Supreme Court of New Jersey
Docket NO. 58,398

MARK LEWIS, et al., Plaintiffs-Appellants	ON APPEAL FROM: APPELLATE DIVISION Docket No. A-2244-03T5
v.	SAT BELOW: Hon. Skillman, P.J.A.D., Collester, J.A.D., and Parrillo, J.A.D.
GWENDOLYN L. HARRIS, et al., Defendants-Respondents	

BRIEF OF *AMICUS CURIAE* THE NATIONAL LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-RESPONDENTS

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INTEREST OF THE AMICUS

Amicus Curiae, the National Legal Foundation, is a 501c(3) public interest law firm. In this capacity, *amicus* has extensive experience and expertise in the issue before this Court. It has participated in litigation, both as an *amicus* and as counsel for parties, in numerous cases involving rights being sought by homosexuals and same-sex couples. Its input was solicited by the Supreme Judicial Court of Massachusetts during the recent litigation involving same-sex marriage in that state.

Amicus believes that its expertise will assist this Court in resolving the matter before it.

SUMMARY OF THE ARGUMENT

Plaintiffs misapply the New Jersey balancing test that is required to be used in analyzing their Equality and Due Process claims. They conflate the interests to be balanced with the three factors this Court has stated should be weighed. When the factors are properly weighed, each of them favors the State's interest in preserving marriage as an institution over the Plaintiffs' putative right to same-sex marriage.

ARGUMENT

I. THE APPELLATE DIVISION PROPERLY AFFIRMED THE TRIAL COURT'S DECISION DENYING PLAINTIFFS' EQUALITY AND DUE PROCESS CLAIMS BECAUSE ALL OF THE FACTORS OF THE REQUIRED BALANCING TEST WEIGH IN FAVOR OF THE STATE'S INTEREST

At the Appellate Division, Mark Lewis and the other Plaintiffs (hereinafter Plaintiffs) chastised the trial court, the State, and certain of the State's *amici* for misapplying the New Jersey balancing test by collapsing it into the federal tiered test and then analyzing their putative "right to marry" accordingly. (*See, e.g.*, N.J. Super. Ct. App. Div. Prb3-4.) However, Plaintiffs themselves, while properly noting the different New Jersey test, failed to understand the test. Given the strength of Plaintiffs' chastising language, (*see, eg., id.*), this error seemed especially egregious. In their Initial Brief to this Court, the Plaintiffs have ceased their chastisement of the trial court's application of the balancing test, but they continue to misapply the balancing test themselves.

It is a given that New Jersey courts reject the federal tiered framework for analyzing federal Equal Protection and Due Process claims when they analyze comparable, state claims under the New Jersey Constitution. *See, e.g., Sojourner A. v. N. J. Dep't of Human Serv.*, 177 N.J. 318, 333 (2003); *Planned Parenthood of Cent. N.J. v. Farmer*, 165 N.J. 609, 629-30 (2000)

(discussing fundamental rights); *Barone v. Dep't of Human Serv.*, 107 N.J. 355, 368 (1987) (discussing equal protection); *Greenberg v. Kimmelman*, 99 N.J. 552, 567 (1985); *Robinson v. Cahill*, 62 N.J. 473, 491-92 (1973).

Instead of the federal test, New Jersey courts use a test that balances the state's interest and the individual's interest. *Sojourner A. v. N.J. Dep't of Human Serv.*, 350 N.J. Super. 152, 173 (N.J. Super. Ct. App. Div. 2002), *aff'd*, 177 N.J. 318 (2003). In "striking the balance" the courts must consider the following factors: "[1] the nature of the affected right, [2] the extent to which the governmental restriction intrudes upon it, and [3] the public need for the restriction." *Greenberg,* 99 N.J. at 567 (citing *Right to Choose v. Byrne*, 91 N.J. 287, 308-09 (1982)).

Plaintiffs might be more readily excused for misunderstanding this balancing test had they not so harshly criticized others for doing the same thing. After all, courts often "speak" loosely when discussing balancing tests. A true balancing test *balances interests* but *weighs factors* in so doing. Nonetheless, courts will sometimes use less precise language. For example, *Caviglia v. Royal Tours of America*, 178 N.J. 460, 479 (2004), states that in "[b]alancing the government's strong interest in enforcing its laws and the reasonable restriction placed on drivers who wish to pursue a

personal injury action, we conclude that subjecting uninsured drivers to disparate legislative treatment is justified by the public need in having all drivers conform with the No Fault Act." This sounds -- but, as will be explained next, *only* sounds -- as if this Court were balancing the State's interest against one of the three factors.

While similar examples can be found, numerous examples can also be found of this Court speaking very precisely. Indeed, several paragraphs earlier in *Caviglia*, this Court had written, "[a]s we previously stated, under our State Constitution, we apply a flexible balancing test that *weighs* the nature of the right, the extent of the governmental restriction on the right, and whether the restriction is in the public interest," *id.* (emphasis added), thereby marking the three enumerated items as factors.

But significantly, one can find even more precise articulations of the balancing test. Two examples can be drawn from cases cited (*see, e.g.* Pb12-13) by the Plaintiffs themselves. *Sojourner A.*, 177 N.J. at 333, makes it clear that "the test[ ] weigh[s] . . . factors." Similarly it is clear that the test balances interests. As this Court noted in *Planned Parenthood*, 165 N.J. at 647-48: "This Court has generally eschewed a multi-tiered approach to constitutional analysis. . . . We simply balance the interests at hand."

Thus, when this Court earlier in *Planned Parenthood* (or in any other of its opinions for that matter) wrote of weighing the interests, *see, e.g., id.* at 631, that expression is simply shorthand for balancing the interests by weighing the factors. This Court's opinions are surely not self-contradictory.

Finally, perhaps the most clear cut explication of the test can be found in *Green Party of New Jersey v. Hartz Mountain Industries, Inc.*, 164 N.J. 127, 153 (2000): "[W]e have attempted in constitutional analysis to *balance the competing interests*, giving proper *weight* to the constitutional values. . . . In striking this balance, we must consider [*i.e.*, weigh the factors of] the nature of the affected right, the extent to which the [ ] restriction intrudes upon it, and the [ ]need for the restriction."

However, when the Plaintiffs write of *weighing the interests*, they are not engaging in similar shorthand. Although the Plaintiffs certainly use various *terms* from the balancing test throughout their briefs, one can search the Plaintiffs' Initial Brief in vain for any use of the three factors *qua* factors.

For example, Plaintiffs do not give the first factor *any* label in their discussion, (*see* Pb13 at Part II.), after arguably having called it an interest in their persuasive headings (*see, e.g., id.* at 13). (However, as will be explained

below, this section is properly seen as not discussing the first factor at all, in that they conflate the *nature of* the interest with the interest itself.) They do call the second factor a "factor," (*id.* at 44), but never treat it as such in their discussion (*see id* at Part III.). They call the third factor a "stage," (*id.* at 47), and again do not treat it as a factor.

It is true that the Plaintiffs have slightly modified their concluding remarks since they filed their brief below. In their Initial Brief to the Appellate Division (N.J. Super. Ct. App. Div. Pb84-85.), they wrote "[i]n sum, the State's asserted interests in excluding plaintiffs from the institution of marriage cannot outweigh the profound interests these committed same-sex couples have in access to marriage with their chosen partners." Now, in their Initial Brief to this Court, they write, "[t]the profound interests underlying the decision to marry the person of one's choice are extremely weighty. . . . . The asserted public needs on the opposite side of the scale carry scant weight . . . ." (Pb56.)

While it may appear that Plaintiffs have made partial progress in understanding balancing tests, even that appearance is deceptive. *None* of their analysis engages in any sort of a traditional weighing process. And, as the above quotation shows, they are still laboring under a fundamental misunderstanding of balancing tests.

Furthermore, the consequence of this mistake is more significant than it might appear at first. The difference between a correct analysis, *weighing* each factor to properly *balance* the interests, and the Plaintiffs' incorrect analysis, weighing the interests, is more than just a matter of labels. When a party incorrectly ascribes weight to matter that ought not be weighed at all, it will make the argument appear stronger than it is. (Again, Plaintiffs' error might be less egregious had they not been so scathing at the Appellate Division in their ridicule of Defendants, the trial court, and various *amici* for their alleged misunderstanding of the appropriate test.)

A further example of Plaintiffs' confusion as to the proper application of the test is found in their brief to this Court. When Plaintiffs state the test, they (without acknowledging doing so) quote it exactly, with the exception of one vitally important word change. (Pb12–13 (citing, but without quotation marks and with the insertion of numbers, twenty-two words from *Caviglia*, 178 N.J. at 473 which in turn is quoting *Greenberg,* 99 N.J. at 567.)) In the first factor, Plaintiffs have changed "nature of the affected *right*" to read "nature of the affected *interest*." *Id.* (emphasis added). This emphasizes their mistaken focus on the individual interest(s) rather than the three factors of the tests. However, the interests cannot legitimately be "back doored" into the factors in this manner.

In comparison to the Plaintiffs' approach, the proper image here is that of an old-time scale with two arms, suspended from each of which is a pan. The two arms represent the state interest and the individual interest. The factors are those items that are placed in one pan or the other. The weight of the factors in the pans tips the scale in favor of one interest or the other. Thus, whether the interest of the individual or of the state is articulated as a single interest or as several inter-related interests, the individual and the state each represent one arm of the scale. In contrast, the Plaintiffs conflate their interest (or interests) with the factors. So, for example, in Part II of their Initial Brief, (especially Part II.C.2 and subparts) they break their interest into numerous interests, all of which they characterize as "extremely weighty." *Id.* at 13. The effort here is to show how much weight all these interests place in the pan on their side. This effort, of course, is mistaken. Their interest -- again, whether considered as one interest or several inter-related interests -- is the arm of the scale not the weight placed in the pan of the scale. What goes in the pans (along with two other factors) is the *nature* of the interest, not the interest *per se*.

In contrast to the Plaintiffs' efforts, this brief will properly analyze the weight of each factor and will show that

the scales tip in favor of the state's interest in preserving marriage and against Plaintiffs' putative interest.

As background, we note that this Court has stated that in deciding whether to uphold a legislative classification a court "must [ ] be mindful of the strong presumption in favor of constitutionality, and the traditional judicial reluctance to declare a statute void, a power to be delicately exercised unless the statute is clearly repugnant to the Constitution." *Barone v. Dep't Human Serv.*, 107 N.J. 355, 369-70 (1987) (citation omitted).

A. The nature of the putative affected right weighs in favor of the State because the putative right is not recognized in fact as a right under either the New Jersey Constitution or the United States Constitution.

In balancing state against individual interests under the New Jersey Constitution, the first factor that this Court must weigh is the nature of the affected right. *Sojourner A.*, 177 N.J. at 334. In discussing the nature of various affected rights under the balancing test, New Jersey courts have used differing terminology to signify important rights; including privacy rights, rights implicit in the New Jersey Constitution, rights fundamental to individual liberty, and constitutionally protected rights. *Greenberg*, 99 N.J. at 571 (discussing privacy rights implicit in the New Jersey Constitution); *Planned Parenthood of Cent. N.J.*, 165 N.J. at 632 (ruling a right to be

fundamental to individual liberty); *Sojourner A.*, 350 N.J. at 169 (declaring a right to be fundamental and constitutionally protected).

For instance, in *Greenberg*, the wife of a trial judge claimed that a New Jersey statute prohibiting certain family members of state officers from employment with casinos violated her rights to marry, to familial association, and to employment opportunity. 99 N.J. at 570–72. In evaluating the claims under the state constitution, this Court first discussed the nature of each right. This Court determined that employment opportunity was not a fundamental right and that it was subject to state regulation. *Id.* at 570–71. Further, this Court concluded that the right to marry and the right to familial association, although not expressly guaranteed under the New Jersey Constitution, had been found to be implicitly protected under a right to privacy. *Id.* at 571. This Court concluded that, although these rights are protected under the New Jersey Constitution, they are subject to "reasonable government regulation." *Id.* at 572. With respect to the right to marry, this Court stated that it was a right that has "traditionally [ ] been subject to pervasive regulation;" including regulations on incestuous marriages, bigamous marriages, and marriages to persons mentally incompetent. *Id.* Ultimately, after weighing

the remaining two factors of the balancing test,[1] this Court determined that the state's interest in protecting the judiciary from the corrupting influence of casinos outweighed the plaintiff's important interests. *Id.* at 576.

The Appellate Division has also issued opinions relevant to the first factor. Although the Appellate Division in *Rutgers Council of AAUP Chapters v. Rutgers*, 298 N.J. Super. 442, 455-61, (N.J. Super. Ct. App. Div. 1997) never explicitly labeled the nature of the putative right; it did discuss the nature of a homosexual marriage. In *Rutgers*, the plaintiffs challenged the state health benefits plan that denied coverage to their same-sex partners on the grounds, *inter alia*, that it violated their equality rights under the New Jersey Constitution. *Id.* at 446. In discussing the right of plaintiffs' same-sex partners to be included as dependants, the court stated that it had "not been disposed to expanding plain language to fit more contemporary views of family and intimate relationships." *Id.* at 449. Furthermore, the court went on to note that "[i]t is so strongly and firmly implied from a full reading of the statutes that a different legislative intent, one which would sanction a marriage between persons of the same sex, cannot be fathomed."

[1] While this brief will look at each of the three factors in turn, the factors typically are not completely separated in the analyses of various courts. Therefore, some mention of other factors may be included in each section of this brief.

Id. at 456. After considering other jurisdictions that had ruled on homosexual marriage, the court stated that it did not violate equal protection to deny homosexuals the right to marry. *Id.* at 461.

In another illustrative case, *Planned Parenthood of Central New Jersey*, the plaintiff challenged the New Jersey Parental Notification Act, which required minors to either notify their parents of their decision to obtain an abortion or have judicial approval of the procedure. 165 N.J. at 612. In discussing the nature of the affected right, this Court found a woman's ability to control her reproductive decisions to be "*fundamental to individual liberty*." *Id.* at 631–32 (emphasis added). After considering the significant intrusion and low state interest this Court found that the statute violated the equal protection provisions of the New Jersey Constitution. *Id.* at 634–43.

We also note that although the New Jersey analysis differs from the federal analysis, New Jersey courts continue to look to the United States Supreme Court for "assistance in constitutional analysis." *Greenberg*, 99 N.J. at 569. The United States Supreme Court has characterized as fundamental only those rights "so deeply rooted in this Nation's history and tradition," *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); or "so rooted in the traditions and conscience of our

people as to be ranked as fundamental." *Synder v. Comm. of Massachusetts*, 291 U.S. 97, 105 (1934).

In this regard, several points are relevant to Plaintiffs' putative right to same-sex marriage. First, the United States Supreme Court *has* ruled several times that the right to marry is a fundamental right. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 381 (1978). In *Loving*, the plaintiffs challenged a Virginia statute that prohibited any white person from marrying a "colored person" in order to "preserve the racial integrity of its citizens." *Loving*, 388 U.S. at 7, (citation omitted). The Court ruled that marriage is "fundamental to our very existence and survival." *Id.* at 12. After finding no legitimate state interest the court struck down the Virginia statute. *Id.*

In *Zablocki*, the plaintiff challenged a Wisconsin statute that forbade him from marrying, absent a court order. 434 U.S. at 375. The statute required parents of non custodial children to prove that the children were being financially cared for and were not likely to become wards of the state before getting married. *Id.* If the parent was behind in child support or was in danger of being so, a court order would not be issued to allow him to marry. *Id.* The plaintiff had fathered a child while in high school, did not have a job for the first two years of the child's life, and was therefore behind in child support.

He was thus forbidden by the statute from marrying his girlfriend who was then pregnant. *Id.* at 376-79. The Court ruled that if "appellee's right to procreate means anything at all" it must imply a fundamental right to enter into a marriage. *Id* at 386. After finding no legitimate state interest the Court struck down the statute. *Id.* at 390-91.

However, noting that marriage was declared to be a fundamental right in *Loving* and *Zablocki* is the beginning and not the end of the analysis. We note first that, because of the remaining factors to be weighed (and to be discussed below), state interests can prevail even against individual interests that a court finds to be fundamental. In *Sojourner A.*, the plaintiff challenged a New Jersey statute that put a "family cap" on the amount of financial assistance a family on welfare could receive for additional children; the plaintiff claimed the statute violated her right to privacy and equal protection under the New Jersey Constitution. *177 N.J.* at 321-22. This Court found reproductive rights to be "'*fundamental to individual liberty*.'" *Id.* at 334; (quoting *Planned Parenthood of Cent. N.J.*, 165 N.J. at 631-32) (emphasis added). However, ultimately this Court found the statute constitutional because the plaintiff's rights were not "unduly" infringed upon and because the state had advanced a legitimate justification. *Id.* at 334-37.

Secondly, we note that there is a vast difference between the right to marriage as discussed in *Loving* and *Zablocki* and the putative right to same-sex marriage. The key case in this state discussing same sex marriage is *M.T. v. J.T.*, 140 N.J. Super. 77 (Super. Ct. App. 1976). Although the case involved different issues, the court held that "a lawful marriage required the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female." *Id.* at 84.

One can compare the putative right at issue in this case with those at issue in the above cases. In this case, seven same-sex couples seek to create a *new* right -- the right of marriage between same-sex couples -- not to protect an already established fundamental right nor even a right implicit in the New Jersey Constitution. Furthermore, if the right were to be couched as a right to marriage generically, the claim would prove too little. For instance, in *Greenberg*, as described above, the wife of a state judge challenged a statute prohibiting family members of judges to work in casinos, arguing that it violated her right to marry, familial association, and right to employment. 99 N.J. at 561. This Court held that, although the rights were important, all were subject to state regulation, and the right to marry was subject to "pervasive regulation." *Id.* at 572. Restricting people of the same sex from marrying has always been included among the reasonable

marriage restrictions. Also, as in *Rutgers*, where the plaintiffs tried to change the definition of dependent to include same-sex partners, the Plaintiffs in the instant case seek to change the definition of marriage to include same-sex couples. 298 N.J. Super. at 449. Unlike *Planned Parenthood of Central New Jersey* and *Sojourner A.* which involved reproductive rights previously established as fundamental, 165 N.J. at 632-33; 177 N.J. at 334, in the instant case there are no reproductive rights at issue nor any other rights previously declared fundamental. Instead, the Plaintiffs are attempting to create a new right. Therefore, this Court should find, as the Appellate Division did in *Rutgers*, 298 N.J. Super. at 461, that New Jersey law prohibiting homosexual marriage does not violate equal protection guarantees. Furthermore, like the *Rutgers* court, this Court should not expand the definition of marriage to include new views that are in opposition to the fundamental definition of marriage. *Id at 449.*

Furthermore, Plaintiffs' use of *Loving* and *Zablocki* is misplaced. The United States Supreme Court in *Loving* declared that two people -- importantly, two people of opposite sex -- had a fundamental right to marry and that a state interest based solely on "White Supremacy" could not support the restriction. 388 U.S. at 7. In *Zablocki*, the United States Supreme Court (at least) assumed that the right of two people -- again of opposite

sex -- to marry was being denied for a *legitimate state interest*. However, the Court held that the state's method of pursuing that interest overreached its desired goal. Thus, *Zablocki* actually supports New Jersey's position here by determining yet again that the state *may* regulate marriage. 434 U.S. at 384-91. In the instant case, the restriction is not based upon racial discrimination or overbroad means, but upon protecting a foundation on which our society was built. Following the holding of *M.T.*, establishing a right of same-sex couples to marry "cannot be fathomed." 140 N.J. Super. at 84-85.

Therefore the first factor, the nature of the right, weighs in favor of the state's interest because there is neither a fundamental right affected nor *any* right recognized by the New Jersey courts or the United States Supreme Court.[2]

B. <u>The putative right is not significantly intruded upon because the state has added new legal protections for same-sex couples making the intrusion minimal, if not non-existent.</u>

The second factor of the balancing test is "the extent to which the governmental restriction intrudes upon" the affected

[2] While *Lawrence v. Texas*, 539 U.S. 558 (2003), overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986) and rejected *Bowers'* reliance on majoritarian morality in the context of consensual sodomy, *Lawrence* self-declaredly does not reach the same-sex marriage issue. 539 U.S. at 585. Thus every New Jersey case and United States Supreme Court case that defines or assumes marriage to be

right. *Greenberg*, 99 N.J. at 567. When weighing this factor, courts will consider the amount of governmental interference. *Right to Choose*, 91 N.J. at 306. Here, the Plaintiffs claim that adherence to the traditional concept of marriage imposes significant economic, legal, and other unnecessary burdens on their choice of partner.

However, this Court has recognized that *economic burdens* do not necessarily unreasonably intrude on marital rights. *Greenberg*, 99 N.J. at 578-79. In *Greenberg*, plaintiff, a judge's wife, claimed the statute prohibiting her employment at casinos placed an economic burden on her right to marry. In considering the claim under the New Jersey Constitution, the Court determined the restriction was a "slight imposition on plaintiff's rights." *Id.* at 579. After considering the strong state interest, this Court upheld the restriction. In contrast, in the instant case (as discussed in the previous section), there simply *are no marital rights* at issue. Thus, the best view is that there is *no* economic burden that can be independently analyzed vis-à-vis marriage. Furthermore, should this Court disagree or should it seek to analyze the economic burden vis-à-vis the *individual Plaintiffs*, the analysis would

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limited to one man and one women – even those based upon majoritarian morality remain good law.

be part-and-parcel of the analysis described under the third factor. *See infra*, Part C.

Similarly the Appellate Division has concluded that a *legal burden* does not necessarily unreasonably intrude upon personal rights. *Rutgers*, 298 N.J. Super. at 461. In *Rutgers*, five employees of Rutgers University challenged the state benefits plan that denied benefits to their same-sex partners because they did not satisfy the requirement of "dependant." *Id.* at 447-48. In considering the intrusion on the putative right, the court recognized that it is not only same-sex couples who cannot qualify for benefits under the state plan. "Cousins, parents, children over 23 years of age, siblings, or anyone too closely related by blood . . . cannot qualify for benefits because of the marriage requirement, no matter how dependant or emotionally bonded they may be." *Id.* at 461. After considering the state interest in providing affordable health care, the court upheld the restriction. *Id.* at 461-62.

In the instant case, Plaintiffs contend that two people of the same sex should satisfy the marriage requirement. For the same reason that the court in *Rutgers* upheld the restriction, in the instant case there is a permissible burden restricting marriage to a relationship between one man and one woman and there is ample justification for that restriction. Therefore, the trial court below correctly recognized that marriage is

subject to pervasive state regulation. *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at *23 (N.J. Super. Ct. Law Div. Nov. 5, 2003).

In *Planned Parenthood of Central New Jersey*, 165 N.J. at 612, this Court considered the governmental requirement of parental notification or judicial waiver before a minor obtained an abortion. *Id.* at 638. This Court determined that the concerns caused by the time delay, increased cost of delay, emotional deterrent, difficulties of judicial waiver proceeding, and confidentiality concerns, all combined to create a significant burden. *Id.* at 643. In contrast, in the instant case, the State is not adding a new burden that might prevent the exercise of an existing right. The State's definition of marriage, as between one man and one woman, is historical. In addition, it is in harmony with the traditional concept of marriage under federal law and the overwhelming majority of state laws. *Marriage in the 50 states*, The Heritage Foundation, at http://www.heritage.org/Research/Family/Marriage50states.cfm (last visited Nov. 8, 2005)

Furthermore, the trial court listed the numerous legal protections the New Jersey Legislature and courts have extended to same-sex couples. *Lewis*, 2003 WL 23191114, at *25-26. Thus, any legal burdens that are an indirect consequence of the

historical definition of marriage have been ameliorated by the direct action of State.

The Appellate Division noted the express legislative intent to provide "certain rights and benefits" for these domestic partners. *Lewis v. Harris*, 378 N.J. Super. 168, 176 (Super. Ct. App. Div. 2005). The Domestic Partnership Act stated that "to have access to these rights and benefits is paramount . . . to any reasonable conception of basic human dignity and autonomy . . . ." *Id.* at 177 (*quoting* N.J. Stat. Ann. § 26:8A-2(d)(West 2004). The legislature specifically addressed and eliminated the dignitary burden that Plaintiffs allege are being imposed upon them.

This Court should recognize that any dignitary, legal, or economic burden indirectly imposed by the traditional concept of marriage are not unreasonably intrusive. Thus, the trial court (which addressed these issues more fully than the Appellate Division) correctly concluded the State restriction has "a minimal effect on the ability of these couples to maintain their relationships." *Lewis*, 2003 WL 23191114, at *24. Therefore, the second factor, the nature of the restriction, weighs in favor of the state's interest.

C. The state has a significant need and responsibility on behalf of the public to protect the integrity of marriage because it is the foundation of our society and has always been subject to pervasive regulation.

The third factor of the balancing test is the public need for the restriction. *Greenberg*, 99 N.J. at 567. For example, in *Greenberg*, in considering the public need for the restriction, this Court looked at the vulnerability of the casino industry to corruption and the public need for confidence in the judiciary. *Id.* at 574. This Court ruled that the state has a legitimate interest is preserving the integrity of the casino industry and after taking into account the other factors, the state's interest outweighed the plaintiff's rights. *Id.* at 576, 579.

In *State v. Vogt*, 341 N.J. Super. 407 (Super. Ct. App. Div. 2001), the plaintiff challenged a New Jersey ordinance that forbade nudity in a public place. The plaintiff, a woman, was convicted for sunbathing topless at a public beach. *Id.* at 410. She claimed that the ordinance violated her equal protection rights because males were not forbidden from sunbathing topless. *Id.* at 417. In evaluating the public need for the restriction, the court ruled that there was an important government interest in protecting the "moral sensibilities" of the public. *Id.* The Appellate Division agreed with a leading case in this area,

which held that a regulation on the exposure of the female breast was "not based on cultural stereotypes but rather on a real 'physical difference between the sexes which has implications for the moral and aesthetic sensitivities of a substantial majority of the country.'" *Id.* at 418 (quoting *Craft v. Hodel*, 683 F. Supp. 289, 300 (D. Mass. 1988)).

In *Planned Parenthood of Central New Jersey*, the plaintiff challenged a New Jersey statute that required her to notify her parents or to obtain a judicial waiver to obtain an abortion. 165 N.J. at 612. When considering the public needs asserted by the state as justification for the restriction this Court found that the needs were not furthered by the restriction. *Id.* at 638. The state asserted that the Parental Notification Act was needed to "protect minors from their own immaturity, foster[ ] and preserve [ ] the family structure, and protect[ ] parents' rights to raise their children in a manner they deem appropriate." *Id.* However, this Court concluded these needs were not advanced by the restrictions, since pregnant minors are not required to obtain consent before choosing a cesarean section, a much more dangerous operation, and because "lines of communication" between parents and children are not created by the disclosure of an intention to have an abortion. *Id.* at 638-40. Therefore, this Court found the restriction violated equal protection under the New Jersey Constitution. *Id.* at 643.

In the instant case, as in *Greenberg*, the state seeks to preserve the integrity of an institution fundamental to our society. 99 N.J. 574. In *Greenberg*, this Court recognizing the vulnerability of corruption in the casino industry and the effect it could have on the public confidence and integrity of the judicial system ruled that the state had a legitimate interest that was suitably furthered by the restriction. *Id*. Furthermore, this Court stated that even if it had found the rights to be fundamental, the state's interest would still have prevailed over the individual's right to marry, familial association, and employment. 99 N.J. at 574. That state interest is similar to the instant case, in which the institution of marriage is at stake. Nothing can threaten an institution more than its complete abolition. Plaintiffs seek the abolition of marriage by re-defining it out of existence. Again, the words of the *M.T.* court ring true: the Plaintiffs' definition of marriage "cannot be fathomed." 140 N.J. Super. at 85. The public need to preserve the definition, and thereby, the integrity of marriage is immeasurable.

Furthermore, the public needs emphasized in *Vogt* are at play here. In *Vogt*, the Appellate Division held that prohibiting women, but not men, from exposing their breasts did not violate equal protection because "[t]he Equal Protection Clause [ ] does not demand that things that are different in

fact be treated the same in law, nor that a state pretend that there are no physiological differences between men and women." *Id.* at 418. Similarly, in the instant case, this Court should not have to pretend that marriage between a man and a woman is the same as a marriage between two people of the same sex. The court in *Vogt* stated that although the baring of a female breast is not offensive to everyone, it is still seen by the majority of society as morally wrong, and could be restricted. *Id.* at 417. Similarly in the instant case, although some people are not offended by the idea of same-sex marriages, a majority of society does not approve, as shown by the passage of all nineteen marriage amendments that have been voted on and by the thirty-eight states that have Defense of Marriage Acts. *Marriage in the 50 states*, The Heritage Foundation, at http://www.heritage.org/Research/Family/Marriage50states.cfm (last visited Nov. 8, 2005), *Texas OKs Gay-Marriage Ban*, FoxNews.com, at http://www.foxnews.com/story/0,2933,174993,00.html. (last visited Nov. 10, 2005). Society should not be forced to endorse something they are morally opposed to.[3]

[3] As noted previously, while *Lawrence v. Texas*, 539 U.S. 558 (2003), overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986) and rejected *Bowers'* reliance on majoritarian morality in the context of consensual sodomy, *Lawrence* self-declaredly does not reach the same-sex marriage issue. 539 U.S. at 585. Thus every New Jersey case and United States Supreme Court case that

Unlike *Planned Parenthood of Central New Jersey*, where the restrictions were not responsive to the public needs, here the restriction against same-sex marriage is the only response to the public need of preventing the re-definition of marriage.

Therefore, this Court should find that the third factor, the public need, weighs in favor of the state's interest because the state does have a legitimate interest in preserving marriage, and that interest is suitably supported by the restriction of marriage to only include two people of opposite sex.

CONCLUSION

In a properly understood and conducted balancing test, the cumulative weight of all the factors in one pan is set against the cumulative weight of all the factors in the other pan. Sometimes the case may be close. Not so here. Here *all* the weight of all of the factors is in one pan. The other pan is empty. Furthermore, even should this Court disagree in some particular, not enough weight can be shifted to the other pan to even make this a close case, let alone tip the scale in the Plaintiffs' favor.

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defines or assumes marriage to be limited to one man and one women – even those based upon majoritarian morality remain good law.

For the foregoing reasons, *amicus curiae*, the National Legal Foundation, respectfully requests this Court to affirm the judgment of the Appellate Division.

Dated: November 11, 2005

Respectfully Submitted,

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