

**SUPREME COURT OF NEW JERSEY
DOCKET NO. A-224-03T5**

MARK LEWIS and DENNIS WINSLOW;
SAUNDRA HEATH and CLARITA
ALICIA TOBY; CRAIG HUTCHISON
and CHRIS LODEWYKS; MAUREEN
KILLIAN and CINDY MENEHIN;
SARAH and SUYIN LAEL; MARILYN
MANEELY and DIANE MARINI; and
KAREN and MARCYE NICHOLSON-MCFADDEN,

Civil Action

Plaintiffs-Appellants,

v.

On Appeal from the Superior
Court of New Jersey, Appellate
Division

GWENDOLYN 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 KOMONISKI, in his official
capacity as Acting State Registrar
of Vital Statistics of the New Jersey
State Department of Health and
State Services,

Defendants-Respondents.

Sat Below:
Stephen Skillman, P.J.A.D.
Anthony J. Parillo, J.A.D.
Donald G. Collester, Jr., J.A.D.

**BRIEF AMICI CURIAE OF THE ANSCOMBE SOCIETY AT PRINCETON
UNIVERSITY**

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TABLE OF CONTENTS

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 1

I. Marriage is a Social Norm and Marriage Law’s Channeling
Function Promotes the Public Good. 5

 A. The Channeling Function of Marriage Law. 5

 B. Marriage Promotes the Common Good 7

 C. Marriage Is More Than a Personal Right 9

 D. Marriage Needs the Support of Civil Society 13

II. The Ongoing Debate Over the Meaning of Marriage Should Be
Allowed to Go Forward Without Judicial Intervention 18

III. CONCLUSION 21

TABLE OF CITATIONS

Cases

Lewis v. Harris, 378 N.J. Super. 168, 875 A.2d 259 (N.J. Ct. App. 2005) 10

Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003) 15, 20

Other

JASON DEPARLE, *AMERICAN DREAM: THREE WOMEN, TEN KIDS, AND A NATION'S DRIVE TO END WELFARE* (2004) 7

KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* (2005) 7

David Frum, *A Blow to Canada's Families* NATIONAL POST, Dec. 14, 2004, at A20 14

Virginie Guiraudon, Karen Phalet & Jessika Ter Wal, *Final Report on the Netherlands*, (European Commission June 2004) at http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/aneval/pb_en.pdf 14

Noelle Knox, *European Gay-Union Trends Influence U.S. Debate*, USA TODAY, July 14, 2004, at 5A 14

Rose M. Kreider & Jason Fields, *Living Arrangements of Children: 2001*, U.S. Census Bureau Current Population Reports P70-104 (July 2005) at <http://www.census.gov/prod/2005pubs/p70-104.pdf> 2

Dr. D. Manting & Dr. J.A. Loeve, *Economic Circumstances and Union Dissolution of Couples in the 1990s in the Netherlands*, Discussion Paper 04006 (Statistics Netherlands April 2004) at <http://www.cbs.nl/nl/publicaties/publicaties/maatschappij/bevolking/papers/economic-circumstances-union-dissolution.pdf> . 14

ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS* (2005) 6

Kristin Anderson Moore, et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?* CHILD TRENDS RESEARCH BRIEF (Child Trends June 2002) at <http://www.childtrends.org/PDF/MarriageRB602.pdf> 17

Press Release, Statistics Netherlands, More Marriages and More Partnerships (Nov. 27, 2002) at

<http://www.cbs.nl/NR/rdonlyres/460EEFBF-E94A-426D-9240-7073882DB08E/0/pb02e244.pdf> 14

Carl E. Schneider, *The Channeling Function in Family Law* 20
HOFSTRA LAW REVIEW 495 (1992) 8-9

Liesbeth Steenhof & Carel Harmsen, *Same-Sex Couples in the Netherlands*, (Statistics Netherlands June 2003) at
<http://www.cbs.nl/nl/publicaties/publicaties/maatschappij/bevolking/papers/same-sex-couples.pdf> 14

INTERESTS OF *AMICI CURIAE*

This court has heard from other amici who are students of Princeton University in a brief from the Princeton Justice Project. This brief, however, represents the voice of students who are not represented by the Princeton Justice Project brief. Predominantly, these students are member of The Anscombe Society. The Society promotes the intellectual foundations of sexual and family ethics.

Amici believe that in the argumentation of this case, a robust understanding of marriage has, at times, been overlooked and even denigrated with an emphasis on marriage as a right rather than a social norm that promotes the common good. *Amici* respectfully urge this court to allow the ongoing debate over the meaning of marriage to proceed on a level playing field that will benefit all parties concerned.

The names of additional students joining this brief are set forth in the attached Appendix. *Amici* submit this brief in support of the Defendants-Respondents, and hereby adopts the Statement of the Case and Statement of the Facts presented in that principal brief.

SUMMARY OF ARGUMENT

In this brief, we speak of marriage as a *norm* and as a *social ideal* that deserves the protection of our laws and society. We are college students, idealistic about the future we hope to help build, for marriage in New Jersey and the rest of American society.

We Princeton students are members of the first generation in American history in which fatherlessness and family fragmentation have become the statistical norm. Rose M. Kreider & Jason Fields, *Living Arrangements of Children: 2001*, U.S. Census Bureau Current Population Reports P70-104 (July 2005) at <http://www.census.gov/prod/2005pubs/p70-104.pdf>. The absence of fathers has not, however, eliminated children's longing for them. The difficulties of inculcating a profound respect for marriage, and fatherhood, in passionate young people in the modern context, are laid in our lap every day. We ask this court not to make our job in this respect infinitely harder, by creating a new model of marriage radically divorced from the conjugal understanding widely understood and shared across society.

Marriage serves the public good by channeling the sexual and reproductive behavior of men and women into the kinds of unions that protect both adults and the children their sexual union alone produce. The primary way the law of marriage points to this norm

is definitional: by holding out the faithful exclusive unions of husbands and wives as an intrinsic part of the deep logic of marriage, and a marriage culture.

We believe that the creation of a new definition of civil marriage that is radically separated from the social understanding of the institution is unwise because the state depends on civil society (including the faith community) to fill the legal structure of marriage with substantive meaning. Moreover, radically separating the social understanding of marriage and the legal definition of marriage will create unnecessary tensions and conflicts between church and state.

Of course marriage must be updated to respond to changing social norms. This is what legislatures are for. *Amici* are merely asking that this court allow for a "level playing field" so we can make the case to the people of New Jersey for the conjugal vision of marriage as intrinsically a union of husband and wife, importantly linked to giving children fathers as well as mothers.

We may not win this debate. In other countries, legislatures have adopted a new genderless vision of marriage. The California state legislature recently voted to do so. Because the main benefits of marriage are social, not legal, the court should not short-circuit the more time-consuming, difficult, but ultimately

essential democratic process of consensus-building around the meaning of marriage. Otherwise it may offer same-sex couples the legal shell without the social support that gives marriage its real power. Moreover, in the democratic process, unlike the rights-based judicial one, even if society were to move towards a genderless vision of marriage, it may retain sufficient residual respect for the dissenting conjugal view to enact safeguards around marriage that will buffer potentially destructive social conflict around this issue.

By contrast, plaintiffs are asking this Court to rule that the ancient conjugal vision of marriage, embraced by almost all faith traditions and most societies as inherently a union of husband and wife, is based on nothing more than irrational animus. They ask you to stigmatize and denigrate as prejudiced and hate-filled the good faith views of us and of millions of New Jerseyans. *Cf.* Draft PJP Brief at 58 & 63 (making analogy between marriage laws and "Jim Crow" laws).

We ask this court to leave open to us, and to the people of New Jersey, a generous third possibility. A marriage debate has been launched. Maybe, just maybe, we will emerge from the gay marriage debate, conducted through the democratic process, with both a richer respect for the basic human dignity of gay people

and for the critical, irreplaceable social function of marriage in joining mothers and fathers into family units that protect children.

ARGUMENT

I. Marriage is a Social Norm and Marriage Law's Channeling Function Promotes the Public Good.

Some of our fellow students and citizens have submitted a brief arguing that marriage as we know it today is fundamentally unjust and irrational. They have asked this Court to strike down New Jersey's marriage laws and to substitute a new vision of marriage, one they call "modern marriage": the union of any two people who promise to "cherish and support" one another. Draft PJP Brief at 56. "Modern marriage" is in their view, virtually normless, and practically purposeless. Procreation, the regulation of sex in the interests of fidelity, even "responsible parenting" they relegate to the trash bin of the old marriage history. Modern marriage is about "nomos building" (*id.* at 60) and creating a "coherent self" (*id.* at 59) and other noble ideals that seem radically disconnected from any legitimate purpose of law, as well as surprisingly stigmatizing to the unmarried. (While we have as great a respect for marriage as the next American, we would hesitate to suggest that single people lack coherent selves.)

They argue for same-sex marriage as a *right*. In this brief, we speak of marriage as a *norm* and as a *social ideal* that deserves the protection of our laws and society. We are college students, idealistic about the future we hope to help build, for marriage in

New Jersey and the rest of American society; and pastors, who devote much of our time to supporting and developing a respect for marriage, including civil marriage, in the young people (and married couples) entrusted to our care.

We Princeton students are members of the first generation in American history in which fatherlessness and family fragmentation have become statistically common. The absence of fathers has not, however, eliminated children's longing for them. Even in as privileged a place as Princeton, the heartache, and the scars, and the unmet longings, and the practical disadvantages created when marriage fails to hold mothers and fathers together, are well known to us. Recent research documenting the long-term damage to children when mothers and fathers fail to get and stay married (see ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS* (2005)) comes to us as no surprise. We can only imagine how children in other venues, dominated by paternal abandonment from the beginning, feel. See JASON DEPARLE, *AMERICAN DREAM: THREE WOMEN, TEN KIDS, AND A NATION'S DRIVE TO END WELFARE* (2004); KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* (2005).

The difficulties of inculcating a profound respect for marriage, and fatherhood, in passionate young people in the modern context, are laid in our lap every day. We ask this court not to

make our job in this respect infinitely harder, by creating a new model of marriage radically divorced from the conjugal understanding widely understood and shared across society.

A. The Channeling Function of Marriage Law

At the outset, we freely acknowledge an important point: this weakening of marriage as a child-rearing norm, and the concomitant increasing absence of fathers from their children lives, has nothing to do with gay people. They did not cause it and cannot cure it. But we believe these trends have everything to do with how deeply committed we are as a society to the idea that children need, long for, and deserve their fathers, as well as their mothers, caring for them, and that marriage is the principal and irreplaceable way that men and women join to give this gift to their children. The one social institution that points to, embodies and expresses this ideal is marriage, and the primary way in which it does so is definitional: by holding out in society the faithful, exclusive, enduring, sexual union of male and female as an ideal for which to strive, even as law and society increasingly seek to compassionately accommodate those whose lives turn out differently. Both of these impulses are important: striving for the ideal and striving for compassion for adults and children who for various reasons aren't living in it.

This is the function of family law that Professor Carl Schneider identified as the "channeling function" of family law. "[I]n the channeling function the law recruits, builds, shapes, sustains, and promotes social institutions." Carl E. Schneider, *The Channeling Function in Family Law* 20 HOFSTRA LAW REVIEW 495, 496 (1992). He notes that "our failure to recognize the function regularly causes courts and scholars to misunderstand the regulation of families and the work of the law." *Id.* "Generally," he writes "the channeling function does not specifically require people to use these social institutions, although it may offer incentives and disincentives for their use. Primarily, rather, it is their very presence, the social currency they have, and the governmental support they receive which combine to make it seem reasonable and even natural for people to use them. Thus people can be said to be channeled into them." *Id.* at 498.

The norms that constitute the social institution are aspirational in nature. That means these normative models "are not and never were the descriptions of any universal empirical reality." *Id.* at 502.

B. Marriage Promotes the Common Good

Precisely because marriage as an institution attempts to shape relations between men and women towards an ideal, the

behavior of any given married couple is likely to fall short of these institutional aspirations. Not all married couples have children. Not all married couples who have children are good parents. But the same could be said for any other characteristic or aim of marriage that is offered by the plaintiffs, the PJP brief, or anyone at all.

Not all marriages are motivated by love, and nowhere near all loving relationships are marriages. Not all married couples have sex, and not all sexual unions are marriages. Not all married people merge bank accounts, and not all people who are economically interdependent are married. Not all marriages are permanent, and not all permanent relationships are marriages. Human intimacy comes in various forms besides marriage, and no law of New Jersey requires married couples to be emotionally intimate with one another.

Amici PJP seize on these realities to suggest that marriage should no longer seek to promote the common good by endorsing aspirational norms but, rather, that the law should restructure marriage to merely facilitate individual choices about how to express the autonomous self. Thus, the essence of marriage, in this view, is individual choice. Others have argued (Brief of the Professors of the History of Marriage, Families and the Law as

Amici Curiae in Support of Plaintiffs-Appellants at 16-18) that marriage is a way the government officially recognizes interpersonal relationships.

The appellate court notes, fittingly, that reasoning this way about the essence of marriage opens marriage up to an endless array of judicial redefinitions. *Lewis v. Harris*, 378 N.J. Super. 168, 187, 875 A.2d 259, 270 (N.J. Ct. App. 2005). If marriage is another word for "nomos building" why don't three people have a right to create coherent selves together?

The arguments of the Princeton Justice Project brief and other advocates of same-sex marriage as a purely individual right prove either too much or nothing at all.¹

¹Another significant problem with the PJP brief's analysis is their claim that "modern marriage" has progressed to the point that the state of New Jersey is (a) no longer concerned about procreation, (b) no longer cares whether children have fathers as well as mothers, and (c) has no interest at all in connecting children to their biological parents. They point to a number of examples all of which are unavailing. For instance, the decision not to consider adultery in child custody decisions did not reflect a desire to eliminate the norm of fidelity in marriage, but the desire to avoid punishing children in custody decisions for the sexual sins of their parents. It was part of a broad move to the "best interests of the child" standard and is based on the decision that children should not be punished at law because of the offense that parent may have committed against his or her spouse. Similarly, the trend in law towards ending the requirement of consummation was not intended to suggest that marriage is no longer a sexual union, importantly related to procreation or parenting, but instead was part of the same movement that lead to the end

The essence of marriage cannot be reduced to its legal form, but the legal form exists in order to serve certain public, aspirational ends. Not every couple will fulfill all these ends. The form of marriage at law serves its social function, even though every individual couple may not.

If men and women attracted to the opposite sex see marriage as the social ideal, and the normal end of romantic love, then male-female sexuality will be channeled into the kinds of relationships that do not harm them or the children they may produce. In marriage, civil society can encourage children, safe in the knowledge that babies born to married couples will begin life, at least, with a mother and father jointly committed to each other and to their children.

Social institutions are thus inherently normative. They attempt to channel behavior by creating forms that incorporate certain internal norms and preferred patterns of behavior. Their existence on the social landscape carries weight. Social institutions are rarely if ever the sole creation of the law. Marriage as a powerful human reality is the product of the whole

of common-law marriage in most American states—the desire to eliminate uncertainty and disputes over who is legally married and who is not. This explains why (as the PJP brief notes) consummation requirement were sometimes replaced by cohabitation requirements, the latter being far more capable of public verification, when disputed, than the former.

community—families, teachers, artists, faith communities, as well as the law—conspiring over the generations to make something as insubstantial as a lover's vow, real.

The law does not play a role in marriage because government has an important interest in enforcing lovers' vows of intimacy—quite the contrary. In the American tradition people are considered competent to handle their own intimate relationships without any intrusion from the government. Marriage is the one exception because government has a powerful stake in holding out this type of relationship as a social ideal for men and women attracted to the opposite sex. The alternative to a marriage culture for men and women attracted to the opposite sex is children created at random intervals by disconnected sexual encounters.

Civil marriage is the creation of the state of New Jersey, but the underlying social institution of marriage that civil marriage is meant to serve is not. For the courts to force upon an unwilling community a new understanding of a social institution as basic as marriage is to overstep its legitimate bounds in ways that are likely to be either futile or counter-productive. If the court succeeds in de-norming conjugal marriage, a profound and damaging social change will have taken place. If the court fails

in getting the society to accept its own genderless understanding of marriage, its own legitimacy will be undermined, and it will offer to same-sex couples only the empty legal shell, without the social support which gives marriage its real meaning.

C. Marriage Is More Than a Personal Right

Rights talk obscures a lot of reality. Data from other countries suggest that while many gay advocates support marriage as a right, very few same-sex couples actually want or need the legal forms associated with marriage.² This reflects, we believe,

²The number of same-sex couples actually entering marriage when they can do so legally is relatively small and is marked by a downward trend. Noelle Knox, *European Gay-Union Trends Influence U.S. Debate*, USA TODAY, July 14, 2004, at 5A (noting 40% decrease in number of same-sex couples contracting marriage in the Netherlands since the law became available); David Frum, *A Blow to Canada's Families* NATIONAL POST, Dec. 14, 2004, at A20 ("18 months after same-sex marriage arrived in Canada, some 98% of adult Canadian gays have chosen to ignore their new legal right"). This trend can be seen in a press release issued by Statistics Netherlands, a department of that country's Ministry of Economic Affairs. Press Release, Statistics Netherlands, More Marriages and More Partnerships (Nov. 27, 2002) at <http://www.cbs.nl/NR/rdonlyres/460EEFBF-E94A-426D-9240-7073882DB08E/0/pb02e244.pdf>. The release notes that in 2001, when marriage was officially redefined to include same-sex couples, there were 2.4 thousand same-sex marriages but that this number dropped to 1.9 thousand in 2002. The release says: "Same-sex couples do not seem to be very interested in marriage. Statistics Netherlands estimates that there are about 50 thousand same-sex couples in the Netherlands, of whom less than 10 percent has married so far." See also Dr. D. Manting & Dr. J.A. Loeve, *Economic Circumstances and Union Dissolution of Couples in the 1990s in the Netherlands*, Discussion Paper 04006 at 5-6 (Statistics

the reality that both the legal structures and social meanings of marriage arise from the on-the-ground experience of law and society of managing opposite-sex relationships of "bridging the sex divide" in the interest of men, women and their children. This legal and social template, transferred wholesale to same-gender couples, simply does not "fit" their experience as well.

Gay and lesbian people are a tiny minority, the benefits of gay marriage for children are unknown and highly speculative, and given the small fraction of same-sex couples who choose to marry, the likelihood that children will in any substantial way benefit from genderless marriage is rationally speaking very small.³

Netherlands April 2004) at <http://www.cbs.nl/nl/publicaties/publicaties/maatschappij/bevolking/papers/economic-circumstances-union-dissolution.pdf> ; Liesbeth Steenhof & Carel Harmsen, *Same-Sex Couples in the Netherlands*, (Statistics Netherlands June 2003) at <http://www.cbs.nl/nl/publicaties/publicaties/maatschappij/bevolking/papers/same-sex-couples.pdf>. Statistics since the press release was issued show the downward trend continuing: the number of same-sex marriages dropped to 1.5 thousand in 2003. Virginie Guiraudon, Karen Phalet & Jessika Ter Wal, *Final Report on the Netherlands 26*, (European Commission June 2004) at http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/aneval/pb_en.pdf.

³ In their brief, PJP asserts that empirical studies demonstrate that two parents are better than one. This is not, however, an accurate statement of social science evidence. Many two-parent families are not the equivalent of intact biological marriages. Contrary to the PJP brief's assertion, Massachusetts Supreme Judicial Court Justice Cordy's dissenting opinion in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 983 (Mass. 2003) (Cordy, J.,

dissenting) never suggested that gay people are unfit parents. Rather, he suggested that the state of the scientific evidence *permitted* the state legislature to rationally judge that the optimal environment for children was a married mother and a father. PJP confuses "fit parent" with "optimal environment." Single mothers and fathers are also typically fit parents, with natural rights to their children (and vice versa), which the state may not disturb arbitrarily. The recognition of parental rights outside of marriage does not logically require, or even imply, that the state of New Jersey no longer cares whether mothers and fathers raise their children together, or whether children remain connected to their biological parents.

They also misdescribe the state of the social science evidence. It is not merely a question of one parent or two. Many two-adult family forms (remarried families, cohabiting families) do not appear to protect children as well as the intact biological mother-father family. See Brief of Amici Curiae Family Scholars in Support of Defendants. The PJP brief is attempting to reconcile two bodies of social science literature that come to apparently opposite conclusions: the overall literature on family structure, which strongly support the idea that married, intact biological families consisting of mothers and fathers are best for children, and a competing, smaller and more recent body of evidence that children with gay parents "do fine."

There is no definitive explanation for why two bodies of scientific literature come to such seemingly opposing conclusions. One possibility, suggested by several experts, is that the literature on gay parenting is flawed by preliminary data, small, unrepresentative samples, and other problems. Better research on representative samples would (if this were true) reveal that children do fare worse raised by same-gender couples than children with a mom and dad.

Another logical possibility is that becoming a parent is a fundamentally different process for gay than for nongay adults. Gay relationships do not produce "accidental children." (By contrast people attracted to the opposite sex must put considerable, consistent effort into avoiding unplanned childbearing; the "fallback" position (that is without powerful effort and motivation) is that their sexual

Legal rights are not dependent on numbers of course. What we are arguing here is something different: reducing marriage to a set of legal incidents profoundly misunderstands how and why marriage matters.

Plaintiffs, in rejecting the legal benefits of marriage as insufficient, are acknowledging (with us) that redefining the social understanding of marriage is not a side effect—it is the main point. Plaintiffs Brief at 40-44. What they ask of this Court

relations can and regularly do produce children whether either or both parents want to be parents or not). Gay parents may thus be “selected” into parenthood in ways that mean only the most committed, child-centered adults end up with children, and this advantage may “make up” in statistical terms for the natural disadvantage children experience when deprived of either their mother or father.

But it cannot be credibly argued that the reason these two bodies of evidence conflict is that the family structure literature compares “one parent vs. two parent families.” The literature clearly shows that several kinds of two-parent family forms (remarried, cohabiting) are not better than lone-mother families, and far less effective at protecting children, on average, than intact, married mother-father families. As one recent survey noted:

“Research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes.... There is thus value for children in promoting strong, stable marriages between biological parents.” Kristin Anderson Moore, et al., *Marriage from a Child’s Perspective: How Does Family Structure Affect Children and What Can We Do About It?* CHILD TRENDS RESEARCH BRIEF (Child Trends June 2002) at <http://www.childtrends.org/PDF/MarriageRB602.pdf>.

is not the right to a set of legal incidents, but the right to use the force of law to reassign the social understanding of what marriage is.

They want the Supreme Court of New Jersey to engage in a profound re-engineering of the meaning and purpose of a basic social institution.

D. Marriage Needs the Support of Civil Society

The channeling function of marriage law is not merely a matter of the state asserting its authority to shape behavior. The state creates the "shell" of marriage with its legal definition. Other institutions of social life help to fill that shell. The law does not compel people to marry nor does it enforce ideal behavior within marriage. Other social institutions must do this.

Judicial mandate of a novel conception of marriage would create a significant divergence between the legal and social understandings of marriage and put at unnecessary risk the willingness or ability of the institutions of social life to play their role in strengthening marriage. This is true because, these social actors will feel that an alien institution has replaced the one they had been working to support and sustain.

II. The Ongoing Debate Over the Meaning of Marriage Should Be Allowed to Go Forward Without Judicial Intervention

We appreciate the need for marriage to change and evolve with changing times. This is what legislatures are for. The debate now launched about the nature, purpose and function of marriage will continue. The New Jersey legislature has already begun the process of accommodating the social needs of gay and lesbian couples. Perhaps times will change enough that our own vision of marriage as deeply and intrinsically conjugal, bridging the sex divide in the interest of women, men and the children their sexual unions alone can create, will receive so little support in society that same-sex marriage will seem logical, natural. All we ask for from this Court is a level playing field: the right to work for our vision of marriage in New Jersey in a democratic way, without having our view of marriage downgraded and stigmatized by this court as an irrational animus.

Perhaps we will lose the debate. Still, in the democratic process, unlike the rights-based judicial one, even if society moves towards a genderless vision of marriage, it may retain sufficient residual respect for the dissenting conjugal view to enact religious liberty safeguards around marriage that will buffer potentially destructive social conflict on this issue.

And maybe, just maybe, when the debate is over, we will emerge from the gay marriage debate, conducted through the

democratic process, with both a richer respect for the basic human dignity of gay people and for the critical, irreplaceable function of marriage in joining mothers and fathers into family unions that protect children.

Judicially obliterating the basic form of marriage in law, by contrast, will send a very clear contrary message: people who understand marriage as intrinsically the union of husband and wife, bringing together humanity's two halves in the service of both love and children, are bigots, motivated by animus and hatred of gay people.⁴ Nothing could be further from the truth, or more destructive to our dreams of marriage renewal for our shared country and shared future.

We respectfully ask this Court not to do this to our hopes for the future of marriage. It is neither just nor compassionate to label marriage, as the law and society in New Jersey currently

⁴Chief Justice Marshall opined in *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003), "that the marriage restriction is rooted in persistent prejudices" (*Id.* at 968), and announced that "history must yield to a more fully developed understanding of the invidious quality of the discrimination." (*Id.* at 958). Quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), Marshall declared that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." (Emphasis added). Justice Greaney issued a warning that same-sex marriage must be granted "full acceptance, tolerance, and respect." *Goodridge*, 798 N.E.2d at 973 (Greaney, J., concurring).

understand it, a bigoted or hateful idea. It would be dangerous and unjust in the middle of a crisis of fatherlessness of unprecedented proportion for the Supreme Court of the State of New Jersey to declare (contrary to historical and scientific evidence) either that mothers and fathers do not matter for children, or that marriage has nothing to do with this goal.

CONCLUSION

For the foregoing reasons, we respectfully request this Court to affirm the judgment of the court below.

Respectfully submitted,

STEINBERG LAW OFFICES

By: _____
Franklyn C. Steinberg, III

Dated:

APPENDIX

Names of Amici:

The Anscombe Society at Princeton University

Cassy Debenedetto

Christian Sahner

Sherif Girgis

Tom Haine

Julian Hertz

Stephen Farias

Sean McGowan

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Sharla Cloutier

Lillie Romeiser

Silvio Pellas

Kirk Doran

Mark Stevens

Shelly Slemph

Ashley Pavlic

Nene Kalu

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