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LODEWYKS; MAUREEN KILIAN and
CINDY MENEGHIN; SARAH and SUYIN
LAEL; MARILYN MANEELY and DIANE
MARINI; and KAREN and MARCYE
NICHOLSON-MCFADDEN,

Plaintiffs-Appellants,

v.

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

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-2244-03T5

ON APPEAL FROM:

MERCER COUNTY,
LAW DIVISION
Docket No. MER-L-15-03

Sat Below:
Hon. Linda R. Feinberg,
A.J.S.C.

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PRELIMINARY STATEMENT

Plaintiffs file this reply to the briefs of the State and its two amici. The State fails to respond to plaintiffs' explanation of why an historical "definition" cannot evade constitutional review, and instead relies on interpretive principles that would have allowed bans on interracial marriage and reproductive freedom to forever remain on America's statute books. Likewise, the State does not explain how popular opposition to providing a civil right can or should deprive courts of their solemn responsibility to protect constitutional guarantees; to the contrary, courts' obligations are greatest when the majority seeks to deprive minorities of rights. And the State still strives to change New Jersey's balancing test so it operates like the federal one. But under the controlling precedent, the issue is whether or not the State's asserted public need for the constitutional infringement outweighs plaintiffs' extraordinary interests in equal access to marriage. On that the State adds nothing except to correctly reject rationales involving procreation and child-rearing. But the State's two amici nonetheless advance those rationales, which are implausible and thus carry no weight in the balance.

ARGUMENT

The New Jersey Supreme Court has explained that courts and not legislatures ultimately determine whether a legislated "definition" complies with the Constitution. Pb16-26.¹ Nonetheless the State characterizes plaintiffs' claims under Article I, ¶ 1 as seeking "social change" that must be accomplished in the legislative arena, and further suggests that this Court look to legislative "trends." Db59.²

¹ See also S. Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 174 (1975) ("It is elementary theory that all police power enactments . . . must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628, 1638 (1943) (Constitutional protections "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."); Trombetta v. Mayor of Atlantic City, 181 N.J. Super. 203, 221 (Law Div. 1981), aff'd 187 N.J. Super. 351 (App. Div. 1982) ("Courts must ultimately define and defend individual rights against government in terms independent of consensus or majority will . . .").

² The State correctly states that a national debate on these issues is underway, but the debate also includes a series of recent judicial decisions holding bans on same-sex couples marrying unconstitutional under state constitutions. Castle v. State, 2004 WL 1985215 (Wash. Super. Sept. 7, 2004); Andersen v. King County, 2004 WL 1738447 (Wash. Super. Aug. 4, 2004); Li v. State, 2004 WL 1258167 (Or. Cir. Apr. 20, 2004); see also People v. Greenleaf, 780 N.Y.S.2d 899 (Ulster County, 2004) (dismissing charges against official who solemnized marriages of same-sex couples, on the grounds that the New York's statutory bar to such marriages is unconstitutional); People v. West, 780 N.Y.S.2d 723 (Ulster County, 2004) (same).

But the Court's duty to interpret the Constitution obviously does not turn on trends and polls.³

After first clearing away errors over the constitutional test required in this case, this Reply Brief will demonstrate how the purported public needs newly raised by amici cannot justify denying plaintiffs the freedom to marry.⁴

A. THIS COURT SHOULD REJECT THE ATTEMPT TO REPLACE THE SETTLED TEST APPLICABLE TO NEW JERSEY CONSTITUTIONAL CLAIMS

The State and its amici repeat the trial court's pervasive error of giving lip service to the applicable constitutional

³ "In 1948, when California became the first state to strike down a ban on interracial marriage, nine out of 10 Americans opposed such unions." Gail Mathabane, Gays Face Same Battle Interracial Couples Fought, USA Today, Jan. 26, 2004, at 13A. At the time of the Loving opinion ten years later, one poll showed seven out of 10 Americans disapproving such unions. 3 Dr. George H. Gallup, The Gallup Poll; Public Opinion, 1935 - 1971, at 2168 (William P. Hansen et al. eds., 1972). By comparison, a 2003 Zogby poll indicated that "the views of New Jersey voters on gay issues were indeed more liberal than those of voters nationwide. . . . [and] a majority of New Jersey voters supported the right of gay couples to marry." Josh Benson, Welcome to the Rainbow State, N.Y. Times, Sept. 5, 2004, §14 (New Jersey), at 1. In any event, however, polls cannot guide constitutional adjudication.

⁴ The State adopts wholesale many of the errors of the trial court to which plaintiffs already have responded. For example, the State does not address plaintiffs' explanation of how the facial discrimination inherent in the ban on marrying their partners eliminates the need for an inquiry into intent. Pb75n.18. The State merely adopts the trial court's finding to the contrary. Db52. In fact, the trial court described this facial discrimination in detail. Ja140a (citing, among other provisions in the statutory scheme for marriage, the provision that "the license shall be obtained in the municipality where the female party resides or the municipality where the male party resides.").

test and then effectively replacing it with the federal test. Jal36a; Db15; Brief of Amicus Curiae Alliance For Marriage In Support Of Defendants-Respondents ("Allianceb") at 5-6.⁵ That compounded error is obvious in the language of their arguments, which use such phrases as "no conceivable grounds" and "negative every conceivable basis."⁶ "These phrases are from an analysis of equal protection under the United States Constitution." Forstrom v. Byrne, 341 N.J. Super. 45, 61 (App. Div. 2001). As the New Jersey Supreme Court has explained in direct response to a dissent's recourse to the federal rational basis standard, "[u]nder New Jersey law, we apply the Right to Choose balancing test" Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 631 n.6 (2000).⁷ But the State and its amici ignore

⁵ The bar to marriage also does not survive even the federal "rational basis" test. See Pb85n.21. But that would matter only if plaintiffs advanced federal claims, which they do not.

⁶ Amici UFI creates straw man issues in their discussion of classifications based on sex and sexual orientation, and their discussion of levels of scrutiny. UF1b19-26. Had plaintiffs brought federal claims, they would indeed be advancing such classifications and tiers of scrutiny. But because the New Jersey Supreme Court has rejected the federal analysis for the claims actually brought in this action, which do not require attempts to pigeon-hole and rank forms of discrimination, plaintiffs instead argue under the applicable test.

⁷ The State erroneously argues the Novembrino/Hunt factors, Db17, when in fact the Supreme Court already applied those very factors in Right to Choose and settled on the balancing test for equality claims under Article I, ¶ 1. There is no authority for applying the balancing test to all equality and privacy claims except those advanced by same-sex couples.

that the language of the federal tiered analysis has no relevance here.⁸

Under the balancing test that controls with regard to the guarantees of equality and privacy under Article I, ¶ 1, the courts review the State's "asserted" need for the infringement; they do not require plaintiffs to conceive of and negate every possible public need. Id. Indeed, "where an important personal right is affected by government action, [the] Court often requires the public authority to demonstrate a greater public need than is traditionally required in construing the federal constitution," id., and looks "more closely at the State's purported justification," id. at 619-20. Here the importance of the personal right - involving a sweeping array of tangible and intangible interests of the most personal nature - is immense. Pb34-55. Thus, in this particular case, the State not only bears the burden of demonstrating a public need to exclude

⁸ The authorities cited by the trial court, the State, and the State's amici on this issue are inapposite. Some of that authority precedes the Supreme Court's definitive rejection of the federal tiered analysis with the 1982 Right to Choose balancing test, Hutton Park Gardens v. W. Orange Town Council, 68 N.J. 543 (1975); others involve distinguishable claims and tests such as those involving commercial speech, Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 270-71 (1998); and others expressly employ the rational basis test rather than the balancing test, Brown v. State, 356 N.J. Super. 71, 79 (App. Div. 2002) (applying federal "rational basis scrutiny"); Auge v. N.J. Dep't of Corr., 327 N.J. Super. 256, 266 (App. Div. 2000) (same); N.J. Ass'n of Health Plans v. Farmer, 342 N.J. Super. 536, 569-70 (Ch. Div. 2000) (same).

committed same-sex couples from marriage, but must establish an extremely weighty need.⁹

B. THIS COURT SHOULD REJECT THE ARGUMENT THAT THE ENTIRE CASE TURNS ON THE EXISTENCE OF A FUNDAMENTAL RIGHT, WHEN THE BALANCING TEST REQUIRES WEIGHING OF INTERESTS IN ANY EVENT

The State advances the remarkable assertion that a claimant's inability to advance a fundamental right is "fatal" to an equality claim under Article I, ¶ 1. Db48-49.¹⁰ If that were so, then the Supreme Court would end the inquiry once it is

⁹ Even if the Supreme Court's precedent were not binding, and the federal test instead applied, this Court would not step beyond the State's asserted needs to postulate other rationales that may justify discrimination. Where a law targets a politically unpopular group, the United State Supreme Court applies "a more searching form of rational basis review." Lawrence v. Texas, 539 U.S. 558, 580, 123 S. Ct. 2472, 2484-85, 156 L. Ed. 2d 508, 527 (O'Connor, J., concurring). That Court has "been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships." Id.

¹⁰ Of course, plaintiffs have already established that the right to marry the person of one's choice is fundamental. Neither the State nor its amici answer the question of what would happen to the Supreme Court's privacy jurisprudence (like its reproductive freedom cases) were the State's arguments to prevail either on narrowing the fundamental right to the particular exclusion challenged, or on giving conclusive weight to the likely views of the Constitution's framers on the particular exclusion. Pb57-65. Further, Amici UFI's argument that New Jersey's guarantee of privacy does not extend to government "recognition" is unavailing because it ignores that the right to marry has already been found to be fundamental notwithstanding that it is a right to government recognition; indeed, amici's argument would deprive different-sex couples of the fundamental right as well. UFIB4-6.

determined, at the threshold, that no fundamental right exists. But the same authority the State cites shows that the Supreme Court has consistently proceeded to analyze whether the guarantee of equality is violated even when the matter does not involve a fundamental right (although the result may ultimately be that the discrimination is justified). Db 49. The core principle of equality is that the government must treat individuals "evenhandedly," even where the interest at stake is as narrow as municipal garbage collection. Pb67-68. Though courts may deny a claim for equality, the State interprets the courts' finding of a sufficient justification to discriminate as a basis for the radical argument that no analysis is necessary.¹¹

C. THE COURT SHOULD REJECT THE SUGGESTION THAT THE STATE'S
INTRUSION ON PLAINTIFFS' INTERESTS IN MARRIAGE IS MERELY AN
INTRUSION ON THE MAINTENANCE OF RELATIONSHIPS

The State, like the trial court, characterizes the government's intrusion on the plaintiffs' interests in marriage as no more than an interference with the maintenance of relationships. Db36. This argument fails to address the

¹¹ Indeed, if the New Jersey Constitution only protected fundamental rights, the State Constitution would be far less protective than the federal. See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (invalidating a zoning restriction under "rational basis test"); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973) (invalidating a food stamp law discriminating against unrelated individuals under "rational basis" test). This of course is not so.

profound interests underlying marriage, ranging from the public, private, and sometimes spiritual expression of exclusive dedication to another human being to the vast web of support and shelter that marriage provides to families. Pb34-55. It further fails to address the deep and scarring injury to human dignity and self-worth that results when the government labels a group as second-class citizens. Pb70-75. Thus, the "domestic partner" status created by the State just this year merely confirms second-class citizenship for those who do not have the choice to marry or have access to the world of meaning that the word "marriage" conveys. As the Massachusetts Supreme Judicial Court explained in response to that State Senate's attempt to substitute "civil unions" for marriage:

[T]he use of the word "marriage" by "spouses" who are the same sex is more than semantic. The dissimilitude between the terms "civil marriage" and "civil union" is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex . . . couples to second-class status. . . . The bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits.

[In re Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (2004)]¹²

¹² See also EGALE Canada Inc. v. Canada (Attorney Gen.), 2003 CarswellBC 1006 at ¶ 156 (2003), stay lifted 2003 CarswellBC 1659 (2003) ("Any other form of recognition for same-sex relationships, including the parallel institution of [registered domestic partnerships] falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples 'almost equal', or to leave it to governments to choose amongst less-than-equal solutions.")

That stigma is deeply felt. "For me, being denied marriage, despite how hard we work to love and support each other and our children, is demeaning and humiliating. Those feelings are part of my daily life, as I work and pay taxes and try to be a good mom and good life partner. The feelings are part of my daily life because of the constant reminders that we are second-class." Ja72a (Sarah ¶ 6).¹³

¹³ The amici's attempt to distort what plaintiffs seek, by comparing plaintiffs' claims to incest and polygamy, is typical of historical opposition to advances in civil rights. Subjugation of women once turned on a perceived horrible that the full participation of women in the political process would lead to "depravation of morals." Dale v. Boy Scouts of America, 160 N.J. 562, 618 (1999), rev'd on federal grounds, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (citations omitted); see also Paterson Tavern & Grill Owners Ass'n, Inc. v. Borough of Hawthorne, 57 N.J. 180, 186 (1970) ("the suggested 'moral and social problems' have never materialized in communities where the employment of women bartenders has been lawful and frequent.") (citation omitted). Banning interracial marriages likewise was compared to bans on incest, bigamy, and polygamy. See, e.g., Perez v. Lippold, 198 P.2d 17, 46 (Cal. 1948) (Shenk, J., dissenting). Now, Amici UFI turns the ban on marriages for committed same-sex couples on a similar comparison, including incestuous marriages with a "niece or nephew," and polygamy. UFIb30-31. Incestuous and polygamous marriages did not flourish in judicial doctrine after the fall of bans on interracial marriage, and there is no basis for thinking they will flourish after the fall of bans on marriages of committed same-sex couples. Plaintiffs seek the freedom to "join in marriage with the person of one's choice." Perez, supra, 198 P.2d at 19. They do not challenge the "binary nature of marriage," and indeed embrace the solemn statutory obligation of "exclusivity," Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 965 (Mass. 2003), so they can pursue a "way of life in which two people commit to each other, foregoing other liaisons and opportunities," Estate of Roccamonte v. Slackman, 174 N.J. 381, 392-93 (2002).

D. THIS COURT SHOULD FIND THAT THE PURPORTED PUBLIC NEEDS FOR DISCRIMINATION HAVE NO WEIGHT

The State's articulated rationales for the discrimination are identical to those discussed in the trial court's opinion, which plaintiffs have already addressed. Pb76-82.¹⁴ The State has advanced no other rationales for discrimination against same-sex couples seeking access to marriage, accounting in part for the posture that allows adjudication of this matter on cross motions for summary judgment. Indeed, the State now seeks to distinguish the historic Goodridge ruling in Massachusetts in part because there the State advanced rationales "not offered in defense of New Jersey's marriage statutes." Db53-54.¹⁵

¹⁴ For example, the State again raises the specter that "significant legal issues" will arise under the Full Faith and Credit clause. Db43. No doubt the effect of that Clause will be litigated in the context of same-sex couples' marriages, but at least one scholar's view is that the Clause has never "been read to require one state to recognize another state's marriages" because marriage licenses have not been considered "judgments." Lea Brilmayer, Full Faith And Credit, Wall St. J., Mar. 9, 2004, at A16.

¹⁵ Of course, that distinction favors plaintiffs because this Court faces far fewer justifications for the very same discrimination. The State's remaining distinctions are unavailing. The New Jersey Supreme Court has explained that this State's Constitution expresses ideals "in a broader way than ever before in American constitutional history. Pb27n.3,80. Whether Massachusetts had existing statutory protections for families of same-sex couples also does not matter. When the Legislature responded to the Goodridge opinion by proposing the most extensive set of protections that exist short of marriage (civil unions), the Massachusetts high court declared the proposal wholly inadequate to meet constitutional requirements. Pb82. Thus, its original decision could not have been affected by the existence of any lesser status than

Those rationales included "the promotion of procreation" and "child rearing." Id. Despite the State's rejection of these rationales, a few amici attempt to inject them into this litigation, to no avail.

1. As The State Agrees, There Is No Public Need To Promote Procreation Through Marriage

One of the amici supporting discrimination in marriage asserts that "procreation is a legitimate and compelling goal for society to promote." Allianceb8. The State has correctly rejected that rationale for barring same-sex couples from marriage. There is no statutory requirement that married couples commit to procreating in marriage. Instead the government allows a vast number of non-procreating individuals to marry. The door of marriage is thus open to different-sex couples who wish not to have children, to those who prefer to adopt children, and to those who cannot have children biologically, such as elderly or infertile couples.¹⁶

marriage, like "domestic partnership." Finally, the Goodridge high court found that traditional definitions of marriage cannot simply justify themselves, even if Massachusetts did not formally advance tradition as a rationale. Pb78.

¹⁶ "People who have never consummated their marriage, and never plan to, may be and stay married. . . . People who cannot stir from their deathbed may marry." Goodridge, supra, 798 N.E.2d at 961. See also Lawrence, 539 U.S. at 605, 123 S. Ct. at 2498, 156 L. Ed. 2d at 543 (Scalia, J., dissenting) (If "moral disapprobation" is not a justification, "what justification could there possibly be for denying the benefits of marriage to homosexual couples Surely not the encouragement of

Amici's attempt to force upon the State an interest in requiring couples to procreate fails as a matter of logic because banning marriages of same-sex couples is a "significantly underinclusive" approach to promoting procreation. Baker v. State, 744 A.2d 864, 881 (Vt. 1999).¹⁷

Furthermore, the Supreme Court has recently rejected the notion of reducing all marital-type relationships to such narrow attributes as procreation:

A marital-type relationship is no more exclusively dependent upon one partner's providing maid service than it is upon sexual accommodation. It is, rather, the undertaking of a way of life in which two people commit to each other, foregoing other liaisons and opportunities, doing for each other whatever each is capable of doing, providing companionship, and fulfilling each other's needs, financial, emotional, physical, and social, as best as they are able. And each couple defines its way of life and each partner's expected contribution to it in its own way.

procreation, since the sterile and the elderly are allowed to marry.").

¹⁷ The Alliance Amicus advances the novel argument that the State cannot bar the large group of non-procreating heterosexual couples from marriage because the State cannot pry into their lives. Allianceb16. Of course the State already inquires about topics like venereal disease and mental incompetence with applicants for marriage licenses. N.J.S.A. 37:1- 9. But the larger point is that there is no support for the proposition that the State would actually want to bar the door to this large group of non-procreating heterosexual couples. The State has no such desire. So the gaping underinclusiveness of a "procreation" rationale does not reflect that the State is refraining from asking applicants for marriage licenses about procreation. Rather it demonstrates that promoting procreation is not a State interest at all.

[Estate of Roccamonte, supra, 174 N.J. at 392-93]¹⁸

"What is essential to the relationship of the parties in one marriage may be of considerably less significance in another. Therefore, a determination of whether a fraud goes to the essentials of the marriage must be decided on a case-by-case basis." V.J.S. v. M.J.B., 249 N.J. Super. 318, 320 (Ch. Div. 1991). In V.J.S., one spouse brought an action for annulment on the grounds that the other spouse committed fraud in concealing his intent to have children when the understanding was that the couple would use contraception and not have any children. An "essential" of the marriage there was that there would be no children, and thus the marriage was void. Id. at 322.

In sum, the statutes and well-reasoned common law rules reflect no State interest in promoting procreation in marriage. "If the begetting of children were the chief end of marriage it should follow that our public policy would favor annulling marriages in sterility cases where the fact of sterility is

¹⁸ In the context of ensuring the federal right to marry for incarcerated individuals, the United States Supreme Court has also explained that marriage has multiple "important attributes," including "expressions of emotional support and public commitment," "spiritual significance," and receipt of government benefits, property rights, and other, less tangible benefits. Turner v. Safley, 482 U.S. 78, 95-96, 107 S. Ct. 2254, 2265, 96 L. Ed. 2d 64, 83 (1987). The lower court had observed that the right to marry for inmates is infringed even though procreation and raising children is "precluded by the fact of incarceration." Safley v. Turner, 777 F.2d 1307, 1314 (8th Cir. 1985) (citations omitted).

unknown to the parties at the time of the marriage. But no statute in this state permits annulment in such cases. . . . Health and happiness appear to be the touchstone." T. v. M., 100 N.J. Super. 530, 538 (Ch. Div. 1968); see also M.T. v. J.T., 140 N.J. Super. 77 (App. Div. 1976) (marriage was valid even though wife had no uterus and thus was incapable of procreation).¹⁹

The State correctly determined that it has no interest in promoting procreation through marriage, and this Court should reject amici's attempt to force that interest upon the State.²⁰

¹⁹ It is simply not correct to assert that the Supreme Court opined that "the very continued existence of the state depends on" procreation and thereby made procreation a state interest justifying discrimination in marriage. Alliance 9. In J.B. v. M.B., 170 N.J. 9 (2001), the Court confronted a difficult post-divorce matter involving disposition of stored preembryos created by in vitro fertilization. As a prelude to discussing its own precedents, the Court discussed the federal Supreme Court's precedents, including a 1942 reference to the "survival of the race." Id. at 23. But in its own adjudication the Court kept distinct the constitutional concepts of marriage and procreation. The case turned on a clash between a husband's asserted right to procreate and a wife's asserted right not to procreate, resulting in affirmance of a judgment that the preembryos were to be destroyed. Id. at 30. The decision highlights how, to the extent a married couple decides to procreate, it does so in accordance with the wishes and respective rights of the members of the couple and not because of a State interest in promoting procreation through marriage.

²⁰ Even assuming for argument's sake that the State had an interest in encouraging procreation through marriage, it is not furthered by a bar to same-sex couples marrying. See Halpern v. Toronto (City), 2003 CarswellOnt 2159 at ¶ 121 (2003) ("Heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry.")

2. As The State Further Agrees, Prohibiting Same-sex Couples From Marrying Does Not Further Child Welfare

The State's Amici also advance a rationale for the ban on same-sex couples marrying that purportedly relates to the State's interest in the welfare of children. See, e.g., UFIb28-30. Unquestionably the State has a profound interest in child welfare, but it has appropriately rejected that interest as a basis for the bar to marriage for plaintiffs.

First, barring access to marriage will not stop same-sex couples from forming families with children.²¹ According to the Census, there are at least 16,000 couples in New Jersey who identify as same-sex couples,²² and that figure is widely considered a significant undercount.²³ These couples are barred from marriage, but 4,902 of those couples have children, including several plaintiff couples. Pb5-6.²⁴

²¹ "Children are part of what makes life worth living, and bigotry cannot be allowed to harm them or deny us that treasured part of life. Whether African-American or Gay-American or both, couples have children to enrich their lives." Ja68a (Suyin ¶ 8).

²² Tavia Simmons and Martin O'Connell, U.S. Census Bureau, Married-Couple and Unmarried Partner Households: 2000, at 4 (Feb. 2003).

²³ "[T]he [Census] count of same-sex couples is certainly on the low side because there are still many people who fear discrimination and harassment and refuse to report that they are part of a gay or lesbian couple." Ronald Alsop, As Same-Sex Households Grow More Mainstream, Business Takes Notice, Wall St. J., Aug. 8, 2001, at B4.

²⁴ The figure of 4,091 is obtained by multiplying the number for each set of households (male and female) by the percentage

Even in the unlikely circumstance that all these families had just one child each, there would be almost 5,000 children in New Jersey in families headed by same-sex couples. While these numbers are Census estimates, the ineluctable message is that committed same-sex couples share the wishes of different-sex couples to build families and enrich their lives with children, *with or without marriage*. Thus amici's premise, that barring the door to marriage will stop committed same-sex couples from having children, is unsupported.²⁵

Amici's more fundamental mistaken premise is that the State has an interest in stopping same-sex couples from having children in the first place. As the State itself has pointed out, New Jersey allows same-sex couples to be foster parents and to jointly adopt foster children, and same-sex couples who decide to give birth to a child can have the partner who is not automatically legally recognized as a parent adopt the child. Db36-37 (citing In re Adoption by H.N.R., 285 N.J. Super. 1

of those households that have children. Simmons and O'Connell, supra, at 4,9.

²⁵ To the contrary, the State's interest in the welfare of children is best served by allowing access to marriage. Pb 47-49. "The task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws." Goodridge, supra, 798 N.E.2d at 963. "The continued maintenance of this caste-like system is irreconcilable with, indeed, totally repugnant to, the State's strong interest in the welfare of all children and its primary focus, in the context of family law where children are concerned, on 'the best interests of the child.'" Id. at 972 (Greaney, J., concurring).

(App. Div. 1995); In re Adoption by J.M.G., 267 N.J. Super. 622 (Ch. Div. 1993)). Moreover, same-sex couples in New Jersey can adopt children who need parents through the State's adoption process. N.J.A.C. 10:121C-4.1(c) (2003) (prohibiting discrimination on the basis of sexual orientation).²⁶ Thus it is simply implausible to assert that New Jersey has any interest in stopping same-sex couples from raising children.²⁷

Contradicting the State, however, amici resort to negative stereotyping of same-sex couples' families, arguing that there is something inferior about a parent not being biologically related to the children. See, e.g., UF1b29. The assertion that a child is in a sub-optimal setting unless there are two parents biologically related to the child is of course an affront not only to families headed by same-sex parents, but to all families where one or both parents have no biological relation to the children. In New Jersey, it is love and nurturing that provides

²⁶ Thus, one plaintiff couple has adopted in New Jersey three daughters not born to them. Ja68a (Suyin ¶ 5). Two of the plaintiff couples are mothers who planned their families by each giving birth to a child, years apart, with the other adopting under New Jersey law. Ja50a-51a (Cindy ¶¶s 7-8); Ja112a-113a (Karen ¶ 4).

²⁷ New Jersey is in step with professionals who work with children, who have determined that "the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish." Am. Psychological Ass'n Council of Representatives, Resolution on Sexual Orientation, Parents, and Children (July 2004), at <http://www.apa.org/pi/lgbc/policy/parentschildren.pdf> (American Psychological Association position statement).

the optimal setting for children, which may be in "biological families, step-families, blended families, single parent families, foster families, families created by modern reproductive technology, and in families made up of unmarried persons." V.C. v. M.J.B., 163 N.J. 200, 232 (2000) (Long, J., concurring). The desired parent-child bond is not the result of "sexual orientation" or "biology," but of the "daily toil parents engage in to keep their children healthy and safe from harm," and of their "love and attention." Id. at 232-33.²⁸

Amici's argument echoes similar arguments in the history of civil rights. "The invocation of stereotypes to justify discrimination is all too familiar. Indeed, the story of discrimination is the story of stereotypes that limit the potential of men, women, and children who belong to excluded groups." Dale, supra, 160 N.J. at 618 (1999). The State correctly determined that it has no interest in stopping same-sex couples from having children by banning their marriages, and same-sex couples are already raising thousands of children in

²⁸ Amicus UFI relies on the dissent in the Massachusetts Goodridge decision, which reviewed the State's interest not under New Jersey's balancing test but under Massachusetts' rational basis test, and which did not account for New Jersey law and public policy regarding parents and children.

New Jersey. This Court should reject amici's attempt to create a State interest that the State itself rejects.²⁹

CONCLUSION

Plaintiffs have been in committed relationships ranging from eleven to thirty-two years, some are raising children in families as large as four, five, and seven. They want to marry, just as their family members, neighbors, and co-workers have done. The State's refusal to grant their requests for licenses causes harms to their families that include higher health insurance and other costs, lower savings for their children's educations, diminished employment opportunities, greater risk in times of medical and other emergencies, and the daily indignities from the government's label of inferiority. Pb4-14,36-54. This discrimination in marriage cannot be reconciled with New Jersey's constitutional guarantees of equality and privacy, notwithstanding the popular majority's views on whether a minority is protected by the Constitution. Nor is it any argument that the Legislature has defined marriage beyond the

²⁹ In a similar case where the statutory scheme was discriminatory, the Supreme Court rejected "archaic and overbroad" stereotypes underlying the exclusion. Tomarchio v. Township of Greenwich, 75 N.J. 62, 73 (1977). In Tomarchio, the Court construed the statutory scheme for workers' compensation law to apply without regard to whether the claimant is a widow or widower. Here this Court should construe the statutory scheme for marriage to apply without regard to whether a couple is same-sex or different-sex.

reach of the Constitution. Most determinatively, there are no public needs, let alone any of adequate weight, to tip the constitutional balance sufficient to justify the State's discrimination against plaintiffs. This Court accordingly should grant plaintiffs' motion for summary judgment.

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Respectfully submitted,

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