charitable' concept," in that they "violate fundamental public policy." *Id.* at 595-96. The University contended throughout the litigation that its policy was based upon its sincere religious beliefs. In the end, the university was allowed to "practice its religious beliefs," though held by the government to be discriminatory, *but* it was denied the governmental benefits of tax exemption and receipt of tax deductible gifts.

While few people would agree with a policy that prohibits interracial dating, the *Bob Jones* case set a dangerous precedent for the underlying principles of religious liberty.<sup>20</sup> Since that

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<sup>20</sup> Compare the *Bob Jones* ruling with similar reasoning from a landmark marriage debate decision of an earlier era: "The state has a perfect right to prohibit polygamy, and all other open

time, at least two other Supreme Court decisions have suggested the continued vitality of this doctrine.<sup>21</sup>

If marriage is redefined, the effect on religious schools is actually less obvious than the likely effect on public schools, since the latter will be legally obligated to reflect state policy in their curricula and related matters. Again, the situation in Massachusetts is instructive and has already led to conflicts. For instance, on April 27, 2005, in Lexington, Massachusetts, former New Jersey resident David Parker was arrested by local police for his adamant objections to the curriculum materials being used at his five-year-old son's elementary school to promote acceptance of alternative family arrangements.<sup>22</sup> The dispute arose because Parker insisted on prior notification before school officials intended to engage his son's class in discussions about same-sex marriage and other

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offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1, 50 (1890).

<sup>21</sup> See, e.g., *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990)(upholding facially neutral statute banning use of hallucinogenic drug, despite burden imposed upon sacramental use of the substance by certain religious groups); *Locke v. Davey*, 540 U.S. 712 (2004)(upholding state scholarship program which facially discriminates against otherwise qualified students who choose to pursue a degree in theology).

<sup>22</sup> See, Maria Cramer and Ralph Ranalli, "Arrested Father Had Point to Make; Disputed School's Lesson on Diversity," BOSTON GLOBE at B1 (Apr. 29, 2005).

adult themes. Parker wanted the school to provide an "opt out" provision for his son, and others who may object. When he reached an impasse in a meeting with the principal and the town's Director of Education, Parker was arrested and charged with trespassing.<sup>23</sup>

These kinds of parent/school challenges are not likely to diminish soon. The transcript of a recent NATIONAL PUBLIC RADIO broadcast illustrates the significant influence that Massachusetts' redefinition of marriage has had on school curricula:

SMITH (NPR Reporter): But many teachers say they're less afraid now since the high court decision legalizing gay marriage. Deb Allen teaches eighth-grade sex ed in Brookline. She keeps a picture of her lesbian partner and their kids on her desk and gay equality signs on the wall. Allen says she's already been teaching a gay-friendly curriculum for nearly a decade, but she says she does begin this year feeling a bit more emboldened.

Ms. DEB ALLEN (Eighth-grade teacher): In my mind, I know that, 'OK, this is legal now.' If somebody wants to challenge me, I'll say, 'Give me a break. It's legal now.'

SMITH: And, Allen says, teaching about homosexuality is also more important now. She says the debate around gay marriage is prompting kids to ask a lot more questions, like what is gay sex, which Allen answers thoroughly and explicitly with a chart.

Ms. ALLEN: And on the side, I'm going to draw some different activities, like kissing and hugging, and different kinds of intercourse. All right?

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<sup>23</sup> *Id.*

SMITH: Allen asks her students to fill in the chart with yeses and nos.

Ms. ALLEN: All right. So can a woman and a woman kiss and hug? Yes. Can a woman and a woman have vaginal intercourse, and they will all say no. And I'll say, 'Hold it. Of course, they can. They can use a sex toy. They could use'--and we talk--and we discuss that. So the answer there is yes.

SMITH: In Massachusetts, local districts have broad discretion when it comes to sex ed, and schools range from this one in Brookline to many others that teach abstinence only or offer no sex ed at all. But teachers say gay and lesbian issues come up all day; not just in sex ed, but everywhere from gym class to social studies or biology. And many teachers say they don't want to go there.

"BARBARA" (Elementary teacher): The average teacher doesn't really want to touch the subject. You know, they're rolling their eyes at this point and biting their tongues and just hoping and praying that they're not going to have to deal with this.

SMITH: Barbara, an elementary teacher northwest of Boston, did not want to use her real name. She says she feels growing pressure from her school to be, as she puts it, 'politically correct.' But she says she'd quit if she ever had to assign books like *Heather Has Two Mommies*, or to answer questions about what gay means.<sup>24</sup>

As a final example, the issue of professional accreditation would also apply to private religious schools, including colleges and universities. Increasingly, academic accreditations require non-discrimination based on marital status and/or sexual orientation. New Jersey's religious-based institutions would

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<sup>24</sup> "Debate in Massachusetts Over How to Address the Issue of Discussing Gay Relationships and Sex in Public School Classrooms," *All Things Considered*, NATIONAL PUBLIC RADIO (Sep. 13, 2004).

face a significant quandary if the Court redefines marriage.

## **2. Hostility, Censorship, and Criminal Prosecution.**

When marriage is redefined, it inevitably encourages not only unnecessary legal conflicts, but also open hostility and vigorous censorship of citizens and churches with opposing views. The state itself is put into the position of censor and prosecutor, and private groups are spurred to action. In Massachusetts, and every other foreign jurisdiction that has legalized same-sex marriage, peaceful religious dissenters have been targeted for intimidation and attack.

Consider the spectacle on display at the "Love Won Out" event in Boston on October 29, 2005.<sup>25</sup> The conference, organized to respectfully address biblical viewpoints on human sexuality, drew "[m]ore than 1,000 gay activists and protestors [who] jammed the street in front of the historic Tremont Temple Baptist Church, shouting 'Get the f--- out of Boston!' [and] 'Hate-filled churches! Shut 'em down!'"<sup>26</sup> Inside, the keynote speaker, Mike

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<sup>25</sup> A description of the event is provided at the organization's website, <http://www.lovewonout.com> (last visited Nov. 11, 2005): "At the Love Won Out conference, you'll . . . learn how to minister to a loved one who's dealing with homosexuality, respond to misinformation in our culture, defend biblical beliefs and prevent your child from embracing this destructive way of life. But mostly, you'll be reminded of the power of God's love and His desire to transform the life of a struggling homosexual to find freedom in Jesus Christ. Come and witness the type of love that draws men and women affected by homosexuality into the arms of their Creator."

<sup>26</sup> Stuart Shepard, "Ex-Gay Conference Meets with Massive

Haley, said:

It's scary. People are increasingly wanting to shut the message down. The hatred from the other side is becoming more and more volatile. If they truly heard our message, if they truly heard the message that we're speaking to these families, they would not be so angry.<sup>27</sup>

An article entitled, "They SHOULD Be Scared!," was posted as a follow up on QueerToday.com, and ominously threatened "[O]ne message for [the conference organizers] and everyone else on the Christian Right: **There's more where that came from!**"<sup>28</sup>

*Amici* certainly do not suggest these radical views are shared or condoned by Plaintiffs-Appellants or by all same-sex couples in New Jersey. However, this phenomenon is worthy of note: such castigation, and eventual censorship, of organized religion is an almost certain by-product of redefining marriage. As stated in one of the most famous homosexual activist manifestos, *After the Ball*:

[For those] who feel compelled to adhere rigidly to an authoritarian belief structure (i.e., an orthodox religion), that condemns homosexuality . . . our **primary objective** regarding die-hard homohaters of this sort **is to cow and silence them.**<sup>29</sup>

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Protest," *Family News in Focus* (Oct. 31, 2005).

<sup>27</sup> *Id.*

<sup>28</sup> Brian Rainey, "They SHOULD Be Scared!," [www.QueerToday.com](http://www.QueerToday.com), Nov. 1, 2005, (all emphasis in original).

<sup>29</sup> See, Marshall K. Kirk and Hunter Madsen, *After the Ball: How America Will Conquer Its Fear and Hatred of Gays in the 90s*, 176 (Penguin Books, 1989)(emphasis added). See also, e.g., Larry Cata

This censorship strategy is proving quite successful. One recent book analyzing these trends concludes, "The ultimate goal [of the movement to redefine marriage] is to not only restrict, but also to punish any speech that does not affirm homosexual behavior."<sup>30</sup> The authors document numerous cases of retribution exacted against clergy and other persons who have merely expressed their sincere religious beliefs on the subject.<sup>31</sup> Cathy Renna, of the Gay and Lesbian Alliance Against Defamation, summarizes her group's position well: "People often get their views from their religions, so we don't want the pulpit saying that gay is wrong."<sup>32</sup>

Recent experience shows that redefining marriage and maintaining religious liberty are mutually exclusive pursuits. When the former is achieved, the freedom to voice and maintain moral and religious opposition is gradually stamped out. At a recent symposium in Massachusetts, the Advocacy Director for the Freedom to Marry Coalition of Massachusetts, articulated the central emerging query for the nation:

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Backer, *Religion as the Language of Discourse of Same Sex Marriage*, 30 CAP. U.L. REV. 221, 235 (2002).

<sup>30</sup> See, Alan Sears and Craig Osten, *The Homosexual Agenda: Exposing the Principal Threat to Religious Freedom Today*, 147 (Broadman & Holman, 2003).

<sup>31</sup> *Id.*, at 143-149.

<sup>32</sup> *Id.*, at 147.

. . .I think the question here is: can same-sex marriage coexist with religion? Well the answer is absolutely yes, *if* you're from a liberal faith tradition; for example, if you're from reformed Judaism, or constructionist Judaism, the United Church of Christ, Unitarian Universalist, or Quaker.<sup>33</sup>

Of course, the answer -- and suggested fate -- for the *mainstream* faith traditions is very different. Because their religious beliefs are firmly at odds with redefining marriage, those beliefs are eventually required to yield.<sup>34</sup>

In most jurisdictions where marriage has been redefined, a push for comprehensive "hate crime" legislation to eliminate opposing views has followed. Under these laws, third parties who refuse to abandon or silence their sincere religious beliefs have been prosecuted and subjected to substantial losses as a result.

For example, in Sweden, soft-spoken Pastor Ake Green was tried in November, 2005 before the Swedish Supreme Court for allegedly committing a "hate crime" when he preached a simple sermon in his small church in Borgholm, which included Bible verses concerning homosexuality.<sup>35</sup> The stage was set in 2002,

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<sup>33</sup> See, Josh Friedes, *Can Same-Sex Marriages Coexist with Religion?*, 38 NEW ENG. L. REV. 533, 535 (2004)(emphasis added).

<sup>34</sup> In *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 968 (Mass. 2003), Chief Justice Marshall declared that "[t]he Constitution cannot control such prejudices [restricting the definition of marriage] but neither can it tolerate them..." Justice Greaney issued a specific warning that same-sex marriage must be granted "full acceptance, tolerance, and respect." *Id.*, at 973 (Greaney, J., concurring).

<sup>35</sup> "Swedish Pastor faces prison for so-called 'hate speech' in Sermon," *ADF Weekly Alert* (Nov. 8, 2005).

when, following the adoption of same-sex marriages, the Swedish Parliament banned all speech and materials opposing homosexual behavior and other alternative lifestyles.<sup>36</sup> Pastor Green was acquitted, but his case is viewed as a harbinger of things to come.

In Madrid, the leader of Spain's Roman Catholic Church, Cardinal Antonio Maria Rouco Varela, was personally sued by a Spanish homosexual group for "slander and incitement to discrimination" after the Cardinal suggested in a sermon that the country's same-sex marriages would degrade Spain's social security system.<sup>37</sup> His heinous offense? "He said gay couples will overburden the state pension system as they draw benefits without having children whose incomes would bolster the system."<sup>38</sup>

This is a global trend. Today, "homosexuality has been added to groups covered by 'hate crimes' legislation in much of Europe and now, in Canada. Churches teaching that homosexuality is inherently sinful face harsh sanctions and, in some cases,

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<sup>36</sup> Bob Kellogg, "Sweden Moves to Criminalize Opposition to Homosexuality," *Family News in Focus* (June 10, 2002).

<sup>37</sup> "Gay Group Sues After Sermon," *Washington Post*, at B7 (Jan. 3, 2004).

<sup>38</sup> "Spanish Gay Group Sues Catholic Leader After Sermon," <http://www.washblade.com/2004/1-9/news/religion/ribs.cfm>.

criminal penalties."<sup>39</sup> In each country, these legislative developments have closely followed the official redefinition of marriage.

In Canada, the author of the new "hate crimes" law, Bill C-250, legislator Svend Robinson, said he hoped his measure would make "the current use of homophobic pejoratives in public schools and in public places socially and criminally reprehensible."<sup>40</sup>

Even before C-250 was passed, a Christian mayor in London, Ontario, was fined \$10,000 for refusing to proclaim 'Gay Pride Day'; a Christian businessman in Toronto who refused to print materials for a group advocating homosexual behavior was fined \$5,000; a British Columbia teacher was suspended for a month for letters he wrote to a local newspaper that said homosexuality was not a 'fixed position' and could be treated; and a man who placed an ad in a Saskatchewan newspaper with biblical references to homosexual behavior was fined \$1,500.<sup>41</sup>

If this Court allows a redefinition of marriage, New Jersey may one day meet the same fate as our northern neighbors. Because five of the current U.S. Supreme Court justices have shown

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<sup>39</sup> R. Albert Mohler, *The Homosexual Agenda: Religious Liberty Under Fire*, The Council on Biblical Manhood and Womanhood (Dec. 4, 2003).

<sup>40</sup> See, Brian Rushfeldt, "The Real Intent of Bill C250 is Finally Acknowledged by the Author of the Bill," Canada Family Action Coalition (May 29, 2003).

<sup>41</sup> *ADF Weekly Alert, supra*, at 2. In the adjudication of that latter case, *Owens v. Saskatchewan (Human Rights Commission)*, [2002] S.J. No. 732, 2002 SKQB 506, the decision was affirmed on appeal to the Saskatchewan Court of Queen's Bench, where the court ruled that the hate crime statute was "a reasonable restriction on the appellant's right to freedom of expression and religion." *Id.* at ¶33.

increasing interest in the application of international law as precedent in American courts,<sup>42</sup> advocates for religious freedom in this country have legitimate concerns.

The above described cases in Canada, Spain and Scandinavia, as well as similar cases and trends in Great Britain, Denmark, New Zealand, and elsewhere,<sup>43</sup> show how changing the institution of marriage leads inevitably to a corresponding intolerance for, and legal restriction of, mainstream religious viewpoints.

## **II. THE CIVIL AND RELIGIOUS COMPONENTS OF MARRIAGE CANNOT BE SEGREGATED.**

While not every adherent of the principal religions in New Jersey will agree that the definition of marriage as the union of a man and a woman ought to be preserved, the vast majority does and its perspective cannot be ignored. This majority recognizes that the state has vital interests in the preservation of marriage, because "marriage has always been understood as a single institution with simultaneous legal, social, historical,

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<sup>42</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 576 (U.S. 2003) (striking down state sodomy laws based in part upon a decision of the European Court of Human Rights).

<sup>43</sup> See, e.g., Sears and Osten, *The Homosexual Agenda*, 181-187; Liam Reed "Legal Warning to Church on Gay Stance," *Irish Times*, at 1 (Aug. 2, 2003) (Irish Council for Civil Liberties warning that Roman Catholic Church teaching on homosexual unions could violate Ireland's 1989 Incitement to Hatred Act).

philosophical, and religious significance."<sup>44</sup>

A smaller group of religious figures has filed an *amicus* brief in this case in support of Plaintiffs-Appellants (hereinafter referred to as "Plaintiffs' Clergy Brief").<sup>45</sup> The central point of that brief is to propose a complete segregation between the public and private aspects of marriage.<sup>46</sup> Such segregation would be inescapably artificial. It would also defy thousands of years of legal history, anthropology, and common sense.

**A. A Complete Segregation of Marriage's Twin Components would Contradict Legal History.**

In suggesting that "civil marriage" and "religious marriage" should be somehow recognized and maintained separately, the Plaintiffs' Clergy Brief fails to acknowledge that "for centuries marriage has been considered a relationship that transcends its legal definition as a civil status by adopting fundamental precepts of natural law and religious heritage."<sup>47</sup> In fact, as

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<sup>44</sup> Wendy Herdlein, *Something Old, Something New: Does the Massachusetts Constitution Provide for Same-Sex "Marriage"?*, 12 B.U. PUB. INT. L.J. 137, 168 (2002).

<sup>45</sup> See, Brief *Amici Curiae* of New Jersey Religious Leaders and of National and Regional Religious Organizations.

<sup>46</sup> *Id.*, at 6-8.

<sup>47</sup> Chauncey E. Brummer, *The Shackles of Covenant Marriage: Who Holds the Keys to Wedlock?*, 25 U. ARK. LITTLE ROCK L. REV. 261 (2003), citing, e.g., John J. Coughlin, *Natural Law, Marriage, and the Thought of Karol Wojtyla*, 28 FORDHAM URB. L.J. 1771, 1774

one commentator has summarized, "Religion and marriage have been linked throughout recorded history; this link has been especially strong in the history of western marriage."<sup>48</sup> An historical context is instructive.

Since Western legal tradition traces its roots to the twelfth century, a review of our marriage history begins there. As canon lawyers compiled and formalized an original body of law from one thousand years of ecclesiastical learning,<sup>49</sup> it was Christian theology that shaped the philosophy of marriage.<sup>50</sup> The medieval canonists drew heavily upon earlier writings, such as those of St. Augustine, who, in fifth century, "identified as the three essential elements of the marital relationship procreation,

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(2001). Indeed, "[t]he concept of marriage as a union between one man and one woman for life has been basic to so many civilizations that it has withstood numerous attempts to dramatically alter its design." Brummer, at 261, *citing* Anita K. Blair, *Constitutional Equal Protection, Strict Scrutiny, and the Politics of Marriage Law*, 47 CATH. U. L. REV. 1231, 1235-36 (1998).

<sup>48</sup> Charles J. Reid, Jr., *The Unavoidable Influence of Religion Upon the Law of Marriage*, 23 QUINNIPIAC L. REV. 493, 495 (2004).

<sup>49</sup> See generally, Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983).

<sup>50</sup> See also, Homer H. Clark, Jr., *The Law of Domestic Relations in the United States*, 2-3 (2d ed., West 1988) ("After the fall of the Roman Empire, the canon law of the Catholic Church was the dominant influence in the marriage and divorce law of European countries.").

fidelity, and lifelong unity, or permanence.”<sup>51</sup> “Marriage remained an aspect of law over which the Church exercised jurisdiction throughout the Middle Ages, and over which, in the context of England, the ecclesiastical courts continued to exercise jurisdiction into the nineteenth century.”<sup>52</sup> Like their medieval predecessors, English jurists continued to emphasize “that marriage was a contract that derived its efficacy from divine law.”<sup>53</sup>

This was the religious background and foundation of the American law of marriage. Although church courts were never provided with jurisdiction over marriage in this country, our secular courts nevertheless “appl[ie]d categories of thought that were given shape and substance by centuries of ecclesiastical writings . . . [and] invoked, adapted, and utilized a religious frame of reference in resolving matrimonial disputes.”<sup>54</sup> From the dawn of our republic, marriage was understood to be based in

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<sup>51</sup> See, Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of American Law of Marriage*, 18 *BYU J. PUB. L.* 449, (2004).

<sup>52</sup> See, Reid, *supra* note 48, at 494 (citing Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition*, 352-53 (Harvard Univ. Press, 2003)).

<sup>53</sup> See, Charles J. Reid, Jr., “Marriage: Its Relationship to Religion and the State in American Law,” Speech delivered at Becket Fund Conference, Washington, D.C., 9 (Dec., 2005)(transcript on file with author).

<sup>54</sup> *Id.*, at 12-13.

natural and divine law, and worthy of protection as the fount of virtue and public good. Marriage and religion have always been closely connected.

This pervasive philosophy was reflected in the leading commentaries of that era. For example, Chancellor James Kent of New York (1763-1847) wrote, "The primary and most important of the domestic relations is that of husband and wife. It has its foundation in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race."<sup>55</sup> The greatly influential U.S. Supreme Court Justice Joseph Story (1779-1845) stated, "The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society."<sup>56</sup> Story regarded marriage as "a religious, as well as a natural and civil contract," and counseled that the institution originated with Adam and Eve -- long before the organization of modern societies.<sup>57</sup> These views represented the mainstream of American legal thought well into

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<sup>55</sup> See, II James Kent, *Commentaries on American Law*, 75 (2d ed., 1836).

<sup>56</sup> See, Joseph Story, *Commentaries on the Conflict of Laws*, 101 (1834).

<sup>57</sup> *Id.*, at 100 ("[Marriage] may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind. It is the parent not the child of society...").

the twentieth century.<sup>58</sup>

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<sup>58</sup> See, Reid, *supra* note 48, at 505-514. Reid cites the work of leading legal scholars and treatise writers of each subsequent era, including these examples:

Leonard Shelford, *The Practical Treatise on the Law of Marriage and Divorce*, 2 (1841): "From various learned authors, it may be inferred that marriage is, according to the primitive law of God and Nature, for the mutual help of husband and wife—the propagation of the human race—the educating and instructing of their children in the fear and love of God, and training them to be useful members of society."

John Fraser MacQueen, *The Rights and Liabilities of Husband and Wife*, 1-2 (1849): "The Contract of Marriage, by which man and woman are conjoined in the strictest society of life till death or divorce separate them, is the most ancient, the most important, and the most interesting of the domestic relations. Though correctly designated a civil contract, it differs in sundry points from other civil contracts; and chiefly in this, that it is indissoluble at the volition fo the parties. For which reason, because of certain mysterious expressions of high import respecting in the sacred writings, it is also deemed a *divine contract*..." (emphasis in original).

Theophilus Parsons, Jr., *The Law of Contracts*, 556 (1853): "The relation of marriage is founded upon the will of God, and the nature of man; and it is the foundation of all moral improvement, and all true happiness."

Joel Prentiss Bishop, *New Commentaries on Marriage, Divorce, and Separation*, 4 (1891): "Marriage is a contract having its origin in the law of nature antecedent to all civil institutions. . . , which is entered into by two persons of different sexes, with a view to their mutual comfort and support, and for the procreation of children."

Frank Keezer, *The Law of Marriage and Divorce*, 6-7 (1906): "Marriage is universal; it is founded on the law of nature. . . . A legal marriage is a union of a man and a woman in the lawful relation of husband and wife, whereby they can cohabit and rear legitimate children."

James A Schouler, *A Treatise on the Law of Marriage, Divorce,*

American courts saw marriage just as the commentators did, and the case law from the various states in the nineteenth and twentieth centuries is replete with similar analysis.<sup>59</sup> New

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*Separation, and Domestic Relations*, 18-19 (1921): "The rights and obligations of [a man and a woman in marriage] are fixed by society in accordance with natural law, and are beyond and above the parties themselves."

<sup>59</sup> See, Charles J. Reid, Jr., "Marriage in the Western Legal Tradition: A Product of Natural Law or a Creature of the State?," Speech delivered at Kuala Lumpur conference, 18-24 (Oct., 2004)(transcript on file with author). Among other examples, Reid includes the following sample of cases:

Indiana Supreme Court: The Court rejected the proposition that a married woman over the age of twenty-one required a guardian as something that "would be a violation of all our ideas of secular and divine law." *Ex Parte Post*, 47 Ind. 142, 143 (In. 1874).

New Hampshire Supreme Court: "[Marriage] is the most intimate and confidential of all human relations, and has always been sanctioned and protected by both human and divine law." *Drew's Appeal*, 57 N.H. 181, 182-183 (N.H. 1876).

Washington Supreme Court: "[T]he married state is a most commendable one, and ought to be encouraged in all legitimate ways, having, as it does, its origin in divine law." *In re Estate of McLaughlin v. McLaughlin*, 4 Wash. 570, 590, 30 P. 651, 658 (Wa. 1892).

Texas Court of Criminal Appeals: The court sustained a bigamy conviction as a violation of "the laws of God and man." *Harrison v. State*, 69 S.W. 500, 502 (Tx.Cr.App. 1902).

Missouri Supreme Court: The Court spoke of marriage as a "sacred relation," held as much "in the common as in the Divine Law." *Nichols v. Nichols*, 147 Mo. 387, 410, 48 S.W. 947 (Mo. 1908).

Arkansas Supreme Court: "[W]e ought to say that marriage is a divine institution. As a consequence thereof, it is ordained

Jersey courts were no different. For example, in *Raymond v. Raymond*, 79 A. 430 (N.J.Ch. 1909), the Court of Chancery ruled that a wife established sufficient ground for a divorce for the cause of desertion because her husband refused to consummate the marriage by sexual intercourse.<sup>60</sup> The language of the opinion

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by the laws of God and man that children shall be brought into the world. The family throughout all Christendom is the primal unit of society." *Pryor v. Pryor*, 151 Ark. 150, 158 (Ar. 1921).

Connecticut Supreme Court: The Court uphold a lawyer's disbarment upon his adultery conviction because he chose "'to put his own ideas of law above what you might fairly call the laws of God and man.'" *Grievance Committee of the Hartford County Bar v. Broder*, 112 Conn. 269, 276, 152 A. 292, 295 (1930) (quoting the sentencing judge at time of the disciplined lawyer's conviction).

Pennsylvania Orphan's Court: The Court offered as one justification for its incest prohibition statute, the need "[t]o maintain the Divine Law forbidding the marriage of close relatives . . ." *In re Enderle Marriage License*, 1 Pa. D & C 2d 114, 120 (Pa.Orph. 1954). In *Adameze v. Adameze*, 47 Pa. D & C 2d 445, 449 (Pa.Com.Pl. 1969), the Court of Common Pleas relied on the language in *Enderle*, and determined, on its own reading of the Book of Leviticus, that marriage between first cousins related by blood was not prohibited by Divine law. In *In re Marriage of MEW*, 4 Pa. D & C 3d 51, 58 (Pa.Com.Pl. 1977), the court cited favorably to *Enderle's* invocation of the Divine law.

New York Supreme Court, Appellate Division: "'The human race was created male and female with the manifest purpose of perpetuating the race. Marriage without sexual intercourse utterly defeats its purpose, as sexual intercourse except in the marital relation is contrary to divine law, . . .'" *Diemer v. Diemer*, 6 A.D. 2d 822, 823 (N.Y. 1958) (quoting *Raymond v. Raymond*, 79 A. 430, 431 (N.J.Ch. 1909)).

<sup>60</sup> *Raymond*, 79 A. at 433. Ironically, the *Raymond* Court reviewed with disfavor the Massachusetts courts' prior refusals to grant a

clearly illustrates the state's historic respect for and understanding of the religious dimension of marriage:

The relation of marriage cannot exist between man and man, or between woman and woman. The human race was created male and female with the manifest purpose of perpetuating the race. Marriage without sexual intercourse utterly defeats its purpose, as sexual intercourse except in the marital relation is contrary to the divine law, and criminal under our laws. . .

The controlling purpose of marriage is to enable the sexes to gratify lawfully the natural desire for procreation which has been implanted in them, that the race may be preserved upon the earth. If either party may refuse to consummate the marriage, and still hold the other in the bond of matrimony, it is apparent that licentiousness would be encouraged and promoted, and we would become a race of bastards. There is nothing degrading in this view of the marriage state. It is in fulfillment of the design of Providence.

. . . If husband or wife may and does refuse to consummate the marriage, the home upon which society depends for virtuous living and which is the nursery for the rearing of children in all that is ennobling in life will cease to exist. Marriage is encouraged for reasons of public policy and morality, and the parties should not be held in an unnatural relation, repugnant to sex, and promotive of adultery. It cannot be doubted that marriage would never be contracted if it was not to be consummated by sexual intercourse.

*Id.*, at 431.

The *Raymond* decision was favorably cited in at least twenty-one subsequent cases, and, in 1940, the New Jersey Court of Errors and Appeals specifically reviewed and endorsed its "legal

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divorce for the same reason. The *Raymond* excerpt included above actually begins with the reminder, "The Massachusetts cases cannot be regarded as authority here." *Id.*, at 431.

reasoning and philosophy."<sup>61</sup>

While the federal courts had relatively fewer occasions to decide marriage cases, their opinions also recognized the important link between religion and marriage. For example, like the state courts, the federal judiciary "unreservedly consulted the Book of Leviticus for guidance on definitional questions in domestic relations law."<sup>62</sup> Professor Reid notes, "Even a judge like Learned Hand invoked 'God's law' in ruling that an immigrant couple consisting of uncle and niece were not guilty of incest for having married one another and were thus not deportable."<sup>63</sup>

The U.S. Supreme Court has consistently acknowledged the religious aspects of marriage as well. Plaintiffs' Clergy Brief, at page 6, misrepresents the high court's view of marriage by quoting only part of an important finding in *Maynard v. Hill*, 125 U.S. 190 (1888). In its *complete* context, the famous passage

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<sup>61</sup> See, *Kreyling v. Kreyling*, 23 A.2d 800, 803 (N.J.Ch. 1942)(citing *Rains v. Rains*, 12 A.2d 857, 859 (N.J. 1940)).

<sup>62</sup> See, Reid, *supra* note 53, at 29 [citing, e.g., *Brotherhood of Locomotive Firemen and Enginemen v. Hogan*, 5 F.Supp. 598,604-605 (D.Minn., 1934)(where court referred to Chapter 18 of Leviticus to decide what would be a forbidden marriage due to "affinity")].

<sup>63</sup> See, Reid, *supra* note 53, at 24 (citing *U.S. v. Francioso*, 164 F. 2d 163 (2d Cir., 1947)). In that case, Judge Hand noted that marriages between uncles and nieces were not forbidden by New York law until 1893, and asserted: "To be sure, its legality does not finally determine its morality; but it helps to do so, for the fact that disapproval of such marriages was so long in taking the form of law, shows that it is condemned in no sense as marriages forbidden by 'God's law.'" *Id.*, at 164.

from that case reads:

[W]hilst marriage is often termed . . . a civil contract -- generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization -- *it is something more than a mere contract.* . . . Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. *It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and society, without which there would be neither civilization nor progress.*

*Id.*, 125 U.S. at 210-11 (emphasis added).<sup>64</sup>

The Supreme Court has also historically referred to marriage between a man and a woman as a "sacred obligation,"<sup>65</sup> and "holy estate,"<sup>66</sup> and Justice O'Connor more recently reaffirmed that marriage is "an exercise of religious faith as well as an expression of personal dedication."<sup>67</sup> A recognition of the

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<sup>64</sup> By 2001, this famous passage had been quoted in at least 134 federal and state cases. See, John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1067 (2001).

<sup>65</sup> *E.g.*, *Reynolds v. United States*, 98 U.S. 145, 165 (1879); see also *Davis v. Beason*, 133 U.S. 333, 341-42 (1890) (citing *Reynolds* in its admonishment of bigamy and polygamy); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (same).

<sup>66</sup> *E.g.*, *Caminetti v. U.S.*, 242 U.S. 470, 487 (1917), quoting *Murphy*, 114 U.S. at 45 ("...[T]he union for life of one man and one woman in the holy estate of matrimony [is] the sure foundation of all that is stable and noble in our civilization...").

<sup>67</sup> *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (outlining the attributes of marriage sufficient to create a constitutionally

inevitable link between religion and marriage has been consistent throughout America's legal history, and much earlier, and this Court should respectfully decline the invitation to contravene that vast body of wisdom and precedent.

**B. A Complete Segregation of Marriage's Twin Components would Disregard Anthropology.**

What Plaintiffs-Appellants and their *amici* seek is an aberration of more than just our case law. If a court declares that "civil marriage" and "religious marriage" are entirely separate, it will be opposed not only to American legal history, but to the near universal understanding of marriage among all humankind.

According to Bronislaw Malinowski (1884-1942), a principal founder of social anthropology, "Individual marriage sanctioned by religion as well as by law exists throughout humanity, primitive, and civilized alike."<sup>68</sup> Himself a secularist and a rationalist, Malinowski traveled around the globe to observe and study a variety of cultures and peoples. He concluded:

Marriage is regarded in all human societies as a sacrament, that is, as a sacred institution

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protected marital relationship in the context of prison. Among the attributes are included an exercise of religious faith and the expectation that the marriage will be fully consummated.)

<sup>68</sup> See, Reid, *supra* note 48, at 494, n.5 (quoting from Bronislaw Malinowski, "Marriage as a Religious Institution," in *Marriage: Past and Present (A Debate Between Robert Briffault and Bronislaw Malinowski)*, 66-67, Ashley Montagu, ed. (Boston: Porter Sargent Publishers, 1956)).

establishing a relationship of the highest value to man and woman. In treating a vow or an agreement as a sacrament, society mobilizes all its forces, legal as well as moral, to cement a stable union. . .

[T]he religious sanctions embrace the legal character of marriage, that is, they make it binding, public and enforced by the organized interests of the community.<sup>69</sup>

A few years earlier, Joel Prentiss Bishop (1814-1901), perhaps the best known legal commentator of his time, also studied the anthropology of marriage.<sup>70</sup> He offered the following view:

The foundation of the marriage law is the doctrine of ethics and of social science, that the sexes should not associate promiscuously, but 'pair off,' to use an expression applied to the birds of the air. This opinion is universal; to be deemed, therefore, as proceeding from the nature of man, and voicing the wisdom of God.<sup>71</sup>

Although "[s]ocial patterns of sexual behavior are determined by more than court decrees,"<sup>72</sup> no court should be asked or expected to alter the anthropology of marriage or to redefine the institution as it has always been known.

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<sup>69</sup> See, Reid, *supra* note 48, at 494 (quoting from *Id.*, at 64, 70).

<sup>70</sup> See, Reid, *supra* note 48, at 507-508.

<sup>71</sup> See, Charles J. Reid, Jr., *The Gingerbread Man Thirty Years On: The Parlous State of Marital Theory*, 1 U. ST. THOMAS L.J. 656, 660-661, n.3 (2003)(citing Joel Prentiss Bishop, *New Commentaries on Marriage, Divorce, and Separation* vol. 1, 4 (T.H. Flood & Co. 1891)).

<sup>72</sup> See, John T. Noonan, Jr., *The Family and the Supreme Court*, 23 Cath. U. L. Rev. 255, 273 (1973).

Marriage as a religious institution, voluntarily entered, is not ended by any court's decree that the married and the unmarried must be treated alike. But the law, while far from omnipotent, has a pedagogic role in the shaping of society which cannot be dismissed.<sup>73</sup>

The law must not discount the religious, social, and historical significance of marriage between one man and one woman, and the great public benefits that are derived from it. To do so is to trivialize the meaning of marriage into "nothing more than an economic partnership" between consenting persons,<sup>74</sup> or "one more state created-channel for distributing the largesse of the state."<sup>75</sup>

**C. A Complete Segregation of Marriage's Twin Components would Defy Logic.**

Some principles in the law are simple. Our courts have always acknowledged that marriage is *sui generis*,<sup>76</sup> because it is. "More than a mere contract"<sup>77</sup> -- and different than

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<sup>73</sup> *Id.*

<sup>74</sup> See, Reid, *supra* at note 59, 2 (lamenting the Hawaii Supreme Court's definition of marriage as a mere "'partnership to which both parties bring their financial resources as well as their individual energies and efforts.'" *Baehr v. Lewin*, 852 P.2d 44, 58 (quoting *Gussin v. Gussin*, 836 P.2d 484, 491 (1992)).

<sup>75</sup> See, Reid, *supra* at note 59, 4 (discussing *Goodridge v. Dept. of Public Health*, 798 N.E. 2d 941 (2003)).

<sup>76</sup> See, e.g., *Hastings v. Douglas*, 249 F. 378, 381 (N.D. W. Va., 1918) ("The marriage contract is *sui generis*. It is the foundation of society.")

<sup>77</sup> See, e.g., *Maynard*, 125 U.S. at 210.

baptisms, bar mitzvahs, confirmations, and all other religious rituals, sacraments, and ceremonies -- the state has profound, singular interests in it. Among other benefits that marriage between a man and a woman provides to society is the promotion of "responsible procreation," *i.e.*, the reduction of myriad social ills associated with out-of-wedlock childbearing by encouraging the raising of as many children as possible by their mother and father in an intact household.<sup>78</sup>

At some point, common sense must enter the equation. The proposal to sever the civil and religious aspects of marriage should be rejected because it defies logic. When a couple obtains a civil license after a religious wedding ceremony, they do not have two separate marriages. These are simply two features of the *same* marriage, which has meaning that is social, religious, and legal. State statutes authorize clergy to solemnize marriages because every state acknowledges the religious import of marriage.<sup>79</sup> Although a religious ceremony is not required to

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<sup>78</sup> See detailed discussions of the countless benefits that one man/one woman marriage provides the state in the various other *amicus* briefs submitted in support of Defendants-Respondents, *e.g.*, Brief of Amicus Monmouth Rubber and Plastics at page 27; Brief of Amici Curiae New Jersey Coalition to Preserve and Protect Marriage et. al. at page 26.

<sup>79</sup> In fact, three out of four weddings in the U.S. are celebrated in a church or synagogue. See, Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage and Its Predecessors*, 16 STAN. L. & POL'Y REV. 135, 195 (2005), citing Andrew J. Weaver et al., *A Systematic Review of Research on Religion in Six Primary Marriage and Family Journals: 1995-1999*,

become married, as explained in this brief, the very "legal structure of marriage is deeply influenced by our specific religious traditions about marriage."<sup>80</sup>

In explaining that American law treats spouses as "next of kin" because of the influence of our specific religious traditions,<sup>81</sup> one commentator asks some compelling questions: "Which of these conceptions [about marriage] are we allowed to keep and which must be discarded as unduly religious? Monogamy? Mutual fidelity? Primacy of husband and wife over other relations? None of these [particular legal norms] are human universals. They are the products of a specific marriage tradition deeply rooted in [Judeo-Christian] *religious* ideas."<sup>82</sup>

The segregation proposal set forth in Plaintiffs' Clergy Brief would be disastrous if accepted. "Creating a truly 'neutral' marriage system, uninfluenced by any religion, would mean eliminating from the law most of what people mean by

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30 AM. J. FAM. THERAPY 293, 302 (2002). This is to be expected because many Americans are religious. "In a 2004 Gallup poll, six out of ten Americans reported that religion is 'very important' to them, (and over eighty percent classified religion as being 'very' or 'fairly' important)." *Id.*

<sup>80</sup> See, Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 70, n.19 (2004).

<sup>81</sup> *E.g.*, Genesis 2:24 specifies, "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh." (HOLY BIBLE, King James Version)

<sup>82</sup> See, Gallagher, *supra* note 77 (emphasis added).

marriage.”<sup>83</sup> In other words, completely separating “religious” and “civil” marriage would entail cutting off the inherited understanding of marriage, with all its normative values, which have their basis in the religious, and not the civil, nature of marriage.

It would also open the door for legal and social chaos. If marriage is completely segregated from its religious meanings, and redefined to become merely an economic arrangement or an emotional relationship of love and companionship, where could *any* line be drawn? Thereafter, there would be no legitimate constitutional basis to confine marriage to just two people, or to prevent other “unique” marital arrangements in years to come. If the Levitical decrees (e.g., from Leviticus 18: 6-18, prohibiting sex between parents and children, siblings, and in-laws as contrary to God’s law), relied upon and referenced by Western courts for millennia, are eliminated from consideration in a pure “civil marriage” paradigm -- why or how would those couplings or others be denied in the future?

Contrary to what the Massachusetts Supreme Judicial Court proclaimed in *Goodridge*, the record shows that marriage is *not* a creation of the state, and it is *not* “a wholly secular

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<sup>83</sup> *Id.*

institution."<sup>84</sup> Until now, marriage has always been considered as something "transcendent, as a product of the natural law, which predated the state and which the state might regulate but not dominate, or define, or destroy."<sup>85</sup> Marriage has heretofore been rightly understood as "the parent and not the child of society."<sup>86</sup> The interaction that exists between religion, the state, and the institution of marriage is both inevitable and beneficial. Without its religious context, marriage would ultimately be left with no content at all.

#### CONCLUSION

*Amici* do not suggest that the above listing of possible effects of a redefinition of marriage is comprehensive. This brief merely sets forth concrete examples that illustrate the very serious and widespread implications that redefining marriage will have for third parties, especially those with religious objections to the new definition. *Amici* submit that such implications are unnecessary since a redefinition of marriage is not mandated by the New Jersey Constitution. Moreover, completely segregating the religious and civil components of marriage would be an unworkable and disastrous departure from

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<sup>84</sup> See, *Goodridge*, 798 N.E 2d at 954 (falsely concluding, "Simply put, the government creates civil marriage.").

<sup>85</sup> See, *Reid*, *supra* note 48, at 512.

<sup>86</sup> See, Justice Joseph Story, *supra* note 57.

thousands of years of legal history and human experience.

For the foregoing reasons, *Amici Curiae* respectfully request that this Court affirm the judgment of the Appellate Court, and decline the invitation to alter the sacred institution of marriage.

Dated January \_\_, 2006.

Respectfully submitted,

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Mark L. Hopkins

## APPENDIX