

**Testimony of
Edward Barocas, Esq.
On behalf of the
American Civil Liberties Union of New Jersey
before the
New Jersey Senate Judiciary Committee
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Thank you for allowing me to testify today. My name is Ed Barocas and I'm the Legal Director for the American Civil Liberties Union of New Jersey, a non-profit, non-partisan organization that defends our fundamental civil rights on behalf of over 15,000 New Jerseyans.

To my knowledge, in the history of New Jersey, our state has never before adopted legislation in which it has determined that all citizens are due certain rights and privileges, yet has set up a separate system and label for the rights of one identified group of citizens as opposed to all others. If such a separate system of rights and an affixation of a different label were done on the basis of race, we would decry it, call it bigotry, see it as an affront to all New Jerseyans, and call it abhorrent and wrong. If it was done on the basis of religion, or ethnicity, or gender, we would do the same. And if it is done on the basis of sexual orientation, it is no less of an affront to all New Jerseyans, and no less abhorrent and wrong.

Giving a historically rights-deprived group of citizens, at long last, the rights of others, but labeling them differently from that of the majority, is a state-sanctioned act of setting certain classes of citizens legally apart. It expresses that certain citizens may deserve rights but are not worthy of the labels that have historically been affixed to those rights. Indeed, I take issue with the use of the term "separate but equal" to describe the creation of a "parallel" scheme of rights for a certain group of citizens. Separate is never equal. Instead of attaining "first-class citizenship," the group being separated is permitted to rise only to "second-class citizenship" or, at best, only to a "separate class of citizenship."

Further, when the government treats people differently, it emboldens private entities or citizens to do the same. There were numerous examples in the Lewis v. Harris case of instances when the families had rights under the domestic partnership law that were not being recognized because a hospital or other private entity simply didn't understand any label different from "marriage." In addition, bullying in our schools based on sexual orientation or perceived sexual orientation is a significant problem, as evidenced by the

case of L.W. v. Toms River Regional School Board, now before the New Jersey Supreme Court. Children, for a myriad of reasons including race, ethnicity, weight, religion, etc., often have to deal with other children who wish to seize on what sets them apart; and those situations can only be exacerbated when the government gives its official seal to setting certain children and their families apart from the rest and literally calling them different names.

Indeed, to those who say that the question before the legislature is about protecting families and the children of New Jersey, I completely agree. The question is about the integrity and value of every child and every family in New Jersey. Segmenting the rights of loving families from those of other loving families, however, is what undermines and devalues family relationships. Marriage equality *is* a family value. For it is the legislature today that decides whether so many little girls and boys will end up asking their parents to explain why the government has set their families apart from all their friends' families, and why their family is shut out from a label that other families enjoy.

The reality is that words do have meaning. Were this not the case, there would be no need for debate; same-sex couples – deserving of the rights of marriage - would simply be included within the term marriage.

To same-sex couples, the word means ensuring actual equality, whether certain individuals within society choose to socially accept them or not. Others in society see the word as important because they find the idea of same-sex couples being included in marriage as distasteful. They view that term as something “we” have ownership over and in which “you” cannot be included – i.e., that only certain people should have access to that term and that others should be denied that access and that right. In that way, for both sides, the fight for equal terminology is not about social acceptance; it is about legal and state-sanctioned differentiation of one group from all others.

In the proposed bill, the Legislature has chosen a term for same-sex couples – “parties to a civil union” – that is the most clinical and cold term as possible, devaluing the subtleties and intangibles that the legislature and courts have recognized are included with the meaning of legal marriage. Towards that end, using the term “spouse” to describe those who enter civil unions, at the very least, provides recognition of the depth of the union, as being more than a contract for goods or services to which a party of the first part and second part must agree.

Further, the proposed scheme, in numerous ways, creates actual legal disparities which continue to violate the right to equal protection under the New Jersey Constitution. Below are just a few:

- It presumably fails to recognize same-sex marriages from other jurisdictions or converts those marriages into something other than marriages (whereas heterosexuals married in other jurisdictions maintain their full marital status and label without requiring a new license);
- It, in application, requires same-sex couples to check “single” on forms (including federal government forms which may carry penalties for misrepresentations) that

- fail to recognize civil unions as anything other than not married (as New Jersey is indeed precluding them from marriage);
- It, in application, denies the right of same-sex couples to have their full panoply of rights recognized in states (such as, currently, Massachusetts) or other countries (e.g., Canada, Spain, the Netherlands, etc.) that allow same-sex marriage and recognize same-sex marriages performed in other jurisdictions. Under the proposed NJ scheme, same-sex couples would have to re-file in that state or country for marriage (since they would have not been permitted to yet be married here given New Jersey's preclusion against it, and those jurisdictions would have no corresponding civil union status because they would have no need for it), whereas heterosexual couples would have their union automatically recognized in the receiving state or country.

In its decision, the New Jersey Supreme Court presumed that, if the Legislature were to choose a separate statutory scheme, the Legislature would clarify why it needs to do so, with the Court also noting that arbitrary distinctions in classifications would still violate the right to equal protection. While the proposed bill explains why same-sex couples should have rights previously denied them, it does not explain why New Jersey needs to set up a separate scheme and to label this group's rights differently from all others. Other than the concept that the group at issue has historically always been denied this right, it is unclear what interests could exist that are not founded in bigotry or the concept that a certain percentage of society is simply "uncomfortable" with the fact that the rights that they have historically been afforded are now being afforded to others. Yet if those are the reasons, it is an awful and destructive precedent to set. Indeed, if such reasons were accepted for setting up separate, parallel schemes of rights when remedying discrimination in the past, our state would be legally fragmented based on race, religion, gender, and numerous other harmful distinctions.

This Legislature made clear, when it passed the Law Against Discrimination, that one of this state's goals is nothing less than the "eradication of the cancer of discrimination." Yet this august body would now be institutionalizing discrimination were it to set apart one group's rights from the rights of all others. I therefore respectfully urge the New Jersey Legislature not to merely take the path that may be most expedient, but to take the path that is most true to the nature of New Jersey and our state's sense of fairness, equality, and decency.