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MANEELY and DIANE MARINI; and  
KAREN and MARCYE NICHOLSON-  
MCFADDEN,

Plaintiffs,

vs.

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

Defendants,

**SUPERIOR COURT OF NEW JERSEY**  
**LAW DIVISION: MERCER COUNTY**

DOCKET NO. MER-L-15-03

Civil Action

SUPPLEMENTAL BRIEF OF AMICUS CURIAE

### Preliminary Statement

In the matter of Standhardt v. Superior Court of Arizona, et. al., 2003 WL 22299701 (Ariz. Ct. App. Oct. 8, 2003), the 3-judge panel of the Arizona Court of Appeals unanimously affirmed the constitutionality of the Arizona marriage law between one man and one woman. (See copy of opinion attached hereto as Exhibit A). In its 34-page opinion, the court rejected both state and federal constitutional claims made by two Arizona men seeking a marriage license. Perhaps most significantly, this case marks the failure of the first attempt to leverage the Supreme Court's recent decision in Lawrence v. Texas into a constitutional right of same-sex "marriage."

In rejecting the plaintiffs' arguments based on Lawrence, the Arizona court noted that even in Lawrence, the Supreme Court had inquired only whether the Texas statute was rationally related to a legitimate state interest -- the lowest standard of constitutional review. Applying this same rational basis test, the Arizona court found that the State of Arizona had a legitimate interest in "encouraging procreation and child-rearing within the stable environment traditionally associated with marriage".

The court also addressed plaintiffs' equal protection arguments, briefly noting that the Arizona marriage law "furthers a proper legislative end and was not enacted simply to make same-sex couples unequal to everyone else." Counsel herein, relies upon the opinion of the Court and incorporates same herein by reference. Plaintiff's reliance upon the Canadian decision of Halpern v Attorney General of Canada, 172 OAC 276 (Ont. Ct. App. 2003) is misplaced and of no precedential value to the decision of **this** Court. Reliance upon Standhardt evaluates the issues herein based on the United States Constitution and State Constitutional principles and is persuasive and precedential.

## LEGAL ARGUMENT

### **Point 1: Defendant's Motion for Summary Judgment Should be Granted**

Summary judgment must be granted if “the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a Judgment or Order as a matter of law.” Rule 4:46-2 (c.). Here, summary judgment is appropriate because no genuine issues of material fact exist. The defendants have conceded the facts as set forth by the plaintiffs and all that remains is a question of law (R. at 11).

Summary judgment should be granted in favor of the defendants because the plaintiffs are unable to overcome the presumption of constitutionality accorded to statutes which affect neither a suspect class nor a fundamental right. “A classification that does not impact a suspect class or impinge upon a fundamental right will be upheld if it is rationally related to a legitimate state governmental interest” Doe v. Poritz, 142 N.J. 1, 92; 662 A.2d 364, 413 (1995). In the application of the rational basis test statutes are “presumed constitutional and the burden is on the party challenging to prove otherwise.” State v. Bulu, 234 N.J.Super. 331, 342; 560 A.2d 1250, 1255 (1989).

In the absence of authority indicating that a heightened or intermediate level of scrutiny be applied to the examination of civil marriage, the court should utilize the rational basis test. Since the plaintiffs claims implicate neither a suspect class, nor a fundamental right the rational basis standard of review should be applied in the present case. The application of the rational basis test would make it impossible for the plaintiffs to overcome the presumption of

constitutionality. Therefore, the court should grant the defendant's motion for summary judgment.

**Point 2: The Greenberg Test should be used in conjunction with a rational basis**

**standard of review**

In applying the equal protection and due process clauses of the New Jersey Constitution the Supreme Court of New Jersey has chosen to rely on a balancing test first articulated by the court in Greenberg v. Kimmelman, 99 N.J. 552, 494 A.2d 294 (1985). The Greenberg test requires the Supreme Court to balance the nature of the affected right, the government interest in the regulation and the extent of the limitation. *Supra* at 567. In applying this test the court has rejected the structured three tiered system employed by the U.S. Supreme Court in favor of a more flexible standard. *See, Rutgers Council of AAUP Chapters v. Rutgers, The State University*, 689 A.2d 828, 832 (N.J. App. 1997), *cert. denied*, 707 A.2d 151 (N.J. 1998).

Although the federal formula for due process and equal protection has not been adopted by the New Jersey Supreme Court, federal jurisprudence impacts the language used by New Jersey courts. The court's decision in Planned Parenthood of New Jersey v. Farmer, 165 N.J. 609, 767 A.2d 620 (2000), consciously applied a strict scrutiny standard to cases involving suspect classes and fundamental rights. In Brown v. City of Newark, 113 N.J. 565, 552 A.2d 125 (1989), the rational basis test was applied to a non-fundamental right, such as peddling. The difficulty lies in applying the Greenberg test to rights or privileges may deserve more than rational basis review, while falling short of a strict scrutiny standard (R. at 25).

The primary issue the court wished the parties to address in their supplemental brief was the question of standard of review. The determination of this question may very well be dispositive in determining the outcome of the case. Amici contends that the significant factor in determining the appropriate standard of review is to examine the three components of the

Greenberg test. Each of these components: the right, the restriction and the government interest form an aspect of the cases examined under the Greenberg test. If New Jersey courts have previously examined each of these aspects of a case under the rational basis test, then the precedent would indicate that the rational basis test should be applied to the case as a whole.

*If the Greenberg test is to be applied, then the standard used in its application should be a composite of the standard which would be applied to each of its components.* Thus, examining the nature of the affected right, the nature of the classifications utilized and the nature of the restrictions imposed provides the best way to discover what standard of review to use. A review of the nature of marriage (the affected right), marriage classifications (the classifications used) and restrictions on marriage (the nature of the restriction) reveals that these interests have received a rational basis review when considered independently. Based on the past treatment of these issues, the court should apply a rational basis standard, or one of similar leniency, in determining whether to grant summary judgment.

**Point 3: The public nature of marriage warrants the application of the rational basis test to state regulation of marriage**

In considering what level of scrutiny should be used in conjunction with the Greenberg test, the first factor to consider is the level of scrutiny previously applied to cases involving marriage. Although New Jersey precedent involving marriage has not utilized the Greenberg test specifically, the deferential treatment accorded to the legislature by the courts indicates the use of a rational basis test or similarly lenient standard. The appellants claim that the private nature of the marriage decision warrants strict (or stricter) scrutiny in examination of marriage regulations. However, precedent contradicts the appellant's characterization of marriage as a private institution. The public nature of marriage as a right legitimizes regulation of the institution by the legislature and examination of that regulation under a rational basis standard.

A central argument of the appellants is that the private nature of a decision to marry dictates that strict scrutiny should be applied to any state regulation of marriage. In State v. Saunders, 75 N.J. 200 (1977), the court held that that the state's police power did not extend to the regulation of private sexual behavior. However, not every personal decision qualifies as a private action. New Jersey courts have differentiated prostitution from private sexual conduct on the grounds that all commerce (including private sexual commerce) is public, while non-commercial sexual conduct is otherwise private. See State v. Wright 235 N.J.Super. 97, 561 A.2d 659 (1989). The distinction between public and private action plays a decisive role determining the scope of the state's police power.

The brief offered by the plaintiffs makes it abundantly clear that entering into a civil marriage is a public rather than a private action. The plaintiff's brief frequently refers to

marriage as a “public legal commitment.” *See* P. Brief at 6, 24 and 44. Public legal commitments are public, not private actions. Even further, the plaintiffs contend that marriage will impact “workplace and private sector safety nets” and change the plaintiff’s “responsibilities to each other and to third parties.” *See* P. Brief at 7. Actions that directly impact the plaintiff’s employers and other third parties cannot be fairly characterized as private actions. The plaintiffs also describe marriage as a “vast and profound legal institution” that plays a “central role . . . in society” and confers “significant government benefits.” *See* P. Brief at 28, 44 and 26. Although they claim that marriage is a private action outside the scope of legitimate state regulation, the plaintiffs repeatedly concede that marriage could hardly be a more public decision affecting not only themselves, but those around them. New Jersey precedent agrees.

In characterizing marriage as an institution, New Jersey courts have consistently placed it in the realm of a public, rather than private action. “‘Marriage’ is a social compact, and subject to social control of public and state; hence its existence and incidents at common law may be altered by state.” *See In re De Conza's Estate*, 177 A. 847 345 (N.J.Orph., 1935). In fact, New Jersey courts actually consider marriage a compact with the state: “The marriage contract is regarded as a triaded one, with the State as the third party, because the status achieved thereby is the foundation of our society.” *See Pisciotta v. Buccino*, 91 A.2d 629, 630 (N.J.Super.App., 1952). “Social compacts” that involve the “State as the third party” cannot properly be characterized as private actions insulated from government regulation. New Jersey courts have correctly interpreted the public nature of marriage to be grounds for a lenient review of the regulation of marriage by the legislature.

**Point 4: The important nature of marriage to society justifies state regulation of the institution and the application of the rational basis test.**

New Jersey courts have consistently found that the state's paramount interest in regulating marriage warranted application of the rational basis test in judicial review of the legislature's actions. In Rothman v. Rothman, 65 N.J. 219, 233, 320 A.2d 496, 504 (1974); the court described marriage as, "a social relationship subject in all respects to state's police power." Regulation of marriage by the legislature has not generally been subject to a strict scrutiny standard of review by the courts. "Government regulations affecting marriage are not subject to strict scrutiny simply because the right to marry is a fundamental right" Rinier v. State, 273 N.J.Super. 135, 141; 641 A.2d 276, 279 (1994). The rational basis standard of review accorded the legislature's regulation of marriage comes is the result of the institution's importance to society.

Regulation of marriage has long been considered a social policy of great governmental importance. "Marriage is an institution, or relation, regulated and controlled by government, upon principles of public policy, for the benefit of the community." Hayden v. Vreeland, 37 N.J.L. 372, 377 (Sup. Ct. 1875). Indeed, "[t]he regulation of the institution of marriage is a matter of *high* public policy." Hervey v. Hervey, 56 N.J. Eq. 424, 428 (1898) (emphasis added). *See also* Wyckoff v. Boggs, 7 N.J.L. 138, 139 (Sup. Ct. 1824) (noting that regulation of marriage is of "very high importance"). The United States Supreme Court recognized the connection between marriage and free society, referring to traditional marriage as "the foundation of the family and society, without which there would be neither civilization nor progress." Maynard v. Hill, 125 U.S. 190, 205 (1888). Nearly 100 years later the New Jersey Supreme Court quoted this from this opinion, stating, "*Marriage, as creating the most important relation in life, as*

*having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.”* Rothman v. Rothman at 469 (emphasis added).

The importance that the court attaches to marriage is the reason that it has chosen not to strictly scrutinize legislative regulation of the institution. “The **legislature**, in dealing with the subject of marriage, has **plenary** power, as marriage differs from ordinary common law contracts, and is subject to control and regulation by the state.” Blackman v. Iles, 4 N.J. 82, 89 (1950) (emphasis added) (quoting Bunten v. Bunten, 15 N.J. Misc. 532 (Sup. Ct. 1937)). The characterization of the legislature’s power as “plenary” indicates significant deference towards the legislature’s regulation of marriage, likely indicating a rational basis, or similarly lenient, standard of review.

Greenberg itself confirms the intuition that the court has adopted a rational basis approach to reviewing legislative regulation of marriage. In Greenberg the court sustains regulations that place limitations on the individuals’ careers based on the employment of their spouse in the federal judiciary. The court states that,

Although constitutionally based, the right to marry remains subject to **reasonable** state regulation. Indeed, that right traditionally has been subject to pervasive regulation. For example, statutes include bans on incestuous marriages, bigamous marriages, and marriages to persons adjudged to be mentally incompetent. Similarly, we find that article I, paragraph 1 embraces a right to familial association, albeit one that is subject to **reasonable** government regulation.”

Greenberg v. Kimmelman, 99 NJ at 572 (emphasis added). Although Greenberg dealt within an indirect regulation of marriage, the analysis used by the court indicates that “reasonable” legislation is acceptable to the court. Should the court envision a standard of review for marriage regulation beyond the rationale basis test, one would expect the court to have referred to “limited regulation,” “necessary regulation,” or possibly “minimal regulation.”

Greenberg also demonstrates that part of the reason for the court's rational basis examination of marriage is the importance of the institution. The previous quotation from Greenberg is followed by the court's statement that, "the question is not whether we recognize the rights upon which plaintiff relies, but how those rights should be viewed in light of the paramount state interest in preserving integrity of the judiciary." *Ibid.* Clearly, the court believes that the importance of the judiciary agitates in favor of a more lenient standard of review. In the state's defense, the court has recognized the institution of marriage to be every bit as paramount as the integrity of the judiciary. Like the judiciary, marriage is integrally related to the "morals and civilization of a people" and thus qualifies for judicial deference when the legislature is attempting to preserve its integrity.

**Point 5: Restrictions on marriage should be analyzed under the rational basis test because of their indirect impact on the lives of the plaintiffs**

The restrictions placed on marriage by the New Jersey state legislature are best characterized as indirect, and as such, should be reviewed under a rational basis standard. Understanding why the restrictions placed on marriage do not directly affect the plaintiffs requires an analytical examination of the plaintiff's argumentation in their first brief. Understanding why restricting marriage to heterosexual relationships is an indirect restriction requires a look at New Jersey and federal case law.

**A. Analysis of plaintiffs' claims of a direct restriction**

The plaintiffs argue that the state has imposed a "direct imposition," which prevents them from marrying "at all." (P. Brief at 36) (underline in original). Prior to the claiming the existence of a "direct" restriction on the right to marry, the plaintiffs accuse the defendants of "narrowing" the right in question from marriage to same-sex marriage, thus forming a non-fundamental sub-category of rights out of a fundamental right. (Plaintiff's brief at 33). These two assertions by the plaintiffs are integrally related to one another.

The plaintiff's assertion that they cannot marry "at all" is only true if they "narrow" the field of potential mates to members of their own sex. In fact, the plaintiffs can enter into marriage; they just cannot marry the half of the population that has the same gender they possess. If the plaintiffs' reasoning were carried to its logical conclusion, a man madly in love with his cousin, or someone with a severe mental handicap would be prevented from marrying "at all" because he was not permitted to marry the only people he desired to marry. However, no precedence exists to suggest that restrictions on marriage based on blood relationships or the capacity to consent prevent individuals from marrying "at all." Thus, the issue of direct

restrictions cannot be resolved by using individuals' preferences for marriage partners as a starting point (if we did there could be no regulation of marriage at all).

Although individual's preferences fail to provide a starting point for defining "direct restrictions," an objectivist perspective is not much help either. For example, the law currently reduces everyone's potential marriage partners by over half of the population: everyone of the same gender is excluded, one's family is excluded, and one is excluded from marrying a mentally incompetent person. The issue then becomes, how great would the restrictions on marriage have to be before they became "direct." The solution to the enigma of "direct restrictions" requires looking at the problem from an entirely different perspective.

### **B. Analysis of direct and indirect restrictions in case law**

The United States Supreme Court effectively defined direct governmental restriction in the case Maier v. Roe.

Our conclusion signals no retreat from Roe or the cases applying it. There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

97 S.Ct. 2376, 2383 (1977). The decision outlines the principle that prohibitions on activity constitute a direct interference, while failure to fund an activity is an indirect interference. Hence, outlawing abortions is a direct interference with privacy (Roe v. Wade), but the refusal to fund abortions for poor women is an indirect interference (Harris v. McRae). As a corollary, a prohibition on sodomy is a direct restriction on homosexual relationships (Lawrence v. Texas), but the refusal to permit homosexuals to marry is an indirect restriction on homosexual relationships.

Although the New Jersey Supreme Court came out differently than the Supreme Court regarding the funding of abortion (Right to Choose v. Byrne 91 NJ 287, 450 A.2d 925), the same principle of differentiating between direct restrictions and indirect restrictions exists in New Jersey precedent. In Sojourner A. ex rel. Y.A. v. New Jersey Dept. of Human Services, 350 N.J.Super. 152, 794 A.2d 822 (2002) the court held that although women have a right to procreation and the rearing of their children, the government is not obligated to provide additional funding to women using AFDC when they have more children. Sojourner makes clear that “when the effect on the fundamental right is “indirect or insubstantial” the rational basis test is applied. 350 N.J.Super. at 169. This decision is consistent with Rinier v. State, which held that, “At most, the provisions [of the tax code] impose an indirect burden suffered not from marrying, but from marrying one in a particular income group. And, while that direct burden may, to some extent, affect the choice whether to marry, it leaves the ultimate choice to the individual.” 273 N.J.Super. at 142. In both of these decisions, a state regulation which discouraged a course of action through the withholding benefits was deemed an indirect, rather than direct, burden on the plaintiffs.

A state restriction on marriage would be direct if it prohibited private marriages, as well as civil marriage for homosexuals. However, New Jersey permits homosexuals to engage in private or public marriage ceremonies and “call their relationship a marriage.” In re Application for Name Change by Bacharach, 344 N.J.Super. 126, 135 (App. Div. 2001). If the state chooses not to bestow its blessing on these relationships, then the result is an indirect burden and a disparate impact, but not a direct restriction.

To review, criminal prohibitions (Roe and Lawrence) qualify as direct restrictions, while a failure to fund (Maher) is indirect. This is the best way to distinguish direct and indirect

restrictions. If the court attempts to rely on the perspective of those involved or the percentage of options the legislature provides (see part A), then it places itself on a slippery slope without a principled place to draw the line. Additionally, “criminal prohibition v. failure to encourage” line of reasoning is consistent with New Jersey precedent in Rinier and Sojourner.

In the absence of a direct restriction on marriage, the similarities between the present case and Sojourner are fairly striking. The types of rights in question are similar: procreation and the right to marry; although, procreation is a fundamental right, while marriage is not. The natures of the classifications are similar: poverty and sexual orientation; neither of these classification are considered suspect in New Jersey. The nature of the restriction is similar: in both cases the restriction is indirect; both Sojourner and the present case involve a disparate impact created by the legislature that does not desire to sanction or encourage the behaviors at issue (welfare motherhood and homosexual conduct). The only remaining question is whether the outcome will be similar – in Sojourner the court granted the defendant’s motion for summary judgment.

**Point 6: The classifications used for distributing benefits through marriage should be analyzed under the rational basis test**

By instituting marriage, the state has created a vast network of benefits to which the plaintiffs are currently seeking access. *See* P. Brief at 7. Many of these benefits are tax breaks which impact the state treasury. *Ibid* at 7. The question before the court is whether or not the classifications for distributing the benefits accompanying marriage violate the equal protection principle in the state constitution. In utilizing the Greenberg test to analyze the state classifications the court should consider the standard of review that is typically used in examining state classifications for distributing benefits. New Jersey precedent indicates that the rational basis standard should be used in evaluating the classifications adopted by the legislature.

The courts accord deference to the legislature via the rational basis test when the legislature is distributing state funds and benefits. The court used the Greenberg test to uphold state classifications for distributing Medicaid funds, finding that,

State funds available for public assistance programs are limited. It is the legislature that has the duty to allocate the resources of the State. As long as the classification chosen by the Legislature rationally advances a legitimate governmental objective, it need not be the wisest, the fairest or the one we would choose.

Barone v. Department of Human Services, Div. of Medical Assistance and Health Services, 107 N.J. 355, 370; 562 A.2d 1055, 1063. Essentially, Barone makes clear that in distributing benefits, particularly financial benefits, legislative decisions are examined under the rational basis test. Nevertheless, the plaintiffs could offer three possible rejoinders: the law fails the rational basis test, the law discriminates against a suspect class, or the law is not facially neutral. These claims will be examined in turn.

Limiting marriage to the union of one man and one woman passes the rational basis test. In Ducanzo v. Edgye 117 A.2d 508 (1955) the court indicates that the purpose of marriage is to promote “family stability, secure the status of children, protect health and public morals, and assure the certainty and sanctity of marriage.” At least two of these goals are rationally furthered by restricting marriage to the union of a man and a woman. First, “the status of children” and procreation are reasonably furthered through the procreative nature of heterosexual unions. Second, “public morals” and “the sanctity of marriage” are rationally related to the promotion of heterosexual unions, if the legislature believes that heterosexual unions are morally superior to homosexual unions.<sup>1</sup> In evaluating goals that are difficult to correlate precisely to the legislation being challenged, the court should bear in mind that the rational basis test *does not hinge upon the “effectiveness” of legislation*, but requires only a legitimate state interest and a rational basis. Sojourner 350 N.J.Super. at 174.

The plaintiffs assert that limiting marriage to the union of a man and a woman would fail even the rational basis test. *See* P. Brief at 25. They base their argument on the claim that marriage serves purposes other than procreation, such as physical intimacy and mutual support between spouses, which can be achieved by homosexual couples just as easily as heterosexual couples. *Supra* at 23-28. However, regulations do not have to possess a direct, logical relationship with every purpose of the regulation to pass the rational basis test. “If an ordinance has both a valid and an invalid purpose courts should not guess which purpose the governing body had in mind, but should uphold the ordinance.” Brown v. City of Newark, 113 N.J. at 584. Thus, if a rational relationship exists between the regulation and some of its stated purposes, the

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<sup>1</sup> Moral legislation would also pass the rational basis test because the regulations are rationally related to the moral objective. *See State v. Saunders*, 75 N.J. 200 (1977). Lawrence v. Texas has no bearing on this case for two reasons. First, Lawrence involved private consensual sex, not a public pronouncement of marriage by the state. Second, the federal constitution was not cited in the complaint.

court should view these as the primary purposes of the legislature in determining whether the regulation passes the rational basis test. Procreation and morality are two stated purposes of marriage that are rationally furthered by restricting marriage to homosexual couples, thus marriage regulation should pass the rational basis test.

If procreation were considered a primary purpose of marriage, then one would have to consider two peripheral cases in which the goal of procreation is not furthered by state regulations. In one case a husband and wife were permitted to annul their marriage, even though they could procreate, because they were unable to engage in sexual relations. T. v. M., 100 N.J. Super. 530, 242 A.2d 670 (Ch. Div. 1968). In another case, a man who had a sex change operation to become a woman was allowed to marry a man, even though they could not procreate. M.T. v. J.T., 355 A.2d 204 (N.J. Super.A.D. 1976). While these cases may not seem rational in a regulatory scheme encouraging procreation, their presence does not imply that regulations limiting marriage to heterosexual couples fails the rational basis test.

Recognizing that perfectly exact legislation is often difficult to achieve and impractical to implement, the courts provide the legislature with leeway in creating classifications. In New Jersey State Bar Ass'n v. Berman, 11 N.J.Tax 433 (Tx. Ct. 1974), the court stated that, “Mere under-inclusiveness is not fatal to the validity of a law under . . . equal protection . . . even if the law disadvantages an individual or identifiable members of a group.” Thus, even though sterile individuals are permitted to marry, while homosexuals are excluded, the state’s classification passes a rational basis standard for providing equal protection under the law. Since New Jersey’s marriage regulations pass the rational basis test, the plaintiffs may resort to arguing that they are not facially neutral or that they infringe upon a suspect class and therefore warrant a higher standard of review.

Controlling precedent makes it clear that a strict scrutiny standard of review is not warranted based on the classifications for marriage used by the New Jersey legislature. Rutgers 298 N.J.Super. 442 (1997). In Rutgers homosexual partners sued Rutgers University in order to be included in the statutory definition of “dependants” for purposes of health benefits. In applying the Greenberg test the court made four important findings. First, the definition of dependents (which excluded homosexual partners) was facially neutral. *Supra* 452. Second, sexual orientation and marital status were not viewed with heightened scrutiny. *Ibid*. Third, the court stated that, “even if [the regulation] has a disparate impact on a class of individuals, an equal protection challenge based on the New Jersey Constitution will succeed only if the Legislature intended to discriminate against the class.” *Supra* 453. Fourth, the court accepted “the administrative and financial policy reasons offered by the State as the basis for the limited benefits afforded.” *Supra* 461. In the final analysis, the Rutgers decision precludes the possibility that a strict scrutiny standard based on a lack of neutrality or suspect class could be applied in this case.

**Point 7: The rational basis test applies and summary judgment should be granted on behalf of the defendants.**

The Greenberg test specifies that the court should balance the nature of the affected right, the nature of the classification and the nature of the restriction. New Jersey precedent clearly sets forth a rational basis standard of review for marriage and classifications which disparately impact homosexuals. An examination of Sojourner reveals that the nature of the restriction in question is indirect, but fails to set forth a standard of review for indirect restrictions on non-fundamental rights. Sojourner involved a fundamental right and the appellate court *still* upheld the decision by the trial court to dismiss the case on summary judgment.

If the standard of review employed in the Greenberg test is a collective standard based on its tripartite factors, then the rational basis test should clearly apply. The decision of the court in Sojourner sets a clear precedent for granting the defendant's motion for summary judgment. Based on the foregoing precedent, we respectfully request that the court do so.

CONCLUSION

Based on the foregoing, it is respectfully requested that the Court grant Defendant's Motion to Dismiss Plaintiff's Complaint and deny Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

Demetrios K. Stratis