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## Is That All You Got?

Attorneys general shirk their duty to defend marriage laws because of political concerns.

By William Duncan

**O**n Wednesday, New Jersey's supreme court heard oral arguments in a challenge to the state's marriage law brought by the Lambda Legal Defense Fund, representing seven same-sex couples.

It is difficult to predict the outcome of a case from watching the oral arguments; the justices asked difficult questions of Lambda's attorney and the attorney for the state. What the argument did make clear, though, is the difficulty of defending marriage laws when the attorney general's office has made a strategic decision to deliberately avoid a whole set of arguments for its position.

The New Jersey case is just one in a series of challenges to state marriage laws based on state constitutional claims (proponents of same-sex marriage are avoiding the federal courts, seeing them as less sympathetic forums for the time being). Most well known is the Massachusetts supreme judicial court decision in 2003 that the state's marriage law was not justified by any rational policy and that same-sex couples must be issued marriage licenses. Similar high profile cases are pending in New York, Washington, California, Maryland, and other states.

Adding to this, however, is a new trend of states whose laws are being challenged refusing to offer substantive justifications for their marriage laws during the litigation. The New Jersey case and Wednesday's oral argument are illustrative. Whereas the state's attorneys in Vermont, Massachusetts, Indiana, and elsewhere have offered full-throated defenses of the state law, New Jersey's seem to be offering only two justifications for its marriage law — maintaining uniformity with other states and preserving the legislature's power to make consequential policy decisions.

This is in contrast to a number of outside groups who have offered (through friend-of-the-court briefs) a wide range of arguments in justification of the current marriage laws. These arguments are supported by an impressive array of social science evidence and compelling argumentation. The groups who have filed briefs in New Jersey supporting the existing marriage law include pro-family organizations in the state, the New Jersey Catholic Conference, students at Princeton, clergy from New Jersey, and others.

When asked at the oral argument why the state was not offering arguments like those of *amici curiae*, the state's attorney said that state law would not support those arguments since the state already gives domestic partnership benefits to same-sex couples. Thus, when pressed to identify the reason that the court ought to allow the current definition of marriage to stand, he was able only to argue that the court ought to let the legislature act (with the understanding that it might eventually change the definition of marriage on its own) because such a

momentous decision is properly made by the people's representatives.

This is a fine argument, and the state's attorney seemed to be very talented, but it hardly exhausts the wealth of reasons why the state might choose to endorse marriage between a man and a woman. There is an abundance of information showing the benefits marriage provides to society generally and to children in particular. The fact that the state might also choose to create a separate status for couples in other kinds of relationships does not undercut the importance of these reasons. The state is not foreclosed from making strong arguments for marriage, it is just choosing not to.

In California, the situation seems even more troubling. Not content to let *amici* parties offer the arguments for marriage that the state is unwilling to, the attorney general's office has made submissions to the court that attack the arguments offered by *amici* (who include the largest religious organizations in the state and a series of extremely impressive academics, with James Q. Wilson leading the list).

Of course, some attorneys general do not like some of the laws they are charged with defending. That does not, however, change their obligation to offer a robust defense of the laws enacted by the legislatures of their states. No matter how skillful an attorney, he cannot help but be hampered if, due to inappropriate political concerns, he is told by his superiors not to raise good faith arguments in defense of his position.

When the state seems unwilling to offer a full defense of marriage laws, other groups can seek to intervene (as they have increasingly done), thus getting the status of full parties to the case. This status, however, is only granted with the court's permission and is not common in cases of this nature. So those who are deeply concerned about what the courts may do to marriage have to ask to bring material to the judges' attention through amicus briefs. The good news is that many of these briefs are excellent. The bad news is that the court is not obligated to treat amicus briefs as authoritative, since they do not come from actual parties to the case. Worse, the state may even work to counter the arguments made in these briefs.

There is good reason to believe the courts will take seriously their obligation to weigh the merits of these cases objectively. Indeed, the New Jersey court of appeals specifically noted the arguments of *amici* in its careful decision upholding the marriage law. Those concerned about the attempt to redefine marriage would rest easier, though, if the attorneys representing the states were free from political restraints in their defense of the laws.

— *William Duncan is director of the Marriage Law Foundation and was co-counsel on an amicus brief filed by the Anscombe Society at Princeton in the New Jersey case.*

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