
)	SUPERIOR COURT OF NEW JERSEY,
)	APPELLATE DIVISION
MARK LEWIS, et al.,)	Docket No. A-2244-03T5
)	
Plaintiffs-Appellants)	
)	
v.)	ON APPEAL FROM:
)	
)	Mercer County, Law Division
GWENDOLYN L. HARRIS, et al.,)	Docket No. MER-L-15-03
)	
Defendants-Respondents)	
)	SAT BELOW:
)	Hon. Linda R. Feinberg, AJSC

**BRIEF OF *AMICUS CURIAE* THE FAMILY RESEARCH COUNCIL
IN SUPPORT OF DEFENDANTS-RESPONDENTS**

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Interests of Amicus Curiae

FAMILY RESEARCH COUNCIL ("FRC") is a nonprofit research and educational corporation headquartered in Washington D.C. FRC exists to reaffirm and promote the traditional family and the Judeo-Christian principles upon which it is built. FRC provides resources and guidance for families and promotes activities which are designed to strengthen traditional marriage.

Summary of Argument

The trial court found that same-sex couples are not similarly situated to opposite-sex couples for the purpose of equal protection analysis. A prerequisite to Plaintiffs' success on an equal protection claim is that they are similarly situated to opposite-sex couples, yet Plaintiffs have completely neglected the argument. Thus, Plaintiffs have failed to satisfy their burden to prove that same-sex couples are similarly situated with opposite-sex couples.

Social science evidence shows that same-sex couples are not similarly situated to opposite-sex couples. Indeed, same-sex couples are not similarly situated with regard to procreation, historical status, optimal child rearing, and relational characteristics.

Argument

I. The Trial Court Correctly Found That Same-sex Couples Are Not Similarly Situated to Opposite-sex Couples

Because Plaintiffs cannot prove that they are similarly situated with opposite-sex couples, the equal protection analysis need not proceed any further. “The equal protection guarantees of the Fourteenth Amendment of the federal Constitution and the New Jersey Constitution, N.J. Const. art. I, § 1, provide that *similarly situated persons shall be treated alike.*” *Brown v. State*, 356 N.J. Super. 71, 79 (N.J. Super. A.D. 2002) (citations omitted) (emphasis added). The Supreme Court has held that “[t]he Constitution does not require things which are different in fact or opinion to be treated in law as if they were the same.” *Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942). The New Jersey Supreme Court has similarly held that “[e]qual protection does not preclude the use of classifications, but requires only that those classifications not be arbitrary.” *Doe v. Poritz*, 142 N.J. 1, 91 (1995). Although the trial court found that same-sex couples are not similarly situated to opposite-sex couples, appellants have failed to even address the argument. *Lewis v. Harris*, 2003 WL 23191114 *22-23 (November 5, 2003 N.J. Super. Court) (“This distinction puts plaintiffs sufficiently dissimilar to individuals who wish to enter into a mixed-gender marriage to invalidate their equal protection arguments From a legal

standpoint, the differences between these classes of individuals are stark"). Thus, Appellants have neglected an argument that is crucial to their case and one that was decided adversely to them in the trial court.

Because of the stark differences between same-sex and opposite-sex couples, Appellants' equal protection claim fails. The state's historic recognition of marriage simply acknowledges the fundamental and unique complementarity between the sexes. The state is not maintaining the definition of marriage for "history's sake," as Appellants claim. Same-sex relationships are distinctly different from opposite-sex relationships reproductively, historically, relationally, and when it comes to optimal child rearing. Under both the federal and state constitutions, the state of New Jersey need not treat them as though they were the same.

Because the nature of these couples' relationship is so different from opposite-sex couples, what they are seeking is not entry into marriage, but instead a wholesale redefinition of marriage. See e.g., *Goodridge v. Department of Pub. Health*, 440 Mass. 309, 337 (2003) ("our decision today marks a significant change to the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries"). But Appellants have failed to meet their burden to prove that same-sex couples are similarly situated or that the

state's acknowledgment of the definition of marriage is arbitrary.

A. Same Sex Couples Are Not Similarly Situated With Opposite-Sex Couples With Regard To Procreation.

Same-sex relationships are not truly similar to opposite-sex couples in respect to procreation. One hundred percent of same-sex couples are sterile as a couple. Two males cannot father a child without a surrogate mother. Two females cannot father a child without a sperm-donating father. Every same-sex couple that seeks pregnancy must "borrow" from the opposite sex. In contrast, genetic procreation is the natural result of sexual intercourse between a man and a woman, without any third party contribution.

Same-sex couples admit that they are not similarly situated in that procreation always involves a third party:

One feature of our experience has been an emphasis on "families we choose," anthropologist Kath Weston's felicitous phrase. Such families are fluid alliances independent of the ties imposed by blood and by law. Often estranged from blood kin, openly gay people are more prone to rely on current as well as former lovers, close friends, and neighbors as their social and emotional support system. Include children in this fluid network and the complexity becomes more pronounced. Because same-sex couples cannot have children through their own efforts, a third party must be involved: a former different-sex spouse, a sperm donor, a surrogate mother, a parent or agency offering a child for adoption. The family of choice can and often does include a relationship with this third party.

William Eskridge, Jr., *The Case for Same-Sex Marriage* 81 (1996) (footnote omitted).

Several courts have recognized this stark difference between same-sex and opposite-sex couples. In *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974), the court forcefully stated that “marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union.”

The Arizona Court of Appeals came to the same conclusion: “We hold that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest.” *Standhardt v. Superior Ct.*, 77 P.3d 451, 463-64 (Ariz. Ct. App. 2003), rev. denied (May 25, 2004). Similarly, in a federal case involving a claim for recognition of same-sex marriage for immigration purposes, the court pointed to procreation as the source of the state’s interest in marriage and the reason why the “legal concept and definition of marriage” precludes same-sex couples. *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Calif. 1980), aff’d, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982).

The biological reality that same-sex couples are not similarly situated to different sex couples in terms of procreative capacity cannot be altered by assisted reproductive technology or changing sexual mores. Nor is the relevance of this difference defeated because some opposite-sex couples are allowed to marry even if not capable of having children. Exceptions to the general rule do not change the rule. *Singer*, 522 P.2d at 1195. Moreover, state efforts to assess an opposite-sex couple's fertility would surely raise other constitutional concerns. *Adams*, 486 F. Supp. at 1124-1125 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)). See generally, Lynn D. Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation 24 Harv. J.L. & Pub. Pol'y, 771, 800-812 (2001).

Equal protection analysis does not apply unless the classes are similarly situated—procreative inability alone places opposite-sex couples in a class by themselves. Procreation is also a relevant difference between same-sex and opposite-sex couples when it comes to the state's interest in marriage.

B. Same-Sex Couples Are Not Similarly Situated With Opposite-Sex Couples With Regard To Their Historical Status.

Same-sex relationships have not had the status of marriage historically. "The institution of marriage as a union of man and

woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972).¹ Throughout history, nearly every civilization has affirmed that concept, and has recognized that same-sex relationships are a departure from the norm. See Peter Lubin and Dwight Duncan, *Follow the Footnote or The Advocate as Historian of Same-Sex Marriage*, 47 Cath. U.L. Rev. 1271, 1324 (1998) (a critique of The Case for Same-Sex Marriage). No great civilization has ever given legal recognition to same-sex relationships as being the equivalent of marriage.² The only historical cultures that supposedly accepted same-sex relationships were primitive cultures or civilizations that were in decline. See William Eskridge, Jr., *The Case for Same-Sex Marriage* 15-50 (1996).

Thus, same-sex and opposite-sex couples are not similarly situated with regard to historical recognition of the relationship. Not only is this distinction key to fundamental

¹ Justice Kennard of the California Supreme Court recently recognized the significance of the Supreme Court's dismissal of *Baker*. "Until the United States Supreme Court says otherwise, which it has not done, *Baker v. Nelson* defines federal constitutional law on the question whether a state may deny same-sex couples the right to marry." *Lewis v. Alfaro*, 33 Cal.4th 1055, 1127 (Cal. 2004).

² Notwithstanding the behavior of one or two Roman emperors, not even William Eskridge claims that Roman law recognized

rights analysis (See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)), but it also highlights that same-sex couples are not seeking to enter into marriage, but instead seek wholesale redefinition of it.

C. Same-Sex Couples Are Not Similarly Situated With Opposite-Sex Couples With Regard To Optimal Child Rearing.

Same-sex couples are not similarly situated to opposite couples with regard to child rearing. Although same-sex couples are free to adopt children in New Jersey, the optimal environment for raising children is in a home comprised of the child's biological mother and father, who are married.

Under every standard-educational achievement, drug use, criminal activity, physical and emotional health, social adjustment and adult earnings-children of intact marriages have fewer problems than children of broken families. . . . Not only do children need two parents; it also seems that ideally a child should have both a mother and a father.

George W. Dent, 15 *Journal of Law & Politics* at 594-95 (1999).

Clinical studies observe that the triad of mother-father-child is necessary and desirable for the growth of a healthy child.

"'Early triangulation' serves especially to consolidate both the self-representation and the parental representation." Richard N. Atkins, *Discovering Daddy: The Mother's Role*, in *Father and Child* 139, 144 (Stanley H. Cath, et al., eds., 1982). The forward to

homosexual marriage. The Case for Same-Sex Marriage at 23.

Father and Child notes the increased awareness of the importance of the role of both mothers and fathers in child rearing:

Our sensitivities and instruments have become honed, attuned to the role a man comes to play during the early years in modulating the intensity of the mother-child tie, inviting that child to become a separate individual in an ever-widening world. . . . Researchers have become more aware of the subtle exchanges of identity taking place and of the mother's and father's part in facilitating development. . . .

John Munder Ross, *Preface xvii-xviii, Father and Child*. Dr.

Alfred A. Messer, a psychiatrist at Northside Hospital in Atlanta, Georgia, also notes the importance of both mothers and fathers as follows: "Children recognize the difference between maleness and femaleness as early as 14 months of age." Alfred A. Messer, *Boys' Father Hunger: The Missing Father Syndrome*, 23 *Medical Aspects of Human Sexuality* 44, 44 (January 1989). Boys establish their physical and gender role identity between the ages of 18 to 36 months. "If the young boy is deprived of his father's presence, the result can be deeply traumatic" *Id.* at 45.

Dozens of same-sex parenting studies have purported to find that children raised by same-sex couples do as well as other children. However, as one mostly favorable review of the same-sex parenting research reports, all of the studies have uniform defects:

there are *no studies of child development based on random, representative samples of such families*. Most studies rely on small-scale, snowball and convenience

samples drawn primarily from personal and community networks or agencies. Most research to date has been conducted on white lesbian mothers who are comparatively educated, mature, and reside in relatively progressive urban centers, most often in California or the Northeastern states.

Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 *American Soc. Rev.* 159, 166 (2001) (emphasis added);³ see also Robert Lerner & Althea Nagai, *No Basis: What the Studies Don't Tell Us about Same-sex Parenting* 3 (2001) (review of homosexual parenting studies "found at least one fatal research flaw" in each one, and thus, "no generalizations can reliably be made based on any of these studies").

Significantly, children raised by a single mother, particularly a divorced mother, have poorer physical health,⁴ poorer mental health,⁵ a greater likelihood of substance abuse,⁶

³The authors blame these defects on "heterosexism," and do not question the over-all conclusion that the sexual orientation of a parent is irrelevant. *Id.* at 167, 179.

⁴Ronald Angel & Jacqueline Worobey, *Single Motherhood and Children's Health*, 29 *Journal of Health and Soc. Behavior* 38, 48-49 (1988).

⁵Ollie Lundberg, *The Impact of Childhood Living Conditions on Illness and Mortality in Adulthood*, 36 *Social Science and Medicine* 1047, 1050, Table 3 (1993); Ronald L. Simons, et al., *Explaining the Higher Incidence of Adjustment Problems of Children of Divorce*, 61 *Journal of Marriage and the Family* 1020, 1028 (1999); Alan Booth & Paul R. Amato, *Parental Predivorce Relations and Offspring Postdivorce Well-Being*, 63 *Journal of Marriage and the Family* 197, 205 (2001).

a higher risk of suicide,⁷ and a higher likelihood of committing a crime that leads to incarceration.⁸ This is the group of children to which the same-sex parenting studies compare children raised in homosexual homes. As one advocate for homosexual parenting acknowledges, "most of the research compares development of children with custodial lesbian mothers to that of children with custodial heterosexual mothers." Charlotte J. Paterson, *Family Relationships of Lesbians and Gay Men*, 62 *Journal of Marriage and the Family* 1052, 1059 (2000). This is because "it has been widely believed that children living in families headed by divorced but heterosexual mothers provide the best comparison group."⁹ Since the pro-same-sex parenting studies find that children raised by homosexuals do as well as,

⁶ Robert L. Flewelling & Karl E. Bauman, Family Structure as a Predictor of Initial Substance Use and Sexual Intercourse in Early Adolescence, 52 *Journal of Marriage and the Family* 171, 175 & Table 2 (1990).

⁷ David M. Cutler, Edward L. Glaeser & Karen Norberg, *Explaining the Rise in Youth Suicide*, Working Paper 7713 at 32, National Bureau of Economic Research (May 2000) (citing impact of divorce).

⁸ Linda J. Waite & Maggie Gallagher, *The Case for Marriage* 134 (2000).

⁹ As Maggie Gallagher, co-author of *The Case for Marriage*, observes: "If the problem with same-sex couples is not sexual orientation per se, but the negative effects of fatherlessness and/or motherlessness on children's well-being, it is hard to imagine a scholarly focus better designed to obscure the evidence." Maggie Gallagher, *Why Supporting Marriage Makes Business Sense* 10 (Corporate Resource Council 2002), available at

but not significantly better than, those raised by divorced, heterosexual mothers, the clear weight of the evidence shows that children raised by same-sex parents do not do as well as children raised by their own mother and father who are married.

In reality, the same-sex parenting studies show a significant difference in outcome between children raised by heterosexual mothers and those raised by lesbians. Stacey and Biblarz, themselves proponents of same-sex parenting, challenge the intellectual honesty of the reports of “no differences.” Stacey & Biblarz at 178. They observe that “[o]nly a crude theory of cultural indoctrination that posited the absolute impotence of parents might predict such an outcome, and the remarkable variability of gender configurations documented in the anthropological record readily undermines such a theory.” *Id.* at 177. Instead of “no differences,” as reported by most studies, some of the studies clearly show a difference when it comes to sexuality. In one of the studies, “adolescent and young adult girls raised by lesbian mothers appear to have been more sexually adventurous and less chaste” *Id.* at 171. Overall, the studies validate a concern held by many who are concerned about the best interests of children:

The sexual orientation of parents appears to have a unique (although not large) effect on children in the politically sensitive domain of sexuality. The evidence, while scanty and underanalyzed, hints that

www.corporate resourcecouncil.org/white_papers.html.

parental sexual orientation is positively associated with the possibility that children will be more likely to attain a similar orientation-and theory and common sense also support such a view.

Id. at 177-78.¹⁰ A similar outcome was reported in the Technical Report of the American Academy of Pediatrics:

Compared with young adults who had heterosexual mothers, men and women who had lesbian mothers were slightly more likely to consider the possibility of having a same-sex partner, and more of them had been involved in at least a brief relationship with someone of the same sex, but in each group similar proportions of adult men and women identified themselves as homosexual.

Ellen C. Perrin, M.D., and the Committee on Psychosocial Aspects of Child and Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 *Pediatrics* 341, 342 (February 2002).¹¹ The impact on sexuality of children raised by homosexual parents may not be as limited as these same-sex parenting advocates suggest. One study reported that “[t]he young adults from lesbian family backgrounds (four of seven sons and ten of fifteen daughters) were significantly more likely to report having considered the possibility of becoming involved in a same-gender sexual relationship, compared with only two of ten sons and one of eight daughters from the heterosexual family control group.” Fiona L. Tasker & Susan Golombok, *Adults Raised*

¹⁰ In Stacey and Biblarz’ view, these differences “cannot be considered deficits from any legitimate public policy perspective.” *Id.* at 177.

¹¹ Available at www.aap.org/policy/020008t.html.

as Children in Lesbian Families, 65 *American J. of Orthopsychiatry* 203, 211 (1995).

The fact that some single parents, blended families, and same-sex couples raise healthy children does not negate the fact that children have the best chances of developing fully in a home where both their mother and father are present. *See generally*, Wardle, 24 *HARV. J. L. & PUB. POL'Y* at 804. Same-sex couples who adopt children or have them through artificial means intentionally deprive the children of the opportunity to be raised by both biological parents. "Even with natural reproduction, death, divorce or abandonment may deprive a child of one or both parents. But unlike natural reproduction, . . . same-sex marriage guarantee[s] that a child will not have both a mother and a father." Dent, 15 *Journal of Law & Politics* at 634-35. Thus, same-sex couples and married parents are not similarly situated regarding child rearing because a same-sex couple can never provide a child with the advantages of being raised by both biological parents.

D. Same-Sex Couples Are Not Similarly Situated With Opposite-Sex Couples With Regard To Relational Characteristics Such As Fidelity And Stability.

Same-sex relationships do not incorporate the same concept of stability and fidelity as marriage. Long before there were civil laws governing marriage in America, men and women committed

themselves to each other for life, and the vast majority remained together and were faithful. The marriage laws of today reflect the traditions that existed before the laws were enacted. And despite the relatively high rate of divorce in America, most married couples are faithful. An extensive survey of sexual practices found that for married couples, “a vast majority are faithful while the marriage is intact.” Robert T. Michael, et al., *Sex in America: A Definitive Survey* 89 (1994). In fact, the survey found that rates of sexual fidelity in marriage were far higher than one would expect: “Among married people, 94 percent had one partner in the past year.” *Id.* at 101. And the average marriage is long lasting. Sixty-seven percent of marriages last ten years, and 50 percent last more than twenty years. Matthew D. Bramlett et al., *First Marriage Dissolution, Divorce, and Remarriage: United States*, Advance Data No. 323 (Nat’l Center for Health Statistics) (May 31, 2001).¹² Nearly 60 percent of first marriages can be expected to last a lifetime. David Popenoe and Barbara Dafoe Whitehead, *The State of Our Unions: The Social Health of Marriage in America 2000*, at 27, The National Marriage Project at Rutgers (2000).¹³

¹² Available at <http://www.cdc.gov/nchs/data/ad/ad323.pdf>.

¹³ Available at <http://marriage.rutgers.edu/NMPAR2000.pdf>.

In contrast, sexual fidelity is rare among homosexual men.¹⁴

One survey of male homosexual couples reported that in 66 percent of relationships men had sex with someone other than their partner within the first year, rising to approximately 90 percent if the relationship endured over five years. Joseph Harry, *Gay Couples* 116 (1984). See also Marshall Kirk & Hunter Madsen, *After the Ball, How America Will Conquer Its Fear and Hatred of Gays in the 90s* 330 (1989) ("the cheating ratio of 'married' gay males, given enough time, approaches 100%"). The latest study of male same-sex relationships in the Netherlands found that men with steady partners have on average 8 casual sex partners a year. Maria Xiridou, et al., *The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection among Homosexual Men in Amsterdam*, 17 AIDS 1029, 1031, Table 1 (2003). A lesbian critic of homosexual men commented on the notorious infidelity:

After a period of optimism about the long-range potential of gay men's one-on-one relationships, gay magazines are starting to acknowledge the more relaxed standards operating here, with recent articles celebrating the bigger bang of sex with strangers or proposing 'monogamy without fidelity'-the latest Orwellian formulation to excuse having your cake and

¹⁴ Like it or not, homosexual women cannot separate their legal status from that of homosexual men. There are more homosexual men than homosexual women, and the sexual mores of the men have defined the "gay" movement.

eating it too.

Camille Paglia, *I'll Take Religion over Gay Culture*, Salon.com online magazine at 4 (June 1998).

Moreover, as with heterosexual cohabitation,¹⁵ the average homosexual relationship is short, with the vast majority lasting less than 1 year. In perhaps the most extensive study of the duration of same-sex relationships to date, investigators discovered that only 15 percent of homosexual men and 17.3 percent of homosexual women had ever had relationships that lasted more than 3 years. Only a few had stayed together for more than 10 years (4 out of 252 men and 1 out of 138 women). Marcel T. Saghir, M.D. and Eli Robins, M.D., *Male and Female Homosexuality: A Comprehensive Investigation* 57, Table 4.13; 225, Table 12.10 (1973). The recent Dutch study found that the

¹⁵ "Two-fifths of cohabiting unions do not continue as cohabitations for more than 1 year, only one-third lasts 2 years, and only 1 in 10 are still cohabiting after 5 years. The median duration of cohabitation is 1.3 years." Larry L. Bumpass and James A. Sweet, *National Estimates of Cohabitation*, 26 *Demography* No. 4, 615, 620-21 (November 1989). The instability of cohabiting couples arises at least in part from the fact that they "tend not to be as committed as married couples in their dedication to the continuation of the relationship and reluctance to terminate it, and they are more oriented toward their own personal autonomy." David Popenoe & Barbara Dafoe Whitehead, *Should We Live Together? What Young Adults Need to Know about Cohabitation before Marriage*, p. 5 (June 2002), The National Marriage Project at Rutgers, <http://marriage.rutgers.edu/Publications/swlt2.pdf>. However, even among cohabitating opposite-sex, sexual fidelity is the norm. The survey reported in *Sex in America* found that more than 75 percent of persons cohabitating were faithful in the prior

average “steady relationship”—which was not even monogamous—lasted 1.5 years. Xiridou et al., 17 AIDS at 1031, Table 1.

Of course some have argued that allowing homosexuals to marry their same-sex partners would result in more fidelity, but statements by homosexual advocates indicate that this is very unlikely. In fact, some homosexual advocates have stated that homosexual relationships are inherently non-monogamous. “[A]mong gay men a long-lasting *monogamous* relationship is almost unknown. Indeed both gay women and gay men tend to be involved in what might be called multiple relationships. . . .” Dennis Altman, *The Homosexualization of America* 187 (1982) (emphasis in original). A study conducted by two homosexual authors concludes that to be homosexual is to be non-monogamous. David P. McWhirter & Andrew M. Mattison, *The Male Couple: How Relationships Develop* 252-262 (1984). In their view, monogamy is an unnatural state that some homosexuals attempt because of their internalized homophobia; so when a homosexual finally grows to accept their homosexuality, they shed monogamy. *Id.* Thus, even if allowed to marry, sexual infidelity among homosexual men will probably remain prevalent because, as Andrew Sullivan puts it, “there is more likely to be greater understanding of the need for *extra-marital outlets* between two men than between a man and a woman.” Andrew Sullivan, *Virtually Normal: An Argument about*

ear. *Sex in America* at 101.

Homosexuality 202 (1995) (emphasis added).

Thus, the nature of a same-sex couple's relationship is different than that of an opposite-sex couple.

Conclusion

For the foregoing reasons, Amicus Curiae respectfully request that this Court affirm the judgment of the trial court.

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Respectfully submitted,

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