# NJSBA 2025 VIRTUAL SPRING CONFERENCE

## 2025 Seminar Material

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New Jersey Institute for Continuing Legal Education

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# NJSBA 2025 VIRTUAL SPRING CONFERENCE

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Table of Contents

# AUDITING FAMILY LAW FIRMS - COMPLIANCE AND STRATEGIES

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# OFFICE OF ATTORNEY ETHICS
# OF THE
# SUPREME COURT OF NEW JERSEY

RANDOM AUDIT COMPLIANCE PROGRAM
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TRENTON, NJ 08625
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# OUTLINE OF RECORDKEEPING REQUIREMENTS UNDER RPC 1.15 AND R.1:21-6

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# TABLE OF CONTENTS

# TABLE OF APPENDICES

***The funds in the hands of an attorney that belong to a client or others must be kept inviolate.***
In Re Banner, 31 NJ 24, 28 (1959)

***It is no defense for lawyers to design an accounting system that prevents them from knowing whether they are using client's trust funds. Lawyers have a duty to assure that their accounting practices are sufficient to prevent misappropriation of trust funds.***
In Re Fleischer, Schultz and Schwimmer, 102 NJ 440, 447 (1986)

## I. RESPONSIBILITIES OF THE ATTORNEY UNDER RPC 1.15, SAFEKEEPING PROPERTY (see Appendix A)

### A. Duties imposed by RPC 1.15

1. Duty to properly maintain required trust and business account books and records set forth in R.1:21-6. [RPC l.15(d)]

2. Duty to fully account to clients for funds or property entrusted to attorney's care. [RPC l.15(a)]

3. Duty to notify clients promptly upon receipt of funds or property in which a client has interest. [RPC l.15(b)]

4. Duty to promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. [RPC l.15(b)]

5. Duty to keep client funds separate from lawyer's own property. [RPC l.15(a) and (c)]

6. Duty not to use those funds for any purpose whatsoever, other than as directed by the client. [RPC l.15(b) and (c)]

### B. Summary of Duties

1. IDENTIFICATION
2. PRESERVATION
3. ACCOUNTABILITY

## II. R.1:21-6 - RECORDKEEPING (Appendix B)

### A. ATTORNEY TRUST ACCOUNTS

1. All funds which an attorney receives while acting in a legal representative capacity on behalf of a client must be placed in an Attorney Trust Account (ATA).

   (a) Examples are deposit funds in a real estate transaction, settlement funds in a personal injury action, receipts in a collection matter, funds recovered or awarded in a matrimonial action.

   (b) An ATA should not be used for funds which the attorney receives while acting in any special fiduciary capacity such as an executor, guardian, receiver, or trustee; these funds are to be placed into separate fiduciary account(s).

2. The attorney may maintain more than one ATA.

3. The basic requirements for ATAs are as follows:

   (a) they must be maintained in a New Jersey financial institution approved by the Supreme Court.

   (b) they must be in the name of the attorney, the partnership, the professional corporation, or employer attorney or firm.

   (c) they must be designated "**ATTORNEY TRUST ACCOUNT**" or if applicable, "**IOLTA ATTORNEY TRUST ACCOUNT**".

      i. if the designation "**ATTORNEY TRUST ACCOUNT**" is used, it must appear on:
         (1) the signature cards
         (2) the bank statements
         (3) the checks
         (4) the deposit slips

      ii. if the "**IOLTA ATTORNEY TRUST ACCOUNT**" designation is used, it must appear on

the signature card and the bank statement; however "**IOLTA**" should not appear on the checks and deposit slips.

iii. Secondary designations are permissible so long as the additional language appears at the beginning or end of the designation, e.g., "IOLTA Attorney Trust Account – Real Estate".

(d) only New Jersey attorneys may sign trust account checks; this function may not be delegated to a non-attorney (e.g., a secretary), and no rubber stamp facsimiles are permitted to be used.

4. Dos and Don'ts for ATAs

(a) Mandatory Deposits – what funds must go into ATAs

i. all funds held on behalf of clients in a legal representative capacity.

ii. all funds in which the attorney and client claim an interest arising out of legal representation.

iii. all funds in which the client and a third party have an interest which come into the attorney's possession during representation of the client.

iv. general retainers for legal services and advances for costs, where there is an explicit understanding with the client that they will be separately maintained in the ATA.

(b) Permissive Deposits – what may go into ATAs

i. general retainers for legal services and advances for costs where no explicit understanding has been reached with the client that they will be maintained in either the trust or the business account.

ii. funds of the lawyer that are reasonably sufficient to pay bank charges (limited to $250).

(c) Prohibited Deposits – what funds may not go into ATAs

i. funds coming into the attorney's hands while acting as an executor, administrator, guardian, trustee, receiver, or any similar fiduciary capacity; these funds must be placed into separate fiduciary accounts.

ii. the attorney's personal funds.

iii. business and investment monies of the attorney.
iv. payroll taxes on employee wages.

5. ATA Bookkeeping in a Nutshell

(a) the basic "books" for the ATA are the Receipts Journal and the Disbursements Journal, also known as the books of original entry in a double-entry bookkeeping system, since it is upon these journals that receipts and disbursements are initially entered.

(b) the secondary books for the ATA are the individual client ledgers which collectively comprise the Client Trust Ledger; these are also known as the subsidiary ledgers since, after entries first are posted to the appropriate journal, the same entries then are made to these ledgers.

(c) the source documents for the entries posted to the above journals and ledgers are the Check Book and the Deposit Slips which keep track, with the help of the monthly bank statement, of the funds which the bank acknowledges as being on account in the ATA.

6. Required Bookkeeping Records for ATAs

(a) Trust Receipts Journal – For each ATA which an attorney maintains, there must be separate receipts journal to record all deposits and credits to that account. (**Appendix C**)

i. for each deposit or credit the following details must be recorded:
   (1) date.
   (2) source of deposit funds or explanation of credit.
   (3) client matter/description.
   (4) amount.

(b) Trust Disbursements Journal – For each ATA which an attorney maintains, there must be a separate disbursements journal to record all disbursements and debits from that account. (**Appendix D**)

i. for each disbursement and debit the following details must be recorded:
   (1) date.
   (2) check number.
   (3) payee.
   (4) client matter/purpose of disbursement.
   (5) amount.

ii. trust account checks cannot be made payable to "Cash". ATM withdrawals and withdrawal slips are not permitted.

iii. Outgoing Wire Transfer (**Appendix D-1**):
   (1) Must be authorized by attorney.
   (2) Signed, written instruction is required authorizing each transfer.
   (3) Blanket authorization covering all future transfers does not comply.
   (4) Online or telephonic authorizations are not permitted.

(c) Client Trust Ledger – For each ATA which an attorney maintains, there must be a Client Trust Ledger containing separate pages, sheets, or cards for each individual client matter for which funds have been received into the account. (**Appendices E-1 to E-7**)

i. the following details are required to be recorded on the individual client ledger for each receipt to or disbursement from that sub-account:
   (1) client matter.
   (2) date of deposit or disbursement.
   (3) source of deposit funds or explanation of credit.
   (4) check number for disbursements
   (5) payee of disbursements and description/purpose.
   (6) amount of deposit or disbursement

ii. the running balance of funds held for each client matter must be kept on the individual client ledger.

(d) Trust Checkbook - Only pre-numbered checks may be used and issued in seriation. A running checkbook balance must always be maintained on the check stubs. (**Appendices F and G**)

i. Deposit Slips - Items deposited must be identified by client name or file number on the deposit slip prior to making the deposit.

ii. A duplicate or copy of the deposit slip must be retained with the accounting records. (**Appendix H**)

iii. All checks, electronic transfers, and deposit slips shall include a distinct area identifying the client's name or file number.

iv. Schedule of Client Trust Ledger Balances

   (1) a listing of the balances taken from all open client trust ledgers must be made at least monthly and totaled.
   (2) the total of all individual ledger balances must always agree to the checkbook balance.

   (3) this schedule and reconciliation must be documented and retained. (**Appendix J**)

(e) Other Required Accounting Records – In addition to the above records, the following items must also be maintained for all ATAs:

i. bank statements.
ii. image-processed or original canceled checks.
iii. copies of signed retainer and compensation agreements.
iv. copies of signed statements to clients showing disbursement to them or on their behalf.
v. copies of all bills to clients.
vi. copies of records showing payments to attorneys, investigators, or other persons not in the attorney's regular employ, for services rendered or performed.

7. Interest-Bearing ATAs

(a) ATAs may be interest-bearing, but the attorney may never be the recipient of interest earned on the client portion of funds being held in the trust account. Only clients or the IOLTA Fund of the Bar of New Jersey may receive interest earned on the client funds in the trust account.

(b) Pursuant to R.l:28A-2, attorneys must register with the IOLTA Fund and must establish an IOLTA ATA if the circumstances outlined in that Rule require the attorney to do so.

(c) Further information may be obtained from:

IOLTA Fund of the Bar of New Jersey
New Jersey Law Center
One Constitution Square
New Brunswick, NJ 08901-1520
(732) 247-8222

**B. ATTORNEY BUSINESS ACCOUNTS**

1. All legal fees received by an attorney for professional services which have been rendered must be placed into a business account.

(a) General retainers for legal services and advanced costs may also be deposited into the business account where no explicit understanding has been reached with clients that these funds will be separately maintained in the ATA.

(b) Payroll and other business expenses may also be processed through a business account, but it is often more practical for the attorney to establish separate accounts for these purposes.

2. Attorneys may maintain more than one business account

3. The basic requirements for business accounts are the same as ATAs (see above) with the following differences:

   (a) The business must be designated as only:
      i. "Attorney Business Account"
      ii. "Attorney Professional Account" or
      iii. "Attorney Office Account"

   (b) Secondary designations are permissible so long as the additional language appears at the beginning or end of the designation, e.g., "Attorney Business Account – Retainers".

   (c) A non-attorney (e.g., a secretary) may be signatory on a business account.

4. Funds which may <u>never</u> go into a business account:

   (a) Client trust funds.

   (b) Funds held by the attorney in another fiduciary capacity (e.g., executor, guardian, receiver, or trustee). These funds must be placed into separate fiduciary accounts.

   (c) Income <u>not</u> related to the law practice (e.g., salary earned from teaching law school classes). These funds should be deposited into the attorney's personal bank account.

5. Required Bookkeeping Records for Business Accounts

(a) Business Receipts Journals. (**Appendix K**)

(b) Business Disbursements Journal. (**Appendix L**)

(c) Business Checkbook.

(d) Business account bank statements with:

i. Image-processed or original canceled checks, electronic or wire transfer advices, and duplicate or copies of deposit slips.

ii. Monthly bank account reconciliations.

6. Interest-Bearing Business Accounts

(a) Business accounts may be interest-bearing.

(b) Attorneys may retain the interest earned on these accounts.

## C. REQUIREMENTS COMMON TO BOTH ACCOUNTS

1. The financial books and records for ATAs and business accounts

(a) must be maintained in "accordance with Generally Accepted Account Practice" (see below).

(b) must be maintained for seven years.

(c) must be located at the principal New Jersey office of the attorney.

(d) must be available for inspection and checks for compliance by authorized representative of the Office of Attorney Ethics.

(e) may be computerized if in accordance with recordkeeping requirements, printed out monthly, and printed copies can be obtained on demand.

2. Image-Processed Checks - Trust and Business Accounts (**Appendices M-1 and M-2**)

   (a) Must include front and back of check.
   (b) No more than two checks (four images) per page allowed.

3. Reporting Requirements: The names of the banking institutions in which such accounts are maintained shall be recorded on the annual registration form filled with the attorney's annual payment to the Ethics Financial Committee and the New Jersey Lawyers' Fund for Client Protection.

4. Dissolution: Records must be maintained by former partners or shareholders or maintained by successor firm for seven years.

5. Out of State Firms: Fees cannot be shared if prohibited by RPC 1.5(e). Separate records for the New Jersey practice must be maintained for seven years.

6. Attorneys associated with out-of-state attorneys: A record of all fees received, and expenses incurred in connection with a matter in which the attorney was associated with an out-of-state attorney must be maintained for seven years.

7. Availability of Records:

   (a) Records must be produced in response to Subpoena Duces Tecum regarding ethics matters.
   (b) Records must be produced at the direction of the Disciplinary Review Board or New Jersey Supreme Court.

   (c) Records must be produced for review and audit by the Office of Attorney Ethics.

8. Disciplinary Action: Failure to comply with the requirements of R.1:21-6 violates RPC 1.15(d).

9. Unidentified and Unclaimed Trust Funds Accumulations and Trust Funds Held for Missing Owners: These balances may be paid to the Clerk of the Superior Court, when supported by a detailed affidavit which avers that a reasonable search, inquiry, and notice have been made without success, after the funds have been held in the trust account for two years. (See Deposit Instructions at **Appendix N**).

## III. MECHANICS OF TRUST ACCOUNTING

### A. GENERALLY ACCEPTED ACCOUNTING PRACTICES

1. R.l:21-6 provides that the accounting records required under this Rule shall be maintained in accordance with "Generally Accepted Accounting Practice" (GAAP).

2. Enter receipts and disbursements into your bookkeeping records in the following manner to comply with GAAP.

   (a) Receipts
      i. Prepare and date deposit slip and identify client matter(s) by file number or client name on same.

      ii. Record receipt of funds on check stubs and enter running checkbook balance.

      iii. Record receipt of funds in Trust Receipts Journal.

      iv. Record receipt of funds on individual client trust ledgers and show current balance on each individual ledger.

   (b) Disbursements
      i. Prepare check and identify client matter by file number or client name and indicate purpose of disbursement on same.

      ii. Subtract amount of each disbursement and enter running checkbook balance on check stubs.

      iii. Record disbursements in the Trust Disbursements Journal.

iv. Record disbursements on individual client trust ledgers and show current balance on each individual ledger.

**B. THREE-WAY RECONCILATION (Monthly is <u>required</u>)**

1. First, obtain your "Book Balance"

   (a) Total the Trust Receipts Journal for the month ended (**Appendix C**). Note: use the date of the bank statement as the ending date.

   (b) Total Disbursements Journal for the same period (**Appendix D**).

   (c) Record these totals on the Control Sheet (**Appendix I**). Factor in previous month's ending balance to arrive at current "Book Balance".

   (d) Enter these figures on Reconciliation Sheet (**Appendix J**).

2. Second, obtain your reconciled "Bank Balance"

   (a) Enter ending balance from your monthly bank statement on the Reconciliation Sheet (**Appendix J**).

   (b) Add deposits in transit (those not credited to your account on the monthly bank statement).

   (c) Subtract outstanding checks or outgoing wire transfers not debited on your monthly bank statement.

   (d) The total will be your reconciled "Bank Balance" and <u>must</u> agree with your "Book Balance".

3. Finally, obtain your "Client Trust Ledger Balance"

   (a) Prepare a schedule of all open balances by client name from the Client Trust Ledger (Use **Appendix J** form).

(b) Total of all client ledgers must agree with your reconciled "Bank Balance" and your "Book Balance".

(Note: Appendix J may be adapted to the Reconciliation of the ABA by the elimination of the third step, i.e., the reconciliation need only be between the Business Book Balance and the reconciled Business Bank Balance.)

## IV. KEY CONCEPTS IN ATTORNEY TRUST ACCOUNTING

### A. PRELIMINARY RULES

1. Record Contemporaneously --within 24 hours of the event.

2. Record all figures exactly --no rounding off permitted.

### B. KEY CONCEPTS

1. Separate Clients are Separate Accounts

   (a) Each client's funds must be looked at as separate from those of all other clients.

   (b) You can never use one client's funds to satisfy the obligations of another client.

   (c) There is no exception to this Rule which has to do with certified uncollected funds in real estate matter; this is explained in Opinion 454 (**Appendix O**).

2. You Can't Spend What You Don't Have

   (a) You cannot disburse more for a client than you have on deposit to that client's credit.

   (b) The total amount of other clients' funds available is irrelevant.

3. Timing is Everything

(a) You cannot disburse against deposits made on behalf of clients until the checks or settlement drafts which comprise the deposits "clear" (are "collected" in bank parlance) and are credited to your trust account.

(b) Know your bank's closing times for crediting of deposits.

4. Always Maintain an Audit Trail

(a) An audit trail is the combination of (1) bank created records, such as bank statements, deposit slips, canceled checks, etc., (2) journal entries recorded in the receipts and disbursements journals, and (3) ledger entries recorded in the client ledger, that together make it possible to trace what happened to client monies handled by an attorney.

(b) On every deposit slip the client's name or file number should appear next to the amount being deposited on that client's behalf.

(c) Similarly, the client's name or file number should appear on every disbursement check.

(d) Client ledger cards should be maintained in a central filing location, segregated between open and closed accounts. Photocopies, but not the originals, of the ledgers may be placed in closed client files.

5. Trust Accounting is Zero-Based Accounting

(a) Proper trust fund management requires periodic review (monthly is recommended) with a view toward properly removing all balances and zeroing-out clients' accounts since the presence of small inactive balances on individual client accounts is a hindrance to the balancing process.

(b) Fees should be promptly removed.

(c) Circumstances surrounding outstanding checks should be

investigated and resolved.

(d) Mathematical errors resulting in small residues of funds should be corrected and the amounts removed.

6. There is No Such Thing as a "Negative Balance"

(a) In trust accounting all balances must either be positive (while monies are being held for clients) or zero (when the matter is closed, and no monies remain for the client in the trust account).

(b) A negative balance for a client means that other clients' funds have been invaded.

7. You Can't Play the Game Unless You Know the Score

(a) An individual running balance for each individual client, on that client's ledger must be maintained at all times.

(b) Similarly, a general running balance for the entire trust account must be maintained at all times; this is usually done on the checkbook stubs but if a one-write or computerized system is used, it may be done by keeping a running balance of the trust receipts and disbursement journals.

## RULE OF PROFESSIONAL CONDUCT 1.15

### Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer shall comply with the provisions of R. 1:21-6 ("Recordkeeping") of the Court Rules.

# Appendix A

**1:21-6. Recordkeeping; Examination of Records**

(a) Required Trust and Business Accounts. Every attorney who practices in this state shall maintain in a financial institution in New Jersey, in the attorney's own name, or in the name of a partnership of attorneys, or in the name of the professional corporation of which the attorney is a member, or in the name of the attorney or partnership of attorneys by whom employed:

(1) a trust account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the attorney may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which trust account or accounts funds entrusted to the attorney's care shall be deposited; and

(2) a business account into which all funds received for professional services shall be deposited.

One or more of the trust accounts shall be the IOLTA account or accounts required by Rule 1:28A.

Other than fiduciary accounts maintained by an attorney as executor, guardian, trustee, or receiver, or in any other similar fiduciary capacity, all attorney trust accounts, whether general or specific, as well as all deposit slips and checks drawn thereon, shall be prominently designated as an "Attorney Trust Account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as an "Attorney Business Account," an "Attorney Professional Account," or an "Attorney Office Account." The IOLTA account or accounts shall each be designated "IOLTA Attorney Trust Account."

The names of institutions in which such primary attorney trust and business accounts are maintained and identification numbers of each account shall be recorded on the annual registration form filed with the annual payment, pursuant to Rule 1:20-1(b) and Rule 1:28-2, to the Disciplinary Oversight Committee and the New Jersey Lawyers' Fund for Client Protection. Such information shall be available for use in accordance with paragraph (h) of this rule. For all IOLTA accounts, the account numbers, the name the account is under, and the depository institution shall be indicated on the registration statement. The signed annual registration statement required by Rule 1:20-1(c) shall constitute authorization to depository institutions to convert an existing non-interest bearing account for nominal or short-term funds to an IOLTA account.

(b) Account Location; Financial Institution's Reporting Requirements. An attorney trust account shall be maintained only in New Jersey financial institutions approved by the Supreme Court, which shall annually publish a list of such approved institutions. A financial institution shall be approved if it shall file with the Supreme Court an agreement, in a form provided by the Court, to report to the Office of Attorney Ethics in the event any properly payable attorney trust account instrument is presented against insufficient funds,

# Appendix B

irrespective of whether the instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty days' notice in writing to the Office of Attorney Ethics. The agreement shall further provide that all reports made by the financial institution shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (2) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

In addition, each financial institution approved by the Supreme Court must co-operate with the IOLTA Program, and must offer an IOLTA account to any attorney who wishes to open one. Nothing herein shall prevent an attorney from establishing a separate interest-bearing account for an individual client in accordance with these rules, providing that all interest earned shall be the sole property of the client and may not be retained by the attorney.

In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Office of Attorney Ethics and to produce any attorney trust account or attorney business account records on receipt of a subpoena therefor. Digital images of these records may be maintained by financial institutions provided that: (a) imaged copies of checks shall, when printed (including, but not limited to, when images are provided to the attorney with a monthly statement or otherwise or when subpoenaed by The Office of Attorney Ethics), be limited to no more than two checks per page (showing the front and back of each check) and (b) all digital records shall be maintained for a period of seven years. Nothing herein shall preclude a financial institution from charging an attorney or law firm for the reasonable cost of producing the reports and records required by this Rule. Every attorney or law firm in this state shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(c) Required Bookkeeping Records.

(1) Attorneys, partnerships of attorneys and professional corporations who practice in this State shall maintain in a current status and retain for a period of 7 years after the event that they record:

(A) appropriate receipts and disbursements journals containing a record of all deposits in and withdrawals from the accounts specified in paragraph (a) of this rule and of any other bank account which concerns or affects their practice of law, specifically identifying the date, source and description of each item deposited as well as the date, payee and purpose of each disbursement. All trust account receipts shall be deposited intact and the duplicate deposit slip shall be sufficiently detailed to identify each item. All trust account withdrawals shall be made only by attorney authorized financial institution transfers as

stated below or by check payable to a named payee and not to cash. Each electronic transfer out of an attorney trust account must be made on signed written instructions from the attorney to the financial institution. The financial institution must confirm each authorized transfer by returning a document to the attorney showing the date of the transfer, the payee, and the amount. Only an attorney admitted to practice law in this state shall be an authorized signatory on an attorney trust account, and only an attorney shall be permitted to authorize electronic transfers as above provided; and

(B) an appropriate ledger book, having at least one single page for each separate trust client, for all trust accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom such funds were disbursed. A regular trial balance of the individual client trust ledgers shall be maintained. The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of moneys received in trust for the client, and deducting the total of all moneys disbursed; and

(C) copies of all retainer and compensation agreements with clients; and

(D) copies of all statements to clients showing the disbursement of funds to them or on their behalf; and

(E) copies of all bills rendered to clients; and

(F) copies of all records showing payments to attorneys, investigators or other persons, not in their regular employ, for services rendered or performed; and

(G) originals of all checkbooks with running balances and check stubs, bank statements, prenumbered cancelled checks and duplicate deposit slips, except that, where the financial institution provides proper digital images or copies thereof to the attorney, then these digital images or copies shall be maintained; all checks, withdrawals and deposit slips, when related to a particular client, shall include, and attorneys shall complete, a distinct area identifying the client's last name or file number of the matter; and

(H) copies of all records, showing that at least monthly a reconciliation has been made of the cash balance derived from the cash receipts and cash disbursement journal totals, the checkbook balance, the bank statement balance and the client trust ledger sheet balances; and

(I) copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.

(2) ATM or cash withdrawals from all attorney trust accounts are prohibited.

(3) No attorney trust account shall have any agreement for overdraft protection.

(d) Type and Availability of Bookkeeping Records. The financial books and other records required by paragraphs (a) and (c) of this rule shall be maintained in accordance with generally accepted accounting practice. Bookkeeping records may be maintained by computer provided they otherwise comply with this rule and provided further that printed copies and computer files in industry-standard formats can be made on demand in accordance with this section or section (h). They shall be located at the principal New Jersey office of each attorney, partnership or professional corporation and shall be available for inspection, checks for compliance with this Rule and copying at that location by a duly authorized representative of the Office of Attorney Ethics. When made available pursuant to this rule, all such books and records shall remain confidential except for the purposes thereof or by direction of the Supreme Court, and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege.

(e) Dissolutions. Upon the dissolution of any partnership of attorneys or of any professional corporation, the former partners or shareholders shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in paragraph (c) of this rule.

(f) Attorneys Practicing With Foreign Attorneys or Firms. All of the requirements of this rule shall be applicable to every attorney rendering legal services in this State regardless whether affiliated with or otherwise related in any way to an attorney, partnership, legal corporation, limited liability company, or limited liability partnership formed or registered in another state.

(g) Attorneys Associated With Out of State Attorneys. An attorney who practices in this State shall maintain and preserve for 7 years a record of all fees received and expenses incurred in connection with any matter in which the attorney was associated with an attorney of another state.

(h) Availability of Records. Any of the records required to be kept by this rule shall be produced in response to a subpoena duces tecum issued in connection with an ethics investigation or hearing pursuant to R. 1:20-1 to 1:20-11, or shall be produced at the direction of the Disciplinary Review Board or the Supreme Court. They shall be available upon request for review and audit by the Office of Attorney Ethics. Every attorney shall be required to cooperate and to respond completely to questions by the Office of Attorney Ethics regarding all transactions concerning records required to be kept under this rule. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege. When produced or examined during the course of a disciplinary or random audit, both the attorney or law firm and the producers and licensors of computerized software shall be conclusively deemed to have consented to the use of said software by disciplinary authorities as evidence during the course of the disciplinary proceeding.

(i) Disciplinary Action. An attorney who fails to comply with the requirements of this rule in respect of the maintenance, availability and preservation of accounts and records or who

fails to produce or to respond completely to questions regarding such records as required shall be deemed to be in violation of R.P.C. 1.15(d) and R.P.C. 8.1(b).

(j) Unidentifiable and Unclaimed Trust Fund Accumulations and Trust Funds Held for Missing Owners. When, for a period in excess of 2 years, an attorney's trust account contains trust funds which are either unidentifiable, unclaimed, or which are held for missing owners, such funds shall be so designated. A reasonable search shall then be made by the attorney to determine the beneficial owner of any unidentifiable or unclaimed accumulation, or the whereabouts of any missing owner. If the beneficial owner of an unidentified or unclaimed accumulation is determined, or if the missing beneficial owner is located, the funds shall be delivered to the beneficial owner when due. Trust funds which remain unidentifiable or unclaimed, and funds which are held for missing owners, after being designated as such, may, after the passage of 1 year during which time a diligent search and inquiry fails to identify the beneficial owner or the whereabouts of a missing owner, be paid to the Clerk of the Superior Court for deposit with the Superior Court Trust Fund. The Clerk shall hold the same in trust for the beneficial owners or for ultimate disposition as provided by order of the Supreme Court. All applications for payment to the Superior Court Clerk under this section shall be supported by a detailed affidavit setting forth specifically the facts and all reasonable efforts of search, inquiry and notice. The Clerk of the Superior Court may decline to accept funds where the petition does not evidence diligent search and inquiry or otherwise fails to conform with this section.

Appendix C

# TRUST RECEIPTS BOOK

**MONTH OF: March** **20 xx**

| DATE | SOURCE | CLIENT | CASE # OR FILE # | AMOUNT | DEPOSIT |
|---|---|---|---|---|---|
| 3/1 | Aetna Casualty Ins. | John Smith | 15-101 | 30,000.00 | 30,000.00 |
| 3/2 | James & Mary Jones | Brown to Jones | 14-200 | 5,000.00 | |
| 3/3 | Handy Tool Co. | ABC Tool Corp. | 15-210 | 1,500.00 | 6,500.00 |
| 3/19 | PNC Bank | Gray fr. White | 15-320 | 60,000.00 | |
| 3/19 | Jersey Mortgage Co. | Gray fr. White | 15-320 | 40,000.00 | |
| 3/19 | Joseph Gray | Gray fr. White | 15-320 | 10,000.00 | 110,000.00 |
| 3/30 | Sally Green | Green vs. Green | 14-110 | 4,300.00 | 4,300.00 |
| | | | | | |
| | | Totals | | 150,800.00 | 150,800.00 |

Appendix D

# TRUST DISBURSEMENTS BOOK

**MONTH OF: March** **20 xx**

| DATE | CHECK NO. | PAYEE | PURPOSE | CLIENT | CASE # OR FILE # | AMOUNT |
|---|---|---|---|---|---|---|
| 3/12 | 710 | John Smith | Settlement | John Smith | 15-120 | 20,000 |
| 3/12 | 711 | Joe Lawyer | Fee | John Smith | 15-120 | 10,000 |
| 3/13 | 712 | VOID | | | | --- |
| 3/14 | 713 | ABC Tool Corp. | Proceeds | ABC Tool | 14-215 | 1,050.00 |
| 3/14 | 714 | Joe Lawyer | Fee | ABC Tool | 14-215 | 450.00 |
| 3/15 | -- | Void ck. #507 dated 1/12/xx | | Williams Co. | 15-125 | (400.00) |
| 3/15 | 715 | Apex Co. | Replace 507 | Williams Co. | 15-125 | 400.00 |
| 3/20 | 716 | William Penn Savings | Payoff | Gray/White | 15-320 | 50,000.00 |
| 3/20 | 717 | Sam White | Proceeds | Gray/White | 15-320 | 35,000.00 |
| 3/20 | 718 | Re/Max Realty | Commission | Gray/White | 15-320 | 5,000.00 |
| 3/20 | 719 | Joe Lawyer | Fee | Gray/White | 15-320 | 600.00 |
| 3/30 | S/C | Bank Charge | | Atty. Funds | | 50 |
| | | | | Totals | | 122,150.00 |

**WIRE TRANSFER REQUEST FORM**

| Section A: Customer Information | | |
|---|---|---|
| **Account Number** | | |
| **Name(as it appears on your account)** | | |
| **Address** | | |
| **City** | **State** | **Zip Code** |
| **Wire Amount** | **Date and Time of Wire Request** | |
| **Daytime Phone** | **Alternate Phone** | |

| Section B: Receiver Information | | |
|---|---|---|
| **Bank Name & Address** | | |
| **Bank Routing Number (ABA)** | | |
| **Beneficiary's Name** | | |
| **Beneficiary's Address** | | |
| **Beneficiary's Account Number** | | |
| **Further Credit or Special Instructions** | | |

| Section C: International Wires | | |
|---|---|---|
| **Int'l Bank Name and address** | | |
| **International Bank Account number (IBAN)** | | |
| **SWIFT code** | **Bank Code** | |
| **City** | **Country** | **Currency** |
| **US Corresponding Bank Name (if applicable)** | | |
| **US Corresponding Routing Number (ABA-if applicable)** | | |

I have read and understand the contents of the attached agreement. By signing below, I agree to all terms and conditions set forth and certify that the information accurately reflects the transaction I desired.

_____ _____

**Customer Signature** **Date**

# Appendix D-1

# CLIENTS' TRUST LEDGER

BROWN to JONES — NAME OF CLIENT

14-200 — FILE OR CASE NUMBER

REAL ESTATE SALE — LEGAL MATTER OR ADVERSE PARTY

| DATE | DESCRIPTION OF TRANSACTION | CHECK NO. | FUNDS PAID | FUNDS RECEIVED | BALANCE |
|---|---|---|---|---|---|
| 3/2/20xx | James & Mary Jones Deposit | | | 5,000.00 | 5,000.00 |
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Appendix E-1

Appendix E-2

# CLIENTS' TRUST LEDGER

ABC TOOL CORP.
**NAME OF CLIENT**

14-215
**FILE OR CASE NUMBER**

COLLECTIONS
**LEGAL MATTER OR ADVERSE PARTY**

| DATE | DESCRIPTION OF TRANSACTION | CHECK NO. | FUNDS PAID | FUNDS RECEIVED | BALANCE |
|---|---|---|---|---|---|
| 3/3/20xx | Handy Tool Co. | | | 1,500.00 | 1,500.00 |
| 3/14/20xx | ABC Tool-Proceeds | 713 | 1,050.00 | | 450.00 |
| 3/14/20xx | Joe Lawyer - Fee | 714 | 450.00 | | -0- |
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Appendix E-3

# CLIENTS' TRUST LEDGER

GRAY from WHITE

**NAME OF CLIENT**

15-320

**FILE OR CASE NUMBER**

REAL ESTATE PURCHASE

**LEGAL MATTER OR ADVERSE PARTY**

| DATE | DESCRIPTION OF TRANSACTION | CHECK NO. | FUNDS PAID | FUNDS RECEIVED | BALANCE |
|---|---|---|---|---|---|
| 3/19/20xx | PNC Bank | | | 60,000.00 | 60,000.00 |
| 3/19/20xx | Jersey Mortgage Co. | | | 40,000.00 | 100,000.00 |
| 3/19/20xx | Joseph Gray | | | 10,000.00 | 110,000.00 |
| 3/20/20xx | William Penn Savings - payoff | 716 | 50,000.00 | | 60,000.00 |
| 3/20/20xx | Sam White - Proceeds | 717 | 35,000.00 | | 25,000.00 |
| 3/20/20xx | Re/Max Realty - Comission | 718 | 5,000.00 | | 20,000.00 |
| 3/20/20xx | Joe Lawyer - Fee | 719 | 600.00 | | 19,400.00 |
| | | | | | |
| | | | | | |

Appendix E-4

# CLIENTS' TRUST LEDGER

JOHN SMITH
**NAME OF CLIENT**

15-120
**FILE OR CASE NUMBER**

PERSONAL INJURY
**LEGAL MATTER OR ADVERSE PARTY**

| DATE | DESCRIPTION OF TRANSACTION | CHECK NO. | FUNDS PAID | FUNDS RECEIVED | BALANCE |
|---|---|---|---|---|---|
| 3/1/20xx | Aetna Casualty Ins. | | | 30,000.00 | 30,000.00 |
| 3/12/20xx | John Smith - Proceeds | 710 | 20,000.00 | | 10,00.00 |
| 3/12/20xx | Joe Lawyer - Fee | 711 | 10,000.00 | | -0- |
| | | | | | |
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# CLIENTS' TRUST LEDGER

WILLIAMS CO.
**NAME OF CLIENT**

15-125
**FILE OR CASE NUMBER**

RETAINER
**LEGAL MATTER OR ADVERSE PARTY**

| DATE | DESCRIPTION OF TRANSACTION | CHECK NO. | FUNDS PAID | FUNDS RECEIVED | BALANCE |
|---|---|---|---|---|---|
| 1/5/20xx | Williams Co. | | | 400.00 | 400.00 |
| 1/12/20xx | Apex Co. | 507 | 400.00 | | -0- |
| 3/15/20xx | To Void Check #507 | 507 | (400.00) | | 400.00 |
| 3/15/20xx | Apex Co. - Replace Ck. #507 | 715 | 400.00 | | -0- |
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Appendix E-5

# CLIENTS' TRUST LEDGER

GREEN vs. GREEN — NAME OF CLIENT

14-110 — FILE OR CASE NUMBER

MATRIMONY — LEGAL MATTER OR ADVERSE PARTY

| DATE | DESCRIPTION OF TRANSACTION | CHECK NO. | FUNDS PAID | FUNDS RECEIVED | BALANCE |
|---|---|---|---|---|---|
| 2/25/20xx | Sally Green - Proceeds sale of prop. | | | 45,000.00 | 45,000.00 |
| 3/30/20xx | Sally Green | | | 4,300.00 | 49,300.00 |
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Appendix E-6

# CLIENTS' TRUST LEDGER

JOE LAWYER

**NAME OF CLIENT**

**FILE OR CASE NUMBER**

ATTY. FUNDS FOR BANK CHARGES

**LEGAL MATTER OR ADVERSE PARTY**

| DATE | DESCRIPTION OF TRANSACTION | CHECK NO. | FUNDS PAID | FUNDS RECEIVED | BALANCE |
|---|---|---|---|---|---|
| 1/24/20xx | Business Acct. Ck. #535 | | | 200.00 | 200.00 |
| 3/31/20xx | Bank Service Charge | | 50.00 | | 150.00 |
| | | | | | |
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Appendix E-7

# Appendix F

8402

DATE May 13, 20XX

TO Collector, City of Trenton

FOR Sands (T-980) Taxes

| | | |
|---|---|---|
| BAL. BRO'T FOR'D | | 12,500 00 |
| DEPOSITS | | 5,000 00 |
| TOTAL | | 17,500 00 |
| THIS CHECK | | 3,200 00 |
| OTHER | | |
| BALANCE | | 14,300 00 |

TAX DEDUCTIBLE

8402

JOHN A. LAWYER, ESQ.
ATTORNEY TRUST ACCOUNT

55-2/212

DATE May 13, 20XX

PAY TO THE ORDER OF Collector, City of Trenton $3,200.00

Thirty-Two Hundred and 00/100 DOLLARS

WACHOVIA
Wachovia Bank, N.A.
wachovia.com

FOR Sands (T-980) Taxes

⑈00008402⑈ ⑆021200025⑆ 2000930345516⑈

8403

DATE May 20, 20XX

TO John A. Lawyer

FOR Smith (L1011) Legal Fee

| | | |
|---|---|---|
| DEPOSITS | | |
| TOTAL | | 14,300 00 |
| THIS CHECK | | 1,300 00 |
| OTHER | | |
| BALANCE | | 13,000 00 |

TAX DEDUCTIBLE

8403

JOHN A. LAWYER, ESQ.
ATTORNEY TRUST ACCOUNT

55-2/212

DATE May 20, 20XX

PAY TO THE ORDER OF John A. Lawyer $1,300.00

Thirteen Hundred and 00/100 DOLLARS

WACHOVIA
Wachovia Bank, N.A.
wachovia.com

FOR Smith (L1011) Legal Fee

⑈00008403⑈ ⑆021200025⑆ 2000930345516⑈

8404

DATE May 20, 20XX

TO John Smith

FOR Smith (L1011) Bal. of Settlement

| | | |
|---|---|---|
| DEPOSITS | | |
| TOTAL | | 13,000 00 |
| THIS CHECK | | 3,700 00 |
| OTHER | | |
| BALANCE | | 9,300 00 |

TAX DEDUCTIBLE

8404

JOHN A. LAWYER, ESQ.
ATTORNEY TRUST ACCOUNT

55-2/212

DATE May 20, 20XX

PAY TO THE ORDER OF John Smith $3,700.00

Thirty-Seven Hundred and 00/100 DOLLARS

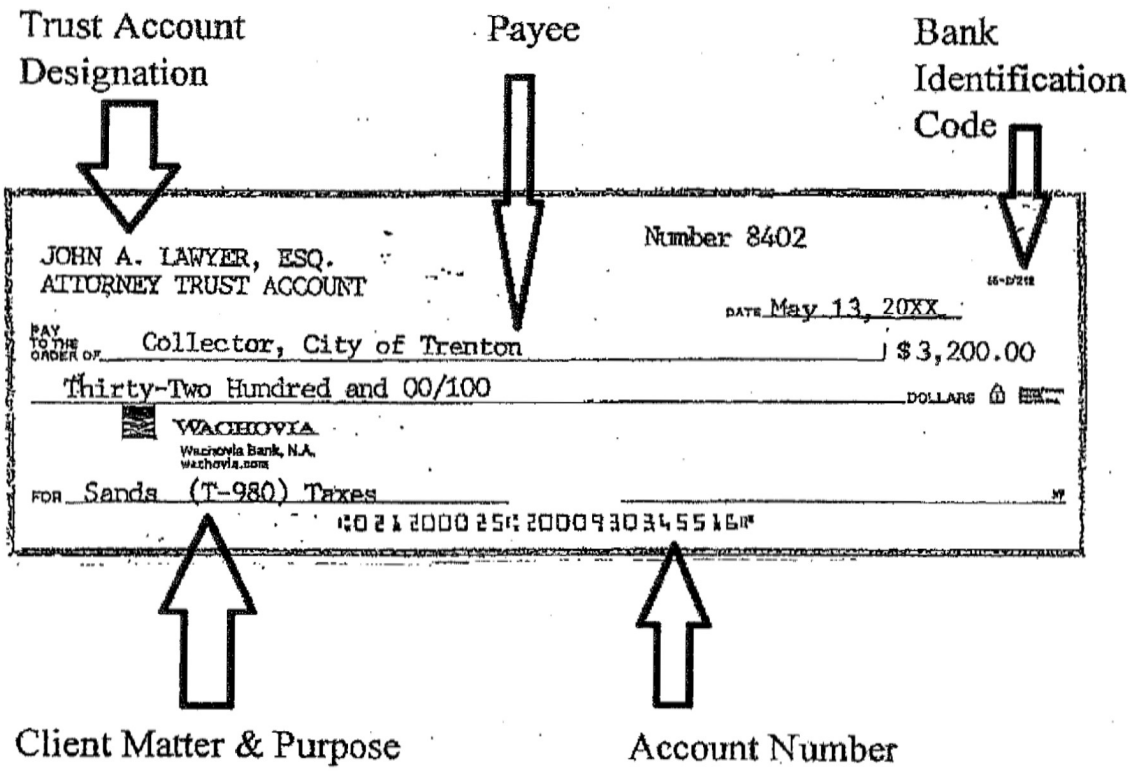
WACHOVIA
Wachovia Bank, N.A.
wachovia.com

FOR Smith (L1011) Bal. of Settlement

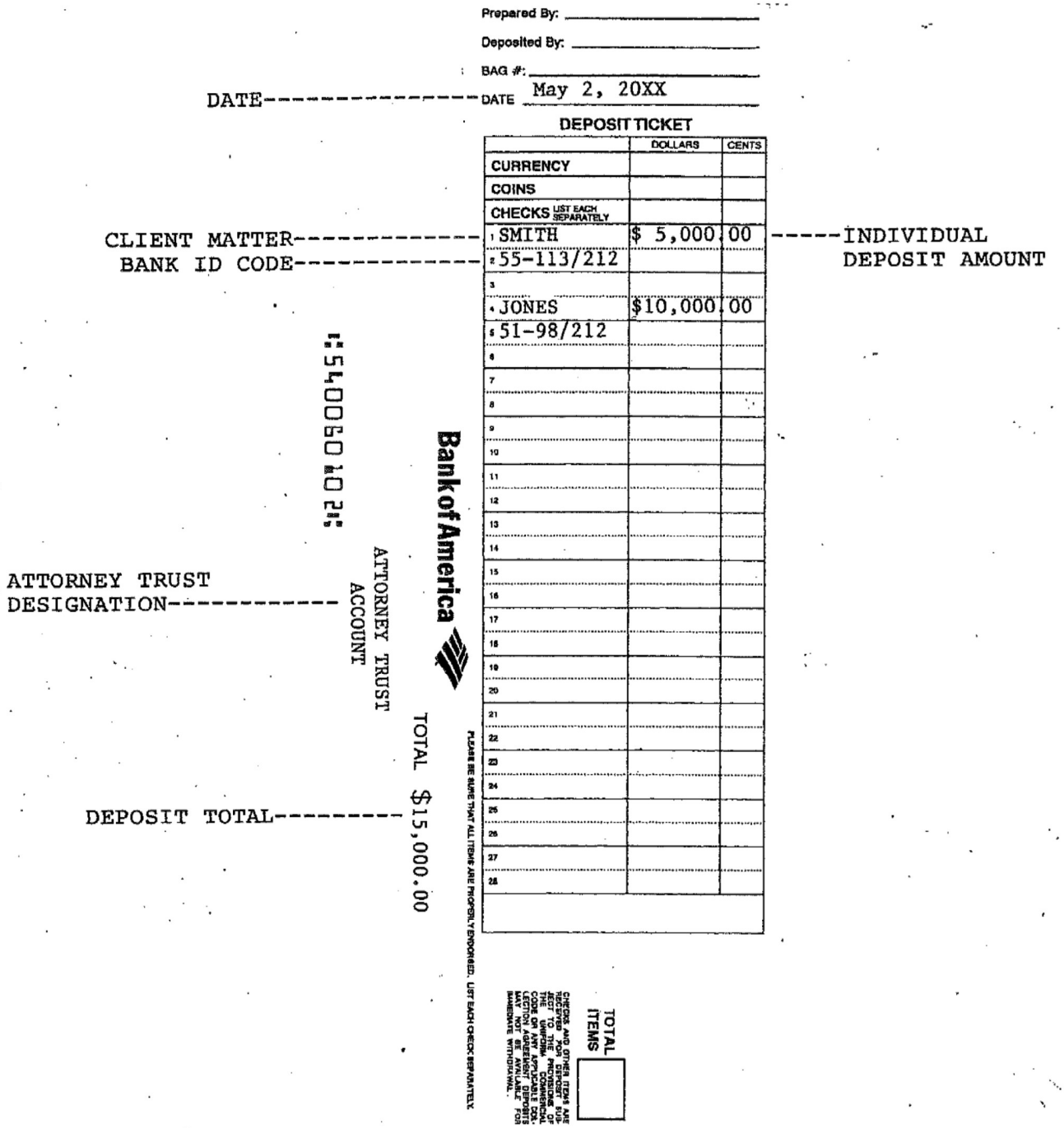
⑈00008404⑈ ⑆021200025⑆ 2000930345516⑈

0099 ARMEY check 01/27/10 10:12

# Trust Account Check




# Appendix G


Prepared By:
Deposited By:
BAG #:
DATE
May 2, 20XX
DEPOSIT TICKET
DOLLARS
CENTS
CURRENCY
COINS
CHECKS LIST EACH SEPARATELY
1 SMITH
$ 5,000.00
2 55-113/212
3
4 JONES
$10,000.00
5 51-98/212
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
TOTAL ITEMS
CHECKS AND OTHER ITEMS ARE RECEIVED FOR DEPOSIT SUBJECT TO THE PROVISIONS OF THE UNIFORM COMMERCIAL CODE OR ANY APPLICABLE COLLECTION AGREEMENT. DEPOSITS MAY NOT BE AVAILABLE FOR IMMEDIATE WITHDRAWAL.
PLEASE BE SURE THAT ALL ITEMS ARE PROPERLY ENDORSED. LIST EACH CHECK SEPARATELY.
Bank of America
ATTORNEY TRUST ACCOUNT
TOTAL $15,000.00
:054000610 2:
DATE
CLIENT MATTER
BANK ID CODE
INDIVIDUAL DEPOSIT AMOUNT
ATTORNEY TRUST DESIGNATION
DEPOSIT TOTAL

# Appendix H

# TRUST ACCOUNT
# RECEIPTS / DISBURSEMENTS
# CONTROL SHEET

## FOR: 20 xx

| MONTH | TRUST FUNDS | | BALANCE |
|---|---|---|---|
| | RECEIVED | DISBURSED | |
| JANUARY | | | |
| FEBRUARY | | | $45,200.00 |
| MARCH | $150,800.00 | $122,150.00 | $73,850.00 |
| APRIL | | | |
| MAY | | | |
| JUNE | | | |
| JULY | | | |
| AUGUST | | | |
| SEPTEMBER | | | |
| OCTOBER | | | |
| NOVEMBER | | | |
| DECEMBER | | | |
| TOTALS | | | |

**Appendix I**

THREE-WAY RECONCILIATION

Attorney Trust Account

Month of March 20 xx

| | | |
|---|---|---|
| I. | Book Balance | |
| | A. Balance from Previous Month | $45,200.00 |
| | B. Receipts | 150,800.00 |
| | C. Disbursements | (122,150.00) |
| | D. Balance at End of Month | $73,850.00 |
| II. | Bank Balance | |
| | A. Balance per Bank Statement | $74,550.00 |
| | B. Add: Deposits-in-Transit | |
| | date: 3/31/xx | 4,300.00 |
| | C. Subtract: Outstanding Checks | |
| | check #: 718 | (5,000.00) |
| | D. Reconciled Bank Balance | $73, 850.00 |
| III. | Client Trust Ledger Balances | |
| | A. Client name: | |
| | Brown to James | $5,000.00 |
| | Gray from White | 19,400.00 |
| | Green v. Green | 49,300.00 |
| | Attorney funds for bank charges | 150.00 |
| | B. Total of Client Trust Ledgers | $73,850.00 |

# Appendix J

Appendix K

# BUSINESS RECEIPTS BOOK

**MONTH OF: _____ 20 xx**

| DATE | RECEIVED FROM | CLIENT OR FILE NO. | FEE INCOME | | | COSTS RECOVERED | OTHER | | TOTAL RECEIPTS | TOTAL DEPOSIT |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | TRUST ACCOUNT | OTHER BILLINGS | MISC. | | ITEM | AMT. | | |
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Appendix L

# BUSINESS DISBURSEMENTS BOOK

**MONTH OF: _____ 20 xx**

| DATE | PAID TO | CHECK NO. | AMOUNT OF CHECK | COSTS ADVANCED | | DRAWING ACCOUNT | SALARIES | TRAVEL | OTHER | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | CLIENT | AMT. | | | | AMT. | ITEM |
| | | | | | | | | | | |
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[redacted] LAW GROUP LLC
ATTORNEY TRUST ACCOUNT

Page: 6 of 8
Statement Period: Nov 01 2022-Nov 30 2022
Cust Ref #:
Primary Account #: [redacted]


[redacted] LAW GROUP, LLC
ATTORNEY TRUST ACCOUNT
[redacted]
1189
DATE 11/14/22
PAY TO THE ORDER OF Progressive Spine & Orthopaedics $ 7,500.00
Seven Thousand Five Hundred & no/100 DOLLARS
TD Bank
FOR [redacted] Full + Final
Vata Gro
⑈001189⑈ ⑆031201360⑆ [redacted]

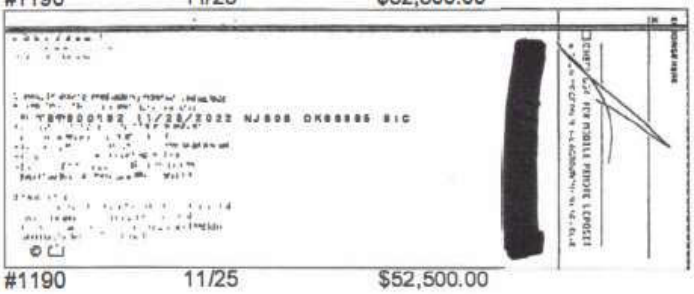
#1189 11/25 $7,500.00


[redacted]
PAYEE MUST ENDORSE
CITIBANK, N.A.
[redacted]
[redacted] 11/28/2022 [redacted] NJ808 OK88885 BIC
CHECK HERE FOR MOBILE PHONE DEPOSIT

#1189 11/25 $7,500.00


[redacted] LAW GROUP, LLC
ATTORNEY TRUST ACCOUNT
[redacted]
1190
DATE 11/15/22
PAY TO THE ORDER OF Progressive Surgery Center $ 52,500.00
Fifty Two Thousand Five Hundred & no/100 DOLLARS
TD Bank
FOR [redacted] Full + Final
Vata
⑈001190⑈ ⑆031201360⑆ [redacted]

#1190 11/25 $52,500.00

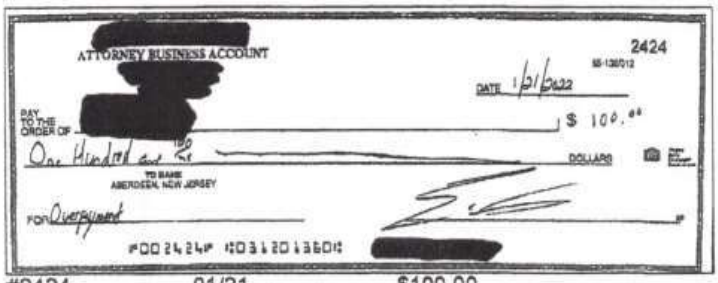

[redacted] 11/28/2022 NJ808 OK88885 BIC
CHECK HERE FOR MOBILE PHONE DEPOSIT
[redacted]

#1190 11/25 $52,500.00

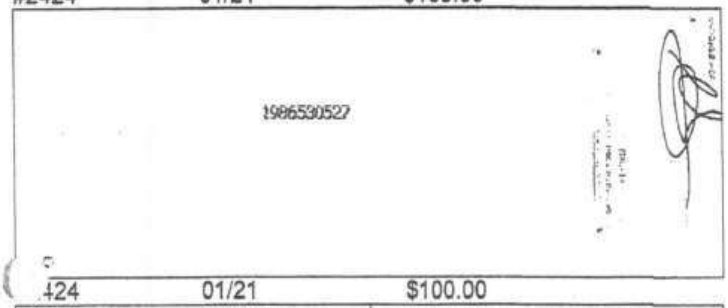
**Appendix M-1**

LAW OFFICE OF [redacted]
ATTORNEY BUSINESS ACCOUNT

Page: 3 of 3
Statement Period: Jan 01 2022-Jan 31 2022
Cust Ref #:
Primary Account #: [redacted]

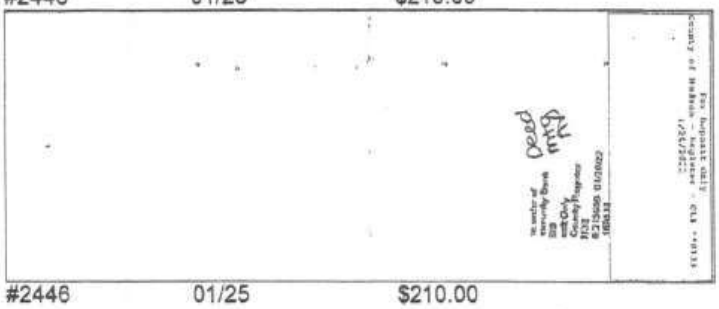



#2424 01/21 $100.00




424 01/21 $100.00


#2446 01/25 $210.00




#2446 01/25 $210.00

**Appendix M-2**

## DEPOSITS OF UNCLAIMED FUNDS IN ATTORNEY TRUST ACCOUNTS

Rule 1:21-6(j) authorizes an attorney to deposit certain funds which are in his or her trust account that may not otherwise be disbursed to a client or on behalf of a client. The rule establishes a three-step process that must be completed prior to submitting the funds for deposit:

1. **Step One:** The attorney must identify those funds which have been unclaimed or in which ownership is unidentified or which are held for a missing owner. The funds must have been in the attorney trust account for more than two years, after which they may be designated by the attorney as suitable for deposit with the Court.

2. **Step Two:** The attorney must maintain the designated funds for a period of one (1) year during which time he/she must conduct a reasonable search for the beneficial owner(s) of the funds. If the ownership of the funds is in question, a diligent effort must be made to determine ownership. If the owner(s) of the funds is known, a diligent search of their whereabouts must be conducted.

3. **Step Three:** If the funds remain unidentifiable, are unclaimed, or the owner(s) cannot be located, they may be deposited into the Superior Court Trust Fund. The attorney must complete a detailed affidavit setting forth the amount and nature of the funds, the name(s) of the owner(s) and the attorney's efforts to identify or to disburse the funds to them. The transaction which gave rise to the trust account deposit that may be helpful to identify ownership of the funds in the event that a claimant subsequently makes application for them.

**Required Documents:** In order to deposit unclaimed funds into Court, the following documents must be submitted to the Trust Fund Unit's mailing address:

Trust Fund Unit
Superior Court Clerk's Office
25 Market St
P.O. Box 971
Trenton, NJ 08625-0971

1. An original and one copy of the affidavit required by R. 1:21-6(j).

2. A check made payable to the order of "Superior Court of New Jersey" in the exact amount specified in the order (the check does not have to be certified).

3. A self-addressed stamped envelope for mailing the receipt.

**Appendix N**

**OPINION 454**

**Attorney's Trust Account - Immediate Drawing Upon Depositing Client's Check**

We are asked whether it is ethical for an attorney to deposit funds belonging to a client in the attorney's trust account and to make immediate disbursement from this fund on behalf of the client. This practice usually arises in the context of a title closing, but there are, of course, many other circumstances in which this procedure is followed.

*R.* 1:21-6(a)(1) and DR 9-102 require that an attorney maintain a separate account for funds of his clients entrusted to his care. He must maintain an appropriate book in which the funds belonging to each client are separately identified. It goes without saying that the funds deposited for a particular client must be used for the benefit of that client and for no other purpose. Many attorneys have substantial sums in their trust account at all times, sums which belong to several clients. Some part of these monies are "collected funds," i.e. funds which represent checks deposited in the account which have had ample time to clear and have thus been properly credited to the attorney's trust account. Depending usually on the distance the drawee bank is from the attorney's bank, it may take from five to ten business days for a check to clear, or from one to two calendar weeks. It is obvious, therefore, that a check drawn on the attorney's trust account for client A the same day client A's check is deposited in this account is drawn on funds which belong to other clients of the attorney.

We are aware of the fact that the foregoing practice is one of long standing in probably universal use not only in New Jersey but elsewhere. We also believe that most attorneys who follow this practice do so only where the checks involved are bank, cashier's or certified checks. Because this procedure is so widespread in title closings, to condemn it as unethical may lead to severe disruption in the handling of title closings and other matters. We suggest first, however, that there are other ways to handle these closings, none of which is entirely satisfactory. Three possibilities come to mind: (1) escrow closings in which no funds are disbursed and no closing completed until all funds have cleared; (2) pre-arrangement by the attorneys involved so that the necessary closing figures are known far enough in advance for the parties to provide funds in such a manner as to obviate the necessity of using the trust account (undoubtedly this would require cooperation of the bank mortgagee which may be asked to provide mortgage funds in several checks); (3) establishment of an account by the attorney of his own funds which can be used to accommodate a client when there is no other solution. Recognizing the problems which would arise were the present practice disapproved in its entirety, it is our opinion that where one of the foregoing solutions is not feasible, the use of bank certified or cashier's checks should be permitted to avoid disruptions in title closings and in the interest of accommodating all clients. Such checks are the obligations of the bank and not simply of a private party. Drawing immediately upon their deposit entails a minimal risk.

The practice which is sanctioned by this opinion has the effort of drawing on unsegregated trust funds of all clients for the benefit of a particular client whose matter is

**Appendix O**

closing. The reduction thus resulting in available trust funds is eliminated shortly thereafter when the bank, certified or cashier's check clears. The justification for what would otherwise be an unauthorized invasion of trust funds consists of the almost nonexistent risk that such bank, certified or cashier's checks will not clear along with the overriding commercial need of all clients that such a practice be continued. Because the practice is so well known and widespread it is fair to assume that clients have implicitly consented to the negligible risk involved in drawing against such checks which have not yet cleared. Of course, any client who explicitly requests that trust funds deposited for his benefit not be subjected to the practice is entitled to have his funds segregated. A consequence of such segregation would be that client, if involved in a transaction where closing depends upon the issuance of trust checks that have not yet cleared, would have to take special arrangements similar to one of those suggested earlier in this opinion. In other words, a client who does not want to take the negligible risks involved in the unsegregated fund will not receive the substantial benefit of the practice discussed in this opinion. Approval of the practice referred to herein is limited strictly to real estate or commercial closing transactions representing the consummation of an agreement resulting in transfers of property or interests in property whether they be real estate, personal property or a combination of both, including sales of businesses where it is either essentially or commercially desirable that trustee checks be issued against certified, bank or cashier's checks that have not cleared. Drawing on trust funds for other purposes, such as the disbursement of the settlement proceeds of a negligence case, regardless of whether certified, cashier's or bank checks have been deposited but have not yet cleared, is not proper.

We wish to make it clear that the practice we are approving relates only to the use of bank, cashier's or certified checks. We consider the practice of drawing against personal checks to cover miscellaneous items at closing or for any other purpose, regardless of the amount, to be unethical. While these amounts may be small in relation to the size of some trust accounts, the same amount may be large in relation to other trust accounts. Drawing against such personal checks creates a substantial risk of loss of trust funds deposited in the account for other clients, a risk not in any way justified by necessities of the situation. Accordingly, such practice is disapproved.

**OPINION 454 (Amendment)**

The Advisory Committee on Professional Ethics has received numerous inquiries concerning its holding in the above matter because the use of checks of savings and loan associations, state or federally-chartered, in connection with real estate or commercial closing transactions was not sanctioned. After careful review of the problems which have arisen because of this exclusion, the Committee has decided that the use of such checks should be approved. Therefore, the first sentence of the last paragraph of Opinion 454 is expanded to read as follows:

"We wish to make it clear that the practice we are approving relates only to the use of bank, savings and loan (state or federal), cashiers' or certified checks."

# Professional Liability Insurance

1) **Professional Corporations for the Practice of Law**
   **R 1:21-1A**

2) **Limited Liability Companies for the Practice of Law**
   **R 1:21-1B**

3) **Limited Liability Partnerships for the Practice of Law**
   **R 1:21-1C**

**The (professional corporation), (limited liability company), (limited liability partnership) shall obtain and maintain one or more policies of lawyers' professional liability insurance.**

**R 1:21-1A (a) (3)**
**R 1:21-1B (a) (3)**
**R 1:21-1C (a) (3)**

- **Within 30 days after filing its certificate of incorporation… each (professional corporation), (limited liability company), (limited liability partnership)… shall file with the Clerk of the Supreme Court a certificate of insurance.**

- **Amendments to and renewals of the certificate of insurance shall be filed with the Clerk of the Supreme Court within 30 days after the date on which such amendments or renewals become effective.**

**R 1:21-1A (b)**
**R 1:21-1B (b)**
**R 1:21-1C (b)**

**Appendix P-1**

## NOTICE TO THE BAR (corrected)

**ATTORNEY MALPRACTICE INSURANCE – NEW RULE 1:21-1D ("INDIVIDUALS OR PARTNERSHIPS ENGAGED IN THE PRIVATE PRACTICE OF LAW; REPORTING OF PROFESSIONAL LIABILITY INSURANCE"); RELATED CONFORMING AMENDMENTS**

The Supreme Court has adopted new Court Rule 1:21-1D ("Individuals or Partnerships Engaged in the Private Practice of Law; Reporting of Professional Liability Insurance"), applicable to certain attorneys engaged in the private practice of law who elect voluntarily to obtain a policy of professional liability insurance. Under the new Rule, such an attorney must file (or to cause an insurer to file) with the Court a certificate of insurance setting forth basic policy information and any policy amendments, renewals, or terminations. Such information will be accessible by the public in the same manner as the information required under Rules 1:21-1A ("Professional Corporations for the Practice of Law"), 1:21-1B ("Limited Liability Companies for the Practice of Law"), and 1:21-1C ("Limited Liability Partnerships for the Practice of Law").

The Court's attached December 21, 2021 Order implements one of the recommendations of the Supreme Court Ad Hoc Committee on Attorney Malpractice Insurance in it 2017 report. All necessary technological enhancements have been completed to support implementation of the new reporting requirement, including integration of attorney malpractice information into the existing attorney index available on the Judiciary's website.

The Court has also adopted conforming amendments to Rules 1:21-1A, -1B, and -1C to require only the last four digits of the policy number rather than the full policy number to be reported for malpractice insurance policies held by Professional Corporations (Rule 1:21-1A), Limited Liability Companies (Rule 1:21-1B), and Limited Liability Partnerships (Rule 1:21-1C).

The Court's December 21, 2021 Order is effective January 1, 2022.

Questions on this notice should be directed to the Supreme Court Clerk's Office at (609) 815-2955.

[Note: This corrected version is being published because some text intended to be retained in the three amended rules was inadvertently not included.]

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: December 23, 2021 (corrected)

**Appendix P-2**

CTORT

ACORD

# CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY) 3/19/2015

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

| PRODUCER | CONTACT NAME: |
|---|---|
| Insurance Agency, Inc. | PHONE (A/C, No, Ext): (800) 222- FAX (A/C, No): (973) 377- |
| | E-MAIL ADDRESS: |

| INSURER(S) AFFORDING COVERAGE | NAIC # |
|---|---|
| INSURER A: Markel Insurance Co. | |
| INSURER B: | |
| INSURER C: | |
| INSURER D: | |
| INSURER E: | |
| INSURER F: | |

INSURED

COVERAGES CERTIFICATE NUMBER: REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS

| INSR LTR | TYPE OF INSURANCE | ADDL INSD | SUBR WVD | POLICY NUMBER | POLICY EFF (MM/DD/YYYY) | POLICY EXP (MM/DD/YYYY) | LIMITS | |
|---|---|---|---|---|---|---|---|---|
| | COMMERCIAL GENERAL LIABILITY | | | | | | EACH OCCURRENCE | $ |
| | CLAIMS-MADE OCCUR | | | | | | DAMAGE TO RENTED PREMISES (Ea occurrence) | $ |
| | | | | | | | MED EXP (Any one person) | $ |
| | | | | | | | PERSONAL & ADV INJURY | $ |
| | GEN'L AGGREGATE LIMIT APPLIES PER: | | | | | | GENERAL AGGREGATE | $ |
| | POLICY PRO-JECT LOC | | | | | | PRODUCTS - COMP/OP AGG | $ |
| | OTHER: | | | | | | | $ |
| | AUTOMOBILE LIABILITY | | | | | | COMBINED SINGLE LIMIT (Ea accident) | $ |
| | ANY AUTO | | | | | | BODILY INJURY (Per person) | $ |
| | ALL OWNED AUTOS / SCHEDULED AUTOS | | | | | | BODILY INJURY (Per accident) | $ |
| | HIRED AUTOS / NON-OWNED AUTOS | | | | | | PROPERTY DAMAGE (Per accident) | $ |
| | | | | | | | | $ |
| | UMBRELLA LIAB OCCUR | | | | | | EACH OCCURRENCE | $ |
| | EXCESS LIAB CLAIMS-MADE | | | | | | AGGREGATE | $ |
| | DED RETENTION $ | | | | | | | $ |
| | WORKERS COMPENSATION AND EMPLOYERS' LIABILITY Y/N | | | | | | PER STATUTE OTH-ER | |
| | ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) N/A | | | | | | E.L. EACH ACCIDENT | $ |
| | If yes, describe under DESCRIPTION OF OPERATIONS below | | | | | | E.L. DISEASE - EA EMPLOYEE | $ |
| | | | | | | | E.L. DISEASE - POLICY LIMIT | $ |
| A | Professional Liab | | | LA-30 | 07/09/2014 | 07/09/2015 | | 2,000,000 |

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

CERTIFICATE HOLDER

Clerk of the Supreme Court
P.O. Box 970
Trenton, NJ 08625-0970

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE



**Appendix P-3**

SECTION MENU ☰

New Jersey attorneys must keep their trust accounts in approved banks.
Below is a current listing of banks in New Jersey who are approved by the Court to accept attorney trust funds.

The list of approved banks is updated often.

Attorneys having any questions about a specific bank not shown below may call the **OAE** at **609-403-7800** .

| | | |
|---|---|---|
| 1st COLONIAL COMMUNITY BANK | FIRST NATIONAL BANK OF ABSECON | NVE BANK* |
| ABACUS FEDERAL SAVINGS BANK | FIRST NATIONAL BANK OF ELMER (THE) | OCEANFIRST BANK, NA |
| ALMA BANK | FIRSTRUST BANK | PARKE BANK |
| AMBOY BANK | FRANKLIN BANK | PCB BANK (Formerly Pacific City Bank) |
| ASCENDIA BANK (formerly Glen Rock Savings Bank) | FREEDOM BANK | PEAPACK-GLADSTONE BANK |
| BANCO POPULAR NORTH AMERICA | FULTON BANK, N.A. | PENNSVILLE NATIONAL BANK |
| BANK OF AMERICA | GREATER ALLIANCE FEDERAL CREDIT UNION | PEOPLE'S SECURITY BANK & TRUST CO. |
| BANK OF HOPE (FORMERLY BBCN BANK) | GSL SAVINGS BANK | PNC BANK, N.A. |
| BANK OF PRINCETON (THE) | HANMI BANK | PONCE BANK |
| BCB COMMUNITY BANK | HANOVER BANK | PROVIDENT BANK (THE) |
| BOGOTA SAVINGS BANK | HAVEN SAVINGS BANK | REGAL BANK |

Chat

| | | |
|---|---|---|
| BLUE FOUNDRY BANK (formerly Boiling Springs Savings Bank) | HSBC BANK USA, N.A.* | REPUBLIC BANK |
| BRUNSWICK BANK AND TRUST | ION BANK (formerly Lincoln 1st Bank) | ROYAL BUSINESS BANK |
| CAPITAL ONE, N.A. | INDUSTRIAL BANK | SANTANDER BANK, NA |
| CENTURY SAVINGS BANK | IDB BANK (formerly Israel Discount Bank of NY) | SCHUYLER SAVINGS BANK |
| CITIBANK, N.A. | J.P. MORGAN CHASE BANK* | SHINHAN BANK AMERICA |
| CITIZENS BANK | KEARNY BANK | SOMERSET SAVINGS BANK, SLA |
| COLUMBIA BANK | KEB HANA BANK USA, NA | SPENCER SAVINGS BANK, SLA |
| CONNECTONE BANK | LAKELAND BANK | STURDY SAVINGS BANK |
| CORNERSTONE BANK | LIBERTY BELL BANK, a Division of The Bank of Delmarva* | TD BANK, N.A. |
| CREDIT UNION OF NEW JERSEY | M & T BANK | TRUIST BANK (formerly BB&T) |
| CREST SAVINGS BANK | MAGYAR BANK | TRUSTCO BANK |
| CROSS RIVER BANK | MALVERN BANK, N.A. | UKRAINIAN NATIONAL FEDERAL CREDIT UNION |
| CROWN BANK | MANASQUAN BANK | UNION COUNTY SAVINGS BANK |
| CTBC BANK CORP (USA) (formerly CHINATRUST | METRO CITY BANK | UNITED ROOSEVELT SAVINGS BANK |

| | | |
|---|---|---|
| BANK (USA)* | | |
| CUSTOMERS BANK | MILLVILLE SAVINGS AND LOAN ASSOCIATION | UNITY BANK |
| ESQUIRE BANK NA | MONROE SAVINGS BANK, SLA | UNIVEST BANK & TRUST |
| FIRST BANK | NEWBANK | VALLEY NATIONAL BANK* |
| FIRST COMMERCE BANK | NEWFIELD NATIONAL BANK | WEBSTER BANK |
| FIRST COMMONWEALTH FEDERAL CREDIT UNION | NEW MILLENNIUM BANK | WELLS FARGO BANK, N.A. |
| FIRST FINANCIAL FCU | NEW YORK COMMUNITY BANK, a division of Flagstar Bank, N.A. | WILLIAM PENN BANK |
| FIRST HOPE BANK, NA | NOAH BANK | WOORI AMERICA BANK |
| | NORTHFIELD BANK | WSFS BANK |

**Revised March 22, 2024**

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# BEST PRACTICES FOR WORKING WITH SURVIVORS OF CRIMES

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# N.J. Const., Art. I, Para. 22

*** This section is current through the November 8, 2022 election ***

***LexisNexis® New Jersey Annotated Constitution > New Jersey State Constitution 1947 > ARTICLE I. Rights and Privileges***

## Paragraph 22. Rights of crime victims

A victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system. A victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with law or the Rules Governing the Courts of the State of New Jersey. A victim of a crime shall be entitled to those rights and remedies as may be provided by the Legislature. For the purposes of this paragraph, “victim of a crime” means: a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or an incident involving another person operating a motor vehicle while under the influence of drugs or alcohol, and b) the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide.

## History

Adopted Nov. 5, 1991, effective Dec. 5, 1991.



End of Document

# N.J. Stat. § 52:4B-34

*** Current through New Jersey 221st First Annual Session, L. 2024, c. 87 and J.R. 2 ***

***LexisNexis® New Jersey Annotated Statutes > Title 52. State Government, Departments and Officers (Subts. 1 — 5) > Subtitle 1. General Provisions (Chs. 1 — 9ZZ) > Chapter 4B. Crime Victim Assistance (§§ 52:4B-1 — 52:4B-76)***

## § 52:4B-34. Short title

This act shall be known and may be cited as the “Crime Victim’s Bill of Rights.”

## History

L. 1985, c. 249, § 1, eff. July 31, 1985.



End of Document

LexisNexis

# N.J. Stat. § 52:4B-35

*** Current through New Jersey 221st First Annual Session, L. 2024, c. 87 and J.R. 2 ***

***LexisNexis® New Jersey Annotated Statutes > Title 52. State Government, Departments and Officers (Subts. 1 — 5) > Subtitle 1. General Provisions (Chs. 1 — 9ZZ) > Chapter 4B. Crime Victim Assistance (§§ 52:4B-1 — 52:4B-76)***

## § 52:4B-35. Findings, declarations

The Legislature finds and declares that without the participation and cooperation of crime victims and witnesses, the criminal justice system would cease to function. The rights of these individuals should be given full recognition and protection. The Legislature has the responsibility to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process. In furtherance of this, the improved treatment of these persons should be assured through the establishment of specific rights. These rights are among the most fundamental and important in assuring public confidence in the criminal justice system.

## History

L. 1985, c. 249, § 2, eff. July 31, 1985.



End of Document

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LexisNexis

# N.J. Stat. § 52:4B-36

*** Current through New Jersey 221st First Annual Session, L. 2024, c. 87 and J.R. 2 ***

***LexisNexis® New Jersey Annotated Statutes > Title 52. State Government, Departments and Officers (Subts. 1 — 5) > Subtitle 1. General Provisions (Chs. 1 — 9ZZ) > Chapter 4B. Crime Victim Assistance (§§ 52:4B-1 — 52:4B-76)***

## § 52:4B-36. Findings, declarations relative to rights of crime victims, witnesses

The Legislature finds and declares that crime victims and witnesses are entitled to the following rights:

**a.** To be treated with dignity and compassion by the criminal justice system;

**b.** To be informed about the criminal justice process;

**c.** To be free from intimidation, harassment or abuse by any person including the defendant or any other person acting in support of or on behalf of the defendant, due to the involvement of the victim or witness in the criminal justice process;

**d.** To have inconveniences associated with participation in the criminal justice process minimized to the fullest extent possible;

**e.** To make at least one telephone call provided the call is reasonable in both length and location called;

**f.** To medical assistance reasonably related to the incident in accordance with the provisions of the "Criminal Injuries Compensation Act of 1971," P.L.1971, c.317 (C.52:4B-1 et seq.);

**g.** To be notified in a timely manner, if practicable, if presence in court is not needed or if any scheduled court proceeding has been adjourned or cancelled;

**h.** To be informed about available remedies, financial assistance and social services;

**i.** To be compensated for loss sustained by the victim whenever possible;

**j.** To be provided a secure, but not necessarily separate, waiting area during court proceedings;

**k.** To be advised of case progress and final disposition and to confer with the prosecutor's representative so that the victim may be kept adequately informed;

**l.** To the prompt return of property when no longer needed as evidence;

**m.** To submit a written statement, within a reasonable amount of time, about the impact of the crime to a representative of the prosecuting agency which shall be considered prior to the prosecutor's final decision concerning whether formal criminal charges will be filed, whether the prosecutor will consent to a request by the defendant to enter into a pre-trial program, and whether the prosecutor will make or agree to a negotiated plea;

**n.** To make, prior to sentencing, an in-person statement directly to the sentencing court concerning the impact of the crime.

This statement is to be made in addition to the statement permitted for inclusion in the presentence report by *N.J.S.2C:44-6*;

**o.** To have the opportunity to consult with the prosecuting authority prior to the conclusion of any plea negotiations, and to have the prosecutor advise the court of the consultation and the victim's position regarding the plea agreement, provided however that nothing herein shall be construed to alter or limit the authority or discretion of the prosecutor to enter into any plea agreement which the prosecutor deems appropriate;

**p.** To be present at any judicial proceeding involving a crime or any juvenile proceeding involving a criminal offense, except as otherwise provided by *Article I, paragraph 22 of the New Jersey Constitution*;

**q.** To be notified of any release or escape of the defendant; and

**r.** To appear in any court before which a proceeding implicating the rights of the victim is being held, with standing to file a motion or present argument on a motion filed to enforce any right conferred herein or by *Article I, paragraph 22 of the New Jersey Constitution*, and to receive an adjudicative decision by the court on any such motion.

## History

L. 1985, c. 249, § 3; amended *1991, c. 44*, § 1; *1999, c. 294*, § 2, eff. Dec. 23, 1999; *2001, c. 208*, § 2, eff. Aug. 15, 2001; *2012, c. 27*, § 1, eff. Oct. 6, 2012.



End of Document

# N.J. Stat. § 52:4B-36.1

*** Current through New Jersey 221st First Annual Session, L. 2024, c. 87 and J.R. 2 ***

***LexisNexis® New Jersey Annotated Statutes > Title 52. State Government, Departments and Officers (Subts. 1 — 5) > Subtitle 1. General Provisions (Chs. 1 — 9ZZ) > Chapter 4B. Crime Victim Assistance (§§ 52:4B-1 — 52:4B-76)***

## § 52:4B-36.1. Rights of victim's survivor relative to a homicide prosecution

Pursuant to *Article I, paragraph 22 of the New Jersey Constitution*, in any homicide prosecution:

**a.** A victim's survivor may, at the time of making the in-person statement to the sentencing court authorized by subsection n. of section 3 of P.L.1985, c.249 (*C.52:4B-36*), display directly to the sentencing court a photograph of the victim taken before the homicide including, but not limited to, a still photograph, a computer-generated presentation, or a video presentation of the victim. The time, length and content of such presentation shall be within the sound discretion of the sentencing judge; and

**b.** A victim's survivor may, during any judicial proceeding involving the defendant, wear a button not exceeding four inches in diameter that contains a picture of the victim, if the court determines that the wearing of such button will not deprive the defendant of his right to a fair trial under the *Sixth Amendment of the United States Constitution* and Article I of the New Jersey Constitution. Other spectators at such judicial proceedings may also wear similar buttons if the court so determines. If the victim's survivor seeks to wear the button at trial, the victim's survivor shall give notice to the defendant and to the court no less than 30 days prior to the final trial date.

## History

L. *2012, c. 27*, § 2, eff. Oct. 6, 2012.



End of Document

LexisNexis

# N.J. Stat. § 52:4B-36.2

*** Current through New Jersey 221st First Annual Session, L. 2024, c. 87 and J.R. 2 ***

***LexisNexis® New Jersey Annotated Statutes > Title 52. State Government, Departments and Officers (Subts. 1 — 5) > Subtitle 1. General Provisions (Chs. 1 — 9ZZ) > Chapter 4B. Crime Victim Assistance (§§ 52:4B-1 — 52:4B-76)***

## § 52:4B-36.2. Crime victims not required to pay certain costs

Pursuant to *Article I, paragraph 22 of the New Jersey Constitution*:

**a.** A crime victim shall not be required to pay the maintenance, support, rehabilitation, or other costs arising from the imprisonment or commitment of a victimizer as a result of the crime; and

**b.** A crime victim shall not be charged any fee otherwise prescribed by law or regulation to obtain copies of the victim's own records to which the victim is entitled to access as provided in section 1 of *P.L.1995, c.23* (*C.47:1A-1.1*), including, but not limited to, any law enforcement agency report, domestic violence offense report, and temporary or permanent restraining order.

## History

L. *2012, c. 27*, § 3, eff. Oct. 6, 2012; amended *2014, c. 19*, § 1, eff. Nov. 1, 2014.



End of Document

LexisNexis

# N.J. Stat. § 52:4B-37

*** Current through New Jersey 221st First Annual Session, L. 2024, c. 87 and J.R. 2 ***

***LexisNexis® New Jersey Annotated Statutes > Title 52. State Government, Departments and Officers (Subts. 1 — 5) > Subtitle 1. General Provisions (Chs. 1 — 9ZZ) > Chapter 4B. Crime Victim Assistance (§§ 52:4B-1 — 52:4B-76)***

## § 52:4B-37. “Victim” defined.

**1.**

Section 4 of P.L.1985, c.249 (C.52:4B-37) is amended to read as follows:

As used in this act, “victim” means a person who suffers personal, physical or psychological injury or death or incurs loss of or injury to personal or real property as a result of a crime committed by an adult or an act of delinquency that would constitute a crime if committed by an adult, committed against that person. “Victim” also includes the spouse, parent, legal guardian, grandparent, child, sibling, domestic partner or civil union partner of the decedent in the case of a criminal homicide or act of juvenile delinquency that would constitute a criminal homicide if committed by an adult.

## History

L. 1985, c. 249, § 4; amended 2001, c. 407, § 2, eff. Jan. 8, 2002; 2016, c. 15, § 1, effective July 11, 2016.



End of Document

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# Hunterdon County Prosecutor's Office
# Victim Impact Information Form

Prosecutor's File # Defendant's Name:

Your Name: _____ Indictment #: _____

If you are not the victim, how are you related to the victim? _____
This *Victim Impact Information Form* and *Victim Impact Statement* are ways for you to participate in the prosecution and sentencing of the offender. **Instructions:** Please answer the questions that apply to your situation. If you need more space, you may use additional sheets of paper. Please print neatly or type.

(1) If you were hurt during the incident, please describe your injuries:

_____

_____

(2) Did you need medical treatment because of this incident? YES or NO

(3) Do you have medical insurance that will help you with the cost? YES or NO

(4) If yes, how much will or did you have to pay out of your own money? $ _____
How much has your insurance paid so far? $ _____

(5) Did you have property damaged or stolen in this incident? YES or NO
If stolen, was it recovered by the police? YES or NO
Please list all items damaged or stolen and the cost of each item:

| Item | Date of Purchase | Purchase Price | Current Value |
|---|---|---|---|
| _____ | _____ | _____ | _____ |
| _____ | _____ | _____ | _____ |
| _____ | _____ | _____ | _____ |

(6) Do you have property insurance that will help with the cost? YES or NO
If yes, how much will or did you have to pay of your own money $ _____

The Victims of Crime Compensation Office can provide assistance to cover the cost of medical services, counseling and funeral services. **If you need help filling a claim with the Victims of Crime Compensation Office, please call the Office of Victim Witness Advocacy at (908) 788-1403.** Restitution is money that the offender must pay back to you because of the crime. You have the right to ask for a restitution order. In order for the judge to order restitution, you **MUST** attach copies of bills, receipts or estimates of medical costs, counseling expenses, stolen or damaged property and lost wages. If you do not possess these items at this time, you **MUST** provide them at a later time to receive any consideration. Please note that restitution to you is based on uninsured loss. You **MUST** submit losses to your insurance company if you are covered.

(7) Do you want the judge to order restitution? YES or NO
If yes, what is the total amount requested? $ _____

(8) Would you like help finding a counselor or support group for crime victims? YES or NO

(9) Please attach any photos or receipts that you possess regarding your personal injury and property loss for documentation purposes.

(10) Do you need interpreting services or other special assistance to help you give a statement or testify? If yes, what type of assistance? Please be specific: _____ YES or NO

**Important:** Court rules require the prosecutor's office to give a copy of this form to the defendant.

The above statements are true: _____ _____
Signature Date

# Victim Impact Statement

Prosecutor's File # Defendant's Name:

Your Name: _____ Indictment #: _____

In the space below, please write about how you and your family were affected by this incident. Please do not talk about the facts of the case or anything you might think of as testimony. The judge and the prosecutor would like to know:

(a) your feelings about the incident
(b) how your life is different because of the incident
(c) what you think the defendant's sentence should be

Please return this form and all documents within 10 business days to:

Holly D. Hoff, Victim-Witness Coordinator
Office of Victim-Witness Advocacy
Hunterdon County Prosecutor's Office
65 Park Avenue, PO BOX 756
Flemington, NJ 08822
**Fax (908) 788-1404**

If you have any questions or concerns, please call the county Office of Victim-Witness Advocacy at (908) 788-1403
Si ústed no entiende este formulario, y desea recibirlo en espanol, favor de llamar al numero (908) 788-1403

# FIRE, FLOOD AND TITLE INSURANCE – WHAT REAL ESTATE ATTORNEYS NEED TO KNOW NOW

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# Homeowner's Insurance & Fire/Wildfire

Brad Slater, CPRIA
www.usi.com

# Agenda

- Homeowner's Insurance Basics
  - Coverages
  - Coverage Levels
  - Covered and Non-covered Perils
  - Rate Determination
- Fire/Wildfire Coverage
  - Frequency and cost of claims
  - Fire Coverage – Internal
  - Mitigation
  - Wildfire coverage – External
  - Wildfire Mitigation

## Homeowner's Coverage

- Coverage A – Dwelling
  - Coverage for the main structure from a variety of perils
  - Coverage for destruction and damage to a residence's interior and exterior
  - Calculated using a Replacement Cost Estimator
- Coverage B – Other Structures
  - Coverage for other structures on the property
  - Examples include a shed, fence, and gazebo
  - Usually at least 10% of Coverage A
- Coverage C – Personal Property
  - Also known as Contents coverage
  - Protection against loss and theft of possessions
  - Usually calculated as a percentage of Coverage A

## Homeowner's Coverage Continued

- Coverage D – Loss of Use
  - Additional living expenses if you are displaced from the home due to a coverage loss above and beyond your usual living expenses
  - Typically a percentage of Coverage A. Can also be Actual Loss Sustained
- Coverage E – Personal Liability
  - Coverage for harm to others
  - Protects you from lawsuits filed by others
  - Coverage ranges from $100,000-$1,000,000
- Coverage F – Medical payments to others
  - Pays for medical expenses of a guest who suffers bodily injury while on your property
  - $1,000-$5,000 though higher limits are available

# Coverage Levels

- Replacement Cost
  - Losses to your home and possessions are covered without a deduction for depreciation
  - Allows you to rebuild your home up to the original value
- Actual Cash Value
  - Losses to your home and possessions are covered after a deduction for depreciation
  - Sometimes used for roof coverage
    - For example, you have a 30-year roof that is 15 years old and suffers a total loss. You would receive 50% of the cost of the replacement for the roof
- Extended Replacement Cost
  - More comprehensive coverage that buffers against inflation
  - Coverage above and beyond your Coverage A Dwelling limit
  - Typically 20%-25% higher than Coverage A limit. Higher limits are available

## Covered and Not Covered Perils

- Covered Losses -
  - Fire
  - Hurricanes, storms, and wind/hail
  - Lightning
  - Theft/Vandalism
  - Water leaks/Freezing may require an additional rider
  - Animal Liability
  - Property damage
- Not covered losses –
  - Flood
  - Wear and tear

# How Rates are Determined

- Rates are determined on the likelihood that an insurer will pay out claims. The more variables that contribute to that risk, the higher the rates.
  - Past claims history
    - 5-7 year look back is standard
  - Building materials
    - Wood frames versus stone or brick
  - Condition of the home
    - Normal maintenance to minimize risks (Example – Trees overhanging home)
  - Coverage amount and options/riders included
    - More coverage means higher potential payout from insurer
  - Neighborhood and crime rates
    - Likelihood of theft and vandalism. Also, the number of policies the insurer has in the neighborhood.
  - Deductible amount
    - Lower deductibles will receive higher rates, and higher deductibles will receive lower rates

## Rates Continued

- Centrally monitored burglar, fire, and water detection/shut off system
  - Reduces the risk of a larger claim due to theft, vandalism, fire, and large water leak
    - Visible sign of alarm system and cameras as deterrence
    - Working smoke detectors and sprinkler systems
    - Water leak detection and automative shut off valves
- Increasing your deductible
  - The higher the deductible the lower your premium
  - Take on more risk when you have a claim and prevents many smaller claims from being filed
- Multi-Policy Discounts
  - The more policies with a single carrier means more discounts

## 1 | Fire damage is the third most common property claim, with an average claim size of $84K

**Frequency and claim amount by category:**

| Claim | Frequency of Claims | Average Claims |
|---|---|---|
| Wind & Hail | 34.3% | $12,913 |
| Water Damage & Freezing | 29.4% | $12,514 |
| Fire & Lightning | 25.1% | $83,519 |
| All Other Property Damage | 7.0% | $7,460 |
| Liability | 2.8% | $10,179 |
| Theft | 1.4% | $4,646 |

*Insurance Information Institute

DID YOU KNOW?

Every 24 seconds, a fire department responds to a fire in the United States




9

# Fire Coverage

- Fires have been in the news a lot lately due to the events out on the West Coast
  - Some carriers out West discontinued fire coverage in the standard Homeowner's policy
    - Coverage would require a separate Wildfire policy
    - In high-risk Wildfire areas these policies can be expensive
- Here on the East Coast, Fire coverage is typically covered in a Homeowner's policy
  - Unless specifically excluded
    - Check each policy individually to see if they are excluded
  - Fires can be the result of an internal fire, or external fire (Wildfire)
    - Covers damage from a fire to repair or rebuild the home and replace damaged or destroyed personal property.
  - Also covers Smoke damage due to the covered fire

# Fire Continued

- Risks and Mitigation
  - Are there fire extinguishers on each level of residence?
  - Are there fire/smoke alarms in attic, garage, and basement as well as the rest of the home?
  - Are there Carbon Monoxide detectors through the home?
  - Any electrical or space heaters?
  - Are large appliances plugged directly into an outlet as opposed to an extension cord?
  - Are there pellet or wood burning stoves?
  - Are smoke detectors hard wired and batteries replaced regularly?
  - Types of cooking devices (gas/electrical)
  - How often are dryer vents cleaned?
  - Do you use candles?
  - Do you have an evacuation plan?
  - How far are you from the fire department and water source (hydrant)?

## 4 | These devices can help mitigate and prevent fire damage

| Device | Overview | | Estimated Device Cost | Passive Fire Response | Electrical Fire Prevention | Recommended for Optimal Protection |
|---|---|---|---|---|---|---|
| UL Centrally Monitored Alarm System | Fire/carbon monoxide alarms that are monitored off-site, ensuring quick response to fire even when the homeowner is not present. |  | - Device: $500 - $1,500<br>- Monitor Fee: $100 | ✓ | | ✓ |
| Electrical Hazard Monitor + Surge Protector | Detects signs of electrical fires and alerts homeowners of fire hazard through a mobile app. A surge protector will divert any high-voltage electrical currents. |  | - Monitor: $99 + $49/year<br>- Surge protector: $$250 - $400<br>- Lightning rod: $200 - $400 | ✓ | ✓ | ✓ |
| Sprinklers | Sprinkler systems automatically release water into the home when they detect heat or smoke. |  | - $1 - $4 per square ft (More cost effective when home is under construction) | ✓ | | ✓ |
| Audible Smoke Detector (Fire Alarm) | Detects smoke/heat/flames and triggers alarms to notify people to evacuate the premises. |  | - $10 - $100 per device | | | |

Print ROI Calculator

# Wildfires

- 1 in 5 Americans live in an area with significant Wildfire risk
- 2 of the 3 largest Wildfires in U.S. history have occurred in the past 5 years
- 8 of the 10 costliest Wildfires in U.S. history has occurred since 2017
- Risks and Mitigation
  - Do you have vents that stop hot embers from entering the home?
  - Is there a wood deck or other exposed wood?
  - Is there a wood fence within 5 feet of any structure?
  - Are there leaves and debris build-up in your gutters?
  - Are there plants adjacent to or overhanging any structure?
  - Is there any unmanaged brush within 50 feet of any structure?

# Wildfire Mitigation

- Permanent Wildfire Spray System
  - Protects both the property and structure with real-time fire alerts, firefighting foam, and automated responses
- Enclosed Eaves
  - Protects ignition of roof from open wildfire flames
- Ember Resistant Vents
  - Prevents embers from entering and spreading via the home's vents
    - Leading cause of total losses from wildfire in U.S.
- Exterior Sprinklers
  - Prevents wildfire flames from approaching property
- Portable Firebreak System
  - Mobile and manual firefighting apparatus
- Brush Removal
  - Remove flammable plants and growth

# FLOOD RISK & INSURANCE

Kevin C. Thomas, MBA, CFM, ANFI, ARM

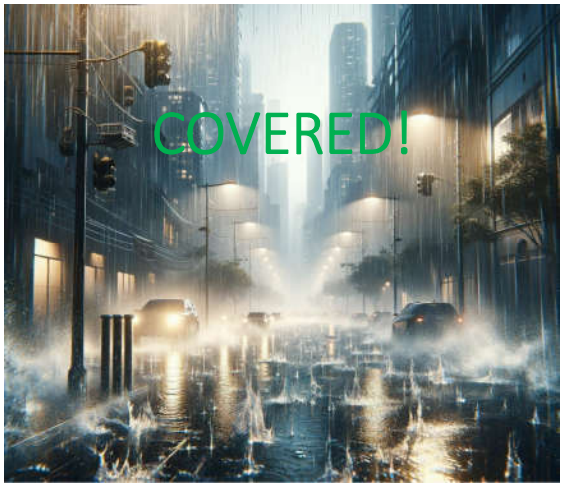
www.usi.com



THE USI ONE ADVANTAGE®

## Covered or Not Covered? – Heavy Rain

## Covered or Not Covered? – Heavy Rain




## Covered or Not Covered? – Broken Pipe

## Covered or Not Covered? – Broken Pipe

## Covered or Not Covered? – Storm Surge

## Covered or Not Covered? – Storm Surge


## Covered or Not Covered? – Hot Water Heater Break

## Covered or Not Covered? – Hot Water Heater Break

## Covered or Not Covered? – Water Main Break

## Covered or Not Covered? – Water Main Break


## What are the Forces of Water?

Buoyancy

Hydrodynamic

Hydrostatic

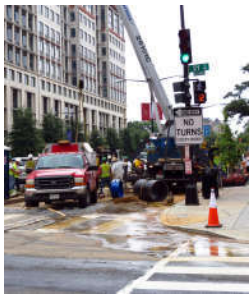
## What is a Flood?

A general and temporary condition of partial or complete inundation of two or more acres of normally dry land, or two or more properties from:

- Overflow of inland or tidal waters
- Unusual and rapid accumulation or runoff of surface waters from any source
- Mudflow

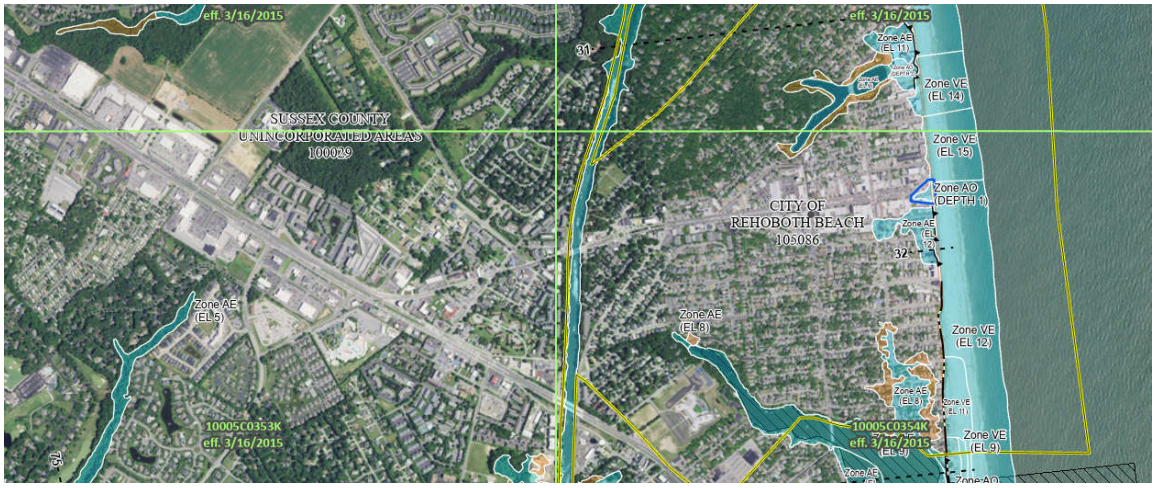
**Homeowners Insurance EXCLUDES flooding and surface water!**

# What Causes Flooding?






# What are Flood Zones?



## What is Base Flood Elevation?

The elevation where a flood has a one percent chance of being equaled or exceeded in any given year

- Applies to V Zones, AE Zones & AH Zones
- AO Zones are based on Depth
- Approximate A Zones have not been assigned a BFE

# What is an Elevation Certificate?

A form provided by FEMA that documents a structure's:

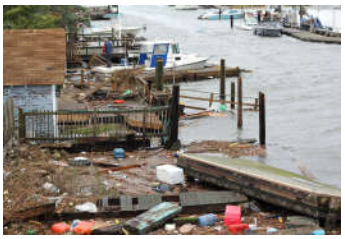
- Location and Flood Insurance Rate Map information
- Foundation type
  - Venting information
- Elevation
  - Foundation or Enclosure
  - Machinery and Equipment
  - Lowest Adjacent Grade and Highest Adjacent Grade
- Preparer's Information

# What does Flood Insurance Cover?

- Structures like dwellings, condo and apartment buildings, warehouses, offices, etc.
- Contents (conditions apply)
- Buildings under construction (conditions apply)
- Increased Cost of Compliance (sublimit/conditions apply)
- Loss Avoidance Measures (sublimit)
- Removal of Non-Owned Debris
- Property Moved to Safety (sublimit)







# Insuring Flood Risk – Federal vs Private Flood Insurance

| | Federal Flood Insurance | Private Flood Insurance |
|---|---|---|
| Waiting Period | 30-day Standard | Up to ten (10) days |
| Replacement Cost Loss Settlement | Only included with Primary home | May be included regardless of occupancy |
| Contents in the basement | Excluded (with few exceptions) | May be included |
| Loss of Use | Excluded | May be included |
| Rebuilding to Code | $30,000 for Increased Cost of Compliance | Higher limits available |
| Single Deductible Option | Not Available – Separate Deductibles Only | Available |
| Excess Flood Coverage | Primary Coverage only subject to maximum limits | Available |

## Insuring Flood Risk – Premium Management

- Letter of Map Changes
  - LOMA – Letter of Map Amendment
  - LOMR – Letter of Map Revision
  - LOMR-F – Letter of Map Revision Based on Fill
- First Floor Height and Elevation of Machinery and Equipment
- Floodproofing
- Community Rating System (CRS)
- NFIP vs. Private Sweet-spots?

# Trends and Issues in Flood Risk – Rising Risk

- 40% of flood losses come from properties deemed to be of low or moderate risk
- Change in climate, sea levels, precipitation, and topography
- Floodplain Management regulations impacting the Increased Cost of Compliance
- Lack of public education

**Table 2: Counties and population at risk by increased frequency of current 1-in-100-year flood event (FSF-PM vs. Atlas 14 comparison)**

| 1 in 100 is (times more likely) | # of counties impacted | Population impacted (millions) | Percent of counties impacted (%) | Percent of popualtion impacted (%) |
|---|---|---|---|---|
| 1 in 50 year or lower (+200%) | 1128 | 167.2 | 36.3% | 51.1% |
| 1 in 25 year or lower (+400%) | 367 | 69.8 | 11.8% | 21.3% |
| 1 in 20 year or lower (+500%) | 221 | 43.6 | 7.1% | 13.3% |
| 1 in 15 year or lower (+667%) | 95 | 22.4 | 3.1% | 6.8% |
| 1 in 10 year or lower (+1,000%) | 20 | 1.3 | 0.6% | 0.4% |
| Total US | 3107 | 327.5 | | |

**Table 3: Selected highly populated cities impacted by Atlas 14 to FSF-PM corrections**

| City | Atlas 14 | Corrected for today | 30 year correction |
|---|---|---|---|
| Baltimore, Maryland | 1 in 100 | 1 in 14 (+614%) | 1 in 12 (+733%) |
| Dallas, Texas | 1 in 100 | 1 in 21 (+376%) | 1 in 18 (+456%) |
| Washington, D.C. | 1 in 100 | 1 in 21 (+376%) | 1 in 19 (+426%) |
| New York City, New York | 1 in 100 | 1 in 23 (+335%) | 1 in 19 (+426%) |
| Philadelphia, Pennsylvania | 1 in 100 | 1 in 29 (+245%) | 1 in 20 (+400%) |
| Chicago, Illinois | 1 in 100 | 1 in 29 (+245%) | 1 in 26 (+285%) |
| Detroit, Michigan | 1 in 100 | 1 in 34 (+194%) | 1 in 16 (+525%) |
| Boston, Massachusetts | 1 in 100 | 1 in 37 (+170%) | 1 in 33 (+203%) |

Data from The 8th National Risk Assessment: The Precipitation Problem, 2023, First Street Foundation

## Trends and Issues in Flood Risk – Adverse Impact

"Floods are 'acts of God', but flood losses are largely acts of man."
- Dr. Gilbert F. White

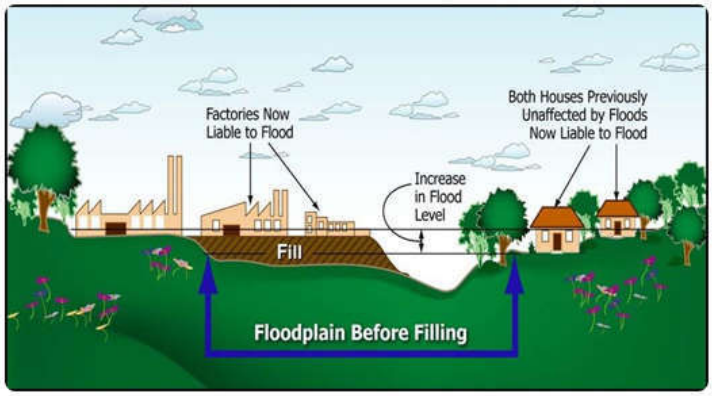



**Illustration of a floodplain before and after filling.** Image courtesy of Nebraska Department of Natural Resources.

## Trends and Issues in Flood Risk- Improving Flood Maps

- Flood zone is no longer a material factor in rating, but rather risk awareness and mandatory purchase requirement
- Proposed Improvements:
- Use better probability calculation
- Flood Prone Area designation
- Sheet & Urban Flooding (AO Zones)
- Building Resiliently and the use of Freeboard

# Trends and Issues in Flood Risk- Lowest Floor Restrictions

Basement building


Split level with basement

Elevated without Enclosure on Posts, Piles, or Piers

Elevated with Enclosure on Posts, Piles, or Piers

Elevated with Enclosure Not on Posts, Piles, or Piers (Solid Foundation Walls)

# Future of Flood Insurance – Taking Action

- Coverage Terms & Availability
  - Private Insurers
    - Risk education
    - CAT Bonds/Reinsurance
    - Parametric Programs
  - NFIP
    - Recognized need for improvement
- Resilience
  - Extended the CBRA area
  - Aggressive Freeboard requirements
  - Prohibit fill in new development
  - CISA

# Future of Flood Insurance - Assessing Risk and Client Needs

CBO Report – Communities at Risk of Flooding (September 2023)

- Demographic breakdown of communities with the greatest current risk (2020) and those with the greatest projected increase in risk (2050)
  - Current properties at risk – 9.1%
  - Projected properties at risk – 10.1%

# Future of Flood Insurance - Assessing Risk and Client Needs

Household Income

- Median household income less than $41,489 – greatest current and projected risk
  - 10.3% to 11.5%
- Median household income more than $99,038 – lowest current and projected risk
  - 7.3% to 8.2%
- Projected risk for coastal communities with a majority of low-income households: +5%

# Future of Flood Insurance - Assessing Risk and Client Needs

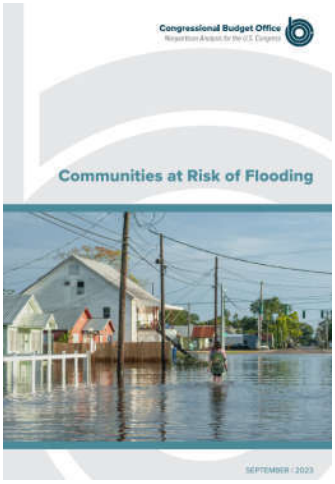
Race

- Communities with a larger share of White householders have the greatest current risk: 11.5%
- Communities with at least 70% of Black householders have the greatest projected increase in risk: +2.3%
- Projected risk for coastal communities with a majority of Black householders: +10%

# Future of Flood Insurance - Assessing Risk and Client Needs

Ethnicity

- Communities with a majority of Hispanic householders have a lower current risk (8.3%) than communities with a majority of Non-Hispanic householders (9.1%)
- Higher income, Hispanic communities have a greater risk of flood than higher income, Non-Hispanic communities
  - Hispanic – 10.4% to 11.6%
  - Non-Hispanic – 7.3% to 8.2%



## Future of Flood Insurance - Preparing for the Next Generation

Generation

Z

(1995 – 2012)

=

22%

Of the US Population

And

$7T

In Buying Power & Influence

# Future of Flood Insurance - Preparing for the Next Generation

**Gen Z is More Racially Diverse**
(50% White, 25% Hispanic, 14% Black, 6% Asian, and 5% Other*)

Black communities have the largest projected increase in risk.

U.S. Black population increased by 32% since 2000, and the current average age is 27, while the White population declined by 3%. And the average age is 58*

**Median Gen Z Annual Income is trending higher than other generations ****

Higher household income tends to be an indicator of less risk except for Hispanic households.

1 out of 4 Gen Zer's identifies as Hispanic.

**Gen Z Distrusts American Companies/Institutions**

63% of Gen Z consumers trust influencers over celebrity spokespeople.***
Only 42% of Gen Z trust companies.****

Representation and authenticity matter, especially when advising Gen Z on risk!

*Source: Pew Research Center
**Source: Federal Reserve
***Source: Morning Consult
****Source: EMarketer

## Future of Flood Insurance - Preparing for the Next Generation

### Gen Z Consumer Behaviors

Seeks recommendations and reviews

Non-Binary Solutions

Social Responsibility

Less Impulsive and seeks stability


PERSONAL RISK PRACTICE LEADER

**Kevin C. Thomas, MBA, CFM, ANFI, ARM**
Personal Risk Practice Leader – MidAtlantic
Office: 302-397-0328 Cell: 302-220-0541

Kevin Thomas serves as a Practice Leader for USI Personal Risk Services in the MidAtlantic Region. His insurance career began in 2004, and since then he has held various sales, operational, and leadership roles with national and regional firms. His personal experiences with flood and fire losses drive his passion to educate others on importance of insurance and preparing for risk.

Kevin is a graduate of Goldey-Beacom College in Wilmington, DE, with a Bachelor of Science degree in Business Administration, and dual Master of Business Administration degrees with concentrations in Human Resource Management and Marketing Management. While at Goldey-Beacom, Kevin earned the Nelson Debater of the Year Award, and currently serves the college as an adjunct professor. Kevin is also certified in Diversity, Equity, and Inclusion through the University of South Florida.

Kevin has earned the Certified Floodplain Manager certification from the Association of State Floodplain Managers, as well as the Associate in National Flood Insurance and Associate in Risk Management designations from The Institutes. A committed lifelong learner to the subject of risk, Kevin's specific focus on flood risk and mitigation has provided opportunities for him to present on the topic on national, state, and local levels.

# MEMORY ON TRIAL – PLEMNARY SESSION FOR LAWYERS IN EVERY KIND OF PRACTICE

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The Professional Education Group

STEPHEN EASTON

# MEMORY ON TRIAL

## The Unseen Challenges of Witness Testimony

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The Professional Education Group

# STEPHEN D. EASTON

New Program

# Memory on Trial

## The Unseen Challenges of Witness Testimony

## About the Program

Explore the complexities and pitfalls of witness memory in high-stakes legal settings. Using a modern marine court martial trial as a case study, this seminar delves into the psychological intricacies of memory, common errors in recall, and the impact on justice. Gain insights into how memory works, the factors that influence it, and strategies to effectively handle memory-related issues in the courtroom. Join us for a compelling look at the unseen challenges of witness testimony and learn practical approaches to navigate them.

## We will Discuss:

- The Science of Memory: How memory works and reliabilty
- Common Memory Errors in Recall
- Impact on Justice
- Strategies for Legal Professionals
- Case Study Analysis: In-depth review of a real life court-martial case illustrating the impact of witness memory on the judicial process

**Since 1981, we've championed empowering attorneys and clients through dedicated professional development. With a steadfast focus on education, motivation, and inspiration, we've cultivated a culture of excellence in the legal profession.**

## Contact Us:


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Kristi@proedgroup.com


POWERHOUSE THE Professional Education Group

## ABOUT YOUR PRESENTER

# STEPHEN D. EASTON

Professor and Attorney at Law

## PROFESSIONAL BIOGRAPHY

**Stephen Easton is a trial lawyer and award-winning teacher who has excelled at trial and in both law school and CLE classrooms. His energy and focused approach flawlessly translate into practical and entertaining CLE presentations.**

**Steve was the President of Dickinson State University until his retirement in late 2024. Prior to that, Easton served as the U.S. Attorney for the District of North Dakota. He has tried cases in civil and criminal courts—in fact, with 4 trials in the past few years, Easton has now tried cases to successful jury verdicts from all 4 seats available to trial attorneys—prosecution, criminal defense, plaintiff's attorney and civil defense attorney.**

**Easton spent 4 years as Dean of the University of Wyoming College of Law, where he also taught trial skills. He continued to hone his impressive litigation skills by actively trying cases even while serving as law professor and dean. Previously, he served as a professor of law at the University of Missouri Columbia School of Law. During his time in North Dakota, Easton was also a partner in the firm of Pearce & Durick, where he concentrated on product liability and insurance defense.**

**Easton was the recipient of the Richard S. Jacobson Award for Excellence in Teaching Trial Advocacy from the Pound Civil Justice Institute, and the Warren E. Burger Prize for scholarship concerning legal excellence, civility, ethics and professionalism from the American Inns of Court.**

**He is the author of three essential guidebooks for attorneys, Opposing Adverse Experts (ABA), How to Win Jury Trials: Building Credibility with Judges and Jurors (ALI-CLE), and Problems, Cases & Materials in Professional Responsibility (Thomson-West). Easton co-authored with Thomas Mauet the book "Trial Techniques and Trials." He has also been published in both the legal and popular press, including The Federal Lawyer; The Practical Litigator; Stanford Law Review; The Wall Street Journal; and USA Today. Easton received his B.A. from Dickinson State University and his JD from Stanford Law School.**

# Program Details

# Memory on Trial

## Stephen Easton

## 2 Hours

### PROGRAM OVERVIEW

**The work of Dr. Elizabeth Loftus and other psychologists has established that a person's recollections about what happened on a particular occasion are often not consistent with what actually happened on that occasion. As Dr. Loftus has said, "[W]hat we believe with all our hearts is not necessarily the truth."**

**Although this seminar is set in the context of litigation, the problems of honest, but incorrect, memories affect all attorneys, including those in transactional, estate planning, family law, and mediation practice. If an attorney believes that a witness's memory is honest, but nonetheless inaccurate, s/he faces an uphill battle. How can that attorney help clients, third parties, jurors, and others understand that they probably overvalue honest memories?**

**Our justice system reflects this over-reliance on honest memories. Many jurisdictions have pattern jury instructions advising jurors about their duty to determine if a witness is testifying honestly, but few have pattern jury instructions advising them about the imperfections of human memory.**

**In this presentation, Steve Easton will provide a case study of a trial whose result turned on the reliability of witnesses' memories. Easton, along with Marine Corps Lt. Col. Jessica Martz (ret'd) and others, represented a Marine Corp Drill Instructor who was charged with illegally kicking a recruit.**

# Program Details

## Memory on Trial

## Stephen Easton

**2 Hours**

**PROGRAM OVERVIEW (continued)**

**This presentation will open with a display of portions of the 300+ page command investigation of the allegations against their client. Easton, who received informed consent from their client to tell the story of this case in articles and lectures for educational purposes, will show statements from over a dozen witnesses who said that their client "Spartan kicked" the recruit. He will then ask attendees to consider how they might try to convince the jury that these memories were less than fully reliable.**

**Easton will then describe how he and then-Major Martz attempted to persuade the jurors ("members," as they are known in court-martial trials) that the witnesses' memories, even though (and to some extent because) they were so consistent, were less than fully reliable. The presentation will end with a discussion of the dangers of over-reliance on honestly reported memory and potential "solutions" the judicial system and practicing attorneys should consider.**

**This is a review of the realities of attempting to make jurors and others aware of a phenomenon—the imperfection of human memory—that is well known to psychologists, but largely unknown to others. It should be of interest, with practical application, to practitioners of all areas of law.**

# Program Outline & Schedule

## Memory on Trial

**2 Hours**

### Outline

**Potential Tactics for Those Challenging Honest, but Incorrect Witness Testimony**

- Reading the File
- Investigation
- Review of Medical Records
- Snooping:
- Going to the Scene(s) of Key Events
- Exploring Potential Availability of Video Records of Key Events
- Learning About the Culture that Might Have Affected Events and Memories

**Research About Memory Scholarship**

- See Bibliography and Quotations, infra

**Exploring Settlement (or, in Criminal Cases, Plea Bargaining)**

**Attempting to Exclude the Testimony of Opposing Witnesses**

**Applying Common Sense**

- Arguing Common Sense to Jurors, to Demonstrate Confidence in Their Judgment

**Fronting the Opposing Honest, but Incorrect, Testimony by Opposing Witnesses in Opening Statement**

**Exposing the Cracks in the Opponent's Witness Testimony and Case**

- Constructing Timelines
- Identifying Influences on Opposing Witnesses' Memories
- Outlining Significant Details that Reduce Opposing Witness Reliability

# Program Outline & Schedule

## Memory on Trial

2 Hours

### Outline (continued)

**Cross-Examination**

- Limiting Cross to Key Points
- Using Cross to Highlight Problems with Witness Memory

**Calling Witnesses to Contradict Opposing Witness Testimony**

- Using Evidence Rule 611 to Ask Leading Questions of Witnesses Identified with Adverse Parties
- Understanding the Limited Impact of "I Did Not Observe That" Testimony

**Presenting Effective Expert Testimony**

- Overcoming Jurors' Trust in Honest Witness Recollection
- Finding and Paying Effective Expert Witnesses

**Resisting the Temptation to Call Character Witnesses**

- Understanding that Evidence Rule 404 Allows Criminal Defendants to Call Character Witnesses, at the Risk of Opening the Door to Prosecution Character Witnesses

**Presenting Your Client's Testimony**

**Introducing Habit Evidence**

- Understanding Evidence Rule 405 Regarding Habit Evidence

**Taking Advantage of Opportunities Presented by Opposing Counsel's Mistakes**

**Using Jury Instructions**

- **Understanding the Problems with Many Pattern Jury Instructions**
- **Looking for Key Phrases in the Court's Instructions to the Jury**

**Arguing Witness Credibility Effectively in Closing**

**Concluding Remarks - Question and Answer Session - Adjournment**

# Bibliography of Potentially Helpful Articles

# About Human Memory

Preliminary Note: This is NOT an exhaustive or up-to-the-minute outline of the extensive research on how the human memory works and the importance of correctly understanding human memory in the justice system and the practice of law. Those working on cases involving memory issues are encouraged to conduct their own research to find the latest, and most applicable, research.

In particular, this bibliography does not attempt to catalog the extensive research conducted by Dr. Elizabeth Loftus of UC-Irvine. She is the internationally recognized pioneer of this important research. Anyone working on a case hinging on human memory should consult her extensive publications.

Hartmut Blank, James Ost, Jo Davies, Georgina Jones, Katie Lambert, and Kelly Salmon, *Comparing the influence of directly vs. indirectly encountered post-event misinformation on eyewitness remembering*, Acta Psychological 144 (2013) 635-641

David H. Dodd and Jeffrey M. Bradshaw, *Leading Questions and Memory: Pragmatic Constraints*, Journal of Verbal Learning and Verbal Behavior 19, 695-704 (1980)

Lorraine Hope, James Ost, Fiona Gabbert, Sarah Healey, and Emma Lenton, *''With a little help from my friends...'': The role of co-witness relationship in susceptibility to misinformation*, Acta Psychological 127 (2008) 476–484

Fiona Jack, Sarah Zydervelt, and Rachel Zajac (2014) *Are co-witnesses special? Comparing the influence of co-witness and interviewer misinformation on eyewitness reports*, Memory, 22:3, 243-255, DOI: 10.1080/09658211.2013.778291

Gunter Kohnken and Claudia Brockmann, *Unspecific Post event Information, Attribution of Responsibility, and Eyewitness Performance*, Applied Cognitive Psychology, Vol. 1, 197-207 (1987)

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Peter L. Pirolli and John O. Miller, *The effect of leading questions on prior memory: Evidence for the coexistence of inconsistent memory traces*, Canadian Journal of Psychology, Volume: 38, pp. 135 et seq., Jan 1, 1984, http://libproxy.uwyo.edu/login/?url=http://search.proquest.com/docview/1289993194?accountid=14793

Mark G. Rivardo, Anna T. Rutledge, Cortney Chelecki, Brooke E. Stayer, Macie Quarles, & Ashley Kline, *Collaborative Recall of Eyewitness Event Increases Misinformation Effect at 1 Week*, North American Journal of Psychology, Volume 15, Issue 3, pp. 495-512 (Dec 2013), http://libproxy.uwyo.edu/login/?url=http://search.proquest.com/docview/1467525296?accountid=14793

Elin M. Skarberg and Daniel B. Wright, *The co-witness misinformation effect: Memory blends or memory compliance?*, Memory, 2008, 16(4), 436-442

Emyo Wang, Helen Paterson & Richard Kemp, *The effects of immediate recall on eyewitness accuracy and susceptibility to misinformation*, Psychology, Crime & Law (2014), 20:7, 619-634, http://dx.doi.org/10.1080/1068316X.2013.854788

## Quotations About Human Memory

“What you end up remembering isn't always the same as what you have witnessed.”

— Julian Barnes, The Sense of an Ending

“Different people remember things differently, and you'll not get any two people to remember anything the same, whether they were there or not.”

— Neil Gaiman, The Ocean at the End of the Lane

“Memory is like plaster: peel it back and you just might find a completely different picture.”

— Jodi Picoult, Handle with Care

“Few things are more deceptive than memories.”

— Carlos Ruiz Zafón, The Shadow of the Wind

“It's strange how memory gets twisted and pulled like taffy in its retelling, how a single event can mean something different to everyone present.”

— Lisa Unger, Beautiful Lies

“And the moral of the story is that you don’t remember what happened. What you remember becomes what happened.”

— John Green

“There is the truth of history, and there is the truth of what a person remembers.”

— Rebecca Wells, Divine Secrets of the Ya-Ya Sisterhood

“You will remember this when all else fades, this moment, here, together, by this well. There will be certain days, and certain nights, you’ll feel my presence near you, hear my voice. You’ll think you have imagined it and yet, inside you, you will catch an answering cry. On April evenings, when the rain has ceased, your heart will shake, you’ll weep for nothing, pine for what’s not there. For you, this life will never be enough, there will forever be an emptiness, where once the god was all in all in you.”

— John Banville, The Infinities

“But it's funny how the memory works and how sometimes we just believe whatever we want.”

— Chris Bohjalian, Secrets of Eden

“We humans are different--our brains are built not to fix memories in stone but rather to transform them. Our recollections change in their retelling.”

— Mira Bartok, The Memory Palace

“We tend to think of memories as monuments we once forged and may find intact beneath the weedy growth of years. But, in a real sense, memories are tied to and describe the present. Formed in an idiosyncratic way when they happened, they're also true to the moment of recall, including how you feel, all you've experienced, and new values, passions, and vulnerability. One never steps into the same stream of consciousness twice.”

— Diane Ackerman, An Alchemy of Mind: The Marvel and Mystery of the Brain

“Memory likes to play hide-and-seek, to crawl away. It tends to hold forth, to dress up, often needlessly. Memory contradicts itself; pedant that it is, it will have its way.”

— Günter Grass, Peeling the Onion

“The saddest thing that can happen to a person is to find out their memories are lies.”

— Juan Gabriel Vásquez, The Sound of Things Falling

“Memories are not always the best measure of things.”

— Amy Neftzger, The Orchard of Hope

“Memory Lane always seems to be under reconstruction.”

— John R. Dallas Jr., We Need to Have a Word: Words of Wisdom, Courage and Patience for Work, Home and Everywhere

“Memories, may be beautiful and yet what's too painful to remember we simply choose to forget.”

The Way We Were 1973 (written by Marvin Hamlisch, Alan Bergman, and Marilyn Bergman; sung by Barbra Streisand)

“The most horrifying idea is that what we believe with all our hearts is not necessarily the truth.”

Elizabeth Loftus, 1996, AU:Neimark

# NEURODIVERSITY IN THE WORKPLACE

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GREGORY J. DOMURAT v. CIBA SPECIALTY CHEMICALS CORPORATION

This case can also be found at 353 N.J. Super. 74, 801 A.2d 423.

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-5221-00T2

GREGORY J. DOMURAT,

Plaintiff-Appellant,

v.

CIBA SPECIALTY CHEMICALS

CORPORATION,

Defendant-Respondent.

_____

Argued April 23, 2002 - Decided July 5, 2002

Before Judges Collester, Lintner and Parker.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket Number
L-9885-97.

Edward J. Nolan argued the cause for appellant
(Deutsch, Resnick, Green & Gramigna, attorneys;
Mr. Nolan, on the brief).

Marvin M. Goldstein argued the cause for
respondent (Proskauer Rose, attorneys; Mr.
Goldstein and Devora L. Lindeman, on the brief).

The opinion of the court was delivered by

PARKER, J.A.D.

Plaintiff appeals from a jury verdict in favor of defendant in an employment discrimination case under the Law Against Discrimination (LAD). N.J.S.A. 10:5-1 to -42. Plaintiff alleged that he was wrongfully discharged by Ciba Specialty Chemicals Corporation (Ciba) in violation of the LAD because of his age (50) and his handicaps (Attention Deficit Disorder (ADD), alcoholism, depression and Lyme disease)See footnote 11. We affirm.

Prior to his employment by Ciba, plaintiff had a history of academic and employment success. He earned an Associates Degree summa cum laude and was valedictorian of his junior college class in 1966. In 1968, he earned his Bachelor of Science degree with a major

in botany and a minor in chemistry. After graduating from college, he held a number of jobs with increasing responsibilities.

Plaintiff was hired by Ciba as a Technical Sales Representative on September 1, 1978, to sell and market Ciba's pigments to industrial customers. He worked from his home in New Jersey and reported to a supervisor in Ciba's Newport, Delaware, facility. He was promoted to Senior Technical Sales Representative in the late 1980's. In that position, he was responsible for major national accounts. His job responsibilities included preparing written reports, such as: (1) call reports, documenting key events with customers and customer needs, to identify sales opportunities and develop new products; (2) monthly reports describing activities in his sales territory; (3) quarterly reports to advise customers on the work Ciba did on their behalf during the quarter; and (5) expense reports. Plaintiff submitted these reports to his Delaware- based managers. Plaintiff was also responsible for developing "action plans related to market segment sales strategies.

Plaintiff received good annual appraisals throughout his years at Ciba until 1991. From 1985 to 1989, his annual appraisals indicated that he met or exceeded his job requirements. In 1990, he was rated a "valued contributor" and received satisfactory ratings in all performance skill factors. His supervisor testified that prior to 1991, plaintiff's customer relationships were good and, although his reporting was not perfect, he "met expectations" in this area.

In 1991, plaintiff's performance deteriorated significantly. In the early part of that year, plaintiff was filing his reports timely. By July, however, his reporting had become sporadic and he had not developed customer-specific business plans. His supervisor, Christopher Whiston, rated his performance for that year below the lowest ranking and plaintiff was placed on a ninety-day performance probation. In a written response to his 1991 evaluation, plaintiff acknowledged that:

The severity of this review has reopened my eyes and mind to the overall requirements and responsibilities of my position as a Senior Tech. Sales Rep. within the Pigments Division. Some personal family matters over the past several years have diverted my attention away from some of these important responsibilities. While I don't believe that my overall territory customer responsibilities have been neglected, certain job requirements have been lacking and extra effort is in order.

I understand the objectives and terms for my continued employment with Ciba-Geigy. I can and do rededicate myself to fulfilling all of the requirements of my position and look

forward to being judged a valued contributor, and more, to the Pigments Division of Ciba-Geigy.

Plaintiff's ninety-day probation required him to perform the basic functions of his job, such as making and documenting customer needs and problems through call reports, analyzing potential opportunities for expanding Ciba's market and submitting all reports on time. Plaintiff successfully completed his probationary requirements by April 1992. His 1992 and 1993 performance appraisals indicated that he was, once again, a "valued contributor." Whiston considered plaintiff "a valuable part of the organization" because he had a lot of years of experience, he had developed customer relations, he understood the business and "[h]e was intelligent, likeable, friendly. He was a strong combination of ... factors."

In 1994, Whiston was promoted and plaintiff's new supervisor was Paul Legnetti. Legnetti had been employed by Ciba since 1981 and had worked with plaintiff from 1981 to 1983, traveling with him five or six times a year. Legnetti had a high regard for plaintiff and "thought Greg was a competent professional salesperson, always ... highly regarded by his customers, ... was well-liked within the organization." Legnetti rated plaintiff a "valued contributor" in his 1994 annual appraisal but noted "disappointing results" in plaintiff's Dispersion House Study, "not so much from ... the information gathered as from the reporting of the results." The Dispersion House Study was assigned to plaintiff during 1994, requiring him to do a market analysis of sales opportunities in the specialized dispersion industry. He had been assigned similar studies in the past.

In the summer of 1994, plaintiff again began experiencing personal problems and by early 1995, four of his key national accounts complained to Legnetti about lack of services. Specifically, the complaints indicated that plaintiff

was not following up on a number of items ... in order to support and fulfill that customer's expectations, that letters about pricing or about other commitments that we were making to those customers were not being delivered on a timely basis, that the overall level of support and commitment that they perceived when Greg was representing Ciba had declined .... [O]ne customer related to [Legnetti] that it almost looked as though Greg didn't know very much about their business anymore.

That complaint was from a very long-term customer who had known plaintiff for a long time.

Plaintiff testified that he had been a "social drinker" until 1991 when he stopped drinking altogether because his wife threw him out of the house for having "beer breath." He subsequently attended Alcoholics Anonymous for three months at his wife's urging and did not drink alcohol at all. In the summer of 1994, however, he began drinking again. At the same time, plaintiff's wife had medical problems for which she was taking a narcotic pain killer and plaintiff began to abuse her medication. His son was being treated for Attention Deficit Disorder (ADD), and plaintiff abused his son's medication as well.

In January 1995, plaintiff saw a psychiatrist, Dr. Jay Kuris, and told Dr. Kuris that he thought he had ADD and that he was an alcoholic. Plaintiff testified that Dr. Kuris prescribed Cylert for ADD, Wellbutrin for depression and Klonopin to help him sleep and stop drinking alcohol. Dr. Kuris did not testify.

Later in 1995, plaintiff's performance with one customer became so seriously deficient that Legnetti assigned the customer to another sales representative. Legnetti himself observed a general decline in plaintiff's performance: his reports became sporadic, lacked their former quality and no longer contained necessary details. Legnetti spoke to plaintiff about his observations and the customer complaints "on a fairly regular basis." He asked plaintiff if there was anything causing the problems and plaintiff told him "that he had some personal issues at home that required a bit of his attention; his wife wasn't feeling well, ... he had some issues with his son that again required some of his attention, ... and that _ he had been doing personal projects and things like that around the house that took up a bit of his time." Legnetti took no action at that time, however, hoping plaintiff would work out the problem.

In June 1995, Legnetti traveled with plaintiff on a number of sales calls and personally observed plaintiff's poor performance in front of customers. He observed that plaintiff was confused, disorganized, "didn't recall the details of prior conversations or agreements with those customers, [and] that the overall preparation and analysis that's required before one goes to see a major customer hadn't occurred." Legnetti also observed that plaintiff's driving was erratic, "that he appeared inattentive while he was driving, speeding up and slowing down ... in the middle lane. Veering over to make a quick exit at the exit ramp."

Legnetti spoke with plaintiff about his observations and plaintiff admitted that he was unprepared for the calls and had forgotten to bring along necessary documents. He also admitted that he was "not functioning to [his] full capacity," and that he was experiencing a number of personal problems on new medications he was taking. He told Legnetti his doctors thought he might have ADD.

Legnetti reported plaintiff's poor performance to Whiston, now Legnetti's supervisor, and they agreed to place plaintiff on probation again, hoping plaintiff would respond as he did in 1992. Before placing plaintiff on probation, however, Legnetti described the situation to John DeSousa, Ciba's Human Resources Manager, who became concerned that plaintiff's erratic driving might be caused by substance abuse. DeSousa recommended that plaintiff be seen by Ciba's on-site Health Services Department (Health Services) in Newport, Delaware.

Plaintiff went to Delaware on July 13, 1995, where he met with Legnetti to discuss performance issues and then with Kay Ciabattoni, an Occupational Health Nurse and head of the on-site Health Services. Plaintiff told Ciabattoni that he was receiving psychotherapy and medication for ADD and discussed his drinking history and his various ailments, including suspected Lyme Disease and a recent shoulder injury. Plaintiff showed Ciabattoni the ten to twelve different medications he was taking, including a narcotic pain killer and an over-the-counter allergy medication.

Plaintiff met with Dr. David Jesic, an on-duty contract doctor who worked part-time at Health Services. Ciabattoni and Dr. Jesic suggested that plaintiff be evaluated at Bowling Green, a local drug and alcohol treatment center, to determine whether the multiple medications were causing his lack of concentration, difficulty driving and other recent problems. Ciabattoni was aware that plaintiff had been taking his wife's pain medication and was concerned that "not all of [plaintiff's] doctors knew ... all of the other medications that other doctors were prescribing."

Plaintiff was evaluated at Bowling Green on July 25, 1995, where it was determined that he was over-medicated and needed to taper off on some of the drugs. Ciabattoni approved plaintiff's request for evaluation and treatment at Carrier Clinic, closer to his home.

On July 28, 1995, plaintiff was evaluated at Carrier by a psychiatrist, Dr. Patel. He gave the same medical history he had provided to Health Services and told Dr. Patel that he was a "recovering alcoholic" but had stopped drinking in May 1995. Dr. Patel told plaintiff he was "probably taking too many drugs," and that he needed to taper off Klonopin, which has a sedative effect. Dr. Patel reported to Ciabattoni that plaintiff's performance problems were related to the medications he was taking and recommended that plaintiff become "affiliated with some sort of an AA group" and with Carrier's Out-Patient Alcohol Treatment Services (OATS). After attending only one session at OATS, however, plaintiff decided he did not need the program because he had already stopped drinking on his own.

On July 27, the day he was evaluated at Carrier, plaintiff requested and was granted work restriction limiting him to paperwork at home because he was uncomfortable driving with

all the medications he was taking. On August 10, 1995, plaintiff requested, and was granted, an extension of the work restriction because he was still feeling the effects of the medications. On August 16, 1995, plaintiff saw a new psychiatrist, Dr. Vasquez, who specialized in ADD and substance abuse. Dr. Vasquez recommended that plaintiff attend ninety AA meetings in ninety days, but plaintiff declined to do so.

On August 25, 1995, plaintiff was examined at Health Services and cleared for return to a full work schedule. Dr. Vasquez, his treating psychiatrist, completed a "return to work" form indicating plaintiff's diagnosis was "alcohol dependence." Plaintiff did not request any further work restrictions or accommodations from Ciba.

That same day, August 25, plaintiff met with Whiston and DeSousa in Delaware and they informed him that he was being placed on probation for ninety days and, if his performance did not improve, he would be subject to "further disciplinary action up to and including termination of [his] employment." As part of his probationary requirements, plaintiff communicated regularly with Legnetti to review his progress. Legnetti informed plaintiff that he was not meeting his performance objectives satisfactorily. Legnetti testified that plaintiff acknowledged his failures, claiming that personal/family issues were taking up a substantial amount of his time and preventing him from completing the assigned projects. Legnetti stated that plaintiff did not claim at any time that his medical condition prevented him from performing his job; plaintiff only mentioned that he was receiving continuing treatment for his Lyme Disease and shoulder problems.

Plaintiff claimed, however, that he asked Legnetti to be relieved of his participation on the International Standards Organization (ISO) Team, so he could have more time to complete his assigned projects and to review a market opportunities analysis completed by another sales representative. Plaintiff testified that Legnetti refused the request, but Mark Dunn and Michael Williams, the ISO team leaders, testified that plaintiff was not assigned to any ISO audits between August and November 1995. In October 1995, plaintiff volunteered to work on the ISO Auditor Steering Committee but attended only one committee meeting and never asked to be relieved of his participation.

Legnetti testified that plaintiff did not successfully meet the objectives of his performance probation, notwithstanding the numerous extensions of time he was given. Legnetti said that he observed a further decline in plaintiff's performance during the probationary period. Plaintiff admitted that he did not meet the probationary performance objectives, despite extensions of time granted by Legnetti.

As a result of the "downward spiral" in plaintiff's performance, on November 17, 1995, Legnetti and DeSousa met with plaintiff in Delaware. Legnetti summarized plaintiff's

failures to meet his probation objectives, and DeSousa gave him a letter of termination. Plaintiff asked for another chance and for more time to complete his assignments. He also raised the issue of his medical problems. DeSousa responded that plaintiff's doctor had cleared him to return to work without any limitations, and the company had no indication that plaintiff had a medical problem which prevented him from doing his job. Nevertheless, DeSousa told plaintiff if he produced medical documentation, Ciba might reconsider its termination decision.

On November 17, the day he was terminated, plaintiff wrote a letter to DeSousa claiming he had been "wrongfully terminated" by Ciba without consideration of the fact that his poor performance was "primarily caused by a series of medical problems that started in January of 1995, and further complications brought on by inappropriate treatment while under the care of a psychiatrist, for diagnosed Attention Deficit Disorder."

On November 20, 1995, plaintiff went to Dr. Vasquez's office with a three-page letter explaining that he had been terminated by Ciba for not meeting his performance objectives. He asked Dr. Vasquez to contact DeSousa about his treatment and the effect of his medication and illness on his ability to perform his job. In response to plaintiff's letter, Dr. Vasquez contacted Health Services on November 20 and informed them that plaintiff had not been attending the substance abuse meetings as Dr. Vasquez had recommended. DeSousa never received any information, written or otherwise, from Dr. Vasquez or any other treating physician, regarding plaintiff's medical condition.

At trial, two psychiatrists testified as experts: Dr. Allwyn Levine for plaintiff and Dr. Morton Fridman for defendant. Dr. Levine testified that plaintiff "suffers from an Attention Deficit Disorder and co-morbid conditions of alcoholism and substance use disorder. He also has some of the other stigmata that are often seen in Attention Deficit Disorder, specifically, organizational difficulties, difficulties in planning. These have basically been lifelong difficulties." He did not explain, however, how plaintiff had managed academic and employment success until 1991 and again from 1992 to 1994. Dr. Levine testified that by August 1995 plaintiff was no longer suffering from a substance use disorder because he had stopped drinking in 1992. Dr. Levine did not mention plaintiff's admission that he began drinking again in 1994 and stopped in May 1995.

Defendant's expert, Dr. Fridman, opined that in 1995 plaintiff's "presentation was consistent with Attention Deficit Hyperactivity Disorder, a history of alcohol abuse, as well as depression and anxiety." Dr. Fridman considered plaintiff's abuse of prescription medications the "major problem" affecting his job performance in 1995. Plaintiff's ADD, on the other hand, was relatively mild and "affecting him minimally in '95." In Dr. Fridman's

opinion, if plaintiff had not been abusing substances or experiencing family/personal problems in 1995, his performance would have been acceptable, as it had been in the past.

In addition to the two experts, one of plaintiff's succession of treating psychiatrists testified. Dr. Ricardo Fernandez began treating plaintiff in May 2000, almost five years after his termination. After plaintiff's first visit, Dr. Fernandez indicated that plaintiff "seemed" to have a history of ADD and gave plaintiff and his wife questionnaires from which the doctor concluded plaintiff did have ADD. Dr. Fernandez agreed that ADD is difficult to diagnose because its symptoms overlap with other psychiatric conditions and people with ADD often have multiple psychiatric disorders. Dr. Fernandez described ADD as follows:

Attention deficit disorder is a condition in which a person has an inability to maintain attention and focus on attention and is easily distracted from pursuing tasks that require attention. It usually is a lifelong disorder. It is often, but not always, associated with hyperactivity and impulsivity. These individuals can be impulsive, they can be irritable as well. There is very often a family history of attention deficit disorder ... as well.

In order to make the diagnosis you need to see disruption in two areas of functioning _ social, academic or occupational.

At trial, plaintiff did not move for a directed verdict on the question of whether plaintiff was "handicapped" based upon both experts' agreeing he had ADD, he did not object to the jury charges, nor did he object to the jury verdict form. Indeed, plaintiff submitted proposed jury charges and a proposed jury verdict form presenting the jury with the question of whether plaintiff was handicapped.

The pertinent questions on the jury verdict form utilized at trial read as follows:

1. Has plaintiff Gregory J. Domurat proven by a preponderance of the evidence that he was handicapped between January and November, 1995?

Yes ____ No ____

If "Yes," answer the next question.

If "No," go to question No. 3.

....

3. Was plaintiff Gregory J. Domurat performing the essential functions of his job at a level that met defendant Ciba Specialty Chemical Corporation's legitimate expectations at the time of his termination?

Yes ____ No ____

The jurors answered "No" to questions 1 and 3.

After the verdict, plaintiff moved for a new trial, contending that "there was no question but that plaintiff was handicap[ped] according to the undisputed medical evidence in the case and under the standards." Plaintiff argued on the motion, as he does before us, that since the experts agreed on plaintiff's diagnosis, the court must determine as a matter of law that plaintiff was handicapped.

After hearing arguments on the motion for a new trial, the trial judge denied plaintiff's application on the ground that the jury was free to make its determination from the evidence as a whole, including the seventeen years plaintiff had successfully done his job at Ciba:

So clearly it was a fact question. There was no way this court could make that decision about whether there was a handicap ....

Furthermore, the purpose of the whole ADA structure and LAD structure is to identify a handicap for the purpose of remediation, not that an employer must employ someone who chooses a) not to remediate and doesn't fulfill all facets of the job performance and doesn't meet the legitimate expectations of the employer and as charged here does not do the essential functions of the job.

So clearly this jury had it within its purview to say there is no handicap here because there was more than enough evidence to support that proposition. Clearly, the doctors who treated plaintiff in 1995 never showed up. The jury is entitled to consider that and they did

apparently. [The expert's] examinations occurred in the year 2000 _ who knows what was going on with this man in 2000, but that's five years after the fact.

Plaintiff now appeals on the following grounds:

POINT I

PLAINTIFF PROVED HE WAS HANDICAPPED UNDER LAD WITH UNCONTROVERTED EXPERT MEDICAL TESTIMONY CONSISTENT WITH THE STATUTORY CRITERIA.

A. Handicap Under LAD

B. Medical Testimony Was Essential To Prove Handicap. The Court And The Jury Were Bound By Undisputed Expert Medical Testimony That Established That Plaintiff Was Handicapped

C. The Jury Should Not Have Decided Any Element Of Plaintiff's Prima Facie Case, Including Whether Plaintiff Was Handicapped

POINT II

PLAINTIFF PROVED HE WAS QUALIFIED TO DO HIS JOB

POINT III

THE TRIAL COURT ERRED IN ITS JURY CHARGE AND SPECIAL INTERROGATORIES NOS. 1 AND 3 REGARDING, RESPECTIVELY, PROOF OF HANDICAP AND PROOF THAT PLAINTIFF WAS QUALIFIED TO PERFORM HIS JOB UNDER LAD[.] THESE ERRORS ENTITLED PLAINTIFF TO A NEW TRIAL TO AVOID AN UNJUST RESULT

A. The Trial Court Asserted Several Times That Plaintiff's One and Only Hurdle Was To Prove Handicap

B. The Trial Judge Misstated The Law To Prove Handicap During The Jury Charge And In The Court's Jury Verdict Form

C. The Trial Court Erred In Its Jury Charge And Special Jury Interrogatory No. 3 Regarding Proof That Plaintiff Was Qualified To Perform His Job Under LAD

D. The Trial Judge's Response To The Jury's Question

E. The Trial Judge's Disposition Of The Plaintiff's Motion For A New Trial Further Demonstrates The Trial Court's Error With Respect To Proof Of Handicap Under LAD

F. Plaintiff Is Entitled To A New Trial To Avoid An Unjust Result

1. Plaintiff Made His Position Known With Respect To The Legal Errors Made By The Trial Court

2. Plaintiff Is Entitled To A New Trial In The Interests of Justice

I

In Point I, plaintiff essentially argues that the jury's verdict was against the weight of the evidence. He contends that because the experts for both plaintiff and defendant agreed that plaintiff had ADD and other psychiatric disorders, the judge should have determined that he was handicapped as a matter of law and not submitted the question to the jury. We do not agree.

The burdens of proof and persuasion are well established for LAD cases:

New Jersey courts have traditionally sought guidance from the substantive and procedural standards established under federal law. Specifically, our courts have adopted the burden-shifting framework articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to prove disparate treatment under LAD. Under that framework, a plaintiff must first prove a prima facie case of discrimination. To do so, a plaintiff must show that he or she (1) belongs to a protected class; (2) applied for or held a position for which he or she was objectively qualified; (3) was not hired or was terminated from that position; and that (4) the employer sought to, or did fill the position with a similarly- qualified person. The establishment of the prima facie case gives rise to a presumption of discrimination.

Once that threshold has been met, the burden of going forward shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. After the employer does so, the burden shifts back to the plaintiff to show that the employer's proffered reason was merely a pretext for discrimination. To prove pretext, however, a plaintiff must do more than simply show that the employer's reason was false; he or she must also demonstrate that the employer was motivated by discriminatory intent. Thus, under the McDonnell Douglas framework, a plaintiff retains the ultimate burden of persuasion at all times; only the burden of proof shifts.

[Viscik v. Fowler Equipment Company, _ N.J. _, __ (2002) (citations omitted).]

The LAD is remedial social legislation. Our Supreme Court has stated repeatedly that it must be liberally construed. In Andersen v. Exxon Co., 89 N.J. 483, 495 (1982), our Supreme Court made it clear that the definition of "handicapped" is not limited to "severe" disabilities:

We reject such an interpretation of the New Jersey statute. We need not limit this remedial legislation to the halt, the maimed or the blind. The law prohibits unlawful discrimination against those suffering from physical disability. As remedial legislation, the Law Against Discrimination should be construed "with that high degree of liberality which comports with the preeminent social significance of its purposes and objects."

[(Citation omitted).]

The issue squarely before us is whether the trial judge erred in denying plaintiff's motion for a new trial when the expert witnesses for both plaintiff and defendant agreed that plaintiff suffered from ADD and other psychiatric disorders. In other words, was the trial judge compelled to find that plaintiff was handicapped as a matter of law or was the jury free to make its own determination from the evidence as a whole, disregarding the experts' testimony.

We have little doubt that ADD and depression, like alcoholism and other psychiatric disorders, qualifies as a "handicap" under the LAD. Clowes v. Terminix International, Inc., 109 N.J. 575, 593 (1988); see also Enriquez v. West Jersey Health Systems, 342 N.J. Super. 501, 519 (App. Div.), certif. denied, 170 N.J. 211 (2001) (gender dysphoria qualifies as a "handicap" under the LAD); Tynan v. Viscinage 13 of the Superior Court, __ N.J. Super. __, __ (2002) (post-traumatic stress disorder, depression, and anxiety panic attacks are psychological disorders that qualify as handicaps under the LAD); Fowler v. Borough of Westville, 97 F. Supp. 2d 602, 615 (D.N.J. 2000) (alcoholism and drug addiction qualify as handicaps under the LAD); Olson v. General Electric Aerospace, 966 F. Supp. 312, 316 (D.N.J. 1997) (depression and other mental disorders are included in the definition of "handicapped" under the LAD).

In Clowes, supra, 109 N.J. at 597, and more recently in Viscik, supra, __ N.J. at __, our Supreme Court held that a plaintiff must present expert medical testimony to prove the existence of a handicap where it is not readily apparent. Nothing in those decisions, however, indicates that undisputed expert testimony removes the question from the province of the jury. Indeed, there is a consistent body of law to the contrary.

In Waterson v. General Motors Corp., 111 N.J. 238, 248 (1988), the Supreme Court held that "[a] jury has no duty to give controlling effect to any or all of the testimony provided by the parties' experts, even in the absence of evidence to the contrary." (Emphasis added). In Poliseno v. General Motors Corp., 328 N.J. Super. 41, 59 (App. Div.), certif. denied, 165 N.J. 138 (2000), we held that where there is sufficient evidence in the record to the contrary, the jury need not accept the expert's testimony in whole or in part. In Ardis v. Reed, 86 N.J. Super. 323, 330 (App. Div.), aff'd o.b., 46 N.J. 1 (1965), we rejected plaintiff's argument that "'total disregard of the plaintiffs' medical testimony, the credibility of which stands unimpeached, is of itself ground for a new trial,'" where there was sufficient evidence in the record "to nullify plaintiffs' contentions." "Where [people] of reason and fairness may entertain differing views as to the truth of testimony, whether it be uncontradicted,

uncontroverted or even undisputed, evidence of such a character is for the jury." Ferdinand v. Agricultural Ins. Co. of Watertown, N.Y., 22 N.J. 482, 494 (1956). In State v. Scelfo, 58 N.J. Super. 472, 477-78 (App. Div. 1959), certif. denied, 31 N.J. 555 (1960), we held that "uncontradicted opinions of ... highly qualified medical experts" were not dispositive on the issue of insanity because "such testimony is subject to the test of credibility in light of the attendant facts. Also, it is in parity with lay opinion testimony in that the jury is entitled to give each equal weight."

Here, the trial judge gave the model jury instruction on assessing the credibility of expert testimony and weighing it together with all other evidence. Notwithstanding the uncontroverted diagnosis of ADD, there was a substantial body of evidence from which the jury could conclude that plaintiff was not handicapped: (1) plaintiff was very successful academically, graduating summa cum laude from junior college and earning his bachelor's degree in the sciences; (2) he performed job responsibilities well, frequently exceeding his job requirements during his first seventeen years at Ciba; and (3) he was well liked among his co-workers and Ciba's clients. This evidence directly contradicted Dr. Fernandez's testimony describing ADD symptoms, diagnostic criteria, and life-time duration.

We hold that a trial judge is not compelled to find as a matter of law that a plaintiff is handicapped under the LAD solely because of uncontroverted medical evidence where there is sufficient evidence in the record to support a contrary finding by the jury.

II

Plaintiff next argues that he was "qualified to do his job." Clearly, the evidence demonstrates that during plaintiff's seventeen years of prior performance at Ciba he frequently exceeded his job requirements and that he was a "valued contributor" to the company in 1992, 1993 and 1994. Question 3, posed to the jury with plaintiff's consent, specifically asked:

Was plaintiff, Gregory J. Domurat, performing the essential functions of his job at a level that met defendant Ciba Specialty Chemical Corporation's legitimate expectations at the time of his termination?

The jury answered, "No."

Nothing in the LAD protects employees from termination if they are not performing the essential functions of the employer's legitimate expectations.

The Law does not prohibit discrimination against the handicapped where "the nature and extent of the handicap reasonably precludes the performance of the particular employment." N.J.S.A. 10:5-4.1; see also N.J.S.A. 10:5-2.1. (the Law does not "prevent the termination or change of the employment of any person who in the opinion of his employer, reasonably arrived at, is unable to perform adequately his duties.")

[Clowes, supra, 109 N.J. at 594.]

Moreover, an employer may terminate a handicapped employee where the handicap "in fact impedes job performance. There should be no second-guessing the employer." Andersen, supra, 89 N.J. at 496.

The evidence clearly demonstrated that at the time he was terminated, plaintiff was unable or unwilling to perform his job responsibilities. When he was returned to a full work schedule on August 25, 1995, there were no medical restrictions indicted by his own treating psychiatrist, Dr. Vasquez; he had rejected substance abuse treatment; he was given clearly delineated responsibilities during his probationary period; and he was granted extensions of time to complete his work. Nevertheless, his performance continued to deteriorate. The jury's finding that plaintiff was not performing the essential functions of his job at the time of his termination was adequately supported by the evidence.

III

Plaintiff next argues that the trial court erred in its jury charge and jury interrogatories 1 and 3. Plaintiff did not object to the charge at trial, nor did he object to the verdict form, indicating that trial counsel perceived no prejudice would result. State v. Wilhely, 63 N.J. 420, 422 (1973). Failure to object to the charges requires plaintiff to make a showing of plain error on appeal. R. 1:7-2 and R. 2:10-2. To demonstrate plain error, plaintiff must show that the unobjected to jury charge and verdict form was "of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2.

The purpose of jury interrogatories is "to require the jury to specifically consider the essential issues of the case, to clarify the court's charge to the jury, and to clarify the meaning of the verdict and permit error to be localized." Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 419 (1997). Jury interrogatories "are not grounds for a reversal unless

they were misleading, confusing or ambiguous." Id. at 418. Here, jury interrogatories 1 and 3 accurately reflected the elements plaintiff was required to prove and stated properly the time frames the jurors should consider in making their determination. Viscik, supra, __ N.J. at __. When reviewing a claim of error in a jury charge, we must consider the charge as a whole to determine whether it "adequately convey[s] the law to the jury and do[es] not mislead or confuse." Zappasodi v. State, 335 N.J. Super. 83, 89 (App. Div. 2000). Our scope of review is limited to whether the jury charge, as a whole, was capable of producing an unjust result. Ibid.

Plaintiff claims that the trial judge misstated the law and confused the jury by using the term "ADD symptoms" in the charge and "may have led the jury to conclude that plaintiff was not handicapped in 1995 unless his handicaps[,] which all the psychiatrists said plaintiff had all his life, manifested themselves to his employer, Ciba, in a special way in 1995." We find no merit in this argument. As we have indicated herein, the evidence supported the jury's conclusion that plaintiff was not handicapped in 1995 because it was contrary to the experts' repeated testimony that ADD was a lifelong disability that causes "disruption in two areas of functioning _ social, academic or occupational." The evidence adequately demonstrated that plaintiff functioned well in all three areas prior to 1991 and from 1992 to 1994.

Plaintiff further complains that the judge improperly instructed the jury that it could disregard the experts' testimony while instructing that they could find plaintiff handicapped by "competent legal evidence in the record to support a medical diagnosis." This charge is consistent with our holding that the jury may do precisely what they were instructed to do.

IV

Based upon our holdings herein, we find the remainder of plaintiff's arguments without sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).

Affirmed.

Footnote: 1 1 In this appeal, plaintiff does not argue that he is handicapped by virtue of Lyme disease or that he was discriminated against on the basis of age.

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**Section 504, Rehabilitation Act of 1973**

**Section 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations**

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705 (20) of this title, shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Development Disabilities Act of 1978. Copies of any proposed regulations shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date of which such regulation is so submitted to such committees. See also 29 CFR Part 32 and 29 CFR Part 37.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of --

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of Title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship --

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (l), (2) or (3); any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services is available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42

U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections related to employment.

**Section 794a. Remedies and attorney fees**

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706 (k) [42 U.S.C. 2000e-5(f) through k)] shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternative therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq)shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistant under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

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# *OBERGEFELL* 10 YEARS LATER

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## OBERGEFELL ET AL. *v.* HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14–556. Argued April 28, 2015—Decided June 26, 2015*

Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

*Held*: The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. Pp. 3–28.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. Pp. 3–10.

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution if marriage were extended to same-sex couples. But the petitioners, far from seeking to devalue marriage, seek it for themselves because of their respect—and need—for its privileges and responsibilities, as illustrated by the pe-

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*Together with No. 14–562, *Tanco et al.* v. *Haslam, Governor of Tennessee, et al.*, No. 14–571, *DeBoer et al.* v. *Snyder, Governor of Michigan, et al.,* and No. 14–574, *Bourke et al.* v. *Beshear, Governor of Kentucky*, also on certiorari to the same court.

titioners' own experiences. Pp. 3–6.

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation's experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in *Bowers* v. *Hardwick*, 478 U. S. 186, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence* v. *Texas*, 539 U. S. 558, 575. In 2012, the federal Defense of Marriage Act was also struck down. *United States* v. *Windsor*, 570 U. S. ___. Numerous same-sex marriage cases reaching the federal courts and state supreme courts have added to the dialogue. Pp. 6–10.

(b) The Fourteenth Amendment requires a State to license a marriage between two people of the same sex. Pp. 10–27.

(1) The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, *e.g., Eisenstadt* v. *Baird*, 405 U. S. 438, 453; *Griswold* v. *Connecticut*, 381 U. S. 479, 484–486. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, *Loving* v. *Virginia*, 388 U. S. 1, 12, invalidated bans on interracial unions, and *Turner* v. *Safley*, 482 U. S. 78, 95, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship in-

volving opposite-sex partners, as did *Baker* v. *Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. But other, more instructive precedents have expressed broader principles. See, *e.g., Lawrence*, *supra,* at 574. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g., Eisenstadt*, *supra*, at 453–454. This analysis compels the conclusion that same-sex couples may exercise the right to marry. Pp. 10–12.

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. This is true for all persons, whatever their sexual orientation.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to *Griswold* v. *Connecticut*, which held the Constitution protects the right of married couples to use contraception, 381 U. S., at 485, and was acknowledged in *Turner*, *supra,* at 95. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See *Lawrence, supra*, at 567.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, *e.g., Pierce* v. *Society of Sisters*, 268 U. S. 510. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. See *Windsor*, *supra,* at ___. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

Syllabus

Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. See *Maynard* v. *Hill*, 125 U. S. 190, 211. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. Pp. 12–18.

(3) The right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving,* where the Court invoked both the Equal Protection Clause and the Due Process Clause; and in *Zablocki* v. *Redhail*, 434 U. S. 374, where the Court invalidated a law barring fathers delinquent on child-support payments from marrying. Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, *e.g., Kirchberg* v. *Feenstra*, 450 U. S. 455, 460–461, and confirmed the relation between liberty and equality, see, *e.g., M. L. B.* v. *S. L. J.*, 519 U. S. 102, 120–121.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence*, 539 U. S., at 575. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians. Pp. 18–22.

(4) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protec-

tion Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker* v. *Nelson* is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. Pp. 22–23.

(5) There may be an initial inclination to await further legislation, litigation, and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Bowers,* in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after *Bowers* was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the Fourteenth Amendment. The petitioners' stories show the urgency of the issue they present to the Court, which has a duty to address these claims and answer these questions. Respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the First Amendment ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. Pp. 23–27.

(c) The Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. Pp. 27–28.

772 F. 3d 388, reversed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

# SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14-562, 14-571 and 14–574

JAMES OBERGEFELL, ET AL., PETITIONERS
14–556 *v.*
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.;

VALERIA TANCO, ET AL., PETITIONERS
14–562 *v.*
BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.;

APRIL DEBOER, ET AL., PETITIONERS
14–571 *v.*
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.; AND

GREGORY BOURKE, ET AL., PETITIONERS
14–574 *v.*
STEVE BESHEAR, GOVERNOR OF KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow

persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

## I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. See, *e.g.,* Mich. Const., Art. I, §25; Ky. Const. §233A; Ohio Rev. Code Ann. §3101.01 (Lexis 2008); Tenn. Const., Art. XI, §18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, *infra*. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. *DeBoer* v. *Snyder*, 772 F. 3d 388 (2014). The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U. S. ___ (2015). The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio,

Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

A

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures,

and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from

Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time." App. in No. 14–556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two

settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. See N. Cott, Public Vows: A History of Marriage and the Nation 9–17 (2000); S. Coontz, Marriage, A History 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as *Amici Curiae* 16–19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes.

Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, Public Vows; S. Coontz, Marriage; H. Hartog, Man & Wife in America: A History (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil

Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as *Amici Curiae* 7–17.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers* v. *Hardwick*, 478 U. S. 186 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer* v. *Evans*, 517 U. S. 620 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence* v. *Texas*, 539 U. S. 558, 575.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr* v. *Lewin*, 74 Haw. 530, 852 P. 2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is

defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 U. S. C. §7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. See *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*. Two Terms ago, in *United States* v. *Windsor*, 570 U. S. ___ (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." *Id.,* at ___ (slip op., at 14).

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see *Citizens for Equal Protection* v. *Bruning*, 455 F. 3d 859, 864–868 (CA8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many

thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, *infra*.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, The State of Marriage Equality in America, State-by-State Supp. (2015).

III

Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan* v. *Louisiana*, 391 U. S. 145, 147–149 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, *e.g., Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479, 484–486 (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe* v. *Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradi-

tion guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*, *supra*, at 572. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki* v. *Redhail*, 434 U. S. 374, 384 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner* v. *Safley*, 482 U. S. 78, 95 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, *e.g., M. L. B.* v. *S. L. J.*, 519 U. S. 102, 116 (1996); *Cleveland Bd. of Ed.* v. *LaFleur*, 414 U. S. 632, 639–640 (1974); *Griswold*, *supra*, at 486; *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942); *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions,

has made assumptions defined by the world and time of which it is a part. This was evident in *Baker* v. *Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, *e.g., Lawrence*, 539 U. S., at 574; *Turner*, *supra*, at 95; *Zablocki*, *supra*, at 384; *Loving*, *supra*, at 12; *Griswold*, *supra*, at 486. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g., Eisenstadt*, *supra*, at 453–454; *Poe*, *supra*, at 542–553 (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12; see also *Zablocki*, *supra,* at 384 (observing *Loving* held "the right to marry is of fundamental importance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. Indeed, the Court has noted it would

be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." *Zablocki*, *supra*, at 386.

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge*, 440 Mass., at 322, 798 N. E. 2d, at 955.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor*, 570 U. S., at ___– ___ (slip op., at 22–23). There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. *Loving, supra*, at 12 ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold* v. *Connecticut*, which held the Constitution protects the right of married couples to use contraception. 381 U. S., at 485. Suggesting that marriage is a right "older than the Bill of Rights," *Griswold* described marriage this way:

> "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social

> projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.*, at 486.

And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See 482 U. S., at 95–96. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor*, *supra,* at ___ (slip op., at 14). Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 539 U. S., at 567. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer*, 262 U. S., at 399. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki*, 434 U. S., at 384

(quoting *Meyer*, *supra*, at 399). Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, *supra,* at ___ (slip op., at 23). Marriage also affords the permanency and stability important to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22–27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as *Amicus Curiae* 4. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see *id.,* at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. See *Windsor*, *supra,* at ___ (slip op., at 23).

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of

precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

> "There is certainly no country in the world where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace . . . . [H]e afterwards carries [that image] with him into public affairs." 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

In *Maynard* v. *Hill*, 125 U. S. 190, 211 (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been "'a great public institution, giving character to our whole civil polity.'" *Id.,* at 213. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally N. Cott, Public Vows. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the

basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae* 6–9; Brief for American Bar Association as *Amicus Curiae* 8–29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor*, 570 U. S., at ___ – ___ (slip op., at 15–16). The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come

the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997), which called for a "'careful description'" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." Brief for Respondent in No. 14–556, p. 8. *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also *Glucksberg*, 521 U. S., at 752–773 (Souter, J., concurring in judgment); *id.,* at 789–792 (BREYER, J., concurring in judgments).

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving* 388 U. S., at 12; *Lawrence*, 539 U. S., at 566–567.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources

alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See *M. L. B.*, 519 U. S., at 120–121; *id.*, at 128–129 (KENNEDY, J., concurring in judgment); *Bearden* v. *Georgia*, 461 U. S. 660, 665 (1983). This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court

first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U. S., at 12. With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Ibid.* The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." 434 U. S., at 383. It was the essential nature of the marriage right, discussed at length in *Zablocki*, see *id.,* at 383–387, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of cover-

ture, see *supra*, at 6, invidious sex-based classifications in marriage remained common through the mid-20th century. See App. to Brief for Appellant in *Reed* v. *Reed*, O. T. 1971, No. 70–4, pp. 69–88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit." Ga. Code Ann. §53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, *e.g., Kirchberg* v. *Feenstra*, 450 U. S. 455 (1981); *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142 (1980); *Califano* v. *Westcott*, 443 U. S. 76 (1979); *Orr* v. *Orr*, 440 U. S. 268 (1979); *Califano* v. *Goldfarb*, 430 U. S. 199 (1977) (plurality opinion); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973). Like *Loving* and *Zablocki*, these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M. L. B.* v. *S. L. J.*, the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See 519 U. S., at 119–124. In *Eisenstadt* v. *Baird*, the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See 405 U. S., at 446–454. And in *Skinner* v. *Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed steriliza-

tion of habitual criminals. See 316 U. S., at 538–543.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See 539 U. S., at 575. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. See *ibid.* *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.*, at 578.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, *e.g., Zablocki*, *supra*, at 383–388; *Skinner*, 316 U. S., at 541.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No

longer may this liberty be denied to them. *Baker* v. *Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

## IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages. See *DeBoer*, 772 F. 3d, at 409.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, *infra*. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented

for resolution as a matter of constitutional law.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette* v. *BAMN*, 572 U. S. ___ (2014), noting the "right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Id.*, at ___ – ___ (slip op., at 15–16). Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, "[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power." *Id.,* at ___ (slip op., at 15). Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking. *Id.,* at ___ (slip op., at 17). This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943). This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Ibid.*

It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing same-sex intimacy. See 478 U. S., at 186, 190–195. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. See *id.*, at 199 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *id.,* at 214 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was "not correct when it was decided." 539 U. S., at 578. Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the Fourteenth Amendment. The petitioners' stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and

Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners' cases, the Court has a duty to address these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See *Kitchen* v. *Herbert*, 755 F. 3d 1193, 1223 (CA10 2014) ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples"). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they

describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

## V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of Obergefell and Arthur, and by that of DeKoe and Kostura, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid marriage denied in another is one of "the most perplexing and distressing complication[s]" in the law of domestic relations. *Williams* v. *North Carolina*, 317 U. S. 287, 299 (1942) (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and pro-

mote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

* * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

*It is so ordered.*

APPENDICES
A
State and Federal Judicial Decisions
Addressing Same-Sex Marriage

**United States Courts of Appeals Decisions**

*Adams* v. *Howerton*, 673 F. 2d 1036 (CA9 1982)
*Smelt* v. *County of Orange*, 447 F. 3d 673 (CA9 2006)
*Citizens for Equal Protection* v. *Bruning*, 455 F. 3d 859 (CA8 2006)
*Windsor* v. *United States*, 699 F. 3d 169 (CA2 2012)
*Massachusetts* v. *Department of Health and Human Services*, 682 F. 3d 1 (CA1 2012)
*Perry* v. *Brown*, 671 F. 3d 1052 (CA9 2012)
*Latta* v. *Otter*, 771 F. 3d 456 (CA9 2014)
*Baskin* v. *Bogan*, 766 F. 3d 648 (CA7 2014)
*Bishop* v. *Smith*, 760 F. 3d 1070 (CA10 2014)
*Bostic* v. *Schaefer*, 760 F. 3d 352 (CA4 2014)
*Kitchen* v. *Herbert*, 755 F. 3d 1193 (CA10 2014)
*DeBoer* v. *Snyder*, 772 F. 3d 388 (CA6 2014)
*Latta* v. *Otter*, 779 F. 3d 902 (CA9 2015) (O'Scannlain, J., dissenting from the denial of rehearing en banc)

**United States District Court Decisions**

*Adams* v. *Howerton*, 486 F. Supp. 1119 (CD Cal. 1980)
*Citizens for Equal Protection, Inc.* v. *Bruning*, 290 F. Supp. 2d 1004 (Neb. 2003)
*Citizens for Equal Protection* v. *Bruning*, 368 F. Supp. 2d 980 (Neb. 2005)
*Wilson* v. *Ake*, 354 F. Supp. 2d 1298 (MD Fla. 2005)
*Smelt* v. *County of Orange*, 374 F. Supp. 2d 861 (CD Cal. 2005)
*Bishop* v. *Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239 (ND Okla. 2006)

*Massachusetts* v. *Department of Health and Human Services*, 698 F. Supp. 2d 234 (Mass. 2010)

*Gill* v. *Office of Personnel Management*, 699 F. Supp. 2d 374 (Mass. 2010)

*Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921 (ND Cal. 2010)

*Dragovich* v. *Department of Treasury*, 764 F. Supp. 2d 1178 (ND Cal. 2011)

*Golinski* v. *Office of Personnel Management*, 824 F. Supp. 2d 968 (ND Cal. 2012)

*Dragovich* v. *Department of Treasury*, 872 F. Supp. 2d 944 (ND Cal. 2012)

*Windsor* v. *United States*, 833 F. Supp. 2d 394 (SDNY 2012)

*Pedersen* v. *Office of Personnel Management*, 881 F. Supp. 2d 294 (Conn. 2012)

*Jackson* v. *Abercrombie*, 884 F. Supp. 2d 1065 (Haw. 2012)

*Sevcik* v. *Sandoval*, 911 F. Supp. 2d 996 (Nev. 2012)

*Merritt* v. *Attorney General*, 2013 WL 6044329 (MD La., Nov. 14, 2013)

*Gray* v. *Orr*, 4 F. Supp. 3d 984 (ND Ill. 2013)

*Lee* v. *Orr*, 2013 WL 6490577 (ND Ill., Dec. 10, 2013)

*Kitchen* v. *Herbert*, 961 F. Supp. 2d 1181 (Utah 2013)

*Obergefell* v. *Wymyslo*, 962 F. Supp. 2d 968 (SD Ohio 2013)

*Bishop* v. *United States ex rel. Holder*, 962 F. Supp. 2d 1252 (ND Okla. 2014)

*Bourke* v. *Beshear*, 996 F. Supp. 2d 542 (WD Ky. 2014)

*Lee* v. *Orr*, 2014 WL 683680 (ND Ill., Feb. 21, 2014)

*Bostic* v. *Rainey*, 970 F. Supp. 2d 456 (ED Va. 2014)

*De Leon* v. *Perry*, 975 F. Supp. 2d 632 (WD Tex. 2014)

*Tanco* v. *Haslam*, 7 F. Supp. 3d 759 (MD Tenn. 2014)

*DeBoer* v. *Snyder*, 973 F. Supp. 2d 757 (ED Mich. 2014)

*Henry* v. *Himes*, 14 F. Supp. 3d 1036 (SD Ohio 2014)

*Latta* v. *Otter*, 19 F. Supp. 3d 1054 (Idaho 2014)

*Geiger* v. *Kitzhaber*, 994 F. Supp. 2d 1128 (Ore. 2014)
*Evans* v. *Utah*, 21 F. Supp. 3d 1192 (Utah 2014)
*Whitewood* v. *Wolf*, 992 F. Supp. 2d 410 (MD Pa. 2014)
*Wolf* v. *Walker*, 986 F. Supp. 2d 982 (WD Wis. 2014)
*Baskin* v. *Bogan*, 12 F. Supp. 3d 1144 (SD Ind. 2014)
*Love* v. *Beshear*, 989 F. Supp. 2d 536 (WD Ky. 2014)
*Burns* v. *Hickenlooper*, 2014 WL 3634834 (Colo., July 23, 2014)
*Bowling* v. *Pence*, 39 F. Supp. 3d 1025 (SD Ind. 2014)
*Brenner* v. *Scott*, 999 F. Supp. 2d 1278 (ND Fla. 2014)
*Robicheaux* v. *Caldwell*, 2 F. Supp. 3d 910 (ED La. 2014)
*General Synod of the United Church of Christ* v. *Resinger*, 12 F. Supp. 3d 790 (WDNC 2014)
*Hamby* v. *Parnell*, 56 F. Supp. 3d 1056 (Alaska 2014)
*Fisher-Borne* v. *Smith*, 14 F. Supp. 3d 695 (MDNC 2014)
*Majors* v. *Horne*, 14 F. Supp. 3d 1313 (Ariz. 2014)
*Connolly* v. *Jeanes*, ___ F. Supp. 3d ___, 2014 WL 5320642 (Ariz., Oct. 17, 2014)
*Guzzo* v. *Mead*, 2014 WL 5317797 (Wyo., Oct. 17, 2014)
*Conde-Vidal* v. *Garcia-Padilla*, 54 F. Supp. 3d 157 (PR 2014)
*Marie* v. *Moser*, ___ F. Supp. 3d ___, 2014 WL 5598128 (Kan., Nov. 4, 2014)
*Lawson* v. *Kelly*, 58 F. Supp. 3d 923 (WD Mo. 2014)
*McGee* v. *Cole*, ___ F. Supp. 3d ___, 2014 WL 5802665 (SD W. Va., Nov. 7, 2014)
*Condon* v. *Haley*, 21 F. Supp. 3d 572 (S. C. 2014)
*Bradacs* v. *Haley*, 58 F. Supp. 3d 514 (S. C. 2014)
*Rolando* v. *Fox*, 23 F. Supp. 3d 1227 (Mont. 2014)
*Jernigan* v. *Crane*, ___ F. Supp. 3d ___, 2014 WL 6685391 (ED Ark., Nov. 25, 2014)
*Campaign for Southern Equality* v. *Bryant*, ___ F. Supp. 3d ___, 2014 WL 6680570 (SD Miss., Nov. 25, 2014)
*Inniss* v. *Aderhold*, ___ F. Supp. 3d ___, 2015 WL 300593 (ND Ga., Jan. 8, 2015)

*Rosenbrahn* v. *Daugaard*, 61 F. Supp. 3d 862 (S. D., 2015)

*Caspar* v. *Snyder*, ___ F. Supp. 3d ___, 2015 WL 224741 (ED Mich., Jan. 15, 2015)

*Searcey* v. *Strange*, 2015 U. S. Dist. LEXIS 7776 (SD Ala., Jan. 23, 2015)

*Strawser* v. *Strange*, 44 F. Supp. 3d 1206 (SD Ala. 2015)

*Waters* v. *Ricketts*, 48 F. Supp. 3d 1271 (Neb. 2015)

**State Highest Court Decisions**

*Baker* v. *Nelson*, 291 Minn. 310, 191 N. W. 2d 185 (1971)

*Jones* v. *Hallahan*, 501 S. W. 2d 588 (Ky. 1973)

*Baehr* v. *Lewin*, 74 Haw. 530, 852 P. 2d 44 (1993)

*Dean* v. *District of Columbia*, 653 A. 2d 307 (D. C. 1995)

*Baker* v. *State*, 170 Vt. 194, 744 A. 2d 864 (1999)

*Brause* v. *State*, 21 P. 3d 357 (Alaska 2001) (ripeness)

*Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003)

*In re Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N. E. 2d 565 (2004)

*Li* v. *State*, 338 Or. 376, 110 P. 3d 91 (2005)

*Cote-Whitacre* v. *Department of Public Health*,446 Mass. 350, 844 N. E. 2d 623 (2006)

*Lewis* v. *Harris*, 188 N. J. 415, 908 A. 2d 196 (2006)

*Andersen* v. *King County*, 158 Wash. 2d 1, 138 P. 3d 963 (2006)

*Hernandez* v. *Robles*, 7 N. Y. 3d 338, 855 N. E. 2d 1 (2006)

*Conaway* v. *Deane*, 401 Md. 219, 932 A. 2d 571 (2007)

*In re Marriage Cases*, 43 Cal. 4th 757, 183 P. 3d 384 (2008)

*Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 957 A. 2d 407 (2008)

*Strauss* v. *Horton*, 46 Cal. 4th 364, 207 P. 3d 48 (2009)

*Varnum* v. *Brien*, 763 N. W. 2d 862 (Iowa 2009)

*Griego* v. *Oliver*, 2014–NMSC–003, ___ N. M. ___, 316 P. 3d 865 (2013)

*Garden State Equality* v. *Dow*, 216 N. J. 314, 79 A. 3d 1036 (2013)

*Ex parte State ex rel. Alabama Policy Institute*, ___ So. 3d ___, 2015 WL 892752 (Ala., Mar. 3, 2015)

B

State Legislation and Judicial Decisions
Legalizing Same-Sex Marriage

**Legislation**

Del. Code Ann., Tit. 13, §129 (Cum. Supp. 2014)
D. C. Act No. 18–248, 57 D. C. Reg. 27 (2010)
Haw. Rev. Stat. §572 –1 (2006) and 2013 Cum. Supp.)
Ill. Pub. Act No. 98–597
Me. Rev. Stat. Ann., Tit. 19, §650–A (Cum. Supp. 2014)
2012 Md. Laws p. 9
2013 Minn Laws p. 404
2009 N. H. Laws p. 60
2011 N. Y Laws p. 749
2013 R. I. Laws p. 7
2009 Vt. Acts & Resolves p. 33
2012 Wash. Sess. Laws p. 199

**Judicial Decisions**

*Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003)

*Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 957 A. 2d 407 (2008)

*Varnum* v. *Brien*, 763 N. W. 2d 862 (Iowa 2009)

*Griego* v. *Oliver*, 2014–NMSC–003, ___ N. M. ___, 316 P. 3d 865 (2013)

*Garden State Equality* v. *Dow*, 216 N. J. 314, 79 A. 3d 1036 (2013)

# SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14-562, 14-571 and 14–574

JAMES OBERGEFELL, ET AL., PETITIONERS
14–556 *v.*
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.;

VALERIA TANCO, ET AL., PETITIONERS
14–562 *v.*
BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.;

APRIL DEBOER, ET AL., PETITIONERS
14–571 *v.*
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.; AND

GREGORY BOURKE, ET AL., PETITIONERS
14–574 *v.*
STEVE BESHEAR, GOVERNOR OF KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the

past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." *Ante*, at 11, 23. As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." *Id.*, at 69 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." *Ante*, at 19. I have no choice but to dissent.

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

I

Petitioners and their *amici* base their arguments on the "right to marry" and the imperative of "marriage equality." There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—*who decides* what constitutes "marriage"?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not "the end" of these cases, *ante*, at 4, I would not "sweep away what has so long been settled" without showing greater respect for all that preceded us. *Town of Greece* v. *Galloway*, 572 U. S. ___, ___ (2014) (slip op., at 8).

A

As the majority acknowledges, marriage "has existed for millennia and across civilizations." *Ante*, at 3. For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. See *ante*, at 4; Tr. of Oral Arg. on Question 1, p. 12 (petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001). As the Court explained two Terms ago, "until recent years, . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States* v. *Windsor*, 570 U. S. ___, ___ (2013) (slip op., at 13).

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbi-

ans. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, A History of Marriage Systems 2 (1988); cf. M. Cicero, De Officiis 57 (W. Miller transl. 1913) ("For since the reproductive instinct is by nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common.").

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without. As one prominent scholar put it, "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." J. Q. Wilson, The Marriage Problem 41 (2002).

This singular understanding of marriage has prevailed in the United States throughout our history. The majority accepts that at "the time of the Nation's founding [marriage] was understood to be a voluntary contract between

a man and a woman." *Ante*, at 6. Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between "husband and wife" as one of the "great relations in private life," and philosophers like John Locke, who described marriage as "a voluntary compact between man and woman" centered on "its chief end, procreation" and the "nourishment and support" of children. 1 W. Blackstone, Commentaries *410; J. Locke, Second Treatise of Civil Government §§78–79, p. 39 (J. Gough ed. 1947). To those who drafted and ratified the Constitution, this conception of marriage and family "was a given: its structure, its stability, roles, and values accepted by all." Forte, The Framers' Idea of Marriage and Family, in The Meaning of Marriage 100, 102 (R. George & J. Elshtain eds. 2006).

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with "[t]he whole subject of the domestic relations of husband and wife." *Windsor*, 570 U. S., at ___ (slip op., at 17) (quoting *In re Burrus*, 136 U. S. 586, 593–594 (1890)). There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. The four States in these cases are typical. Their laws, before and after statehood, have treated marriage as the union of a man and a woman. See *DeBoer* v. *Snyder*, 772 F. 3d 388, 396–399 (CA6 2014). Even when state laws did not specify this definition expressly, no one doubted what they meant. See *Jones* v. *Hallahan*, 501 S. W. 2d 588, 589 (Ky. App. 1973). The meaning of "marriage" went without saying.

Of course, many did say it. In his first American dictionary, Noah Webster defined marriage as "the legal union of a man and woman for life," which served the purposes of "preventing the promiscuous intercourse of the sexes, . . . promoting domestic felicity, and . . . securing the

maintenance and education of children." 1 An American Dictionary of the English Language (1828). An influential 19th-century treatise defined marriage as "a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex." J. Bishop, Commentaries on the Law of Marriage and Divorce 25 (1852). The first edition of Black's Law Dictionary defined marriage as "the civil status of one man and one woman united in law for life." Black's Law Dictionary 756 (1891) (emphasis deleted). The dictionary maintained essentially that same definition for the next century.

This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. Early cases on the subject referred to marriage as "the union for life of one man and one woman," *Murphy* v. *Ramsey*, 114 U. S. 15, 45 (1885), which forms "the foundation of the family and of society, without which there would be neither civilization nor progress," *Maynard* v. *Hill*, 125 U. S. 190, 211 (1888). We later described marriage as "fundamental to our very existence and survival," an understanding that necessarily implies a procreative component. *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967); see *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942). More recent cases have directly connected the right to marry with the "right to procreate." *Zablocki* v. *Redhail*, 434 U. S. 374, 386 (1978).

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws that respect each participant's separate status. Racial restrictions on marriage, which "arose as an incident to slavery" to promote "White Supremacy," were repealed by many States and ultimately struck down by this Court.

*Loving*, 388 U. S., at 6–7.

The majority observes that these developments "were not mere superficial changes" in marriage, but rather "worked deep transformations in its structure." *Ante*, at 6–7. They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, "Marriage is the union of a man and a woman, where the woman is subject to coverture." The majority may be right that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured. *Ante*, at 6.

B

Shortly after this Court struck down racial restrictions on marriage in *Loving*, a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected their analogy to *Loving*, and this Court summarily dismissed an appeal. *Baker* v. *Nelson*, 409 U. S. 810 (1972).

In the decades after *Baker*, greater numbers of gays and lesbians began living openly, and many expressed a desire to have their relationships recognized as marriages. Over time, more people came to see marriage in a way that could be extended to such couples. Until recently, this new view of marriage remained a minority position. After the Massachusetts Supreme Judicial Court in 2003 interpreted its State Constitution to require recognition of same-sex marriage, many States—including the four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has

shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and Equal Protection Clauses of the Fourteenth Amendment compel their States to license and recognize marriages between same-sex couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic "momentum" in favor of "expand[ing] the definition of marriage to include gay couples," but concluded that petitioners had not made "the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters." 772 F. 3d, at 396, 403. That decision interpreted the Constitution correctly, and I would affirm.

## II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor General of the United States, appearing in support of petitioners, expressly disowned that position before this Court. See Tr. of Oral Arg. on Question 1, at 38–39. The majority nevertheless resolves these cases for petitioners based

almost entirely on the Due Process Clause.

The majority purports to identify four "principles and traditions" in this Court's due process precedents that support a fundamental right for same-sex couples to marry. *Ante*, at 12. In reality, however, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner* v. *New York*, 198 U. S. 45. Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

A

Petitioners' "fundamental right" claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States' marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no "Companionship and Understanding" or "Nobility and Dignity" Clause in the Constitution. See *ante*, at 3, 14. They argue instead that the laws violate a right *implied* by the Fourteenth Amendment's requirement that "liberty" may not be deprived without "due process of law."

This Court has interpreted the Due Process Clause to include a "substantive" component that protects certain liberty interests against state deprivation "no matter what process is provided." *Reno* v. *Flores*, 507 U. S. 292, 302 (1993). The theory is that some liberties are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and therefore cannot be deprived without compelling justification. *Snyder* v. *Massachusetts*, 291

U. S. 97, 105 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Washington* v. *Glucksberg*, 521 U. S. 702, 720 (1997) (internal quotation marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (Address at Stanford) ("One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.").

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott* v. *Sandford*, 19 How. 393 (1857). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law." *Id.,* at 450. In a dissent that has outlasted the majority opinion, Justice Curtis explained that when the "fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical

opinions of individuals are allowed to control" the Constitution's meaning, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Id.*, at 621.

*Dred Scott*'s holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner* v. *New York*, this Court invalidated state statutes that presented "meddlesome interferences with the rights of the individual," and "undue interference with liberty of person and freedom of contract." 198 U. S., at 60, 61. In *Lochner* itself, the Court struck down a New York law setting maximum hours for bakery employees, because there was "in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law." *Id.,* at 58.

The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least "room for debate and for an honest difference of opinion." *Id.,* at 72 (opinion of Harlan, J.). The majority's contrary conclusion required adopting as constitutional law "an economic theory which a large part of the country does not entertain." *Id.,* at 75 (opinion of Holmes, J.). As Justice Holmes memorably put it, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," a leading work on the philosophy of Social Darwinism. *Ibid.* The Constitution "is not intended to embody a particular economic theory . . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embody-

ing them conflict with the Constitution." *Id.*, at 75–76.

In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that "[t]he criterion of constitutionality is not whether we believe the law to be for the public good." *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525, 570 (1923) (opinion of Holmes, J.). By empowering judges to elevate their own policy judgments to the status of constitutionally protected "liberty," the *Lochner* line of cases left "no alternative to regarding the court as a . . . legislative chamber." L. Hand, The Bill of Rights 42 (1958).

Eventually, the Court recognized its error and vowed not to repeat it. "The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely," we later explained, "has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963); see *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952) ("we do not sit as a super-legislature to weigh the wisdom of legislation"). Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them "unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955).

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*'s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for "judicial self-restraint." *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992). Our precedents have required that implied fundamental rights be "objec-

tively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U. S., at 720–721 (internal quotation marks omitted).

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in *Glucksberg*, many other cases both before and after have adopted the same approach. See, *e.g., District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U. S. 52, 72 (2009); *Flores*, 507 U. S., at 303; *United States* v. *Salerno*, 481 U. S. 739, 751 (1987); *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion); see also *id.,* at 544 (White, J., dissenting) ("The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."); *Troxel* v. *Granville*, 530 U. S. 57, 96–101 (2000) (KENNEDY, J., dissenting) (consulting "'[o]ur Nation's history, legal traditions, and practices'" and concluding that "[w]e owe it to the Nation's domestic relations legal structure . . . to proceed with caution" (quoting *Glucksberg*, 521 U. S., at 721)).

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. *Ante*, at 18. But given the few "guideposts for responsible decisionmaking in this unchartered area," *Collins*, 503 U. S., at 125, "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula," *Moore*, 431 U. S., at 504, n. 12 (plurality opinion). Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of "discipline" in identify-

ing fundamental rights, *ante*, at 10–11, does not provide a meaningful constraint on a judge, for "what he is really likely to be 'discovering,' whether or not he is fully aware of it, are his own values," J. Ely, Democracy and Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers." *Griswold* v. *Connecticut*, 381 U. S. 479, 501 (1965) (Harlan, J., concurring in judgment).

B

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*.

1

The majority's driving themes are that marriage is desirable and petitioners desire it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. *Ante*, at 3, 4, 6, 28. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." *Turner* v. *Safley*, 482 U. S. 78, 95 (1987); *Zablocki*, 434 U. S., at 383; see *Loving*, 388 U. S., at 12. These cases

do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In *Loving*, the Court held that racial restrictions on the right to marry lacked a compelling justification. In *Zablocki*, restrictions based on child support debts did not suffice. In *Turner*, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as "the union of a man and a woman, *where neither party owes child support or is in prison*." Nor did the interracial marriage ban at issue in *Loving* define marriage as "the union of a man and a woman *of the same race*." See Tragen, Comment, Statutory Prohibitions Against Interracial Marriage, 32 Cal. L. Rev. 269 (1944) ("at common law there was no ban on interracial marriage"); *post*, at 11–12, n. 5 (THOMAS, J., dissenting). Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners." *Ante*, at 11.

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. See *Windsor*, 570 U. S., at ___ (ALITO, J., dissenting) (slip op., at 8) ("What Windsor and the United States seek . . . is not the protection of a deeply rooted right but the recognition of a very new right."). Neither petitioners nor the majority cites a

single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

2

The majority suggests that "there are other, more instructive precedents" informing the right to marry. *Ante*, at 12. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental "right of privacy." *Griswold*, 381 U. S., at 486. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. *Id.*, at 485–486. The Court stressed the invasive nature of the ban, which threatened the intrusion of "the police to search the sacred precincts of marital bedrooms." *Id.,* at 485. In the Court's view, such laws infringed the right to privacy in its most basic sense: the "right to be let alone." *Eisenstadt* v. *Baird*, 405 U. S. 438, 453–454, n. 10 (1972) (internal quotation marks omitted); see *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The Court also invoked the right to privacy in *Lawrence* v. *Texas*, 539 U. S. 558 (2003), which struck down a Texas statute criminalizing homosexual sodomy. *Lawrence* relied on the position that criminal sodomy laws, like bans on contraceptives, invaded privacy by inviting "unwarranted government intrusions" that "touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home." *Id.*, at 562, 567.

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is "condemned to live in loneli-

ness" by the laws challenged in these cases—no one. *Ante*, at 28. At the same time, the laws in no way interfere with the "right to be let alone."

The majority also relies on Justice Harlan's influential dissenting opinion in *Poe* v. *Ullman*, 367 U. S. 497 (1961). As the majority recounts, that opinion states that "[d]ue process has not been reduced to any formula." *Id.,* at 542. But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan's opinion makes clear that courts implying fundamental rights are not "free to roam where unguided speculation might take them." *Ibid.* They must instead have "regard to what history teaches" and exercise not only "judgment" but "restraint." *Ibid.* Of particular relevance, Justice Harlan explained that "laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis." *Id.*, at 546.

In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S. 189, 196 (1989); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 35–37 (1973); *post*, at 9–13 (THOMAS, J., dissenting). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights taken by this Court in *Glucksberg*. *Ante*, at 18 (quoting 521 U. S., at 721). It is revealing that the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority's methodology: *Lochner* v. *New York*, 198 U. S. 45. The majority opens its opinion by announcing petitioners' right to "define and express their identity." *Ante*, at 1–2. The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." *Ante*, at 12. This free-wheeling notion of individual autonomy echoes nothing so much as "the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor." *Lochner*, 198 U. S., at 58 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed by its "new insight" into the "nature of injustice," which was invisible to all who came before but has become clear "as we learn [the] meaning" of liberty. *Ante*, at 10, 11. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right." *Ante*, at 19. Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences

adopted in *Lochner*. See 198 U. S., at 61 ("We do not believe in the soundness of the views which uphold this law," which "is an illegal interference with the rights of individuals . . . to make contracts regarding labor upon such terms as they may think best").

The majority recognizes that today's cases do not mark "the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights." *Ante*, at 25. On that much, we agree. The Court was "asked"—and it agreed—to "adopt a cautious approach" to implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives the grave errors of that period.

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Cf. *Brown* v. *Buhman*, 947 F. Supp. 2d 1170 (Utah 2013), appeal pending, No. 14-4117 (CA10). Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," *ante*, at 13, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their

children would otherwise "suffer the stigma of knowing their families are somehow lesser," *ante*, at 15, why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," *ante*, at 22, serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian "Throuple" Expecting First Child, N. Y. Post, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L. J. 1977 (2015).

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State "doesn't have such an institution." Tr. of Oral Arg. on Question 2, p. 6. But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either.

4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would "pose no risk of harm to themselves or third parties." *Ante*, at 27. This argument again echoes *Lochner*, which relied on its assessment that "we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." 198 U. S., at 57.

Then and now, this assertion of the "harm principle" sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of "due process." There is indeed a process due the people on issues of this sort—the democratic process. Respecting that understanding requires the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice Holmes's dissent in *Lochner*, the Fourteenth Amendment does not enact John Stuart Mill's On Liberty any more than it enacts Herbert Spencer's Social Statics. See Randolph, Before *Roe v. Wade*: Judge Friendly's Draft Abortion Opinion, 29 Harv. J. L. & Pub. Pol'y 1035, 1036–1037, 1058 (2006). And it certainly does not enact any one concept of marriage.

The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the "nature of injustice is that we may not always see it in our own times." *Ante*, at 11. As petitioners put it, "times can blind." Tr. of Oral Arg. on Question 1, at 9, 10. But to blind yourself to history is both prideful and unwise. "The

past is never dead. It's not even past." W. Faulkner, Requiem for a Nun 92 (1951).

III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. *Ante*, at 20. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing." G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & P. Karlan, Constitutional Law 453 (7th ed. 2013). The majority's approach today is different:

> "Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." *Ante*, at 19.

The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. *Ante*, at 22. Yet the majority fails to provide even a single sentence explaining how the Equal

Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. See *Northwest Austin Municipal Util. Dist. No. One* v. *Holder*, 557 U. S. 193, 197 (2009). In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." *Lawrence*, 539 U. S., at 585 (O'Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners have challenged. Although they discuss some of the ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples.

## IV

The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments." *Republican Party of Minn.* v. *White*, 536 U. S. 765, 793 (2002) (KENNEDY, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the

people, who are responsible for making "new dimensions of freedom . . . apparent to new generations," for providing "formal discourse" on social issues, and for ensuring "neutral discussions, without scornful or disparaging commentary." *Ante*, at 7–9.

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been "extensive litigation," "many thoughtful District Court decisions," "countless studies, papers, books, and other popular and scholarly writings," and "more than 100" *amicus* briefs in these cases alone. *Ante*, at 9, 10, 23. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers' "better informed understanding" of "a liberty that remains urgent in our own era." *Ante*, at 19. The answer is surely there in one of those *amicus* briefs or studies.

Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after "a quite extensive discussion." *Ante*, at 8. In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. "Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unre-

solved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 700 (1976). As a plurality of this Court explained just last year, "It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Schuette* v. *BAMN*, 572 U. S. ___, ___ –___ (2014) (slip op., at 16–17).

The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. They see voters carefully considering same-sex marriage, casting ballots in favor or opposed, and sometimes changing their minds. They see political leaders similarly reexamining their positions, and either reversing course or explaining adherence to old convictions confirmed anew. They see governments and businesses modifying policies and practices with respect to same-sex couples, and participating actively in the civic discourse. They see countries overseas democratically accepting profound social change, or declining to do so. This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. "That is exactly how our system of government is supposed to work." *Post,* at 2–3 (SCALIA, J., dissenting).

But today the Court puts a stop to all that. By deciding

this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, "The political process was moving . . . , not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N. C. L. Rev. 375, 385–386 (1985) (footnote omitted). Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Amdt. 1.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for

religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. *Ante*, at 27. The First Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1, at 36–38. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. *Ante*, at 19. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. *Ante*, at 19. The majority reiterates such characterizations over and over. By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring defini-

tion of marriage—have acted to "lock . . . out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors. *Ante*, at 17, 19, 22, 25. These apparent assaults on the character of fairminded people will have an effect, in society and in court. See *post*, at 6–7 (ALITO, J., dissenting). Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted. *Ante*, at 19.

In the face of all this, a much different view of the Court's role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

* * *

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

# SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14-562, 14-571 and 14–574

JAMES OBERGEFELL, ET AL., PETITIONERS
14–556 *v.*
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.;

VALERIA TANCO, ET AL., PETITIONERS
14–562 *v.*
BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.;

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14–571 *v.*
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.; AND

GREGORY BOURKE, ET AL., PETITIONERS
14–574 *v.*
STEVE BESHEAR, GOVERNOR OF KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I join THE CHIEF JUSTICE's opinion in full. I write separately to call attention to this Court's threat to American democracy.

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance.

Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

## I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to.[1] Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of govern-

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[1] Brief for Respondents in No. 14–571, p. 14.

ment is supposed to work.[2]

The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. Forbidden are laws "impairing the Obligation of Contracts,"[3] denying "Full Faith and Credit" to the "public Acts" of other States,[4] prohibiting the free exercise of religion,[5] abridging the freedom of speech,[6] infringing the right to keep and bear arms,[7] authorizing unreasonable searches and seizures,[8] and so forth. Aside from these limitations, those powers "reserved to the States respectively, or to the people"[9] can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today's opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):

> "[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States."[10]

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[2] Accord, *Schuette* v. *BAMN*, 572 U. S. ___, ___–___ (2014) (plurality opinion) (slip op., at 15–17).

[3] U. S. Const., Art. I, §10.

[4] Art. IV, §1.

[5] Amdt. 1.

[6] *Ibid.*

[7] Amdt. 2.

[8] Amdt. 4.

[9] Amdt. 10.

[10] *United States* v. *Windsor*, 570 U. S. ___, ___ (2013) (slip op., at 16) (internal quotation marks and citation omitted).

> "[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations."[11]

But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as "due process of law" or "equal protection of the laws"—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.[12] We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks the Fourteenth Amendment ought to protect.[13] That is so because "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its

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[11] *Id.,* at ___ (slip op., at 17).

[12] See *Town of Greece* v. *Galloway*, 572 U. S. ___, ___–___ (2014) (slip op., at 7–8).

[13] *Ante*, at 10.

dimensions . . . . "[14] One would think that sentence would continue: ". . . and therefore they provided for a means by which the People could amend the Constitution," or perhaps ". . . and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation." But no. What logically follows, in the majority's judge-empowering estimation, is: "and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[15] The "we," needless to say, is the nine of us. "History and tradition guide and discipline [our] inquiry but do not set its outer boundaries."[16] Thus, rather than focusing on *the People's* understanding of "liberty"—at the time of ratification or even today—the majority focuses on four "principles and traditions" that, *in the majority's view*, prohibit States from defining marriage as an institution consisting of one man and one woman.[17]

This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section

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[14] *Ante*, at 11.
[15] *Ibid.*
[16] *Ante*, at 10–11.
[17] *Ante,* at 12–18.

of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers[18] who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans[19]), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not.* And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

## II

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that

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[18] The predominant attitude of tall-building lawyers with respect to the questions presented in these cases is suggested by the fact that the American Bar Association deemed it in accord with the wishes of its members to file a brief in support of the petitioners. See Brief for American Bar Association as *Amicus Curiae* in Nos. 14–571 and 14–574, pp. 1–5.

[19] See Pew Research Center, America's Changing Religious Landscape 4 (May 12, 2015).

every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003.[20] They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment." These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago,[21] cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so.[22] Of course the opinion's showy profundities are often

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[20] *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003).

[21] *Windsor*, 570 U. S., at ___ (ALITO, J., dissenting) (slip op., at 7).

[22] If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that

profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."[23] (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can "rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[24] (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, "[i]n any particular case," either the Equal Protection or Due Process Clause "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right."[25] (What say? What possible "essence" does substantive due process "capture" in an "accurate and comprehensive way"? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court

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allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

[23] *Ante*, at 13.

[24] *Ante,* at 19.

[25] *Ibid.*

*really* dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses "converge in the identification and definition of [a] right," that is only because the majority's likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.

* * *

Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments."[26] With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence.

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[26] The Federalist No. 78, pp. 522, 523 (J. Cooke ed. 1961) (A. Hamilton).

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STEVE BESHEAR, GOVERNOR OF KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our

Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a "liberty" that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.

## I

The majority's decision today will require States to issue marriage licenses to same-sex couples and to recognize same-sex marriages entered in other States largely based on a constitutional provision guaranteeing "due process" before a person is deprived of his "life, liberty, or property." I have elsewhere explained the dangerous fiction of treating the Due Process Clause as a font of substantive rights. *McDonald* v. *Chicago*, 561 U. S. 742, 811–812 (2010) (THOMAS, J., concurring in part and concurring in judgment). It distorts the constitutional text, which guarantees only whatever "process" is "due" before a person is deprived of life, liberty, and property. U. S. Const., Amdt. 14, §1. Worse, it invites judges to do exactly what the majority has done here—"'roa[m] at large in the constitutional field' guided only by their personal views" as to the "'fundamental rights'" protected by that document. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 953, 965 (1992) (Rehnquist, C. J., concurring in judgment in part and dissenting in part) (quoting *Griswold* v. *Connecticut*, 381 U. S. 479, 502 (1965) (Harlan, J., concurring in judgment)).

By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority. Petitioners argue

that by enshrining the traditional definition of marriage in their State Constitutions through voter-approved amendments, the States have put the issue "beyond the reach of the normal democratic process." Brief for Petitioners in No. 14–562, p. 54. But the result petitioners seek is far less democratic. They ask nine judges on this Court to enshrine their definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation. That a "bare majority" of this Court, *ante,* at 25, is able to grant this wish, wiping out with a stroke of the keyboard the results of the political process in over 30 States, based on a provision that guarantees only "due process" is but further evidence of the danger of substantive due process.[1]

## II

Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim. To invoke the protection of the Due Process Clause at all—whether under a theory of "substantive" or "procedural" due process—a party must first identify a deprivation of "life, liberty, or property." The majority claims these state laws deprive petitioners of "liberty," but the concept of "liberty" it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses.

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[1] The majority states that the right it believes is "part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." *Ante,* at 19. Despite the "synergy" it finds "between th[ese] two protections," *ante*, at 20, the majority clearly uses equal protection only to shore up its substantive due process analysis, an analysis both based on an imaginary constitutional protection and revisionist view of our history and tradition.

A

1

As used in the Due Process Clauses, "liberty" most likely refers to "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 W. Blackstone, Commentaries on the Laws of England 130 (1769) (Blackstone). That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure.

Both of the Constitution's Due Process Clauses reach back to Magna Carta. See *Davidson* v. *New Orleans*, 96 U. S. 97, 101–102 (1878). Chapter 39 of the original Magna Carta provided, "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." Magna Carta, ch. 39, in A. Howard, Magna Carta: Text and Commentary 43 (1964). Although the 1215 version of Magna Carta was in effect for only a few weeks, this provision was later reissued in 1225 with modest changes to its wording as follows: "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land." 1 E. Coke, The Second Part of the Institutes of the Laws of England 45 (1797). In his influential commentary on the provision many years later, Sir Edward Coke interpreted the words "by the law of the land" to mean the same thing as "by due proces of the common law." *Id.,* at 50.

After Magna Carta became subject to renewed interest in the 17th century, see, *e.g., ibid.*, William Blackstone referred to this provision as protecting the "absolute rights

of every Englishman." 1 Blackstone 123. And he formulated those absolute rights as "the right of personal security," which included the right to life; "the right of personal liberty"; and "the right of private property." *Id.,* at 125. He defined "the right of personal liberty" as "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." *Id.*, at 125, 130.[2]

The Framers drew heavily upon Blackstone's formulation, adopting provisions in early State Constitutions that replicated Magna Carta's language, but were modified to refer specifically to "life, liberty, or property."[3] State

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[2]The seeds of this articulation can also be found in Henry Care's influential treatise, English Liberties. First published in America in 1721, it described the "three things, which the Law of *England* . . . principally regards and taketh Care of," as "*Life*, *Liberty* and *Estate*," and described habeas corpus as the means by which one could procure one's "Liberty" from imprisonment. The Habeas Corpus Act, comment., in English Liberties, or the Free-born Subject's Inheritance 185 (H. Care comp. 5th ed. 1721). Though he used the word "Liberties" by itself more broadly, see, *e.g., id.,* at 7, 34, 56, 58, 60, he used "Liberty" in a narrow sense when placed alongside the words "Life" or "Estate," see, *e.g., id.,* at 185, 200.

[3]Maryland, North Carolina, and South Carolina adopted the phrase "life, liberty, or property" in provisions otherwise tracking Magna Carta: "That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Md. Const., Declaration of Rights, Art. XXI (1776), in 3 Federal and State Constitutions, Colonial Charters, and Other Organic Laws 1688 (F. Thorpe ed. 1909); see also S. C. Const., Art. XLI (1778), in 6 *id.,* at 3257; N. C. Const., Declaration of Rights, Art. XII (1776), in 5 *id.,* at 2788. Massachusetts and New Hampshire did the same, albeit with some alterations to Magna Carta's framework: "[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Mass. Const., pt. I, Art. XII (1780), in 3 *id.,* at 1891; see also

decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word "liberty" to refer only to freedom from physical restraint. See Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431, 441–445 (1926). Even one case that has been identified as a possible exception to that view merely used broad language about liberty in the context of a habeas corpus proceeding—a proceeding classically associated with obtaining freedom from physical restraint. Cf. *id.,* at 444–445.

In enacting the Fifth Amendment's Due Process Clause, the Framers similarly chose to employ the "life, liberty, or property" formulation, though they otherwise deviated substantially from the States' use of Magna Carta's language in the Clause. See Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property," 4 Harv. L. Rev. 365, 382 (1890). When read in light of the history of that formulation, it is hard to see how the "liberty" protected by the Clause could be interpreted to include anything broader than freedom from physical restraint. That was the consistent usage of the time when "liberty" was paired with "life" and "property." See *id.,* at 375. And that usage avoids rendering superfluous those protections for "life" and "property."

If the Fifth Amendment uses "liberty" in this narrow sense, then the Fourteenth Amendment likely does as well. See *Hurtado* v. *California*, 110 U. S. 516, 534–535 (1884). Indeed, this Court has previously commented, "The conclusion is . . . irresistible, that when the same phrase was employed in the Fourteenth Amendment [as was used in the Fifth Amendment], it was used in the same sense and with no greater extent." *Ibid.* And this

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N. H. Const., pt. I, Art. XV (1784), in 4 *id.,* at 2455.

Court's earliest Fourteenth Amendment decisions appear to interpret the Clause as using "liberty" to mean freedom from physical restraint. In *Munn* v. *Illinois*, 94 U. S. 113 (1877), for example, the Court recognized the relationship between the two Due Process Clauses and Magna Carta, see *id.,* at 123–124, and implicitly rejected the dissent's argument that "'liberty'" encompassed "something more . . . than mere freedom from physical restraint or the bounds of a prison," *id.,* at 142 (Field, J., dissenting). That the Court appears to have lost its way in more recent years does not justify deviating from the original meaning of the Clauses.

2

Even assuming that the "liberty" in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.

The founding-era understanding of liberty was heavily influenced by John Locke, whose writings "on natural rights and on the social and governmental contract" were cited "[i]n pamphlet after pamphlet" by American writers. B. Bailyn, The Ideological Origins of the American Revolution 27 (1967). Locke described men as existing in a state of nature, possessed of the "perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man." J. Locke, Second Treatise of Civil Government, §4, p. 4 (J. Gough ed. 1947) (Locke). Because that state of nature left men insecure in their persons and property, they entered civil society, trading a portion of their natural liberty for an increase in their security. See

*id.,* §97, at 49. Upon consenting to that order, men obtained civil liberty, or the freedom "to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it." *Id.,* §22, at 13.[4]

This philosophy permeated the 18th-century political scene in America. A 1756 editorial in the Boston Gazette, for example, declared that "Liberty in the *State of Nature*" was the "inherent natural Right" "of each Man" "to make a free Use of his Reason and Understanding, and to chuse that Action which he thinks he can give the best Account of," but that, "in Society, every Man parts with a Small Share of his *natural* Liberty, or lodges it in the publick Stock, that he may possess the Remainder without Controul." Boston Gazette and Country Journal, No. 58, May 10, 1756, p. 1. Similar sentiments were expressed in public speeches, sermons, and letters of the time. See 1 C.

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[4]Locke's theories heavily influenced other prominent writers of the 17th and 18th centuries. Blackstone, for one, agreed that "natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature" and described civil liberty as that "which leaves the subject entire master of his own conduct," except as "restrained by human laws." 1 Blackstone 121–122. And in a "treatise routinely cited by the Founders," *Zivotofsky* v. *Kerry*, *ante,* at 5 (THOMAS, J., concurring in judgment in part and dissenting in part), Thomas Rutherforth wrote, "By liberty we mean the power, which a man has to act as he thinks fit, where no law restrains him; it may therefore be called a mans right over his own actions." 1 T. Rutherforth, Institutes of Natural Law 146 (1754). Rutherforth explained that "[t]he only restraint, which a mans right over his own actions is originally under, is the obligation of governing himself by the law of nature, and the law of God," and that "[w]hatever right those of our own species may have . . . to restrain [those actions] within certain bounds, beyond what the law of nature has prescribed, arises from some after-act of our own, from some consent either express or tacit, by which we have alienated our liberty, or transferred the right of directing our actions from ourselves to them." *Id.,* at 147–148.

Hyneman & D. Lutz, American Political Writing During the Founding Era 1760–1805, pp. 100, 308, 385 (1983).

The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed *outside of* government. See Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L. J. 907, 918–919 (1993). As one later commentator observed, "[L]iberty in the eighteenth century was thought of much more in relation to 'negative liberty'; that is, freedom *from*, not freedom *to*, freedom from a number of social and political evils, including arbitrary government power." J. Reid, The Concept of Liberty in the Age of the American Revolution 56 (1988). Or as one scholar put it in 1776, "[T]he common idea of liberty is merely negative, and is only the *absence of restraint*." R. Hey, Observations on the Nature of Civil Liberty and the Principles of Government §13, p. 8 (1776) (Hey). When the colonists described laws that would infringe their liberties, they discussed laws that would prohibit individuals "from walking in the streets and highways on certain saints days, or from being abroad after a certain time in the evening, or . . . restrain [them] from working up and manufacturing materials of [their] own growth." Downer, A Discourse at the Dedication of the Tree of Liberty, in 1 Hyneman, *supra*, at 101. Each of those examples involved freedoms that existed outside of government.

B

Whether we define "liberty" as locomotion or freedom from governmental action more broadly, petitioners have in no way been deprived of it.

Petitioners cannot claim, under the most plausible definition of "liberty," that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children in peace. They

have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of "liberty," they are entitled to access privileges and benefits that exist solely *because of* the government. They want, for example, to receive the State's *imprimatur* on their marriages—on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of "liberty" that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader

definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one's spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it. As Locke had explained many years earlier, "The first society was between man and wife, which gave beginning to that between parents and children." Locke §77, at 39; see also J. Wilson, Lectures on Law, in 2 Collected Works of James Wilson 1068 (K. Hall and M. Hall eds. 2007) (concluding "that to the institution of marriage the true origin of society must be traced"). Petitioners misunderstand the institution of marriage when they say that it would "mean little" absent governmental recognition. Brief for Petitioners in No. 14–556, p. 33.

Petitioners' misconception of liberty carries over into their discussion of our precedents identifying a right to marry, not one of which has expanded the concept of "liberty" beyond the concept of negative liberty. Those precedents all involved absolute prohibitions on private actions associated with marriage. *Loving* v. *Virginia*, 388 U. S. 1 (1967), for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and cohabiting in Virginia, *id.,* at 2–3.[5] They were each sen-

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[5] The suggestion of petitioners and their *amici* that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. "America's earliest laws against interracial sex and marriage were spawned by slavery." P. Pascoe, What Comes Naturally: Miscegenation Law and the Making of Race in America 19 (2009). For instance, Maryland's 1664 law prohibiting marriages between "'freeborne English women'" and "'Negro Sla[v]es'" was passed as part of the very act that authorized lifelong

tenced to a year of imprisonment, suspended for a term of 25 years on the condition that they not reenter the Commonwealth together during that time. *Id.,* at 3.[6] In a similar vein, *Zablocki* v. *Redhail*, 434 U. S. 374 (1978), involved a man who was prohibited, on pain of criminal penalty, from "marry[ing] in Wisconsin or elsewhere" because of his outstanding child-support obligations, *id.,* at 387; see *id.,* at 377–378. And *Turner* v. *Safley*, 482 U. S. 78 (1987), involved state inmates who were prohibited from entering marriages without the permission of the superintendent of the prison, permission that could not be granted absent compelling reasons, *id.,* at 82. In *none* of those cases were individuals denied solely governmental

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slavery in the colony. *Id.,* at 19–20. Virginia's antimiscegenation laws likewise were passed in a 1691 resolution entitled "An act for suppressing outlying Slaves." Act of Apr. 1691, Ch. XVI, 3 Va. Stat. 86 (W. Hening ed. 1823) (reprint 1969) (italics deleted). "It was not until the Civil War threw the future of slavery into doubt that lawyers, legislators, and judges began to develop the elaborate justifications that signified the emergence of miscegenation law and made restrictions on interracial marriage the foundation of post-Civil War white supremacy." Pascoe, *supra*, at 27–28.

Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history. Brief for Scholars of History and Related Disciplines as *Amici Curiae* 1. It arose not out of a desire to shore up an invidious institution like slavery, but out of a desire "to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world." *Id.,* at 8. And it has existed in civilizations containing all manner of views on homosexuality. See Brief for Ryan T. Anderson as *Amicus Curiae* 11–12 (explaining that several famous ancient Greeks wrote approvingly of the traditional definition of marriage, though same-sex sexual relations were common in Greece at the time).

[6]The prohibition extended so far as to forbid even religious ceremonies, thus raising a serious question under the First Amendment's Free Exercise Clause, as at least one *amicus* brief at the time pointed out. Brief for John J. Russell et al. as *Amici Curiae* in *Loving* v. *Virginia*, O.T. 1966, No. 395, pp. 12–16.

recognition and benefits associated with marriage.

In a concession to petitioners' misconception of liberty, the majority characterizes petitioners' suit as a quest to "find . . . liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex." *Ante,* at 2. But "liberty" is not lost, nor can it be found in the way petitioners seek. As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment. The majority's "better informed understanding of how constitutional imperatives define . . . liberty," *ante,* at 19,—better informed, we must assume, than that of the people who ratified the Fourteenth Amendment—runs headlong into the reality that our Constitution is a "collection of 'Thou shalt nots,'" *Reid* v. *Covert*, 354 U. S. 1, 9 (1957) (plurality opinion), not "Thou shalt provides."

## III

The majority's inversion of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty.

### A

The majority apparently disregards the political process as a protection for liberty. Although men, in forming a civil society, "give up all the power necessary to the ends for which they unite into society, to the majority of the community," Locke §99, at 49, they reserve the authority to exercise natural liberty within the bounds of laws established by that society, *id.,* §22, at 13; see also Hey §§52, 54, at 30–32. To protect that liberty from arbitrary interference, they establish a process by which that society can

adopt and enforce its laws. In our country, that process is primarily representative government at the state level, with the Federal Constitution serving as a backstop for that process. As a general matter, when the States act through their representative governments or by popular vote, the liberty of their residents is fully vindicated. This is no less true when some residents disagree with the result; indeed, it seems difficult to imagine *any* law on which all residents of a State would agree. See Locke §98, at 49 (suggesting that society would cease to function if it required unanimous consent to laws). What matters is that the process established by those who created the society has been honored.

That process has been honored here. The definition of marriage has been the subject of heated debate in the States. Legislatures have repeatedly taken up the matter on behalf of the People, and 35 States have put the question to the People themselves. In 32 of those 35 States, the People have opted to retain the traditional definition of marriage. Brief for Respondents in No. 14–571, pp. 1a–7a. That petitioners disagree with the result of that process does not make it any less legitimate. Their civil liberty has been vindicated.

B

Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect.

The history of religious liberty in our country is familiar: Many of the earliest immigrants to America came seeking freedom to practice their religion without restraint. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1422–1425 (1990). When they arrived, they created their own havens for religious practice. *Ibid.* Many of these havens were initially homogenous communities with established

religions. *Ibid.* By the 1780's, however, "America was in the wake of a great religious revival" marked by a move toward free exercise of religion. *Id.,* at 1437. Every State save Connecticut adopted protections for religious freedom in their State Constitutions by 1789, *id.,* at 1455, and, of course, the First Amendment enshrined protection for the free exercise of religion in the U. S. Constitution. But that protection was far from the last word on religious liberty in this country, as the Federal Government and the States have reaffirmed their commitment to religious liberty by codifying protections for religious practice. See, *e.g.,* Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.*; Conn. Gen. Stat. §52–571b (2015).

Numerous *amici*—even some not supporting the States—have cautioned the Court that its decision here will "have unavoidable and wide-ranging implications for religious liberty." Brief for General Conference of Seventh-Day Adventists et al. as *Amici Curiae* 5. In our society, marriage is not simply a governmental institution; it is a religious institution as well. *Id.,* at 7. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph, *ante,* at 27. And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Ibid.* Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious

practice.[7]

Although our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court's constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority's decision short-circuits that process, with potentially ruinous consequences for religious liberty.

## IV

Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the "dignity" of same-sex couples. *Ante,* at 3, 13, 26, 28.[8] The flaw in that reasoning, of course, is that the Constitution contains no "dignity" Clause, and even if it did, the government would be incapable of bestowing dignity.

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that "all men are created equal"

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[7] Concerns about threats to religious liberty in this context are not unfounded. During the hey-day of antimiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies. Va. Code Ann. §20–60 (1960).

[8] The majority also suggests that marriage confers "nobility" on individuals. *Ante,* at 3. I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more "noble" than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.

and "endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

The majority's musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority demeans. Its mischaracterization of the arguments presented by the States and their *amici* can have no effect on the dignity of those litigants. Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

* * *

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from—not provided by—the State. Today's decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on "due process" to afford substantive rights, disregards the most plausible

understanding of the "liberty" protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution and our society. I respectfully dissent.

# SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14-562, 14-571 and 14–574

JAMES OBERGEFELL, ET AL., PETITIONERS
14–556 *v.*
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.;

VALERIA TANCO, ET AL., PETITIONERS
14–562 *v.*
BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.;

APRIL DEBOER, ET AL., PETITIONERS
14–571 *v.*
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.; AND

GREGORY BOURKE, ET AL., PETITIONERS
14–574 *v.*
STEVE BESHEAR, GOVERNOR OF KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage.[1] The question in

[1] I use the phrase "recognize marriage" as shorthand for issuing mar-

these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.

I

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term "liberty" in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today's majority, it has a distinctively postmodern meaning.

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are "'deeply rooted in this Nation's history and tradition.'" *Washington* v. *Glucksberg*, 521 U. S. 701, 720–721 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. See *United States* v. *Windsor*, 570 U. S. ___, ___ (2013) (ALITO, J., dissenting) (slip op., at 7). Indeed:

> "In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge* v. *Department of Public Health*, 440 Mass.

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riage licenses and conferring those special benefits and obligations provided under state law for married persons.

309, 798 N. E. 2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.

"What [those arguing in favor of a constitutional right to same sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility." *Id.,* at ___ (slip op., at 7–8) (footnote omitted).

For today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

## II

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding of the purpose of civil marriage. Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need. And by benefiting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States

encourage and formalize marriage, confer special benefits on married persons, and also impose some special obligations. This understanding of the States' reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States' objectives in the same way as opposite-sex marriage.

This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

Adherents to different schools of philosophy use different terms to explain why society should formalize marriage and attach special benefits and obligations to persons who marry. Here, the States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse. Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children. They thus argue that there are reasonable secular grounds for restricting marriage to opposite-sex couples.

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women.[2] This de-

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[2] See, *e.g.,* Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, D. Martin, B. Hamilton, M. Osterman, S. Curtin, & T. Matthews, Births: Final Data for 2013, 64 National Vital Statistics Reports, No. 1, p. 2 (Jan. 15, 2015), online at http://www.cdc.gov/nchs/data/nvsr/nvsr64/

velopment undoubtedly is both a cause and a result of changes in our society's understanding of marriage.

While, for many, the attributes of marriage in 21st-century America have changed, those States that do not want to recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage's further decay. It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.

As I wrote in *Windsor*:

> "The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.
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> "We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some

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nvsr64_01.pdf (all Internet materials as visited June 24, 2015, and available in Clerk of Court's case file); cf. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics (NCHS), S. Ventura, Changing Patterns of Nonmartial Childbearing in the United States, NCHS Data Brief, No. 18 (May 2009), online at http://www.cdc.gov/nchs/data/databrief/db18.pdf.

time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution.

"At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials." 570 U. S., at ___ (dissenting opinion) (slip op., at 8–10) (citations and footnotes omitted).

## III

Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. *E.g.*, *ante*, at 11–13. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. *Ante*, at 26–27. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The majority today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriage should worry about the scope of the power that today's majority claims.

Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that

preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

Most Americans—understandably—will cheer or lament today's decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends.

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**Who Gets the Credit for Marriage Equality in New Jersey?**

Thomas Prol, Esq.

*The people who deserved the credit for marriage equality are those who stepped forward in 2007 and bared their souls in front of microphones as a standing-room audience hung on every word of their gripping anguish. These same-sex couples and their families made the political movement into a force just by being their authentic selves, by sharing their stories of suffering, harm, and discrimination.*

Addressing the members of the New Jersey State Bar Association (NJSBA) Family Law Section at their annual retreat in late March, I discussed how New Jersey laws and courts have treated (more often negatively than not) the LGBT community over the past seventy-five years. One particular focus of my remarks was the political and legal strategy behind the battle for marriage equality over the past two decades - how recognition of the relationships of committed same-sex couples migrated from an idea to case law to a codified statute.

What a long, strange, trip it's been that brought us to the moment on January 10, 2022, when Governor Murphy signed A5367/S3416 to codify marriage equality as a statutory right for committed same-sex couples. The legislation also requires that all laws concerning marriage and civil union are to be read with gender neutral intent. Over nineteen years earlier, Lambda Legal, a national LGBTQ legal advocacy organization, joined Larry Lustberg, Jennifer Ching and the strike team at the Gibbons law firm to file the October 8, 2002 Complaint that commenced *Lewis v. Harris*, 188 N.J. 415 (October 25, 2006), the first of New Jersey's two marriage equality lawsuits.

In *Lewis*, the New Jersey Supreme Court held that the state violated the equal protection guarantee of Article I, paragraph 1 of the State Constitution by denying rights and benefits to committed same-sex couples which were statutorily given to their heterosexual counterparts. They ruled unanimously that same-sex are entitled to all of the same rights, privileges and obligations of marriage as different sex couples, stating that the "unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution." *Lewis* at 423.

The High Court split on the remedy, with a slim majority stating that the "State can fulfill that constitutional requirement in one of two ways. It can either amend the marriage statutes to include same-sex couples or enact a parallel statutory structure by another name, in which same-sex couples would not only enjoy the rights and benefits, but also bear the burdens and obligations of civil marriage." *Lewis* at 463. The New Jersey Legislature chose to create a parallel statutory structure for the relationships of committed same-sex couples and their families that was intended to be separate, but equal. That separate relationship status, the Civil Unions Act, N.J.S. 37:1-28 et seq., took effect on February 19, 2007.

Thereafter, the Act's Civil Unions Review Commission (CURC) was formed, held hearings, took testimony, and issued findings, as discussed below. As a result of those findings along with the ensuing three years of continuing inequality and discrimination that Civil Unions exacerbated, on March 18, 2010, the Lewis plaintiffs approached the Supreme Court on a Motion in Aid of Litigants' Rights. Unfortunately, just like present day, the Court was strained by political turmoil in its co-equal branches of government and did not have a full complement of

Justices. As a result, the Motion failed by a 3-3 tie vote and the plaintiffs were turned away to continue to suffer inequality.

On June 29, 2011, the LGBT civil rights advocacy organization Garden State Equality filed a new litigation seeking equal marriage rights for committed same-sex couples and to remove the label of inferiority affixed to gay and lesbian relationships under Civil Unions. On September 27, 2013, the Honorable Mary C. Jacobson, A.J.S.C., ruled in *Garden State Equality et al. v. Dow, et al.*, 82 A. 3d 336 (N.J. Super. Ct. Law Div. 2013) that, consistent with the United States Supreme Court holding in *United States v. Windsor*, 570 U.S. 744 (2013), limiting same-sex couples to civil unions violated the rights of same-sex couples to equal protection under the New Jersey Constitution. Judge Jacobson held that civil unions were not equivalent to marriage because same-sex couples did not have access to federal benefits available to married couples. The trial court, Appellate Division and Supreme Court each declined the State's request for a stay of the trial court's decision and the ruling took effect on October 21, 2013.

From the filing of the initial *Lewis* Complaint in 2002 to Judge Jacobson's *Garden State Equality* 2013 ruling to Governor Murphy affixing his seal to the 2022 legislation, the gay and LGBT community's pursuit of the basic civil right of marriage followed a long, winding trail of political turmoil and legal strategy. On that trek, numerous obstacles and enemies were encountered.

The legal front can be told politely as an inspiring tale of how dedicated lawyers with a nimble, carefully crafted plan of action provoked a seismic shift in law and policy that benefited many lives in a profound and meaningful way. Indeed, many civil rights achievements in our nation's history have been made possible by the dedication by attorneys as they expose prejudices and discrimination to the crucible of legal scrutiny and the rule of law. Such was how the legal battle was won here in New Jersey with gratitude to the skills and strategy of Larry Lustberg and his Gibbons team as well as David Buckel and Hayley Gorenberg at Lambda Legal.

The political battle was less elegant and was where most of those obstacles and enemies were met. For example, my personal experience during this time saw me publicly declared "a practicing homosexual" in front of several hundred people (as I told my accuser and the audience at the time, I had stopped practicing long before and had become quite accomplished at it), and included one red-faced state Senator wagging his finger in my face in the Senate committee room incensed that the NJSBA was supporting marriage equality while another Senator announced to the entire committee and several hundred people in the audience that I had spent three years in law school learning how to lie and I was not lying effectively as I testified in support of marriage equality.

Most of the opponents were eventually overcome, acquiesced, or simply died, though not all. It was telling that the original Senate committee hearing on December 7, 2009, saw an overflowing room of advocates and opponents for 9 hours of testimony, yet the December 16, 2021, Senate committee hearing only had 5 attendees testifying from the public and wrapped in less than an hour with only one "no" vote. Those twelve years were jam-packed with activism, mostly led by Garden State Equality, including statewide town hall meetings and an intentional effort to engage the public and media, and to raise the consciousness of New Jersey residents about same-sex couples and their families.

When New Jersey's marriage equality statute finally became law in 2022 after a nearly twenty-year odyssey, there was no shortage of people stepping forward to claim the mantle of its achievement. Either directly or through their surrogates, several even had the *chutzpah* to claim it

never would have happened without them alone. This included some who were part of the first two failed efforts to adopt it legislatively, failures that were largely due to their tactical missteps and bombast during the political effort.

To understand who gets credit for New Jersey finally achieving marriage equality by statute - if one needs to award credit - we need look no further than the CURC hearings at which hundreds of same-sex couples came forward to hang out their personal laundry and share with the world the harm and discrimination they suffered by the unequal treatment of their relationships.

To see and hear it unfold back then during three CURC hearings in 2007 - first at the New Jersey Law Center in New Brunswick, then at Camden Community College in Gloucester, and finally at the Nutley Town Hall – you knew at the time those moments were destined to be historic.

In December 2008, the 13-member CURC unanimously issued a 79-page report that reflected the raw honestly of the LGBT community they encountered in the CURC hearing, finding that civil unions are "not clear to the general public"; confer "second-class status" on the couples who form them; "invites and encourages unequal treatment of same-sex couples and their children"; and, they concluded, the legislature's adoption of the Civil Unions Act created "[s]eparate treatment [that] was wrong then and it is just as wrong now."

To be there and bear witness at the CURC hearings was to appreciate that the people who deserve the credit for marriage equality are those who stepped forward in 2007 and afterwards and bared their souls in front of microphones as a standing-room audience hung on every word of their gripping anguish. These same-sex couples and their families made the political movement into a force just by being their authentic selves, by sharing their stories of suffering, harm, and discrimination. If someone ever asks how we got marriage equality in New Jersey, know that there was no one person or personality that achieved it. It was a communal project, the work of many in a true "labor of love" that finally got us to the top of the mountain.

*Thomas Prol, a partner with Sills Cummis & Gross, is the former president of the New Jersey State Bar Association and a founding executive committee member of Garden State Equality, the largest LGBTQ+ rights organization in New Jersey and an advocate for the LGBT curriculum bill. The opinions in here are his own.*

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KeyCite Yellow Flag - Negative Treatment
Judgment Affirmed as Modified by Lewis v. Harris, N.J., October 25, 2006

378 N.J.Super. 168
Superior Court of New Jersey,
Appellate Division.

Mark LEWIS and Dennis Winslow; Saundra Heath and Clarita Alicia Toby; Craig Hutchison and Chris Lodewyks; Maureen Kilian and Cindy Meneghin; Sarah and Suyin Lael; Marilyn Maneely and Diane Marini; and Karen and Marcye Nicholson–McFadden, Plaintiffs–Appellants,
v.
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–Respondents.

Argued Dec. 7, 2004.
|
Decided June 14, 2005.

**Synopsis**
**Background:** Same-sex couples brought action against state officials with supervisory responsibilities relating to local officials' issuance of marriage licenses, alleging local officials' refusal to issue marriage licenses to plaintiff same-sex couples violated their state constitutional rights to privacy, due process, and equal protection. The Superior Court, Law Division, Mercer County, granted summary judgment to defendants. Plaintiffs appealed.

**Holdings:** The Superior Court, Appellate Division, Skillman, P.J.A.D., held that:

[1] the right to marry, which is a fundamental right that is subject to the substantive due process and privacy protections of the New Jersey Constitution, extends only to marriages between members of the opposite sex, and

[2] restricting marriages to members of opposite sex did not violate equal protection, under New Jersey Constitution.

Affirmed.

Parrillo, J.A.D., filed a concurring opinion.

Collester, J.A.D., filed a dissenting opinion.

West Headnotes (13)

[1] **Constitutional Law**
Presumptions and Construction as to Constitutionality

In reviewing the constitutionality of statutes, the court must keep in mind that those provisions represent the considered action of a body composed of popularly elected representatives and therefore are entitled to a strong presumption of validity. (Per Skillman, P.J.A.D., with one Judge concurring.)

Cases that cite this headnote

[2] **Constitutional Law**
Clearly, positively, or unmistakably unconstitutional
**Constitutional Law**
Proof beyond a reasonable doubt

The presumption of the constitutionality of a statute can be rebutted only upon a showing that the statute's repugnancy to the Constitution is clear beyond a reasonable doubt. (Per Skillman, P.J.A.D., with one Judge concurring.)

Cases that cite this headnote

[3] **Constitutional Law**
Policy
**Constitutional Law**

  

Wisdom

The personal views of the members of the court concerning the wisdom or policy of a statute should play no part in determining its constitutionality. (Per Skillman, P.J.A.D., with one Judge concurring.)

1 Cases that cite this headnote

[4] **Constitutional Law**
Procedural due process in general
**Constitutional Law**
Substantive Due Process in General

The New Jersey constitutional provision declaring that all people have certain natural and unalienable rights protects both procedural and substantive due process rights. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

1 Cases that cite this headnote

[5] **Constitutional Law**
Privacy and Sexual Matters

The substantive due process rights protected by the New Jersey constitutional provision declaring that all people have certain natural and unalienable rights include the right of privacy. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

Cases that cite this headnote

[6] **Constitutional Law**
Sex and Procreation

The right of privacy under the New Jersey Constitution embraces the right to make procreative decisions and the right of consenting adults to engage in sexual conduct. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

Cases that cite this headnote

[7] **Constitutional Law**
Rights and interests protected; fundamental rights

In determining whether a claimed right is entitled to protection as a matter of substantive due process, a court should look to he traditions and collective conscience of the people to determine whether a principle is so rooted there as to be ranked as fundamental. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

1 Cases that cite this headnote

[8] **Amicus Curiae**
Powers, functions, and proceedings

Although an amicus curiae is ordinarily limited to arguing issues raised by the parties, an amicus may present different arguments than the parties relating to those issues. (Per Skillman, P.J.A.D., with one Judge concurring.)

1 Cases that cite this headnote

[9] **Amicus Curiae**
Powers, functions, and proceedings

Appellate Division of Superior Court would consider, in same-sex couples' appeal of trial court's denial of their state constitutional claims to a right to marry, arguments of amici curiae that promotion of procreation and creating optimal environment for raising children were justifications for limiting marriage to members of opposite sex, though Attorney General, as representative of state defendants, disclaimed any reliance on such justifications, where plaintiff couples were afforded adequate

  

opportunity to answer those arguments and had devoted half of their reply brief to answering those arguments. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

8 Cases that cite this headnote

[10] **Constitutional Law**
Sexual orientation
**Constitutional Law**
Marital Relationship
**Marriage and Cohabitation**
Sex or Gender; Same-Sex Marriage

The right to marry, which is a fundamental right that is subject to the substantive due process and privacy protections of the New Jersey Constitution, extends only to marriages between members of the opposite sex. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

6 Cases that cite this headnote

[11] **Constitutional Law**
Discrimination and Classification

In determining whether the State has violated the equal protection guarantees of the New Jersey Constitution, courts employ a balancing test that considers the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

Cases that cite this headnote

[12] **Constitutional Law**
Levels of Scrutiny

The crucial threshold step in the required constitutional analysis of an equal protection claim is identification of the nature of the claimed right. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

Cases that cite this headnote

[13] **Constitutional Law**
Marriage and civil unions
**Marriage and Cohabitation**
Sex or Gender; Same-Sex Marriage

Same-sex couples did not have constitutionally protected right to marry, as threshold step in equal protection analysis, and thus, state laws restricting marriage to opposite sex couples did not violate equal protection. (Per Skillman, P.J.A.D., with one Judge concurring.) N.J.S.A. Const. Art. 1, par. 1.

6 Cases that cite this headnote

**Attorneys and Law Firms**

****261 *172** David S. Buckel (Lambda Legal Defense and Education Fund, Inc.) of the New York bar, admitted pro hac vice, New York City, argued the cause for appellants (Gibbons, Del Deo, Dolan, Griffinger & Vecchione and Mr. Buckel, attorneys; Lawrence S. Lustberg and Jennifer Ching (Gibbons, Del Deo, Dolan, Griffinger & Vecchione), Newark, Mr. Buckel and Susan L. Sommer (Lambda Legal Defense and Education Fund, Inc.), on the brief).

***173** Patrick DeAlmeida, Assistant Attorney General, argued the cause for respondents (Peter C. Harvey, Attorney General, attorney; Mr. DeAlmeida, of counsel; Mr. DeAlmeida and Mary Beth Wood, Deputy Attorney General, on the brief).

Messina & Laffey, for amicus curiae the New Jersey Catholic Conference, the New Jersey Coalition to Preserve and Protect Marriage, the New Jersey Family Policy Council and Mr. and Mrs. David C. Heslington (Joshua K. Baker, Lincoln C. Oliphant and William C. Duncan, of counsel; Michael Behrens, on the brief).

  

Dennis M. Caufield, for amicus curiae the Family Research Council (Glen Lavy, Byron Babione and Dale Schowengerdt (Alliance Defense Fund), of counsel; Mr. Caufield, on the brief).

**262 Levow & Costello, for amicus curiae Legal Momentum (Jennifer Brown and Deborah Widiss (Legal Momentum), Elizabeth L. Rosenblatt and Douglas NeJaime (Irell & Manella), of counsel; Kevin Costello, on the brief).

Blank Rome, for amicus curiae National Association of Social Workers and National Association of Social Workers New Jersey Chapter (Carolyn Polowy and Sherri Morgan, of counsel; Stephen M. Orlofsky and Jordana Cooper, on the brief).

American Civil Liberties Union of New Jersey Foundation, for amicus curiae American Civil Liberties Union of New Jersey, American–Arab Anti–Discrimination Committee, Asian American Legal Defense and Education Fund, Hispanic Bar Association of New Jersey, National Organization for Women of New Jersey, and the National Organization for Women Legal Defense and Education Fund (Edward Barocas, on the brief).

Nashel, Kates, Nussman, Rapone & Ellis, for amicus curiae American Psychological Association and New Jersey Psychological Association (Paul M. Smith and William M. Hohengarten (Jenner & Block), and Nathalie F.P. Gilfoyle (American *174 Psychological Association), of counsel; Howard M. Nashel, on the brief).

Weinstein Snyder Lindemann Sarno, for amicus curiae Professors of the History of Marriage, Families, and the Law (Suzanne B. Goldberg (Rutgers School of Law, Newark), of counsel; Jeffrey P. Weinstein, on the brief).

Latham & Watkins, for amicus curiae Human Rights Campaign, Human Rights Campaign Foundation, Children of Lesbians and Gays Everywhere (COLAGE), Family Pride Coalition, Freedom to Marry, Gay & Lesbian Advocates & Defenders (GLAD), National Center for Lesbian Rights, National Gay and Lesbian Task Force, New Jersey Lesbian and Gay Coalition (NJLGC), and Parents, Families and Friends of Lesbians and Gays (PFLAG) (Alan E. Kraus, Richard S. Zbur, Stuart S. Kurlander, Charles J. Butler and Jeffrey R. Hamlin (Latham & Watkins), and Elizabeth A. Seaton (Human Rights Campaign), on the brief).

Lowenstein Sandler, for amicus curiae City of Asbury Park (Douglas S. Eakeley, of counsel and on the brief).

Demetrios K. Stratis, for amicus curiae Monmouth Rubber & Plastics Corp. and John M. Bonforte, Sr. (Mr. Stratis and Vincent P. McCarthy and Kristina J. Wenberg (American Center for Law & Justice, Northeast, Inc.), on the brief).

Campbell & Campbell, for amicus curiae United Families International and United Families New Jersey (Donald D. Campbell, Paul Benjamin Linton and Richard G. Wilkins, on the brief).

Anderl & Oakley, for amicus curiae Alliance for Marriage (David R. Oakley and Dwight G. Duncan, on the brief).

Before Judges SKILLMAN, COLLESTER and PARRILLO.

**Opinion**

The opinion of the court was delivered by

***175** SKILLMAN, P.J.A.D.

The issue presented by this appeal is whether the New Jersey Constitution compels the State to allow same-sex couples to marry. We conclude that the statutory limitation of the institution of marriage to members of the opposite sex does not violate our Constitution.

Plaintiffs are seven same-sex couples. Defendants are state officials with supervisory responsibilities relating to local officials' issuance of marriage licenses. Plaintiffs' complaint alleges that each couple applied for a marriage license in the municipality **263 in which they reside, but the clerk refused to issue the license because New Jersey law does not authorize a marriage between members of the same sex. Plaintiffs claim that the denial of their applications for marriage licenses violates their rights of privacy and equal protection of the law protected by the New Jersey Constitution. Plaintiffs do not contend that New Jersey's marriage statutes authorize a marriage between members of the same sex or that the limitation of marriage to members of the opposite sex violates the United States Constitution. As relief for the claimed violations of their state constitutional rights, plaintiffs sought a mandatory injunction compelling the defendant state officials to provide them access to the institution of marriage on the same terms and conditions as a couple of the opposite sex.

Defendants filed a motion to dismiss plaintiffs' complaint pursuant to *R.* 4:6–2(e) on the ground that it fails to state a claim upon which relief can be granted. Plaintiffs filed a cross-motion for summary judgment. After oral argument,

  

defendants' motion was converted to a motion for summary judgment.

The trial court issued a comprehensive written opinion rejecting plaintiffs' claims and upholding the constitutionality of New Jersey's statutory provisions that only allow members of the opposite sex to marry. In rejecting plaintiffs' claim that they have a fundamental right to marry and that the State violated this right by refusing to issue them marriage licenses, the court stated:

> ***176** The right to marry has always been understood in law and tradition to apply only to couples of different genders. A change in that basic understanding would not lift a restriction on the right, but would work a fundamental transformation of marriage into an arrangement that could never have been within the intent of the Framers of the 1947 Constitution. Significantly, such a change would contradict the established and universally accepted legal precept that marriage is the union of people of different genders.

In rejecting plaintiffs' equal protection claim, the court stated:

> Plaintiffs, like anyone else in the state, may receive a marriage license, provided that they meet the statutory criteria for marriage, including an intended spouse of the opposite gender. Plaintiffs are, in that sense, in the same position as all other New Jersey residents. The State makes the same benefit, mixed-gender marriage, available to all individuals on the same basis. Whether or not plaintiffs wish to enter into a mixed-gender marriage is not determinative of the statute's validity. It is the availability of the right on equal terms, not the equal use of the right that is central to the constitutional analysis. Plaintiffs seek not to lift a barrier to marriage, but to change its very essence.

Based on this opinion, the trial court entered final judgment dismissing plaintiffs' complaint.

During the pendency of this appeal, the Legislature enacted the Domestic Partnership Act, *L.* 2003, *c.* 246, which confers substantial legal rights upon same-sex couples who enter into domestic partnerships corresponding in many respects to the rights of opposite-sex couples who marry. This new legislation, which was enacted on January 12, 2004 and became effective on July 10, 2004, *L.* 2003, *c.* 246, § 60, is based on legislative findings and declarations that "[t]here are a significant number of individuals in this State who choose to live together in important personal, emotional and economic committed relationships with another individual," ****264** *N.J.S.A.* 26:8A–2(a); that "[t]hese familial relationships, which are known as domestic partnerships, assist the State by their establishment of a private network of support for the financial, physical and emotional health of their participants," *N.J.S.A.* 26:8A–2(b); and that "[b]ecause of the material and other support that these familial relationships provide to their participants, the Legislature believes that these mutually supportive relationships should be formally recognized by statute, and that certain rights and benefits should be made available to individuals ***177** participating in them," *N.J.S.A.* 26:8A–2(c). The Domestic Partnership Act also contains a legislative declaration that:

> The need for all persons who are in domestic partnerships, regardless of their sex, to have access to these rights and benefits is paramount in view of their essential relationship to any reasonable conception of basic human dignity and autonomy, and the extent to which they will play an integral role in enabling these persons to enjoy their familial relationships as domestic partners and to cope with adversity when a medical emergency arises that affects a domestic partnership.
>
> [*N.J.S.A.* 26:8A–2(d).]

To accomplish these legislative objectives, the Domestic Partnership Act provides that members of the same sex who "have a common residence and are otherwise jointly responsible for each other's common welfare as evidenced by joint financial arrangements or joint ownership of real or personal property," *N.J.S.A.* 26:8A–4(b)(1), who "agree to be jointly responsible for each other's basic living expenses during the domestic partnership," *N.J.S.A.* 26:8A–4(b)(2), and who satisfy the other statutory prerequisites of such a State-sanctioned union, see *N.J.S.A.* 26:8A–4(b)(3) to (9), are entitled to receive a Certificate of Domestic Partnership, *N.J.S.A.* 26:8A–8(b). Upon issuance of this certificate, a patient's domestic partner and his or her children have the same right of visitation in a health care facility as a patient's spouse or children. *N.J.S.A.* 26:2H–12.22. In addition, a domestic partner is authorized to consent to an autopsy upon the body of his or her partner, *N.J.S.A.* 26:6–50, and has the same right as a spouse to consent to donation of a deceased domestic partner's organs for statutorily approved purposes, *N.J.S.A.* 26:6–58(b)(1). The Domestic Partnership Act also amends the State's tax laws to give

  

domestic partners the same exemption from the State's inheritance tax provided to married couples, *N.J.S.A.* 54:34–1(f); *N.J.S.A.* 54:34–2(a); *N.J.S.A.* 54:34–1(j), the same $1,000 exemption from the State gross income tax that can be claimed for a spouse who does not file a separate return, *N.J.S.A.* 54A:3–1, and the right to claim a domestic partner as a "dependent" under the Gross Income Tax Act, *N.J.S.A.* 54A:1–2(e). Moreover, a domestic partner of a State employee is entitled to the same benefits under the State pension laws and State Health Benefits Program as a spouse, ***178** *N.J.S.A.* 18A:66–2; *N.J.S.A.* 43:6A–3; *N.J.S.A.* 43:15A–6; *N.J.S.A.* 43:16A–1; *N.J.S.A.* 52:14–17.26; *N.J.S.A.* 53:5A–3, and private insurance companies that provide dependent coverage for health, hospital, medical and dental expenses benefits must provide such coverage for a covered person's domestic partner, *N.J.S.A.* 17:48A–7aa; *N.J.S.A.* 17:48D–9.5; *N.J.S.A.* 17:48E–35.26; *N.J.S.A.* 17B:26–2.1x; *N.J.S.A.* 17B:27–46.1bb; *N.J.S.A.* 17B:27A–7.9; *N.J.S.A.* 17B:27A–19.12; *N.J.S.A.* 26:25–4.27; *N.J.S.A.* 26:8A–11; *N.J.S.A.* 34:11A–20. In addition, the Act amends the Law Against Discrimination (LAD), *N.J.S.A.* 10:5–1 to –42, to extend the prohibitions of that statute to discrimination on the basis ****265** of domestic partnership status. *L.* 2003, *c.* 246, § 12.

As a result of enactment of the Domestic Partnership Act, which extends many of the economic benefits and regulatory protections of marriage to persons of the same sex who enter into domestic partnerships, plaintiffs may now avoid many of the adverse consequences of being denied the opportunity to marry alleged in their complaint, such as denial of the right to participate in family insurance plans, denial of hospital visitation rights, denial of the right to make health care decisions when their partner is incapacitated, denial of the right to bury and control the disposition of a partner's remains, and denial of the benefit of the protections against discrimination provided by the LAD, by entering into domestic partnerships. The record does not indicate whether any of the plaintiff couples have entered into or plan to enter into domestic partnerships because the case was heard in the trial court before enactment of the Domestic Partnership Act. Consequently, this case does not involve any claim of a denial of constitutional rights to same-sex domestic partners on the ground that they are not afforded all the benefits and rights of opposite-sex married couples. Rather, plaintiffs' claim is that even if the Domestic Partnership Act conferred all the benefits and legal rights of marriage, the New Jersey Constitution would nevertheless compel recognition of same-sex marriage.

***179** [1] [2] [3] In reviewing the constitutionality of the statutes that limit marriage to members of the opposite sex, as in reviewing any other statute, we must keep in mind that those provisions "represent[ ] the considered action of a body composed of popularly elected representatives" and therefore are entitled to a strong presumption of validity. *N.J. Sports & Exposition Auth. v. McCrane,* 61 *N.J.* 1, 8, 292 *A.*2d 545 (1972), *appeal dismissed sub nom., Borough of E. Rutherford v. N.J. Sports & Exposition Auth.,* 409 *U.S.* 943, 93 *S.Ct.* 270, 34 *L.Ed.*2d 215 (1972). This presumption "can be rebutted only upon a showing that the statute's 'repugnancy to the Constitution is clear beyond a reasonable doubt.' " *Hamilton Amusement Ctr. v. Verniero,* 156 *N.J.* 254, 285, 716 *A.*2d 1137 (1998) (quoting *Harvey v. Bd. of Chosen Freeholders,* 30 *N.J.* 381, 388, 153 *A.*2d 10 (1959)), *cert. denied,* 527 *U.S.* 1021, 119 *S.Ct.* 2365, 144 *L.Ed.*2d 770 (1999). The personal views of the members of the court concerning "the wisdom or policy of a statute" should play no part in determining its constitutionality. *N.J. Sports & Exposition Auth., supra,* 61 *N.J.* at 8, 292 *A.*2d 545. A constitution is not simply an empty receptacle into which judges may pour their own conceptions of evolving social mores. "To yield to the impulse to [invalidate legislation merely because members of the court disapprove of its public policy] is to subvert the sensitive interrelationship between the three branches of government which is at the heart of our form of democracy." *Vornado, Inc. v. Hyland,* 77 *N.J.* 347, 355, 390 *A.*2d 606 (1978), *appeal dismissed sub nom., Vornado, Inc. v. Degnan,* 439 *U.S.* 1123, 99 *S.Ct.* 1037, 59 *L.Ed.*2d 84 (1979). Consequently, our personal views of the legislative decision to limit the institution of marriage to members of the opposite sex are irrelevant. The only question is whether this legislative decision violates a specific constitutional provision.

Plaintiffs' claim of a constitutional right to recognition of same-sex marriage is based on article I, paragraph 1, of the New Jersey Constitution, which provides:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and ****266 *180** liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

Our Supreme Court has held that this paragraph confers state constitutional rights to due process and equal protection of the law. *Sojourner A. v. N.J. Dep't of Human Servs.,* 177 *N.J.* 318, 332, 828 *A.*2d 306 (2003);

  

*Greenberg v. Kimmelman,* 99 *N.J.* 552, 568, 494 *A.*2d 294 (1985). Plaintiffs invoke both of these rights in support of their challenge to the limitation of the institution of marriage to members of the opposite sex. We address plaintiffs' due process claim in section I of this opinion and their equal protection claim in section II.

## I

[4] [5] [6] Article I, paragraph 1, protects both procedural and substantive due process rights. *See Doe v. Poritz,* 142 *N.J.* 1, 99, 662 *A.*2d 367 (1995); *Greenberg, supra,* 99 *N.J.* at 568–69, 494 *A.*2d 294. The substantive due process rights protected by this provision include the right of privacy. *See Sojourner A., supra,* 177 *N.J.* at 332–33, 828 *A.*2d 306; *Greenberg, supra,* 99 *N.J.* at 567–68, 571–72, 494 *A.*2d 294. This right of privacy "embraces the right to make procreative decisions ... [and] the right of consenting adults to engage in sexual conduct." *Greenberg, supra,* 99 *N.J.* at 571–72, 494 *A.*2d 294 (citations omitted).

Our Supreme Court has held that the due process and privacy protections of article I, paragraph 1, also include the right of members of the opposite sex to marry. *Ibid.* In fact, the Court has characterized this right as "fundamental." *J.B. v. M.B.,* 170 *N.J.* 9, 23–24, 783 *A.*2d 707 (2001); *In re Baby M.,* 109 *N.J.* 396, 447, 537 *A.*2d 1227 (1988). However, the Court has never considered whether the New Jersey Constitution confers a right to marry upon members of the same sex.

This court indirectly rejected the view that same-sex couples have a constitutional right to marry in a decision sustaining the validity of provisions of the State Health Plan that denied health benefits to same-sex partners that were extended to spouses of ***181** married public employees. *Rutgers Council of AAUP Chapters v. Rutgers,* 298 *N.J.Super.* 442, 452–62, 689 *A.*2d 828 (App.Div.1997), *certif. denied,* 153 *N.J.* 48, 707 *A.*2d 151 (1998). Relying upon decisions in other jurisdictions that have rejected same-sex couples' claims of a constitutional right to marry, we concluded that the determination whether to extend the same benefits to same-sex partners as to spouses involves "political and economic issues to be decided by the elected representatives of the people." *Id.* at 462, 689 *A.*2d 828.

Other jurisdictions have expressly rejected constitutional challenges to statutes that limit the institution of marriage to members of the opposite sex. *See, e.g., Standhardt v. Superior Court ex rel. Maricopa,* 206 *Ariz.* 276, 77 *P.*3d 451 (Ct.App.2003), *review denied* (Ariz.2004); *Dean v. Dist. of Columbia,* 653 *A.*2d 307 (D.C.1995); *Morrison v. Sadler,* 821 *N.E.*2d 15 (Ind.Ct.App.2005); *Jones v. Hallahan,* 501 *S.W.*2d 588 (Ky.Ct.App.1973); *Baker v. Nelson,* 291 *Minn.* 310, 191 *N.W.*2d 185 (1971), *appeal dismissed for want of a substantial federal question,* 409 *U.S.* 810, 93 *S.Ct.* 37, 34 *L.Ed.*2d 65 (1972); *In re Cooper,* 187 *A.D.*2d 128, 592 *N.Y.S.*2d 797, 799–801, *appeal dismissed,* 82 *N.Y.*2d 801, 604 *N.Y.S.*2d 558, 624 *N.E.*2d 696 (1993); *Singer v. Hara,* 11 *Wash.App.* 247, 522 *P.*2d 1187, *review denied,* 84 *Wash.*2d 1008 (1974). In *Singer,* the court concluded that the limitation of the institution of marriage to members of the opposite sex "is based upon the state's recognition that ****267** our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children," 522 *P.*2d at 1195, and that "marriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman," *id.* at 1197. Other courts that have rejected challenges to the constitutionality of the limitation of marriage to members of the opposite sex also have relied upon the role that marriage plays in procreation and in providing the optimal environment for child rearing. *See* ***182** *Standhardt, supra,* 77 *P.*3d at 461–64; *Dean, supra,* 653 *A.*2d at 333; *Morrison, supra,* 821 *N.E.*2d at 23–35; *Nelson, supra,* 191 *N.W.*2d at 186.

The only state supreme court decision that has declared the limitation of the institution of marriage to members of the opposite sex to be unconstitutional is *Goodridge v. Dep't of Pub. Health,* 440 *Mass.* 309, 798 *N.E.*2d 941 (2003), which is discussed later in this opinion. *See also Opinions of the Justices to the Senate,* 440 *Mass.* 1201, 802 *N.E.*2d 565 (2004). In addition, the Vermont Supreme Court held that denial of the benefits incident to marriage to same-sex domestic partners violated the "common benefits" provision of the Vermont Constitution, but that this constitutional violation could be remedied by enactment of a domestic partnership act or other legislation that extends the benefits that flow from marriage to same-sex couples. *Baker v. State,* 170 *Vt.* 194, 744 *A.*2d 864, 886–87 (1999). The Vermont Legislature subsequently enacted legislation authorizing domestic partnerships to comply with this mandate. *Vt. Stat. Ann.* tit. 15 §§ 1201–07 (2004). The Hawaii Supreme Court held that the limitation of marriage to members of the opposite sex established a sex-based classification that required strict scrutiny under equal protection analysis, *Baehr v. Lewin,* 74 *Haw.* 530, 852 *P.*2d 44 (1993), and on remand, a trial court declared this limitation to be

  

violative of the Hawaii Constitution, but before the case was brought back before the Hawaii Supreme Court, the electorate approved a constitutional amendment prohibiting same-sex marriage, *Haw. Const.* art. I, § 23. *See* William C. Duncan, *Whither Marriage in the Law?,* 15 *Regent L. Rev.* 119, 119–20 (2003).[1]

***183** [7] Our Supreme Court has indicated that in determining whether a claimed right is entitled to protection as a matter of substantive due process, a court should "look to 'the traditions and [collective] conscience of our people to determine whether a principle is so rooted [there] ... as to be ranked as fundamental.' " *King v. S. Jersey Nat'l Bank,* 66 *N.J.* 161, 178, 330 *A.*2d 1 (1974) (quoting *Griswold v. Connecticut,* 381 *U.S.* 479, 493, 85 *S.Ct.* 1678, 1686, 14 *L.Ed.*2d 510, 520 (1965) (Goldberg, J., concurring)). Similarly, the Supreme Court of the United States has recently reaffirmed that "the Due Process Clause specially ****268** protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " *Washington v. Glucksberg,* 521 *U.S.* 702, 720–21, 117 *S.Ct.* 2258, 2268, 138 *L.Ed.*2d 772, 787–88 (1997) (citations omitted). The Court noted that confining constitutional protection to "fundamental rights found to be deeply rooted in our legal tradition ... tends to rein in the subjective elements that are necessarily present in due-process judicial review." *Id.* at 722, 117 *S.Ct.* at 2268, 138 *L.Ed.*2d at 788.

Marriage between members of the same sex is clearly not a "fundamental right [ ] ... deeply rooted in our legal tradition." To the contrary, as we observed in *M.T. v. J.T.,* 140 *N.J.Super.* 77, 83–84, 355 *A.*2d 204 (App.Div.), *certif. denied,* 71 *N.J.* 345, 364 *A.*2d 1076 (1976):

> [A] lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female. Despite winds of change, this understanding of a valid marriage is almost universal....
>
> ... The historic assumption in the application of common law and statutory strictures relating to marriages is that only persons who can become 'man and wife' have the capacity to enter marriage.

Plaintiffs' claim that a right to marriage between members of the same sex may be found in ***184** article I, paragraph 1, of the New Jersey Constitution has no foundation in its text, this Nation's history and traditions or contemporary standards of liberty and justice. It certainly is an idea that would have been alien to the delegates to the 1947 Constitutional Convention who proposed this provision and to the voters who approved it. Although there has been a substantial liberalization of public attitudes towards the rights of homosexuals in the intervening fifty-eight years, there is no current public consensus favoring recognition of marriages between members of the same sex. In fact, in 1996 Congress enacted the Defense of Marriage Act (DOMA), *Pub.L.* No. 104–199, 110 *Stat.* 2419, which provides that no State shall be required to give effect under the Full Faith and Credit Clause of the United States Constitution, *U.S. Const.* art. IV, § 1, to any other state's law that recognizes same-sex marriage, 28 *U.S.C.A.* § 1738C, and that all Acts of Congress that refer to "marriage" or "spouse" shall be interpreted to apply only to mixed-gender couples, 1 *U.S.C.A.* § 7. And as previously discussed, our Legislature recently enacted the Domestic Partnership Act, which confers substantial legal rights upon same-sex couples who enter into domestic partnership unions but stops short of recognizing the right of members of the same sex to marry.

[8] [9] Plaintiffs have failed to identify any source in the text of the New Jersey Constitution, the history of the institution of marriage or contemporary social standards for their claim that the Constitution mandates State recognition of marriage between members of the same sex. Plaintiffs describe marriage as simply a "compelling and definitive expression of love and commitment that can occur between two adults"—without any reference to the historical, religious or social foundations of the institution—and argue that because two members of the same sex have the same capacity as members of the opposite sex to "make a strong and meaningful lifetime commitment to each other," the State must extend the same recognition to same-sex marriage as a marriage between members of the opposite sex. However, our society and laws view marriage as something more than just State recognition ****269** ***185** of a committed relationship between two adults. Our leading religions view marriage as a union of men and women recognized by God, *see* Larry Catá Backer, *Religion as the Language of Discourse of Same Sex Marriage,* 30 *Cap. U.L. Rev.* 221, 234–36 (2002), and our society considers marriage between a man and woman to play a vital role in propagating the species and in providing the ideal environment for raising children.[2] *See* George W. Dent, Jr., *The Defense of Traditional Marriage,* 15 *J.L. & Pol.,* 581, 593–601 (1999); William C. Duncan, *The State Interests in Marriage,* 2 *Ave Maria L. Rev.* 153, 164–72 (2004); Monte Neil Stewart, *Judicial Redefinition of Marriage,* 21 *Canadian J. Fam. L.,* 11, 41–85 (2004).

Indeed, the very cases that plaintiffs rely upon for the proposition that there is a fundamental right to marry

  

reflect these common understandings of the religious and social foundations of marriage that limit the institution to members of the opposite sex. ***186** For example, in *Turner v. Safley,* 482 *U.S.* 78, 96, 107 *S.Ct.* 2254, 2265, 96 *L.Ed.*2d 64, 83 (1987), the Court noted that "many religions recognize marriage as having spiritual significance; ... and ..., therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication." In *Zablocki v. Redhail,* 434 *U.S.* 374, 384, 98 *S.Ct.* 673, 680, 54 *L.Ed.*2d 618, 629 (1978), the Court "recognized that the right 'to marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause," and described marriage "as 'fundamental to the very existence and survival of the race.' " (Citations omitted).

The conclusion that marriage between members of the same sex has no historical foundation or contemporary societal acceptance and therefore is not constitutionally mandated is supported by decisions in other jurisdictions that have addressed the issue. In *Standhardt, supra,* 77 *P.*3d at 459, the court concluded that "[a]lthough same-sex relationships are more open and have garnered greater societal acceptance in recent years, same-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty." Similarly, in *Dean,* the court concluded that "same-sex marriage is not a 'fundamental right' protected by the due process clause, because that kind of relationship ****270** is not 'deeply rooted in this Nation's history and tradition.' " 653 *A.*2d at 331 (quoting *Moore v. City of E. Cleveland,* 431 *U.S.* 494, 503, 97 *S.Ct.* 1932, 1938, 52 *L.Ed.*2d 531, 540 (1977)); *see also Nelson, supra,* 191 *N.W.*2d at 186 (noting that "[t]he 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.").

Plaintiffs argue that the State's contention that the essence of the institution of marriage is a State-sanctioned union between members of the opposite sex constitutes "circular reasoning,"—a characterization adopted by the dissent in its discussion of decisions in other jurisdictions that have upheld the limitation of the ***187** institution of marriage to members of the opposite sex. *See infra,* 378 *N.J.Super.* at 204, 875 *A.*2d at 280–81. However, plaintiffs' argument proceeds along the same kind of circular path that they accuse the State of following. Plaintiffs start with the premise that there is no difference between a "compelling and definitive expression of love and commitment" between members of the same sex and a marriage between members of the opposite sex, and then argue from this premise that the State has failed to carry its burden of justifying the limitation of the institution of marriage to a man and a woman. But the significant difference between these arguments is that the State's argument is grounded on historical tradition and our nation's religious and social values, while plaintiffs' argument is based on nothing more than their own normative claim that society should give unions between same-sex couples the same form of recognition as marriages between members of the opposite sex.

The same form of constitutional attack that plaintiffs mount against statutes limiting the institution of marriage to members of the opposite sex also could be made against statutes prohibiting polygamy. Persons who desire to enter into polygamous marriages undoubtedly view such marriages, just as plaintiffs view same-sex marriages, as "compelling and definitive expression[s] of love and commitment" among the parties to the union. Indeed, there is arguably a stronger foundation for challenging statutes prohibiting polygamy than statutes limiting marriage to members of the opposite sex "because, unlike gay marriage, [polygamy] has been and still is condoned by many religions and societies."[3] Dent, *supra,* 15 *J.L. & Pol.* at 628. Nevertheless, courts have uniformly rejected constitutional challenges to statutes prohibiting polygamy on the grounds that polygamous marriage is offensive to our Nation's religious principles and social mores. *Reynolds v. United States,* 98 *U.S.* 145, 161–67, 25 *L.Ed.* 244, 248–51 (1878); *Potter v. Murray City,* 760 *F.*2d 1065, 1068–71 (10th Cir.), *cert.* ***188** *denied,* 474 *U.S.* 849, 106 *S.Ct.* 145, 88 *L.Ed.*2d 120 (1985); *see also State v. Green,* 99 *P.*3d 820 (Utah 2004). In *Reynolds,* the Court stated:

> Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and African people.... [F]rom the earliest history of England polygamy has been treated as an offence against society.
>
> ....
>
> ****271** ... In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.
>
> [98 *U.S.* at 164–65, 25 *L.Ed.* at 250.]

More recently, the Tenth Circuit concluded:

> Monogamy is inextricably woven into the fabric of

  

> our society. It is the bedrock upon which our culture is built. In light of these fundamental values, the State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship.
>
> [*Potter, supra,* 760 *F.*2d at 1070 (citation omitted).]

Plaintiffs' only response to the State's comparison of the justification for limitation of the institution of marriage to members of the opposite sex with its limitation to a single man and a single woman is that "[t]hey do not challenge the 'binary nature of marriage' and indeed embrace the solemn statutory obligation of 'exclusivity.' " However, persons whose religions and cultural traditions condone polygamy, but disapprove of same-sex marriage, could just as easily say that they do not challenge the limitation of marriage to members of the opposite sex, only the requirement that marriage must be binary.

[10] In sum, the right to marry is a fundamental right that is subject to the privacy protections of article I, paragraph 1, of the New Jersey Constitution. However, this right extends only to marriages between members of the opposite sex. Plaintiffs' claim of a constitutional right to State recognition of marriage between members of the same sex has no foundation in the text of the Constitution, this Nation's history and traditions or contemporary standards of liberty and justice. Therefore, we reject plaintiffs' ***189** claim under the substantive due process and privacy protections of the New Jersey Constitution.

## II

[11] [12] We turn next to plaintiffs' equal protection claim. In determining whether the State has violated the equal protection guarantees of article I, paragraph 1, our courts employ a balancing test that considers "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." *Greenberg, supra,* 99 *N.J.* at 567, 494 *A.*2d 294. Thus, the "crucial" threshold step in the required constitutional analysis is identification of "the nature of the [claimed] right." *Ibid.*; *see also Poritz, supra,* 142 *N.J.* at 94, 662 *A.*2d 367.

In the decisions upon which plaintiffs construct their constitutional attack upon the limitation of marriage to members of the opposite sex, it was undisputed that the statute in issue affected a constitutional right. *See Sojourner A., supra,* 177 *N.J.* at 333, 828 *A.*2d 306 ("a woman's right to make procreative decisions"); *Greenberg, supra,* 99 *N.J.* at 571–72, 494 *A.*2d 294 (the right of members of the opposite sex to marry); *Right to Choose v. Byrne,* 91 *N.J.* 287, 303–04, 450 *A.*2d 925 (1982) ("a woman's right to choose whether to carry a pregnancy to full-term or to undergo an abortion"); *Planned Parenthood of Cent. N.J. v. Farmer,* 165 *N.J.* 609, 762 *A.*2d 620 (2000) (same). Consequently, the only question in those cases was "the extent to which the [challenged statute] intrude[d] upon [a recognized constitutional right], and the public need for the restriction." *Greenberg, supra,* 99 *N.J.* at 567, 494 *A.*2d 294.

****272** [13] In contrast, the essential question in this case is whether same-sex couples have any constitutional right to marry. For reasons set forth at length in section I of this opinion, we are satisfied that only members of the opposite sex have a constitutionally protected right to marry. Therefore, plaintiffs have failed to satisfy their threshold burden to show the existence of an ***190** "affected right," and for that reason the State is not required to show that the "public need" for restrictions upon that right outweigh plaintiffs' interest in its exercise.[4]

The primary federal decision upon which plaintiffs rely, *Loving v. Virginia,* 388 *U.S.* 1, 87 *S.Ct.* 1817, 18 *L.Ed.*2d 1010 (1967), rested upon the premise, derived from *Skinner v. Oklahoma,* 316 *U.S.* 535, 541, 62 *S.Ct.* 1110, 1113, 86 *L.Ed.* 1655, 1660 (1942), that members of the opposite sex have a constitutionally protected right to marry. Proceeding on this premise, the Court invalidated a Virginia statute that prohibited a "white person" from marrying anyone other than another "white person" on the grounds that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause [of the Fourteenth Amendment.]" *Loving, supra,* 388 *U.S.* at 12, 87 *S.Ct.* at 1823, 18 *L.Ed.*2d at 1018. Noting that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival[,]" the Court also held that the statute violated the Due Process Clause. *Ibid.* (quoting *Skinner, supra,* 316 *U.S.* at 541, 62 *S.Ct.* at 1113, 86 *L.Ed.* at 1660). However, nothing in *Loving* suggests that the Fourteenth Amendment prohibits a State from limiting the institution of marriage to a State-recognized union between a man and a woman. In fact, several years after *Loving,* when the Minnesota Supreme Court rejected a constitutional challenge to that State's prohibition against marriage by members of the same sex in a decision that distinguished *Loving* on the ground that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex," ***191** *Nelson, supra,* 191 *N.W.*2d at 187, the Supreme Court dismissed an appeal from that decision

  

"for want of a substantial federal question," 409 *U.S.* 810, 93 *S.Ct.* 37, 34 *L.Ed.*2d 65; *see also Adams v. Howerton,* 673 *F.*2d 1036, 1039 n. 2 (9th Cir.), *cert. denied,* 458 *U.S.* 1111, 102 *S.Ct.* 3494, 73 *L.Ed.*2d 1373 (1982). Subsequent Supreme Court decisions also indicate that the constitutionally protected right recognized by the Court is the right of members of the opposite sex to marry. *See Turner, supra,* 482 *U.S.* at 95–96, 107 *S. Ct.* at 2265, 96 *L.Ed.*2d at 83; *Zablocki, supra,* 434 *U.S.* at 383–86, 98 *S.Ct.* at 679–81, 54 *L.Ed.*2d at 628–31; *see also Standhardt, supra,* 77 *P.*3d at 458 (noting that *Loving* "was anchored to the concept of marriage as a union involving persons of the opposite sex," and that "[i]n contrast, recognizing a right to marry someone of the same sex would not expand the established right to marry, but would redefine the legal meaning of 'marriage.' ").

The only opinion by a member of the Court that directly addresses whether the Fourteenth Amendment may be found to compel recognition of a right of same-sex ****273** couples to marry is Justice Scalia's opinion in *Lawrence v. Texas,* 539 *U.S.* 558, 604–05, 123 *S.Ct.* 2472, 2497–98, 156 *L.Ed.*2d 508, 542–43 (2003) (Scalia, J., dissenting). In dissenting from the majority's holding that a Texas statute making it a crime for two persons of the same sex to engage in certain types of intimate sexual conduct violated the Due Process Clause, he stated:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.
>
> [539 *U.S.* at 604, 123 *S.Ct.* at 2498, 156 *L.Ed.*2d at 542.]

However, Justice Kennedy's majority opinion rejected this contention, stating:

> [This case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.
>
> [539 *U.S.* at 578, 123 *S.Ct.* at 2484, 156 *L.Ed.*2d at 525.]

Even more pointedly, Justice O'Connor stated in a concurring opinion that "preserving the traditional institution of marriage" is a "legitimate state interest" and that "other reasons exist to ***192** promote the institution of marriage beyond mere moral disapproval of an excluded group." 539 *U.S.* at 585, 123 *S.Ct.* at 2487–88, 156 *L.Ed.*2d at 530. Therefore, there is nothing in *Loving* or *Lawrence* that indicates that the Fourteenth Amendment bars a state from prohibiting marriage between members of the same sex, and significantly, plaintiffs have disavowed reliance upon the United States Constitution in their attack upon this State's limitation of marriage to members of the opposite sex.

In the only state supreme court decision that has held the limitation of the institution of marriage to members of the opposite sex to be violative of a state constitution, *Goodridge,* the court's plurality opinion starts with the premise that marriage is a social institution that reflects "[t]he exclusive commitment of two individuals to each other [that] nurtures love and mutual support[,]" 798 *N.E.*2d at 948, or as restated later in the opinion, "a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family," *id.* at 954. The opinion then frames the question in the case as whether the State has demonstrated a sufficient justification for withholding the benefits of marriage, as thus conceived, from same-sex couples. The opinion proceeds to consider the justifications relied upon by the State for limitation of marriage to opposite-sex couples—"(1) providing a 'favorable setting for procreation'; (2) ensuring the optimal setting for child rearing, which the department defines as 'a two-parent family with one parent of each sex'; and (3) preserving scarce State and private financial resources"—and finds each one to be constitutionally inadequate. *Id.* at 961–68.

The essential premise of the *Goodridge* plurality opinion—that the institution of marriage is simply an "exclusive commitment of two individuals to each other," *id.* at 943—constitutes a normative judgment that conflicts with the traditional and still prevailing religious and societal view of marriage as a union between a man and a woman that plays a vital role in propagating the species and provides the ideal setting for raising children. Consequently, ***193** unlike *Loving*, *Goodridge* does not establish a right of equal access to marriage, regardless of race or any other invidiously discriminatory factor, but instead significantly alters the nature of this social institution. Indeed, the plurality opinion itself acknowledges that "our decision today ****274** marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries." *Id.* at 965.

The understanding of the nature of marriage as a State-recognized union between a man and a woman reflects the understanding of the delegates to the 1947 Constitutional Convention who proposed article I, paragraph 1, of our Constitution and the voters who approved it. This constitutional provision does not give a court the license to create a new constitutional right to

  

same-sex marriage simply because its members may feel that the State should grant same-sex couples the same form of recognition as opposite-sex couples who choose to marry. Moreover, to whatever extent it may be appropriate to consider current social mores and values in interpreting the liberty and equality protections of article I, paragraph 1, there is no basis for concluding that our society now accepts the view that there is no essential difference between a traditional marriage of a man and woman and a marriage between members of the same sex. To the contrary, Congress's enactment in 1996 of the Defense of Marriage Act, the New Jersey Legislature's recent enactment of the Domestic Partnership Act, which confers substantial legal rights upon same-sex couples but stops short of recognizing the right of members of the same sex to marry, and the strongly negative public reactions to the decisions in *Goodridge* and in lower courts of other states that have held the limitation of the institution of marriage to members of the opposite sex to be unconstitutional, demonstrate that there is not yet any public consensus favoring recognition of same-sex marriage. Therefore, we reject plaintiffs' claim that the New Jersey Constitution requires extension of the institution of marriage to same-sex couples.

***194** Although same-sex couples do not have a constitutional right to marry, they have significant other legal rights. Same-sex couples may seek to adopt children together, *see In re Application for Change of Name by Bacharach,* 344 *N.J.Super.* 126, 134, 780 *A.*2d 579 (App.Div.2001); their right to engage in sexual relations is protected by both the United States and New Jersey Constitutions, *see Lawrence, supra,* 539 *U.S.* at 578, 123 *S.Ct.* at 2484, 156 *L.Ed.*2d at 525–26; *Greenberg, supra,* 99 *N.J.* at 571–72, 494 *A.*2d 294; *State v. Saunders,* 75 *N.J.* 200, 214, 381 *A.*2d 333 (1977); and they may enter into domestic partnership unions under the Domestic Partnership Act that entitle them to many of the same legal benefits enjoyed by married opposite-sex couples. Moreover, domestic partners may assert claims that the due process and equal protection guarantees of article I, paragraph 1, of the New Jersey Constitution entitle them to additional legal benefits provided by marriage. *See Baker v. State, supra,* 744 *A.*2d at 869–86.

A time may come when our society accepts the view that same-sex couples should be allowed to marry. If there were such an evolution in public attitudes, our Legislature presumably would amend the marriage laws to recognize same-sex marriage just as it recognized the increasing public acceptance of same-sex unions by enacting the Domestic Partnership Act. However, absent legislative action, there is no basis for construing the New Jersey Constitution to compel the State to authorize marriages between members of the same sex.

Affirmed.

PARRILLO, J.A.D., concurring.

I join in the majority decision essentially for the reasons so clearly expressed by Judge Skillman. I write separately to underscore ****275** the nature of the right being asserted, the continuing viability of the State's interest in preserving its originating force, and the proper divide between judicial and legislative activity in a matter of such profound social significance.

***195** Plaintiffs challenge New Jersey's marriage laws, *N.J.S.A.* 37:1–1 to –27, solely on state constitutional grounds because they implicitly recognize there is no federally protected right of same-sex couples to marry. So limited, their argument posits a right that is really twofold: the right *to* marry and the rights *of* marriage. Plaintiffs want the former, in part, because it bestows the latter, and because if the latter are fundamental, the former must be as well. Although the rhetoric of justification tends to collapse the nature of the rights in question, they are, upon closer examination, quite separate and not at all the same.

The rights *of* marriage—the so-called secular implications—are actually not contained in the marriage laws under attack, which simply delineate which persons may not marry each other, *see, e.g., N.J.S.A.* 37:1–1, but rather are conferred by a host of statutes not here in issue. Unquestionably, the economic, legal and regulatory benefits incident to a marriage license are significant. But, as Judge Skillman's opinion points out, many of these rights and protections are afforded to committed same-sex couples under our Domestic Partnership Act, *N.J.S.A.* 26:8A–1 to –12, as well as evolving case law that recognizes, among other privileges, the right of same-sex couples to seek to adopt children together. *See In re Application for a Change of Name by Bacharach,* 344 *N.J.Super.* 126, 134, 780 *A.*2d 579 (App.Div.2001) (citing *In re Adoption of Two Children by H.N.R.,* 285 *N.J.Super.* 1, 6, 666 *A.*2d 535 (App.Div.1995)). Of course, to the extent those laws unconstitutionally withhold any of the publicly-conferred tangible or intangible benefits of marriage from same-sex couples, plaintiffs remain free to redress any such deprivation on an ad-hoc basis, by challenging the particular statutory exclusion resulting in disparate or unfair treatment. In fact, it would seem a much more effective approach to address the claimed denial directly, rather than to simply advance the notion

  

as an additional basis for finding a constitutional mandate for state recognition of same-sex marriage.

***196** The latter's symbolic significance, however, lies at the heart of plaintiffs' argument. Although New Jersey's Domestic Partnership law affords plaintiffs a legally-recognized status more or less "marriage-like," it does not carry the title "marriage." This is, by no means, to suggest the legal conflict is merely semantic or not as rationally important to the people on each side of the issue. On the contrary, definitions matter. This is why the conflict over the core meaning and purpose of marriage is so highly charged. Indeed, notwithstanding equal benefits and protections under our law, plaintiffs would still argue that denial of the right *to* marry operates per se to deny a constitutionally protected right; that the right to marry, under New Jersey's constitution, compels state sanctioning of same-sex marriage. Resolution of this issue, therefore, requires an understanding of the precise status in issue.

Plaintiffs' claim of a right to marry relies on traditional equality and liberty jurisprudence, the latter couched in the more recent terminology of privacy, autonomy, and identity. No doubt, plaintiffs have taken their bearings from the "close personal relationship" model of marriage espoused in *Goodridge v. Department of Public Health,* 440 *Mass.* 309, 798 *N.E.*2d 941 (2003). Citing "respect for individual autonomy," *id.* at 949, the *Goodridge* plurality ****276** defined marriage simply as "the exclusive and permanent commitment of the married partners to one another[ ]," *id.* at 961; "the voluntary union of two persons as spouses, to the exclusion of all others[ ]," *id.* at 969; and "at once a deeply personal commitment to another human being and a highly public celebration of ideals of mutuality, companionship, intimacy, fidelity, and family." *Id.* at 954. Given this narrow view, it is no wonder the *Goodridge* plurality concluded that "our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family." *Id.* at 961.

This distillation of marriage down to its pure "close personal relationship" essence, however, strips the social institution "of any goal or end beyond the intrinsic emotional, psychological, or sexual ***197** satisfaction which the relationship brings to the individuals involved." Monte Neil Stewart, *Judicial Redefinition of Marriage,* 21 *Can. J. Fam. L.* 11, 81 (2004) (quoting D. Cere, "The Conjugal Tradition in Post Modernity: The Closure of Public Discourse?" at 6 (2003) (unpublished)). Yet, the marital form traditionally has embraced so much more, including:

> the fundamental facets of [traditional] conjugal life: the fact of sexual difference; the enormous tide of heterosexual desire in human life, the massive significance of male female bonding in human life; the procreativity of heterosexual bonding, the unique social ecology of heterosexual parenting which bonds children to their biological parents, and the rich genealogical nature of heterosexual family ties.
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> [*Ibid.* (citation omitted.)].

The simple fact is that the very existence of marriage does "privilege procreative heterosexual intercourse." Marriage, plainly speaking, is a privileged state and that is precisely why plaintiffs are waging this battle. Procreative heterosexual intercourse is and has been historically through all times and cultures an important feature of that privileged status, and that characteristic is a fundamental, originating reason why the State privileges marriage. *Skinner v. Oklahoma,* 316 *U.S.* 535, 541, 62 *S.Ct.* 1110, 1113, 86 *L.Ed.* 1655 (1942); *J.B. v. M.B.,* 170 *N.J.* 9, 23, 783 *A.*2d 707 (2001); *Lindquist v. Lindquist,* 130 *N.J.Eq.* 11, 19, 20 *A.*2d 325 (E. & A.1941); *see also Dean v. District of Columbia,* 653 *A.*2d 307, 337 (D.C.1995). When plaintiffs, in defense of genderless marriage, argue that the State imposes no obligation on married couples to procreate, they sorely miss the point. Marriage's vital purpose is not to mandate procreation but to control or ameliorate its consequences—the so-called "private welfare" purpose. To maintain otherwise is to ignore procreation's centrality to marriage.

By seeking public recognition and affirmation of their private relationships, plaintiffs acknowledge that marriage is more than a merely private declaration, but an act of public significance and consequence for which the State exerts an important regulatory ***198** role.[1] Indeed, to seek such official assent is to concede the authority of those whose regard is sought.

****277** Because marriage has secular implications—the so-called "rights *of* marriage"—the State has a legitimate interest in determining eligibility criteria. In fact, no one really disputes that the State is empowered to privilege marriage by restricting access to, or drawing principled boundaries around, it. *Greenberg v. Kimmelman,* 99 *N.J.* 552, 572, 494 *A.*2d 294 (1985). Indeed, there are reasons for limiting unfettered access to marriage. Otherwise, by allowing the multiplicity of human choices that bear no resemblance to marriage to qualify, the institution would become non-recognizable and unable to perform its vital function. Thus, New Jersey statutes ban bigamous marriages, *N.J.S.A.* 2C:24–1, common law marriages, *N.J.S.A.* 37:1–10, incestuous marriages, *N.J.S.A.* 37:1–1, and marriages to persons adjudged to be mentally

  

incompetent or with a venereal disease in a communicable stage, *N.J.S.A.* 37:1–9. The governmental interest in these restrictions has been repeatedly and widely recognized.

To be sure, longstanding traditions restricting the right to marry are not immune from constitutional challenge. Yet, plaintiffs' reliance on *Loving v. Virginia,* 388 *U.S.* 1, 87 *S.Ct.* 1817, 18 *L.Ed.*2d 1010 (1967), does not advance this proposition. Anti-miscegenation laws simply may not be equated with laws reserving marriage to opposite-sex couples. Marriage has an inherent nature, and race is not intrinsic to that status. The so-called "tradition" of laws prohibiting interracial marriages "was contradicted by a *text*—an Equal Protection Clause that implicitly establishes racial equality as a constitutional value." *Planned* ***199** *Parenthood v. Casey,* 505 *U.S.* 833, 980, n. 1, 112 *S.Ct.* 2791, 120 *L.Ed.*2d 674 (1992) (Scalia, J., dissenting in part).

In contradistinction, a core feature of marriage is its binary, opposite-sex nature. Interestingly, plaintiffs admittedly have no quarrel with the legal requirement that marriage be limited to a union of two people. But, the binary idea of marriage arose precisely because there are two sexes. Plaintiffs simply have not posited an alternative theory of marriage that would include members of the same sex, but still limit the arrangement to couples, or that would otherwise justify the distinction. If, however, the meaning of marriage and the right to marital status is sufficiently defined without reference to gender, then what principled objection could there be to removing its binary barrier as well? If, for instance, marriage were only defined with reference to emotional or financial interdependence, couched only in terms of privacy, intimacy, and autonomy, then what non-arbitrary ground is there for denying the benefit to polygamous or endogamous unions whose members claim the arrangement is necessary for their self-fulfillment?

The legal nature of marriage cannot be totally malleable lest the durability and viability of this fundamental social institution be seriously compromised, if not entirely destabilized. Because the reasons for the existence of marriage retain substantial vitality to date, because the "specialness" of its opposite-sex feature makes it meaningful and achieves important public purposes, and because the meaning and value of alternative theories are speculative and unknown, the State's interest in maintaining the traditional gender block is rationally based.

It may well be, as some posit, that marriage "is socially constructed, and thus transformable[.]" Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra–Community Critique,* 21 *N.Y.U. Rev. of L. & Soc. Change,* 567, 589 (1994). Perhaps so. And it would be foolish not to recognize a certain dynamism in the evolving ****278** view of marriage and its role in society. Indeed, the basic reality of procreative ***200** capacity in right *to* marry cases to date may, in the future, take on different meaning or significance given the displacing potential of cross-cultural forces in our society, such as contraception and assisted reproductive technology. Suffice it to say, however, there is no plausible basis for suggesting the link is now so weak as to require the line be drawn any differently. Nothing before the court compels us to remove the "deep logic" of gender as a necessary component of marriage, or to recognize, on equal footing, any adult relationship characterized merely by interdependence, mutuality, intimacy, and endurance.

Any societal judgment to level the playing field must appreciate the proper divide between judicial and legislative activity. "[L]aw has a purpose and a power to preserve or change public meanings and thus a purpose and a power to preserve or change social institutions." Stewart, *supra,* at 80. In this vein, it is the Legislature's prerogative to define and advance governmental ends, while the judiciary ensures the means selected bear a just and reasonable relationship to the governmental objective, or, in the case of suspect classifications or fundamental rights, are supported by compelling State interests. It is, therefore, a proper role for the Legislature to weigh the societal costs against the societal benefits flowing from a profound change in the public meaning of marriage. On the other hand, the judiciary is not in the business of preferring, much less anointing, one value as more valid than another, particularly where, at least in the foreseeable future, the conflict is not susceptible to resolution by scientific or objective means. The choice must come from democratic persuasion, not judicial fiat.

COLLESTER, J.A.D., dissenting.

Although my colleagues and I arrive at a different conclusion, we are in agreement that any individual views we have on the morality or social implications of same-sex marriage must play no part in our analysis of the constitutional issues presented. In the ongoing public debate there are persons of intelligence, sensitivity ***201** and good will on each side of the issue. Some believe that lawful marriage between persons of the same gender would undermine the essential nature of both marriage and family life. Others argue that it would give proper

  

recognition to committed same-sex relationships and by doing so enhance marriage. Our function as judges is to interpret the Constitution, not rewrite it, and our interpretation must be principled rather than skewed to fit an individual philosophy or a desired result. *N.J. Sports Authority v. McCrane,* 61 *N.J.* 1, 8, 292 *A.*2d 545 (1972). Nonetheless, we must interpret our Constitution to uphold individual rights, liberties and guarantees for all citizens even though our conclusion may disappoint or offend some earnest and thoughtful citizens.

For all of its personal, familial and spiritual value, marriage is a creature of State laws governing its entrance, protecting its special status, and, when necessary, specifying the terms of its dissolution. Marriage is also a fundamental civil right protected by both the Federal and New Jersey Constitutions. *Zablocki v. Redhail,* 434 *U.S.* 374, 383, 98 *S.Ct.* 673, 680, 54 *L.Ed.*2d 618 (1978); *J.B. v. M.B.,* 170 *N.J.* 9, 23–24, 783 *A.*2d 707 (2001). Laws may not "interfere directly and substantially with the right to marry." *Zablocki, supra,* 434 *U.S.* at 387, 98 *S.Ct.* at 681, 54 *L.Ed.*2d at 631.

The right to marry is effectively meaningless unless it includes the freedom to ****279** marry a person of one's choice. *Goodridge v. Dep't of Pub. Health,* 440 *Mass.* 309, 798 *N.E.*2d 941, 958 (2003); *see also, Perez v. Lippold,* 32 *Cal.*2d 711, 198 *P.*2d 17, 21 (1948). In *Loving v. Virginia,* 388 *U.S.* 1, 12–13, 87 *S.Ct.* 1817, 1823–24, 18 *L.Ed.*2d 1010, 1018 (1967), the United States Supreme Court struck down laws prohibiting interracial marriage under both the Due Process and Equal Protection Clauses of the Federal Constitution. *Zablocki, supra,* 434 *U.S.* at 392, 98 *S.Ct.* at 685, 54 *L.Ed.*2d at 635, invalidated a Wisconsin law requiring a person under a child support order to meet financial requirements and seek court approval in order to marry. Prison inmates cannot be foreclosed from marrying a person of their choosing, who is either ***202** inside or outside the institution. *Turner v. Safley,* 482 *U.S.* 78, 94, 107 *S.Ct.* 2254, 2265, 96 *L.Ed.*2d 64, 83 (1987); *see also, Vazquez v. Dep't of Corrections,* 348 *N.J.Super.* 70, 76, 791 *A.*2d 281 (App.Div.2002) (holding the denial of a request by an inmate serving a life sentence violated her constitutional right to marry).

Statutory restrictions on the right to marry are few, and they are grounded in the State's proper regulatory authority, commonly called its police power, to protect general health, safety and welfare. Marriage is prohibited to a child, a close relative, a mental incompetent or a person afflicted with a venereal disease in a communicable stage. *See, N.J.S.A.* 37:1–1 to –9. None of the plaintiffs in this case fall within these proscribed categories, and neither the State nor the majority opinion suggest a reason of health, safety or general welfare to justify a prohibition of their right to marry the person of their choosing.

While New Jersey statutes do not specifically limit marriage to a union of a man and a woman or expressly prevent a person from marrying someone of the same sex, it is clear that they do so. *M.T. v. J.T.,* 140 *N.J.Super.* 77, 83–84, 355 *A.*2d 204 (App.Div.), *certif. denied,* 71 *N.J.* 345, 364 *A.*2d 1076 (1976). Plaintiffs argue that this prohibition deprives them of their fundamental right to marry a person of their choosing in contravention of their rights of liberty, privacy and equal protection of laws, guaranteed by the New Jersey Constitution. *See, Sojourner A. v. Dep't of Human Services,* 177 *N.J.* 318, 332, 828 *A.*2d 306 (2003); *Greenberg v. Kimmelman,* 99 *N.J.* 552, 568, 494 *A.*2d 294 (1995); *In re Quinlan,* 70 *N.J.* 10, 39–40, 355 *A.*2d 647 (1976).

Plaintiffs are diverse in background and occupation and have lived in committed relationships for decades. Chris Lodewycks and Craig Hutchinson have been together for thirty-four years. Chris is an investment asset manager, president of the Summit Business Association and a trustee of his local YMCA. Mark Lewis and Dennis Winslow are Episcopal priests whose pastoral duties have included officiating at hundreds of weddings and assisting congregants with marriage counseling. Mark is the chaplain for ***203** the Secaucus fire and police departments and a trustee of Christ Hospital in Jersey City. Another ordained minister, Alice Troy, is midway through the second decade in her relationship with Sandra Heath.

The other plaintiffs are raising children. The relationship of Cindy Meneghin and Maureen Kilian spans thirty years and they each gave birth following artificial insemination and adopted the other's child. As parents of a twelve year old boy and an eleven year old girl, they attend PTA meetings, coach soccer and are very involved in the lives of their children. Cindy is Director of Web Services at Montclair State University, and Maureen is a church administrator.

****280** Karen Nicholson–McFadden and Marcye Nicholson–McFadden also gave birth to their children, a boy now six and a girl now two, following artificial insemination and cross-adoption. Karen and Marcye have been partners for sixteen years and operate an executive search firm. Karen is a member of the local zoning board of adjustment.

Sarah Lael and her partner, Suyin Lael, adopted their

  

eight year old daughter and at last report were in the process of adopting two other children under the age of five. Marilyn Amneely gave birth to five children during an eighteen year marriage and retained their custody following her divorce. Marilyn's relationship with plaintiff Diane Marini began fourteen years ago, and since that time, Diane has participated in the lives of Marilyn's children as a step-parent. Diane owns two businesses and is a member of the Haddonfield planning board, while Marilyn is a registered nurse at Thomas Jefferson University Hospital in Philadelphia. Together they survived a health crisis after Diane was diagnosed with breast cancer in 1999.

My colleagues and I agree as to the fundamental nature of the right to marry, but they reject plaintiffs' constitutional claims by defining marriage strictly as heterosexual unions. By this definition, plaintiffs are not deprived of the right to marry as long as it is to a member of the opposite sex. But since they cannot marry ***204** the person of their choice, it is really no right at all. By so defining marriage, the majority views plaintiffs' assertion of a right to marry as a claim of a different kind of right or to a different kind of marriage, which is beyond judicial authority to recognize as lawful. This analysis mirrors decisions in other jurisdictions which have summarily rejected similar constitutional claims based on other State constitutions. *See, e.g., Standhardt v. Superior Court ex rel. County of Maricopa,* 206 *Ariz.* 276, 77 *P.*3d 451 (Ct.App.2003), *review denied* (Ariz.2004); *Baker v. Nelson,* 291 *Minn.* 310, 191 *N.W.*2d 185, 186 (1971), *appeal dismissed,* 409 *U.S.* 810, 93 *S.Ct.* 37, 34 *L.Ed.*2d 65 (1972). *But see, Goodridge v. Dep't of Pub. Health, supra,* 798 *N.E.*2d at 949.

The argument is circular: plaintiffs cannot marry because by definition they cannot marry. But it has the advantage of simplicity. If marriage by definition excludes plaintiffs from marrying persons of their choosing, then, unlike all others, they have no fundamental or constitutionally protected right and must seek creation of that right through the political process and a legislative redefinition of marriage. Therefore, opposite-sex marriage is a tautology. Same-sex marriage, an oxymoron. We need go no further. Case closed.

I disagree with both the analysis and the result. To cabin the right to marry within a definition of marriage which prohibits plaintiffs from even asserting a constitutional claim for entitlement to marry the person of their choosing robs them of constitutional protections and deprives them of the same rights of marriage enjoyed by the other individuals of this State, even those confined in State prisons.

After recasting the issue as to whether plaintiffs' claim fits within the restricted definition of marriage, not surprisingly the majority finds no support for marriage between same-sex persons that is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty," and thereby declares that plaintiffs have no fundamental right of marriage.

***205** The analysis is reminiscent of arguments in support of anti-miscegenation laws before *Loving.* Those laws defined marriage as the union of a man and woman of the same race, and proponents presented ****281** a long history in support of the definition.[1] Indeed, in *Loving* the State of Virginia argued that there was no fundamental right to interracial marriage because "the historic tradition of marriage" did not contemplate such marriages. In rejecting the argument, the Supreme Court framed the issue not as a claim of right to interracial marriage but rather as an assertion of a fundamental right to marriage. *Loving, supra,* 388 *U.S.* at 12, 87 *S.Ct.* at 1823–24, 18 *L.Ed.*2d at 1018 (1967). The Court declared that the right to marry was one of the "basic civil rights of man" and could not be restricted or prohibited by racial classification. *Loving, supra,* 388 *U.S.* at 12, 87 *S.Ct.* at 1824, 18 *L.Ed.*2d at 1018, quoting *Skinner v. State of Oklahoma,* 316 *U.S.* 535, 541, 62 *S.Ct.* 1110, 1113, 86 *L.Ed.* 1655, 1660 (1942). Therefore, while *Loving* rejected a prohibition of marriage based on race, the analysis is relevant to the instant case because *Loving* also rejected a definition of marriage foreclosing an individual's right to marry a person of one's choosing and addressed the issue of the constitutional viability of the restriction in terms of the fundamental right to marriage itself rather than to a separate right or different form of marriage.

The majority grounds its definition of marriage excluding persons of the same sex upon historic or religious tradition as well as the societal value attached to procreation. In my view, the first reason is unpersuasive, the second, irrelevant.

With respect to religious beliefs and traditions, it is clear that no matter how marriage is defined, the marriage ceremony has ***206** spiritual significance to most, and many consider it a sacrament or exercise of religious faith. *Turner v. Safley,* 482 *U.S.* 78, 96, 107 *S.Ct.* 2254, 2265, 96 *L.Ed.*2d 64, 83 (1987). To a great number of people, same-sex marriage is contrary to religious faith and teachings. Their objections must be respected, not demeaned. But it is slippery constitutional footing to base a definition of marriage on religious tradition, and, more to the point, plaintiffs seek access only to civil marriage.

  

None of them, not even the three ordained clergy, maintain that same-sex marriage is supported by religious doctrine or tradition, and in this action they do not seek acceptance or recognition within a particular religious community. What they do say is that the spiritual dimension of marriage is unjustly denied to them by civil laws prohibiting them from marrying the person of their choice.

History should be considered a guide, not a harness, to recognition of constitutional rights, and patterns of the past cannot justify contemporary violations of constitutional guarantees. As Justice Holmes famously declared over a century ago,

> [i]t is revolting to have no better reason for a rule of law then that so it was laid down in the name of Henry IV. It is more revolting if [its foundation has] vanished long since, and the rule simply persists from blind imitation of the past.
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> [Justice Oliver Wendell Holmes, *The Path of the Law,* 10 *Harv. L. Rev.* 457, 469 (1897).]

That said, it would be folly to challenge that the common historic and legal conception of marriage is as a heterosexual institution. ****282** [2] Moreover, I fully agree with the majority that the idea of marriage between persons of the same sex would have been alien both to those who drafted and those who ratified the New Jersey Constitution of 1947. But so were spaceships, computers and reproductive technology. A constitutional right of privacy was not recognized by the United States Supreme Court until 1965 in ***207** *Griswold v. Connecticut,* 381 *U.S.* 479, 484–85, 85 *S.Ct.* 1678, 1681, 14 *L.Ed.*2d 510, 514–15 (1965), and it was almost a decade later when our Supreme Court discerned that right in Article I, paragraph 1 of our Constitution. *In re Quinlan, supra,* 70 *N.J.* at 39–40, 355 *A.*2d 647. It is also farfetched to assume that the framers of the Constitution envisioned a constitutional right for a woman to choose to have an abortion since at that time abortion was a crime which was vigorously prosecuted. *State v. Moretti,* 52 *N.J.* 182, 244 *A.*2d 499 (1968), *cert. denied,* 393 *U.S.* 952, 89 *S.Ct.* 376, 21 *L.Ed.*2d 363 (1968); *State v. Raymond,* 113 *N.J.Super.* 222, 227, 273 *A.*2d 399 (App.Div.1971).

Certainly, marriage was not perceived as a partnership to the extent that it is today. The common law concept of marriage as a unity was still prevalent. Interspousal immunity from civil suit, then considered fundamental to marriage, was not rejected until decades later. *Immer v. Risko,* 56 *N.J.* 482, 488, 267 *A.*2d 481 (1970); *Merenoff v. Merenoff,* 76 *N.J.* 535, 557, 388 *A.*2d 951 (1978). The unity of marriage precluded spouses from being co-conspirators until the 1970s. *See, State v. Pittman,* 124 *N.J.Super.* 334, 336, 306 *A.*2d 500 (Law Div.1973). A more egregious example was the marriage defense to rape, whereby a husband could avoid prosecution because marriage was a unity and consent by the wife to sexual intercourse was implied. *See, State v. Smith,* 85 *N.J.* 193, 426 *A.*2d 38 (1981).

By far the greatest changes in marriage as it has evolved from its common law unity to a partnership were in terms of its dissolution. Equitable distribution of property acquired during marriage, rehabilitative alimony, child support guidelines and joint custody are just some of the issues which judges routinely consider, but they were outside the scope of divorce litigation law a generation past. Indeed, divorce was relatively uncommon when our State Constitution was adopted. Current estimates are that up to fifty percent of marriages end in divorce, most of which are granted on no-fault grounds, which did not exist in 1947. The dynamics within marriage have also undergone great changes. Married couples, with or without children, are commonly both ***208** employed. Single parent households have multiplied as divorce rates have climbed, and adoptions are now more readily available to unmarried persons, including same-sex couples. Rather than a static concept, marriage has been described as an "evolving paradigm," *Goodridge, supra,* 798 *N.E.*2d at 966–67, and another paradigm, that of the nuclear family, has also undergone vast changes. *See, V.C. v. M.J.B.,* 163 *N.J.* 200, 232–34, 748 *A.*2d 539 (2000) (Long, J., concurring).

While public debate on same-sex marriage is polarized, there should be agreement as to the greater acceptance of gay and lesbian relationships in popular culture and as individuals living in the communities of our State. The 2000 census reported that at least 16,000 same-sex couples reside in New Jersey, a figure considered markedly conservative. Ruth Padawer, ****283** *Census 2000: Gay Couples, At Long Last, Feel Acknowledged, The Record,* August 15, 2001. In its amicus curiae brief, the city of Asbury Park contends in support of plaintiffs' position that the right of same-sex marriage would assist in building stronger communities in the State.

There have been significant alterations to the legal landscape in the past decades since the 1947 Constitution respecting claims of right by gays and lesbians in both constitutional adjudications and domestic relations cases. Most notably is *Lawrence v. Texas,* 539 *U.S.* 558, 123 *S.Ct.* 2472, 156 *L.Ed.*2d 508 (2003) in which the United States Supreme Court specifically overruled *Bowers v. Hardwick,* 478 *U.S.* 186, 106 *S.Ct.* 2841, 92 *L.Ed.*2d 140 (1986), its precedent of less than twenty years earlier, and

  

held that the criminalization of intimate sexual contact between adult homosexuals in private impinged upon their liberty interests protected by the Due Process Clause of the Fourteenth Amendment. *Lawrence, supra,* 539 *U.S.* at 578, 123 *S.Ct.* at 2484, 156 *L.Ed.*2d at 525. In disclaiming the historical rationale of *Bowers,* the *Lawrence* majority opinion by Justice Kennedy quoted language applicable to the case at bar from Justice Stevens' *Bowers* dissent:

> ***209** "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."
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> [*Lawrence, supra,* 539 *U.S.* at 577–78, 123 *S.Ct.* at 2483, 156 *L. Ed.*2d at 525 (quoting *Bowers v. Hardwick, supra,* 478 *U.S.* at 216, 106 *S.Ct.* at 2858, 92 *L. Ed.*2d at 162). (Stevens, J., dissenting.)]

Judicial decisions of this State have enhanced the rights of gays and lesbians in matters of family law. As witnessed by the Lael family, sexual orientation is not a bar to adoption. *Adoption of Two Children by H.N.R.,* 285 *N.J.Super.* 1, 11, 666 *A.*2d 535 (App.Div.1995); *Matter of Adoption of Child by J.M.G.,* 267 *N.J.Super.* 622, 631–32, 632 *A.*2d 550 (Ch.Div.1993); *see also, In re Application for Change of Name by Bacharach,* 344 *N.J.Super.* 126, 134, 780 *A.*2d 579 (App.Div.2001). Similarly, the custody and visitation rights of natural or psychological parents cannot be denied or abridged based on sexual orientation. *V.C., supra,* 163 *N.J.* at 230, 748 *A.*2d 539; *M.P. v. S.P.,* 169 *N.J.Super.* 425, 439, 404 *A.*2d 1256 (App.Div.1979); *In re J.S. & C.,* 129 *N.J.Super.* 486, 489, 324 *A.*2d 90 (Ch.Div.1974), *aff'd,* 142 *N.J.Super.* 499, 362 *A.*2d 54 (App.Div.1976). Moreover, a same-sex partner may lawfully change a surname to match that of his or her partner. *Bacharach, supra,* 344 *N.J.Super.* at 134, 780 *A.*2d 579.

The enhancement of rights in family law for gays and lesbians is representative of a more functional view of family than when our Constitution was adopted. *See, e.g., Braschi v. Stahl Assoc.,* 74 *N.Y.*2d 201, 544 *N.Y.S.*2d 784, 543 *N.E.*2d 49, 54 (1989) (holding that for purposes of the New York rent control laws, a surviving homosexual could not be evicted after his long-term partner died because in "the reality of family life" he qualified as a spouse or member of the immediate family). *See generally,* Martha Minow, *The Free Exercise* ****284** *of Families,* 1991 *U. Ill. L. Rev.* 925, 931–32 (1991); Note, *Looking For a Family Resemblance,* 104 *Harv. L. Rev.* 1640 (1991); Barbara J. Cox, *Love Makes a Family—Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families,* 8 *J.L. & Pol.,* 5 (1991).

Our Supreme Court explored the dimensions and functional reality of "family" in *V.C., supra,* 163 *N.J.* at 227–28, 748 *A.*2d 539, in which it held that a former same-sex partner had standing as a psychological parent to seek legal custody and visitation of twins born to her former partner following artificial insemination. In her separate concurring opinion, Justice Long gave substance to the functional view of family, stating:

> [W]e should not be misled into thinking that any particular model of family life is the only one that embodies "family values." Those qualities of family life on which society places a premium—its stability, the love and affection shared by its members, their focus on each other, the emotional and physical care and nurturance that parents provide their offspring, the creation of a safe harbor for all involved, the wellspring of support family life provides its members, the ideal of absolute fealty in good and bad times that infuses the familial relationship (all of which justify isolation from outside intrusion)—are merely characteristics of family life that, except for its communal aspect, are unrelated to the particular form a family takes.
>
> [*Id.* at 232, 748 *A.*2d 539.]

The "winds of change" in the traditional understanding of family and marriage which we noted almost thirty years ago in *M.T. v. J.T.,* 140 *N.J.Super.* 77, 83–84, 355 *A.*2d 204 (App.Div.), *certif. denied,* 71 *N.J.* 345, 364 *A.*2d 1076 (1976), have been felt by the Legislature, which enacted the Domestic Partnership Act, *L.* 2003, *c.* 246, while this appeal was pending. The Act confers some but not all state legal rights afforded married persons to those who qualify and register as domestic partners. *N.J.S.A.* 26:8A–1 to –12.[3]

***211** Therefore, while conclusions drawn from the past admittedly depend to a degree on where one focuses the telescope, history since 1947 points to changes in the reality of marriage and family life as well as greater acceptance of committed same-sex relationships. I see no basis in the history of marriage to justify a definition

  

which denies plaintiffs the right to enter into lawful marriage in this State with the person of their choice.

Although the Attorney General disclaims the promotion of procreation as a rationale for prohibiting same-sex marriage, the majority does give it weight, stating that "our society considers marriage between a man and woman to play a vital role in propagating the species and in providing the ideal environment for raising children." I agree with the Attorney General. Procreation is irrelevant to the issue before us.

Promotion of procreation as a factor defining marriage to exclude same-sex applicants is relied upon in those cases cited by the majority which recognize that history or tradition cannot alone justify its restrictive **285 definition of marriage or distinguish it from the argument based on history which was rejected by the Supreme Court in *Loving*. *See, e.g., Baker v. Nelson,* 291 *Minn.* 310, 191 *N.W.*2d 185, 186–87 (1971) ("procreation and the rearing of children within a family" provides "a clear distinction between a marital distinction based merely on race and one based on the fundamental difference in sex."). *See generally,* William H. Hohengarten, *Same–Sex Marriage and the Right of Privacy,* 103 *Yale L.J.* 1495, 1513–23 (1994).

However, there is not, nor could there be, a threshold requirement to marriage of the intention or ability to procreate. *See, M.T., supra,* 140 *N.J.Super.* at 83–84, 355 *A.*2d 204. Of course many heterosexuals marry for reasons unrelated to having children. Some never intend to do so. Some are unable to do so by reason of physical inability, age or health. Moreover, tying the *212 essence of marriage to procreation runs into cases upholding as a right of privacy the election not to procreate. *See, Griswold, supra,* 381 *U.S.* at 485, 85 *S.Ct.* at 1682, 14 *L.Ed.*2d at 515 (protecting the right of married persons to use contraceptives); *Eisenstadt v. Baird,* 405 *U.S.* 438, 454–55, 92 *S.Ct.* 1029, 1039, 31 *L.Ed.*2d 349, 363 (1972) (extending the same rights to persons who are not married), *Roe v. Wade,* 410 *U.S.* 113, 153, 93 *S.Ct.* 705, 727, 35 *L.Ed.*2d 147, 177 (1972) (upholding a woman's right to choose an abortion). *See also, Right to Choose v. Byrne,* 91 *N.J.* 287, 305–06, 450 *A.*2d 925 (1982).

Also if procreation or the ability to procreate is central to marriage, logic dictates that the inability to procreate would constitute grounds for its termination. However, as opposed to the inability or unwillingness to engage in sexual intercourse, the inability or refusal to procreate is not a legal basis for divorce or annulment. *See, e.g., T. v. M.,* 100 *N.J.Super.* 530, 538, 242 A.2d 670 (Ch.Div.1968). Finally, the claim that the promotion of procreation is a vital element of marriage and justifies exclusion of persons of the same gender falls on its face when confronted with reproductive science and technology. The fact is some persons in committed same-sex relationships can and do legally and functionally procreate. Cindy Meneghin, Maureen Kilian, Karen Nicholson–McFadden and Marcye Nicholson–McFadden, all plaintiffs in this case, each gave birth to their children following artificial insemination.

Moreover, the majority mentions the conventional wisdom of "the role that marriage plays in procreation and providing the optimal environment for child rearing," but no authority is given to justify this "optimal" status. This presents simply as an article of faith and one which ignores the reality of present family life parenting, which includes adoption, step-parenting and the myriad of other relationships of parenting noted by our Supreme Court in *V.C.* Further, the argument that opposite-sex persons provide a more suitable environment for raising children because they are married simply underscores that plaintiffs and their children are *213 unjustly treated by denying them a right to marry their committed partners. Finally, there is nothing in the record to indicate that the eight plaintiffs in this case currently raising or having raised children as natural parents, adoptive parents or step-parents, are providing an environment for growth and happiness of the children that is anything less than optimal.

Two New Jersey cases are cited by the majority in support of its position. The first, *Rutgers Council of AAUP Chapters v. Rutgers,* 298 *N.J.Super.* 442, 689 *A.*2d 828 (App.Div.1997), *certif. denied,* 153 *N.J.* 48, 707 *A.*2d 151 (1998), bears only indirectly. There we declined to interpret the term "dependents" to include domestic **286 partners for purposes of coverage in the State Health Benefits Plan, *id.* at 452, 689 *A.*2d 828, a result which spawned two separate concurring opinions terming it "distasteful." *Id.* at 463, 464, 689 *A.*2d 828 (Baime, J.A.D., and Levy, J.A.D., concurring.).[4] I submit that the comments in the *Rutgers* majority opinion relating to a same-sex marriage were simply dicta and not authoritative or persuasive in this case.

The other case, *M.T. v. J.T.,* 140 *N.J.Super.* 77, 355 *A.*2d 204 (App.Div.) *certif. denied,* 71 *N.J.* 345, 364 *A.*2d 1076 (1976), is cited and quoted for its support of the historic understanding of marriage as the lawful union of a man and a woman. Interestingly, M.T. was both. Born a man, he cohabited with J.T. in a homosexual relationship for five years and then underwent transsexual surgery which involved removal of his male sex organs and the

  

construction and placement of "a vagina and labia adequate for traditional penile/vaginal intercourse." *Id.* at 80, 355 *A.*2d 204. M.T. and J.T. later married in New York and continued their cohabitation, this time as husband and wife, for two years in New Jersey during which time they regularly engaged in sexual intercourse. *Id.* at 79, 355 *A.*2d 204. After they separated, M.T. filed ***214** a support complaint as a non-working wife. J.T. countered that he had no obligation to pay support because M.T. was in reality a man and that therefore their marriage was void. We held that M.T. was a woman, that the marriage was valid and that she was entitled to support for the following reason:

> Plaintiff has become physically and psychologically unified and fully capable of sexual activity with her reconciled sexual attributes of gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes. It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex and did so here.
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> [*Id.* at 89–90, 355 *A.*2d 204.]

I gather from *M.T.* that a relationship qualifies as a lawful marriage if the genitalia of the partners are different so that they can engage in sexual intercourse. Accordingly, history and procreation are irrelevant provided surgery is successful, and the new woman and her partner are then entitled to a constitutional right to marry that neither he nor she had in the pre-op room. Constitutional rights should not be limited by genitalia or the ability to engage in a particular form of sexual intimacy. *See, Lawrence, supra,* 539 *U.S.* at 575, 123 *S.Ct.* at 2482, 156 *L.Ed.*2d at 523.

The arguments based on tradition, history, promotion of procreation or existing case law do not justify a definition of marriage which proscribes plaintiffs from asserting their right to marry the person of their choosing under Article I, paragraph 1 of the Constitution. That provision reads as follows:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

The expansive language of this paragraph has been interpreted by our Supreme Court to guarantee all substantive rights of due process to all persons as well ****287** as equal protection of the laws of this State. *Sojourner A., supra,* 177 *N.J.* at 332, 828 *A.*2d 306; *Doe v. Poritz,* 142 *N.J.* 1, 8, 662 *A.*2d 367 (1995); *Greenberg, supra,* 99 *N.J.* at 568, 494 *A.*2d 294. While the Federal Constitution remains the primary source of individual rights, the New Jersey ***215** Constitution is a separate source of individual freedoms and may provide more expansive protection of individual liberties. *See, e.g., State v. Novembrino,* 105 *N.J.* 95, 146, 519 *A.*2d 820 (1987) (exclusionary rule unaffected by federal good faith exception); *Right to Choose v. Byrne,* 91 *N.J.* 287, 300, 450 *A.*2d 925 (1982) (statute restricting Medicaid funding abortion to circumstances where necessary to saving life of mother held to be a denial of equal protection contrary to *Harris v. McRae,* 448 *U.S.* 297, 100 *S.Ct.* 2671, 65 *L.Ed.*2d 784 (1980)); *State v. Schmid,* 84 *N.J.* 535, 559, 423 *A.*2d 615 (1980) (broader concept of individual rights of speech). *See also,* Justice Stewart G. Pollock, *Adequate and Independent Grounds as a Means of Balancing the Relationship Between State and Federal Courts,* 63 *Tex. L. Rev.* 977 (1986); Justice William J. Brennan, *State Constitutions and The Protection of Individual Rights,* 90 *Harv. L. Rev.* 489 (1977).

Plaintiffs base their due process challenges on the constitutional right of privacy recognized in Article I, paragraph 1 of the New Jersey Constitution. At first blush, plaintiffs' claim of a right of privacy in support of a right to marry may seem anomalous, for privacy is commonly understood with a right to be left alone as famously discussed in legal parlance by Justice Brandeis in *The Right to Privacy,* 4 *Harv. L. Rev.* 5 (1890). But the constitutional right of privacy also means the right of an individual to make his or her fundamental life choices rather than the State making those decisions. *See generally,* Hoehengarten, *supra,* 103 *Yale L.J.* at 1524–30; *see also,* Jeb Rubenfeld, *The Right to Privacy,* 102 *Harv. L. Rev.* 737, 754–56 (1989). So a married couple may choose not to procreate by using contraception. *Griswold, supra,* 381 *U.S.* at 484–85, 85 *S.Ct.* at 1681–82, 14 *L.Ed.*2d at 514–15. A woman may make her own decision whether to bear or beget a child. *Roe, supra,* 410 *U.S.* at 153, 93 *S.Ct.* at 727, 35 *L.Ed.*2d at 177 (1973); *Right to Choose, supra,* 91 *N.J.* at 305–06, 450 *A.*2d 925; *Planned Parenthood v. Casey,* 505 *U.S.* 833, 112 *S.Ct.* 2791, 120 *L.Ed.*2d 674 (1992). Two consenting adults, heterosexual or homosexual, may elect to engage in sexual relations. *Lawrence, supra,* 539 *U.S.* at 578, 123 *S.Ct.* at 2484, 156 *L.Ed.*2d at 525; ***216** *State v. Saunders,* 75 *N.J.* 200, 381 *A.*2d 333 (1977). And a person may elect to discontinue life support knowing that

  

death will result. *Quinlan, supra,* 70 *N.J.* at 10, 355 *A.*2d 647. In all these and other cases the law has recognized rights of individuals to make fundamental life decisions in the conduct of their lives despite State opposition. We should do so here.

Of course there are proper limits in an individual's rights of choice, just as there are proper government limits on privacy and liberty. But when the limitation amounts to a prohibition of a central life choice to some and not others based on sexual orientation, it constitutes State deprivation of an individual's fundamental right of substantive due process as well as equal protection of the laws.

Which leads me to polygamy. My colleagues view the nature of the right to marry asserted by plaintiffs as equally applicable to polygamy. The spectre of polygamy was raised by Justice Scalia in his *Lawrence* dissent in which he expanded a slippery slope analysis into a loop-de-loop by arguing that decriminalizing acts of homosexual intimacy would lead to the downfall of moral legislation of society by implicitly authorizing same-sex marriage and ****288** polygamy as well as "adult incest, prostitution, masturbation, adultery, fornication, bestiality and obscenity." *Lawrence, supra,* 539 *U.S.* at 590, 123 *S.Ct.* at 2490, 156 *L.Ed.*2d at 533 (Scalia, J., dissenting).[5]

It is just as unnecessary for us to consider here the question of the constitutional rights of polygamists to marry persons of their choosing as it would be to join Justice Scalia's wild ride. Plaintiffs do not question the binary aspect of marriage; they embrace it. Moreover, despite the number of amicus curiae briefs filed in this ***217** appeal and the myriad of views presented, no polygamists have applied. One issue of fundamental constitutional rights is enough for now.[6]

Challenges to state laws on grounds of a right of privacy impact both substantive due process and equal protection. While analytically distinct, these concepts are linked and tend to overlap constitutional adjudication involving marriage, family life and sexual intimacy. *Lawrence, supra,* 539 *U.S.* at 575, 123 *S.Ct.* at 2482, 156 *L.Ed.*2d at 523; *Goodridge, supra,* 798 *N.E.*2d at 953. Early decisions considered the right to marry as a matter of liberty within due process protection, *Meyer v. Nebraska,* 262 *U.S.* 390, 399, 43 *S.Ct.* 625, 626, 67 *L.Ed.* 1042, 1045 (1923). In *Griswold, supra,* 381 *U.S.* at 484–85, 85 *S.Ct.* at 1681–82, 14 *L.Ed.*2d at 514–15, the majority found a right of privacy inclusive of marriage in the "penumbra" of the First, Third, Fourth, and Ninth Amendments of the Federal Constitution. A right of marriage was held to be inherent in substantive due process, *Zablocki, supra,* 434 *U.S.* at 383–86, 98 *S.Ct.* at 679–81, 54 *L.Ed.*2d at 628–30, and as a protectable interest for equal protection of laws in *Skinner, supra,* 316 *U.S.* at 541–42, 62 *S.Ct.* at 1113–14, 86 *L.Ed.* at 1660. In all instances the right to marry was heralded as a fundamental right subject only to reasonable State regulations such as the banning of incestuous marriages, *N.J.S.A.* 37:1–1, bigamous marriages, *N.J.S.A.* 2C:24–1, and marriages to those persons mentally incompetent, *N.J.S.A.* 37:1–9.

In adjudicating claims of constitutional right of substantive due process or equal protection, our Supreme Court has eschewed the multi-tiered analysis employed by the United States Supreme Court in cases such as ***218** *City of Cleburne v. Cleburne Living Ctr.,* 473 *U.S.* 432, 440, 105 *S.Ct.* 3249, 3254, 87 *L.Ed.*2d 313, 320 (1985) and *Carey v. Population Services Intl.,* 431 *U.S.* 678, 686, 97 *S.Ct.* 2010, 2016, 52 *L.Ed.*2d 675, 677 (1977). Aptly described in dissent by Justice Clifford as a "veil of tiers," *Matthews v. City of Atlantic City,* 84 *N.J.* 153, 174, 417 *A.*2d 1011 (1980) (Clifford, J., dissenting), the federal framework tends to be inflexible and shroud the "full understanding of the clash between individual and governmental interests." *Planned Parenthood of Cent. N.J. v. Farmer,* 165 *N.J.* 609, 630, 762 *A.*2d 620 (2000). *See also, Robinson v. Cahill,* 62 *N.J.* 473, 491–92, 303 *A.*2d 273, *cert. denied sub. nom.,* ****289** *Dickey v. Robinson,* 414 *U.S.* 976, 94 *S.Ct.* 292, 38 *L.Ed.*2d 219 (1973). In its place our Supreme Court has adopted a test to evaluate claims of due process or equal protection under the State Constitution by examining each claim of right on a continuum and weighing the extent of the right asserted, the governmental restriction challenge and the public need for the restriction. *Greenberg, supra,* 99 *N.J.* at 567–69, 494 *A.*2d 294. *See also, Planned Parenthood, supra,* 165 *N.J.* at 629–31, 762 *A.*2d 620; *Right to Choose, supra,* 91 *N.J.* at 299–301, 450 *A.*2d 925. This balancing test is especially appropriate where, as in this case, state law infringes on a fundamental right such as the right to marry. *Greenberg, supra,* 99 *N.J.* at 571, 494 *A.*2d 294; *see also, Right to Choose, supra,* 91 *N.J.* at 308–09, 450 *A.*2d 925; *United States Chamber of Commerce v. State,* 89 *N.J.* 131, 157–58, 445 *A.*2d 353 (1982).

The right to marry is to my view a fundamental right of substantive due process protected by the New Jersey Constitution and, for the reasons stated earlier, the exclusion of plaintiffs from the right cannot be justified by tradition or procreation. The balancing test then considers the extent to which the governmental restriction impinges upon that right. *Greenberg, supra,* 99 *N.J.* at 567, 494 *A.*2d 294. Here there is not only a restriction but a prohibition which excludes a sizeable number of

  

persons and their children from the personal, familial and spiritual aspects of marriage. Finally, the balancing test inquires as to the public need for the restriction, or as in this case, the prohibition of the ***219** right. *Ibid.* Here the majority and concurring opinions again rely on history, tradition and procreation. It is not necessary to repeat all the arguments set forth earlier in this dissent. Tradition in itself is not a compelling state interest. If it were, many societal institutions as well as individual rights would be compromised. After all, slavery was a traditional institution for over 200 years. *See, People v. Greenleaf, 5 Misc.*3d 337, 780 *N.Y.S.*2d 899, 901 (Just.Ct.2004). To deprive plaintiffs of marrying the person of their choice, a right enjoyed by all others, on the basis of a tradition of exclusion serves only to unjustifiably and unconstitutionally discriminate against them. Moreover, procreation is even less persuasive as a public need. Can there be serious thought that legal recognition of same-sex marriage will significantly reduce heterosexual marriages or the birth rate? While some cases do link defining of marriage solely to members of the opposite sex to "the survival of the [human] race," *see, e.g., Baker, supra,* 191 *N.W.*2d at 186, I cannot fathom that a list of threats to our survival would include same-sex marriage. Also if there is an under-population crisis, somehow it has escaped my attention.

Even if plaintiffs' claim of a right to marry is not considered a *fundamental* right, their constitutional challenge meets the "rational basis test," which is the third tier of the Federal tiers test. Briefly, the first tier requires "strict scrutiny" for legislative acts directly affecting fundamental rights; a lesser standard of "important government objections" is the intermediate tier test where a substantial right is indirectly affected or a semi-suspect class, like gender, is involved; and the bottom rung is occupied by other governmental acts for which the State must show only that the law rationally relates to a legitimate interest. *Greenberg, supra,* 99 *N.J.* at 564–65, 494 *A.*2d 294.

While the balancing test stated in *Greenberg* still sets the standard, I believe that plaintiffs prevail on their constitutional challenge even if the least restrictive or "rational basis" standard of review is employed since there is no showing of a basis of other than tradition or procreation to ****290** exclude plaintiffs from the significant ***220** (if not fundamental) state of marriage. *See, Goodridge, supra,* 798 *N.E.*2d at 961 ("[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection.").

As to equal protection, my conclusion is the same. Our Constitution and the Federal Constitution require that all similarly situated people be treated alike. *Cleburne, supra,* 473 *U.S.* at 439, 105 *S.Ct.* at 3254, 87 *L.Ed.*2d at 330; *Brown v. State,* 356 *N.J.Super.* 71, 79, 811 *A.*2d 501 (App.Div.2002). It is disingenuous to say that plaintiffs are treated alike because they can marry but not the person they choose. By prohibiting them from a real right to marry, plaintiffs as well as their children suffer the real consequences of being "different." While the Domestic Partnership Act gives, at some cost, many, but not all, of the benefits and protections automatically granted to married persons, we have learned after much pain that "separate but equal" does not substitute for equal rights. Plaintiff Sarah Lael describes the difference in this way:

> For me, being denied marriage, despite how hard we work and support each other and our children, it is demeaning and humiliating. These feelings are part of my daily life ... because of constant reminders that we are second class.

What Sarah Lael and her partner lack and seek may be summed up in the word dignity. But there is more they will gain from lawful marriage. That something else goes to the essence of marriage and is probably best left to poets rather than judges. It is the reason that people do get married. For marriage changes who you are. It gives stability, legal protection and recognition by fellow citizens. It provides a unique meaning to everyday life, for legally, personally and spiritually a married person is never really alone. Few would choose life differently.

With great admiration for the wisdom, logic and eloquence of my colleagues, I must dissent.

**All Citations**

378 N.J.Super. 168, 875 A.2d 259

Footnotes

1 There also have been a number of state lower court decisions, mostly unpublished, that have concluded that the limitation of marriage to members of the opposite sex violated those states' constitutions. *See, e.g., Brause v. Bureau of Vital Statistics,* No. 3AN–95–6562 CI, 1998 WL 88743 (Alaska Super.Ct. Feb. 27, 1998); *Li v. State,* No. 0403–03057, 2004 WL 1258167 (Or.Cir.Ct. Apr.

  

20, 2004). Several of those decisions were promptly followed by the adoption of constitutional amendments prohibiting same-sex marriage. *See, e.g., Alaska Const.* art. I, § 25; *Or. Const.* art. XV, § 5a; *see Li v. State,* 338 *Or.* 376, 110 *P.*3d 91, 98 (2005) (recognizing that, as a result of the constitutional amendment in Oregon, the institution of marriage in that State is now limited to "opposite-sex couples.").

2 The Attorney General disclaims reliance upon promotion of procreation and creating the optimal environment for raising children as justifications for the limitation of marriage to members of the opposite sex. However, several amici curiae, including the New Jersey Coalition to Preserve and Protect Marriage, the New Jersey Family Policy Council and the New Jersey Catholic Conference, argue that our current form of marriage provides an environment in which procreation may be embraced and the optimal condition established for child rearing. Although an amicus curiae is ordinarily limited to arguing issues raised by the parties, an amicus may present different arguments than the parties relating to those issues. *See James v. Arms Tech., Inc.,* 359 *N.J.Super.* 291, 324, 820 *A.*2d 27 (App.Div.2003); *Keating v. State,* 157 *So.*2d 567, 569 (Fla.Dist.Ct.App.1963) (noting that an "amicus is not at liberty to inject new issues in a proceeding ... [but] is not confined solely to arguing the parties' theories in support of a particular issue."). We also note that plaintiffs were afforded an adequate opportunity to answer those arguments; in fact, half of their reply brief is devoted to those arguments. Therefore, we consider the amici's arguments regarding procreation and child rearing to be properly before us. In any event, there is no need for us to determine the validity of those justifications for limitation of the institution of marriage to opposite-sex couples. We only note that the historical and prevailing contemporary conception of marriage as solely a union between a single man and a single woman is based partly on society's view that this institution plays an essential role in propagating the species and child rearing.

3 For a general discussion of the institution of polygamous marriage, see Richard A. Posner, *Sex and Reason* 253–60 (1992).

4 This is not to suggest that there are no public interests served by the limitation of the institution of marriage to members of the opposite sex. As discussed in section I, this limitation is deeply rooted in our nation's history and traditions and contemporary religious and cultural values, and also supported by the public interests discussed in depth in Judge Parrillo's concurring opinion. *See infra,* 378 *N.J.Super.* at 197–200, 875 *A.*2d at 276–78. However, the State is not required to show that those interests outweigh a presumed right of same-sex couples to marry in order to defeat plaintiffs' equal protection claim.

1 Unlike the usual contexts in which privacy and liberty interests are asserted, namely to seek protection from unwarranted governmental intrusion into matters of intimate personal concern, *In re Grady,* 85 *N.J.* 235, 249–50, 426 *A.*2d 467 (1981); *In re Quinlan,* 70 *N.J.* 10, 40, 355 *A.*2d 647 (1976), *cert. denied sub nom., Garger v. New Jersey,* 429 *U.S.* 922, 97 *S.Ct.* 319, 50 *L.Ed.*2d 289 (1976), or to gain the right to engage in private conduct without criminal sanction, *State v. Saunders,* 75 *N.J.* 200, 216–17, 381 *A.*2d 333 (1977), plaintiffs here affirmatively seek public approval of purely private behavior.

1 In 1947 thirty-one of the forty-eight states had criminal statutes punishing those who entered into such marriages as well as those who performed them. Twenty years later when *Loving* was decided, sixteen states still had these laws. Robert J. Sickels, *Race, Marriage, and the Law,* 64 (1972); James Trosino, *American Wedding: Same–Sex Marriage and the Miscegenation Analogy,* 73 *B.U. L. Rev.* 93 (1993).

2 A somewhat contrary view of history is set forth in William N. Eskridge, Jr., *A History of Same–Sex Marriage,* 79 *Va. L. Rev.* 1419, 1435–84 (1993). Compare, George W. Dent, Jr., *The Defense of Traditional Marriage,* 15 *J.L. Pol.* 581, 593–601 (1999).

3 Two important legal distinctions between domestic partners and married persons are that (1) property acquired by a partner during a domestic partnership is treated as individual unlike in a marriage where joint ownership may arise as a matter of law; and (2) the status of domestic partnership "neither creates nor diminishes individual partners' rights and responsibilities toward children, unlike in a marriage where both spouses possess legal rights and obligations with respect to any children born during the marriage." *N.J.S.A.* 26:8A–1.

4 The Legislature subsequently remedied the matter through the Domestic Partnership Act. *N.J.S.A.* 26:8A–1 to –12. *See also, N.J.S.A.* 18A:66–2; *N.J.S.A.* 43:6A–3; *N.J.S.A.* 43:15A–6; *N.J.S.A.* 43:16A-l; *N.J.S.A.* 52:14–17.26.

5 Justice Scalia's tirade spawned many scholarly articles on privacy and polygamy. *See, e.g.,* Joseph Buzzuti, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?,* 43 *Cath. Law.* 409 (2004); Cassiah M. Ward, Note, *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America,* 11 *Wm. & Mary J. Women & Law,* 131 (2004).

  

6 The curious may consider the following authorities in distinguishing polygamy. Richard A. Posner, *Sex and Reason,* 253–60 (1992); Alyssa Rower, *The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment,* 38 *Fam. L.Q.* 711 (2004). For a popular, albeit controversial, history of polygamy and Morman religious fundamentalism, see Jon Krakauer, *Under the Banner of Heaven: A Story of Violent Faith* (2004).

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188 N.J. 415
Supreme Court of New Jersey.

Mark **LEWIS** and Dennis Winslow; Saundra Heath and Clarita Alicia Toby; Craig Hutchison and Chris Lodewyks; Maureen Kilian and Cindy Meneghin; Sarah and Suyin Lael; Marilyn Maneely and Diane Marini; and Karen and Marcye Nicholson–McFadden, Plaintiffs–Appellants,
v.
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–Respondents.

Argued Feb. 15, 2006.
|
Decided Oct. 25, 2006.

**Synopsis**
**Background:** Same-sex couples brought action against state officials with supervisory responsibilities relating to local officials' issuance of marriage licenses, alleging local officials' refusal to issue marriage licenses to plaintiff same-sex couples violated their state constitutional rights to privacy, due process, and equal protection. The Superior Court, Law Division, Mercer County, granted summary judgment to defendants. Plaintiffs appealed. The Superior Court, Appellate Division, Skillman, P.J.A.D., 378 N.J.Super. 168, 875 A.2d 259, affirmed. Plaintiffs appealed.

**Holdings:** The Supreme Court, Albin, J., held that:

[1] same-sex marriage is not a fundamental right entitled to protection under the liberty guarantee of the New Jersey Constitution;

[2] committed same-sex couples must be afforded the same rights and benefits enjoyed by married opposite-sex couples; and

[3] Legislature would be required to, within 180 days, either amend the marriage statutes or enact an statutory structure affording same-sex couples the same rights and benefits enjoyed by married opposite-sex couples.

Affirmed in part and modified in part.

Poritz, C.J., concurred in part and dissented in part and filed an opinion in which Long and Zazzali, JJ., joined.

West Headnotes (15)

[1] **Appeal and Error**
Findings of fact and conclusions of law

The Supreme Court, when addressing solely questions of law, is not bound to defer to the legal conclusions of the lower courts.

3 Cases that cite this headnote

[2] **Constitutional Law**
Personal liberty

In attempting to discern those substantive rights that are fundamental under the liberty guarantee of the New Jersey Constitution, the Supreme Court has adopted the general standard followed by the United States Supreme Court in construing the Due Process Clause of the Fourteenth Amendment of the Federal Constitution; the Court looks to the traditions and collective conscience of the people to determine whether a principle is so rooted there as to be ranked as fundamental. U.S.C.A. Const.Amend. 14; N.J.S.A. Const. Art. 1, par. 1.

12 Cases that cite this headnote

[3] **Constitutional Law**
Personal liberty

Determining whether there exists a fundamental right secured by the liberty guarantee of the New Jersey Constitution involves a two-step inquiry; first, the asserted fundamental liberty interest must be clearly identified, and second, that liberty interest must be objectively and deeply rooted in the traditions, history, and conscience of the people of the State. N.J.S.A. Const. Art. 1, par. 1.

7 Cases that cite this headnote

[4] **Marriage and Cohabitation**
Right to marry or cohabit in general

The right to marriage is recognized as fundamental by both the Federal and State Constitutions. U.S.C.A. Const.Amend. 14; N.J.S.A. Const. Art. 1, par. 1.

2 Cases that cite this headnote

[5] **Marriage and Cohabitation**
Regulation and control in general

The fundamental right to marriage is subject to reasonable state regulation. U.S.C.A. Const.Amend. 14; N.J.S.A. Const. Art. 1, par. 1.

1 Cases that cite this headnote

[6] **Constitutional Law**
Personal liberty
**Marriage and Cohabitation**
Sex or Gender; Same-Sex Marriage

Same-sex marriage is not a fundamental right entitled to protection under the liberty guarantee of the New Jersey Constitution. N.J.S.A. Const. Art. 1, par. 1.

7 Cases that cite this headnote

[7] **Constitutional Law**
Statutes and other written regulations and rules

When a statute is challenged on the ground that it does not apply evenhandedly to similarly situated people, equal protection jurisprudence requires that the legislation, in distinguishing between two classes of people, bear a substantial relationship to a legitimate governmental purpose. N.J.S.A. Const. Art. 1, par. 1.

3 Cases that cite this headnote

[8] **Constitutional Law**
Statutes and other written regulations and rules

The test applied to equal protection challenges under the New Jersey Constitution involves the weighing of three factors: the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction; the test is a flexible one, measuring the importance of the right against the need for the governmental restriction. N.J.S.A. Const. Art. 1, par. 1.

5 Cases that cite this headnote

[9] **Constitutional Law**
Differing levels set forth or compared

When a statute is challenged under the Fourteenth Amendment's Equal Protection Clause, one of three tiers of review applies—strict scrutiny, intermediate scrutiny, or rational basis—depending on whether a fundamental right, protected class, or some other protected interest is in question. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

  

[10] **Constitutional Law**
Differing levels set forth or compared

In an equal protection analysis under the New Jersey Constitution, each claim is examined on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction; accordingly, the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right. N.J.S.A. Const. Art. 1, par. 1.

2 Cases that cite this headnote

[11] **Constitutional Law**
Marriage and civil unions
**Marriage and Cohabitation**
Sex or Gender; Same-Sex Marriage

Unequal scheme of benefits and privileges afforded same-sex couples was not supported by a legitimate public need, for purposes of equal protection analysis under the New Jersey Constitution. N.J.S.A. Const. Art. 1, par. 1.

18 Cases that cite this headnote

[12] **Constitutional Law**
Marriage and civil unions

Under the equal protection guarantee of the New Jersey Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples. N.J.S.A. Const. Art. 1, par. 1.

22 Cases that cite this headnote

[13] **Constitutional Law**
Nature and scope in general
**Marriage and Cohabitation**
Sex or Gender; Same-Sex Marriage

Issue of whether long-accepted definition of marriage would be altered to include same-sex marriage, or a parallel scheme should be enacted, providing to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples, was a legislative issue, and thus Legislature would be required to, within 180 days, either amend the marriage statutes or enact an appropriate statutory structure, so as to afford same-sex couples the same rights and benefits enjoyed by married opposite-sex couples. N.J.S.A. Const. Art. 1, par. 1.

25 Cases that cite this headnote

[14] **Constitutional Law**
Clearly, positively, or unmistakably unconstitutional

The Supreme Court will give deference to any legislative enactment unless it is unmistakably shown to run afoul of the Constitution.

3 Cases that cite this headnote

[15] **Constitutional Law**
Statutes and other written regulations and rules

For purposes of an equal protection analysis, a legislature must have substantial latitude to establish classifications, and therefore determining what is different and what is the same ordinarily is a matter of legislative discretion.

Cases that cite this headnote

  

**West Codenotes**

**Validity Called into Doubt**
N.J.S.A. 26:8A–10(a)(3)N.J.S.A. 26:8A–4(b)(1, 2, 6)

**Attorneys and Law Firms**

**198 David S. Buckel, New York, NY, a member of the New York bar, argued the cause for appellants (Gibbons, Del Deo, Dolan, Griffinger & Vecchione, attorneys; Mr. Buckel, Susan L. Sommer, a member of the New York bar, Lawrence S. Lustberg, Newark, and Megan **Lewis**, on the briefs).

Patrick DeAlmeida, Assistant Attorney General argued the cause for respondents (Anne Milgram, Acting Attorney General of New Jersey, attorney; Mr. DeAlmeida and Mary Beth Wood, on the briefs).

David R. Oakley, Princeton, submitted a brief on behalf of amicus curiae Alliance for Marriage, Inc. (Anderl & Oakley, attorneys).

Edward L. Barocas, Legal Director, submitted a brief on behalf of amici curiae American Civil Liberties Union of New Jersey, American–Arab Anti–Discrimination Committee, Asian American Legal Defense and Education Fund, Hispanic Bar Association of New Jersey, and The National Organization for Women of New Jersey.

Howard M. Nashel, Hackensack, submitted a brief on behalf of amici curiae American Psychological Association and New Jersey Psychological Association (Nashel, Kates, Nussman, Rapone & Ellis, attorneys).

Franklyn C. Steinberg, III, Somerville, submitted a brief on behalf of amicus curiae The Anscombe Society at Princeton University.

Douglas S. Eakeley, Roseland, submitted a brief on behalf of amicus curiae City of Asbury Park (Lowenstein Sandler, attorneys).

Kevin H. Marino and John A. Boyle, Newark, submitted a brief on behalf of amici curiae Asian Equality, Equality Federation, People for the American Way Foundation and Vermont Freedom to Marry Task Force (Marino & Associates, attorneys; Paul A. Saso, New York, NY, of counsel).

Mark L. Hopkins, Long Valley, submitted a brief on behalf of amicus curiae Clergy of New Jersey.

Richard F. Collier, Jr., Princeton, submitted a brief on behalf of amicus curiae Family Leader Foundation (Collier & Basil, attorneys).

Dennis M. Caufield submitted a brief on behalf of amicus curiae Family Research Council.

**199 Leslie A. Farber, Montclair, and Thomas H. Prol submitted a brief on behalf of amici curiae Garden State Equality Education Fund, Inc. and Garden State Equality, LLC, a Continuing Political Committee (Leslie A. Farber, attorneys; Mr. Prol, of counsel).

Alan E. Kraus, Newark, submitted a brief on behalf of amici curiae Human Rights Campaign, Human Rights Campaign Foundation, Children of Lesbians and Gays Everywhere (COLAGE), Family Pride Coalition, Freedom to Marry, Gay & Lesbian Advocates & Defenders (GLAD), National Center for Lesbian Rights, National Gay and Lesbian Task Force, New Jersey Lesbian and Gay Coalition (NJLGC), and Parents, Families and Friends of Lesbians and Gays (PFLAG) ( Latham & Watkins, attorneys).

Kevin Costello, Cherry Hill, submitted a brief on behalf of amicus curiae Legal Momentum (Levow & Costello, attorneys).

Cliona A. Levy, New York, NY, submitted a brief on behalf of amicus curiae Madeline Marzano–Lesnevich (Sonnenschein Nath & Rosenthal, attorneys).

Demetrios K. Stratis submitted a brief on behalf of amici curiae Monmouth Rubber & Plastics, Corp. and John M. Bonforte, Sr., (Demetrios K. Stratis, attorneys; Mr. Stratis and Vincent P. McCarthy, on the brief).

Stephen M. Orlofsky and Jordana Cooper, Cherry Hill, submitted a brief on behalf of amici curiae National Association of Social Workers and National Association of Social Workers New Jersey Chapter (Blank Rome, attorneys).

Steven G. Sanders, Chatham, submitted a brief on behalf of amicus curiae National Black Justice Coalition (Arseneault, Fassett & Mariano, attorneys).

Robert R. Fuggi, Jr., Toms River, submitted a brief on behalf of amicus curiae National Legal Foundation (Fuggi & Fuggi, attorneys).

Michael Behrens, Madison, submitted a brief on behalf of amici curiae The New Jersey Coalition to Preserve and Protect Marriage, The New Jersey Family Policy Council and The New Jersey Catholic Conference (Messina & Laffey, attorneys).

Debra E. Guston, Glen Rock, and Trayton M. Davis, New

  

York, NY, a member of the New York bar, submitted a brief on behalf of amici curiae New Jersey Religious Leaders and National and Regional Religious Organizations in Support of Marriage (Guston & Guston, attorneys).

Stuart A. Hoberman, Woodbridge, President, submitted a brief on behalf of amicus curiae New Jersey State Bar Association (Mr. Hoberman, attorney; Felice T. Londa, Elizabeth, Andrew J. DeMaio, Matawan, Gail Oxfeld Kanef, Newwark, Robert A Knee, Saddle Brook, Scott A. Laterra and Thomas J. Snyder, Denville, on the brief).

R. William Potter, Princeton, submitted a brief on behalf of amici curiae Princeton Justice Project and Undergraduate Student Government of Princeton University (Potter and Dickson, attorneys; Mr. Potter and Linda A. Colligan, Rye, NY, on the brief).

Michael P. Laffey, Holmdel, submitted a brief on behalf of amicus curiae Professors of Psychology and Psychiatry.

Adam N. Saravay, Newark, submitted a brief on behalf of amicus curiae Professors of the History of Marriage, Families, and the Law (McCarter & English, attorneys; Mr. Saravay and Sydney E. Dickey, on the brief).

Donald D. Campbell submitted a letter in lieu of brief on behalf of amici curiae United Families International and United ****200** Families–New Jersey (Campbell & Campbell, attorneys).

Ralph Charles Coti submitted a brief on behalf of amici curiae James Q. Wilson, Douglas Allen, Ph.D., David Blankenhorn, Lloyd R. Cohen, J.D., Ph.D., John Coverdale, J.D., Nicholas Eberstadt, Ph.D., Robert P. George, J.D., Harold James, Ph.D., Leon R. Kass, M.D., Ph.D., Douglas W. Kmiec and Katherine Shaw Spaht (Coti & Segrue, attorneys).

**Opinion**

Justice ALBIN delivered the opinion of the Court.

***422** The statutory and decisional laws of this State protect *individuals* from discrimination based on sexual orientation. When those individuals are gays and lesbians who follow the inclination of their sexual orientation and enter into a committed relationship with someone of the same sex, our laws treat them, as *couples,* differently than heterosexual couples. As committed same-sex partners, they are not permitted to marry or to enjoy the multitude of social and financial benefits and privileges conferred on opposite-sex married couples.

In this case, we must decide whether persons of the same sex have a fundamental right to marry that is encompassed within the concept of liberty guaranteed by Article I, Paragraph 1 of the New Jersey Constitution. Alternatively, we must decide whether Article I, Paragraph 1's equal protection guarantee requires that committed same-sex couples be given on equal terms the legal benefits and privileges awarded to married heterosexual couples ***423** and, if so, whether that guarantee also requires that the title of marriage, as opposed to some other term, define the committed same-sex legal relationship.

Only rights that are deeply rooted in the traditions, history, and conscience of the people are deemed to be fundamental. Although we cannot find that a fundamental right to same-sex marriage exists in this State, the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution. With this State's legislative and judicial commitment to eradicating sexual orientation discrimination as our backdrop, we now hold that denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of Article I, Paragraph 1. To comply with this constitutional mandate, the Legislature must either amend the marriage statutes to include same-sex couples or create a parallel statutory structure, which will provide for, on equal terms, the rights and benefits enjoyed and burdens and obligations borne by married couples. We will not presume that a separate statutory scheme, which uses a title other than marriage, contravenes equal protection principles, so long as the rights and benefits of civil marriage are made equally available to same-sex couples. The name to be given to the statutory scheme that provides full rights and benefits to same-sex couples, whether marriage or some other term, is a matter left to the democratic process.

I.

A.

Plaintiffs are seven same-sex couples who claim that New Jersey's laws, which restrict civil marriage to the union of a man and a woman, violate the liberty and equal protection guarantees of the New Jersey Constitution. Each plaintiff has been in a "permanent committed relationship" for more than ten years and each seeks to

  

marry his or her partner and to enjoy the legal, *424 financial, and social benefits that are afforded by marriage. When the seven couples applied for marriage **201 licenses in the municipalities in which they live, the appropriate licensing officials told them that the law did not permit same-sex couples to marry. Plaintiffs then filed a complaint in the Superior Court, Law Division, challenging the constitutionality of the State's marriage statutes.

In terms of the value they place on family, career, and community service, plaintiffs lead lives that are remarkably similar to those of opposite-sex couples.[1] Alicia Toby and Saundra Heath, who reside in Newark, have lived together for seventeen years and have children and grandchildren. Alicia is an ordained minister in a church where her pastoral duties include coordinating her church's HIV prevention program. Saundra works as a dispatcher for Federal Express.

Mark Lewis and Dennis Winslow reside in Union City and have been together for fourteen years. They both are pastors in the Episcopal Church. In their ministerial capacities, they have officiated at numerous weddings and signed marriage certificates, though their own relationship cannot be similarly sanctified under New Jersey law. When Dennis's father was suffering from a serious long-term illness, Mark helped care for him in their home as would a devoted son-in-law.

Diane Marini and Marilyn Maneely were committed partners for fourteen years until Marilyn's death in 2005.[2] The couple lived in Haddonfield, where Diane helped raise, as though they were her own, Marilyn's five children from an earlier marriage. Diane's mother considered Marilyn her daughter-in-law and Marilyn's children her grandchildren. The daily routine of their lives mirrored those of "other suburban married couples [their] age." *425 Marilyn was a registered nurse. Diane is a businesswoman who serves on the planning board in Haddonfield, where she is otherwise active in community affairs.

Karen and Marcye Nicholson–McFadden have been committed partners for seventeen years, living together for most of that time in Aberdeen. There, they are raising two young children conceived through artificial insemination, Karen having given birth to their daughter and Marcye to their son. They own an executive search firm where Marcye works full-time and Karen at night and on weekends. Karen otherwise devotes herself to daytime parenting responsibilities. Both are generally active in their community, with Karen serving on the township zoning board.

Suyin and Sarah Lael have resided together in Franklin Park for most of the sixteen years of their familial partnership. Suyin is employed as an administrator for a non-profit corporation, and Sarah is a speech therapist. They live with their nine-year-old adopted daughter and two other children who they are in the process of adopting. They legally changed their surname and that of their daughter to reflect their status as one family. Like many other couples, Suyin and Sarah share holidays with their extended families.

Cindy Meneghin and Maureen Kilian first met in high school and have been in a committed relationship for thirty-two years. They have lived together for twenty-three years in Butler where they are raising a fourteen-year-old son and a twelve-year-old daughter. Through artificial **202 insemination, Cindy conceived their son and Maureen their daughter. Cindy is a director of web services at Montclair State University, and Maureen is a church administrator. They are deeply involved in their children's education, attending after-school activities and PTA meetings. They also play active roles in their church, serving with their children in the soup kitchen to help the needy.

Chris Lodewyks and Craig Hutchison have been in a committed relationship with each other since their college days thirty-five years ago. They have lived together in Pompton Lakes for the *426 last twenty-three years. Craig works in Summit, where he is an investment asset manager and president of the Summit Downtown Association. He also serves as the vice-chairman of the board of trustees of a YMCA camp for children. Chris, who is retired, helps Craig's elderly mother with daily chores, such as getting to the eye doctor.

The seeming ordinariness of plaintiffs' lives is belied by the social indignities and economic difficulties that they daily face due to the inferior legal standing of their relationships compared to that of married couples. Without the benefits of marriage, some plaintiffs have had to endure the expensive and time-consuming process of cross-adopting each other's children and effectuating legal surname changes. Other plaintiffs have had to contend with economic disadvantages, such as paying excessive health insurance premiums because employers did not have to provide coverage to domestic partners, not having a right to "family leave" time, and suffering adverse inheritance tax consequences.

When some plaintiffs have been hospitalized, medical facilities have denied privileges to their partners customarily extended to family members. For example,

  

when Cindy Meneghin contracted meningitis, the hospital's medical staff at first ignored her pleas to allow her partner Maureen to accompany her to the emergency room. After Marcye Nicholson–McFadden gave birth to a son, a hospital nurse challenged the right of her partner Karen to be present in the newborn nursery to view their child. When Diane Marini received treatment for breast cancer, medical staff withheld information from her partner Marilyn "that would never be withheld from a spouse or even a more distant relative." Finally, plaintiffs recount the indignities, embarrassment, and anguish that they as well as their children have suffered in attempting to explain their family status.[3]

***427** B.

In a complaint filed in the Superior Court, plaintiffs sought both a declaration that the laws denying same-sex marriage violated the liberty and equal protection guarantees of Article I, Paragraph 1 of the New Jersey Constitution and injunctive relief compelling defendants to grant them marriage licenses.[4] The defendants named in the complaint are Gwendolyn L. ****203 Harris**, the then Commissioner of the New Jersey Department of Human Services responsible for implementing the State's marriage statutes; Clifton R. Lacy, the then Commissioner of the New Jersey Department of Health and Senior Services responsible for the operation of the State Registrar of Vital Statistics; and Joseph Komosinski, the then Acting State Registrar of Vital Statistics of the Department of Health and Senior Services responsible for supervising local registration of marriage records.[5] The departments run by those officials have oversight duties relating to the issuance of marriage licenses.

The complaint detailed a number of statutory benefits and privileges available to opposite-sex couples through New Jersey's civil marriage laws but denied to committed same-sex couples. Additionally, in their affidavits, plaintiffs asserted that the laws prohibiting same-sex couples to marry caused harm to their dignity and social standing, and inflicted psychic injuries on them, their children, and their extended families.

***428** The State moved to dismiss the complaint for failure to state a claim upon which relief could be granted, *see R.* 4:6–2(e), and later both parties moved for summary judgment, *see R.* 4:46–2(c). The trial court entered summary judgment in favor of the State and dismissed the complaint.

In an unpublished opinion, the trial court first concluded that marriage is restricted to the union of a man and a woman under New Jersey law. The court maintained that the notion of "same-sex marriage was so foreign" to the legislators who in 1912 passed the marriage statute that "a ban [on same-sex marriage] hardly needed mention." The court next rejected plaintiffs' argument that same-sex couples possess a fundamental right to marriage protected by the State Constitution, finding that such a right was not so rooted in the collective conscience and traditions of the people of this State as to be deemed fundamental. Last, the court held that the marriage laws did not violate the State Constitution's equal protection guarantee. The court determined that "limiting marriage to mixed-gender couples is a valid and reasonable exercise of government authority" and that the rights of gays and lesbians could "be protected in ways other than alteration of the traditional understanding of marriage." Plaintiffs were attempting "not to lift a barrier to marriage," according to the court, but rather "to change its very essence." To accomplish that end, the court suggested that plaintiffs would have to seek relief from the Legislature, which at the time was considering the passage of a domestic partnership act.

C.

A divided three-judge panel of the Appellate Division affirmed. ***Lewis*** *v.* ***Harris***, 378 *N.J.Super.* 168, 194, 875 *A.*2d 259 (App.Div.2005). Writing for the majority, Judge Skillman determined that New Jersey's marriage statutes do not contravene the substantive due process and equal protection guarantees of Article I, Paragraph 1 of the State Constitution. *Id.* at 188–89, 875 *A.*2d 259. In analyzing the substantive due process claim, Judge Skillman concluded ***429** that "[m]arriage between members of the same sex is clearly not a fundamental right." *Id.* at 183, 875 *A.*2d 259 (internal quotation marks omitted). He reached that conclusion because he could find no support for such a proposition in the text of the State Constitution, this State's history and traditions, or contemporary ****204** social standards. *Id.* at 183–84, 875 *A.*2d 259. He noted that "[o]ur leading religions view marriage as a union of men and women recognized by God" and that "our society considers marriage between a man and woman to play a vital role in propagating the species and in providing the ideal environment for raising children." *Id.* at 185, 875 *A.*2d 259.[6]

In rebuffing plaintiffs' equal protection claim, Judge Skillman looked to the balancing test that governs such claims—a consideration of " 'the nature of the affected right, the extent to which the governmental restriction

  

intrudes upon it, and the public need for the restriction.' " *Id.* at 189, 875 *A*.2d 259 (quoting *Greenberg v. Kimmelman,* 99 *N.J.* 552, 567, 494 *A*.2d 294 (1985)). Starting with the premise that there is no fundamental right to same-sex marriage, Judge Skillman reasoned that plaintiffs could not demonstrate the existence of an "affected" or "claimed" right. *Id.* at 189–90, 875 *A*.2d 259 (internal quotation marks omitted). From that viewpoint, the State was not required to show that a public need for limiting marriage to opposite-sex couples outweighed a non-existent affected right to same-sex marriage. *Id.* at 190, 875 *A*.2d 259.

Judge Skillman chronicled the legislative progress made by same-sex couples through such enactments as the Domestic Partnership Act and expressed his view of the constricted role of judges in setting social policy: "A constitution is not simply an empty receptacle into which judges may pour their own conceptions of evolving social mores." *Id.* at 176–79, 875 *A*.2d 259. In ***430** the absence of a constitutional mandate, he concluded that only the Legislature could authorize marriage between members of the same sex. *Id.* at 194, 875 A.2d 259. Judge Skillman, however, emphasized that same-sex couples "may assert claims that the due process and equal protection guarantees of [the State Constitution] entitle them to additional legal benefits provided by marriage." *Ibid.*

In a separate opinion, Judge Parrillo fully concurred with Judge Skillman's reasoning, but added his view of the twofold nature of the relief sought by plaintiffs—"the right *to* marry and the rights *of* marriage." *Id.* at 194–95, 875 *A*.2d 259 (Parrillo, J., concurring). Judge Parrillo observed that the right to marry necessarily includes significant "economic, legal and regulatory benefits," the so-called rights of marriage. *Id.* at 195, 875 *A*.2d 259. With regard to those "publicly-conferred tangible [and] intangible benefits" incident to marriage that are denied to same-sex couples, Judge Parrillo asserted plaintiffs are free to challenge "on an ad-hoc basis" any "particular statutory exclusion resulting in disparate or unfair treatment." *Ibid.* He concluded, however, that courts had no constitutional authority to alter "a core feature of marriage," namely "its binary, opposite-sex nature." *Id.* at 199–200, 875 *A*.2d 259. He maintained that "[p]rocreative heterosexual intercourse is and has been historically through all times and cultures an important feature of that privileged status, and that characteristic is a fundamental, originating reason why the State privileges marriage." *Id.* at 197, 875 *A*.2d 259. He submitted that it was the Legislature's role "to weigh the societal costs against the societal benefits flowing from a profound change in the public meaning of marriage." *Id.* at 200, 875 *A*.2d 259.

In dissenting, Judge Collester concluded that the substantive due process and equal ****205** protection guarantees of Article I, Paragraph 1 obligate the State to afford same-sex couples the right to marry on terms equal to those afforded to opposite-sex couples. *Id.* at 218–20, 875 *A*.2d 259 (Collester, J., dissenting). He charted the evolving nature of the institution of marriage and of the rights ***431** and protections afforded to same-sex couples, and reasoned that outdated conceptions of marriage "cannot justify contemporary violations of constitutional guarantees." *Id.* at 206–10, 875 *A*.2d 259. He described the majority's argument as circular: Plaintiffs have no constitutional right to marry because this State's laws by definition do not permit same-sex couples to marry. *Id.* at 204, 875 *A*.2d 259. That paradigm, Judge Collester believed, unfairly insulated the State's marriage laws from plaintiffs' constitutional claims and denied "plaintiffs the right to enter into lawful marriage in this State with the person of their choice." *Id.* at 204, 211, 875 *A*.2d 259. Judge Collester dismissed the notion that "procreation or the ability to procreate is central to marriage" today and pointed out that four plaintiffs in this case gave birth to children after artificial insemination. *Id.* at 211–12, 875 *A*.2d 259. He further asserted that if marriage indeed is "the optimal environment for child rearing," then denying plaintiffs the right to marry their committed partners is fundamentally unfair to their children. *Id.* at 212–13, 875 *A*.2d 259 (internal quotation marks omitted). Because the current marriage laws prohibit "a central life choice to some and not others based on sexual orientation" and because he could find no rational basis for limiting the right of marriage to opposite-sex couples, Judge Collester determined that the State had deprived plaintiffs of their right to substantive due process and equal protection of the laws. *Id.* at 216–20, 875 *A*.2d 259.

We review this case as of right based on the dissent in the Appellate Division. *See R.* 2:2–1(a)(2). We granted the motions of a number of individuals and organizations to participate as amici curiae.

## II.

[1] This appeal comes before us from a grant of summary judgment in favor of the State. *See R.* 4:46–2(c). As this case raises no factual disputes, we address solely questions of law, and thus are not bound to defer to the legal conclusions of the lower ***432** courts. *See Balsamides v. Protameen Chems., Inc.,* 160 *N.J.* 352, 372, 734 *A*.2d 721 (1999) (stating that "matters of law are subject to a *de novo* review").

  

Plaintiffs contend that the State's laws barring members of the same sex from marrying their chosen partners violate the New Jersey Constitution. They make no claim that those laws contravene the Federal Constitution. Plaintiffs present a twofold argument. They first assert that same-sex couples have a fundamental right to marry that is protected by the liberty guarantee of Article I, Paragraph 1 of the State Constitution. They next assert that denying same-sex couples the right to marriage afforded to opposite-sex couples violates the equal protection guarantee of that constitutional provision.

In defending the constitutionality of its marriage laws, the State submits that same-sex marriage has no historical roots in the traditions or collective conscience of the people of New Jersey to give it the ranking of a fundamental right, and that limiting marriage to opposite-sex couples is a rational exercise of social policy by the Legislature. The State concedes that state law and policy do not support the argument that limiting marriage to heterosexual couples is necessary for either procreative purposes or providing the optimal ****206** environment for raising children.[7] Indeed, the State not only recognizes the right of gay and lesbian parents to raise their own children, but also places foster children in same-sex parent homes through the Division of Youth and Family Services.

The State rests its case on age-old traditions, beliefs, and laws, which have defined the essential nature of marriage to be the union of a man and a woman. The long-held historical view of marriage, according to the State, provides a sufficient basis to uphold the constitutionality of the marriage statutes. Any change to the bedrock principle that limits marriage to persons of the ***433** opposite sex, the State argues, must come from the democratic process.

The legal battle in this case has been waged over one overarching issue—the right to marry. A civil marriage license entitles those wedded to a vast array of economic and social benefits and privileges—the rights of marriage. Plaintiffs have pursued the singular goal of obtaining the right to marry, knowing that, if successful, the rights of marriage automatically follow. We do not have to take that all-or-nothing approach. We perceive plaintiffs' equal protection claim to have two components: whether committed same-sex couples have a constitutional right to the benefits and privileges afforded to married heterosexual couples, and, if so, whether they have the constitutional right to have their "permanent committed relationship" recognized by the name of marriage. After we address plaintiffs' fundamental right argument, we will examine those equal protection issues in turn.

## III.

Plaintiffs contend that the right to marry a person of the same sex is a fundamental right secured by the liberty guarantee of Article I, Paragraph 1 of the New Jersey Constitution. Plaintiffs maintain that the liberty interest at stake is "the right of every adult to choose whom to marry without intervention of government." Plaintiffs do not profess a desire to overthrow all state regulation of marriage, such as the prohibition on polygamy and restrictions based on consanguinity and age.[8] They therefore accept some limitations on "the exercise of personal choice in marriage." They do claim, however, that the State cannot regulate marriage by defining it as the union between a man and a ***434** woman without offending our State Constitution. In assessing their liberty claim, we must determine whether the right of a person to marry someone of the same sex is so deeply rooted in the traditions and collective conscience of our people that it must be deemed fundamental under Article I, Paragraph 1. We thus begin with the text of Article I, Paragraph 1, which provides:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.
>
> [*N.J. Const.* art. I, ¶ 1.]

[2] The origins of Article I, Paragraph 1 date back to New Jersey's 1844 Constitution. ****207** [9] That first paragraph of our Constitution is, in part, "a 'general recognition of those absolute rights of the citizen which were a part of the common law.' " *King v. S. Jersey Nat'l Bank,* 66 *N.J.* 161, 178, 330 *A.*2d 1 (1974) (quoting *Ransom v. Black,* 54 *N.J.L.* 446, 448, 24 *A.* 1021 (Sup.Ct.1892), *aff'd per curiam,* 65 *N.J.L.* 688, 51 *A.* 1109 (E. & A. 1900)). In attempting to discern those substantive rights that are fundamental under Article I, Paragraph 1, we have adopted the general standard followed by the United States Supreme Court in construing the Due Process Clause of the Fourteenth Amendment of the Federal Constitution. We "look to 'the traditions and [collective] conscience of our people to determine whether a principle is so rooted [there] ... as to be ranked as fundamental.' " *Ibid.* (internal quotation marks omitted) (alterations in original) (quoting *Griswold v. Connecticut,* 381 *U.S.* 479,

493, 85 *S.Ct.* 1678, 1686, 14 *L.Ed.*2d 510, 520 (1965) (Goldberg, J., concurring)); *see also Watkins v. Nelson,* 163 *N.J.* 235, 245, 748 *A.*2d 558 (2000); *Doe v. Poritz,* 142 *N.J.* 1, 120, 662 *A.*2d 367 (1995); *State v. Parker,* 124 *N.J.* 628, 648, 592 *A.*2d 228 (1991), *cert. denied,* 503 *U.S.* 939, 112 *S.Ct.* 1483, 117 *L.Ed.*2d 625 (1992).

***435** [3] Under Article I, Paragraph 1, as under the Fourteenth Amendment's substantive due process analysis, determining whether a fundamental right exists involves a two-step inquiry. First, the asserted fundamental liberty interest must be clearly identified. *See Washington v. Glucksberg,* 521 *U.S.* 702, 721, 117 *S.Ct.* 2258, 2268, 138 *L.Ed.*2d 772, 788 (1997). Second, that liberty interest must be objectively and deeply rooted in the traditions, history, and conscience of the people of this State. *See King, supra,* 66 *N.J.* at 178, 330 *A.*2d 1; *see also Glucksberg, supra,* 521 *U.S.* at 720–21, 117 *S.Ct.* at 2268, 138 *L.Ed.*2d at 787–88 (stating that liberty interest must be "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" (internal quotation marks omitted)).

How the right is defined may dictate whether it is deemed fundamental. One such example is *Glucksberg, supra,* a case involving a challenge to Washington's law prohibiting and criminalizing assisted suicide. 521 *U.S.* at 705–06, 117 *S.Ct.* at 2261, 138 *L.Ed.*2d at 779. In that case, the Supreme Court stated that the liberty interest at issue was not the " 'liberty to choose how to die,' " but rather the "right to commit suicide with another's assistance." *Id.* at 722–24, 117 *S.Ct.* at 2269, 138 *L.Ed.*2d at 789–90. Having framed the issue that way, the Court concluded that the right to assisted suicide was not deeply rooted in the nation's history and traditions and therefore not a fundamental liberty interest under substantive due process. *Id.* at 723, 728, 117 *S.Ct.* at 2269, 2271, 138 *L.Ed.*2d at 789, 792.

[4] [5] The right to marriage is recognized as fundamental by both our Federal and State Constitutions. *See, e.g., Zablocki v. Redhail,* 434 *U.S.* 374, 383–84, 98 *S.Ct.* 673, 679–80, 54 *L.Ed.*2d 618, 628–29 (1978); *J.B. v. M.B.,* 170 *N.J.* 9, 23–24, 783 *A.*2d 707 (2001). That broadly stated right, however, is "subject to reasonable state regulation." *Greenberg, supra,* 99 *N.J.* at 572, 494 *A.*2d 294. Although the fundamental right to marriage extends even to those imprisoned, *Turner v. Safley,* 482 *U.S.* 78, 95–96, 107 *S.Ct.* 2254, 2265, 96 *L.Ed.*2d 64, 83 (1987), and those in ****208** noncompliance ***436** with their child support obligations, *Zablocki, supra,* 434 *U.S.* at 387–91, 98 *S.Ct.* at 681–83, 54 *L.Ed.*2d at 631–33, it does not extend to polygamous, incestuous, and adolescent marriages, *N.J.S.A.* 2C:24–1; *N.J.S.A.* 37:1–1, –6. In this case, the liberty interest at stake is not some undifferentiated, abstract right to marriage, but rather the right of people of the same sex to marry. Thus, we are concerned only with the question of whether the right to same-sex marriage is deeply rooted in this State's history and its people's collective conscience.[10]

In answering that question, we are not bound by the nation's experience or the precedents of other states, although they may provide guideposts and persuasive authority. *See Doe v. Poritz, supra,* 142 *N.J.* at 119–20, 662 *A.*2d 367 (stating that although practice "followed by a large number of states is not conclusive[,] ... it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (internal quotation marks omitted)). Our starting point is the State's marriage laws.

Plaintiffs do not dispute that New Jersey's civil marriage statutes, *N.J.S.A.* 37:1–1 to 37:2–41, which were first enacted in 1912, limit marriage to heterosexual couples. That limitation is clear from the use of gender-specific language in the text of various statutes. *See, e.g., N.J.S.A.* 37:1–1 (describing prohibited marriages in terms of opposite-sex relatives); *N.J.S.A.* 37:2–10 (providing that "husband" is not liable for debts of "wife" incurred before or after marriage); *N.J.S.A.* 37:2–18.1 (providing release ***437** rights of curtesy and dower for "husband" and "wife"). More recently, in passing the Domestic Partnership Act to ameliorate some of the economic and social disparities between committed same-sex couples and married heterosexual couples, the Legislature explicitly acknowledged that same-sex couples cannot marry. *See N.J.S.A.* 26:8A–2(e).

Three decades ago, Justice (then Judge) Handler wrote that "[d]espite winds of change," there was almost a universal recognition that "a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female." *M.T. v. J.T.,* 140 *N.J.Super.* 77, 83–84, 355 *A.*2d 204 (App.Div.), *certif. denied,* 71 *N.J.* 345, 364 *A.*2d 1076 (1976). With the exception of Massachusetts, every state's law, explicitly or implicitly, defines marriage to mean the union of a man and a woman.[11]

****209** Although today there is a nationwide public debate raging over whether same-sex marriage should be authorized under the laws or constitutions of the various states, the framers of the 1947 New Jersey Constitution, much less the drafters of our marriage statutes, could not have imagined that the liberty right protected by ***438** Article I, Paragraph 1 embraced the right of a person to

  

marry someone of his or her own sex. *See, e.g., Baker v. Nelson,* 291 *Minn.* 310, 191 *N.W.*2d 185, 186 (1971) ("The institution of marriage as a union of man and woman ... is as old as the book of Genesis."), *appeal dismissed,* 409 *U.S.* 810, 93 *S.Ct.* 37, 34 *L.Ed.*2d 65 (1972); Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 2–3 (2000) (describing particular model of marriage "deeply implanted" in United States history to be "lifelong, faithful monogamy, formed by the mutual consent of a man and a woman"); *see also* 1 *U.S.C.A.* § 7 (defining under Federal Defense of Marriage Act "the word 'marriage' [to] mean[ ] only a legal union between one man and one woman as husband and wife").

Times and attitudes have changed, and there has been a developing understanding that discrimination against gays and lesbians is no longer acceptable in this State, as is evidenced by various laws and judicial decisions prohibiting differential treatment based on sexual orientation. *See, e.g., N.J.S.A.* 10:5–4 (prohibiting discrimination on basis of sexual orientation); *N.J.S.A.* 26:8A–1 to –13 (affording various rights to same-sex couples under Domestic Partnership Act); *In re Adoption of a Child by J.M.G.,* 267 *N.J.Super.* 622, 623, 625, 632 *A.*2d 550 (Ch.Div.1993) (determining that lesbian partner was entitled to adopt biological child of partner). *See generally* Joshua Kaplan, *Unmasking the Federal Marriage Amendment: The Status of Sexuality,* 6 *Geo. J. Gender & L.* 105, 123–24 (2005) (noting that "1969 is widely recognized as the beginning of the gay rights movement," which is considered "relatively new to the national agenda"). On the federal level, moreover, the United States Supreme Court has struck down laws that have unconstitutionally targeted gays and lesbians for disparate treatment.

In *Romer v. Evans,* Colorado passed an amendment to its constitution that prohibited all legislative, executive, or judicial action designed to afford homosexuals protection from discrimination based on sexual orientation. 517 *U.S.* 620, 623–24, 116 *S.Ct.* 1620, 1623, 134 *L.Ed.*2d 855, 860–61 (1996). The Supreme Court ***439** declared that Colorado's constitutional provision violated the Fourteenth Amendment's Equal Protection Clause because it "impos [ed] a broad and undifferentiated disability on a single named group" and appeared to be motivated by an "animus toward" gays and lesbians. *Id.* at 632, 116 *S.Ct.* at 1627-28, 134 *L.Ed.*2d at 865–66. The Court concluded that a state could not make "a class of persons a stranger to its laws." *Id.* at 635, 116 *S.Ct.* at 1629, 134 *L.Ed.*2d at 868.

More recently, in *Lawrence v. Texas,* the Court invalidated on Fourteenth Amendment due process grounds Texas's sodomy statute, which made it a crime for ****210** homosexuals "to engage in certain intimate sexual conduct." 539 *U.S.* 558, 562, 578, 123 *S.Ct.* 2472, 2475, 2484, 156 *L.Ed.*2d 508, 515, 525–26 (2003). The Court held that the "liberty" protected by the Due Process Clause prevented Texas from controlling the destiny of homosexuals "by making their private sexual conduct a crime." *Id.* at 578, 123 *S.Ct.* at 2484, 156 *L.Ed.*2d at 525. The *Lawrence* Court, however, pointedly noted that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Ibid.* In a concurring opinion, Justice O'Connor concluded that the Texas law, as applied to the private, consensual conduct of homosexuals, violated the Equal Protection Clause, but strongly suggested that a state's legitimate interest in "preserving the traditional institution of marriage" would allow for distinguishing between heterosexuals and homosexuals without offending equal protection principles. *Id.* at 585, 123 *S.Ct.* at 2487–88, 156 *L.Ed.*2d at 530 (O'Connor, J., concurring).

Plaintiffs rely on the *Romer* and *Lawrence* cases to argue that they have a fundamental right to marry under the New Jersey Constitution, not that they have such a right under the Federal Constitution. Although those recent cases openly advance the civil rights of gays and lesbians, they fall far short of establishing a right to same-sex marriage deeply rooted in the traditions, history, and conscience of the people of this State.

***440** Plaintiffs also rely on *Loving v. Virginia,* 388 *U.S.* 1, 87 *S.Ct.* 1817, 18 *L.Ed.*2d 1010 (1967), to support their claim that the right to same-sex marriage is fundamental. In *Loving,* the United States Supreme Court held that Virginia's antimiscegenation statutes, which prohibited and criminalized interracial marriages, violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Id.* at 2, 87 *S.Ct.* at 1818, 18 *L.Ed.*2d at 1012. Although the Court reaffirmed the fundamental right of marriage, the heart of the case was invidious discrimination based on race, the very evil that motivated passage of the Fourteenth Amendment. *Id.* at 10–12, 87 *S.Ct.* at 1823–24, 18 *L.Ed.*2d at 1017–18. The Court stated that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Id.* at 10, 87 *S.Ct.* at 1823, 18 *L.Ed.*2d at 1017. For that reason, the Court concluded that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12, 87 *S.Ct.* at 1823, 18 *L.Ed.*2d at 1018. From the fact-specific background of that case, which dealt with

  

intolerable racial distinctions that patently violated the Fourteenth Amendment, we cannot find support for plaintiffs claim that there is a fundamental right to same-sex marriage under our State Constitution. We add that all of the United States Supreme Court cases cited by plaintiffs, *Loving, Turner,* and *Zablocki,* involved heterosexual couples seeking access to the right to marriage and did not implicate directly the primary question to be answered in this case.

[6] Within the concept of liberty protected by Article I, Paragraph 1 of the New Jersey Constitution are core rights of such overriding value that we consider them to be fundamental. Determining whether a particular claimed right is fundamental is a task that requires both caution and foresight. When engaging in a substantive due process analysis under the Fourteenth Amendment, the United States Supreme Court has instructed that it must "exercise the utmost care" before finding new rights, which ***441** place important social ****211** issues beyond public debate, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of [the] Court." *Glucksberg, supra,* 521 *U.S.* at 720, 117 *S.Ct.* at 2267–68, 138 *L.Ed.*2d at 787 (internal quotation marks omitted). In searching for the meaning of "liberty" under Article I, Paragraph 1, we must resist the temptation of seeing in the majesty of that word only a mirror image of our own strongly felt opinions and beliefs. Under the guise of newly found rights, we must be careful not to impose our personal value system on eight-and-one-half million people, thus bypassing the democratic process as the primary means of effecting social change in this State. That being said, this Court will never abandon its responsibility to protect the fundamental rights of all of our citizens, even the most alienated and disfavored, no matter how strong the winds of popular opinion may blow.

Despite the rich diversity of this State, the tolerance and goodness of its people, and the many recent advances made by gays and lesbians toward achieving social acceptance and equality under the law, we cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right. When looking for the source of our rights under the New Jersey Constitution, we need not look beyond our borders. Nevertheless, we do take note that no jurisdiction, not even Massachusetts, has declared that there is a fundamental right to same-sex marriage under the federal or its own constitution.[12]

***442** Having decided that there is no fundamental right to same-sex marriage does not end our inquiry. *See WHS Realty Co. v. Town of Morristown,* 323 *N.J.Super.* 553, 562–63, 733 *A.*2d 1206 (App.Div.) (recognizing that although provision of municipal service is not fundamental right, inequitable provision of that service is subject to equal protection analysis), *certif. denied,* 162 *N.J.* 489, 744 *A.*2d 1211 (1999). We now must examine whether those laws that deny to committed same-sex couples both the right to and the rights of marriage afforded to heterosexual couples offend the equal protection principles of our State Constitution.

## IV.

Article I, Paragraph 1 of the New Jersey Constitution sets forth the first principles of our governmental charter—that every person possesses the "unalienable rights" to enjoy life, liberty, and property, and to pursue happiness. Although our State Constitution nowhere expressly states that every person shall be entitled to the equal protection of the laws, we have construed the expansive language of Article I, Paragraph 1 to embrace that fundamental guarantee. *Sojourner A. v. N.J. Dep't of Human Servs.,* 177 *N.J.* 318, 332, 828 *A.*2d 306 (2003); *Greenberg, supra,* 99 *N.J.* at 568, 494 *A.*2d 294. Quite simply, that first paragraph to our State Constitution "protect[s] against injustice and against the unequal treatment of those ****212** who should be treated alike." *Greenberg, supra,* 99 *N.J.* at 568, 494 *A.*2d 294.

Plaintiffs claim that the State's marriage laws have relegated them to "second-class citizenship" by denying them the "tangible and intangible" benefits available to heterosexual couples through marriage. Depriving same-sex partners access to civil marriage and its benefits, plaintiffs contend, violates Article I, Paragraph 1's equal protection guarantee. We must determine whether the ***443** State's marriage laws permissibly distinguish between same-sex and heterosexual couples.

[7] [8] [9] [10] When a statute is challenged on the ground that it does not apply evenhandedly to similarly situated people, our equal protection jurisprudence requires that the legislation, in distinguishing between two classes of people, bear a substantial relationship to a legitimate governmental purpose. *Caviglia v. Royal Tours of Am.,* 178 *N.J.* 460, 472–73, 842 *A.*2d 125 (2004); *Barone v. Dep't of Human Servs.,* 107 *N.J.* 355, 368, 526 *A.*2d 1055 (1987). The test that we have applied to such equal protection claims involves the weighing of three factors: the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction. *Greenberg,*

  

*supra,* 99 *N.J.* at 567, 494 *A.*2d 294; *Robinson v. Cahill,* 62 *N.J.* 473, 491–92, 303 *A.*2d 273, *cert. denied,* 414 *U.S.* 976, 94 *S.Ct.* 292, 38 *L.Ed.*2d 219 (1973). The test is a flexible one, measuring the importance of the right against the need for the governmental restriction.[13] *See Sojourner A., supra,* 177 *N.J.* at 333, 828 *A.*2d 306. Under that approach, each claim is examined "on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction." *Ibid.* Accordingly, "the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right." *George Harms Constr. Co. v. N.J. Tpk. Auth.,* 137 *N.J.* 8, 29, 644 *A.*2d 76 (1994); *see also Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp.,* 80 *N.J.* 6, 43, 364 *A.*2d 1016 (1976), *cert. denied,* 430 *U.S.* 977, 97 *S.Ct.* 1672, 52 *L.Ed.*2d 373 (1977). Unless ***444** the public need justifies statutorily limiting the exercise of a claimed right, the State's action is deemed arbitrary. *See Robinson, supra,* 62 *N.J.* at 491–92, 303 *A.*2d 273.

A.

In conducting this equal protection analysis, we discern two distinct issues. The first is whether committed same-sex couples have the right to the statutory benefits and privileges conferred on heterosexual married couples. Next, assuming a right to equal benefits and privileges, the issue is whether committed same-sex partners have a constitutional right to define their relationship by the name of marriage, the word that historically has characterized the union of a man and a woman. In addressing plaintiffs' claimed interest in equality of treatment, we begin with a retrospective look at the evolving expansion of rights to gays and lesbians in this State.

Today, in New Jersey, it is just as unlawful to discriminate against individuals ****213** on the basis of sexual orientation as it is to discriminate against them on the basis of race, national origin, age, or sex. *See N.J.S.A.* 10:5–4. Over the last three decades, through judicial decisions and comprehensive legislative enactments, this State, step by step, has protected gay and lesbian individuals from discrimination on account of their sexual orientation.

In 1974, a New Jersey court held that the parental visitation rights of a divorced homosexual father could not be denied or restricted based on his sexual orientation. *In re J.S. & C.,* 129 *N.J.Super.* 486, 489, 324 *A.*2d 90 (Ch.Div.1974), *aff'd per curiam,* 142 *N.J.Super.* 499, 362 *A.*2d 54 (App.Div.1976). Five years later, the Appellate Division stated that the custodial rights of a mother could not be denied or impaired because she was a lesbian. *M.P. v. S.P.,* 169 *N.J.Super.* 425, 427, 404 *A.*2d 1256 (App.Div.1979). This State was one of the first in the nation to judicially recognize the right of an individual to adopt a same-sex partner's biological ***445** child.[14] *J.M.G., supra,* 267 *N.J.Super.* at 625, 626, 631, 632 *A.*2d 550 (recognizing "importance of the emotional benefit of formal recognition of the relationship between [the non-biological mother] and the child" and that there is not one correct family paradigm for creating "supportive, loving environment" for children); *see also In re Adoption of Two Children by H.N.R.,* 285 *N.J.Super.* 1, 3, 666 *A.*2d 535 (App.Div.1995) (finding that "best interests" of children supported adoption by same-sex partner of biological mother). Additionally, this Court has acknowledged that a woman can be the "psychological parent" of children born to her former same-sex partner during their committed relationship, entitling the woman to visitation with the children. *V.C. v. M.J.B.,* 163 *N.J.* 200, 206–07, 230, 748 *A.*2d 539, *cert. denied,* 531 *U.S.* 926, 121 *S.Ct.* 302, 148 *L.Ed.*2d 243 (2000); *see also id.* at 232, 748 *A.*2d 539 (Long, J., concurring) (noting that no one "particular model of family life" has monopoly on " 'family values' " and that "[t]hose qualities of family life on which society places a premium ... are unrelated to the particular form a family takes"). Recently, our Appellate Division held that under New Jersey's change of name statute an individual could assume the surname of a same-sex partner. *In re Application for Change of Name by Bacharach,* 344 *N.J.Super.* 126, 130–31, 136, 780 *A.*2d 579 (App.Div.2001).

Perhaps more significantly, New Jersey's Legislature has been at the forefront of combating sexual orientation discrimination and advancing equality of treatment toward gays and lesbians. In 1992, through an amendment to the Law Against Discrimination (LAD), *L.* 1991, *c.* 519, New Jersey became the fifth state[15] in the ***446** nation to prohibit discrimination on the basis of "affectional or sexual orientation."[16] *See N.J.S.A.* 10:5–4. In making ****214** sexual orientation a protected category, the Legislature committed New Jersey to the goal of eradicating discrimination against gays and lesbians. *See also Fuchilla v. Layman,* 109 *N.J.* 319, 334, 537 *A.*2d 652 ("[T]he overarching goal of the [LAD] is nothing less than the eradication of the cancer of discrimination." (internal quotation marks omitted)), *cert. denied,* 488 *U.S.* 826, 109 *S.Ct.* 75, 102 *L.Ed.*2d 51 (1988). In 2004, the Legislature added "domestic partnership status" to the categories protected by the LAD. *L.* 2003, *c.* 246.

The LAD guarantees that gays and lesbians, as well as

  

same-sex domestic partners, will not be subject to discrimination in pursuing employment opportunities, gaining access to public accommodations, obtaining housing and real property, seeking credit and loans from financial institutions, and engaging in business transactions. *N.J.S.A.* 10:5–12. The LAD declares that access to those opportunities and basic needs of modern life is a civil right. *N.J.S.A.* 10:5–4.

Additionally, discrimination on the basis of sexual orientation is outlawed in various other statutes. For example, the Legislature has made it a bias crime for a person to commit certain offenses with the purpose to intimidate an individual on account of sexual orientation, *N.J.S.A.* 2C:16–1(a)(1), and has provided a civil cause of action against the offender, *N.J.S.A.* 2A:53A–21. It is a crime for a public official to deny a person any "right, privilege, power or immunity" on the basis of sexual orientation. *N.J.S.A.* 2C:30–6(a). It is also unlawful to discriminate against gays and lesbians under ***447** the Local Public Contracts Law and the Public Schools Contracts Law. *N.J.S.A.* 40A:11–13; *N.J.S.A.* 18A:18A–15. The Legislature, moreover, formed the New Jersey Human Relations Council to promote educational programs aimed at reducing bias and bias-related acts, identifying sexual orientation as a protected category, *N.J.S.A.* 52:9DD–8, and required school districts to adopt anti-bullying and anti-intimidation policies to protect, among others, gays and lesbians, *N.J.S.A.* 18A:37–14, –15(a).

In 2004, the Legislature passed the Domestic Partnership Act, *L.* 2003, *c.* 246, making available to committed same-sex couples "certain rights and benefits that are accorded to married couples under the laws of New Jersey."[17] *N.J.S.A.* 26:8A–2(d). With same-sex partners in mind, the Legislature declared that "[t]here are a significant number of individuals in this State who choose to live together in important personal, emotional and economic committed relationships," *N.J.S.A.* 26:8A–2(a), and that those "mutually supportive relationships should be formally recognized by statute," *N.J.S.A.* 26:8A–2(c). The Legislature also acknowledged that such relationships "assist the State by their establishment of a private network of support for the financial, physical and emotional health of their participants." *N.J.S.A.* 26:8A–2(b).

For those same-sex couples who enter into a domestic partnership, the Act provides a limited number of rights and benefits possessed by married couples, including "statutory protection against various forms of discrimination against domestic partners; certain visitation and decision- ****215** making rights in a health care setting; certain tax-related benefits; and, in some cases, health and pension benefits that are provided in the same manner as for spouses." *N.J.S.A.* 26:8A–2(c). Later amendments to other statutes have provided domestic partners with additional rights pertaining ***448** to funeral arrangements and disposition of the remains of a deceased partner, *L.* 2005, *c.* 331, inheritance privileges when the deceased partner dies without a will, *L.* 2005, *c.* 331, and guardianship rights in the event of a partner's incapacitation, *L.* 2005, *c.* 304.

In passing the Act, the Legislature expressed its clear understanding of the human dimension that propelled it to provide relief to same-sex couples. It emphasized that the need for committed same-sex partners "to have access to these rights and benefits is paramount in view of their essential relationship to any reasonable conception of basic human dignity and autonomy, and the extent to which they will play an integral role in enabling these persons to enjoy their familial relationships as domestic partners." *N.J.S.A.* 26:8A–2(d).

Aside from federal decisions such as *Romer* and *Lawrence,* this State's decisional law and sweeping legislative enactments, which protect gays and lesbians from sexual orientation discrimination in all its virulent forms, provide committed same-sex couples with a strong interest in equality of treatment relative to comparable heterosexual couples.

B.

We next examine the extent to which New Jersey's laws continue to restrict committed same-sex couples from enjoying the full benefits and privileges available through marriage. Although under the Domestic Partnership Act same-sex couples are provided with a number of important rights, they still are denied many benefits and privileges accorded to their similarly situated heterosexual counterparts. Thus, the Act has failed to bridge the inequality gap between committed same-sex couples and married opposite-sex couples. Among the rights afforded to married couples but denied to committed same-sex couples are the right to

(1) a surname change without petitioning the court, *see Bacharach, supra,* 344 *N.J.Super.* at 135–36, 780 *A.*2d 579;

***449** (2) ownership of property as tenants by the entirety, *N.J.S.A.* 46:3–17.2, which would allow for both automatic transfer of ownership on death, *N.J.S.A.*

  

46:3–17.5, and protection against severance and alienation, *N.J.S.A.* 46:3–17.4;

(3) survivor benefits under New Jersey's Workers' Compensation Act, *N.J.S.A.* 34:15–13;

(4) back wages owed to a deceased spouse, *N.J.S.A.* 34:11–4.5;

(5) compensation available to spouses, children, and other relatives of homicide victims under the Criminal Injuries Compensation Act, *N.J.S.A.* 52:4B–10(c), –2;

(6) free tuition at any public institution of higher education for surviving spouses and children of certain members of the New Jersey National Guard, *N.J.S.A.* 18A:62–25;

(7) tuition assistance for higher education for spouses and children of volunteer firefighters and first-aid responders, *N.J.S.A.* 18A:71–78.1;

(8) tax deductions for spousal medical expenses, *N.J.S.A.* 54A:3–3(a);

(9) an exemption from the realty transfer fee for transfers between spouses, *N.J.S.A.* 46:15–10(j), –6.1; and

(10) the testimonial privilege given to the spouse of an accused in a criminal action, *N.J.S.A.* 2A:84A–17(2).

**216 In addition, same-sex couples certified as domestic partners receive fewer workplace protections than married couples. For example, an employer is not required to provide health insurance coverage for an employee's domestic partner. *N.J.S.A.* 34:11A–20(b). Because the New Jersey Family Leave Act does not include domestic partners within the definition of family member, *N.J.S.A.* 34:11B–3(j), gay and lesbian employees are not entitled to statutory leave for the purpose of caring for an ill domestic partner, *see N.J.S.A.* 34:11B–4(a). The disparity of rights and remedies also extends to the laws governing wills. For instance, a bequest in a will by one domestic partner to another is not automatically revoked after termination of the partnership, as it would be for a divorced couple, *N.J.S.A.* 3B:3–14. For that reason, the failure to revise a will prior to death may result in an estranged domestic partner receiving a bequest that a divorced spouse would not. There is also no statutory provision permitting the payment of an allowance for the support and maintenance of a surviving domestic partner when a will contest is pending. *See N.J.S.A.* 3B:3–30 (stating that support and maintenance may be paid out of decedent's estate to surviving spouse pending will contest).

*450 The Domestic Partnership Act, notably, does not provide to committed same-sex couples the family law protections available to married couples. The Act provides no comparable presumption of dual parentage to the non-biological parent of a child born to a domestic partner, *N.J.S.A.* 9:17–43, –44.[18] As a result, domestic partners must rely on costly and time-consuming second-parent adoption procedures.[19] The Act also is silent on critical issues relating to custody, visitation, and partner and child support in the event a domestic partnership terminates. *See, e.g., N.J.S.A.* 9:2–4 (providing custody rights to divorced spouses).[20] For example, the Act does not place any support obligation on the non-biological partner-parent who does not adopt a child born during a committed relationship. Additionally, there is no statutory mechanism for post-relationship support of a domestic partner. *See N.J.S.A.* 2A:34–23 (providing for spousal support following filing of matrimonial complaint). Contrary to the law that applies to divorcing spouses, *see N.J.S.A.* 2A:34–23, –23.1, the Act states that a court shall not be required to equitably distribute property acquired by one or both partners during the domestic partnership on termination of the partnership. *N.J.S.A.* 26:8A–10(a)(3).

Significantly, the economic and financial inequities that are borne by same-sex domestic partners are borne by their children too. With fewer financial benefits and protections available, those *451 children are disadvantaged in a way that children in married households are not. Children **217 have the same universal needs and wants, whether they are raised in a same-sex or opposite-sex family, yet under the current system they are treated differently.

Last, even though they are provided fewer benefits and rights, same-sex couples are subject to more stringent requirements to enter into a domestic partnership than opposite-sex couples entering into marriage. The Act requires that those seeking a domestic partnership share "a common residence;" prove that they have assumed joint responsibility "for each other's common welfare as evidenced by joint financial arrangements or joint ownership of real or personal property;" "agree to be jointly responsible for each other's basic living expenses during the domestic partnership;" and show that they "have chosen to share each other's lives in a committed relationship of mutual caring." *N.J.S.A.* 26:8A–4(b)(1), (2), (6). Opposite-sex couples do not have to clear those hurdles to obtain a marriage license. *See N.J.S.A.* 37:1–1 to –12.3.

Thus, under our current laws, committed same-sex

  

couples and their children are not afforded the benefits and protections available to similar heterosexual households.

C.

[11] We now must assess the public need for denying the full benefits and privileges that flow from marriage to committed same-sex partners. At this point, we do not consider whether committed same-sex couples should be allowed to marry, but only whether those couples are entitled to the same rights and benefits afforded to married heterosexual couples. Cast in that light, the issue is not about the transformation of the traditional definition of marriage, but about the unequal dispensation of benefits and privileges to one of two similarly situated classes of people. We therefore must determine whether there is a public need to deny committed same-sex partners the benefits and privileges available to heterosexual couples.

***452** The State does not argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children. Other than sustaining the traditional definition of marriage, which is not implicated in this discussion, the State has not articulated any legitimate public need for depriving same-sex couples of the host of benefits and privileges catalogued in Section IV.B. Perhaps that is because the public policy of this State is to eliminate sexual orientation discrimination and support legally sanctioned domestic partnerships. The Legislature has designated sexual orientation, along with race, national origin, and sex, as a protected category in the Law Against Discrimination. *N.J.S.A.* 10:5–4, –12. Access to employment, housing, credit, and business opportunities is a civil right possessed by gays and lesbians. *See ibid.* Unequal treatment on account of sexual orientation is forbidden by a number of statutes in addition to the Law Against Discrimination.

The Legislature has recognized that the "rights and benefits" provided in the Domestic Partnership Act are directly related "to any reasonable conception of basic human dignity and autonomy." *N.J.S.A.* 26:8A–2(d). It is difficult to understand how withholding the remaining "rights and benefits" from committed same-sex couples is compatible with a "reasonable conception of basic human dignity and autonomy." There is no rational basis for, on the one hand, giving gays and lesbians full civil rights in their status as individuals, and, on the other, giving them an incomplete set of rights when they follow the inclination of their sexual orientation and enter into committed same-sex relationships.

****218** Disparate treatment of committed same-sex couples, moreover, directly disadvantages their children. We fail to see any legitimate governmental purpose in disallowing the child of a deceased same-sex parent survivor benefits under the Workers' Compensation Act or Criminal Injuries Compensation Act when children of married parents would be entitled to such benefits. Nor do we see the governmental purpose in not affording the child of a same-sex parent, who is a volunteer firefighter or first-aid responder, ***453** tuition assistance when the children of married parents receive such assistance. There is something distinctly unfair about the State recognizing the right of same-sex couples to raise natural and adopted children and placing foster children with those couples, and yet denying those children the financial and social benefits and privileges available to children in heterosexual households. Five of the seven plaintiff couples are raising or have raised children. There is no rational basis for visiting on those children a flawed and unfair scheme directed at their parents. To the extent that families are strengthened by encouraging monogamous relationships, whether heterosexual or homosexual, we cannot discern any public need that would justify the legal disabilities that now afflict same-sex domestic partnerships.

There are more than 16,000 same-sex couples living in committed relationships in towns and cities across this State. Ruth Padawer, *Gay Couples, At Long Last, Feel Acknowledged, The Rec.,* Aug. 15, 2001, at 104. Gays and lesbians work in every profession, business, and trade. They are educators, architects, police officers, fire officials, doctors, lawyers, electricians, and construction workers. They serve on township boards, in civic organizations, and in church groups that minister to the needy. They are mothers and fathers. They are our neighbors, our co-workers, and our friends. In light of the policies reflected in the statutory and decisional laws of this State, we cannot find a legitimate public need for an unequal legal scheme of benefits and privileges that disadvantages committed same-sex couples.

D.

In arguing to uphold the system of disparate treatment that disfavors same-sex couples, the State offers as a justification the interest in uniformity with other states' laws. Unlike other states, however, New Jersey forbids sexual orientation discrimination, and not only allows

  

same-sex couples to adopt children, but also places foster children in their households. Unlike New Jersey, other states have expressed open hostility toward legally recognizing ***454** committed same-sex relationships.[21] *See* Symposium, *State Marriage Amendments: Developments, Precedents, and Significance,* 7 *Fla. Coastal L.Rev.* 403, 403 (2005) (noting that "[s]ince November 1998, nineteen states have passed state marriage amendments ... defining marriage as the union of a man and a woman" and "[v]oters in thirteen states ratified [those amendments] in the summer and fall of 2004 alone and by overwhelming margins").

****219** Today, only Connecticut and Vermont, through civil union, and Massachusetts, through marriage, extend to committed same-sex couples the full rights and benefits offered to married heterosexual couples. *See Conn. Gen.Stat.* §§ 46b–38aa to –38pp; *Vt. Stat. Ann.* tit. 15, §§ 1201–1207; *Goodridge v. Dep't of Pub. Health,* 440 *Mass.* 309, 798 *N.E.*2d 941, 969 (2003). A few jurisdictions, such as New Jersey, offer some but not all of those rights under domestic partnership schemes.[22]

The high courts of Vermont and Massachusetts have found that the denial of the full benefits and protections of marriage to committed same-sex couples violated their respective state constitutions.[23] In *Baker v. State,* the Vermont Supreme Court held ***455** that same-sex couples are entitled "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples" under the Common Benefits Clause of the Vermont Constitution, "its counterpart [to] the Equal Protection Clause of the Fourteenth Amendment." 170 *Vt.* 194, 744 *A.*2d 864, 870, 886 (1999). To remedy the constitutional violation, the Vermont Supreme Court referred the matter to the state legislature. *Id.* at 886. Afterwards, the Vermont Legislature enacted the nation's first civil union law. *See Vt. Stat. Ann.* tit. 15, §§ 1201–1207; *see also* Mark Strasser, *Equal Protection at the Crossroads: On Baker, Common Benefits, and Facial Neutrality,* 42 *Ariz. L.Rev.* 935, 936 n. 8 (2000).

In *Goodridge, supra,* the Supreme Judicial Court of Massachusetts declared that Massachusetts, consistent with its own constitution, could not "deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry." 798 *N.E.*2d at 948. Finding that the State's ban on same-sex marriage did "not meet the rational basis test for either due process or equal protection" under the Massachusetts Constitution, the high court redefined civil marriage to allow two persons of the same sex to marry. *Id.* at 961, 969. Massachusetts is the only state in the nation to legally recognize same-sex marriage.[24] In ****220** contrast to Vermont and Massachusetts, Connecticut ***456** did not act pursuant to a court decree when it passed a civil union statute.

Vermont, Massachusetts, and Connecticut represent a distinct minority view. Nevertheless, our current laws concerning same-sex couples are more in line with the legal constructs in those states than the majority of other states. In protecting the rights of citizens of this State, we have never slavishly followed the popular trends in other jurisdictions, particularly when the majority approach is incompatible with the unique interests, values, customs, and concerns of our people. *See New State Ice Co. v. Liebmann,* 285 *U.S.* 262, 311, 52 *S.Ct.* 371, 386–87, 76 *L.Ed.* 747, 771 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Equality of treatment is a dominant theme of our laws and a central guarantee of our State Constitution, and fitting for a State with so diverse a population. The New Jersey Constitution not only stands apart from other state constitutions, but also "may be a source of 'individual liberties more expansive than those conferred by the Federal Constitution.' " *State v. Novembrino,* 105 *N.J.* 95, 144–45, 519 *A.*2d 820 (1987) (quoting *PruneYard Shopping Ctr. v. Robins,* 447 *U.S.* 74, 81, 100 *S.Ct.* 2035, 2040, 64 *L.Ed.*2d 741, 752 (1980)). Indeed, we have not hesitated to find that our State Constitution provides our citizens with greater rights to privacy, free speech, and equal protection than those available under the United States Constitution. *See, e.g., State v. McAllister,* 184 *N.J.* 17, 26, 32–33, 875 *A.*2d 866 (2005) (concluding ***457** that New Jersey Constitution recognizes interest in privacy of bank records, unlike Federal Constitution); *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.,* 138 *N.J.* 326, 332, 349, 374, 650 *A.*2d 757 (1994) (holding that free speech protection of New Jersey Constitution requires, subject to reasonable restrictions, privately-owned shopping centers to permit speech on political and societal issues on premises, unlike First Amendment of Federal Constitution), *cert. denied,* 516 *U.S.* 812, 116 *S.Ct.* 62, 133 *L.Ed.*2d 25 (1995); *Right to Choose v. Byrne,* 91 *N.J.* 287, 298, 310, 450 *A.*2d 925 (1982) (holding that restriction of Medicaid funding to those abortions that are "necessary to save the life of the mother" violates equal protection guarantee of New Jersey Constitution although same restriction does not violate United States Constitution).

[12] Article I, Paragraph 1 protects not just the rights of the majority, but also the rights of the disfavored and the disadvantaged; they too are promised a fair opportunity

  

"of pursuing and obtaining safety and happiness." *N.J. Const.* art. I, ¶ 1. Ultimately, we have the responsibility of ensuring that every New Jersey citizen receives the full protection of our State Constitution. In light of plaintiffs' strong interest in rights and benefits comparable to those of married couples, the State has failed to show a public need for disparate treatment. We conclude that denying to committed same-sex couples the financial and social benefits and privileges given to their married heterosexual counterparts bears no substantial relationship to a legitimate governmental purpose. We now hold that under the equal protection guarantee of **221 Article I, Paragraph 1 of the New Jersey Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples.

V.

[13] The equal protection requirement of Article I, Paragraph 1 leaves the Legislature with two apparent options. The Legislature could simply amend the marriage statutes to include same-sex *458 couples, or it could create a separate statutory structure, such as a civil union, as Connecticut and Vermont have done. *See Conn. Gen.Stat.* §§ 46b–38aa to –38pp; Vt. Stat. Ann. tit. 15, §§ 1201–1207.

Plaintiffs argue that even equal social and financial benefits would not make them whole unless they are allowed to call their committed relationships by the name of marriage. They maintain that a parallel legal structure, called by a name other than marriage, which provides the social and financial benefits they have sought, would be a separate-but-equal classification that offends Article I, Paragraph 1. From plaintiffs' standpoint, the title of marriage is an intangible right, without which they are consigned to second-class citizenship. Plaintiffs seek not just legal standing, but also social acceptance, which in their view is the last step toward true equality. Conversely, the State asserts that it has a substantial interest in preserving the historically and almost universally accepted definition of marriage as the union of a man and a woman. For the State, if the age-old definition of marriage is to be discarded, such change must come from the crucible of the democratic process. The State submits that plaintiffs seek by judicial decree "a fundamental change in the meaning of marriage itself," when "the power to define marriage rests with the Legislature, the branch of government best equipped to express the judgment of the people on controversial social questions."

Raised here is the perplexing question—"what's in a name?"—and is a name itself of constitutional magnitude after the State is required to provide full statutory rights and benefits to same-sex couples? We are mindful that in the cultural clash over same-sex marriage, the word marriage itself—independent of the rights and benefits of marriage—has an evocative and important meaning to both parties. Under our equal protection jurisprudence, however, plaintiffs' claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples.

*459 [14] We do not know how the Legislature will proceed to remedy the equal protection disparities that currently exist in our statutory scheme. The Legislature is free to break from the historical traditions that have limited the definition of marriage to heterosexual couples or to frame a civil union style structure, as Vermont and Connecticut have done. Whatever path the Legislature takes, our starting point must be to presume the constitutionality of legislation. *Caviglia, supra,* 178 *N.J.* at 477, 842 *A.*2d 125 ("A legislative enactment is presumed to be constitutional and the burden is on those challenging the legislation to show that it lacks a rational basis."). We will give, as we must, deference to any legislative enactment unless it is unmistakably shown to run afoul of the Constitution. *Hamilton Amusement Ctr. v. Verniero,* 156 *N.J.* 254, 285, 716 *A.*2d 1137 (1998) (stating that presumption of statute's validity "can be rebutted only upon a showing that the statute's repugnancy to the Constitution is clear beyond a reasonable doubt" (internal quotation marks omitted)), *cert. denied,* 527 *U.S.* 1021, 119 *S.Ct.* 2365, 144 *L.Ed.*2d 770 (1999). Because this State has no **222 experience with a civil union construct that provides equal rights and benefits to same-sex couples, we will not speculate that identical schemes called by different names would create a distinction that would offend Article I, Paragraph 1. We will not presume that a difference in name alone is of constitutional magnitude.

[15] "A legislature must have substantial latitude to establish classifications," and therefore determining "what is 'different' and what is 'the same' " ordinarily is a matter of legislative discretion. *Plyler v. Doe,* 457 *U.S.* 202, 216, 102 *S.Ct.* 2382, 2394, 72 *L.Ed.*2d 786, 798–99 (1982); *see also Greenberg, supra,* 99 *N.J.* at 577, 494 *A.*2d 294 ("Proper classification for equal protection purposes is not a precise science.... As long as the classifications do not discriminate arbitrarily between persons who are similarly situated, the matter is one of legislative prerogative.").[25] If the Legislature *460 creates a separate statutory structure for same-sex couples by a

  

name other than marriage, it probably will state its purpose and reasons for enacting such legislation. To be clear, it is not our role to suggest whether the Legislature should either amend the marriage statutes to include same-sex couples or enact a civil union scheme. Our role here is limited to constitutional adjudication, and therefore we must steer clear of the swift and treacherous currents of social policy when we have no constitutional compass with which to navigate.

Despite the extraordinary remedy crafted in this opinion extending equal rights to same-sex couples, our dissenting colleagues are willing to part ways from traditional principles of judicial restraint to reach a constitutional issue that is not before us. Before the Legislature has been given the opportunity to act, the dissenters are willing to substitute their judicial definition of marriage for the statutory definition, for the definition that has reigned for centuries, for the definition that is accepted in forty-nine states and in the vast majority of countries in the world. Although we do not know whether the Legislature will choose the option of a civil union statute, the dissenters presume in advance that our legislators cannot give any reason to justify retaining the definition of marriage solely for opposite-sex couples. A proper respect for a coordinate branch of government counsels that we defer until it has spoken. Unlike our colleagues who are prepared immediately to overthrow the long established definition of marriage, we believe that our democratically elected representatives should be given a chance to address the issue under the constitutional mandate set forth in this opinion.

We cannot escape the reality that the shared societal meaning of marriage—passed down through the common law into our statutory law—has always been the union of a man and a woman. ***461** To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin. When such change is not compelled by a constitutional imperative, it must come about through civil dialogue and reasoned discourse, and the considered judgment of the people in whom we place ultimate trust in our republican form of government. Whether an issue with such far-reaching social implications as how to define marriage falls within the judicial or the democratic realm, to many, is debatable. Some ****223** may think that this Court should settle the matter, insulating it from public discussion and the political process. Nevertheless, a court must discern not only the limits of its own authority, but also when to exercise forbearance, recognizing that the legitimacy of its decisions rests on reason, not power. We will not short-circuit the democratic process from running its course.

New language is developing to describe new social and familial relationships, and in time will find its place in our common vocabulary. Through a better understanding of those new relationships and acceptance forged in the democratic process, rather than by judicial fiat, the proper labels will take hold. However the Legislature may act, same-sex couples will be free to call their relationships by the name they choose and to sanctify their relationships in religious ceremonies in houses of worship. *See Bacharach, supra,* 344 *N.J.Super.* at 135, 780 *A.*2d 579 (noting that state laws and policies are not offended if same-sex couples choose to "exchange rings, proclaim devotion in a public or private ceremony, [or] call their relationship a marriage"); Lynn D. Wardle, *Is Marriage Obsolete?,* 10 *Mich. J. Gender & L.* 189, 191–92 ("What is deemed a 'marriage' for purposes of law may not be exactly the same as what is deemed marriage for other purposes and in other settings [such as] religious doctrines....").

The institution of marriage reflects society's changing social mores and values. In the last two centuries, that institution has undergone a great transformation, much of it through legislative ***462** action. The Legislature broke the grip of the dead hand of the past and repealed the common law decisions that denied a married woman a legal identity separate from that of her husband.[26] Through the passage of statutory laws, the Legislature gave women the freedom to own property, to contract, to incur debt, and to sue.[27] The Legislature has played a major role, along with the courts, in ushering marriage into the modern era. *See, e.g.,* Reva B. Siegel, Symposium, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings 1860–1930,* 82 *Geo. L.J.* 2127, 2148–49 (1994) (discussing courts' role in reformulation of married women's rights).

Our decision today significantly advances the civil rights of gays and lesbians. We have decided that our State Constitution guarantees that every statutory right and benefit conferred to heterosexual couples through civil marriage must be made available to committed same-sex couples. Now the Legislature must determine whether to alter the long accepted definition of marriage. The great engine for social change in this country has always been the democratic process. Although courts can ensure equal treatment, they cannot guarantee social acceptance, which must come through the evolving ethos of a maturing society. Plaintiffs' quest does not end here. Their next appeal must be to their fellow citizens whose voices are heard through their popularly elected representatives.

  

****224 *463** VI.

To comply with the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, the State must provide to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples. The State can fulfill that constitutional requirement in one of two ways. It can either amend the marriage statutes to include same-sex couples or enact a parallel statutory structure by another name, in which same-sex couples would not only enjoy the rights and benefits, but also bear the burdens and obligations of civil marriage. If the State proceeds with a parallel scheme, it cannot make entry into a same-sex civil union any more difficult than it is for heterosexual couples to enter the state of marriage.[28] It may, however, regulate that scheme similarly to marriage and, for instance, restrict civil unions based on age and consanguinity and prohibit polygamous relationships.

The constitutional relief that we give to plaintiffs cannot be effectuated immediately or by this Court alone. The implementation of this constitutional mandate will require the cooperation of the Legislature. To bring the State into compliance with Article I, Paragraph 1 so that plaintiffs can exercise their full constitutional rights, the Legislature must either amend the marriage statutes or enact an appropriate statutory structure within 180 days of the date of this decision.

For the reasons explained, we affirm in part and modify in part the judgment of the Appellate Division.

***464** Chief Justice PORITZ, concurring and dissenting.

I concur with the determination of the majority that "denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of Article I, Paragraph 1[,]" of the New Jersey Constitution.[1] *Ante* at 423, 908 *A*.2d at 200. I can find no principled basis, however, on which to distinguish those rights and benefits from the right to the title of marriage, and therefore dissent from the majority's opinion insofar as it declines to recognize that right among all of the other rights and benefits that will be available to same-sex couples in the future.

I dissent also from the majority's conclusion that there is no fundamental due process right to same-sex marriage "encompassed within the concept of liberty guaranteed by Article I, Paragraph 1." *Ante* at 422–23, 908 *A*.2d at 200. The majority acknowledges, as it must, that there is a universally accepted fundamental right to marriage "deeply rooted in the traditions, history, and conscience of the people." *Ante* at 423, 908 *A*.2d at 200. Yet, by asking whether there is a right to ****225** *same-sex* marriage, the Court avoids the more difficult questions of personal dignity and autonomy raised by this case. Under the majority opinion, it appears that persons who exercise their individual liberty interest to choose same-sex partners can be denied the fundamental right to participate in a state-sanctioned civil marriage. I would hold that plaintiffs' due process rights are violated when the State so burdens their liberty interests.

***465** I.

The majority has provided the procedural and factual context for the issues the Court decides today. I will not repeat that information except as it is directly relevant to the analytical framework that supports this dissent. In that vein, then, some initial observations are appropriate.

Plaintiffs have not sought relief in the form provided by the Court—they have asked, simply, to be married. To be sure, they have claimed the specific rights and benefits that are available to all married couples, and in support of their claim, they have explained in some detail how the withholding of those benefits has measurably affected them and their children. As the majority points out, same-sex couples have been forced to cross-adopt their partners' children, have paid higher health insurance premiums than those paid by heterosexual married couples, and have been denied family leave-time even though, like heterosexual couples, they have children who need care. *Ante* at 426, 908 *A*.2d at 202. Further, those burdens represent only a few of the many imposed on same-sex couples because of their status, because they are unable to be civilly married. The majority addresses those specific concerns in its opinion.

But there is another dimension to the relief plaintiffs' seek. In their presentation to the Court, they speak of the deep and symbolic significance to them of the institution of marriage. They ask to participate, not simply in the tangible benefits that civil marriage provides—although certainly those benefits are of enormous importance—but in the intangible benefits that flow from being civilly married. Chief Justice Marshall, writing for the Massachusetts Supreme Judicial Court, has conveyed some sense of what that means:

> Marriage also bestows enormous private and social

  

> advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." ***466** *Griswold v. Connecticut,* 381 *U.S.* 479, 486, 85 *S.Ct.* 1678, 14 *L.Ed.*2d 510 (1965). Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.
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> [*Goodridge v. Dep't. of Pub. Health,* 440 *Mass.* 309, 798 *N.E.*2d 941, 954–55 (2003).]

Plaintiffs are no less eloquent. They have presented their sense of the meaning of marriage in affidavits submitted to the Court:

> In our relationship, Saundra and I have the same level of love and commitment as our married friends. But being able to proudly say that we are married is important to us. Marriage is the ultimate expression of love, commitment, and honor that you can give to another human being.

****226** * * * *

> Alicia and I live our life together as if it were a marriage. I am proud that Alicia and I have the courage and the values to take on the responsibility to love and cherish and provide for each other. When I am asked about my relationship, I want my words to match my life, so I want to say I am married and know that my relationship with Alicia is immediately understood, and after that nothing more needs be explained.

* * * *

> I've seen that there is a significant respect that comes with the declaration "[w]e're married." Society endows the institution of marriage with not only a host of rights and responsibilities, but with a significant respect for the relationship of the married couple. When you say that you are married, others know immediately that you have taken steps to create something special.... The word "married" gives you automatic membership in a vast club of people whose values are clarified by their choice of marriage. With a marriage, everyone can instantly relate to you and your relationship. They don't have to wonder what kind of relationship it is or how to refer to it or how much to respect it.

* * * *

> My parents long to talk about their three married children, all with spouses, because they are proud and happy that we are all in committed relationships. They want to be able to use the common language of marriage to describe each of their children's lives. Instead they have to use a different language, which discounts and cheapens their family as well as mine[, because I have a same-sex partner and cannot be married].
>
> By those individual and personal statements, plaintiffs express a deep yearning for inclusion, for participation, for the right to marry in the deepest sense of that word. When we say that the Legislature cannot deny the tangible benefits of marriage to same-sex ***467** couples, but then suggest that "a separate statutory scheme, which uses a title other than marriage," is presumptively constitutional, *ante* at 423, 908 *A.*2d at 200, we demean plaintiffs' claim. What we "name" things matters, language matters.

In her book *Making all the Difference: Inclusion, Exclusion, and American Law,* Martha Minnow discusses "labels" and the way they are used:

> Human beings use labels to describe and sort their perceptions of the world. The particular labels often chosen in American culture can carry social and moral consequences while burying the choices and responsibility for those consequences.
>
> ....
>
> Language and labels play a special role in the perpetuation of prejudice about differences.
>
> > [Martha Minnow, *Making all the Difference: Inclusion, Exclusion, and American Law* 4, 6 (1990).]
>
> We must not underestimate the power of language. Labels set people apart as surely as physical separation

  

on a bus or in school facilities. Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law. By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as "real" **227 marriage, that such lesser relationships cannot have the name of marriage.[2]

## II.

### A.

Beginning with *Robinson v. Cahill,* this Court has repeatedly rejected a "mechanical" framework for due process and equal *468 protection analyses under Article I, Paragraph 1 of our State Constitution. 62 *N.J.* 473, 491–92, 303 *A.*2d 273 (1973). *See Right to Choose v. Byrne,* 91 *N.J.* 287, 308–09, 450 *A.*2d 925 (1982); *Greenberg v. Kimmelman,* 99 *N.J.* 552, 567–68, 494 *A.*2d 294 (1985); *Planned Parenthood v. Farmer,* 165 *N.J.* 609, 629–30, 762 *A.*2d 620 (2000); *Sojourner A. v. N.J. Dept. of Human Serv.,* 177 *N.J.* 318, 332–33, 828 *A.*2d 306 (2003). Chief Justice Weintraub described the process by which the courts should conduct an Article I review:

> [A] court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.
>
> [*Robinson, supra,* 62 *N.J.* at 492, 303 *A.*2d 273 (citation omitted).]

Later, the Court "reaffirmed that approach [because] it provided a ... flexible analytical framework for the evaluation of equal protection and due process claims." *Sojourner A., supra,* 177 *N.J.* at 333, 828 *A.*2d 306. There, we restated the nature of the weighing process:

> In keeping with Chief Justice Weintraub's direction, we "consider the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." [In so doing] we are able to examine each claim on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction.
>
> [*Ibid.* (quoting *Planned Parenthood, supra,* 165 *N.J.* at 630, 762 *A.*2d 620).]

The majority begins its discussion, as it should, with the first prong of the test, the nature of the affected right. *Ante* at 444, 908 *A.*2d at 212. The inquiry is grounded in substantive due process concerns that include whether the affected right is so basic to the liberty interests found in Article I, Paragraph 1, that it is "fundamental."[3] When we ask the question whether there is *469 a fundamental right to *same-sex* marriage " rooted in the traditions, and collective conscience of our people," *ante* at 434, 908 *A.*2d at 206, we suggest the answer, and it is "no."[4] That is because **228 the liberty interest has been framed "so narrowly as to make inevitable the conclusion that the claimed right could not be fundamental because historically it has been denied to those who now seek to exercise it." *Hernandez v. Robles,* 7 *N.Y.*3d 338, 381, 821 *N.Y.S.*2d 770, 855 *N.E.*2d 1 (2006) (Kaye, C.J., dissenting from majority decision upholding law limiting marriage to heterosexual couples). When we ask, however, whether there is a fundamental right to marriage rooted in the traditions, history and conscience of our people, there is universal agreement that the answer is "yes." *See Loving v. Virginia,* 388 *U.S.* 1, 87 *S.Ct.* 1817, 18 *L.Ed.*2d 1010 (1967); *Turner v. Safley*, 482 *U.S.* 78, 107 *S.Ct.* 2254, 96 *L.Ed.*2d 64 (1987); *Zablocki v. Redhail,* 434 *U.S.* 374, 98 *S.Ct.* 673, 54 *L.Ed.*2d 618 (1978); *see also J.B. v. M.B.,* 170 *N.J.* 9, 23–24, 783 *A.*2d 707 (2001) (noting that right to marry is a fundamental right protected by both federal and state constitutions); *In re Baby M.,* 109 *N.J.* 396, 447, 537 *A.*2d 1227 (1988) (same); *Greenberg v. Kimmelman, supra,* 99 *N.J.* at 571, 494 *A.*2d 294 (same). What same-sex couples seek is admission to that most valuable institution, what they seek is the liberty to choose, as a matter of personal autonomy, to commit to another person, a same-sex person, in a civil marriage. Of course there is no history or tradition including same-sex couples; if there were, there would *470 have been no need to bring this case to the courts. As Judge Collester points out in his dissent below, "[t]he argument is circular: plaintiffs cannot marry because by definition they cannot marry." ***Lewis*** *v.* ***Harris****,* 378 *N.J.Super.* 168, 204, 875 *A.*2d 259 (App.Div.2005) (Collester, J., dissenting); *see Hernandez, supra,* 7 *N.Y.*3d at 385, 821 *N.Y.S.*2d 770, 855 *N.E.*2d 1 (Kaye, C.J., dissenting) ("It is no answer that same-sex couples can be excluded from marriage because 'marriage,' by definition, does not include them. In the end, 'an argument that marriage is heterosexual because it 'just is' amounts to circular reasoning.' " (quoting *Halpern v. Attorney Gen. of Can.,* 65 *O.R.*3d 161, 181 (2003))).

I also agree with Judge Collester that *Loving* should have

  

put to rest the notion that fundamental rights can be found only in the historical traditions and conscience of the people. *See* ***Lewis***, *supra,* 378 *N.J.Super.* at 205, 875 *A.*2d 259. Had the United States Supreme Court followed the traditions of the people of Virginia, the Court would have sustained the law that barred marriage between members of racial minorities and caucasians. The Court nevertheless found that the Lovings, an interracial couple, could not be deprived of "the freedom to marry [that] has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving, supra,* 388 *U.S.* at 12, 87 *S.Ct.* at 1824, 18 *L.Ed.*2d at 1018. Most telling, the Court did not frame the issue as a right to interracial marriage but, simply, as a right to marry sought by individuals who had traditionally been denied that right. *Loving* teaches that the fundamental right to marry no more can be limited to same-race couples than it can be limited to those who choose a committed relationship with persons of the opposite sex. By imposing that limitation on same-sex couples, the majority denies them access to one of our most cherished institutions simply because they are homosexuals.

*Lawrence v. Texas,* 539 *U.S.* 558, 123 *S.Ct.* 2472, 156 *L.Ed.*2d 508 (2003), in overruling ****229*** *Bowers v. Hardwick,* 478 *U.S.* 186, 106 *S.Ct.* 2841, 92 *L.Ed.*2d 140 (1986), made a different but equally powerful point. In *Bowers,* the Court had sustained a Georgia statute that made sodomy a crime. ***471*** 478 *U.S.* at 189, 106 *S.Ct.* at 2843, 92 *L.Ed.*2d at 145. When it rejected the *Bowers* holding seventeen years later, the Court stated bluntly that "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence, supra,* 539 *U.S.* at 578, 123 *S.Ct.* at 2484, 156 *L.Ed.*2d at 525. Justice Kennedy explained further that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id.* at 579, 123 *S.Ct.* at 2484, 156 *L.Ed.*2d at 526.

We are told that when the Justices who decided *Brown v. Board of Education,* 347 *U.S.* 483, 74 *S.Ct.* 686, 98 *L.Ed.* 873 (1954), finally rejected legal segregation in public schools, they were deeply conflicted over the issue. Michael J. Klarman, *Brown and Lawrence (and Goodridge),* 104 *Mich. L.Rev.* 431, 433 (2005). "The sources of constitutional interpretation to which they ordinarily looked for guidance—text, original understanding, precedent, and custom—indicated that school segregation was permissible. By contrast, most of the Justices privately condemned segregation, which Justice Hugo Black called 'Hitler's creed.' Their quandary was how to reconcile their legal and moral views." *Ibid.* (footnote omitted). Today, it is difficult to believe that "*Brown* was a hard case for the Justices." *Ibid.*

Without analysis, our Court turns to history and tradition and finds that marriage has never been available to same-sex couples. That may be so—but the Court has not asked whether the limitation in our marriage laws, "once thought necessary and proper in fact serve[s] only to oppress." I would hold that plaintiffs have a liberty interest in civil marriage that cannot be withheld by the State. Framed differently, the right that is burdened under the first prong of the Court's equal protection/due process test is a right of constitutional dimension.

**B.**

Although the majority rejects the argument I find compelling, it does grant a form of relief to plaintiffs on equal protection ***472*** grounds, finding a source for plaintiffs' interest outside of the Constitution. *Ante* at 448, 458–59, 908 *A.*2d at 221. Having previously separated the right to the tangible "benefits and privileges" of marriage from the right to the "name of marriage," and having dismissed the right to the name of marriage for same-sex couples because it is not part of our history or traditions, the majority finds the right to the tangible benefits of marriage in enactments and decisions of the legislative, executive, and judicial branches protecting gays and lesbians from discrimination, allowing adoption by same-sex partners, and conferring some of the benefits of marriage on domestic partners. *Ante* at 438–39, 444–48, 452, 908 *A.*2d at 208, 212–15, 217.

The enactments and decisions relied on by the majority as a source of same-sex couples' interest in equality of treatment are belied by the very law at issue in this case that confines the right to marry to heterosexual couples. Moreover, as the majority painstakingly demonstrates, the Domestic Partnership Act, *N.J.S.A.* 26:8A–1 to –13, does not provide many of the tangible benefits that accrue automatically when heterosexual couples marry. *Ante* at 448–51, 908 *A.*2d at 215–17. New ****230*** Jersey's statutes reflect both abhorrence of sexual orientation discrimination and a desire to prevent same-sex couples from having access to one of society's most cherished institutions, the institution of marriage. Plaintiffs' interests arise out of constitutional principles that are integral to the liberty of a free people and not out of the legislative provisions described by the majority. In any

  

case, it is clear that civil marriage and all of the benefits it represents is absolutely denied same-sex couples, and, therefore, that same-sex couples' fundamental rights are not simply burdened but are denied altogether (the second prong of the Court's test).

Finally, the majority turns to the third prong—whether there is a public need to deprive same-sex couples of the tangible benefits and privileges available to heterosexual couples. *Ante* at 451, 908 *A*.2d at 217. Because the State has argued only that historically ***473** marriage has been limited to opposite-sex couples, and because the majority has accepted the State's position and declined to find that same-sex couples have a liberty interest in the choice to marry, the majority is able to conclude that *no* interest has been advanced by the State to support denying the rights and benefits of marriage to same-sex couples. *Ante* at 451–53, 908 *A*.2d at 217–18. Without any state interest to justify the denial of tangible benefits, the Court finds that the Legislature must provide those benefits to same-sex couples. *Ibid.*. I certainly agree with that conclusion but would take a different route to get there.

Although the State has not made the argument, I note that the Appellate Division, and various *amici curiae,* have claimed the "promotion of procreation and creating the optimal environment for raising children as justifications for the limitation of marriage to members of the opposite sex." ***Lewis***, *supra,* 378 *N.J.Super.* at 185 n. 2, 875 *A*.2d 259. That claim retains little viability today. Recent social science studies inform us that "same-sex couples increasingly form the core of families in which children are conceived, born, and raised." Gregory N. Herek, *Legal Recognition of Same–Sex Relationships in the United States: A Social Science Perspective,* 61 *Am. Psychol.* 607, 611 (2006). It is not surprising, given that data, that the State does not advance a "promotion of procreation" position to support limiting marriage to heterosexuals. Further, "[e]mpirical studies comparing children raised by sexual minority parents with those raised by otherwise comparable heterosexual parents have not found reliable disparities in mental health or social adjustment," *id.* at 613, suggesting that the "optimal environment" position is equally weak. Without such arguments, the State is left with the "but that is the way it has always been" circular reasoning discussed *supra* at 469–70, 908 A.2d at 227–28.

## C.

Perhaps the political branches will right the wrong presented in this case by amending the marriage statutes to recognize fully the ***474** fundamental right of same-sex couples to marry. That possibility does not relieve this Court of its responsibility to decide constitutional questions, no matter how difficult. Deference to the Legislature is a cardinal principle of our law except in those cases requiring the Court to claim for the people the values found in our Constitution. Alexander Hamilton, in his essay, *Judges as Guardians of the Constitution, The Federalist No. 78,* (Benjamin Fletcher Wright ed., 1961) spoke of the role of the courts and of judicial independence. He argued that "the courts of justice are ... the bulwarks ****231** of a limited Constitution against legislative encroachments" because he believed that the judicial branch was the only branch capable of opposing "oppressions [by the elected branches] of the minor party in the community." *Id.* at 494. Our role is to stand as a bulwark of a constitution that limits the power of government to oppress minorities.

The question of access to civil marriage by same-sex couples "is not a matter of social policy but of constitutional interpretation." *Opinions of the Justices to the Senate,* 440 *Mass.* 1201, 802 *N.E.*2d 565, 569 (2004). It is a question for this Court to decide.

## III.

In his essay *Three Questions for America,* Professor Ronald Dworkin talks about the alternative of recognizing "a special 'civil union' status" that is not "marriage but nevertheless provides many of the legal and material benefits of marriage." *N.Y. Rev. Books,* Sept. 21, 2006 at 24, 30. He explains:

> Such a step reduces the discrimination, but falls far short of eliminating it. The institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social, and personal meaning. It means something slightly different to each couple, no doubt. For some it is primarily a union that sanctifies sex, for others a social status, for still others a confirmation of the most profound possible commitment. But each of these meanings depends on associations that have been attached to the institution by centuries of experience. We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love. The status of marriage is therefore a social resource of irreplaceable value to those to whom it is offered: it enables two people together to create value in their lives that they could not create if that institution

  

> had never existed. We know that ***475** people of the same sex often love one another with the same passion as people of different sexes do and that they want as much as heterosexuals to have the benefits and experience of the married state. If we allow a heterosexual couple access to that wonderful resource but deny it to a homosexual couple, we make it possible for one pair but not the other to realize what they both believe to be an important value in their lives.
>
> [*Ibid.*]

On this day, the majority parses plaintiffs' rights to hold that plaintiffs must have access to the tangible benefits of state-sanctioned heterosexual marriage. I would extend the Court's mandate to require that same-sex couples have access to the "status" of marriage and all that the status of marriage entails.

Justices LONG and ZAZZALI join in this opinion.

*For affirmance in part/modification in part*—Justices LaVECCHIA, ALBIN, WALLACE and RIVERA–SOTO—4.

*For concurring in part/dissenting in part*—Chief Justice PORITZ and Justices LONG and ZAZZALI—3.

**All Citations**

188 N.J. 415, 908 A.2d 196

Footnotes

1 The following sketches of plaintiffs' lives come from affidavits submitted to the trial court in 2003 and from factual assertions in the complaint. We assume that their familial relationships remain unchanged.

2 As a result of Marilyn's passing, Diane, who remains a party to this action, seeks only declaratory relief.

3 While plaintiffs' appeal was pending before the Appellate Division, the Legislature enacted the Domestic Partnership Act, *L.* 2003, *c.* 246, affording certain rights and benefits to same-sex couples who enter into domestic partnerships. With the passage of the Act and subsequent amendments, some of the inequities plaintiffs listed in their complaint and affidavits have been remedied. *See* discussion *infra* Part IV.A–B. For example, under the Domestic Partnership Act, same-sex domestic partners now have certain hospital visitation and medical decision-making rights. *N.J.S.A.* 26:8A–2(c).

4 The initial complaint in this case was filed on June 26, 2002. That complaint was replaced by the "amended complaint" now before us. All references in this opinion are to the amended complaint.

5 Each defendant was sued in his or her official capacity and therefore stands as an alter ego of the State. For the sake of simplicity, we refer to defendants as "the State."

6 It should be noted that the "Attorney General disclaim[ed] reliance upon promotion of procreation and creating the optimal environment for raising children as justifications for the limitation of marriage to members of the opposite sex." *Id.* at 185 n. 2, 875 *A.*2d 259.

7 Unlike the Appellate Division, we will not rely on policy justifications disavowed by the State, even though vigorously advanced by amici curiae.

8 Plaintiffs concede that the State can insist on the binary nature of marriage, limiting marriage to one per person at any given time. As Judge Skillman pointed out, polygamists undoubtedly would insist that the essential nature of marriage is the coupling of people of the opposite sex while defending multiple marriages on religious principles. ***Lewis***, *supra,* 378 *N.J.Super.* at 187–88, 875 *A.*2d 259.

9 The text of Article I, Paragraph 1 of the 1947 New Jersey Constitution largely parallels the language of the 1844 Constitution. *Compare N.J. Const.* art. I, ¶ 1, *with N.J. Const. of 1844* art. I, ¶ 1.

10 The dissent posits that we have defined the right too narrowly and that the fundamental right to marry involves nothing less than "the liberty to choose, as a matter of personal autonomy." *Post* at 469, 908 *A.*2d at 228. That expansively stated formulation, however, would eviscerate any logic behind the State's authority to forbid incestuous and polygamous marriages. For example,

  

under the dissent's approach, the State would have no legitimate interest in preventing a sister and brother or father and daughter (assuming child bearing is not involved) from exercising their "personal autonomy" and "liberty to choose" to marry.

11 *Alaska Const.* art. I, § 25; *Ark. Const.* amend. 83, § 1; *Ga. Const.* art. I, § IV, ¶ I; *Haw. Const.* art. I, § 23; *Kan. Const.* art. XV, § 16; *Ky. Const.* § 233a; *La. Const.* art. XII, § 15; *Mich. Const.* art. I, § 25; *Miss. Const.* art. 14, § 263A; *Mo. Const.* art. I, § 33; *Mont. Const.* art. XIII, § 7; *Neb. Const.* art. I, § 29; *Nev. Const.* art. I, § 21; *N.D. Const.* art. XI, § 28; *Ohio Const.* art. XV, § 11; *Okla. Const.* art. II, § 35; *Or. Const.* art. XV, § 5a; *Tex. Const.* art. I, § 32; *Utah Const.* art. I, § 29; *Ala.Code* § 30–1–19; *Ariz.Rev.Stat.* § 25–101; *Cal. Fam.Code* § 308.5; *Colo.Rev.Stat.* § 14–2–104; *Conn. Gen.Stat.* § 45a–727a; *Del.Code Ann. tit.* 13, § 101; *Fla. Stat.* § 741.212; *Idaho Code Ann.* § 32–201; 750 *Ill. Comp. Stat.* 5/201, 5/212; *Ind.Code* § 31–11–1–1; *Iowa Code* § 595.2; *Me.Rev.Stat. Ann.* tit. 19–A, §§ 650, 701; *Md.Code Ann., Fam. Law* § 2–201; *Minn.Stat.* §§ 517.01, 517.03; *N.H.Rev.Stat. Ann.* §§ 457:1, 457:2; *N.J.S.A.* 37:1–1, –3; *N.M. Stat.* § 40–1–18; *N.Y. Dom. Rel. Law* §§ 12, 50; *N.C. Gen.Stat.* §§ 51–1, 51–1.2; 23 *Pa. Cons.Stat.* §§ 1102, 1704; *R.I. Gen. Laws* §§ 15–1–1, 15–1–2, 15–2–1; *S.C.Code Ann.* § 20–1–15; *S.D. Codified Laws* § 25–1–1; *Tenn.Code Ann.* § 36–3–113; *Vt. Stat. Ann.* tit. 15, § 8; *Va.Code Ann.* §§ 20–45.2, 20–45.3; *Wash. Rev.Code* § 26.04.020(1)(c); *W. Va.Code* § 48–2–104(c); *Wis. Stat.* §§ 765.001(2), 765.01; *Wyo. Stat. Ann.* § 20–1–101.

12 *See Dean v. District of Columbia,* 653 *A.*2d 307, 331 (D.C.1995); *Standhardt v. Superior Court of Ariz.,* 206 *Ariz.* 276, 77 *P.*3d 451, 459–60 (App.2003); *Baehr v. Lewin,* 74 *Haw.* 530, 852 *P.*2d 44, 57 (1993); *Morrison v. Sadler,* 821 *N.E.*2d 15, 34 (Ind.Ct.App.2005); *Baker, supra,* 191 *N.W.*2d at 186; *Hernandez v. Robles,* 7 *N.Y.*3d 338, 362–63, 821 *N.Y.S.*2d 770, 855 *N.E.*2d 1 (2006) (plurality opinion); *Andersen v. King County,* 158 *Wash.*2d 1, 27 – 31, 43 – 45, 138 *P.*3d 963, 978–79, 986 (2006) (plurality opinion); *see also Goodridge v. Dep't of Pub. Health,* 440 *Mass.* 309, 798 *N.E.*2d 941, 961 (2003) (stating that it was not necessary to reach fundamental right issue in light of finding that no rational basis existed for denying same-sex couples right to marry under state constitution).

13 Our state equal protection analysis differs from the more rigid, three-tiered federal equal protection methodology. When a statute is challenged under the Fourteenth Amendment's Equal Protection Clause, one of three tiers of review applies—strict scrutiny, intermediate scrutiny, or rational basis—depending on whether a fundamental right, protected class, or some other protected interest is in question. *Clark v. Jeter,* 486 *U.S.* 456, 461, 108 *S.Ct.* 1910, 1914, 100 *L.Ed.*2d 465, 471 (1988). All classifications must at a minimum survive rational basis review, the lowest tier. *Ibid.*

14 Unlike New Jersey, a number of states prohibit adoption by same-sex couples. *See* Kari E. Hong, *Parens Patriarchy: Adoption, Eugenics, and Same–Sex Couples,* 40 *Cal.W.L.Rev.* 1, 2–3 (2003) (detailing states that have enacted measures to restrict adoption by same-sex couples).

15 At the time of New Jersey's amendment, only four other states, Wisconsin, Massachusetts, Connecticut, and Hawaii, had adopted similar anti-discrimination provisions. *See L.* 1981, *c.* 112 (codified at *Wis. Stat.* §§ 111.31 to 111.39 (1982)); *St.* 1989, *c.* 516 (codified at *Mass. Gen. Laws* ch. 151B, §§ 1 to 10 (1989)); *Public Act No.* 91–58 (codified at *Conn. Gen.Stat.* §§ 46a–81a to –81r (1991)); *L.* 1991, *c.* 2 (codified at *Haw.Rev.Stat.* §§ 378–1 to 6 (1991)); *L.* 1991, *c.* 519 (codified at *N.J.S.A.* 10:5–1 to –42 (1992)).

16 "Affectional or sexual orientation" is defined to mean "male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation." *N.J.S.A.* 10:5–5(hh).

17 The rights and benefits provided by the Domestic Partnership Act extend to two classes of people—persons who "are of the same sex and therefore unable to enter into a marriage with each other that is recognized by New Jersey law" and persons "who are each 62 years of age or older and not of the same sex." *N.J.S.A.* 26:8A–4(b)(5).

18 Every statutory provision applicable to opposite-sex couples might not be symmetrically applicable to same-sex couples. The presumption of parentage would apply differently for same-sex partners inasmuch as both partners could not be the biological parents of the child. It appears that the presumption in such circumstances would be that the non-biological partner consented to the other partner either conceiving or giving birth to a child.

19 *But see In re Parentage of Child of Robinson,* 383 *N.J.Super.* 165, 176, 890 *A.*2d 1036 (Ch.Div.2005) (declaring that same-sex partner was entitled to statutory presumption of parenthood afforded to husbands).

20 To obtain custody or visitation rights, the non-biological parent must petition the courts to be recognized as a psychological parent. *See V.C., supra,* 163 *N.J.* at 206, 230, 748 *A.*2d 539 (declaring former lesbian partner of biological mother of twins "psychological parent," and awarding regular visitation).

  

21 A number of states declare that they will not recognize domestic relationships other than the union of a man and a woman, and specifically prohibit any marriage, civil union, domestic partnership, or other state sanctioned arrangement between persons of the same sex. *See, e.g., Ga. Const.* art. I, § IV, ¶ I(b); *Kan. Const.* art. XV, § 16(b); *Ky. Const.* § 233a; *La. Const.* art. XII, § 15; *Mich. Const.* art. I, § 25; *Neb. Const.* art. I, § 29; *N.D. Const.* art. XI, § 28; *Ohio Const.* art. XV, § 11; *Utah Const.* art. I, § 29; *Alaska Stat.* § 25.05.013; *Okla. Stat.* tit. 51, § 255(A)(2); *Tex. Fam.Code Ann.* § 6.204(b); *Va.Code Ann.* § 20–45.3.

22 *See Cal. Fam.Code* §§ 297–299.6; *Haw.Rev.Stat.* §§ 572C–1 to –7; *Me.Rev.Stat. Ann.* tit. 22, § 2710; *N.J.S.A.* 26:8A–1 to –13; *D.C.Code* §§ 32–701 to –710.

23 The Hawaii Supreme Court was the first state high court to rule that sexual orientation discrimination possibly violated the equal protection rights of same-sex couples under a state constitution. *See Encyclopedia of Everyday Law, Gay Couples,* http://law.enotes.com/everyday-law-encyclopedia/gay-couples (last visited Oct. 10, 2006). In *Baehr, supra,* the Hawaii Supreme Court concluded that the marriage statute "discriminates based on sex against the applicant couples in the exercise of the civil right of marriage, thereby implicating the equal protection clause of article I, section 5 of the Hawaii Constitution" and remanded for an evidentiary hearing on whether there was a compelling government interest furthered by the sex-based classification. 852 *P.*2d at 57, 59. After the remand but before the Hawaii Supreme Court had a chance to address the constitutionality of the statute, Hawaii passed a constitutional amendment stating that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples." *Haw. Const.* art. I, § 23. The Hawaii Legislature enacted a statute conferring certain rights and benefits on same-sex couples through a reciprocal beneficiary relationship. *Haw.Rev.Stat.* §§ 572C–1 to –7.

24 After rendering its decision, the Massachusetts Supreme Judicial Court issued an opinion advising the state legislature that a proposed bill prohibiting same-sex couples from entering into marriage but allowing them to form civil unions would violate the equal protection and due process requirements of the Massachusetts Constitution and Declaration of Rights. *Opinions of the Justices to the Senate,* 440 *Mass.* 1201, 802 *N.E.*2d 565, 566, 572 (2004). The court later upheld the validity of an initiative petition, which if successful would amend the Massachusetts Constitution to define " 'marriage only as the union of one man and one woman.' " *Schulman v. Attorney General,* 447 *Mass.* 189, 850 *N.E.*2d 505, 506–07 (2006).

25 We note that what we have done and whatever the Legislature may do will not alter federal law, which only confers marriage rights and privileges to opposite-sex married couples. *See* 1 *U.S.C.A.* § 7 (defining marriage, under Federal Defense of Marriage Act, as "legal union between one man and one woman").

26 *See Newman v. Chase,* 70 *N.J.* 254, 260 n. 4, 359 *A.*2d 474 (1976) (noting that prior to Married Women's Property Act of 1852 "the then prevailing rule" entitled husband "to the possession and enjoyment of his wife's real estate during their joint lives"); Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 12 (2000) (explaining that marriage resulted in husband becoming "the one *full* citizen in the household"); Hendrick Hartog, *Man and Wife in America: A History* 99 (2000) (stating that "merger" of wife's identity led to wife's loss of control over property and over her contractual capacity).

27 *See, e.g., L.* 1906, *c.* 248 (May 17, 1906) (affording married women right to sue); *L.* 1852, *c.* 171 (Mar. 25, 1852) (providing married women property rights).

28 We note, for example, that the Domestic Partnership Act requires, as a condition to the establishment of a domestic partnership, that the partners have "a common residence" and be "otherwise jointly responsible for each other's common welfare." *N.J.S.A.* 26:8A–4(b)(1). Such a condition is not placed on heterosexual couples who marry and thus could not be imposed on same-sex couples who enter into a civil union.

1 Article I, Paragraph 1, states:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.
> [*N.J. Const.* art. I, ¶ 1.]

This language constitutes our State equivalent of the Due Process and Equal Protection Clauses of the Federal Constitution.

2 Professor Michael Wald, in *Same–Sex Couple Marriage: A Family Policy Perspective* similarly states that "if a State passed a civil union statute for same-sex couples that paralleled marriage, it would be sending a message that these unions were in some way second class units unworthy of the term 'marriage'[,] ... that these are less important family relationships." 9 *Va. J. Soc. Pol'y. & L.* 291, 338 (2001).

  

3 Professor Laurence Tribe has described in metaphoric terms, the relationship between due process and equal protection analyses. *Lawrence v. Texas:* The "Fundamental Right" That Dare Not Speak Its Name, 117 *Harv. L.Rev.* 1893, 1897–98. His understanding is especially apt in respect of New Jersey's test. He finds in judges' "conclusions" a "narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix ... [representing] a single, unfolding tale of equal liberty and increasingly universal dignity." *Ibid.* This case is a paradigm for the interlocking concepts that support both the due process and the equal protection inquiry.

4 The majority understands that "[h]ow the right is defined may dictate whether it is deemed fundamental." *Ante* at 435, 908 *A*.2d at 207. By claiming that the broad right to marriage is "undifferentiated" and "abstract," and by focusing on the narrow question of the right to same-sex marriage, the Court thereby removes the right from the traditional concept of marriage. *Ante* at 435–36, 908 *A*.2d at 207–08.

GARDEN STATE EQUALITY; DANIEL WEISS and JOHN GRANT; MARSHA SHAPIRO and LOUISE WALPIN; MAUREEN KILIAN and CINDY MENEGHIN; SARAH KILIAN-MENEGHIN, a minor, by and through her guardians; ERICA and TEVONDA BRADSHAW; TEVERICO BARACK HAYES BRADSHAW, a minor, by and through his guardians; MARCYE and KAREN NICHOLSON-McFADDEN; KASEY NICHOLSON-McFADDEN, a minor, by and through his guardians; MAYA NICHOLSON-McFADDEN, a minor, by and through her guardians; THOMAS DAVIDSON and KEITH HEIMANN; MARIE HEIMANN DAVIDSON, a minor, by and through her guardians; GRACE HEIMANN DAVIDSON, a minor, by and through her guardians; ELENA and ELIZABETH QUINONES; DESIREE NICOLE RIVERA, a minor, by and through her guardian; JUSTINE PAIGE LISA, a minor, by and through her guardian; PATRICK JAMES ROYLANCE, a minor, by and through his guardian; and ELI QUINONES, a minor, by and through his guardians,

Plaintiffs,

- vs -

PAULA DOW, in her official capacity as Attorney General of New Jersey; JENNIFER VELEZ, in her official capacity as Commissioner of the New Jersey Department of Human Services, and MARY E. O'DOWD, in her official capacity as Commissioner of the New Jersey Department of Health and Senior Services,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

Docket No. _____

Civil Action

**COMPLAINT for Declaratory and Injunctive Relief**



## INTRODUCTION

1. Plaintiffs, Garden State Equality ("GSE"), which is the state's largest organization

advocating for lesbian, gay, bisexual and transgender ("LGBT") rights; and committed same-sex couples and their minor children Daniel Weiss and John Grant; Marsha Shapiro and Louise Walpin; Maureen Kilian and Cindy Meneghin and their daughter, Sarah Kilian-Meneghin; Erica Bradshaw and Tevonda Hayes Bradshaw and their son Teverico Barack Hayes Bradshaw; Marcye and Karen Nicholson-McFadden and their son, Kasey Nicholson-McFadden, and daughter, Maya Nicholson-McFadden; Thomas Louis Davidson and William Keith Heimann and their daughters Marie Frances Pan Xiao Jai Heimann Davidson and Grace Louise Chen Rong Kai Heimann Davidson; and Elena and Elizabeth Quinones and their children Desiree Nicole Rivera, Justine Paige Lisa, Patrick James Roylance, and Eli Quinones, seek a declaration that their exclusion from the institution of civil marriage violates Article I, Paragraph 1 of the New Jersey Constitution of 1947 and the Fourteenth Amendment to the Constitution of the United States, and that for those couples who are legally married in another jurisdiction, it is unconstitutional for the Defendants to deny recognition of marriages validly entered in other jurisdictions by same-sex couples. Plaintiffs also seek an injunction preventing the Defendants from denying them access to civil marriage, and from maintaining the separate and unequal legal status of "civil union" solely for same-sex couples, and for those same-sex couples who are legally married in another jurisdiction, enjoining the Defendants from denying recognition of those marriages.

2. Today, New Jersey shunts lesbian and gay couples into the novel and inferior status of "civil union," while reserving civil marriage only for heterosexual couples. As the Plaintiffs' experience shows, the relegation of lesbian and gay couples to civil unions, and their exclusion from civil marriage, and thereby from the legal status of "marriage" and "spouse," violates the guarantee of equal protection under Article I, Paragraph 1 of the New Jersey

Constitution of 1947. Specifically, the separate and inherently unequal statutory scheme singles out lesbians and gay men for inferior treatment on the basis of their sexual orientation and sex, and also has a profoundly stigmatizing effect on them, their children, and on other lesbian and gay New Jerseyans. As the Supreme Court of New Jersey made clear, the equal protection guarantee forbids "the unequal dispensation of rights and benefits to committed same-sex partners[.]" *Lewis v. Harris*, 188 *N.J.* 415, 423 (2006). This exclusion also violates the Fourteenth Amendment to the Constitution of the United States.

3. The denial of access to the legal status of "marriage" and "spouse" has caused the Plaintiff couples, couples who are members of GSE, and other same-sex couples and their children concrete harms. Because of the novel legal construct to which they have been consigned, they face a persistent and widespread lack of recognition of their rights in civic and commercial dealings. They are denied workplace benefits and protections equal to those accorded to married couples. They are blocked from seeing their loved ones during medical emergencies. Their exclusion from marriage deprives them of certainty in their legal rights and status, and burdens them and their families with the resulting financial consequences. Their separate status is a badge that requires that they reveal their sexual orientation whether they wish to or not, in situations such as job interviews and jury service, invading their privacy and exposing them to additional discrimination. The segregation of lesbian and gay couples into a novel legal status, like other classifications unrelated to a person's ability to perform or contribute to society, also wrongly enshrines in the law the view that lesbian and gay individuals are not as worthy or deserving as others, causing dignitary and psychic harms. This inequality contravenes the Supreme Court of New Jersey's directive that "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State

Constitution." *Lewis v. Harris*, 188 *N.J.* at 423. This treatment also violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

4. Further, the exclusion of lesbian and gay individuals from civil marriage violates the constitutional imperative that in the absence of compelling justification, the government may not infringe the rights of individuals to marry, as protected for "all persons" by the New Jersey Constitution of 1947, Article I, Paragraph 1, and by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The Plaintiff couples and couples who are members of GSE here seek only the freedom for lesbian and gay individuals to enter into the established, highly venerated institution of civil marriage with the person of their choosing, just as heterosexuals may do. Today, however, same sex couples may attain formal recognition of their family relationships through "civil union" only, a novel and unfamiliar legal construct that lacks the universal legal, economic, historical, and social meaning of civil marriage. This limitation violates the State's due process obligations to Plaintiffs and other same-sex couples.

## PARTIES

### Plaintiffs

5. Garden State Equality Educational Fund ("GSE") is New Jersey's largest organization advocating for LGBT civil rights. It has more than 82,000 members, both LGBT individuals and their allies. Many members are in a committed, same-sex relationship, and a large number are raising children with a committed, same-sex partner. Numerous members of GSE are in a civil union and would like to marry, but are barred from doing so because New Jersey does not allow same-sex couples to marry. Some have declined to enter a civil union due to their objection to its second-class status, but likewise would marry if they could. Through sponsorship of programs for LGBT-headed families and LGBT youth, and through its educational outreach activities, Plaintiff Garden State Equality has become thoroughly familiar

with the challenges, inequality, and harms facing same-sex couples and their children, as a result of New Jersey denying those couples access to marriage and instead providing them only the novel status of civil union, which places same-sex couples and their children in a second-class status in relation to families where parents are allowed to marry. Furthermore, GSE, through its participation in anti-bullying initiatives in New Jersey and its program of identifying resources for children who require support services to address the negative impact of discrimination against LGBT people, is familiar with the difficulties and stigmatization facing LGBT youth in New Jersey, which are compounded by the state-sponsored discrimination inherent in the relegation of same-sex couples to the separate and unequal status of civil union.

6. Daniel ("Danny") Weiss, 46, and John Grant, 46, reside in Asbury Park, New Jersey. Danny runs a small law firm specializing in immigration law, and John, until a devastating accident, worked as controller of the Michael J. Fox Foundation for Parkinson's Research. They have been together four years, and entered into a civil union on May 17, 2009. In October 2010, John was critically injured when he was struck by a car. Despite their civil union, doctors and hospital staff did not recognize their legal relationship, and did not acknowledge Danny's authority to make decisions for John's critical care. Discussions with doctors and other hospital staff about what a civil union meant, and whether it was "like a Massachusetts marriage," took place as John was suffering a brain hemorrhage, and John's sister was summoned in the middle of the night from Delaware to participate in treatment decisions. After lifesaving surgical procedures, John is on a long road of rehabilitation. Danny has reworked his entire schedule to organize and attend John's appointments with neurologists, neurosurgeons, physiatrists, and other health care professionals and to monitor John's progress and setbacks. The couple traveled to Connecticut to be married in December 2010, as soon as

John was strong enough to make the drive, because they had learned through painful experience that a civil union would not protect them when they were most vulnerable. They wish to be recognized as a married couple in New Jersey, where they work and make their home, which New Jersey law does not now allow because it limits marriage to different-sex couples and demotes marriages from other jurisdictions to civil unions.

7. Marsha Shapiro, 56, and Louise Walpin, 57, reside in South Brunswick, New Jersey. They have been a couple for twenty-two years. Marsha is a social worker, and Louise is a nurse. They have raised four children together, including Marsha's biological son Aaron, who had severe cognitive and physical disabilities and died just before his twenty-first birthday in 2008. In addition to Aaron, they have raised Louise's three biological children, now adults. Marsha and Louise have sought to celebrate and legalize their relationship in every manner afforded them in New Jersey. In 1992, they committed to each other in a ceremony performed by a rabbi. Their ketubah, or Jewish wedding vow and contract, hangs in their home as a daily reminder of their love and commitment. In 2003, they entered a civil union in Vermont. When New Jersey began offering domestic partnership in 2004, Marsha and Louise entered into a domestic partnership. On February 23, 2007, they entered into a civil union in New Jersey. However, for the reasons set forth below, they seek to enter civil marriage in order to realize the full panoply of rights, benefits, status, and recognition that civil marriage affords, and which they are currently denied. Marsha and Louise are eligible to marry in New Jersey but for the fact that they are a same-sex couple; they have not sought to obtain a marriage license in New Jersey, because to do so would be futile in light of New Jersey's prevailing law.

8. Maureen Kilian, 53, and Cindy Meneghin, 53, reside in Butler, New Jersey. They met in high school and have been in a committed relationship for more than thirty-five years.

They have two children, Joshua Kilian-Meneghin, 18, and Sarah Kilian-Meneghin, 16. They are very active in their church, the Episcopal Church of the Redeemer in Morristown, and in their children's school activities. They have long sought legal equality for their relationship and family, first as plaintiffs in *Lewis v. Harris*, and now in this action. They sought to obtain a New Jersey marriage license in 2002, and were refused because they are a same-sex couple. They entered into a civil union on February 24, 2007, and celebrated with a crowd of more than 300 people at their church. However, they have found that their civil union does not protect them in the way that they had hoped. In emergency medical situations both before and after having a civil union, Maureen has been denied access to Cindy, and the ability to direct her treatment. Because they feel vulnerable, and because they do not want the State to continue to send the message to their children that their family is not legitimate, or is less valid than other families, they continue to seek the right to enter civil marriage. Cindy and Maureen are eligible to marry in New Jersey but for the fact that they are a same-sex couple; they have not sought to obtain a marriage license in New Jersey since 2002, because to do so would be futile in light of New Jersey's prevailing law.

9. Sarah Kilian-Meneghin ("Sarah"), a minor child, is represented in this action by and through her guardians, Cindy and Maureen. *R.* 4:26-2(a). She asks that her parents be allowed to marry so that her family no longer carries the confusing, stigmatizing, and inferior label of "civil union," rather than marriage. She faces a loss of dignity and legitimacy, in her own eyes, the eyes of many others, and under law, from her parents' not having the freedom to marry one another. Cindy and Maureen fear that she will internalize the message that she receives from the State that her family is not as worthy as other families, and that she and her brother and parents do not deserve the support and respect other families receive.

10. Tevonda Hayes Bradshaw and Erica Bradshaw, both 36, reside in North Plainfield, New Jersey. They have been in a committed relationship since 2007. Both commute to New York City: Tevonda is a disability analyst at the Office of Temporary and Disability Assistance in New York City, and Erica is a teaching artist with ENACT, a group that helps New York City public school students learn social, emotional and behavioral skills through creative drama and drama therapy techniques. Erica also sells real estate in New Jersey, at Century 21 in Scotch Plains, New Jersey. Tevonda and Erica have an infant son, Teverico Barack Hayes Bradshaw, born April 8, 2011. Aware of and deeply concerned about the disregard for and confusion about civil unions that has negatively affected other lesbian and gay couples in New Jersey, the Bradshaws have expended time, energy, and money to execute multiple additional documents to attempt to protect their relationship. Most recently, on June 17, 2011, they concluded adoption proceedings in court for Erica to adopt Teverico, though he is a child of their civil union and should be regarded as her son. In order to adopt her own child, Erica had to undergo court-related examination of her background, including being fingerprinted, which she found extremely offensive.

11. Teverico ("Teverico"), a minor child, is represented in this action by and through his guardians, Tevonda and Erica, in his claim that his parents be allowed to marry so that his family no longer carries the confusing, stigmatizing and inferior label of "civil union," rather than marriage. *R.* 4:26-2(a). Because the State does not allow Tevonda and Erica to marry, their child does not have the benefit of the rights, obligations, cost savings, and benefits conferred on married parents under New Jersey law, nor of the rights and status conferred on children of married parents by New Jersey law, that help and provide security to other New Jersey children in good times and bad. For example, Tevonda and Erica would have preferred but were unable

to save or invest the money that they paid in adoption-related legal fees and expenses to secure Erica's parent-child relationship with Teverico toward their child's future education instead. Teverico also faces a loss of dignity and legitimacy, in his own eyes, the eyes of many others, and under law, from his parents not having the freedom to marry one another. Tevonda and Erica fear that their son will internalize the message that he receives from their government that his family is not as worthy as other families, and that he and his parents do not deserve the support and respect that other families receive.

12. Karen and Marcye Nicholson-McFadden reside in Aberdeen, New Jersey. They have been in a committed relationship for twenty-one years. Together they run an executive search firm. They have two children, Kasey Nicholson-McFadden, 11, and Maya Nicholson-McFadden, 8, and have supported each other through the ups and downs of life. They have long sought legal equality for their relationship and family, first as plaintiffs in *Lewis v. Harris*, and now in this action. They continue to press for marriage equality, because they want the full rights, benefits, and recognition that other married couples and their families receive. They also do not want to have their children taught that their parents' relationship or their family is of lesser importance than any other family in New Jersey. They sought to obtain a New Jersey marriage license in 2002, and were refused because they are a same-sex couple. They entered a civil union in April, 2007; Karen and Marcye are eligible to marry in New Jersey but for the fact that they are a same-sex couple; they have not sought to obtain a marriage license in New Jersey since 2002, because to do so would be futile in light of New Jersey's prevailing law.

13. Kasey Nicholson-McFadden ("Kasey") and Maya Nicholson-McFadden ("Maya"), minor children, are represented in this action by and through their guardians, Karen and Marcye. *R.* 4:26-2(a). They ask that their parents be allowed to marry so that their family

no longer carries the stigmatizing and inferior label of "civil union," rather than marriage. Kasey and Maya are unperturbed that their parents are lesbians, but are troubled that their parents are unmarried, because the State will not allow it. Maya has raised with her classroom teacher and classmates her concern that her parents are unable to marry. Because the State does not allow Karen and Marcye to marry, their children do not have the benefit of all of the rights, obligations, cost savings, and benefits conferred on married parents under New Jersey law, nor of the rights and status conferred on children of married parents by New Jersey law, that help and provide security to other New Jersey children in good times and bad. Kasey and Maya face a loss of dignity and legitimacy, and their parents worry that their children will internalize the State's message that their family is not as worthy or deserving as others.

14. Thomas Louis Davidson ("Tom"), 49, and William Keith Heimann ("Keith"), 53, reside in Shrewsbury, New Jersey. They have together adopted two daughters, Grace Louise Chen Rong Kai Heimann Davidson, age 8, and Marie Frances Pan Xiao Jai Heimann Davidson, age 11. Tom and Keith will celebrate their twenty-fifth anniversary as a couple in January 2012. They were married on July 31, 2008 in California, and entered a civil union in New Jersey on February 23, 2007. The family is very active in their church, the Methodist Church of Red Bank, where Keith has taught Sunday school. Tom recently lost his job as a visual designer of merchandise displays at Food Emporium, when his employer downsized. Keith, who has taught at Brookdale Community College since 2001, has for ten years maintained Tom and their children on his health insurance policy. During a recent statewide audit in New Jersey, the state contractor questioned whether they had adequate documentation of their relationship, and cancelled health care coverage for Tom and the children. It took months to reinstate the policy, because the insurance auditor did not recognize "civil union" as a legally valid relationship.

Keith and Tom want to have the status of being married under New Jersey law because marriage has a universally understood meaning, and one that reflects their family structure.

15. Grace Heimann Davidson ("Grace") and Marie Heimann Davidson ("Marie"), minor children, are represented in this action by and through their guardians, Tom and Keith. *R.* 4:26-2(a). The girls greatly dislike having to repeatedly offer lengthy explanations of civil unions to other children who are curious about their family. They ask that their parents be allowed to marry so that their family no longer carries the confusing, stigmatizing, and inferior label of "civil union," rather than marriage. Because the State does not recognize Keith and Tom as married, their children do not have the benefit of the rights, obligations, cost savings, and benefits conferred on married parents under New Jersey law, that help and provide security to other New Jersey children in good times and bad. The children's loss of health care coverage last summer illustrates one of the concrete effects of their status, resulting from the fact that they are the children of a civil union instead of a marriage. The children also face a loss of dignity and legitimacy, in their own eyes, the eyes of many others, and under law, from their parents not having the freedom to marry one another.

16. Elena and Elizabeth ("Liz") Quinones reside in Phillipsburg, New Jersey. Elena works at a bank in Hoboken, and Liz is a security sergeant at Farleigh Dickinson University. They have been together nine years and sought legal recognition of their committed and loving relationship by entering a civil union in February 2007, as soon as they could set the date to celebrate. Elena and Liz have a two-year-old son, Eli, and also raise Elena's three children: Desiree Nicole Rivera, 17 ("Desiree"); Justine Paige Lisa, 15 ("Justine"); and Patrick James Roylance, 12 ("Patrick"). Elena and Liz were initially optimistic that entering a civil union would provide them the same rights and benefits as marriage, and celebrated their civil union

with a ceremony and gala reception for friends and family, including Elena's stepfather, who checked himself out of the hospital for the day to celebrate with the couple. But Elena and Liz have found that the construct of "civil union" fails to offer them the same protection as marriage would. Elena and Liz are eligible to marry in New Jersey but for the fact that they are a same-sex couple; they have not sought to obtain a marriage license in New Jersey, because to do so would be futile in light of New Jersey's prevailing law.

17. Justine, Desiree, Patrick, and Eli, all minor children, are represented in this action by and through their guardians, Elena and Liz Quinones. *R.* 4:26-2(a). They ask that their parents be allowed to marry, so that their family no longer carries the confusing, stigmatizing and inferior label of "civil union," rather than marriage. Because the State does not allow Elena and Liz to marry, their children do not have the benefit of the rights, obligations, cost savings and protections conferred on married parents under New Jersey law, nor of the rights and status conferred on married parents and their children by New Jersey law that help and provide security to other New Jersey children in good times and bad. Justine, Desiree, Patrick, and Eli are harmed by the ill-understood civil union status of their parents, which causes their parents to incur additional expenses to protect familial relationships, beyond those that are needed by families headed by married couples. For example, they paid additional adoption-related legal fees and expenses to secure Liz's parent-child relationship with Eli, and could not save or invest that money toward their children's future education. The children also face a loss of dignity and legitimacy, in their own eyes, the eyes of many others, and under the law, as a result of their parents not having the freedom to marry one another. To avoid the unequal status and confusion engendered by the label "civil union," the children often use the term "marriage" with regard to Elena and Liz, but doing so is uncomfortable, because their children are painfully aware that in

reality Elena and Liz are barred from legal marriage by the State. Elena and Liz fear that their children will internalize the message that they receive from their government that their family is not as worthy as other families, and that they and their parents do not deserve the support for their relationships to each other that other children and their parents receive.

**Defendants**

18. Defendant Paula T. Dow, as the Attorney General of the State of New Jersey, is the chief law enforcement officer of the State. In this constitutional role, *see N.J. Const.* Art. V,§ IV, ¶ 3, she is responsible for enforcing the laws that exclude Plaintiff couples, couples who are members of GSE, and other same-sex couples from civil marriage.

19. The Legislature has delegated to Defendant Jennifer Velez, as the Commissioner of the New Jersey Department of Human Services, the power to adopt rules and regulations necessary to effectuate the marriage statutes, *N.J.S.A.* 37:1-12.3, and as such she is responsible for maintaining the exclusion of same-sex couples from civil marriage.

20. The Legislature has delegated to Defendant Mary E. O'Dowd, as the Commissioner of the New Jersey Department of Health and Senior Services, the power, pursuant to *N.J.S.A.* 37:1-29 and 37:1-35, to adopt rules and regulations necessary to implement the Civil Union Act, including those addressing "the issue of how partners in a civil union couple may legally answer questions on forms, governmental and private, concerning their status as partners in a civil union couple." *N.J.S.A.* 37:1-35. Also as Commissioner of the Department of Health and Senior Services, Commissioner O'Dowd oversees the New Jersey Registrar of Vital Statistics, which maintains records of marriages and civil unions in the state, and provides the forms for marriage and civil union licenses, *N.J.S.A.* 37:1-8. In these capacities, she is responsible for maintaining the separate legal construct of "civil union" for committed same-sex couples.

## VENUE

21. Venue is proper in Mercer County because the cause of action arises there, where Defendants enforce the Civil Union Act and deny Plaintiffs the right to enter civil marriage. *R.* 4:3-2(a)(2). This action is properly brought in the Law Division because the relief sought herein is primarily legal. *R.* 4:3-1(a)(4).

## STATEMENT OF FACTS

22. Civil marriage provides tangible and intangible benefits to its participants and their families in legal, economic, cultural, historical, emotional, psychological, and social dimensions.

23. New Jersey permits only different-sex couples to enter into civil marriage. As noted by the Supreme Court in *Lewis v. Harris*, the civil marriage statutes, *N.J.S.A.* 37:1-1 to 37:2-41, limit marriage to heterosexual couples. 188 *N.J.* at 436-37. According to information on a website maintained by the Department of Health and Senior Services, Vital Statistics and Registry, in order for two people to establish a marriage in the State, it "shall be necessary that they . . . [b]e of the opposite sex[.]"

24. Individuals in committed same-sex relationships may attain legal recognition of their relationship only through "civil union." This legal status was created by the Civil Union Act, *N.J.S.A.* 37:1-28, *et seq.*, enacted on December 21, 2006, and effective February 19, 2007. *L.* 2006 *c.* 103. By its terms, the Civil Union Act applies only to same-sex couples. *N.J.S.A.* 37:1-29. Different-sex couples may not enter into a civil union.

25. Civil unions were introduced in New Jersey as a result of the decision of the Supreme Court of New Jersey in *Lewis v. Harris*, 188 *N.J.* 415 (2006), which required, as a matter of State constitutional law, that the benefits and obligations of marriage be made available on equal terms to same- and different-sex couples. 188 *N.J.* at 423. *See N.J.S.A.* 37:1-28(e)

(Civil Union Act adopted purportedly in order "to comply with the constitutional mandate set forth" in *Lewis*).

26. Rather than allowing same-sex couples access to the longstanding, venerated institution of civil marriage, the Legislature chose instead to relegate same-sex couples to a separate legal category — that of "civil union" — for the purpose of distributing rights and benefits purportedly equal to those available to couples in civil marriage. *See L.* 2006 *c.* 103 (enacted Dec. 21, 2006 and effective Feb. 19, 2007), *codified at N.J.S.A.* 37:1-28 *et seq.*

27. In recognition of the possibility that civil unions might fail to provide equality, as required by the Constitution and as recognized by *Lewis*, the Legislature, in the same Act, also created the Civil Union Review Commission, *see N.J.S.A.* 37:1-36, which it charged with studying the effectiveness of civil unions, *N.J.S.A.* 37:1-36(c)(1) and (3), and of providing "civil unions rather than marriage" to same-sex couples, *N.J.S.A.* 37:1-36(c)(5) and (6). The Legislature asked the Commission to report its findings, *N.J.S.A.* 37:1-36(g), which it did provisionally on February 19, 2008, *see* N.J. Civ. Union Rev. Comm., *First Interim Report*, and finally on December 10, 2008, *see* N.J. Civ. Union Rev. Comm., *Final Report*. The Commission unanimously found that "the separate categorization established by the Civil Union Act invites and encourages unequal treatment[,]" resulting in a lack of equality for same-sex couples and their children in multiple facets of civic and social dealings, such that "the provisioning of the rights of marriage through the separate status of civil unions perpetuates the unequal treatment of committed same-sex couples."

28. Three years after passage of the Civil Union Act, and with the benefit of the findings of the Civil Union Review Commission, the Legislature considered a bill that would have made civil marriage available to all consenting and otherwise qualified couples, regardless

of sexual orientation. The text of this bill, known in the Senate as S. 1967, The Freedom of Religion and Equality in Civil Marriage Act, recognized that "[a]lthough same-sex couples may enter into civil unions, nonetheless New Jersey's discriminatory exclusion of these couples from marriage further harms same-sex couples and their families by denying them unique public recognition and affirmation." This bill was approved by the Senate Judiciary Committee on December 7, 2009, but defeated by the full Senate on January 7, 2010.

29. Although the Civil Union Act purported to provide same-sex couples "all the rights and benefits that married heterosexual couples enjoy," *N.J.S.A.* 37:1-28(d), in practice this novel legal category is an inferior legal status, and one that stigmatizes its participants. Plaintiffs are harmed by the exclusion from civil marriage in many ways, as set forth below.

***Unequal Treatment and Lack of Recognition in Public Accommodations and Civic Life***

30. The Plaintiffs are harmed because the novel legal status of "civil union" to which they are relegated is largely unknown, unfamiliar, and not recognized, both in New Jersey and outside the State. This means that in daily transactions from the mundane to the momentous, same-sex couples and their children experience a lack of recognition of their legal status, which results in a denial of civil rights in a variety of public accommodations and facets of civic life.

31. The Plaintiff couples, couples who are members of GSE, and other same-sex couples have been denied access to their family members by medical providers in a variety of contexts, from life-threatening emergency situations to routine medical visits, by both public and private health care providers. Specifically, the Plaintiff couples, couples who are members of GSE, and other same-sex couples have found that many nurses, doctors, and other health care workers and staff are unfamiliar with the term "civil union" or "civil union partner." Hospital forms, including computerized programs utilized during hospital intake procedures, do not

provide for such a designation, and recognize instead only "spouse." The Plaintiff couples, couples who are members of GSE, and other same-sex couples have found that their relationships have been described as "other," "friend," "roommate," or "unknown" — designations that are inaccurate, diminishing, and accord no legal status, access, or decision-making authority in medical settings.

a. For example, in October 2010, John Grant was struck by a car in New York City. His skull shattered, he was rushed to a local hospital. Police called the last number listed in his cell phone and reached his civil union partner, Danny Weiss, who rushed to his side. Despite their civil union, doctors and hospital staff did not recognize their legal relationship. Desperate to demonstrate their connection when the civil union failed, Danny at one point tried to show hospital personnel that he and John were wearing matching rings. Discussions with doctors and other hospital staff about what a civil union meant, and whether it was "like a Massachusetts marriage," took place as John was suffering a brain hemorrhage. Confused about Danny's authority to make medical decisions, hospital staff had John's sister summoned in the middle of the night from Delaware to participate in treatment decisions.

b. When Tevonda Bradshaw went into labor this April, she and her civil union partner Erica Bradshawn went to the hospital, and Tevonda forgot to bring her wallet containing her identification. While Tevonda was in labor, hospital staff sent Erica home to retrieve the wallet so Tevonda could sign their infant out of the hospital afterwards; though Erica had her own identification with her, and the couple had pre-registered as parents at the hospital, Erica was not recognized as Teverico's parent, as a married spouse would have been.

c. On February 8, 2011, Marsha Shapiro brought her civil union partner, Louise Walpin, to the emergency room at Princeton Medical Center, because Louise was experiencing gastrointestinal pain. The hospital registrar did not recognize the term "civil union partner," and insisted on listing Louise as "single," leaving them with no legally recognized relationship for purposes of allowing Marsha to make medical decisions on Louise's behalf. Louise, who works as a nurse at Children's Specialized Hospital, is familiar with the widely-used medical record-keeping system "Meditech." This computerized system has no way of registering "civil union partner."

d. Prior to having a civil union, Cindy Meneghin experienced a medical emergency when she came down with meningitis. In the emergency room, her partner, Maureen Kilian, was denied access until she was ultimately able to assert that she had a valid advance directive for Cindy. Their relationship was no more recognized after their civil union, when Cindy again had to go to the emergency room with suspected appendicitis. Cindy told a nurse there that her civil union partner, Maureen, would soon be arriving, but the nurse did not know what a civil union partner was, and kept insisting that "it's not a marriage," and that therefore Maureen did not have any rights of access or voice in Cindy's treatment.

32. Because of the way in which their relationships are labeled differently by the State, the Plaintiff couples, couples who are members of GSE, and other same-sex couples must disclose their sexual orientation in their civic dealings, in a manner that is discriminatory, unfair and violates their privacy. This forced disclosure impinges on the couples' activities in the public sphere, including in the quintessential civic duty of jury service. Prospective jurors are routinely asked their marital status. Because civil union partners cannot truthfully respond that

they are single or married or describe their same-sex partners as legal "spouses," their answers to these questions, which require that they attempt to educate the judge, court staff, and all jurors present about civil union, revealing their sexual orientation. For example, in 2010 Plaintiff Louise Walpin was called to jury service at the Middlesex County Courthouse. In court, in front of court staff and other jurors, the judge asked questions about her marital status. Answering truthfully, that she lived with her "civil union partner," exposed her sexual orientation to everyone in the room. Had she been able to answer that she was married and lived with her "spouse," she would not have been in that position, and nor would she have to wonder whether discrimination based on her sexual orientation was a factor in her dismissal from jury service that day.

33. The Plaintiff couples, couples who are members of GSE, and other same-sex couples have experienced confusion about and disregard for their civil union status when seeking government and private-sector services that require they accurately fill out required forms, as the forms fail to acknowledge "civil union" as a family or legal structure. These experiences occur frequently, in a wide variety of contexts including at their children's schools, in medical offices they visit for routine appointments, and with an array of other service providers. In other aspects of public life, the Plaintiff couples, couples who are members of GSE, and other same-sex couples and their children are burdened by a need to explain and justify their legal relationship, as a direct consequence of their exclusion from civil marriage and segregation into the category of "civil union."

a. For example, Marsha Shapiro and Louise Walpin's extreme sorrow at the time of their son Aaron's death in 2008 was increased because the funeral home with which they were dealing did not recognize the term "civil union." While picking out a

casket for Aaron, and arranging for official forms to accompany his burial, the funeral home insisted that Marsha produce documentation of her relationship to Louise, even though she had already stated that they had a civil union.

b. Marcye Nicholson-McFadden recently dealt with her car insurance carrier, who questioned her about whether she was married, and when Marcye explained her civil union status, informed Marcye that she should just be able to state that she was married, and that the civil union designation was "silly."

c. Last month Karen Nicholson-McFadden went to a new dentist, and again she created her own box for "civil union" on a form that did not contain the option. The staff person to whom she gave the form suggested altering her response to say "married," so that it would be recognized by the health insurance system.

34. When they travel, the Plaintiff couples, couples who are members of GSE, and other same-sex couples and their children are harmed by the denial of access to civil marriage. "Civil union," which currently exists in only one other state, is not a well-understood term with a fixed meaning, as is marriage. Therefore, when traveling outside of New Jersey, the Plaintiff couples, couples who are members of GSE, and other same-sex couples and their children are again unable to convey the nature of their relationship and unable to access the set of rights and privileges that marriage provides. Even when traveling in states that do recognize marriages of same-sex couples, the relationships of Plaintiff couples, couples who are members of GSE, and other New Jersey same-sex couples and their children are regarded as less than equal.

35. Furthermore, many states, including regional neighbors such as Maryland, New York (which next month will allow same-sex couples to marry), and Rhode Island, recognize marriages of same-sex couples validly performed in other jurisdictions. But civil-union partners

have had to litigate in order to have their status recognized, and in many areas and jurisdictions, civil union recognition remains an open question. Thus, in many jurisdictions civil union status denies these couples and their children the same basis to claim rights and responsibilities that is given to married couples and their children in jurisdictions that currently respect the marriages of same-sex couples, because "civil union," as the Civil Union Act makes clear, is not the same as "marriage," and thus has no cognate in the laws of those states.

***Unequal Workplace Benefits and Protections***

36. The Plaintiff couples, couples who are members of GSE, and other same-sex couples and their children are denied workplace benefits equivalent to those afforded married spouses, because of the novel nomenclature that New Jersey has created to define their legal relationships. Although under *N.J.S.A.* 37:1-32(e), insurance carriers covered by state law are supposed to provide equal benefits to civil union partners and spouses, in practice this frequently does not occur. Civil union partners and their children are not automatically covered by employee benefit plans or collectively bargained agreements that provide benefits for, or extend coverage to, the married spouse of an employee. In many instances, this difference means that same-sex couples are denied the same level of benefits provided to married spouses, or are forced to pay more money to attain the same benefits afforded others.

37. In other jurisdictions, such as Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, and Vermont, where same-sex couples may enter civil marriage, employers commonly extend benefits to same-sex spouses on the same terms as to other married spouses, even if current federal law would allow them to discriminate. However, in New Jersey, where same-sex couples are designated by a separate term and are never recognized as married (because even if they have married in another jurisdiction, New Jersey

demotes their valid marriages and recognizes them only as civil unions), they are not viewed as "spouses," and employers therefore often deny benefits to civil union partners. Often, the Plaintiff couples, couples who are members of GSE, and other civil-unioned same-sex couples are forced to curtail their employment options or incur additional expenses to provide health insurance for their partners and children, because they lack the legal status of married spouses — even if married elsewhere. For example, Plaintiff Louise Walpin provides health insurance for her family because her partner, Marsha Shapiro, is self-employed. Their family's need for health insurance has historically been high, as their deceased son Aaron had profound special needs, and another son required special schooling and care. The family's expenses associated with their children's care have been so high that Marsha and Louise had to take out second and third mortgages on their home. Louise has had to limit her employment to jobs that offer benefits to civil union partners. In November 2009, the human resources department at her current nursing job, which she loves, notified her that, because of financial circumstances, the company was reevaluating whether it would continue to offer benefits to civil union partners of employees. The same consideration was not given to eliminating spousal benefits. The employer subsequently advised that benefits for Marsha would continue, but for one year only. Another one-year extension for civil union partner coverage was issued in 2011, with the express caveat that the commitment again is only for the current year. Such uncertainty, and the great anxiety and worry that it creates for the couple, would not exist if they could marry.

***Lack of Family Law Protection***

38. A critical aspect of marriage is the protection it affords families and spouses in the event of separation or divorce. Obviously the Plaintiff couples seek to marry, not divorce, but it is the case that family law protections available to same-sex couples seeking to divorce in New

Jersey are unequal with respect to access to the courts if, as could occur for some same-sex as well as different-sex couples, the relationship becomes troubled. Significantly, the statute providing for dissolution of marriage upon the grounds of "irreconcilable differences" does not clearly apply to civil union. This ground for divorce absolves either party of the need to allege bad faith or specific acts on the part of the other party, and as a result makes divorce proceedings significantly less litigious, and therefore less expensive. Although the Civil Union Act provided that "[t]he laws of domestic relations, including . . . divorce . . . shall apply to civil union couples[,]" *N.J.S.A.* 37:1-31(c), the later-enacted statute creating no-fault divorce did not mention civil unions. *See L.* 2007 *c.* 6. Family Part judges remain confused about the applicability of this provision to civil union dissolution, as do family law practitioners. At the very least, it is a question that must be answered in each and every civil union dissolution proceeding, at the litigants' expense.

39. Furthermore, same-sex couples who have been married in other jurisdictions face uncertainty in the event of dissolution. The State has opposed the ability of such couples to receive a divorce, as opposed to a dissolution, leaving these couples and third parties uncertain as to whether their marriage remains in effect in other jurisdictions. The current Family Part Case Information Statement which must accompany every filing in the Superior Court, Family Part, including a dissolution of civil union, uses the nomenclature of "marriage," asking litigants to report "date of marriage." It does not mention "civil union."

40. The legal status of out-of-state marriages of same-sex couples is characterized by uncertainty in other respects as well. Although the Attorney General issued an opinion that such marriages should be recognized as civil unions for purposes of New Jersey law, the State also created the process of "reaffirmation," whereby same-sex couples may formally apply to have

their out-of-state marriages recognized as civil unions. Marriages between different-sex people do not require any such formal conversion, as they are automatically granted recognition. The existence of the "reaffirmation" process both indicates the level of confusion about what civil unions are and creates confusion about the status of valid marriages of same-sex couples entered into in other jurisdictions. This confusion arises because of the State-created civil union status to which same-sex couples in New Jersey have been consigned.

***Disparate and Unfair Financial Burdens***

41. Because they are denied access to civil marriage and its universally recognized meaning, the Plaintiff couples, couples who are members of GSE, and other same-sex couples incur additional costs to ensure that their property rights, family relationships, and tax obligations are properly understood, enforceable, and protected in light of their separate categorization. Access to civil marriage would reduce or obviate the need for specialized legal services for same-sex couples.

42. Many of the Plaintiff couples, couples who are members of GSE, and other same-sex couples have executed health-care proxies, in the event that their civil unions are not recognized in a medical emergency. For example, Danny Weiss carries copies of such documents on paper and on a keychain flash drive everywhere he goes, and Liz Quinones carries a binder of family documents in her car.

43. Several of the Plaintiff couples, as well as many couples who are members of GSE, and other same-sex couples have pursued and paid for court proceedings to adopt their own children, because they are deeply concerned that the presumption of parenthood will not be applied to them, as members of a civil union.

44. Many of the Plaintiff couples, couples who are members of GSE, and other same-

sex couples experience complications and confusion when filing their taxes, because tax professionals often do not understand "civil union." Elena and Liz Quinones, for example, had trouble getting their taxes handled properly at the New Jersey office of a national chain of tax professionals unfamiliar with civil union.

45. Relegating same-sex couples to civil unions hinders their ability to seek marriage-based benefits when Section 3 of the Defense of Marriage Act, 1 *U.S.C.* § 7 ("DOMA") is no longer operative. The United States Government Accountability Office has catalogued 1,138 federal statutory provisions that distinguish between married and unmarried individuals and couples. In several states that allow same-sex couples to marry, those couples are challenging the denial of marriage-related federal benefits such as Social Security benefits, pension rights, taxation exemptions (and, conversely, penalties), educational loans, and inheritance rights. Indeed, the President and the Department of Justice have concluded that Section 3 of DOMA is unconstitutional and are refusing to defend it in court, *see* Letter from Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html (last accessed June 28, 2011); several federal courts have held DOMA to be unconstitutional and enjoined its enforcement, *see Gill v. Office of Pers. Mgmt.*, 699 *F.Supp.*2d 374 (D. Mass. 2010); *Massachusetts v. Dep't of Health & Human Servs.*, 689 *F. Supp.*2d 234 (D. Mass. 2010); *In re Balas*, No. 2:11-bk-17831, 2011 Bankr. LEXIS 2157 (C.D. Cal. June 13, 2011); and another federal court has denied a motion to dismiss a complaint challenging DOMA's constitutionality, *see Dragovich v. U.S. Dep't of the Treasury*, No. 10-01564, 2011 U.S. Dist. LEXIS 4859 (N.D. Cal. Jan. 18, 2011). The viability of DOMA is in serious doubt. Yet New Jersey bars same-sex couples from marriage, so Plaintiff couples, couples who are members of GSE, and other same-sex couples are

hindered from engaging in marriage-based challenges to DOMA and its discriminatory effects, and will not gain the rights and benefits that will be available after the repeal or striking down of DOMA: under New Jersey law, they are not married spouses, but rather civil union partners, a term that has no established legal meaning in relation to marriage-based federal benefits.

***Encouraging Discrimination by Private Individuals***

46. By labeling the relationships of lesbian and gay couples as different from those of heterosexual couples, the State ratifies and legitimizes the notion that lesbian and gay individuals are worthy of lesser stature in society and encourages discrimination against lesbian and gay people. The State's exclusion of same-sex couples from marriage and creation of a separate institution for them triggers and fuels social stigma, harassment, discrimination, and even violence against people who are lesbian and gay and their children.

47. State-created civil unions enable discrimination by forcing the Plaintiff couples, couples who are members of GSE, and other same-sex couples to disclose their sexual orientation in order to realize benefits to which they are legally entitled. Because same-sex couples are denied access to the legal status of "marriage" and "spouse," they must reveal their sexual orientation in situations where otherwise they might not choose to, or where they could not legally be forced — or even asked — to do so. For instance, this invasion of privacy occurs when a civil union partner must ask his or her current employer about benefits for civil union partners that would automatically be extended to married spouses, or must inquire whether a prospective employer will extend benefits to a civil union partner. Louise Walpin, who would not otherwise discuss her sexual orientation at a job interview, felt compelled to inquire whether her prospective employers offered benefits to civil union partners when looking for a nursing job in New Jersey. Prospective employers often did not know what a "civil union" was, or would

not provide benefits for civil union partners. Louise wonders whether some employers discriminated against her and did not hire her because her inquiries disclosed her sexual orientation.

***Stigmatization, Psychological Harm, and Dignitary Harm***

48. By distinguishing between the relationships of lesbians and gay men, in contrast to those of heterosexuals, the government labels lesbians and gay men, their partners, and their children with a badge of inferiority. Exclusion of same-sex couples from marriage also perpetuates false and harmful stereotypes about lesbian and gay individuals, such as that they are promiscuous, incapable of forming lasting bonds, and sub-optimal parents.

49. Social science and medical literature establishes that repeated stigmatization and exposure to discrimination has consequences that go beyond mere passing indignity. Such stigmatization and discrimination can impose lasting and even permanent physical, emotional, and psychological harm.

***Additional Specific Harms to Children***

50. Furthermore, the Civil Union Act has failed to remedy the unconstitutional circumstance in which "inequities" are "borne by [the] children" of same-sex couples, 188 *N.J.* at 450. As before, the law of the State "visit[s] on these children a flawed and inferior scheme directed at their parents," *id.* at 453. In addition to affording less protection to households headed by same-sex couples while at the same time disproportionately imposing financial burdens upon such households, the unequal treatment of lesbian and gay relationships causes direct and indirect dignitary harm to the children of same-sex couples, and to lesbian and gay youth.

51. Children in households headed by same-sex couples are harmed by the fact that their parents are excluded from marriage. They suffer from stigma directed at their parents as a

consequence of their State-imposed second-class status, and they are denied the same level of security and legal protection afforded their peers with married parents.

52. The Plaintiff couples, couples who are members of GSE, and other same-sex couples in New Jersey cannot invoke the status of marriage in order to communicate to their children and others the depth and permanence of the couples' commitment in terms that society, and even young children, readily understand and respect. Their children are left to grow up with the State-sponsored message that their parents and families are inferior to others and that they and their parents do not deserve the same societal recognition and support as families headed by different-sex couples do.

53. The benefits of marriage are needed as much by children in homes headed by same-sex couples as they are by children reared in the homes of different-sex couples. Marriage is as likely to benefit the minor Plaintiffs, children of couples who are members of GSE, and children of other same-sex couples emotionally, economically, and legally as it does other children, and would secure greater dignity and social legitimacy for them and their families.

54. Minor Plaintiffs, children of couples who are members of GSE, and children of other same-sex couples have the same needs for emotional, legal, and economic security; personal dignity; familial stability; and social acceptance and legitimacy for their families and themselves as do children of different-sex couples, including the need for clearly defined and readily recognized legal relationships with both parents. Children whose parents cannot access or afford adoption would, in particular, benefit from access to, and ready recognition of, the automatic parent-child ties that matrimonial law clearly provides to children born into a marriage.

55. Such clear definition of the parent-child relationship is especially important

during times of crisis, such as medical emergencies or the death of a parent. Secure legal ties can assure continuity in the child's relationship with the surviving parent and minimize the risk of claims by others for custody. Likewise, should parents separate, secure legal ties make it unlawful for one parent arbitrarily to seek to cut off the other parent-child relationship. Marriage, in this way and others set forth herein, increases the overall economic resources available to children, whether the marriage continues or ends by death or divorce. Confusion regarding legal status, as is commonly experienced in connection with civil unions, thus threatens the well-being of the minor Plaintiffs and the children of couples who are members of GSE.

56. Allowing same-sex couples to marry is in the best interests of and will benefit children being raised by same-sex couples and the couples themselves, without having any detrimental effect on different-sex couples or their children.

57. Lesbian and gay youth — whether they have or had different-sex, same-sex or single parents — are also harmed by the exclusion of same-sex couples from marriage. These youth receive the message that they, and their future relationships, are not worthy of the esteemed institution of marriage, and that they are therefore not valued equally by their government and communities. Such discrimination and stigmatization compounds psychological harm and contributes to disproportionate rates of substance abuse, victimization, bullying, depression, and suicide.

***No Valid Justification for Exclusion***

58. The continued exclusion of lesbians and gay men from the institution of civil marriage is consistent with the historical practice of marginalizing and demeaning disfavored groups by excluding them from the most favored legal status. Classifications based on sexual

orientation have a history of fueling invidious discrimination. In New Jersey and nationwide, lesbians and gay men have been the subject of marginalization and discrimination.

59. In other areas of its law, New Jersey has recognized that lesbians and gay men are subject to discrimination, and that such discrimination is harmful and should be illegal. For example, New Jersey has brought sexual orientation within ambit of the Law Against Discrimination. *N.J.S.A.* 10:5-12(a); *Lewis*, 188 *N.J.* at 444-48 (discussing commitment of New Jersey to eliminating sexual orientation discrimination).

60. Even in maintaining a separate system of civil union for same-sex couples, the State recognizes that same-sex couples form lasting relationships for the purposes of mutual support and love, and evinces its state interest in promoting the durability and stability of these relationships. *N.J.S.A.* 37:1-28(a), (b).

61. The State also recognizes, and medical, psychological, and social science literature supports, that sexual orientation has no bearing on an individual or couple's ability to successfully raise children. *See Lewis*, 188 *N.J.* at 444-45. Thus, the State, which has disavowed reliance upon procreation and child-rearing considerations as justifications for excluding lesbian and gay individuals from marriage, *Lewis*, 188 *N.J.* at 429 n.6, 432, recognizes the right of lesbian and gay parents to raise their own children, and places foster children in same-sex parent homes through the Division of Youth and Family Services.

62. The State previously sought to justify its exclusion of same-sex couples from civil marriage in part by reference to its "interest in uniformity with other states' laws." 188 *N.J.* at 453. To the extent that the State would still assert an interest in uniformity, interim developments have rendered New Jersey's treatment of same-sex relationships an anomaly. In the region surrounding New Jersey, the States of Connecticut, Maryland, Massachusetts, New

Hampshire, New York, Rhode Island, and Vermont all provide or recognize marriages of same-sex couples. Today, because New Jersey designates the relationships of same-sex couples as something other than marriage, it is increasingly out-of-step with the majority of surrounding states, and denies same-sex relationships the stature accorded them in many neighboring jurisdictions — even in those that do not themselves issue marriage licenses to same-sex couples.

63. The State has no legitimate interest in denying same-sex couples access to civil marriage. Indeed, the State has an interest in promoting the stability of same-sex relationships and in promoting positive outcomes for children raised by lesbian and gay parents. The categorization of lesbian and gay relationships as less than, different from, and inferior to the relationships of heterosexual people undermines these interests.

**CLAIMS FOR RELIEF**

64. The Plaintiff couples, couples who are members of GSE, and other same-sex couples are harmed by the stigmatizing, separate-but-unequal system of "civil union" maintained by New Jersey. The exclusion of the Plaintiff couples, couples who are members of GSE, and other same-sex couples from civil marriage is at best irrational, and at worst, an intentional signal of governmental disapproval of lesbian and gay relationships and an invitation to discriminate against lesbians and gay men and their children.

65. Though the exclusion of lesbian and gay couples from civil marriage lacks even a rational basis, the State's exclusion must be subjected to a heightened standard of review, because it is a classification based on sexual orientation and sex, and because it impinges upon fundamental rights.

**Claim One: Denial of Equal Protection Mandated by Article I, Paragraph 1 of the New Jersey Constitution**

66. Plaintiffs reallege and incorporate by reference the preceding allegations as if fully set forth herein.

67. Article I, Paragraph 1 of the New Jersey Constitution provides that every person possesses the "unalienable rights" to enjoy life, liberty, and property, and to pursue happiness, and protects against the unequal treatment of those who should be treated alike.

68. By imposing civil unions on same-sex couples only, New Jersey harms Plaintiff same-sex couples and their children, who are similarly situated to different-sex couples and their children with respect to the formation of loving and familial bonds, barring them from civil marriage for no legitimate purpose or countervailing public need.

69. Furthermore, the state's exclusion is unconstitutional under the decision in *Lewis v. Harris*, in which the New Jersey Supreme Court recognized that a "parallel statutory structure" could be permissible under the New Jersey Constitution only if it provided for equal rights and benefits. *Lewis*, 188 *N.J.* at 423. "[T]he unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution." *Id.*

70. As set forth above, the institution of "civil union" is unequal and inferior to the institution of marriage, which is a legal relationship that is universally understood and recognized. A civil union does not even provide all of the tangible rights and benefits of marriage. Furthermore, it effectively invites and sanctions discrimination on the basis of sexual orientation by government officials and private individuals and entities.

71. Civil unions also do not and cannot provide the intangible and symbolic rights and benefits attendant to marriage, and the deprivation of these benefits constitutes a cognizable constitutional harm for the Plaintiff couples, couples who are members of GSE, and other same-

sex couples and their children. The state reserves civil marriage, the most socially valued form of relationship, for different-sex couples, and has created an inferior legal relationship for lesbian and gay people and their children in the eyes of the law and the community, denying them equal rights on the basis of the adults' sexual orientation and their sex and impermissibly classifying their children on the bases of their parents' sexual orientation, sex and marital status.

72. The State cannot demonstrate that there is a "public need" to exclude Plaintiffs from civil marriage sufficient to outweigh the harm to Plaintiffs caused by the manifest inequality and inferiority of civil union status relative to marriage. *See Lewis*, 188 *N.J.* at 443. This is especially true given that the State recognizes the right and ability of same-sex couples to raise children, *Lewis*, 188 *N.J.* at 429 n.6, 432, and has further acknowledged the necessity of "promoting stable and durable relationships" between same-sex couples, and "eliminating obstacles and hardships these couples may face." *N.J.S.A.* 37:1-28(b).

73. The State's imposition of civil unions and denial of access to marriage violate the equal protection of the laws guaranteed by Article I, Paragraph 1 of the New Jersey Constitution.

**Claim Two: Denial of the Fundamental Right to Marry Protected by Article I, Paragraph 1 of the New Jersey Constitution**

74. Plaintiffs reallege and incorporate by reference all preceding paragraphs as if set forth fully herein.

75. The right to marriage is recognized as fundamental and is accordingly protected by Article I, Paragraph 1 of the New Jersey Constitution. *Lewis*, 188 *N.J.* at 435.

76. Denying the Plaintiff couples, couples who are members of GSE, and other same-sex couples the right to enter civil marriages, which is the primary and preferred State-sanctioned family relationship, and instead relegating them to the separate status of civil unions deprives them and their families of the fundamental liberties protected by Article I, Paragraph 1 of the

New Jersey Constitution. Through this denial, the State stigmatizes lesbian and gay New Jerseyans, as well as their children and families, and denies them the same autonomy, dignity, respect, and status afforded married people, in violation of the New Jersey Constitution.

77. Moreover, denying same-sex couples the right to enter civil marriages and relegating lesbians and gay men to civil unions also infringes the fundamental rights of same-sex couples to autonomy and privacy in their relationships, as guaranteed by Article I, Paragraph 1 of the New Jersey Constitution of 1947. The right of privacy includes the right to nondisclosure of confidential or personal information and protects against unwarranted disclosure of one's sexual orientation. As set forth above, by labeling the relationships of same-sex couples differently from the relationships of different-sex couples, the state forces lesbian and gay individuals in committed relationships to disclose their sexual orientation in a variety of public situations.

78. Civil unions and the exclusion of Plaintiffs and other same-sex couples from civil marriage deprive the Plaintiff couples, couples who are members of GSE, and other same-sex couples of the due process guaranteed by Article I, Paragraph 1 of the New Jersey Constitution.

**Claim Three: Denial of Equal Protection Mandated by the Fourteenth Amendment to the United States Constitution, in Violation of 42 U.S.C. § 1983**

79. Plaintiffs reallege and incorporate by reference the preceding allegations as if fully set forth herein.

80. The Fourteenth Amendment to the Constitution of the United States provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

81. Denying the Plaintiff couples, couples who are members of GSE, and other same-sex couples the ability to marry, and instead shunting them to civil unions, violates the Equal Protection Clause of the Fourteenth Amendment. The State improperly distinguishes between heterosexual New Jerseyans on the one hand and lesbian and gay New Jerseyans on the other,

and excludes only lesbians and gay men from the institution of civil marriage, with harmful consequences to those families defined by civil unions.

82. In their familial relationships, lesbian and gay individuals and their children are similarly situated to heterosexual individuals and their children in every way relevant to the State-sponsored institution of civil marriage. The State thus discriminates between similarly situated individuals on the basis of the adults' sexual orientation and their sex, and impermissibly classifies their children on the bases of their parents' sexual orientation, sex, and marital status.

83. There is no legitimate governmental object to be attained by treating the relationships of lesbian and gay individuals differently and as inferior to the relationships of heterosexuals. Rather, given that the State has already conceded that "[S]tate law and policy do not support the argument that limiting marriage to heterosexual couples is necessary for either procreative purposes or providing the optimal environment for raising children," *Lewis*, 188 *N.J.* at 432, and that the State has determined that same-sex relationships should be accorded a legal status that provides "all the rights and benefits that married heterosexual couples enjoy[,]" *N.J.S.A.* 37:1-28(d), the maintenance of a separate legal status for same-sex couples has no purpose other than to preserve and perpetuate discrimination. It does just that.

84. The legislative classification embodied in the Civil Union Act does not serve even a legitimate and rational government purpose and cannot satisfy any standard of review. Moreover, it was enacted to single out for disfavored status a politically vulnerable minority that has historically been targeted for discrimination based on immutable characteristics unrelated to the ability to contribute to society. Thus, heightened scrutiny of the legislative classification embodied in the Civil Union Act, and of the exclusion of lesbians and gay men from civil marriage, is warranted because the State places lesbians and gays in a separate category with

of same-sex couples of the right to equal protection of the law secured by the Fourteenth Amendment to the United States Constitution, in violation of 42 *U.S.C.* § 1983.

**Claim Four: Denial of Substantive Due Process Protected by the Fourteenth Amendment to the United States Constitution in Violation of 42 U.S.C. § 1983**

89. Plaintiffs reallege and incorporate by reference the preceding allegations as if fully set forth herein.

90. The Fourteenth Amendment to the Constitution of the United States precludes any State from "depriv[ing] any person of life, liberty, or property, without due process of law[.]" *U.S. Const.* amend. XIV, § 1. The Due Process Clause dictates that governmental interference with a fundamental right may be sustained only upon a showing that the burdening legislation is narrowly tailored to serve a compelling governmental interest.

91. This due process guarantee protects choices central to personal dignity and autonomy and provides individuals the right to demand respect for conduct protected by the substantive guarantee of liberty.

92. Federal law recognizes that marriage is a personal, fundamental right, and the substantive liberty protected by the Due Process Clause protects personal decisions relating to marriage. Civil marriage is a singular and unitary institution denied to the Plaintiff couples, couples who are members of GSE, and other same-sex couples by the State of New Jersey. The Civil Union Act thus prevents the Plaintiff couples, couples who are members of GSE, and other same-sex couples from exercising a fundamental liberty interest by denying them access to the universally recognized institution of marriage.

93. Civil unions do not fulfill New Jersey's due process obligations to the Plaintiff couples, couples who are members of GSE, and other same-sex couples. This legal status is distinct and inferior, and serves only to discriminate against individuals in same-sex

relationships, who are denied access to civil marriage. Thus, the exclusion of lesbians and gay men from marriage and the imposition of the Civil Union Act, on its face and as applied to Plaintiffs, violates the Due Process Clause.

94. Insofar as they are excluding the Plaintiff couples, couples who are members of GSE, and other same-sex couples from civil marriage, Defendants, acting under color of state law, are depriving and will continue to deprive Plaintiffs of the right to due process of the law secured by the Fourteenth Amendment to the Constitution of the United States, in violation of 42 *U.S.C.* § 1983.

## PRAYER FOR RELIEF

**WHEREFORE**, Plaintiffs prays that the Court enter an Order:

1) Declaring that denying the Plaintiff couples, couples who are members of GSE, and other same-sex couples the right to marry and relegating them to civil unions violates their rights and their children's rights under Article I, Paragraph 1 of the New Jersey Constitution and the Fourteenth Amendment to the Constitution of the United States, and for those couples who are legally married in another jurisdiction, declaring that it is unconstitutional for the Defendants to deny recognition of marriages validly entered in other jurisdictions by same-sex couples, as marriages;

2) Permanently enjoining Defendants from denying the Plaintiff couples, couples who are members of GSE, and other same-sex couples the right to enter civil marriages in New Jersey or from limiting them to civil unions, and for those same-sex couples who are legally married in another jurisdiction, enjoining Defendants from denying recognition of the marriages;

3) Awarding Plaintiffs legal fees and costs; and

4) Any other relief as is deemed just and warranted.

Respectfully submitted,

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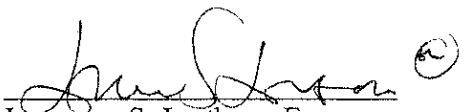
Dated: June 29, 2011

**CERTIFICATION OF NO OTHER ACTIONS**

The undersigned hereby certifies pursuant to *R.* 4.5-1(b)(2) that the matter in controversy is not the subject of any other action pending in any other court or a pending arbitration proceeding, and no other action or arbitration proceeding is contemplated. Further, other than the parties set forth in this complaint, the undersigned knows of no other parties that should be made a part of this lawsuit. In addition, the undersigned recognizes the continuing obligation to file and serve on all parties and the court an amended certification if there is a change in the facts stated in this original certification.

Dated: Newark, New Jersey
June 29, 2011

By: 

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## DESIGNATION OF TRIAL COUNSEL

In accordance with *R.* 4:5-1(c), Plaintiffs hereby designate Lawrence S. Lustberg as trial counsel in this matter.

Dated: Newark, New Jersey
June 29, 2011

Respectfully submitted,

By: _____

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The Legislature finds and declares:

a. Civil marriage is a legal institution recognized by the State in order to encourage stable relationships and to protect individuals from discrimination, and the State has an interest in encouraging stable relationships and protecting individuals from discrimination.

b. In the 2007 unanimous holding in Lewis v. Harris, 188 N.J. 415 (October 25, 2006), the New Jersey Supreme Court ruled that same-sex are entitled to all of the same rights, privileges and obligations of marriage as different sex couples, stating that the "unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution." Id. at 423.

c. In Lewis, the High Court held that the state violated the equal protection guarantee of Article I, paragraph 1 of the State Constitution by denying rights and benefits to committed same-sex couples which were statutorily given to their heterosexual counterparts. The Court split on the remedy, however, with a slim majority stating that the "State can fulfill that constitutional requirement in one of two ways. It can either amend the marriage statutes to include same-sex couples or enact a parallel statutory structure by another name, in which same-sex couples would not only enjoy the rights and benefits, but also bear the burdens and obligations of civil marriage." Lewis, *supra*, at 463.

d. Consistent with the majority holding in Lewis, the New Jersey Legislature chose to create a parallel statutory structure for the relationships of committed same-sex couples and their families that was intended to be separate, but equal. That separate relationship status, the Civil Unions Act, N.J.S. 37:1-28 et seq., took effect on February 19, 2007.

e. Under the Civil Unions Act at N.J.S. 37:1-28, the New Jersey Civil Unions Review Commission ("NJCURC") was created to evaluate the implementation, operation and effectiveness of the act; collect information about the act's effectiveness from members of the public, State agencies and private and public sector businesses and organizations; determine whether additional protections are needed; collect information about the recognition and treatment of civil unions by other states and jurisdictions including the procedures for dissolution; evaluate the effect on same-sex couples, their children and other family members of being provided civil unions rather than marriage; evaluate the financial impact on the State of New Jersey of same-sex couples being provided civil unions rather than marriage; and review the Domestic Partnership Act, N.J.S. 26:8A-1 et seq., and

make recommendations whether this act should be repealed. In December 2008, after undertaking multiple public hearings, the 13-member NJCURC unanimously issued a 79-page report that found: civil unions are "not clear to the general public"; confer "second-class status" on the couples who form them; "invites and encourages unequal treatment of same-sex couples and their children"; and concluded that, at the time of the legislature's adoption of the Civil Unions Act, "[s]eparate treatment was wrong then and it is just as wrong now."

f. On June 29, 2011, the LGBT civil rights advocacy organization Garden State Equality filed a new litigation seeking equal marriage rights for committed same-sex couples and seeking to remove the label of inferiority affixed to gay and lesbian relationships where Civil Unions were intended to create a second, alternate relationship status solely for them. On September 27, 2013, the Honorable Mary C. Jacobson, A.J.S.C., ruled in that litigation, Garden State Equality et al. v. Dow, et al., 82 A. 3d 336 (N.J. Super. Ct. Law Div. 2013), consistent with United States Supreme Court holding in United States v. Windsor, 570 U.S. 744 (2013), limiting same-sex couples to civil unions violated the rights of same-sex couples to equal protection under the New Jersey Constitution. Judge Jacobson ruled that since civil unions were not equivalent to marriage under federal law, same-sex couples did not have access to federal benefits available to married couples. The trial court, Appellate Division and Supreme Court each refused the State's request for a stay of the trial court's decision and the ruling took effect on October 21, 2013.

g. Since October 21, 2013, same-sex couples have been authorized to enter into marriage relationships pursuant to N.J.S. 37:1-1 by way of the aforementioned trial court holding under Garden State Equality. However, it is necessary and proper for that holding to now be formally codified under legislation so that committed same-sex couples are afforded access to equality under New Jersey statutory law in addition to the state's common law.

h. Enactment of this legislation is intended to and will codify the two judicial decisions, Lewis v. Harris and Garden State Equality v. Dow, into the New Jersey statutes.

i. Consistent with the long standing public policy of the State of New Jersey, the Legislature hereby declares that committed same-sex couples and their families are entitled to equality, liberty, dignity, and protection in their domestic partnership, civil union and marriage relationships.

j. All marriage relationships, including those of same-sex couples, entered into in New Jersey are to be afforded equal dispensation of rights and benefits from federal and state government, and the recognition of the legislative acts, public records, and judicial decisions related thereto are matters of strong public policy to be afforded full faith and credit under the United States Constitution.

k. The New Jersey Legislature renews its support for the Civil Unions Act as a statutory option for all New Jersey couples regardless of gender or age, but hereby acknowledges that is was wrong to have created that parallel statutory structure for the sole purpose of depriving committed same-sex couples of the ability to enter into a marriage. Accordingly, the state hereby apologizes for this mistake and the historical discrimination it foisted upon the LGBT community by the denial of equal marriage rights.

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# Governor Murphy Signs Legislation to Enshrine Marriage Equality into State Law

01/10/2022

**TRENTON –** Governor Murphy today signed into law S3416, which codifies marriage equality in New Jersey law by providing that all laws concerning marriage and civil union are to be read with gender neutral intent. Marriage equality currently exists in New Jersey based on state and federal Court decisions. This new law demonstrates the Governor and Legislature's commitment to protecting marriage equality by codifying it into New Jersey law.

"Despite the progress we have made as a country, there is still much work to be done to protect the LGBTQ+ community from intolerance and injustice. New Jersey is stronger and fairer when every member of our LGBTQ+ family is valued and given equal protection under the law," **said Governor Murphy.** "I am honored to sign legislation that represents our New Jersey values and codifies marriage equality into state law."

Primary sponsors of the bill include Senators Steve Sweeney, Loretta Weinberg, and Vin Gopal, and Assemblymembers Valerie Vainieri Huttle, Mila M. Jasey, Annette Quijano, Andrew Zwicker, and Joann Downey.

"This is about acting to ensure equal treatment and civil rights for all New Jerseyans, including same-sex couples," **said Senate President Steve Sweeney**. "Marriage equality respects the rights of loving couples who deserve to be treated equally. The courts have ruled that same-sex marriages are a fundamental right, but we want to put it into statute to protect against any backtracking by the U. S. Supreme Court.  It is the right thing to do."

"Devoted same-sex couples all across New Jersey are raising families as contributing members of their communities," **said Senate Majority Leader Loretta Weinberg**. "We fought to correct the injustice that denied these rights for too many loving couples for far too long. We don't want to see those rights lost to an arch-conservative agenda of recent Supreme Court appointees."

"Basic equal rights should not be denied to any class of citizen, regardless of gender identity or sexual orientation," **said Senator Vin Gopal**. "The law must protect all civil rights and continue to honor the union between two people who love each other. We need to make these rights more secure by writing them into law."

"In 2012, I was proud to be a prime sponsor of New Jersey's Marriage Equality Act. Following Governor Christie's veto, advocates continued the fight to the New Jersey Supreme Court, where they were finally successful in legalizing same-sex marriage**," said Assemblywoman Valerie Vainieri Huttle.** "I am proud to once again have led the

charge to ensure that the rights of the LGBTQ community are safeguarded."

"As Justice Kennedy so eloquently observed in Obergefell, 'No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than they once were," **said Assemblywoman Mila Jasey.** "Today, we recommit to guaranteeing that one of 'civilization's oldest institutions' is forever enshrined in statute for all who desire to embark upon the commitment above all others."

"Today we take action with this new law in order to preserve marriage equality in New Jersey," **said Assemblywoman Annette Quijano.** "We remain committed to our friends in the Garden State's LGBTQ community and do all we can to ensure same-sex couples have equal rights under the law which includes marriage."

"In 2013, I was ecstatic and grateful that the Court ruled that New Jersey must recognize same-sex marriage," **said Assemblyman Andrew Zwicker.** "Today, **I** am proud to stand in solidarity with everyone who fought the good fight for a right that couples should have always had: the right for someone to marry who they love. It is important for State law to forever enshrine the legality of marriage equality."

"This new law is just one more step to show we continue to stand strong against discrimination and prejudice, and we seek to create a New Jersey that is inclusive and unified for all people**," said Assemblywoman Joann Downey.**

This legislation brings New Jersey statutory law into conformance with the 2013 decision in Garden State Equality v. Dow as well as the 2015 United Supreme Court decision in Obergefell v. Hodges, which held that same-sex marriage is a fundamental right and that all states are required to allow same-sex couples to marry. Enacting S3416 into law ensures that the right to same-sex marriage will continue to exist in New Jersey even if these state and federal court precedents were to be overturned.

"How the world has changed since last time the legislature passed marriage equality in 2012. This time we have a Governor who is a champion of civil and human rights second to none," **said Steven Goldstein, founder of Garden State Equality.** "I am also thrilled this new statue marks the final law steered to passage by our equality legend Senator Loretta Weinberg. What a fitting, crowning legacy."

"Securing marriage equality in New Jersey for committed same-sex couples and their families has literally been a labor of love at Garden State Equality for nearly two decades," **said Thomas Prol, a founding and current Garden State Equality executive committee member and co-author of the legislation.** "We are grateful to the Governor and the legislative leadership for helping us protect these vital rights from the national onslaught being leveled against the LGBTQ community every day. Our community can now sleep tight knowing that their relationships are cemented in New Jersey's statutory law books."

"Twelve years ago, the Senate failed to pass marriage equality and then Senate President Dick Codey predicted that one day they would all look back and say, 'what were we thinking?' As one of the first couples to be married when marriage equality was established, our gratitude goes to all who saw this as a civil rights issue then and continued the fight to bring us to this day, especially Senators Loretta Weinberg and Raymond Lesniak," **said Marsha Shapiro and Louise Walpin.** "Special thanks to Governor Phil Murphy for keeping his promise to move New Jersey forward and codifying the right for all New Jerseyans to marry the one they love into law."

**AN ACT** concerning marriage, revising various parts of the statutory law and supplementing Title 37 of the Revised Statutes.

**BE IT ENACTED** *by the Senate and General Assembly of the State of New Jersey:*

1. (New section) This act shall be known and may be cited as the "Marriage Equality Act."

2. (New section) The Legislature finds and declares that:

a. On June 26, 2013 the United States Supreme Court ruled in U.S. v. Windsor, No. 12-307, 133 S. Ct. 2675; 186 L. Ed. 2d 808; 2013 U.S. LEXIS 4921 that the federal government must grant federal benefits to same-sex couples who are lawfully married in states that have granted these couples the right to marry.

b. On September 27, 2013 a judge of the New Jersey Superior Court ruled in Garden State Equality et al. v. Dow, Docket No. L-1729-11, 2013 N.J. Super. LEXIS 169, that same-sex couples would have the right to marry in New Jersey beginning on October 21, 2013.

c. On October 18, 2013 the New Jersey Supreme Court unanimously refused to issue a stay of the Superior Court order, holding that "the State has not shown a reasonable probability it will succeed on the merits." On October 21, 2013 the State withdrew its appeal.

d. The first same-sex marriages in the State took place on October 21, 2013, pursuant to the Superior Court order.

e. Including New Jersey, 16 states and the District of Columbia currently allow same-sex couples to marry.

f. Same-sex marriage in this State would have been authorized by Senate Bill No. 1 of 2012-2013, which passed both Houses of the Legislature in February 2012 and was conditionally vetoed by the Governor. The conditional veto would have eliminated the same-sex marriage provision and would have created a new State office to increase awareness and enforcement of the civil union law.

g. However, increased awareness and enforcement of the civil union law are inferior to marriage equality. Civil unions were established by the Legislature by P.L.2006, c.103, in response to a 2006 decision of the New Jersey Supreme Court. In Lewis v. Harris, 188 N.J. 415 (2006), the court had ruled that denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of Article I, paragraph 1 of the New Jersey Constitution. The court held that to comply with this constitutional mandate, the Legislature must either amend the marriage statutes to include those couples or create a parallel statutory structure to attempt to provide the rights and benefits enjoyed by, and burdens

**EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.**

**Matter underlined thus is new matter.**

and obligations borne by, married couples. The civil union law was the Legislature's attempt to create this "parallel statutory structure."

h. The New Jersey Civil Union Review Commission was established by P.L.2006, c.103 to investigate whether "provid[ing] civil unions rather than marriage" to same-sex couples afforded them equality.

i. The commission unanimously concluded that the civil union law, instead of ending discrimination against same-sex couples, "invite[d] and encourage[d] unequal treatment." The commission found that employers had denied civil union partners equal benefits and hospitals had denied civil union partners equal rights to visitation and medical decision-making. The commission also found that the children of same-sex couples would benefit by society's recognition that their parents are married, because the separate and inferior label of civil union stigmatized these children.

j. Because civil unions are available only to same-sex couples, the civil union enactment invades their privacy and invites discrimination when these couples are forced to disclose their civil union status on forms, in job interviews, and in other settings.

k. Civil marriage is a legal institution recognized by the State in order to encourage stable relationships and to protect individuals from discrimination, and the State has an interest in encouraging stable relationships and protecting individuals from discrimination.

l. In enacting this bill to grant same-sex marriage statutory recognition, it is the intent of the Legislature to codify the ruling of the Superior Court in Garden State Equality et al. v. Dow and the public policy of this State.

m. It is also the intent of the Legislature in enacting this bill to leave decisions about religious marriage to religions, and to uphold the free exercise of religion guaranteed by the First Amendment to the United States Constitution and by Article I, paragraph 4 of the New Jersey Constitution.

n. Therefore, this bill includes a religious exemption stating that no member of the clergy of any religion authorized to solemnize marriage and no religious society, institution or organization in this State shall be required to solemnize any marriage in violation of the free exercise of religion guaranteed by the First Amendment to the United States Constitution or by Article I, paragraph 4 of the New Jersey Constitution.

o. This bill specifies that no religious society, institution or organization in this State serving a particular faith or denomination shall be compelled to provide space, services, advantages, goods, or privileges related to the solemnization, celebration or promotion of marriage if such solemnization, celebration or promotion of marriage is in violation of the beliefs of such religious society, institution or organization.

p. In addition, this bill specifies that no civil claim or cause of action against any religious society, institution or organization, or any employee thereof, shall arise out of any refusal to provide

space, services, advantages, goods, or privileges. No State action to penalize or withhold benefits from any such religious society, institution or organization, or any employee thereof, shall result from any refusal to provide space, services, advantages, goods, or privileges pursuant to this exemption.

3. (New section) "Marriage" means the legally recognized union of two consenting persons in a committed relationship. Whenever the term "marriage" occurs or the term "man," "woman," "husband" or "wife" occurs in the context of marriage or any reference is made thereto in any law, statute, rule, regulation or order, the same shall be deemed to mean or refer to the union of two persons pursuant to this amendatory and supplementary act.

4. (New section) A marriage of two persons of the same sex entered into outside this State which is valid under the laws of the jurisdiction in which the marriage was entered shall be valid in this State.

5. (New section) It is the intent of the Legislature that this amendatory and supplementary act be interpreted consistently with the guarantees of the First Amendment to the United States Constitution and of Article I, paragraph 4 of the New Jersey Constitution.

6. (New section) a. No member of the clergy of any religion authorized to solemnize marriage and no religious society, institution or organization in this State shall be required to solemnize any marriage in violation of the free exercise of religion guaranteed by the First Amendment to the United States Constitution or by Article I, paragraph 4 of the New Jersey Constitution.

b. No religious society, institution or organization in this State shall, other than when providing a place of public accommodation as defined in section 5 of P.L.1945, c.169 (C.10:5-5), be compelled to provide space, services, advantages, goods, or privileges related to the solemnization, celebration or promotion of marriage if such solemnization, celebration or promotion of marriage is in violation of the beliefs of such religious society, institution or organization.

c. No civil claim or cause of action against any religious society, institution or organization, or any employee thereof, shall arise out of any refusal to provide space, services, advantages, goods, or privileges pursuant to this section, other than when providing a place of public accommodation as defined in section 5 of P.L.1945, c.169 (C.10:5-5). No State action to penalize or withhold benefits from any such religious society, institution or organization, or any employee thereof, shall result from any refusal to provide space, services, advantages, goods, or privileges pursuant to this section.

7. (New section) On and after the effective date of this amendatory and supplementary act:

a. no new civil unions shall be established under P.L.2006, c.103 (C.37:1-28 et al.); and

b. all partners in civil unions previously established under P.L.2006, c.103 (C.37:1-28 et al.) may apply for a marriage license in accordance with the provisions of R.S.37:1-4 and all other applicable provisions of law.

8. Partners in a civil union couple who enter into marriage with each other on or after October 21, 2013 shall be deemed to have been married beginning on the date they entered into their civil union.

9. R.S.37:1-4 is amended to read as follows:

37:1-4. Issuance of marriage or civil union license, emergencies, validity.

a. Except as provided in R.S.37:1-6 and subsection b. of this section, the marriage [or civil union] license shall not be issued by a licensing officer sooner than 72 hours after the application therefor has been made; provided, however, that the Superior Court may, by order, waive all or any part of said 72-hour period in cases of emergency, upon satisfactory proof being shown to it. Said order shall be filed with the licensing officer and attached to the application for the license.

b. The licensing officer shall issue a marriage license immediately to partners in a civil union established pursuant to P.L.2006, c.103 (C.37:1-28 et al.) who apply for such license.

c. A marriage [or civil union] license, when properly issued as provided in this article, shall be good and valid only for 30 days after the date of the issuance thereof.

(cf: P.L.2006, c.103, s.9)

10. (New section) For a period of one year following the effective date of P.L. , c. (C. ) (pending before the Legislature as this bill), partners in a civil union established pursuant to P.L.2006, c.103 (C.37:1-28 et al.) who apply for a marriage license pursuant to subsection b. of R.S.37:1-4 shall not be required to pay any fees for the issuance of such license, including but not limited to the fees imposed by R.S.37:1-12 and section 1 of P.L. 1981, c.382 (C.37:1-12.1).

11. R.S.37:1-13 is amended to read as follows:

37:1-13. Authorization to solemnize marriages [and civil unions].

Each judge of the United States Court of Appeals for the Third Circuit, each judge of a federal district court, United States magistrate, judge of a municipal court, judge of the Superior Court, judge of a tax court, retired judge of the Superior Court or Tax

Court, or judge of the Superior Court or Tax Court, the former County Court, the former County Juvenile and Domestic Relations Court, or the former County District Court who has resigned in good standing, surrogate of any county, county clerk and any mayor or the deputy mayor when authorized by the mayor, or chairman of any township committee or village president of this State, and every [minister] member of the clergy of every religion, are hereby authorized to solemnize marriages [or civil unions] between such persons as may lawfully enter into the matrimonial relation [or civil union]; and every religious society, institution or organization in this State may join together in marriage [or civil union] such persons according to the rules and customs of the society, institution or organization.
(cf: P.L.2006, c.103, s.17)

12. Section 94 of P.L.2006, c.103 (C.37:1-36) is repealed.

13. (New section) The Commissioner of Health, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1) shall adopt rules and regulations to effectuate the purposes of this amendatory and supplementary act.

14. This act shall take effect on the 60th day following enactment, except that the Commissioner of Health may take such anticipatory administrative action in advance as shall be necessary for the implementation of this act. Section 10 of this act shall expire one year following the date of enactment.



STATEMENT

This bill, the "Marriage Equality Act," would codify same-sex marriage, which was recently authorized in New Jersey by a judicial ruling.

*Findings and Declarations*

The bill's findings and declarations provide in part that:

a. On June 26, 2013 the United States Supreme Court ruled in U.S. v. Windsor, No. 12-307, 133 S. Ct. 2675; 186 L. Ed. 2d 808; 2013 U.S. LEXIS 4921 that the federal government must grant federal benefits to same-sex couples who are lawfully married in states that have granted these couples the right to marry.

b. On September 27, 2013 a judge of the New Jersey Superior Court ruled in Garden State Equality et al. v. Dow, Docket No. L-1729-11, 2013 N.J. Super. LEXIS 169, that same-sex couples would have the right to marry in New Jersey beginning on October 21, 2013.

c. On October 18, 2013 the New Jersey Supreme Court unanimously refused to issue a stay of the Superior Court order,

holding that "the State has not shown a reasonable probability it will succeed on the merits." On October 21, 2013 the State withdrew its appeal.

d. The first same-sex marriages in the State took place on October 21, 2013, pursuant to the Superior Court order.

e. Including New Jersey, 16 states and the District of Columbia currently allow same-sex couples to marry.

f. Same-sex marriage in this State would have been authorized by Senate Bill No. 1 of 2012-2013, which passed both Houses of the Legislature in February 2012 and was conditionally vetoed by the Governor. The conditional veto would have eliminated the same-sex marriage provision and instead create a new State office to increase awareness and enforcement of the civil union law.

g. However, increased awareness and enforcement of the civil union law are inferior to marriage equality. Civil unions were established by the Legislature by P.L.2006, c.103, in response to a 2006 decision of the New Jersey Supreme Court. In Lewis v. Harris, 188 N.J. 415 (2006), the court had ruled that denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of Article I, paragraph 1 of the New Jersey Constitution. The court held that to comply with this constitutional mandate, the Legislature must either amend the marriage statutes to include those couples or create a parallel statutory structure to attempt to provide the rights and benefits enjoyed by, and burdens and obligations borne by, married couples. The civil union law was the Legislature's attempt to create this "parallel statutory structure."

h. The New Jersey Civil Union Review Commission was established by P.L.2006, c.103 to investigate whether "provid[ing] civil unions rather than marriage" to same-sex couples afforded them equality.

i. The commission unanimously concluded that the civil union law, instead of ending discrimination against same-sex couples, "invite[d] and encourage[d] unequal treatment." The commission found that employers had denied civil union partners equal benefits and hospitals had denied civil union partners equal rights to visitation and medical decision-making. The commission also found that the children of same-sex couples would benefit by society's recognition that their parents are married, because the separate and inferior label of civil union stigmatized these children.

j. Because civil unions are available only to same-sex couples, the civil union enactment invades their privacy and invites discrimination when these couples are forced to disclose their civil union status on forms, in job interviews, and in other settings.

k. Civil marriage is a legal institution recognized by the State in order to encourage stable relationships and to protect individuals from discrimination, and the State has an interest in encouraging stable relationships and protecting individuals from discrimination.

l. In enacting this bill to grant same-sex marriage statutory recognition, it is the intent of the Legislature to codify the ruling of the Superior Court in Garden State Equality et al. v. Dow and the public policy of this State.

m. It is also the intent of the Legislature in enacting this bill to leave decisions about religious marriage to religions, and to uphold the free exercise of religion guaranteed by the First Amendment to the United States Constitution and by Article I, paragraph 4 of the New Jersey Constitution.

*Marriage*

Under the bill, "marriage" would be defined as the legally recognized union of two consenting persons in a committed relationship. The bill provides that whenever the term "marriage," "man," "woman," "husband" or "wife" occurs or any reference is made thereto in any law, statute, rule, regulation or order, the same shall be deemed to mean or refer to the union of two persons pursuant to the bill.

*Religious Exemptions*

The bill provides that it is the intent of the Legislature that the bill be interpreted consistently with the guarantees of the First Amendment to the United States Constitution and of Article I, paragraph 4 of the New Jersey Constitution.

The bill specifically provides that no member of the clergy of any religion authorized to solemnize marriage and no religious society, institution or organization in this State would be required to solemnize any marriage in violation of the free exercise of religion guaranteed by the First Amendment to the United States Constitution or by Article I, paragraph 4 of the New Jersey Constitution. The bill also provides that no religious society, institution or organization in this State shall, other than when providing a place of public accommodation as defined in the Law Against Discrimination (section 5 of P.L.1945, c.169 (C.10:5-5)), be compelled to provide space, services, advantages, goods, or privileges related to the solemnization, celebration or promotion of marriage if such solemnization, celebration or promotion of marriage is in violation of the beliefs of such religious society, institution or organization.

In addition, the bill provides that no civil claim or cause of action against any religious society, institution or organization, or any employee thereof, would arise out of any refusal to provide space, services, advantages, goods, or privileges pursuant to the bill, other than when providing a place of public accommodation as defined in the Law Against Discrimination. Under the bill no State action to penalize or withhold benefits from any such religious society, institution or organization, or any employee thereof, would result from any refusal to provide space, services, advantages, goods, or privileges.

*"Member of the Clergy" Language*

In addition, the bill updates language in current law concerning the authority to solemnize marriages, set out in R.S.37:1-13. Currently, this section of law authorizes "every minister of every religion" to solemnize marriages. The bill would change the word "minister" to "member of the clergy." This change is intended only to modernize the language of the statute and not to have any substantive effect.

*Civil Unions*

The bill also provides that on and after its effective date, no new civil unions could be established. Existing civil unions would not be affected by the bill and would continue unless dissolved by the parties.

In addition, the bill repeals section 94 of P.L.2006, c.103 (C.37:1-36), which had established the now-defunct New Jersey Civil Union Review Commission. The function of the commission was to evaluate the operation and effectiveness of the civil union enactment.

Under the bill, civil union partners who wish to apply for a marriage license would receive the license immediately upon application, without the statutory 72-hour waiting period. For a period of one year following the effective date of the bill, civil union partners would not be charged a fee for the issuance of a marriage license. After expiration of the one-year period, civil union partners who wish to marry would be charged the usual fees, which currently total $28. Marriage license fees are set out in R.S.37:1-12 and section 1 of P.L. 1981, c.382 (C.37:1-12.1).

*Retroactivity for Civil Union Partners*

Finally, the bill grants retroactivity for civil union partners who wish to enter into marriage. Under the bill, partners in a civil union couple who enter into marriage with each other on or after October 21, 2013 would be retroactively deemed to have been married as of the date they entered into their civil union.

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The "Marriage Equality Act"; recognizes same-sex marriage.

# HOW APPEALING – THE VERY LATEST IN APPEALS FOR CIVIL LITIGATORS

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SYLLABUS

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court and may not summarize all portions of the opinion.

**Linda B. Brehme v. Thomas Irwin (A-40-23) (089025)**

**Argued October 7, 2024 -- Decided January 15, 2025**

**FASCIALE, J., writing for a unanimous Court.**

In this appeal, the Court considers whether a plaintiff who (1) accepts full payment of an automobile personal injury final judgment -- awarding damages for pain and suffering, disability, impairment, loss of enjoyment of life, and past lost wages -- and (2) executes a warrant to satisfy that judgment, may then appeal an in limine ruling barring evidence of future medical expenses.

Defendant Thomas Irwin rear-ended plaintiff Linda Brehme's car. Brehme's Personal Injury Protection (PIP) carrier paid benefits, but not up to the policy limits. Brehme filed a personal injury complaint against Irwin. At trial, Brehme moved to admit into evidence her projected future medical expenses. The trial judge denied the motion because Brehme had not exhausted her PIP limits.

The jury awarded Brehme $225,000 "for pain, suffering, disability, impairment and loss of enjoyment of life," $50,000 for past lost wages, and $0 for future lost earnings. On July 7, 2022, the judge entered the final judgment.

Irwin's carrier paid the final judgment, which Brehme's counsel deposited into his trust account. Brehme's counsel also signed a warrant to satisfy judgment dated July 18, 2022. On July 29, 2022, Brehme's counsel wrote to the judge stating that he was "attempting to file an appeal regarding the barring of Brehme's claim for future medical expenses." On August 8, 2022, Irwin filed the warrant to satisfy judgment with the trial court. That same day, Brehme filed her Notice of Appeal (NOA) from the final judgment.

The Appellate Division dismissed Brehme's appeal as moot, noting that Brehme "accepted and received the full [final] judgment amount" and later "signed a warrant to satisfy judgment" before indicating her desire to appeal. The Court granted certification. 257 N.J. 424 (2024).

**HELD:** When a plaintiff accepts a final judgment, that party may still appeal if the party can show that (1) it made known its intention to appeal prior to accepting

payment of the final judgment and prior to executing the warrant to satisfy judgment, and (2) prevailing on the appellate issue will not in any way impact the final judgment other than to potentially increase it. Because Brehme cannot show either that she expressed her intention to appeal before accepting payment of the final judgment and before her counsel executed the warrant to satisfy the judgment or that the appeal will not impact the final judgment other than to increase it, Brehme's appeal cannot proceed. For that reason, no decision rendered can affect the outcome of the case, and her appeal was properly dismissed as moot.

1. Relying on Rules 2:4-1 and 4:48-1, Brehme argues that her appeal is not moot. But although neither rule expressly bars her appeal, neither squarely supports its vitality. Under Rule 2:4-1, "appeals from final judgments of courts . . . shall be filed within 45 days of their entry." Brehme complied with the deadline in Rule 2:4-1, but that Rule does not expressly address whether a plaintiff can accept full payment of a final judgment, execute a warrant to satisfy that judgment, and then still appeal. Rule 4:48-1 provides that when a party satisfies a final judgment, "a warrant shall be executed [by anyone entitled to receive satisfaction] and delivered to the party making satisfaction." Brehme's emphasis on the fact that she filed the NOA on the same day that Irwin filed the warrant is misplaced; the key is when a party signs a warrant to satisfy judgment, not when the warrant is filed. Rule 4:48-1 does not explicitly address the legal effect of accepting a judgment and executing a warrant to satisfy the judgment before filing a notice of appeal. (pp. 8-10)

2. Under the common law, the long-standing rule was that when a litigant accepts the benefit awarded by a final judgment, that litigant is precluded from afterward challenging the validity of the conditions by an appeal. But in Adolph Gottscho, Inc. v. American Marking Corp., the Court clarified that the issue of appealability is more nuanced: a party is not estopped from appealing a separable issue, even when a party accepts the benefits of a final judgment, if the only issue raised on appeal would increase the benefit awarded to the party appealing, but not impact the accepted, underlying final judgment. 26 N.J. 229, 242 (1958). The Gottscho Court highlighted the factual timeline as well: the plaintiff in Gottscho made known its intent to cross-appeal prior to accepting the judgment "while it at all times continued to assert that an additional sum was due." Ibid. Therefore, when a plaintiff accepts a final judgment, that party may still appeal if the party can show that (1) it made its intention to appeal known prior to accepting payment of the final judgment and prior to executing a warrant to satisfy that judgment, and also that (2) prevailing on the appellate issue will not in any way impact the final judgment other than to potentially increase it. (pp. 10-15)

3. Here, as to the first prong, Brehme did not make her intention to appeal known prior to accepting payment of the final judgment and prior to executing a warrant to satisfy that judgment. Making an intent to appeal known includes the requirement

that the plaintiff inform the party paying the final judgment that the plaintiff still intends to appeal. A defendant may pay a final judgment for several reasons. The most obvious reason is to end the litigation. Final payment and execution of a warrant to satisfy judgment without the other party's knowledge that a plaintiff plans to appeal does not promote finality, efficiency, or fairness. A plaintiff's expression of intent to appeal must be made before accepting payment of the final judgment and before executing the warrant to satisfy judgment in order to best effectuate the purposes that underlie Rule 2:4-1. (pp. 16-17)

4. As to the second prong, prevailing on the issue of whether a plaintiff can admit into evidence future medical expenses in a civil suit even though her PIP limits have not yet been exhausted would require vacating the final judgment because a claim for future medical expenses is not separable from seeking compensation for pain and suffering. A subsequent jury's consideration of the factors to determine future medical expenses may impact the final judgment in this case because the earlier jury already considered the same factors when deciding how much to award Brehme for pain and suffering. And because Brehme did not receive treatment for three years, it is possible that a subsequent jury could consider the evidence differently to find that she is entitled to less damages. The evidentiary issue raised on this appeal is not separable from the underlying final judgment, and Brehme cannot show it will only increase the final judgment. (pp. 18-20)

5. The Court refers this matter to the Civil Practice Committee to assess whether to clarify Rule 4:48-1. (p. 20)

**AFFIRMED.**

**CHIEF JUSTICE RABNER and JUSTICES PATTERSON, PIERRE-LOUIS, WAINER APTER, NORIEGA, and HOFFMAN join in JUSTICE FASCIALE's opinion.**

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SUPREME COURT OF NEW JERSEY

A-40 September Term 2023

089025

Linda B. Brehme,

Plaintiff-Appellant,

v.

Thomas Irwin,

Defendant-Respondent,

and

New Jersey Manufacturers
Insurance Company,

Defendant.

On certification to the Superior Court,
Appellate Division.

| Argued | Decided |
| --- | --- |
| October 7, 2024 | January 15, 2025 |

Gerald H. Clark argued the cause for appellant (Clark Law Firm, attorneys; Gerald H. Clark, Jake Antonaccio, and Lazaro Berenguer, of counsel and on the briefs).

Carl Mazzie argued the cause for respondent (Foster & Mazzie, attorneys; Carl Mazzie, on the brief).

Stephen J. Foley, Jr., argued the cause for amicus curiae New Jersey Defense Association (Campbell, Foley,

Delano & Adams, attorneys; Stephen J. Foley, Jr., on the brief).

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JUSTICE FASCIALE delivered the opinion of the Court.

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In this appeal, we must determine whether a plaintiff who (1) accepts full payment of an automobile personal injury final judgment -- awarding damages for pain and suffering, disability, impairment, loss of enjoyment of life, and past lost wages -- and (2) executes a warrant to satisfy that judgment, may then appeal an in limine ruling barring evidence of future medical expenses.

We hold that when a plaintiff accepts a final judgment, that party may still appeal if the party can show that (1) it made known its intention to appeal prior to accepting payment of the final judgment and prior to executing the warrant to satisfy judgment, and (2) prevailing on the appellate issue will not in any way impact the final judgment other than to potentially increase it. In this case, plaintiff Linda Brehme appealed without satisfying either prong. The Appellate Division therefore correctly dismissed the appeal as moot without reaching the merits.

We affirm.

I.

Defendant Thomas Irwin, now deceased, rear-ended Brehme's car in December 2016 and admitted that he was at fault in the accident. Brehme had a $250,000 Personal Injury Protection (PIP) policy. The PIP carrier, New Jersey Manufacturers Insurance Company (NJM), paid approximately $142,900 in benefits. Brehme never exhausted her remaining PIP limits. Brehme asserts that NJM cut her off from PIP benefits, but it is unclear exactly when that occurred or on what basis.[1]

In October 2018, Brehme filed a personal injury complaint against Irwin.[2] Three years and eight months later, the parties tried the case on damages only because Irwin admitted liability. Although she received no medical treatment for three years prior to the trial, in June 2022, Brehme relied on an amended collateral source rule, N.J.S.A. 39:6A-12,[3] and moved to admit

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[1] Brehme's counsel stated that he represents Brehme in this case, not "in connection with any PIP matters." He verified that "the propriety of [NJM's] decision to cut off [Brehme] . . . was [not] litigated in any forum." The parties reference a PIP cut-off letter and PIP ledger, but neither was provided in the record on appeal.

[2] In her complaint, Brehme also asserted uninsured motorist and underinsured motorist claims against NJM, which she later dismissed.

[3] N.J.S.A. 39:6A-12 addresses the inadmissibility of evidence of losses collectible under PIP coverage. On August 15, 2019, Governor Philip D. Murphy signed two bills into law that amended N.J.S.A. 39:6A-12.

into evidence her projected future medical expenses. The trial judge denied the motion because Brehme had not exhausted her PIP limits. During trial that month, the judge denied reconsideration. Prior to appealing from the final judgment, Brehme did not seek leave to appeal from the interlocutory evidentiary ruling barring her claim for future medical expenses.

By a vote of six to one, the jury awarded Brehme $225,000 "for pain, suffering, disability, impairment and loss of enjoyment of life." Unanimously, it also awarded $50,000 for past lost wages and $0 for future lost earnings. The total verdict was $275,000. On July 7, 2022, the judge entered the final judgment, which included pre- and post-judgment interest.[4]

Irwin's carrier paid the final judgment, which Brehme's counsel deposited into his trust account. Brehme's counsel also signed a warrant to satisfy judgment dated July 18, 2022. On July 29, 2022, after Brehme accepted payment of the final judgment and the warrant had been executed, Brehme's counsel wrote to the judge stating that he was "attempting to file an

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Governor's Statement Upon Signing S. 2432 & S. 3963 (Aug. 15, 2019). One of those laws, L. 2019, c. 244, provides that the act shall "apply to causes of action pending on that date or filed on or after that date." This lawsuit was pending as of August 15, 2019, so the amendment would apply here, but we do not reach the question of whether the judge erred by barring evidence of future medical expenses because we determine that Brehme waived her right to appeal.

[4] The total amount was $311,435.59.

appeal regarding the barring of Brehme's claim for future medical expenses." In that letter, he submitted a proposed order under the five-day rule, Rule 4:42-1(c), which purportedly memorialized the ruling barring evidence of future medical expenses.

On August 8, 2022, Irwin filed the warrant to satisfy judgment with the trial court. That same day, Brehme filed her Notice of Appeal (NOA) from the final judgment.[5] Thus, Brehme filed the NOA three weeks after she had accepted payment of the final judgment, and three weeks after her counsel executed the warrant to satisfy judgment.

The Appellate Division concluded that "[Brehme] never advanced, either on the record or in writing, that she intended to pursue her claim for future medical expenses." Rather, she "accepted and received the full [final] judgment amount" and later "signed a warrant to satisfy judgment" before indicating her desire to appeal: "[Brehme]'s receipt and acceptance of the . . . [final] judgment precluded her appeal challenging the trial judge's denial of

[5] The clerk's office marked the NOA as deficient "for not uploading a signed copy of the order [Brehme] is appealing." Brehme perfected her appeal and then obtained an appellate order allowing her to include the evidentiary ruling excluding evidence of future medical expenses as part of her appeal from the final judgment. Brehme's appeal is thus from the final judgment; she challenges the trial judge's ruling excluding evidence of future medical expenses.

future medical expenses." That court did not reach the merits of Brehme's appeal.

We granted Brehme's petition for certification. 257 N.J. 424 (2024). We also granted the New Jersey Defense Association's (NJDA)'s motion for leave to appear as amicus curiae.[6]

II.

Brehme argues that she filed her NOA within the forty-five-day deadline under Rule 2:4-1 and that the rule does not require a party to announce its decision to appeal before that deadline. She contends that although her attorney executed the warrant to satisfy judgment before writing the judge to request an order that memorialized his evidentiary ruling, she preserved her right to appeal since she filed the NOA on the day that Irwin filed the warrant to satisfy judgment under Rule 4:48. Brehme argues that under this Court's jurisprudence, she should be permitted to appeal the earlier trial evidentiary ruling excluding her future medical expenses claim and that the appellate court erred by dismissing her appeal as moot.

Irwin asserts that Brehme failed to clearly make her intention to appeal known before she accepted the benefits of the final judgment. And Irwin

[6] The NJDA focused on the merits of Brehme's appeal. Because we now affirm the dismissal of the appeal as moot, we do not address the merits.

argues that if Brehme prevails on the merits -- by obtaining permission to admit into evidence future medical expenses even though her PIP limits have not yet been exhausted -- the only remedy would be to vacate the final judgment for a new damages trial because evidence of pain and suffering and future medical expenses are not separable. He adds that prevailing on appeal would nullify the final judgment, rather than potentially increase it, contrary to case law.

III.

Here, the Appellate Division concluded that Brehme's appeal is moot. "An issue is moot 'when [this Court's] decision sought in a matter, when rendered, can have no practical effect on the existing controversy.'" In re Proposed Constr. of Compressor Station (CS327), 258 N.J. 312, 327 (2024) (quoting Redd v. Bowman, 223 N.J. 87, 104 (2015)). To reach that determination, we must consider both the relevant legal standards and their application to the facts of a case. "A court will generally search the record to determine if an appeal is actually moot or whether the parties have some continuing interest in the outcome." Mandel on N.J. Appellate Practice § 3:3-2 at 55 (2024). The general approach is to "carefully evaluat[e] the record for a continuing interest." Id. at 56; see, e.g., Sente v. Mayor & Mun. Council of Clifton, 66 N.J. 204, 209 (1974) (thoroughly evaluating the record and holding

that an appeal was moot and that the Appellate Division should not have entertained it). In our review of the record, "we accept the trial court's findings of fact, but we need not defer to the trial court's legal conclusions reached from the established facts." State v. L.H., 206 N.J. 528, 543 (2011) (quoting State v. Jefferson, 413 N.J. Super. 344, 352 (App. Div. 2010)); see also Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.")).

Relying on Rules 2:4-1 and 4:48-1, Brehme argues that her appeal is not moot because it complies with the court rules. We conclude, however, that although neither rule expressly bars her appeal, neither squarely supports its vitality.

Under Rule 2:4-1, "appeals from final judgments of courts . . . shall be filed within 45 days of their entry." It is well known that Rule 2:4-1 promotes finality, efficiency, and justice. See, e.g., In re Est. of Pfizer, 6 N.J. 233, 239 (1951) ("[I]t is of the utmost importance that at some point judgments become final and litigations come to an end."); Mandel, § 19:1-2 at 400 ("[A]t some point, final actions . . . in litigated cases should be insulated from appeal and potential alteration.").

Here, the judge entered final judgment on July 7, 2022, and Brehme filed her NOA from that judgment on August 8, 2022. Brehme thus complied with Rule 2:4-1's forty-five-day deadline. The fact that she never sought leave to appeal from the interlocutory ruling barring evidence of future medical expenses does not change that compliance, but rather reflects the "general policy in favor of 'restrained appellate review of issues relating to matters still before the trial court' to avoid piecemeal litigation." Harris v. City of Newark, 250 N.J. 294, 312 (2022) (quoting Moon v. Warren Haven Nursing Home, 182 N.J. 507, 510 (2005)). The Appellate Division's order that "[t]he appeal from the final judgment may include [Brehme]'s argument that the trial court erred in its interlocutory ruling that [Brehme] could not present a claim for future medical expenses" reflects as much.

But although Brehme complied with the deadline in Rule 2:4-1, that Rule does not expressly address whether a plaintiff can accept full payment of a final judgment, execute a warrant to satisfy that judgment, and then still appeal.

Nor does Rule 4:48-1 address that issue. Rule 4:48-1 provides that when a party satisfies a final judgment, "a warrant shall be executed [by anyone entitled to receive satisfaction] and delivered to the party making satisfaction." Executing a warrant to satisfy judgment means that a party signed the warrant.

Thus, Brehme's emphasis on the fact that she filed the NOA on the same day that Irwin filed the warrant is misplaced; the key is when a party signs a warrant to satisfy judgment, not when the warrant is filed. Accepting payment of the final judgment and then executing the warrant to satisfy judgment -- before filing the NOA -- constitutes sufficient acknowledgment by Brehme that the final judgment was valid.

Brehme asserts that Rule 4:48-1 does not alter the forty-five-day period prescribed in Rule 2:4-1, and that is true. But Rule 4:48-1 also does not explicitly address the legal effect of accepting a judgment and executing a warrant to satisfy the judgment before filing a notice of appeal.

Our common law, however, has addressed in other contexts whether a plaintiff can accept payment of a final judgment, execute a warrant to satisfy that judgment, and then appeal.

The long-standing general rule was "that when a litigant accepts the benefit awarded . . . by a [final] judgment," that litigant "is precluded from afterward challenging the validity of the conditions by an appeal." In re Mortg. Guar. Corps.' Rehab. Act, 137 N.J. Eq. 193, 198 (E. & A. 1945); see also Krauss v. Krauss, 74 N.J. Eq. 417, 421 (E. & A. 1908) ("[W]here a party recovers a [final] judgment . . . and [then] accepts the benefits thereof . . . , he is estopped to afterwards reverse the [final] judgment . . . on error. The

acceptance operates as and may be pleaded as a release of error.").

Applying that principle, the Appellate Division has explained that when one party pays a judgment and the other accepts the money and executes a warrant to satisfy judgment, "[t]he legal effect of what transpires is that a contract is entered into between the parties to terminate the litigation." Sturdivant v. Gen. Brass & Mach. Corp., 115 N.J. Super. 224, 227 (App. Div. 1971). The exchange of payment and signed warrant, in the appellate court's words, reveals that "the parties have recognized the validity of the judgment and have voluntarily entered into a contract to waive or surrender their respective right to appeal." Ibid. (relying on 4 Am. Jur. 2d Appeal & Error § 242 at 737 (1962) ("It has been broadly asserted that any act on the part of a party by which he impliedly recognizes the validity of a judgment against him operates as a waiver of his right to appeal therefrom, or to bring error to reverse it, and clearly one who voluntarily acquiesces in or ratifies a judgment against him cannot appeal from it. The acquiescence which prohibits an appeal, or destroys it when taken, is the doing or giving of the thing which the decree commands to be done or given.")).

But in Adolph Gottscho, Inc. v. American Marking Corp., the Court clarified that the issue of appealability is more nuanced. In that case, the defendant appealed from a final judgment entered by the Chancery Division,

and the plaintiff filed a cross-appeal. 26 N.J. 229, 232 (1958). While those appeals were pending, the defendant paid the final judgment and thereafter received a warrant to satisfy judgment. Id. at 241-42. The plaintiff's pending cross-appeal continued, which "was explicitly confined to [a] single issue." Id. at 242.

After considering the defendant's contention that the cross-appeal had been mooted by the plaintiff's acceptance of the judgment, the Court disagreed and concluded that the appeal was "maintainable." Id. at 241-42. The Court stressed that "the single issue" presented on appeal "could serve to increase but not to reduce the amount of the judgment." Id. at 242 (emphasis added). That distinction was significant, the Court noted, because "[t]he plaintiff's acceptance of the sum found by the trial court to be due, and its delivery of the warrant of satisfaction while it at all times continued to assert that an additional sum was due, was in nowise inconsistent and furnished no real basis for an estoppel." Ibid. In other words, the Court clarified that a party is not estopped from appealing a separable issue, even when a party accepts the benefits of a final judgment, if the only issue raised on appeal would increase the benefit awarded to the party appealing, but not impact the accepted, underlying final judgment. Ibid.

But the Gottscho Court highlighted the factual timeline as well: the plaintiff in Gottscho made known its intent to cross-appeal prior to accepting the judgment "while it at all times continued to assert that an additional sum was due." Ibid. And the Court explained that its "conclusion that the cross-appeal was maintainable is buttressed by the many decisions elsewhere which recognize the right of a party to accept a sum to which he is in any event entitled and still pursue his request for a legal ruling on appeal which would increase that sum." Ibid. (emphasis added). The language "still pursue" likewise suggests a challenge brought prior to the acceptance of judgment rather than after.

One of the many decisions cited by Gottscho, which illuminated what is meant by "increase" the underlying judgment, is Bass v. Ring, 299 N.W. 679 (Minn. 1941). In Bass, the Supreme Court of Minnesota explained that

> "where the reversal of a judgment cannot possibly affect an appellant's right to the benefit secured under a judgment, then an appeal may be taken, and will be sustained, despite the fact that the appellant has sought and secured" the benefit which he has already accepted. The reason is that in such a case "it is possible for the appellant to obtain a more favorable judgment in the appellate court without the risk of a less favorable judgment from a new trial of the whole case there or in the lower court." In such posture of the litigation, "the acceptance of what the judgment gives him is not inconsistent with an appeal for the sole purpose of securing, without retrial of the whole case, a decision more advantageous to him."

> [299 N.W. at 680 (quoting 2 Am. Jur. Appeal & Error § 215 at 977-78 (1936)).]

See also 169 A.L.R. 980 (1941); Shaffer v. Great Am. Indem. Co., 147 F.2d 981 (5th Cir. 1945); Bohl v. Bohl, 32 N.W.2d 690 (S.D. 1948); Hayward v. Green, 88 A.2d 806 (Del. 1952).

Corpus Juris Secundum, a national legal encyclopedia, also addresses the issue:

> **A party accepting benefits under a judgment is not precluded from appealing if the parts of the judgment are separable, the party would have been entitled to the benefits in any event, or the appeal is for the purpose of increasing the recovery.**
>
> The right to appeal is not waived or estopped if the controversy is separable, so that accepting the benefit of a favorable part is consistent with an appeal from the adverse part. . . . Thus, a party who has accepted benefits under a judgment is not estopped from appealing for the purpose of increasing the recovery, unless the appeal leaves the appellant at the risk of receiving a less favorable judgment. . . .
>
> On the other hand, an appeal may not be maintained if the appellant has accepted the amount adjudged in full settlement or satisfaction of the claim, the appellant has accepted the judgment debtor's tender of the full amount of the judgment before filing the notice of appeal, the payment was made and accepted on the understanding or agreement that no appeal would be taken, the parts of the judgment are so closely and mutually dependent that an appeal would bring up every part of the judgment, or the controversy was not

> confined to the allowed counterclaim but rather the entire claim and amount were in dispute.
>
> [4 C.J.S. Appeal & Error § 286 (2024) (footnotes omitted).]

Thus, Gottscho's reference to "increase" includes not only potentially adding to the judgment amount, but also, the issue raised on the appeal must be separable from the underlying final judgment such that prevailing on the appeal cannot possibly affect an appellant's right to the benefit secured under the final judgment by decreasing the amount awarded.

We therefore hold that when a plaintiff accepts a final judgment, that party may still appeal if the party can show that (1) it made its intention to appeal known prior to accepting payment of the final judgment and prior to executing a warrant to satisfy that judgment, and also that (2) prevailing on the appellate issue will not in any way impact the final judgment other than to potentially increase it.[7]

[7] The need for a party to make its intention to appeal known prior to accepting payment of the final judgment and prior to executing a warrant to satisfy that judgment is premised in part on the factual timeline in Gottscho. The Gottscho Court did not expressly impose such a requirement; rather, it was self-evident from the facts of that case. Even if we do not apply prong one of our holding here, Brehme's appeal remains moot because she cannot satisfy prong two of our holding.

## IV.

Application of those legal principles to the facts of this case is straightforward.

### A.

As to the first prong, Brehme did not make her intention to appeal known prior to accepting payment of the final judgment and prior to executing a warrant to satisfy that judgment. She accepted payment of the final judgment, her counsel deposited the money into his trust account, and her counsel signed a warrant to satisfy judgment. Three weeks later, Brehme filed her NOA from the final judgment.

Requesting an order that memorialized the evidentiary ruling excluding future medical expenses, which her counsel sought after Brehme accepted payment of the final judgment and after he executed the warrant to satisfy judgment, and informing the judge that Brehme was "attempting to file an appeal," did not help, because it did not express an intent to appeal before accepting payment of the final judgment and before execution of the warrant to satisfy judgment. Making an intent to appeal known includes the requirement that the plaintiff inform the party paying the final judgment (before payment of the final judgment and execution of the warrant to satisfy judgment) that the plaintiff still intends to appeal.

A defendant may pay a final judgment for several reasons. The most obvious reason is to end the litigation. Irwin did that here. Final payment and execution of a warrant to satisfy judgment without the other party's knowledge that a plaintiff plans to appeal does not promote finality, efficiency, or fairness. A plaintiff's expression of intent to appeal must be made before accepting payment of the final judgment and before executing the warrant to satisfy judgment in order to best effectuate the purposes that underlie Rule 2:4-1.

Brehme's reliance on Gottscho is misplaced. In that case, the plaintiff cross-appealed before it accepted payment of the final judgment. 26 N.J. at 241-42. The defendant paid that judgment while the plaintiff's cross-appeal was pending. Ibid. Here, the opposite occurred. Irwin's carrier paid the final judgment, Brehme accepted the money, and her counsel executed the warrant to satisfy the judgment before she filed her NOA. And unlike here, the single issue on the plaintiff's cross-appeal in Gottscho was separable from the plaintiff's final judgment. Id. at 242. Prevailing on its isolated appellate issue could not possibly have affected the plaintiff's right to the benefit it secured under its final judgment. Ibid.

That brings us to the second prong.

B.

As to the second prong, prevailing on the evidentiary appellate issue -- whether a plaintiff can admit into evidence future medical expenses in a civil suit even though her PIP limits have not yet been exhausted -- would require vacating the final judgment because a claim for future medical expenses is not separable from seeking compensation for pain and suffering. Thus, even if we concluded that Brehme met prong one, she is unable to show that prevailing on the trial court evidentiary ruling will not impact the final judgment and only potentially increase it.

It is well established that personal injury awards are generally not divisible. Caldwell v. Haynes, 136 N.J. 422, 442 (1994). That is especially true where the evidence of pain and suffering is inextricably linked to evidence of future medical expenses. One jury cannot hear evidence relevant to pain and suffering and another jury hear evidence relevant to future medical expenses. Assuming the admissibility of future medical expenses in this case, the two claims -- pain and suffering and future medical expenses -- would have to be considered simultaneously. Those claims cannot be fairly adjudicated separately.

A jury considers essentially the same factors when deciding whether to award damages for future medical expenses and pain and suffering. For future

medical expenses, a jury should consider "the nature, extent, and duration of [a] plaintiff's injury," as well as a plaintiff's age, health before the accident, and how long the jury "reasonably expect[s] the medical expenses to continue." Model Jury Charges (Civil), 8.11(I), "Future Medical Expenses" (approved May 1997). For pain and suffering, a jury should consider "a plaintiff's age, usual activities, occupation, family responsibilities and similar relevant facts in evaluating the probable consequences of any injuries you find [a plaintiff] has suffered." Model Jury Charges (Civil), 8.11(E), "Disability, Impairment and Loss of the Enjoyment of Life, Pain and Suffering" (rev. May 2017). The jury considers "the nature, character and seriousness of any injury, discomfort or disfigurement," and the duration of an injury,

> as any verdict you make must cover the harms and losses suffered . . . since the accident, to the present time, and even into the future if you find that [the] injury and its consequence have continued to the present time or can reasonably be expected to continue into the future.
>
> [Ibid.]

A subsequent jury's consideration of the factors to determine future medical expenses may impact the final judgment in this case because the earlier jury already considered those same factors when deciding how much to award Brehme for pain and suffering. And because Brehme did not receive treatment for three years, it is possible that a subsequent jury could consider

the evidence differently to find that she is entitled to less damages. It is not guaranteed that the issue of future medical expenses will only increase the sum the jury awarded to Brehme. See, e.g., Gottscho, 26 N.J. at 242. Thus, the evidentiary issue raised on this appeal is not separable from the underlying final judgment, and Brehme cannot show it will only increase the final judgment.

Because Brehme cannot show either that she expressed her intention to appeal before accepting payment of the final judgment and before her counsel executed the warrant to satisfy the judgment or that the appeal will not impact the final judgment other than to increase it, Brehme's appeal cannot proceed. For that reason, any decision rendered can have no effect on the outcome of the case. See Compressor Station, 258 N.J. at 327. Accordingly, her appeal was properly dismissed as moot.

We refer this opinion to the Civil Practice Committee to assess whether to clarify Rule 4:48-1 in light of the principles outlined above.

V.

The judgment of the Appellate Division is affirmed.

CHIEF JUSTICE RABNER and JUSTICES PATTERSON, PIERRE-LOUIS, WAINER APTER, NORIEGA, and HOFFMAN join in JUSTICE FASCIALE's opinion.

# RECORD IMPOUNDED



SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2181-21
A-2182-21
A-2183-21

ORMOND SIMPKINS, JR.,

Plaintiff-Appellant,

v.

SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, COLUMBIA HIGH SCHOOL, and MAPLEWOOD MIDDLE SCHOOL,

Defendants-Respondents,

and

NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES, DIVISION OF CHILD PROTECTION AND PERMANENCY, FAMILY CONNECTIONS, INC., and NICOLE DUFAULT,

Defendants.

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FRANKIE JEROME,

Plaintiff-Appellant,

v.

SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT and COLUMBIA HIGH SCHOOL,

Defendants-Respondents,

and

NICOLE DUFAULT,

Defendant.

---

BRANDON HAYES,

Plaintiff-Appellant,

v.

SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, COLUMBIA HIGH SCHOOL, and MAPLEWOOD MIDDLE SCHOOL,

Defendants-Respondents,

and

NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES, DIVISION OF CHILD PROTECTION AND PERMANENCY, FAMILY CONNECTIONS, INC., and NICOLE DUFAULT,

Defendants.

———————————————————————

Argued October 12, 2022 – Decided October 8, 2024

Before Judges Accurso, Vernoia and Natali.

On appeal from interlocutory orders of the Superior Court of New Jersey, Law Division, Essex County, Docket Nos. L-4264-21, L-4265-21 and L-4478-21.

John W. Baldante argued the cause for appellants (Levy, Baldante, Finney & Rubenstein, PC, attorneys; John W. Baldante and Mark R. Cohen, on the briefs).

Benjamin H. Zieman argued the cause for respondent South Orange-Maplewood Board of Education (Anderson & Shah LLC, attorneys; Benjamin H. Zieman, on the briefs).

The opinion of the court was delivered by

ACCURSO, P.J.A.D.

In these three cases, in which we heard argument back-to-back and consolidate for resolution here, Ormond Simpkins, Jr., Frankie Jerome and Brandon Hayes appeal on our leave from trial court orders granting defendant South Orange-Maplewood School District's motions to dismiss with prejudice those counts of plaintiffs' complaints asserting claims for vicarious liability arising out of their alleged sexual abuse by their former teacher Nicole Dufault. Each appeal raises the same argument — that the trial court erred in

failing to recognize that our Supreme Court's holding in Hardwicke v. American Boychoir School, 188 N.J. 69, 101-02 (2006), adopting the aided-by-agency theory of section 219(2)(d) of the Restatement (Second) of Agency (1958), and the 2019 amendments to the Tort Claims Act, N.J.S.A. 59:1-1 to 12-3, have combined to make the School District vicariously liable for Dufault's sexual abuse of plaintiffs, notwithstanding it was committed outside the scope of Dufault's employment. Because we agree with the trial court that the District cannot be held liable under N.J.S.A. 59:2-2(a), the Act's vicarious liability provision, for Dufault's sexual abuse committed outside the scope of her employment, even after Hardwicke and the 2019 amendments to the Tort Claims Act, we affirm.

Plaintiffs have each filed multi-count complaints against the School District alleging they were sexually abused by Nicole Dufault, a language arts and special education teacher at Columbia High School while they were students during the 2013-14 school year. Plaintiffs, who were between the ages of fourteen and seventeen, allege the abuse took place on multiple occasions in Dufault's classroom during school hours as well as in her car on school grounds and elsewhere.

Plaintiffs claim Dufault altered their attendance records to excuse their absences from other classes when they were with her and favorably manipulated their grades. The abuse continued until September 2014, when a video surfaced of Dufault engaged in sexual relations with another student, and she was arrested. Plaintiffs contend she has since pleaded guilty to three counts of aggravated sexual contact, forfeited her teaching certificates and any future public employment and been sentenced to a three-year suspended prison term and parole supervision for life.

The trial court granted the District's motion to dismiss with prejudice those counts of all three complaints pleading common law claims seeking to hold the District vicariously liable for Dufault's alleged abuse.[1] The court held the Tort Claims Act's vicarious liability provision, N.J.S.A. 59:2-2(a), permits a public entity to be held liable only for those acts of its employees occurring within the scope of their employment. The court found "DuFault's alleged assault and sexual abuse of plaintiff[s] was clearly outside the scope of her

[1] The court also dismissed plaintiffs' claims seeking to hold the District directly liable as a passive abuser under the Child Sexual Abuse Act, N.J.S.A. 2A:61B-1(a)(1) and (b). Plaintiffs did not seek leave to appeal that ruling, and these interlocutory appeals are limited to the court's dismissal of the common law counts of plaintiffs' complaints seeking to hold the District vicariously liable for acts committed by Dufault outside the scope of her employment.

employment," being obviously beyond anything authorized by the District and not in any way actuated by a purpose to serve her employer. See Davis v. Devereux Found., 209 N.J. 269, 302-07 (2012).

We review a trial court's decision on a motion to dismiss a complaint for failure to state a claim under Rule 4:6-2(e) de novo, "affording no deference to the trial court's determination." Pace v. Hamilton Cove, 258 N.J. 82, 95-96 (2024). "Because the appeal arises on defendant['s] motion for judgment on the pleadings[,] . . . we assume the truth of the allegations of the complaint, giving plaintiff[s] the benefit of all reasonable factual inferences that those allegations support." F.G. v. MacDonell, 150 N.J. 550, 556 (1997).

Plaintiffs do not challenge the trial court's ruling that Dufault's conduct towards them was outside the scope of her employment. They reprise their argument that although "the general rule is that an employer cannot be held vicariously liable for the tortious intentional conduct of its employee when that conduct is committed outside the scope of employment . . . there are time-honored and well-recognized exceptions," including the one adopted by our Supreme Court in Hardwicke, "that in limited circumstances where remedial legislation and important public policy concerns are involved, the employer

can be held vicariously liable for its employee's intentional conduct outside the scope of employment under the Restatement (Second) of Agency § 219(2)(d)."

Plaintiffs contend Dufault sexually abused them by "leveraging her power as a teacher on behalf of the . . . District," constituting a "textbook definition of 'aided agency' as articulated in the Hardwicke decision" and section 219(2)(d). They maintain the trial court erred in failing to recognize that "plaintiffs are permitted to assert viable agency claims, including common-law vicarious liability under respondeat superior" under the aided-by-agency theory adopted by the Court in Hardwicke.

Relying on our decision in E.C. by D.C. v. Inglima-Donaldson, 470 N.J. Super. 41 (App. Div. 2021), plaintiffs further argue the District cannot rely on the immunity provided it under N.J.S.A. 59:2-10 to shield it from vicarious liability for Dufault's sexual abuse of plaintiffs because the Legislature disabled that immunity in N.J.S.A. 59:2-1.3(a)(1) in "sexual abuse cases . . . if the employee used the position of employment as an 'aided' tool of leverage to commit the sexual abuse." Plaintiffs contend that even if the District and the trial court are correct that N.J.S.A. 59:2-2(a), is a liability provision and not an immunity, the District's motion to dismiss must fail under E.C. because "it is

still just an affirmative defense whereby plaintiffs' claims on this issue — vicarious liability — can only be disposed of factually at the time of trial."

We disagree. Plaintiffs misread our decision in E.C. and misapprehend the meaning of the Tort Claims Act's liability provisions, specifically N.J.S.A. 59:2-2(a). We start with Hardwicke and the Tort Claims Act.

Plaintiffs are correct the Court in Hardwicke recognized an exception to the general rule of respondeat superior that an employer is "liable for torts of one of its employees only when the latter was acting within the scope of his or her employment." Di Cosala v. Kay, 91 N.J. 159, 168-69 (1982). Relying on Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 619-20 (1993), where it had held an employer could be vicariously liable under Restatement (Second) of Agency § 219(2)(d)[2] for the conduct of a supervisor acting outside the scope of

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[2] Section 219 of the Restatement (Second) of Agency provides:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or

his employment if it had "delegate[d] the authority to control the work environment to a supervisor and [the] supervisor abuse[d] [the] delegated authority," the Court in Hardwicke held a private boarding school qualifying as a passive abuser under the Child Sexual Abuse Act, N.J.S.A. 2A:61B-1(a)(1), could be held vicariously liable for common law claims based on conduct falling within the Act's definition of sexual abuse committed by an employee acting outside the scope of his or her employment. Hardwicke, 188 N.J. at 100-02 (quoting Lehmann, 132 N.J. at 620) (alterations in original).

Critically, the Court didn't find the sexual abuse Hardwicke claimed to have suffered occurred within the scope of his abuser's employment by the School; it found the circumstances warranted an exception to the Restatement rule that "[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment." Restatement (Second) of Agency §

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(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

219(2). As the Court has often noted, "[o]nly rarely will intentional torts fall within the scope of employment." Davis, 209 N.J. at 303. And crimes, particularly serious ones, "are in nature different from what servants in a lawful occupation are expected to do." Ibid. (quoting Restatement (Second) of Agency § 231 cmt. a. Restatement (Second) of Agency § 219(2)(d) on which the Court in Hardwicke relied is addressed exclusively to an employer's liability for the torts of its employees "acting outside the scope of their employment.").

That distinction, as the trial court found, is critical to plaintiffs' vicarious liability claims against the District, because the Legislature has waived the State's sovereign immunity only for "injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances." N.J.S.A. 59:2-2(a) (emphasis added). A public entity has no liability under the Tort Claims Act for the acts of its employees occurring outside the scope of their employment. Tice v. Cramer, 133 N.J. 347, 355 (1993). The 2019 Amendments to the Tort Claims Act, specifically N.J.S.A. 59:2-1.3, did not change that.

The 2019 amendments to the Tort Claims Act extended the statute of limitations for sexual assault or abuse claims against public entities in accord with the Legislature's newly enacted statute of limitations for sexual abuse claims, N.J.S.A. 2A:14-2a and -2b, and abrogated the Act's notice and filing requirements for those claims. See W.S. v. Hildreth, 252 N.J. 506, 512-14 (2023) (explaining the effect of the extended statute of limitations and the abolishment of the procedural requirements for filing claims of sexual abuse against public entities in the 2019 amendments).

There is no question but that the Court in Hardwicke held a private entity qualifying as a passive abuser under the Child Sexual Abuse Act may be held vicariously liable for common law claims alleging conduct within the Act's definition of sexual abuse committed by an employee acting outside the scope of his employment in accord with section 219(2)(d) of the Restatement. 188 N.J. at 100-02. But that a private entity may be held liable for the torts of an employee outside the scope of employment will not make a public entity similarly liable because "[t]he liability of the public entity must be found in the [Tort Claims] Act." Tice, 133 N.J. at 355; N.J.S.A. 59:2-1(a) ("Except as otherwise provided by this act, a public entity is not liable for an injury,

whether such injury arises out of an act or omission of the public entity or a public employee or any other person.").

Plaintiffs do not identify any provision of the Tort Claims Act making a public entity liable for the torts of a public employee occurring outside the scope of employment. That failure is fatal to their vicarious liability claims against the District. Plaintiffs alleging negligence against a public entity "must first establish the predicates for liability" in the Tort Claims Act "and later avoid application of any provision granting the sovereign immunity." Kolitch v. Lindedahl, 100 N.J. 485, 502 (1985) (Handler J., dissenting).

Although we agree with plaintiffs the District may not rely on the immunity afforded it in N.J.S.A. 59:2-10, providing "[a] public entity is not liable for the acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct," the District does not rely on it here and doesn't need to in order to defeat plaintiffs' vicarious liability claims.

We found in E.C. that N.J.S.A. 59:2-1.3(a)(1) was silent as to the immunity provisions of the Tort Claims Act the Legislature "intended to disable" in stating

> immunity from civil liability granted by that act to a public entity or public employee shall not apply to an

> action at law for damages as a result of a sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in [N.J.S.A. 2A:30B-2], or sexual abuse as defined in [N.J.S.A. 2A:61B-1] being committed against a person, which was caused by a willful, wanton or grossly negligent act of the public entity or public employee.

Notwithstanding, we concluded, N.J.S.A. 59:2-10 is an immunity that will not apply in sex abuse cases against public entities. E.C.. 470 N.J. Super. at 53-54.

The law is long-settled, however, that N.J.S.A. 59:2-10 is an immunity provided public entities "for the acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct" occurring within the scope of employment. See Bernstein v. State, 411 N.J. Super. 316, 330-33 (App. Div. 2010) (explaining "public entities have no vicarious liability for the willful misconduct of their employees" acting within the scope of their employment under N.J.S.A. 59:2-10); McDonough v. Jorda, 214 N.J. Super. 338, 349-50 (App. Div. 1986) (holding no vicarious liability against police department or city for police officer's willful misconduct in assault and battery on a college student incident to arrest under 59:10-2). See also Margolis and Novack, Title 59: Claims against Public Entities, cmt. 1 on N.J.S.A. 59:2-10 (2024) ("This section establishes a basis for employer

immunity once a ground is established for the employer's vicarious liability under 59:2-2(a)."). A plaintiff reaps no benefit from avoiding a statutory immunity provision, like N.J.S.A. 59:2-10, unless he has already managed to establish a predicate for liability under the Tort Claims Act. See Cosgrove v. Lawrence, 215 N.J. Super. 561, 563 (App. Div. 1987) (noting in the absence of a basis for vicarious liability under 59:2-2, the public entity's immunity under 59:2-10 is irrelevant). Plaintiffs have not identified any provision in the Tort Claims Act making the District vicariously liable for Dufault's acts outside the scope of her employment; none exists.

Finally, plaintiffs misread our opinion in E.C. in asserting we held the Tort Claims Act's vicarious liability provision, N.J.S.A. 59:2-2(a), is "just an affirmative defense whereby plaintiffs' claims on this issue — vicarious liability — can only be disposed of factually at the time of trial." Nowhere in E.C. did we address N.J.S.A. 59:2-2. Indeed, we noted specifically that we had chosen "not to consider [on interlocutory appeal] either the viability of [the] plaintiffs' claim that the board may be held vicariously liable or the impact of N.J.S.A. 59:9-2(d)" on the case. E.C., 470 N.J. Super. at 56. Moreover, a holding that N.J.S.A. 59:2-2 is an affirmative defense to public

entity liability would stand the Act on its head and run contrary to decades of Supreme Court precedent interpreting it.

N.J.S.A. 59:2-1(a) and (b) establish the structure of the Tort Claims Act:

> a. Except as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.
>
> b. Any liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person.

The 1972 Attorney General's Task Force Comment to N.J.S.A. 59:2-1 explains the Act re-established the "immunity of all governmental bodies in New Jersey" following its abrogation in Willis v. Department of Conservation and Economic Development, 55 N.J. 534 (1970). N.J.S.A. 59:1-2, declares it "to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act," and that all its provisions "should be construed with a view to carry out" that legislative declaration. See Chatman v. Hall, 128 N.J. 394, 414 (1992) (explaining the Tort Claims Act "reestablished blanket immunity [for public entities] subject to specific provisions establishing liability").

N.J.S.A. 59:2-2(a), which provides "[a] public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances," is one of those "specific provisions establishing liability." Chatman, 128 N.J. at 414. Indeed, the Task Force Comment describes subsection (a) as the "primary source of public entity liability." Our Supreme Court has said the same. See Robinson v. Vivirito, 217 N.J. 199, 207 (2014) ("This Court has commented that vicarious liability of the public entity for the negligent act of its employee is the primary source of liability for the public entity.") (citing Tice, 133 N.J. at 355); Rochinsky v. State, Dep't of Transp., 110 N.J. 399, 409 (1988) (identifying N.J.S.A. 59:2-2(a) as one of the "three principal liability sections in the Act").

Contrary to plaintiffs' assertion, N.J.S.A. 59:2-2(a) is, both in the structure of the Act and the cases interpreting it, plainly a liability predicate not an immunity provision as to which the public entity would bear the burden of pleading and proof as an affirmative defense. See Ellison v. Hous. Auth. of City of S. Amboy, 162 N.J. Super. 347, 351 (App. Div. 1978). As our Supreme Court has held that "[t]he liability of the public entity must be found in the Act," Tice, 133 N.J. at 355, and plaintiffs have failed to identify any

provision within it that would make the District liable for the acts of an employee outside the scope of employment, the motion to dismiss plaintiffs' vicarious liability claims was properly granted.

Affirmed.

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***Order Prepared by the Court***

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| WIGGINS PLASTICS, INC. AND KNICKERBOCKER BED COMPANY,<br><br>Plaintiffs,<br>v.<br><br>COUNTY OF PASSAIC; PASSAIC COUNTY BOARD OF CHOSEN FREEHOLDERS; PASSAIC COUNTY BOARD OF COMMISSIONERS; ASSUNCAO BROTHERS, INC.; NGM INSURANCE COMPANY; JOHN DOES 1 THROUGH 10 (fictitious names of individuals whose identities are presently unknown); JOHN DOES 11 THROUGH 20 (fictitious names of employees, agents, representatives and/or assigns of the County of Passaic and/or Passaic County Board of Chosen Freeholders and/or Passaic County Board of Commissioners and/or Assuncao Brothers, Inc. and/or NGM Insurance Company, whose identities are presently unknown) and ABC CORPORATIONS 1-10 (fictitious names of entities whose identities are presently unknown),<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION: PASSAIC COUNTY<br><br>DOCKET NO. PAS-L-2441-22<br><br>**ORDER** |

**THIS MATTER** having been brought before the Court by the law office of Howarth & Associates, LLC, attorneys for Defendants, County of Passaic and Passaic County Board of Commissioners, improperly pled as Passaic County Board of Chosen Freeholders, for an Order for Summary Judgment to dismiss the Fourth Count of the Second Amended Complaint, and the Court having considered the moving papers, and having heard the argument of counsel, and for good and sufficient cause being shown;

**IT IS** on this 6th day of February, 2025,

ORDERED that Partial Summary Judgment be and hereby is **GRANTED**; and

IT IS FURTHER ORDERED that the Defendants' Motion is Granted, and the Fourth Count of Plaintiffs' Second Amended Complaint alleging vicarious liability against the County Defendants for the acts of the Defendant, Assuncao Brothers, Inc. be and the same is hereby dismissed with prejudice; and

IT IS FURTHER ORDERED that a service of this Order shall be deemed effectuated upon all parties upon its upload to eCourts.

**/s/ Darren J. Del Sardo**

**HON. DARREN J. DEL SARDO, P. J. Cv.**

X Opposed

____ Unopposed

**SEE ATTACHED STATEMENT OF REASONS**

**NOT TO BE PUBLISHED WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS**

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|---|---|
| WIGGINS PLASTICS, INC. and KNICKERBOCKER BED COMPANY,<br><br>Plaintiff(s),<br><br>v.<br><br>COUNTY OF PASSAIC, et al.,<br><br>Defendant(s). | SUPERIOR COURT OF NEW JERSEY<br>PASSAIC COUNTY<br>LAW DIVISION<br><br>DOCKET NO.: PAS L-2441-22<br><br>CIVIL ACTION - CBLP<br><br>**OPINION** |

**Decided February 06, 2025**

Charles A. Yuen, Esq., of Charles Allen Yuen LLC, counsel for Plaintiffs Wiggins Plastics, Inc. and Knickerbocker Bed Company.

Michael A. Mattessich, Esq., of Howarth & Associates, LLC, counsel for Defendants County of Passaic and Passaic County Board of Commissioners.

**Hon. Darren J. Del Sardo, P.J. Cv.**

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Pending before the Court is the Defendant, County of Passaic and Passaic County Board of Commissioners' motion for summary judgment, filed on December 6, 2024. Plaintiffs, Wiggins Plastics, Inc., and Knickerbocker Bed Company, filed an Opposition to the Motion on January 21, 2025. Defendant submitted a Reply Brief on January 23, 2025. Oral argument was heard on January 31, 2025. After careful consideration, the Court relies upon the following statement of reasons in support of its decision.

## BACKGROUND

This matter arises from damages sustained by Plaintiffs at their property located at 180 Kingsland Road in Clifton, New Jersey, following the effects of Hurricane Ida on or about September 1, 2021. Plaintiffs allege that the flooding and subsequent damages were caused, in part, by negligent acts related to a bridge replacement project contracted by the County of Passaic to Defendant Assuncao Brothers, Inc. Plaintiffs' Fourth Count alleges vicarious liability for the County's supervisory role over the contractor. Defendants move for summary judgment, arguing that the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq., immunizes the County from vicarious liability for the acts of independent contractors. Plaintiffs oppose the motion, asserting that material factual disputes remain and that the motion is premature due to incomplete discovery.

## STANDARD

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." R. 4:46-2(c). The trial court's "function is not . . . to weigh the evidence and determine the truth . . . but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. at 520 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The trial judge must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the nonmoving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Ibid. When the facts present "a single, unavoidable

resolution" and the evidence "is so one-sided that one party must prevail as a matter of law," then a trial court should grant summary judgment. Ibid.

"A party may defeat a motion for summary judgment by demonstrating that the evidential materials relied upon by the moving party, considered in light of the applicable burden of proof, raise sufficient credibility issues to permit a rational fact finder to resolve the alleged disputed issued in favor of the nonmoving party.'" D'Amato v. D'Amato, 305 N.J. Super. 109, 114 (App. Div. 1997) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). The trial court's "function is not . . . to weigh the evidence and determine the truth . . . but to determine whether there is a genuine issue for trial." Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

The trial judge must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Ibid. When the facts present "a single, unavoidable resolution" and the evidence "is so one-sided that one party must prevail as a matter of law," then a trial court should grant summary judgment. Ibid. Where there is a motion for summary judgment, "[i]t is incumbent upon [the party opposing the motion] to make an affirmative demonstration . . . that the facts are not as the movant alleges." Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div. 1962).

While a motion for summary judgment "may be made as early as twenty days from the service of the complaint. R. 4:46-1, nevertheless, case law has made plain, a matter is not 'ripe' for summary judgment where discovery is incomplete." J. Josephson, Inc. v. Crum & Forster Ins. Co., 293 N.J. Super. 170, 203 (App. Div. 1996). "When critical facts are peculiarly within the moving party's knowledge, it is especially inappropriate to grant summary judgment when

discovery is incomplete." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988). "[A party] must have a reasonable opportunity to obtain facts not available to it other than through formal discovery." Wilson v. Amerada Hess Corp., 168 N.J. 236, 253 (2001).

**DECISION**

The Court has reviewed Defendants' motion for summary judgment seeking dismissal of the Fourth Count of Plaintiffs' Second Amended Complaint, which alleges vicarious liability against the County of Passaic. The central issue before the Court is whether the County can be held vicariously liable for the alleged negligent acts of Assuncao Brothers, Inc. ("Assuncao"), an independent contractor engaged in the Kingsland Road Bridge replacement project.

Under the New Jersey Tort Claims Act ("TCA"), public entities may be held vicariously liable for the wrongful acts of their employees pursuant to N.J.S.A. 59:2-2(a), which states that "[a] public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment." However, the TCA expressly excludes independent contractors from the definition of a "public employee." N.J.S.A. 59:1-3. This distinction is established in case law, which has consistently held that public entities are not liable for the actions of independent contractors. See McCormick v. State, 446 N.J. Super. 603, 611 (App. Div. 2016) ("In keeping with the thrust of the Act, Courts have refused to adopt any theory of liability that would make public entities responsible for the acts of nonemployee third parties."); Gomes v. Cty. of Monmouth, 444 N.J. Super. 479, 491 (App. Div. 2016).

Here, Plaintiffs have conceded that Assuncao was an independent contractor. Despite this concession, they have not identified any applicable exception that would impose liability on the

County, nor have they presented specific facts that could establish vicarious liability and preclude summary judgment at this stage. Plaintiffs cite Chatman v. Hall, 128 N.J. 394 (1992), but that case only affirms the principle that a public entity can be vicariously liable only if its employee is liable. Moreover, Plaintiffs have not demonstrated that the County had a nondelegable duty that would impose liability despite Assuncao's status as an independent contractor. The Plaintiff also relies on Majestic Realty Associates, Inc. v. Toti Contracting Co., 30 N.J. 245 (1959), but that case predates the Tort Claims Act and is inapplicable.

For these reasons, the Court finds that Defendants are entitled to summary judgment with respect to the Fourth Count of Plaintiffs' Second Amended Complaint and their motion is **GRANTED**. Plaintiffs may continue to pursue any remaining claims against the County as set forth in the other Counts of their Complaint.

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0366-22

RUSSELL FORDE HORNOR,

Plaintiff-Respondent,

v.

UPPER FREEHOLD REGIONAL BOARD OF EDUCATION, d/b/a UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, and ALLENTOWN HIGH SCHOOL,

Defendants-Appellants,

and

NEW JERSEY FUTURE FARMERS OF AMERICA,

Defendant-Respondent,

and

ALLENTOWN FUTURE FARMERS OF AMERICA and CHARLES HUTLER, III,

Defendants.

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Argued March 1, 2023 – Decided October 8, 2024

Before Judges Accurso, Vernoia and Natali.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3887-21.

Cherylee O. Melcher argued the cause for appellants (Hill Wallack, LLP, attorneys; Cherylee O. Melcher, on the briefs).

Gabriel C. Magee argued the cause for respondent Russell Forde Hornor (Levy Baldante Finney & Rubenstein, PC, attorneys; Gabriel C. Magee and Mark R. Cohen, on the brief).

Zachary J. Styczynski argued the cause for respondent New Jersey Future Farmers of America (Davison, Eastman, Muñoz, Paone, PA, attorneys; Zachary J. Styczynski, on the brief).

The opinion of the court was delivered by

ACCURSO, P.J.A.D.

The Upper Freehold Regional Board of Education appeals on our leave from the trial court's denial of its motion to dismiss those counts of plaintiff Russell Forde Hornor's complaint asserting claims for breach of fiduciary duty and vicarious liability arising out of his alleged sexual abuse at age fifteen by his former teacher Charles Hutler. We reverse. New Jersey does not recognize a fiduciary duty in teachers, school administrators and boards of

education to their students, and the 2019 amendments to the Tort Claims Act, N.J.S.A. 59:1-1 to 12-3, do not make the Board vicariously liable under N.J.S.A. 59:2-2(a) for the sexual assault Hornor concedes was outside the scope of Hutler's employment.

In November 2021, Hornor, then fifty-eight-years-old, filed a seven-count complaint against the Board, New Jersey Future Farmers of America, Allentown Future Farmers of America, Hutler's estate and both individual and institutional fictitious defendants alleging Hutler, Hornor's freshman science teacher in 1978-79, sexually abused him.

Specifically, Hornor claims Hutler, who was also the chapter adviser and team coach for the Allentown Chapter of New Jersey Future Farmers of America, in which Hornor was enrolled by virtue of his participation in his school's agricultural science program, assisted him with daily transportation to his after-school job at a local nursery, and further gained his trust and friendship by taking him to Future Farmers of America basketball games and events. Hutler would also take Hornor, who describes himself as having had "a troubled and dysfunctional home life," bowling and to the movies with two of Hornor's friends. Hornor claims that after those outings, Hutler, who died in 2011, would buy the boys alcohol and drink with them.

After a Future Farmers of America plant and landscaping competition at Rutgers in April 1979, in which Hornor had placed fourth, Hutler took Hornor and his friends out to celebrate, driving them to a liquor store and purchasing wine for the group. After taking the other boys home, Hutler drove Hornor to Hutler's apartment on a ruse, where he sexually assaulted him. Hutler instructed Hornor not to tell anyone about the assault as no one would believe him. Hornor believes Hutler sexually abused him in other ways or on other occasions, and abused other boys as well, but is convinced he has emotionally suppressed additional details or episodes of abuse.

Hornor's complaint, as to the Board, contained counts alleging negligence, negligent supervision, negligent hiring and retention, gross negligence, intentional infliction of emotional distress, breach of fiduciary duty, a sexually hostile environment under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -50, and his entitlement to punitive damages. The Board promptly moved to dismiss, with prejudice, the counts for breach of fiduciary duty, punitive damages and any claims asserting

vicarious liability for Hutler's sexual abuse of plaintiff pursuant to Rule 4:6-2(e) for failure to state a claim upon which relief can be granted.[1]

Hornor opposed the motion, and after extensive briefing and oral argument, the court denied it and endorsed the parties' agreement to permit Hornor to file an amended complaint removing the count for punitive damages. The trial court acknowledged Hornor's claim that Hutler and the Board owed him a fiduciary duty is not one recognized in New Jersey. It, nevertheless, found such a duty by extending the Supreme Court's holding in F.G. v. MacDonell, 150 N.J. 550, 556 (1997), where the Court recognized a fiduciary duty in a clergyman to a parishioner to whom the clergyman is providing pastoral counseling, to Hutler's "successful campaign to earn" Hornor's "trust and confidence," which "extended beyond the [school] bell" and ultimately resulted in his sexual abuse.[2]

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[1] The Board also unsuccessfully moved to dismiss the count for intentional infliction of emotional distress. It did not, however, move for reconsideration or leave to appeal that ruling, and thus we do not consider it here.

[2] The court held

> F.G.'s themes of trust, confidence in another, and vulnerability apply with equal force to the school setting such that an extension of F.G.'s holding to an educator is an appropriate, common sense, and modest

As to Hornor's claim for vicarious liability, the court held that after the 2019 amendments to the Tort Claims Act, "a public entity, such as the Board, may be vicariously liable for the sexual abuse inflicted by its employee's willful, wanton, or grossly negligent act occurring within the scope of his or her employment." See N.J.S.A. 59:2-1.3(a)(1); E.C. by D.C. v. Inglima-Donaldson, 470 N.J. Super. 41, 56 (App. Div. 2021).

Hornor acknowledges Hutler's abuse of him was outside the scope of Hutler's employment. But the trial court relied on Hardwicke v. American Boychoir School, 188 N.J. 69, 101-02 (2006) — in which the Supreme Court held a private boarding school could be held liable as a passive abuser under the Child Sexual Abuse Act, N.J.S.A. 2A:61B-1(a)(1), allowing Hardwicke to also pursue his related common law claims based on willful, wanton or negligent conduct falling within the Act's definition of sexual abuse committed by a school administrator acting outside the scope of his employment under section 219(2)(d) of the Restatement (Second) of Agency (Am. Law Inst. 1958), when the school had delegated specific authority to the abuser and the

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> extension of the common law where the educator takes affirmative steps beyond the classroom, as Hutler did here, to earn a child's trust and provide counseling beyond mere reading, writing, and arithmetic.

delegation aided him in committing the sexual abuse — to find the Board could be held vicariously liable for Hutler's sexual abuse of Hornor.

The Board moved for reconsideration, which the court granted, in part. The court struck all claims for punitive damages but for those arising from the Board's alleged violation of the Law Against Discrimination and denied reconsideration with respect to its rulings on fiduciary duty and vicarious liability. We granted the Board's motion for leave to appeal the court's rulings on those two claims.

We review a trial court's decision on a motion to dismiss a complaint for failure to state a claim under Rule 4:6-2(e) using the same standard as applied in that court. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). Our review is de novo, and we owe no deference to legal conclusions we deem mistaken. Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019). The same is true of our review of the trial court's interpretation of statutes. Aronberg v. Tolbert, 207 N.J. 587, 597 (2011). "Because the appeal arises on defendants' motion for judgment on the pleadings[,] . . . we assume the truth of the allegations of the complaint, giving plaintiff the benefit of all reasonable factual inferences that those allegations support." F.G., 150 N.J. at 556.

Plaintiff's claim of breach of fiduciary duty

The Board claims the trial court ignored controlling Supreme Court precedent defining the duty owed by public school teachers, administrators and boards of education to their students and overread and misapplied F.G. in creating a new fiduciary duty in the Board to students in the district. Specifically, the Board argues the pastoral counseling relationship between the priest and his parishioner in F.G. bears no resemblance to Hutler taking Hornor to basketball games and helping him get to an afterschool job, even if Hornor regarded Hutler as a mentor. It also notes Hornor failed to plead any similar allegations of a confidential relationship between Hornor and the Board.

The Board contends Hornor's complaint includes only conclusory allegations that the Board breached its "fiduciary duties to avoid harming children and to protect them from harm at the hands of [its] employees" in the same manner he claims it breached its duties in the negligence counts, all of which resulted in the same harm, making the fiduciary duty claim simply duplicative of recognized tort duties already pled. Finally, the Board argues "[a] fiduciary relationship between [a] K-12 school and its personnel and their students is contrary to both the duty of undivided loyalty owed by fiduciaries

to their beneficiaries and the prohibition on conflicts of interest that govern fiduciaries' conduct."

Hornor counters that he is not contending "all student-teacher relationships result in a fiduciary duty" only those in which a teacher, like Hutler, uses a "grooming process" to create a confidential relationship of dominance over a student like Hornor, which confidential relationship he claims "establishes a fiduciary duty." Hornor claims the Court "already recognized [in F.G.] that the creation of the type of 'special relationship' alleged here creates a fiduciary duty, albeit in a somewhat different, but analogous, context." Hornor contends Hutler's "'grooming activities' created a narrowly tailored fiduciary duty" to him, and the 2019 amendments to the Tort Claims Act allow Hornor to recover for the Board's breach of that duty. We disagree.

F.G., is a First Amendment case in which the Supreme Court reversed our decision recognizing a cause of action for clergy malpractice arising out of a priest's sexual misconduct with a parishioner. F.G. v. MacDonell, 291 N.J. Super. 262, 265-66 (App. Div. 1996), aff'd in part, rev'd in part, 150 N.J. 550 (1997). F.G. had consulted the rector of her parish, MacDonell, for pastoral counseling. 150 N.J. at 556. "Aware that F.G. was vulnerable, MacDonell

nonetheless induced her to engage in a sexual relationship with him." Ibid. F.G. subsequently sued MacDonell for clergy malpractice, along with negligent infliction of emotional distress and breach of fiduciary duty, alleging he "'engaged in sexual behavior with [her] inappropriate to and in violation of [the special relationship]' he owed her, and that 'he failed to exercise the degree of skill, care and diligence which is exercised by the average qualified pastoral counselor provider.'" Id. at 556-57 (alterations in original).

Although the Court determined F.G. could state a claim against MacDonell, it declined to find a cause of action for clergy malpractice. Id. at 561. Writing for the Court, Justice Pollock explained that defining the standard of care in a clergy malpractice case "could embroil courts in establishing the training, skill, and standards applicable for members of the clergy in a diversity of religions with widely varying beliefs," and "require courts to identify the beliefs and practices of the relevant religion and then to determine whether the clergyman had acted in accordance with them," resulting in the very real risk of "restrain[ing] the free exercise of religion." Id. at 562-63.

The Court determined it could avoid that entanglement with religion by casting the cause of action as one for breach of fiduciary duty instead. Id. at

558. It explained a fiduciary relationship, the essence of which "is that one party places trust and confidence in another who is in a dominant or superior position[,] . . . arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship." Id. at 563. The Court found that "[t]rust and confidence are vital to the counseling relationship between parishioner and pastor," and that "[b]y accepting a parishioner for counseling, a pastor also accepts the responsibility of a fiduciary." Id. at 564.

Most important for First Amendment purposes, "an action for breach of fiduciary duty," unlike an action for clergy malpractice, "does not require establishing a standard of care and its breach. Establishing a fiduciary duty essentially requires proof that a parishioner trusted and sought counseling from the pastor. A violation of that trust constitutes a breach of the duty." Id. at 565. By declaring a cleric to have a fiduciary duty to a parishioner he has accepted into pastoral counseling, the Court provided the parishioner an avenue to recover monetary damages for the violation of her trust without "running the risk of entanglement with the free exercise of religion" by defining the duties of a member of the clergy to a parishioner and adjudicating their alleged breach in our courts. Id. at 558.

In our view, F.G. provides no support for recognizing a fiduciary duty on the part of a board of education to a student in the district. Defining the duty of a board of education to its students does not entangle the courts in the free exercise of religion. Moreover, F.G. did not involve a claim against the church, nor any claim outside the narrow confines of a voluntary pastoral counseling relationship between a priest and his parishioner. It provides no guidance as to how such a claim could be brought against an entity defendant, like the school district with whom plaintiff admittedly did not have a confidential relationship. In addition, assigning a fiduciary duty running to a specific student from an entity like the Board, that owes obligations to multiple stakeholders involved in educating the district's children, often with conflicting interests, is incompatible with the duty's defining characteristic of undivided loyalty to a particular person or interest. See Bankers Trust Co. v. Bacot, 6 N.J. 426, 436 (1951) (noting "undivided loyalty is of the very essence of a trust relationship"). Cf. McDonough v. Roach, 35 N.J. 153, 159 (1961) (explaining danger of dual office holding that "invite[s] a clash of the obligations each unit of government owes to its respective citizens").

Even more troubling to us, however, is the trial court's adoption of plaintiff's argument that it was Hutler's alleged "grooming" of Hornor that

created the "special relationship" giving rise to Hutler's fiduciary duty to Hornor.[3] In McKelvey v. Pierce, another clergy case, the Court explained "[t]he fiduciary's obligations to the dependent party," there a seminarian, "include a duty of loyalty and a duty to exercise reasonable skill and care" in acting or giving advice within the scope of the relationship, and that "the fiduciary is liable for harm resulting from a breach of the duties imposed by

[3] Hornor relies on a definition of grooming in an article by Daniel Pollack and Andrea MacIver, Understanding Sexual Abuse in Child Abuse Cases, Child L. Prac. Today, Nov. 2015 (citing U.S. Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) Program), which describes it as:

> a method used by offenders that involves building trust with a child and the adults around a child in an effort to gain access to and time alone with her/him. In extreme cases, offenders may use threats and physical force to sexually assault or abuse a child. More common, though, are subtle approaches designed to build relationships with families.
>
> The offender may assume a caring role, befriend the child or even exploit their position of trust and authority to groom the child and/or the child's family. These individuals intentionally build relationships with the adults around a child or seek out a child who is less supervised by adults in her/his life. This increases the likelihood that the offender's time with the child is welcomed and encouraged.

the existence of such a relationship." 173 N.J. 26, 57 (2002), holding modified by Hyman v. Rosenbaum Yeshiva of N. Jersey, 258 N.J. 208 (2024).

Here, the alleged harm did not arise out of Hutler's breach of the duties of loyalty and reasonable skill and care in acting or giving advice within the scope of a defined relationship with Hornor, the harm was in the nature and scope of the relationship itself. The trial court was clear that, in its view, not every teacher owes a fiduciary duty to his students, but only those teachers grooming students for sexual abuse.[4] Grooming a student for sexual abuse is

[4] Specifically, the court stated

> Although it is undisputed that courts across the nation at various levels have not reached a consensus, this court concludes that a fiduciary duty exists to protect a student from sexual abuse where, as here, a confidential relationship involving the repose of trust by a student in an educator exists based on the close relationship between victim and alleged abuser that extended beyond mere classroom instruction.

The court went on to explain, however, that "[s]uch is not to say that a broader fiduciary duty exists nor is imposed on all educators in all circumstances to all students." Thus, the court took "no position" on whether other teachers might also have fiduciary duties to their students "outside the context of an alleged sexual abuse."

The duty the trial court adopted is unacceptably vague, being identifiable, it would appear, only on its breach. The court took pains to note it's not every teacher who mentors a student outside the classroom who will be held to have

not remotely akin to the voluntary counseling relationship between pastor and parishioner in F.G. We cannot imagine the fiduciary duty the Court found to inhere in a pastoral counseling relationship could appropriately be extended to "Hutler's successful campaign" to earn Hornor's trust and confidence by "a pattern of long-term, methodical grooming."[5] The concepts are antithetical to one another.

Most important, there was no need for the trial court to have wrestled with the question of the Board's duty to Hornor. The Court defined that duty

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accepted a fiduciary duty toward that student, but only those found liable for sexual abuse. The test for the existence of a duty, however, "is not retrospective but prospective." Mayer v. Hous. Auth. of City of Jersey City, 44 N.J. 567, 573 (1965) (Haneman, J. dissenting). "Fairness ordinarily requires that a man be able to ascertain in advance of a jury's verdict whether the duty is his and whether he has performed it." Davis v. Devereux Found., 209 N.J. 269, 297 (2012) (quoting Goldberg v. Hous. Auth. of City of Newark, 38 N.J. 578, 589 (1962)).

[5] We also question the wisdom of stretching "to create a new tort to provide a remedy for conduct that was already tortious," that is, the sexual abuse of a student, and for which relief is otherwise provided by the Act. See F.G., 150 N.J. at 570 (O'Hern, J. dissenting). See 1972 Task Force Comment to N.J.S.A. 59:2-1 (recommending "restraint in the acceptance of novel causes of action against public entities"). See also Rochinsky v. State, Dep't of Transp., 110 N.J. 399, 407 n.4 (1988) ("The Comments following certain sections of the statute were taken from the Report of the Attorney General's Task Force on Sovereign Immunity — 1972, and accompanied the Act during its consideration by the Legislature. They have the precedential weight and value of legislative history.").

in the context of the sexual abuse of students over twenty years ago in Frugis v. Bracigliano, 177 N.J. 250, 257 (2003), a case involving an elementary school principal who photographed male students in his office in "provocative poses," for his own sexual gratification.[6] The Court held that "[s]chool personnel owe a duty to exercise reasonable care for the safety of students entrusted to them," which "extends to supervisory care required for the student's safety or well-being as well as to the reasonable care for the student at school-sponsored activities in which the student participates." Id. at 270. The Court defined the standard of care as "that degree of care which a person of ordinary prudence, charged with comparable duties, would exercise under the circumstances," and held "[t]he duty may be violated by not only the commission of acts but also in the neglect or failure to act." Ibid. That

[6] The same duty in school personnel was recognized in other contexts long before Frugis. See Titus v. Lindberg, 49 N.J. 66, 73 (1967) ("The duty of school personnel to exercise reasonable supervisory care for the safety of students entrusted to them, and their accountability for injuries resulting from failure to discharge that duty, are well-recognized in our State and elsewhere.").

standard is reflected in Model Jury Charges (Civil), 5.74, "Duty of Teachers and School Personnel to Student" (approved Sept. 1980).[7]

As Justice Albin explained for the Court in Frugis:

> The law imposes a duty on children to attend school and on parents to relinquish their supervisory role over their children to teachers and administrators during school hours. While their children are educated during the day, parents transfer to school officials the power to act as the guardians of those young wards. No greater obligation is placed on school officials than to protect the children in their charge from foreseeable dangers, whether those dangers arise from the careless acts or intentional transgressions of others. Although the overarching mission of a board of education is to educate, its first imperative must be to do no harm to the children in its care. A board of education must take reasonable measures to assure that the teachers and administrators who stand as surrogate parents during the day are

[7] The Court in Frugis also detailed the instructions the trial judge is to provide the jury in apportioning liability between the abuser and the board — after it has decided all questions of liability and damages — including "the heightened duty of school boards to ensure students' safety from foreseeable harms, particularly those presented by the intentional acts of school personnel." 177 N.J. at 282. The Court required that a jury be instructed in a "two-phase procedure" that its "apportionment of liability should reflect the extent to which the school board's failure to discharge its duties exposed the students in its care to intentional misconduct by one of its employees" and that its apportionment "should not diminish the school board's overriding duty to protect students from foreseeable intentional torts by school personnel." Id. at 282-83.

> educating, not endangering, and protecting, not exploiting, vulnerable children.[8]
>
> [177 N.J. at 268.]

The Court has since reaffirmed its consistent application of "traditional principles of due care and foreseeability to cases involving in loco parentis relationships, rather than adopting a 'non-delegable' or absolute duty" in such cases — which is obviously closely akin to, if not the same as, the fiduciary duty the trial court adopted here. Davis v. Devereux Found., 209 N.J. 269, 289, 291-92 (2012) (noting "[t]he liability of in loco parentis institutions [is] determined in accordance with traditional negligence principles; the 'non-delegable' duty proposed here, amounting to an employer's absolute liability for an employee's criminal act, has not been accepted by [the Supreme] Court in any setting similar to that of this case"). Indeed, the Court in Davis noted that "Frugis . . . confirms that the in loco parentis institution is held to a duty of due care." Id. at 290. Given the Court's unwavering consistency over several decades in defining the duty of in loco parentis institutions,

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[8] The trial court quoted this same passage from Frugis, but drew from it not that boards of education have a duty to exercise reasonable care for the safety of students but a heightened, more exacting duty, "something stricter," "the punctilio of an honor the most sensitive," Justice (then Chief Judge) Cardozo's oft-quoted definition of fiduciary duty for the New York Court of Appeals in Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

specifically including public boards of education, as one of due care, the trial court erred in recognizing any different duty in the Board to Hornor.

Plaintiff's claim for vicarious liability

The Board asserts the aided-by-agency theory urged by Hornor and adopted by the trial court does not assist Hornor here because the 2019 amendments to the Tort Claims Act did not alter N.J.S.A. 59:2-2, which establishes public entity liability for only those injuries "proximately caused by an act or omission" of the entity's employee acting "within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances." The Board asserts N.J.S.A. 59:2-2 is based on the doctrine of respondeat superior under which "the plaintiff must prove the existence of an employer-employee relationship and that the employee's tortious actions 'occurred within the scope of that employment'" for liability to attach to the employer. G.A.-H. v. K.G.G., 238 N.J. 401, 415 (2019) (quoting Carter v. Reynolds, 175 N.J. 402, 408-09 (2003)). Because Hornor concedes Hutler's sexual abuse was outside the scope of his employment, the Board contends Hornor cannot establish the Board's vicarious liability for the assault.

Hornor argues the Board ignores "the sea change in the law" wrought by the 2019 amendments to the Tort Claims Act, which he contends allow the

Board to "be both vicariously liable for the sexual abuse committed by its employees and directly liable for its own negligent hiring, retention, and supervision of employees who commit such abuse."[9]

Specifically, Hornor contends the Legislature "explicitly made a public entity's liability for the sexual abuse of a child the same as that of a charitable entity," as demonstrated by the Governor's statement on signing the initial May 2019 version of N.J.S.A. 59:2-1.3(a), in which he explained he was "signing the bill based on a commitment from the bill's sponsors to introduce and swiftly pass a bill" to "clarify[] that public entities should be held to the same standard of liability that is applied to religious and nonprofit organizations." Governor's Signing Statement to S. 477 (May 13, 2019).

Hornor contends the final version of N.J.S.A. 59:2-1.3(a)(1) effective December 1, 2019, disabled the immunities afforded public entities under

[9] The Board concedes it can be sued directly for its alleged negligent hiring, retention and supervision of Hutler based on acts he committed both in and beyond the scope of his employment. See Di Cosala v. Kay, 91 N.J. 159, 170-74 (1982) (expressly recognizing "the tort of negligent hiring or retention of an incompetent, unfit or dangerous employee," and holding "the employee conduct which may form the basis of the cause of action need not be within the scope of employment"); N.J.S.A. 59:2-1.3(a)(2). The Board did not move to dismiss the counts of Hornor's complaint alleging its direct negligence — beyond its successful motion to strike the claim for punitive damages pursuant to N.J.S.A. 59:9-2(c).

N.J.S.A. 59:2-10 for damages resulting from sexual offenses caused by the willful, wanton or grossly negligent acts of their employees, resulting in the Board being subject to vicarious liability for Hutler's acts of sexual abuse outside the scope of his employment to the same extent as the defendant boarding school in Hardwicke under the aided-by-agency principle of Restatement (Second) of Agency § 219(2)(d).

Resolution of the parties' dispute requires an understanding of the scope of a public entity's liability for the acts of its employees under the Tort Claims Act prior to the 2019 amendments, and the effect of the amendments on Hornor's claims.

The Tort Claims Act

The New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to 12-3, is a complicated statute. Enacted in 1972 in twelve chapters after extended study in response to the Court's abrogation of the State's sovereign immunity to tort claims in Willis v. Department of Conservation and Economic Development, 55 N.J. 534 (1970), it reestablished "sovereign immunity in a manner consistent with the proposals contained in the 1972 Attorney General's Task Force Report." Velez v. City of Jersey City, 180 N.J. 284, 289 (2004). N.J.S.A. 59:1-2 declares it to be

> the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All of the provisions of this act should be construed with a view to carry out the above legislative declaration.

The essential structure of the statute and its analytic approach to liability and immunity — the warp and weft of the Act — is set out in N.J.S.A. 59:2-1:

> a. Except as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.
>
> b. Any liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person.

The Task Force Comment to Subsection (a) explains the choice of a statute that reimposed sovereign immunity unless liability is specified over a statute imposing liability with specified exceptions. Quoting the California Law Revision Commission, which led to the California Tort Claims Act of 1963 on which our Act is modeled, the Task Force explained "[a] statute imposing liability with specified exceptions . . . would invite actions brought in hopes of imposing liability on theories not yet tested in the courts and could result in greatly expanding the amount of litigation and the attendant expense which public entities would face." N.J.S.A. 59:2-1 Task Force Comment.

Thus, in analyzing a tort claim against a public entity in New Jersey, the first task is always to locate the predicate for liability in the Act. Troth v. State, 117 N.J. 258, 277 (1989) (O'Hern J., concurring). If there is no predicate for liability, the inquiry is at an end. "[P]ublic entities are immune from liability unless they are declared to be liable" by a provision of the Tort Claims Act.[10] N.J.S.A. 59:2-1 Task Force Comment.

If there is a statutory predicate for liability under the Act, N.J.S.A. 59:2-1(b) provides it will be subject to any immunity the public entity has under the Act, and otherwise, and to any defense available to a private person. Thus, "[e]ven when one of the Act's provisions establishes liability, that liability is ordinarily negated if the public entity possesses a corresponding immunity." Rochinsky v. State, Dep't of Transp., 110 N.J. 399, 408 (1988).

N.J.S.A. 59:2-1(b) "establishes the principle that even common-law and statutory immunities not contained in the Act can prevail over the Act's liability provisions." Id. at 409. "The statutory scheme recognizes that immunity from tort liability is a species of affirmative defense, which can

[10] The rule is opposite for public employees. "A public entity is deemed 'not liable for an injury' except as provided in the Act," N.J.S.A. 59:2-1, whereas "a public employee 'is liable for injury' except as otherwise provided" in the Act, N.J.S.A. 59:3-1. Chatman v. Hall, 128 N.J. 394, 402 (1992).

excuse responsibility for tort without negating the existence of fault." Kolitch v. Lindedahl, 100 N.J. 485, 502 (1985) (Handler J., dissenting). Justice Handler succinctly explained that a plaintiff bringing a negligence action against a public entity "must first establish the predicates for liability, and later avoid application of any provision granting the sovereign immunity." Ibid.

Although these basic principles are easy enough to grasp, explaining their application is not always so straightforward. Part of the problem is we often don't distinguish between situations in which the public entity is immune because there is no predicate for liability in the Tort Claims Act and those in which there is a liability predicate in the Act, but the entity has immunity, that is "absolution from liability," based on some other provision of the Act, or some other statute or the common law. Merenoff v. Merenoff, 76 N.J. 535, 547 (1978) (quoting Prosser, Law of Torts 970 (4th ed. 1971)). The best example is the phrase most often repeated in Tort Claims cases, that is, the "guiding principle" that governmental "immunity from tort liability is the general rule and liability is the exception." Polzo v. Cnty. of Essex, (Polzo I) 196 N.J. 569, 578 (2008) (quoting Coyne v. State Dep't of Transp., 182 N.J. 481, 488 (2005) (quoting Garrison v. Twp. of Middletown, 154 N.J. 282, 286 (1998))). Although undoubtedly true, it doesn't train the mind to identify and

differentiate between the liability and immunity provisions of a complicated statute.[11]

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[11] We would not be the first to acknowledge it is not always a simple matter to distinguish a liability predicate in the Tort Claims Act from an immunity. Although some provisions, like the plan or design immunity provided by N.J.S.A. 59:4-6 are unambiguously clear immunities for which the public entity bears the burden of proof, if not specific pleading, although that is certainly the better practice, see Rivera v. Gerner, 89 N.J. 526, 535 (1982), others, like N.J.S.A. 59:9-2(d), the $3,600 medical expense and permanency thresholds for pain and suffering damages, are harder to characterize.

The difficulty in distinguishing certain provisions of the Act as liability predicates or immunities is that they can be fairly characterized as defenses "going to the cause of action," which Judge Pressler described as "a hybrid species of legal fact which is defensive in that it is ordinarily defendant's rather than plaintiff's burden to plead, but elemental in that defendant's failure to do so will not bar his right to raise it and thus to defeat the action at any time during the litigation." Montag v. Bergen Bluestone Co., 145 N.J. Super. 140, 148 (Law. Div. 1976). See also Pressler & Verniero, Current N.J. Court Rules, cmt. 1.2.2 on R. 4:5-4 (2024) (noting an affirmative defense need not "be specially pleaded where the defense appears on the face of the complaint and clearly goes to the maintainability of the action").

Notwithstanding our analytical commitment to distinguishing between liability predicates and immunity provisions in the Tort Claims Act, the law being well-settled that "[w]hen both liability and immunity appear to exist, the latter trumps the former," Tice v. Cramer, 133 N.J. 347, 356 (1993), it is rare that a case turns on the distinction as this one does. See Rivera, 89 N.J. at 535 (noting the "little profit" to be had "from an extended analysis of the extent of a public entity's burden to plead and prove its affirmative defense of immunity [under N.J.S.A. 59:9-2(d)] or whether, as has been suggested in other fields of limited liability, the plaintiff bears the continuing burden of overcoming each and every limitation of a cause of action") (citations omitted).

Our Supreme Court has noted "[t]here are three principal liability sections in the Act": N.J.S.A. 59:2-2, incorporating the doctrine of respondeat superior; N.J.S.A. 59:2-3, addressing discretionary activities and including "both immunity and liability provisions"; and N.J.S.A. 59:4-2, providing liability for dangerous conditions of public property, Rochinsky, 110 N.J. at 409-10 — although there are certainly others tucked throughout the Act, see, e.g., N.J.S.A. 59:4-4 (establishing liability for failure to provide emergency signals on a street or highway); N.J.S.A. 59:9-2(a), (b) and (c) (barring pre-judgment interest, judgments based on strict liability, and punitive damages, respectively); N.J.S.A. 59:8-3(a) (barring suit against a public entity when a notice of claim has not been filed in accordance with the Act). See also Jones v. Morey's Pier, Inc., 230 N.J. 142, 157 (2017) (holding that "excluding contribution and indemnification claims from the tort claims notice

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Of course, the failure to meet the medical expense and permanency thresholds of N.J.S.A. 59:9-2(d) "in no way affects the maintainability of the action itself. It only limits the permissible extent of the recovery by eliminating one of the customary elements of common-law personal injury damages." Beauchamp v. Amedio, 164 N.J. 111, 119-20 (2000) (quoting Montag, 145 N.J. Super. at 149). It is thus not a "liability" predicate in the same way as N.J.S.A. 59:2-2, the Act's vicarious liability provision. See also C.W. v. Roselle Bd. of Educ., 474 N.J. Super. 644, 654 (App. Div.), leave to appeal den., 254 N.J. 172 (2023) (holding the Legislature did not eliminate the $3,600 medical expense threshold in N.J.S.A. 59:9-2(d) in suits against public entities for child sexual abuse under the 2019 amendments).

requirement would contravene the public policy stated by the Legislature . . . [that] 'public entities shall only be liable for their negligence within the limitations of this act'" (quoting N.J.S.A. 59:1-2)).

The scope of the liability predicates differs significantly, with some, like N.J.S.A. 59:2-2(a), establishing "sweeping vicarious liability" for public entities for the acts of their employees, Margolis and Novack, Title 59: Claims against Public Entities, cmt. 1 on N.J.S.A. 59:2-2 (2024), and others, like N.J.S.A. 59:4-2 "impos[ing] specific conditions" on a public entity's liability for the dangerous condition of its property, thus tightly circumscribing the liability the Act concedes, O'Connell v. State, 171 N.J. 484, 501 (2002) (Stein J., dissenting).

"The primary source of public entity liability" is, of course, contained in N.J.S.A. 59:2-2(a), providing "[a] public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances." N.J.S.A. 59:2-2 Task Force Comment. The section "establishes the principle of vicarious liability for all public entities." Ibid. Thus, "[t]he primary liability imposed on public entities is that of respondeat superior: when the public employee is liable for acts within the scope of that

employee's employment, so too is the entity; conversely, when the public employee is not liable, neither is the entity." Tice v. Cramer, 133 N.J. 347, 355 (1993) (citing N.J.S.A. 59:2-2). A public entity has no vicarious liability for acts of its employees outside the scope of employment. N.J.S.A. 59:2-2(a); Cosgrove v. Lawrence, 214 N.J. Super. 670, 680 (Law. Div. 1986) (explaining "once a determination is made that the act is not within the scope of employment," the focus of the action shifts from vicarious liability to consideration of whether the employer could be held directly liable for its negligent hiring and supervision), aff'd, 215 N.J. Super. 561 (App. Div. 1987).

Hornor concedes that Hutler's sexual abuse was outside the scope of his employment. Because N.J.S.A. 59:2-2 makes a public employer, like the Board, vicariously liable for the acts of an employee, like Hutler, only when the employee is acting within the scope of his employment, Hornor cannot establish a statutory predicate for the Board's vicarious liability for Hutler's acts. Although the absence of a liability predicate would ordinarily end our inquiry, Hornor contends the 2019 amendments to the Tort Claims Act provide him a basis for vicarious liability against the Board. We thus turn to those amendments.

The 2019 amendments to the Tort Claims Act

The 2019 amendments to the Tort Claims Act were part of the Child Victims Act, L. 2019, c. 120, L. 2019, c. 239, expansive legislation intended to greatly extend the statutes of limitations for claims of sexual abuse for both child and adult victims, create a two-year window for victims to bring claims time-barred even under the newly extended statutes, and expand the categories of potential defendants in such actions, "and for some actions permit retroactive application of standards of liability to past acts of abuse for which liability did not previously exist." S. Judiciary Comm. Statement to S. 477 (Mar. 7, 2019). In addition to creating new statutes of limitations, Chapter 120 amended the Tort Claims Act, the Child Sexual Abuse Act, N.J.S.A. 2A:61B-1, and the Charitable Immunity Act, N.J.S.A. 2A:53A-7 to -11.

As to the Tort Claims Act, Chapter 120 extended the statute of limitations for claims against public entities for sexual assault or abuse in accord with the newly enacted statute of limitations for sexual abuse claims, N.J.S.A. 2A:14-2a and -2b, and abrogated the notice and filing requirements in Chapter 8 for such claims. See W.S. v. Hildreth, 252 N.J. 506, 512-14 (2023) (explaining the effect of the extended statute of limitations and the abrogation

of procedural requirements for claims of sexual abuse filed against a public entity on or after December 1, 2019).

The parties' focus, and ours, is on N.J.S.A. 59:2-1.3, a new section inserted into the Tort Claims Act entitled "Liability for public entity, employee," adopted by Chapter 120 and amended by L. 2019, c. 239, both effective December 1, 2019. As presented for the Governor's signature, Chapter 120, the Senate Committee Substitute for Senate bill 477, section 7 provided:

> 7. (New section) Notwithstanding any other provision of law to the contrary, including but not limited to the "New Jersey Tort Claims Act," N.J.S.59:1-1 et seq., a public entity is liable in an action at law for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in section 2 of P.L.1992, c. 7 [N.J.S.A. 2A:30B-2], or sexual abuse as defined in section 1 of P.L.1992, c. 109 [N.J.S.A. 2A:61B-1].

The Committee Statement explained the purpose of section 7 was to eliminate public entity immunity for sexual abuse claims.

> This section provides that the "New Jersey Tort Claims Act," N.J.S.59:1-1 et seq., or any other law, that may provide some form of governmental immunity from lawsuits based on injuries resulting from acts of sexual abuse are inapplicable, so that any public entity, as defined in the "New Jersey Tort Claims Act," may be held liable in any such suit in the same manner as a private organization.

[S. Judiciary Comm. Statement to S. 477.]

Governor Murphy signed the bill into law on May 13, 2019. In his signing statement, however, he explained he was

> signing the bill based on a commitment from the bill's sponsors to introduce and swiftly pass a bill that will correct an error in the section of the bill relating to the liability of public entities. This section inadvertently fails to establish a standard of proof for cases involving claims filed against public entities. If unaddressed, the lack of clarity would create uncertainty and likely lead to additional litigation. I have received assurances that the Legislature will correct this omission by clarifying that public entities should be held to the same standard of liability that is applied to religious and nonprofit organizations. Applying a different standard would be unjustified.
>
> [Governor's Statement to S. Comm. Substitute for S. 477 (May 13, 2019).]

The Legislature, as promised, amended section 7 of Chapter 120, by passing Chapter 239, as amended by the Assembly Budget Committee, (now codified as N.J.S.A. 59:2-1.3), providing as follows with new language underlined and omitted language struck through:

> 1. Section 7 of P.L.2019, c. 120 [N.J.S.A.59:2-1.3] is amended to read as follows:
>
> 7. a. Notwithstanding any ~~other~~ provision of ~~law to the contrary, including but not limited to~~ the "New Jersey Tort Claims Act," N.J.S.59:1-1 et seq., to the contrary:

(1) immunity from civil liability granted by that act to a public entity ~~is liable in an action at law for an injury resulting from the commission of~~ or public employee shall not apply to an action at law for damages as a result of a sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in section 2 of P.L.1992, c. 7 [N.J.S.A. 2A:30B-2], or sexual abuse as defined in section 1 of P.L.1992, c. 109 [N.J.S.A. 2A:61B-1] being committed against a person, which was caused by a willful, wanton or grossly negligent act of the public entity or public employee; and

(2) immunity from civil liability granted by that act to a public entity shall not apply to an action at law for damages as a result of a sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in section 2 of P.L.1992, c. 7 [N.J.S.A. 2A:30B-2], or sexual abuse as defined in section 1 of P.L.1992, c. 109 [N.J.S.A. 2A:61B-1] being committed against a minor under the age of 18, which was caused by the negligent hiring, supervision or retention of any public employee.

b. Every action at law involving a public entity or public employee as described in subsection a. of this section shall be subject to the statute of limitations set forth in section 2 of P.L.2019, c. 120 [N.J.S.A. 2A:14-2a], and may be brought during the two-year period set forth in subsection a. of section 9 of P.L.2019, c. 120 [N.J.S.A. 2A:14-2b], notwithstanding that the action would otherwise be barred through application of the statute of limitations.

2. This act shall take effect on December 1, 2019, the same day that P.L.2019, c.120 [N.J.S.A. 2A:14-2a to -2c] takes effect, and shall apply to any cause of action

> filed on or after that date, as well as any cause of action filed prior to that effective date that has not yet been finally adjudicated or dismissed by a court as of that effective date.

The Assembly Budget Committee Statement to Chapter 239 (Assembly Bill 5392) explained the Legislature's purpose in retooling Chapter 120.

> The Assembly Budget Committee reports favorably Assembly Bill No. 5392, with committee amendments.
>
> This bill, as amended, establishes new liability standards in sexual abuse lawsuits filed against public entities and public employees. It would expressly provide that the statutory immunity from lawsuits granted to public entities and public employees pursuant to the "New Jersey Tort Claims Act," N.J.S. 59:1-1 et seq., would not be applicable with respect to the following types of sexual abuse lawsuits:
>
> — an action at law for damages against a public entity or public employee as a result of sexual abuse being committed against a person, which was caused by a willful, wanton or grossly negligent act of the public entity or public employee; or
>
> — an action at law for damages against a public entity as a result of sexual abuse being committed against a minor under the age of 18, which was caused by the negligent hiring, supervision or retention of any public employee.
>
> These types of lawsuits are the same types of lawsuits for which the general statutory immunity of the Charitable Immunity Act, P.L.1959, c.90 [N.J.S.A. 2A:53A-7 to -11] does not apply, thereby permitting such lawsuits to proceed against non-profit

organizations organized exclusively for religious, charitable, educational, or hospital purposes, and their trustees, directors, officers, employees, agents, servants and volunteers.

Based on the amendatory language set forth in the bill, any available immunity for public entities and public employees from some source of law other than the "New Jersey Tort Claims Act" could be raised by public entities and public employees as a defense to any of the aforementioned types of sexual abuse lawsuits.

. . . .

COMMITTEE AMENDMENTS

The committee amendments to the bill:

— expressly provide that only the specific immunity from lawsuits granted to public entities and public employees pursuant to the "New Jersey Tort Claims Act," N.J.S. 59:1-1 et seq., is not applicable with respect to the types of sexual abuse lawsuits described in the bill, thus any available immunity from some other source of law could be raised by public entities and public employees as a defense to any such lawsuits; and

— reword the bill's descriptions of the above described sexual abuse lawsuits for which public entities and public employees could not claim statutory immunity under the "New Jersey Tort Claims Act" to make these descriptions more consistent with how other causes of action are described under that act.

FISCAL IMPACT:

> The Office of Legislative Services (OLS) expects that the bill will expose the State, school districts, and local units of government to civil claims that may result in added legal defense expenditures and substantial settlements and judgments against affected governments. The OLS, however, has no information on the number of cases that may be brought against the State, school districts, and local units of government; the number of cases that may result in a settlement or court-awarded damages against governmental entities; and the amount of settlements and damages awarded.
>
> [Assemb. Budget Comm. Statement to A. 5392 with committee amendments (June 17, 2019).]

In our view, the Legislature's "amendment" of Chapter 120, section 7 by Chapter 239 — essentially its wholesale replacement of that section — makes plain the Legislature responded to Governor Murphy's concern about public entity liability under Chapter 120, by shifting N.J.S.A. 59:2-1.3 from a liability predicate ("a public entity is liable in an action at law for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act . . . or sexual abuse") to an immunity provision ("immunity from civil liability granted by that act to a public entity or public employee shall not apply to an action at law for damages as a result of a sexual assault, any other crime of a sexual nature, a prohibited sexual act . . . or sexual abuse . . . being committed against a person, which was caused by a

willful, wanton or grossly negligent act of the public entity or public employee"). See DiProspero v. Penn, 183 N.J. 477, 492 (2005) (noting "the best indicator of [legislative] intent is the statutory language").

If we had any doubt about the plain meaning of the text, which we don't, it would be put to rest by the Assembly Budget Committee's Statement that the amendments it made to Chapter 129, passed by both houses and signed by the Governor,

> expressly provide that only the specific immunity from lawsuits granted to public entities and public employees pursuant to the "New Jersey Tort Claims Act," N.J.S. 59:1-1 et seq., is not applicable with respect to the types of sexual abuse lawsuits described in the bill, thus any available immunity from some other source of law could be raised by public entities and public employees as a defense to any such lawsuits.

The statutory text along with the Assembly Budget Committee Statement establish unequivocally that Chapter 239 was intended to disable any immunity provided by the Tort Claims Act to a public entity or to a public employee for their willful, wanton or grossly negligent acts in sexual abuse cases.[12] See Roberts v. State, Div. of State Police, 191 N.J. 516, 521 (2007)

[12] The text also disables any Tort Claims Act immunity a public entity has for sexual assault or abuse committed against a minor under eighteen caused by

the entity's negligent hiring, supervision or retention of any public employee, N.J.S.A. 59:2-1.3(a)(2), mirroring N.J.S.A. 2A:53A-7.4. The Court held many years ago that the Tort Claims Act provides no immunity to a public entity for negligent, hiring, supervision or retention. See Frugis, 177 N.J. at 268-70 (affirming directed verdict for Frugis on negligent supervision claim against the school board).

As to the provision of N.J.S.A. 59:2-1.3(a)(1) disabling any immunity the Act provides a public employee for claims arising out of sexual assault or abuse caused by a willful, wanton or grossly negligent act — mirroring the limited immunity provided the employees of charitable organizations in N.J.S.A. 2A:53A-7(c) — the Tort Claims Act provides no immunity to public employees for such conduct. N.J.S.A. 59:3-1(a) makes public employees liable for injury caused by their acts or omissions to the same extent as private persons, except as otherwise provided by the Act. N.J.S.A. 59:3-1 Task Force Comment. Further, N.J.S.A. 59:3-14(a) expressly provides that "[n]othing in this act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct." But see N.J.S.A. 59:3-1(c) providing "[a] public employee is not liable for an injury where a public entity is immune from liability for that injury."

Subsection (c) was added by amendment to 59:3-1 in response to the Court's holding in in Chatman v. Hall, 128 N.J. 394 (1992) that public employees could be held liable for dangerous conditions of public property in cases where the entity was immune. See Velez, 180 N.J. at 290-91 (explaining the amendment was intended "to create a parallel liability scheme for public employees and public entities").

In the event a public employee is found liable for an act of sexual assault or abuse outside the scope of his employment — thus leaving his public employer without liability under 59:2-2(a) — N.J.S.A. 59:2-1.3(a)(1) would presumably deprive the employee of the immunity provided him in 59:3-1(c), consonant with 59:3-14(a).

(noting usefulness of "legislative history, sponsors' statements, committee reports, and other extrinsic evidence" in ascertaining legislative intent). As both the statutory language and the legislative history make clear, N.J.S.A. 59:2-1.3, as amended by Chapter 239, strips public entities of those Tort Claims Act immunities that might otherwise absolve them of liability in sexual abuse cases; it does not provide a statutory predicate for the vicarious liability of public entities for sexual assault or abuse committed outside a public employee's scope of employment. See N.J.S.A. 59:2-1(a), 2-2(a).

Even having resolved, however, that N.J.S.A. 59:2-1.3, as amended, has not effected any change in the Act's liability predicates, we are still left with the same problem we confronted in E.C. — that "N.J.S.A. 59:2-1.3(a) does not specify what provisions of the Tort Claims Act it intended to disable." 470 N.J. Super. at 53. As Margolis and Novack put it: "[s]ubsection (a)(1) purports only to eliminate pre-existing immunities for the entity or its employee when either . . . has acted 'willfully, wantonly or with gross negligence' in causing damages resulting from crimes and other acts constituting sexual assault or abuse," without identifying "what those immunities might have been." Cmt. on N.J.S.A. 59:2-1.3, at 42. In E.C. we held that N.J.S.A. 59:2-10, which states that "[a] public entity is not liable for

the acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct," is an immunity "that is disabled" in sexual abuse cases by N.J.S.A. 59:2-1.3.[13] 470 N.J. Super. at 53-54, 56.

E.C. however, is not helpful to Hornor here. Hornor concedes the sexual abuse committed by Hutler was committed outside the scope of his employment. See Cosgrove, 215 N.J. Super. at 562-63 (holding social worker-therapist's sexual relationship with his patient was outside his scope of employment under Restatement (Second) of Agency § 228 (1958) adopted in New Jersey). See also Davis, 209 N.J. at 303 ("[o]nly rarely will intentional torts fall within the scope of employment").

N.J.S.A. 59:2-10 provides immunity to a public entity from vicarious liability for crimes, actual fraud, actual malice, or willful misconduct committed by an employee within the employee's scope of employment, for

[13] We agree with the holding in E.C. that N.J.S.A. 59:2-10 is a public entity immunity disabled under N.J.S.A. 59:2-1.3, at least as to willful, wanton or grossly negligent conduct in cases of sexual assault or abuse. 470 N.J. Super. at 54. We also agree that N.J.S.A. 59:9-2(d) is not an immunity and thus not disabled under N.J.S.A. 59:2-1.3. Ibid. We reject E.C.'s referring to the Act's statutory predicates for liability as "limitations on liability," however, as it suggests to us "[a] statute imposing liability with specified exceptions," that is "limitations on liability," instead of the form chosen for the Tort Claims Act, one providing "that public entities are immune from liability unless they are declared to be liable by an enactment." N.J.S.A. 59:2-1 Task Force Comment.

which the entity would otherwise be liable by virtue of N.J.S.A. 59:2-2(a), the Act's vicarious liability predicate. See Fielder v. Stonack, 141 N.J. 101, 130 (1995) (denying summary judgment to officer involved in a police chase based on material issue of disputed fact as to officer's willful misconduct occurring in the scope of his employment but granting summary judgment to his Township employer, because if the officer's "conduct is found to constitute willful misconduct, the Township is not liable for his actions. N.J.S.A. 59:2-10. If, however, his conduct does not rise to the level of willful misconduct, both he and the Township are granted immunity under [N.J.S.A. 59:]5-2(b)(2)"). See also N.J.S.A. 59:3-14(a) ("Nothing in this act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct") (emphasis added); Cosgrove, 215 N.J. Super. at 563 (noting in the absence of a basis for vicarious liability under 59:2-2 of the Tort Claims Act, the public entity's immunity under 59:2-10 is irrelevant).

Disabling the Board's immunity under N.J.S.A. 59:2-10 from liability for acts committed within the scope of Hutler's employment under N.J.S.A. 59:2-1.3, still leaves Hornor without a statutory predicate for the Board's vicarious liability for acts Hornor concedes were committed outside the scope of Hutler's

employment. "[P]laintiffs alleging negligence must first establish the predicates for liability, and later avoid application of any provision granting the sovereign immunity." Kolitch, 100 N.J. at 502 (Handler J., dissenting). It doesn't benefit a plaintiff to avoid a statutory provision granting the public entity immunity, like 59:2-10, unless he has managed to establish a predicate for liability first. See Cosgrove, 215 N.J. Super. at 563

Relying on Governor Murphy's Statement on signing Chapter 120, that "public entities should be held to the same standard of liability that is applied to religious and nonprofit organizations," Hornor contends that Chapter 239 "expressly and intentionally makes the liability of a public entity equal to that of a charitable entity," and thus the Board "may now also be held vicariously liable for Hutler's acts of sexual abuse," although outside the scope of his employment, under the aided-by-agency theory recognized by the Court in Hardwicke. We thus turn to consider Hardwicke and the 2019 amendments to the Charitable Immunity Act and their effect, if any, on Hornor's effort to hold the Board vicariously liable for the sexual assault committed by Hutler outside the scope of his employment.

The Charitable Immunity Act, Hardwicke and the 2019 amendments

Our Supreme Court abolished charitable immunity in 1958 in three decisions issued on the same day, Collopy v. Newark Eye and Ear Infirmary, 27 N.J. 29, 47-48 (1958), Dalton v. St. Luke's Catholic Church, 27 N.J. 22, 27-28 (1958) and Benton v. YMCA, 27 N.J. 67, 71-72 (1958). "Within a week, the Legislature acted to restore the doctrine by introduction of an act to provide immunity for all nonprofit corporations organized for religious, charitable, educational, or hospital purposes from negligence suits brought by any person who was a beneficiary, to whatever degree, of the organization's works."[14] Schultz v. Roman Cath. Archdiocese of Newark, 95 N.J. 530, 536-37 (1984). As the Court has since noted, "the effect of this statute was to reinstate the common law doctrine as it existed prior to its demise at the hands of the 1958 trilogy of Benton, Collopy and Dalton." Tonelli v. Bd. of Educ. of Twp. of Wyckoff, 185 N.J. 438, 444 (2005) (quoting Parker v. St. Stephen's Urban Dev. Corp., Inc., 243 N.J. Super. 317, 323 (App. Div. 1990)).

In 1984, the Supreme Court in Schultz, a case involving the suicide of a child after he was sexually abused by a Franciscan employed by the Roman

[14] Justice Hoens provides a detailed history of the Charitable Immunity Act in her dissent in P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132, 163-71 (2008).

Catholic Archdiocese of Newark, held the charity was not liable to the boy's parents for its alleged "reckless, careless, and negligent" hiring of the boy's abuser and "in failing to supervise him." 95 N.J. at 532. Justice Handler, joined by Justices Schreiber and Pollock, dissented, asserting "[a]n unstrained reading of the statutory language conveys the clear meaning that the wrongful conduct that is the focus of the statute consists of 'negligence.' There is not the slightest linguistic hint that . . . 'negligence' . . . denotes anything other than ordinary negligence." Id. at 542 (Handler J., dissenting). Justice Handler maintained "the [charitable] immunity statute has no application to the victim of an intentional tort committed by a dangerous employee of a charity." Id. at 552 (Handler J., dissenting).

In 1995, the Legislature amended the Act, extending immunity to a charity's trustees, directors, officers, employees, agents and volunteers, but specifically denying those individuals immunity for any "willful, wanton or grossly negligent act of commission or omission, including sexual assault and other crimes of a sexual nature." L. 1995, c. 183, § 1 (codified at N.J.S.A. 2A:53A-7(a) and -7(c)). "That amendment did not make the charity itself liable to a victim of sexual abuse; it did, however, strip immunity from employees, officers, and volunteers, who otherwise would be within the broad

scope of the Act's historically protective sweep." P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132, 170 (2008) (Hoens, J., dissenting).

In 2005, the Legislature again amended the Act, this time declaring that the immunity provided to the charity "shall not apply to a claim in any civil action that the negligent hiring, supervision or retention of any employee, agent or servant resulted in a sexual offense being committed against a person under the age of 18 who was a beneficiary of the nonprofit organization." L. 2005, c. 264 § 1 (codified at N.J.S.A. 2A:53A-7.4). See P.V. ex rel. T.V. v. Camp Jaycee, 393 N.J. Super. 19, 27 n.3 (App. Div. 2007) (noting as the plaintiff was a twenty-year-old, the "case would not fall within [N.J.S.A. 2A:53A-7.4's] exception to the Charitable Immunity Act even if plaintiffs' complaint could be read to assert a claim for Camp Jaycee's alleged negligent hiring, supervision or retention of employees"), aff'd, 197 N.J. 132 (2008).

Further, the Legislature made the law applicable to pending actions and to any action for which the statute of limitations had yet to expire. L. 2005, c. 264, § 2 (codified at N.J.S.A. 2A:53A-7.5). The Senate Judiciary Committee's Statement to the bill specifically referenced the Court's holding in Schultz, and that the bill would make the Charitable Immunity Act inapplicable in such cases. S. Judiciary Comm. Statement to S. 540 (March 1, 2004).

The following year, in Hardwicke, the Court adopted the position of the dissenters in Schultz, holding the Charitable Immunity Act "immunizes charitable entities for negligence only," "and not 'other forms of aggravated wrongful conduct, such as malice or fraud, or intentional, reckless and wanton, or even grossly negligent behavior.'" 188 N.J. at 97, 99 (quoting Schultz, 95 N.J. at 542) (Handler, J., dissenting). The Court found the Legislature's 2005 amendment eliminating immunity for negligent hiring resulting in the sexual abuse of a minor, "strongly" suggested it intended to eliminate the only immunity the Charitable Immunity Act "provided — the immunity for negligence." Id. at 99.

The Court in Hardwicke also found the Boychoir School was "a 'person' standing 'in loco parentis' within a 'household'" to its boarding students, thus establishing it could be held liable as a "passive abuser" under the Child Sexual Abuse Act, N.J.S.A. 2A:61B-1. Id. at 86-94. Along with rejecting the School's argument that the Charitable Immunity Act immunized it from liability for Hardwicke's statutory claims, the Court likewise held the Act did not shield the School from Hardwicke's related common-law claims, rejecting its argument that it could not be held vicariously liable for the intentional torts of its employees occurring outside the scope of employment. Id. at 99-102.

The Court held the same considerations that informed its analysis in Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 619-20 (1993), applied to common law claims for child abuse that were based on a statutory violation of the Child Sexual Abuse Act. Id. at 102. Given the important public policy to protect children from sexual abuse articulated in that Act, the Court held the Boychoir School could be held vicariously liable for common law claims based on conduct falling within the Act's definition of sexual abuse committed by its employees acting outside the scope of their employment under Restatement (Second) of Agency § 219(2)(d)[15] "if an employer [had] delegate[d] the

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[15] Section 219 of the Restatement (Second) of Agency provides:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or

authority to control the work environment to a supervisor and [the] supervisor abuse[d] [the] delegated authority" or "the authority delegated by the employer to the supervisor aided the supervisor in injuring the plaintiff."[16] Hardwicke, 188 N.J. at 100-02 (quoting Lehmann, 132 N.J. at 620) (alterations in original).

Thus, to summarize the state of the law before the 2019 amendments, charitable entities were immunized under the Charitable Immunity Act for only simple negligence following the Court's 2006 decision in Hardwicke and were without even that immunity for claims of negligent hiring, supervision or retention resulting in the sexual abuse of a child under the age of eighteen

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> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

[16] The Court also referenced its extension of the holding in Lehmann to claims brought under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -9 in Abbamont v. Piscataway Township Board of Education, 138 N.J. 405, 415-18 (1994). Hardwicke, 188 N.J. at 101-02. The discussion of vicarious liability in Abbamont, however, was focused on the employer's liability for a supervisor's acts within the scope of employment consistent with the statute's definition of "'retaliatory action' as 'the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.'" Abbamont, 138 N.J. at 414 (quoting N.J.S.A. 34:19-2(e)).

following the enactment of N.J.S.A. 2A:53-7.4 in 2005. After Hardwicke, employers qualifying as passive abusers under the Child Sexual Abuse Act could also be held vicariously liable for common law claims based on conduct falling within the Act's definition of sexual abuse committed by their employees acting outside the scope of their employment in accord with section 219(2)(d) of the Restatement (Second) of Agency. A nonprofit entity's trustees, directors, officers, employees, agents and volunteers enjoyed charitable immunity for tort claims alleging negligence but were without immunity for any "willful, wanton or grossly negligent act of commission or omission, including sexual assault and other crimes of a sexual nature" pursuant to N.J.S.A. 2A:53A-7(a) and -7(c).

Against that backdrop, we consider the 2019 amendments to the Charitable Immunity Act. Chapter 120 amended two provisions of the Act — N.J.S.A. 2A:53A-7(c) and N.J.S.A. 2A:53A-7.5.

N.J.S.A. 2A:53A-7(c) was amended to provide:

> c. Nothing in this section shall be deemed to grant immunity to: (1) any nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes, or its trustee, director, officer, employee, agent, servant or volunteer, causing damage by a willful, wanton or grossly negligent act of commission or omission, including sexual

assault ~~and~~, any other ~~crimes~~ crime of a sexual nature, a prohibited sexual act as defined in section 2 of P.L.1992, c. 7 [N.J.S.A. 2A:30B-2], or sexual abuse as defined in section 1 of P.L.1992, c. 109 [N.J.S.A. 2A:61B-1]; (2) any trustee, director, officer, employee, agent, servant or volunteer causing damage as the result of the negligent operation of a motor vehicle; or (3) an independent contractor of a nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes.

N.J.S.A. 2A:53A-7.5 was amended to provide:

a. The provisions of this supplementary act, P.L.2005, c. 264 [N.J.S.A. 2A:53A-7.4 et seq.], shall apply prospectively and also shall be applicable to all civil actions for which the statute of limitations has not expired as of the effective date of this act, and subsequently, not expired as of the effective date of P.L.2019, c. 120 [N.J.S.A. 2A:14-2a et seq.], including the ~~statutes of limitation~~ statute of limitations set forth in N.J.S.A. 2A:14-2, section 2 of P.L.2019, c. 120 [N.J.S.A. 2A:14-2a], section 1 of P.L.1964, c. 214 [N.J.S.A. 2A:14-2.1], ~~section 1of P.L.1992, c. 109 [N.J.S.A. 2A:61B-1]~~ or any other statute. These applicable actions include but are not limited to matters filed with a court that have not yet been dismissed or finally adjudicated as of the effective date of this act or P.L.2019, c. 120 [N.J.S.A. 2A:14-2a et seq.].

b. Notwithstanding the provisions of subsection a. of this section, the provisions of P.L.2005, c. 264 [N.J.S.A. 2A:53A-7.4] shall apply to all civil actions for an injury resulting from an act that

> occurred prior to the effective date of P.L.2019, c. 120 [N.J.S.A. 2A:14-2a et seq.], and these actions shall be subject to the statute of limitations set forth in section 2 of P.L.2019, c. 120 [N.J.S.A. 2A:14-2a].

The effect of these amendments, as explained in the Statement of the Senate Judiciary Committee, (besides adding to the list of sexual offenses included in the willful, wanton and grossly negligent acts for which there is no immunity) was to codify the holding in Hardwicke "that organizational charitable immunity only applies to protect organizations from lawsuits claiming injury based on merely negligent acts, not more aggravated forms of wrongful conduct, such as willful, wanton or grossly negligent acts," including sexual assault or abuse. S. Jud. Comm. Statement to S. 477; N.J.S.A. 2A:53A-7(a). The Committee noted that prior to Hardwicke, "the Supreme Court and lower courts found that the act did shield organizations from liability for gross negligence and even intentional conduct committed by its trustees, directors, officers, employees, agents, servants, or volunteers," citing Schultz, 95 N.J. at 535-536 and Monaghan v. Holy Trinity Church, 275 N.J. Super. 594, 604 (App. Div. 1994) (holding the immunity under the Charitable Immunity Act extends to allegations of gross negligence). Ibid.

Further, the Legislature made that more limited organizational immunity, as well as the exception in N.J.S.A. 2A:53A-7.4 making charitable "organizations liable for acts of mere negligence in the hiring, supervision, or retention of an employee . . . resulting in sexual abuse committed against a minor under the age of 18," applicable to any suit filed "under the new, extended statute[s] of limitations [N.J.S.A. 2A:14-2a] . . . or . . . during the . . . two-year filing window for otherwise time-barred claims," N.J.S.A. 2A:14-2b. Ibid.

For a child victim, the limitations period is thirty-seven years after the child turns eighteen, that is, age fifty-five, or within seven years of discovery, whichever is later. N.J.S.A. 2A:14-2a(a)(1). For persons abused as adults, the limitations period is seven years after discovery. N.J.S.A. 2A:14-2a(b)(1). As noted in the Statement of the Judiciary Committee, "[t]he retroactive expansion of organizational liability under [N.J.S.A. 2A:53A-7(c)] does not create any additional retroactive liability for trustees, directors, officers, employees, agents, servants, or volunteers, as they were always generally liable for their own willful, wanton or grossly negligent acts," N.J.S.A. 2A:53A-7(c). S. Jud. Comm. Statement to S. 477. The same is true of the retroactive expansion of the Act's exception for organizational liability

for negligent hiring resulting in the sexual abuse of a minor, N.J.S.A. 2A:53A-7.4, as "[t]he standard immunity for negligent acts provided to such persons by the Charitable Immunity Act, as amended in 1995 . . . is not pierced by the exception established in P.L.2005, c.264 [N.J.S.A. 2A:53A-7.4]." Ibid.

Thus, far from signaling a "sea change in the law," as Hornor's counsel asserts, the 2019 amendments to the Charitable Immunity Act largely codified the limits of the law of charitable immunity as it has existed for nearly the last twenty years. The change is its applicability to cases like this one in which the events took place almost forty-five years ago when Hornor was a freshman in high school in 1978 and 1979. Stated differently, the 2019 amendments to the Charitable Immunity Act didn't broaden liability for non-profit entities, it lengthened it — significantly.[17]

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[17] That is not true of all the changes included in the 2019 Crime Victims Act. Besides disabling immunities provided to public entities in N.J.S.A. 59:2-10, the amendment to the Child Sexual Abuse Act, N.J.S.A. 2A:61B-1, by Chapter 120 broadened the category of passive abusers who could be liable under the statute to include persons standing in loco parentis "who knowingly permit[] or acquiesce[] in sexual abuse," removing the requirement that those persons be "within the household," although that change was made prospective only. L. 2019, c. 120 §§ 4, 2, 9 (May 13, 2019) (codified at N.J.S.A. 2A:61B-1(a)(1), 61B-1(b), 14-2a(a)(1), 14-2b(a)); S. Jud. Comm. Statement to S. 477 § 4. See also Doe ex rel. Doe v. Small, 654 F. Supp. 3d 376, 401-02 (D.N.J. 2023)

The effect of the 2019 amendments on plaintiff's vicarious liability claims

Although we have no hesitation in agreeing with Hornor's counsel that in enacting Chapter 239, the Legislature expressly disabled, retroactively, any immunity afforded a public entity by the Tort Claims Act for willful, wanton or grossly negligent acts resulting in sexual assault or abuse, as well as any immunity for negligent hiring, supervision and retention resulting in the sexual abuse of a minor, mirroring provisions of the Charitable Immunity Act, including those changes made in the 2019 amendments,[18] we do not agree the

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(dismissing claim against school district relying on the Senate Judiciary's Statement "that the removal of 'in the household' from the [Child Sexual Abuse Act] is 'intended to only apply prospectively'").

[18] Owing to the complicated structure of the Tort Claims Act, however, achieving symmetry between it and the Charitable Immunity Act in the two types of actions contemplated in the 2019 amendments is challenging. And it would appear that even after the 2019 amendments, the immunity provided charitable entities by the Charitable Immunity Act remains broader than that provided public entities under the Tort Claims Act.

For example, N.J.S.A. 2A:53A-7(c) of the Charitable Immunity Act, as amended, immunizes charitable entities from claims of negligence, including for acts or omissions resulting in sexual assault or abuse, while the Tort Claims Act has long been held not to provide a public entity any immunity for such claims in its in loco parentis role. See Jerkins ex rel. Jerkins v. Anderson, 191 N.J. 285, 289, 295 (2007) (holding in recognition of the many "foreseeable dangers" children face during the school day, "a school's duty to exercise reasonable care for the children in its custody is integral to our public

education system"); Frugis, 177 N.J. at 270 ("School personnel owe a duty to exercise reasonable care for the safety of students entrusted to them.").

We, thus, disagree with the example in E.C. that N.J.S.A. 59:2-1.3(a)(1) "would apply when a public entity is an occupier of real property — like a school — and provides woefully inadequate security, thereby allowing a predator to enter the school and commit a sexual crime against a student." 470 N.J. Super. at 50. We are of the opinion "the acts or omissions of the public entity" in that instance would be assessed based on the duty of reasonable care, as in Jerkins and Frugis, not "through application of the willful, wanton or grossly negligent standard" of 59:2-1.3(a)(1). Ibid. Applying N.J.S.A. 59:2-1.3(a)(1) in that example would immunize a public entity for its negligence, contrary to cases, like Jerkins and Frugis, that have not found any immunity available in the Tort Claims Act for those entities under the circumstances.

The duty of the public entity would be different if it did not stand in loco parentis to the claimant. See Foster v. Newark Hous. Auth., 389 N.J. Super. 60, 66 (App. Div. 2006) (claimant alleging injury based on inoperable lock must establish housing authority failed to prevent dangerous condition of public property under N.J.S.A. 59:4-2 (citing Bligen v. Jersey City Hous. Auth., 131 N.J. 124, 136-37 (1993))). But a claimant would be obligated to demonstrate the entity had been palpably unreasonable, notwithstanding the dangerous condition of the entity's property, as it constitutes a predicate for liability. N.J.S.A. 59:4-2 ("Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable."); Kolitch, 100 N.J. at 492-93.

Likewise, a public entity, even without in loco parentis responsibilities, is not immunized by the Tort Claims Act for claims of negligent hiring, supervision and retention regardless of the age of the claimant or the nature of the injury. See Hoag v. Brown, 397 N.J. Super. 34, 54-55 (App. Div. 2007) (holding the vicarious liability immunity provided public entities in N.J.S.A. 59:2-10 does not bar a direct claim against the entity for negligent hiring, retention and supervision). Thus, adding 59:2-1.3(a)(2) to the Act, to mirror N.J.S.A.

Board "may now also be held vicariously liable for Hutler's acts of sexual abuse," although outside the scope of his employment, under the aided-by-agency theory recognized by the Court in Hardwicke.

Hornor's counsel fundamentally misapprehends the effect of the 2019 amendments on the Charitable Immunity Act and, ultimately, on the viability of Hornor's vicarious liability claims against the Board under the Tort Claims Act. In our view, the 2019 amendments to those two statutes have not had, nor were intended to have had, any effect on the law of agency as applied to either nonprofit organizations or public entities.

There is absolutely no indication in either the text of N.J.S.A. 2A:53A-7(c) of the Charitable Immunity Act or its legislative history to indicate the Legislature intended anything other than to codify the central holding in Hardwicke that the Charitable Immunity Act "immunizes simple negligence only, and not 'other forms of aggravated wrongful conduct, such as malice or fraud, or intentional, reckless and wanton, or even grossly negligent behavior.'" 188 N.J. at 97 (quoting Schultz, 95 N.J. at 542 (Handler, J.,

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2A:53A-7.4, the 2005 statute excepting claims of negligent hiring, supervision or retention resulting in the sexual abuse of a youth under eighteen from the immunity otherwise provided charitable organizations, did not alter the already existing broader duty of public entities because 59:2-1.3, by its terms, only disables immunities "granted by that act."

dissenting)). To state the obvious, the Charitable Immunity Act is a statute addressing the immunity of charitable entities for tort claims, not a statute addressing the common law doctrine of respondeat superior.

The 2019 amendments to the Charitable Immunity Act codified, and made retroactive, the holding in Hardwicke that charitable entities have no immunity for willful, wanton or grossly negligent acts and also made retroactive the exception in N.J.S.A. 2A:53A-7.4, providing charitable entities have no immunity whatsoever for claims of negligent hiring, supervision or retention resulting in a sexual offense being committed against a beneficiary under the age of eighteen. The 2019 amendments likewise disabled any immunities the Tort Claims Act provided public entities that might otherwise absolve them of liability in sexual abuse cases for willful, wanton or grossly negligent acts, identified in E.C. as N.J.S.A. 59:2-10, which immunizes a public entity "for the acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct." 470 N.J. Super. at 53-55. As already noted, however, that statute immunizes a public entity from acts or omissions committed by an employee within the employee's scope of employment, for which the entity would otherwise be liable by virtue of N.J.S.A. 59:2-2(a). It does not provide a liability predicate for Hornor's claim

that the Board is vicariously liable for Hutler's sexual assault, which Hornor admits was committed outside the scope of Hutler's employment.

As the Supreme Court noted in Davis, "[t]he primary focus of [Hardwicke]," beyond its landmark holding reinterpreting the scope of immunity provided by the Charitable Immunity Act, "was the impact of the [Child Sexual Abuse Act], in which the Legislature provided for a private right of action against a 'passive abuser' who knowingly permits or acquiesces in the sexual abuse of a child." 209 N.J. at 290. Having decided that Hardwicke had "stated a statutory cause of action against the School for sexual abuse" under the Child Sexual Abuse Act and was not barred from pursuing claims for "willful, wanton or grossly negligent conduct" under the Charitable Immunity Act, the Court held Hardwicke could "pursue his statutory cause of action and any common-law claims he may have that are based on willful, wanton or grossly negligent conduct, and/or negligent hiring, supervision and retention" against the Boychoir School. Hardwicke, 188 N.J. at 99.

Recalling the "important public policies" the Legislature sought to vindicate in the Law Against Discrimination and the Conscientious Employee Protection Act that had impelled the Court to adopt section 219(d) of the Restatement (Second) of Agency as the appropriate framework for evaluating

employer liability in employment discrimination and retaliation cases, the Court held:

> The considerations that informed our analyses in Lehmann and Abbamont apply equally to claims predicated on facts indicating child abuse. . . . [T]he [Child Sexual Abuse Act] recognizes the vulnerability of children and demonstrates a legislative intent to protect them from victimization. In our view, common-law claims based on child abuse are supported by the same compelling rationale. The [Child Sexual Abuse Act] imposes responsibility on those in the best position to know of the abuse and stop it; application of section 219 of the Restatement to plaintiff's common-law claims advances those goals.
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> [Id. at 102.]

Hornor's counsel's argument that "after Hardwicke, the only thing that prevented a public school from being held vicariously liable for an employee's sexual abuse of a child was section 59:2-10 of the [Tort Claims Act]" is incorrect. The reason public schools weren't liable for the sexual abuse of their students after Hardwicke is that they didn't qualify as "passive abusers" under the Child Sexual Abuse Act because they did not stand in loco parentis "within the household." See J.P. v. Smith, 444 N.J. Super. 507, 522-24 (App. Div. 2016); D.M. v. River Dell Reg'l High Sch., 373 N.J. Super. 639, 649 (App. Div. 2004). That, of course, changed after the 2019 amendment to the

Act deleting the "within the household" requirement. Going forward, public schools and private schools, just as any "other person standing in loco parentis who knowingly permits or acquiesces in sexual abuse" of a child, can be held directly liable as a passive abuser under the Child Sexual Abuse Act. N.J.S.A. 2A:61B-1; J.H. v. Mercer Cnty. Youth Det. Ctr., 396 N.J. Super. 1, 11 (App. Div. 2007) (relying on Hardwicke to hold county youth detention center qualified as a "person" under the Act).[19]

The 2019 amendments to the Child Sexual Abuse Act, while providing for the direct liability of an organizational entity as a passive abuser, do not address the entity's vicarious liability for sexual assault or abuse committed by

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[19] In Davis, both our court and the Supreme Court noted our error in J.H. in finding the Court in Hardwicke had held the Boychoir School owed a "non-delegable duty" to Hardwicke under Restatement (Second) of Agency § 219(2)(c), on which we relied to hold that "under modern principles of agency law liability of an employer for the torts of an employee acting outside the scope of his employment is permitted when the conduct violates a non-delegable duty of the employer," 396 N.J. Super. at 17. See Davis v. Devereux Found., 414 N.J. Super. 1, 10 (App. Div. 2010) (finding "no basis for reading the Court's opinion [in Hardwicke] as introducing what would clearly be a major doctrinal change respecting the law governing institutions that care for children and the disabled" by finding they owed the individuals in their care a non-delegable duty based on the Child Sexual Abuse Act), aff'd in part, and rev'd in part on other grounds, 209 N.J. at 291 n.5 (noting "to the extent that the panel deciding J.H. invoked a 'non-delegable' common-law duty, purportedly created by this Court in Hardwicke and Frugis, it misconstrued this Court's decisions in those cases").

an active abuser-employee. Whether or not a private day school qualifying as a passive abuser under the Child Sexual Abuse Act may be held vicariously liable for the sexual assault or abuse of a student occurring on or after the effective date of the 2019 amendments pursuant to the aided-by-agency clause of Restatement (Second) of Agency § 219(2)(d) under the Charitable Immunity Act — an issue not addressed in those amendments — a public school cannot be held vicariously liable for such under the Tort Claims Act.[20]

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[20] The plaintiff in Davis did not argue that Devereux was vicariously liable for its employee's criminal act in severely scalding her developmentally disabled son, although outside the scope of employment, under the aided-by-agency theory of section 219(d)(2) of the Restatement (Second) of Agency, and the Court did not address the theory in its lengthy discussion of the doctrine of respondeat superior and section 219 in that case. We have elsewhere noted that the aided-by-agency clause in section 219(d)(2) has proved controversial, largely because "a broad reading of its language would result in an employer's strict liability" for its employee's intentional torts committed outside the scope of employment, E.S. for G.S. v. Brunswick Inv. Ltd. P'ship, 469 N.J. Super. 279, 299 (App. Div. 2021), the same reason the Court rejected imposing a non-delegable duty on in loco parentis institutions in Davis, 209 N.J. at 291-92 ("The liability of in loco parentis institutions has [previously] been determined in accordance with traditional negligence principles; the 'non-delegable' duty proposed here, amounting to an employer's absolute liability for an employee's criminal act, has not been accepted by this Court in any setting similar to that of this case."). See also Aguas v. State, 220 N.J. 494, 511 (2015) (explaining the Court had "declined to hold employers strictly liable for hostile work environment sexual harassment by supervisors" in Lehmann because it had concluded that "in some cases strict liability would be unjust — for example, 'where a supervisor rapes one of his subordinates in the workplace'") (quoting

N.J.S.A. 59:2-2(a) allows for liability of a public entity "for injury proximately caused by an act or omission of a public employee" only "within the scope of his employment."[21] As section 219(2)(d) addresses an employer's

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Lehmann, 132 N.J. at 623-24 (quoting T.L. v. Toys 'R' Us, 255 N.J. Super. 616, 661 (App. Div. 1992) (Skillman, J.A.D., dissenting))).

Although the Davis majority noted it did "not reach the issue of whether the 'non-delegable' or absolute duty at issue, were such a duty to be recognized, would be barred by the [Charitable Immunity Act]," the dissenters countered that "[a]ny analysis of the implications of [N.J.S.A. 2A:53A-7] would also be subject to this Court's holding in Hardwicke," 188 N.J. at 97, 100-02. Davis, 209 N.J. at 302 n.10, 319. We note the Legislature has not waived the State's sovereign immunity for strict liability claims. Strict liability claims against public entities are expressly barred by N.J.S.A. 59:9-2(b). The American Law Institute abandoned the aided-by-agency theory of vicarious liability in its Restatement (Third). Restatement (Third) of Agency § 7.08 cmt. b. (2006); E.S., 469 N.J. Super. at 295-96.

[21] Hornor's contention that 59:2-2(a) is no impediment to establishing the Board's vicarious liability for Hutler's sexual assault because that subsection provides for a public entity's vicarious liability for injury caused by a public employee "within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances," and "our Supreme Court has already determined that a private entity may be held vicariously liable for the sexual abuse of a student committed by its employee in Hardwicke" is without sufficient merit to warrant extended discussion here. See R. 2:11-3(e)(1)(E).

The Court in Hardwicke held the Boychoir School, against which Hardwicke had stated a statutory claim as a passive abuser under the Child Sexual Abuse Act, could be held vicariously liable for the intentional torts of its employees committed outside the scope of employment under Restatement (Second) of Agency § 219(2)(d). See E.S., 469 N.J. Super. at 301. A public entity is not

liability for conduct occurring outside the scope of employment, it does not provide a basis for holding a public entity, like the Board, liable under the Tort Claims Act. Hornor's failure to identify a liability predicate in the Act for the Board's vicarious liability for Hutler's sexual assault is fatal to Hornor's vicarious liability claim against the Board. See Tice, 133 N.J. at 355 (reiterating "[t]he liability of the public entity must be found in the Act");

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liable for the intentional torts of its employees outside the scope of employment in the same manner a private entity is liable because the Legislature has deemed a public entity is only vicariously liable for the acts or omissions of its employees occurring within the scope of employment, 59:2-2(a); and 59:2-1.3(a)(1) only disabled a public entity's immunity for sexual assaults or abuse under 59:2-10, E.C., 470 N.J. Super. at 53-54, which absolves a public entity of liability "for the acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct" occurring within the scope of employment for which it would otherwise be liable under 59:2-2(a), Fielder, 141 N.J. at 123, 130.

Thus, N.J.S.A. 59:2-2(a) is an absolute barrier to Hornor's vicarious liability claims because the Board can only be held liable for the acts of its employees occurring within the scope of employment. Hornor concedes Hutler's assault did not occur within the scope of his employment, and Restatement (Second) of Agency § 219(2)(d) ("A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation") and the vicarious liability holding in Hardwicke address an employer's liability only for acts of its employees outside the scope of employment. There is simply no provision in the Tort Claims Act making a public entity liable for injury proximately caused by an act or omission of a public employee acting outside the scope of employment even after the 2019 amendments and the enactment of 59:2-1.3.

Kolitch, 100 N.J. at 502 (Handler J., dissenting) (explaining a plaintiff bringing a negligence action against a public entity "must first establish the predicates for liability, and later avoid application of any provision granting the sovereign immunity"); Troth, 117 N.J. at 276-77 (O'Hern J., concurring) (same).

We reverse the trial court's denial of the Board's motion to dismiss those counts of Hornor's complaint asserting claims for breach of fiduciary duty and vicarious liability and remand for the dismissal of those counts with prejudice. Our holding does not impair Hornor's ability to proceed on his direct claim against the Board for negligent hiring, supervision and retention, which is, of course, not limited to acts Hutler committed within the scope of his employment. See Schultz, 95 N.J. at 534-35 ("Under respondeat superior, an employer is liable only for those acts of his employee committed within the scope of employment, while negligent hiring reaches further to cover acts outside the scope of employment."); G.A.-H., 238 N.J. at 415 ("Unlike respondeat superior, negligent hiring, supervision, and training are not forms of vicarious liability and are based on the direct fault of an employer.").

Reversed and remanded for further proceedings not inconsistent with our opinion. We do not retain jurisdiction.

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# IMMIGRATION UNDER THE NEW EXECUTIVE ORDERS

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AMERICAN IMMIGRATION LAWYERS ASSOCIATION

**Expedited Removal: Key Updates, Who Is Impacted, and How to Fight Back**

February 14, 2025[1]

Expedited removal (ER) is a policy that is often thought of as a "border issue," and not something that many interior practitioners have to worry about. However, recent changes made by the second Trump administration demonstrate how important it is for practitioners to become fluent in this area of law to adequately represent clients.

Shortly after inauguration, the second Trump administration issued a federal register notice, Designating Aliens for Expedited Removal ("Notice") which enables the Department of Homeland Security (DHS) to exercise the full scope of its statutory authority to place someone in expedited removal. The prior Trump administration also attempted to use expedited removal to the full statutory limit.[2] This Notice also rescinded the Biden administration's expedited removal notice.

Similarly, Acting DHS Secretary Huffman also issued a January 23, 2025 memorandum to ICE, CBP, and USCIS leadership on "Guidance Regarding How to Exercise Enforcement Discretion," (DHS memo) provided further details on how the administration will apply ER within the interior.

## What is Expedited Removal & Consequences for Non-Citizens

Expedited removal ("ER") is a process by which immigration officers can remove certain noncitizens administratively and rapidly without a hearing and with limited due process protections and access to counsel. Created in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act, the statutory framework allows for executive discretion to a certain point in the application of expedited removal to certain noncitizens.[3]

Once an immigration officer determines that a noncitizen is subject to ER, they are ordered removed. Unlike other removal orders, an ER order cannot traditionally be appealed, and carries a five-year bar to reentry in most circumstances. If an individual says that they want to apply for

[1] This practice resource is developed by a subcommittee composed of members representing AILA's Asylum & Refugee, EOIR, ICE, and CBP committees, as well as the Removal Defense Section Steering Committee. Special thanks to subcommittee members: Stefanie Fisher-Pinkert, Annelise Araujo, Raymond Bolourtchi, Lory Rosenberg, and Sophia Genovese for their work on this resource.

[2] *See* "Designating Aliens for Expedited Removal," 84 FR 35409 (July 23, 2019).

[3] *See* 82 FR 4902, 69 FR 48877; 67 FR 68923 (Expedited removal criteria set forth in previous designations).

asylum, or are afraid of returning to their home country, they must be referred to a credible fear interview (CFI).[4] Noncitizens in expedited removal "who demonstrate credible fear are not statutorily eligible for bond hearings."[5]

## Changes to Expedited Removal under the Current Trump Administration

| *Who Expedited Removal Applies To* | |
|---|---|
| **Prior to January 21, 2025**[6] | **Current Policy** |
| Noncitizens and inadmissible or removable due to misrepresentation or lack of a valid visa or entry document.[7] | |
| Noncitizens encountered at the port of entry or within 100 air miles of any U.S. international border. | Noncitizens encountered at a port of entry or **anywhere** in the United States. |
| Encountered within 14 days of entry. | Unable to demonstrate continuous physical presence for the **two year period** immediately prior to the date of the determination that they are inadmissible. |
| Has not been admitted or paroled. **Note**: *see below discussion.* | |

ER **does not** apply to:

- Noncitizens who are charged with **any other** ground of removability or inadmissibility other than 8 U.S.C. Section 1182(a)(6)(C) or (a)(7).
- Unaccompanied children.
- Noncitizens where (1) the noncitizen arrived by aircraft at a port of entry; and (2) the United States does not have full diplomatic relations with their country of citizenship that is in the Western hemisphere.[8]
- Applicants for admission under the Visa Waiver Program.
- U.S. citizens, lawful permanent residents, refugees, or asylees who have not had their status terminated.

[4] *See* INA sec. 235(b)(1)(A)(ii); *see also* 8 C.F.R 235.3(b)(4).

[5] https://immigrationlitigation.org/wp-content/uploads/2025/02/25.02.07-Expedited-Removal.pdf, citing *Jennings v. Rodriguez* 583 U.S. 281, 297-303 (2018).

[6] *See* INA sec. 235(b)(1)[8 U.S.C. §1225(b)(1)]; *see also* 87 FR 16022-24 (March. 21, 2022).

[7] 8 U.S.C. Section 1182(a)(6)(C) or (a)(7).

[8] INA sec. 235(b)(1)(F).

- Noncitizens (or qualifying family members) with approved petitions for a U visa.
- Noncitizens that were permitted to withdraw their application for admission.
- Individuals who were admitted or paroled.

DHS is likely to attempt an argument that individuals with parole who have had this status terminated are subject to ER.[9] Practitioners should be prepared for this argument, and the National Immigration Litigation Alliance (NILA) lays out a persuasive plain language argument against this application of ER.[10]

*DHS Guidance on the Application of Expedited Removal*

The DHS Memo provides further insight into how ER will be used within the interior as an enforcement mechanism, which includes reviewing the parole status of existing parolees. Specifically, the DHS Memo:

- Implements two new policies applied to noncitizens "DHS is aware of":
    - If a noncitizen is amenable to ER, but has not had ER applied, DHS should "take all steps necessary" to review the case and consider applying expedited removal.
        - This can include steps to terminate any ongoing removal proceedings or parole status.
    - If a noncitizen was granted parole under a policy that is paused, modified, or terminated under a January 20 memorandum that is not currently publicly available.
        - Review the parole status to determine whether parole remains appropriate in "in light of any changed legal or factual circumstances."
- Authorizes DHS components to pause, modify, or terminate any parole program that is inconsistent with this memo.
- The memo alleges that the screening within ER "is sufficient to protect the reliance interests of any aliens who have applied for asylum or planned to do so in a timely manner."

Notably, the DHS Memo suggests that noncitizens who failed to apply for asylum within one year should be prioritized. The DHS Memo further describes exceptions to the one year filing deadline as "narrow," implying a potentially restrictive interpretation of these exceptions. Attorneys should advise accordingly on any asylum applications relying on these exceptions.

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[9] *See* U.S. Department of Homeland Security, "Guidance Regarding How to Exercise Enforcement Discretion" (January 23, 2025).

[10] Everything Expedited Removal, https://immigrationlitigation.org/wp-content/uploads/2025/02/25.02.07-Expedited-Removal.pdf at 15, *citing* See 8 U.S.C. § 1225(b)(1)(A)(i), (iii) (applying expedited removal only to an individual who "is arriving in the United States" or who "has not been admitted or paroled into the United States") (emphasis added); *see also* 8 C.F.R. § 235.3(b)(6) (explaining that individuals subject to expedited removal pursuant to a DHS designation "will be given a reasonable opportunity to establish to the satisfaction of the examining immigration officer that he or she was . . . paroled into the United States following inspection at a port-of-entry" and also conferring discretion to review whether parole has been or should be terminated). But see 8 C.F.R. § 235.3(b)(1)(i) (stating that "expedited removal proceedings shall apply to . . . [a]rriving aliens, as defined in 8 C.F.R. § 1.2").

## Screening Tips

Review your current and potential clients for the following for those particularly vulnerable to this policy change:

- People who entered via a DHS parole program (such as CHNV parole) or via CBP One appointments, and who have not been granted another form of relief.
    - DHS argues their discretionary parole power can be used to terminate said status and place individuals in ER proceedings.
- Noncitizens who did not apply for asylum by the one year deadline.
    - The guidance memo affirmatively states that as a class of noncitizens DHS may prioritize.
- Any noncitizen anywhere in the U.S. who has been physically present for less than 2 years and is inadmissible under 8 U.S.C. Section 1182(a)(6)(C) or (a)(7).
- Noncitizens who could have been placed in ER at their entrance, but were instead placed in INA sec. 240 proceedings, including those who entered through a port of entry.[11]

Noncitizens who have been physically present in the United States *should not* be placed into ER. Practitioners should strongly challenge any attempt to place noncitizens in proceedings who can establish 2 years of physical presence.

## Preparing your clients

- Discuss with clients strategies around gathering evidence:
    - That they entered over 2 years ago (e.g. if not an arriving noncitizen, such as people who entered without inspection and were later granted parole); or
    - Developing evidence of urgent humanitarian or significant public benefit reasons for the beneficiary to maintain parole.
- Advise clients to carry additional documents.
    - Have clients carry a G-28 signed by their attorney and their attorney's business card at all times to present in case they are detained.
    - Have clients carry proof of any pending applications or petitions.
    - If your client is SIJS qualified or has a pending I-360, have your client carry proof of the pending application. SIJS classification is statutory parole.
    - If your client filed asylum before USCIS under the Trafficking Victims Protection Reauthorization Act (TVPRA), have your client carry proof of the UAC classification and pending asylum application.
- Ensure your clients know their rights when speaking to or interacting with ICE.

## Potential legal arguments

For additional legal arguments, please see NILA's Practice Advisory: Everything Expedited Removal.

[11] DHS will need to move for dismissal first. It is crucial to remember that once a Notice to Appear is filed with the court, jurisdiction has vested, and therefore, dismissal would need to be granted by the immigration judge. See 8 C.F.R. §§ 1003.13, 1003.14.

*Challenging placement in Expedited Removal*

Practitioners should strongly challenge any attempt to place a noncitizen in ER who can establish 2 years of physical presence.[12] Discuss the risks of carrying documents and proof of physical presence on their person. Please consider:

- Whether your client is legally required to carry documentation on them.
- Whether the documentation they are carrying gives away information on their birth place or nationality;
- Whether the documentation contains information about other family or household members;
- Whether they may be able to use documentation DHS already has (i.e. DHS receipt notices).

*Oppose DHS Motions to Dismiss*

For noncitizens in removal proceedings, practitioners can and should file motions opposing any attempts by OPLA to file motions to dismiss in order to place someone into expedited removal. Practitioners should aggressively continue to argue that the EOIR acquires jurisdiction over the case once the NTA is filed and the Respondent should be afforded Due Process of Law and have the relief heard by the Court, including taking into account legitimate reliance interests to date.

On January 22, 2025, the ACLU filed suit in the District of Columbia.[13] The Plaintiff's Brief addresses many strong points and arguments that practitioners should consider including in their Opposition to any DHS Motion to Dismiss.

*Federal Litigation*

There is a statutory limitation on habeas corpus relief for those against whom an expedited removal order is issued. 8 USC §1252(e)(2) limits federal court habeas jurisdiction to whether the subject is actually a foreign national, whether the subject was ordered removed under 8 USC §1225(b)(1)(the expedited removal statute) and whether the subject can prove that they are actually an LPR, refugee or asylee whose status has not been terminated. Practitioners can and should consider habeas relief where the application of the expedited removal procedure is made with respect to people not covered by the statute.

*Reinstatement of Removal*

Reinstatement applies to noncitizens with prior removal, deportation, or exclusion orders. The process allows DHS to "reinstate" a prior removal, thus bypassing the need for formal removal proceedings. After apprehension, when DHS determines whether to place someone in 240 proceedings or expedited removal, they may also be amenable to *reinstatement* if they have a prior removal order.

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[12] *See* 8 U.S. Code Section 1225 (a)(1).

[13] (Case No. 1:25-CV-00190). *See*: https://assets.aclu.org/live/uploads/2025/01/1.pdf.

DHS officers conduct interrogations to determine whether an individual should be reinstated.[14] The officer must obtain the prior order and compare fingerprints if there is an identity dispute.[15] The foreign national can contest the order, and DHS will review it. If the person fears returning, they must be referred to an asylum officer for a reasonable fear interview.[16]

Even if an individual is subject to reinstatement, a DHS official can issue a NTA and place them in removal proceedings. Practitioners should contest reinstatement and present evidence supporting discretionary authority and issuance of a NTA instead. Remember sole judicial review of a reinstatement order will be via Petition for Review in the US Court of Appeals with jurisdiction over the noncitizen's order.

## Conclusion

This recent expedited removal expansion broadens the scope of individuals subject to expedited removal, including those who have lived in the United States for less than two years. It also specifies specific populations that may be targeted first under the new guidance - particularly those who did not apply for asylum within one year of their entrance. Practitioners should be aware of the potential legal arguments and strategies available to challenge placement in expedited removal particularly those to oppose DHS motions to dismiss. Additionally, federal litigation may be an option for seeking relief from expedited removal orders. It is crucial for advocates to remain vigilant in protecting the rights of noncitizens and ensuring that they have access to due process and fair treatment in immigration proceedings.

## Additional Resources

- Practice Advisory: Everything Expedited Removal (NILA)
- Practice Alert: Significant Implications for Parolees in New DHS Memo (AILA)
- Practice Pointer: Options for Responding to OPLA's Unilateral Motions to Dismiss (AILA)
- Practice Advisory: Reinstatement of Removal (American Immigration Council)
- Practice Alert: Travel Warning (AILA)
- Practice Alert: New Updates Regarding Parole (AILA)
- For your clients
    - Client Flier: Know Your Rights if ICE Visits Your Home (AILA)
    - What You Need to Know About ICE Encounters (Legal Aid Society)

[14] 8 C.F.R. § 241.8(a).
[15] 8 C.F.R. § 241.8(a)(1).
[16] 8 C.F.R. §§ 208.31, 241.8(e).

# Agency Information Collection Activities; New Collection: Generic Clearance for the Collection of Social Media Identifier(s) on Immigration Forms

A Notice by the U.S. Citizenship and Immigration Services on 03/05/2025

This document has a comment period that ends in 55 days. (05/05/2025)

**108 comments received. View posted comments**

**PUBLISHED CONTENT - DOCUMENT DETAILS**

**Agencies:** Department of Homeland Security
U.S. Citizenship and Immigration Services
**Agency/Docket Number:** OMB Control Number 1615-New
**Document Citation:** 90 FR 11324
**Document Number:** 2025-03492
**Document Type:** Notice
**Pages:** 11324-11326 (3 pages)
**Publication Date:** 03/05/2025

DOCUMENT HEADINGS

Department of Homeland Security
U.S. Citizenship and Immigration Services
[OMB Control Number 1615-New]

## AGENCY:

U.S. Citizenship and Immigration Services, Department of Homeland Security.

## ACTION:

60-Day notice.

## SUMMARY:

The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed new collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the (print page 11325) categories of respondents, the estimated burden ( *i.e.* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments. This collection of information is necessary to comply with section 2 of the Executive order (E.O.) entitled "Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats", which directs implementation of uniform vetting standards and requires the collection of all information necessary for a rigorous vetting and screening of all grounds of inadmissibility or bases for the denial of immigration-related benefits. In a review of information collected for admission and benefit decisions, U.S. Citizenship and Immigration Services (USCIS) identified the need to collect social media identifiers ("handles") and associated social media platform names from applicants to enable and help inform identity verification, national security and public safety screening, and vetting, and related inspections.

## DATES:

Comments are encouraged and will be accepted for 60 days until May 5, 2025.

## ADDRESSES:

All submissions received must include the Office of Management and Budget (OMB) Control Number 1615-NEW in the body of the letter, the agency name, and Docket ID USCIS-2025-0003. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov (https://www.regulations.gov)* under e-Docket ID number USCIS-2025-0003.

## FOR FURTHER INFORMATION CONTACT:

USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721-3000 (This is not a toll-free number. Comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov (https://www.uscis.gov),* or call the USCIS Contact Center at 800-375-5283 (TTY 800-767-1833).

## SUPPLEMENTARY INFORMATION:

### Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov (https://www.regulations.gov)* and entering USCIS-2025-0003 in the search box. Comments must be submitted in English, or an English translation must be provided. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov (https://www.regulations.gov),* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov (https://www.regulations.gov).*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

## Background

Executive Order 14161 (/executive-order/14161), "Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats," directs implementation of uniform vetting standards and necessitates the collection of all information necessary for a rigorous vetting and screening of all grounds of inadmissibility or bases for the denial of immigration-related benefits. *See*90 FR 8451 (/citation/90-FR-8451) (Jan. 20, 2025). Execution of the E.O. requires U.S. Citizenship and Immigration Services (USCIS) to collect social media identifier(s) data on immigration forms and/or within information collection systems. This data will be collected from certain populations of individuals on applications for immigration-related benefits and is necessary for the enhanced identity verification, vetting and national security screening, and inspection conducted by USCIS and required under the E.O.

This collection of information is necessary to comply with section 2 of the E.O. establishing enhanced screening and vetting standards and procedures enabling USCIS to assess an alien's eligibility to receive an immigration-related benefit from USCIS. This data collection also is used to help validate an applicant's identity and determine whether such grant of a benefit poses a security or public-safety threat to the United States.

## Overview of This Information Collection

(1) *Type of Information Collection:* New Collection.

(2) *Title of the Form/Collection:* Generic Clearance for the Collection of Social Media Identifier(s) on Immigration Forms.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* GC-2025-0003; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. E.O. 14161 (/executive-order/14161), "Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats," directs implementation of uniform vetting standards and necessitates collection of all information necessary for a rigorous vetting and screening of all grounds of inadmissibility or bases for the denial of immigration-related benefits. Execution of the E.O. requires USCIS to collect Social Media Identifier(s) on immigration forms and/or information collection systems. This data will be collected from certain populations of individuals on applications for immigration-related benefits and is necessary for the enhanced identity verification, vetting and national security screening and, inspection conducted by USCIS and required under the E.O.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

- The estimated total number of respondents for the information collection N-400 is 909,700 and the estimated hour burden per response is 0.08 hour.
- The estimated total number of respondents for the information collection I-131 is 1,073,059 and the estimated hour burden per response is 0.08 hour.
- The estimated total number of respondents for the information (print page 11326) collection I-192 is 68,050 and the estimated hour burden per response is 0.08 hour.
- The estimated total number of respondents for the information collection I-485 is 1,060,585 and the estimated hour burden per response is 0.08 hour.
- The estimated total number of respondents for the information collection I-589 is 203,379 and the estimated hour burden per response is 0.08 hour.
- The estimated total number of respondents for the information collection I-590 is 106,200 and the estimated hour burden per response is 0.08 hour.

- The estimated total number of respondents for the information collection I-730 is 13,000 and the estimated hour burden per response is 0.08 hour.
- The estimated total number of respondents for the information collection I-751 is 140,000 and the estimated hour burden per response is 0.08 hour.
- The estimated total number of respondents for the information collection I-829 is 1,010 and the estimated hour burden per response is 0.08 hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 285,999 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $0. No additional costs to the public are anticipated due to this action. Any costs to the respondents associated with the specific form filed are captured in those approved collections.

Dated: February 26, 2025.

Jerry L Rigdon,

Acting Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2025-03492 (/d/2025-03492) Filed 3-4-25; 8:45 am]

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GLENN A. GRANT, J.A.D.
Acting Administrative Director of the Courts

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**TO:** **Assignment Judges**
**Trial Court Administrators**

**FROM:** **Glenn A. Grant, J.A.D., Acting Administrative Director**

**RE:** **Compliance with Federal Law Regarding the Handling of ICE Activities at or Near Court Locations – Updated Protocols**

**DATE:** **February 3, 2025**

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This memo supplements Directive #07-19 ("Immigration-Related Policies: Revisions to Judiciary Forms; Updated Attorney General Guidance; Court Involvement with ICE Activities"). It provides updated guidance on handling of Immigration and Customs Enforcement (ICE) activities at or near New Jersey court locations, including state courthouses, municipal courts, and other sites. This update aligns with the latest federal guidance to ensure compliance while maintaining the integrity and neutrality of the judiciary.

## Unchanged Federal Protocols:

As stated in Department of Homeland Security (DHS) Interim Guidance: Civil Immigration Enforcement Actions in or near Courthouses (DHS Policy 11072.3), ICE will continue to generally avoid enforcement actions in or near courthouses, particularly in areas dedicated to non-criminal proceedings. As stated in the DHS guidance, "ICE officers and agents should generally avoid enforcement actions in or near courthouses, or areas within courthouses that are wholly dedicated to non-criminal proceedings (e.g., family court, small claims court)." To the extent possible, civil immigration enforcement actions will continue to take place in non-public areas and be conducted in collaboration with court security staff. ICE officers and agents will seek to avoid unnecessarily alarming the public or disrupting court operations.

**Updated Federal Protocols:**

Under the DHS policy, ICE officers and agents may pursue enforcement actions against individuals accompanying a target, such as family members or friends, on a case-by-case basis. These actions will consider the totality of circumstances and require careful judgment by ICE officers.

**Protocol for New Jersey Judges and Court Staff:**

The Judiciary recently met with ICE Officials in New Jersey. Following up on that meeting, we now reaffirm the following principles and protocols:

1. **Identification and Notification:**
    - ICE officers and agents should identify themselves to courthouse security personnel and state the purpose of their visit.
    - Court security personnel should notify the Assignment Judge and Trial Court Administrator of ICE's presence. In a Municipal Court, security personnel should notify the Vicinage Municipal Presiding Judge and the Municipal Court Judge. Such notification should not interfere with or delay federal law enforcement activity.
2. **Verification of Authority:**
    - ICE officers and agents will show a warrant, generally either an I-205 (Warrant of Removal/Deportation) or I-200 (Warrant for Arrest of Alien) to courthouse security.
    - In general, ICE officers and agents will be displaying a badge that makes it easy to identify them as law enforcement officials.
3. **Coordination and Discretion:**
    - Consistent with DHS guidance, ICE actions should be conducted in collaboration with court security staff and, where possible, in non-public areas to minimize disruption.
    - To the extent practicable, arrests should occur after court proceedings conclude, unless an emergency dictates otherwise.
4. **Documentation and Communication:**
    - Any ICE enforcement action should be documented by designated court staff, and the Administrative Director should be informed if protocols are not followed, including if any judge or court personnel attempt to interfere with federal authorities.

5. **Adherence to Federal Law:**
    - Judges and court staff must not impede or interfere with ICE officers and agents performing their duties, in compliance with federal law.

**Conclusion:**

This guidance aims to balance adherence to federal directives with the need to maintain a safe and neutral environment within New Jersey's court system. Thank you for your professionalism and cooperation in implementing these guidelines.

**cc:** Chief Justice Stuart Rabner
Presiding Judges (All)
Steven D. Bonville, Chief of Staff
Clerks of Court
AOC Directors and Assistant Directors
Special Assistants to the Administrative Director
Robin Morante, Chief, Court and Judicial Security
ATCAs/Operations Division Managers

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American Immigration Council

FEBRUARY 2025

ANALYSIS

# The Trump Administration's Registration Requirement for Immigrants

## A Rapid Analysis by the American Immigration Council

On February 25, U.S. Citizenship and Immigration Services announced that the Trump administration will reanimate a provision of U.S. immigration law that has essentially been dormant for decades: a requirement for all immigrants who did not enter with a visa to register with the federal government after their arrival, and carry proof of their registration with them.

The administration is clarifying which immigrants already count as being registered—please see the section below on "Who the Registration Process Will Affect" for a full explanation of this—and plans to issue a new form for immigrants who are not already registered to submit.

The administration is using this forthcoming registration process alongside federal criminal law—which makes it a crime for immigrants to fail to register or fail to carry proof of registration. In doing so, the Trump administration is giving itself another tool to use against immigrants: the threat of criminal prosecution.

The registration requirement will force many people in the United States—including those who entered without inspection and have had no contact with the federal government during their years living in American communities—to make a choice between two options that both carry serious risk. Many others, such as immigrants who are already deemed registered—which includes both many undocumented immigrants and many who have legal status in the United States—will face a risk of prosecution if they fail to carry registration papers with them at all times.

## Background

Being in the United States without immigration status is not a crime. It is a civil violation, for which the civil penalty is deportation. Past efforts to change the law by making it a federal crime to be in the U.S. without authorization, such as the 2005 "Sensenbrenner bill," have failed.

There is, however, a federal law on the books that declares it to be the duty of all noncitizens 14 or older who have not already been "registered or fingerprinted" to register with the federal government within 30 days of their arrival (8 U.S.C. § 1302) and allows for them to be criminally prosecuted if they fail to register (8 U.S.C. § 1306). Another federal law allows any adult immigrant to be prosecuted if they fail to produce evidence of having registered when stopped by a federal agent (8 U.S.C. § 1304). This law was enacted during World War II, when it required noncitizens to register at their local post office. The law was later integrated into the immigration process, requiring people to register at ports of entry upon their arrival and thus providing no way for people who entered without authorization to comply with the law. Over time, the law and regulations fell into disuse and became outdated; for example, the list of forms that were designated "appropriate" for registration was different from the list of forms that were considered "evidence" of registration.

Furthermore, because there was no way for someone to register after arriving in the United States, the law was unenforceable against those who entered without inspection—it required people to do something the federal government had not created a process for them

to do. With one exception—the post-9/11 National Security Entry-Exit Registration System, discussed below—the federal government has never attempted to require registration of a large group of immigrants who were not already "registered" through a separate immigration benefit or enforcement process.

This is what the Trump administration is now changing. By announcing that it will create a new process permitting anyone to "register" with the federal government, the administration is now laying the groundwork for the registration law to be dusted off and enforced. Furthermore, the administration is encouraging federal prosecutors to enforce violations of the registration provision—allowing unauthorized immigrants to be swept up in criminal proceedings for failing to comply.

**The implementation of this registration process will have two major effects.**

The most acute impact will be on immigrants who are not already considered registered. Many immigrants, including millions of people without lawful status, are already deemed to be registered—including anyone who has received a work permit and anyone who has been placed in deportation proceedings. Please see the "Who the Registration Process Will Affect" section, below, for more complete information about which immigrants are deemed registered already and which are not.

However, unauthorized immigrants who have not been deemed registered—including anyone who entered the United States without inspection and has not had any contact with the federal government—will now be placed in a very vulnerable and sensitive position. People who choose to submit a "registration" form may be opening themselves up to being arrested by immigration authorities and placed in removal proceedings. People who choose not to submit the form, on the other hand, may be in danger of criminal prosecution.

Additionally, the Trump administration's policy raises the possibility that immigrants who are registered—regardless of lawful status—might be criminally charged and penalized for failing to carry proof of their registration with them at all times.

## Federal Laws Regarding Immigrant Registration

8 U.S.C. section 1302, codified via the Alien Registration Act of 1940, requires all noncitizens over the age of 14 who have not already registered, and who are in the U.S. for more than 30 days, to register with the federal government within 30 days of their arrival. Noncitizens under the age of 14 must be registered by a parent or legal guardian. The law allows the attorney general to waive the registration requirement for anyone.

8 U.S.C. sections 1306(a) and 1304 attach criminal penalties for failing to register. Under section 1306(a), any noncitizen who "willfully fails" to register with the government (or the parent of any noncitizen under 14 who fails to do so) after 30 days is guilty of a federal misdemeanor crime. If charged and convicted, it allows the noncitizen (or parent) to be sentenced to up to six months in jail and/or fined up to $1,000. Under section 1304, any adult who fails to carry proof of registration can be charged with a misdemeanor and fined up to $100.

The regulations implementing these laws can be found at 8 C.F.R. § 264.1.

## The Trump Administration's Efforts to Enforce These Laws

One of the executive orders signed on the first day of the current Trump administration highlighted the registration requirement, instructing the U.S. Department of Homeland Security (along with the State Department and Department of Justice) to "ensure that all previously unregistered aliens comply" with the registration law, and to ensure that failure to comply with the registration requirement is treated as a "civil and criminal enforcement priority." A memo sent to federal prosecutors on January 21, instructing them to prioritize criminal prosecutions for immigration-related offenses, listed the criminal registration law (sections 1304 and 1306) among those that should be prosecuted when discovered. However, in order to successfully prosecute people for failing to register, the government needed to provide a way for them to register to begin with.

The February 25 announcement from USCIS makes it clear that process will be forthcoming. It encourages everyone who has not already been deemed registered to create a USCIS online account, which can then be used to submit the registration form when such a form is ultimately published.

Once there is a way to register, federal prosecutors will be able to criminally charge people for the crime of failing to register or failing to carry evidence of registration with them. This will allow them to prosecute unauthorized immigrants who previously could not be criminally prosecuted. U.S. Immigration and Customs Enforcement agents may also be deputized as criminal law enforcement officers for this purpose, permitting them to arrest people on both civil immigration charges and criminal law violations.

## Who the Registration Process Will Affect

Federal regulations include a list of forms which are considered sufficient for registration. According to the USCIS announcement, anyone who has been issued one of the following documents *and who has been fingerprinted by the federal government* is considered "registered" under the law and will not need to submit new registration through the forthcoming process. However, they may need to carry proof of their documentation with them if they want to avoid criminal charges.

- I-94 (Arrival-Departure Record) which covers:
    - People admitted with non-immigrant visas.
    - People paroled into the U.S. under 212(d)(5) of INA.
    - People who have been granted permission to depart without the institution of deportation proceedings.
- I-95, Crewmen's Landing Permit—Crewmen arriving by vessel or aircraft.
- I-184, Alien Crewman Landing Permit and Identification Card—Crewmen arriving by vessel.
- I-185, Nonresident Alien Canadian Border Crossing Card—Citizens of Canada or British subjects residing in Canada.
- I-186, Nonresident Alien Mexican Border Crossing Card—Citizens of Mexico residing in Mexico.
- I-221, Order to Show Cause and Notice of Hearing—People against whom deportation proceedings are being instituted.
- I-221S, Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien—People against whom deportation proceedings are being instituted.
- I-551, Permanent Resident Card—Lawful permanent residents of the United States.
- I-766, Employment Authorization Document—People with work permits.
- I-862, Notice to Appear—People against whom removal proceedings are being instituted.
- I-863, Notice of Referral to Immigration Judge—People against whom removal proceedings are being instituted.

Many immigrants who do not have full legal status in the United States nevertheless have one or more of these documents and are thus considered registered. For example, most of the 3.7 million immigrants who are currently in deportation proceedings before an immigration judge have been issued one of the documents above. Similarly, many immigrants have work permits, including many people with Temporary Protected Status or Deferred Action for Childhood Arrivals and many asylum applicants. People who have been paroled into the United States are considered registered even if the period of their parole has expired.

Immigrants who do not have any of these documents may be considered unregistered. This includes people who entered without inspection and have had no subsequent contact with the federal government because they have previously been unable to seek legal status or even to register a—population that may number in the

millions. It also includes people who have applied for some benefits, such as TPS or DACA, but who have not been fingerprinted and whose applications have not been approved.

## NSEERS: An Earlier Registration Effort Raising Serious Constitutional Issues

The only modern effort to enforce the registration provision was the National Security Entry-Exit Registration System (NSEERS), created in the wake of 9/11. NSEERS did not apply to all unauthorized immigrants, but instead to men over the age of 16 on non-immigrant visas from one of a list of 24 countries the Bush administration declared were "havens for terrorists." (All but one of these countries were majority-Muslim; the exception was North Korea.) Immigrants subjected to NSEERS were required to show up at local immigration offices to submit themselves for fingerprinting and interviews, and to check in at designated intervals afterward.

In some cases, NSEERS was used for immigration enforcement. In the first two months of the program, 1,000 people who had registered were detained by immigration officials, almost all of them on immigration violations for violating the terms of their status. Within the first year of the program, 83,000 immigrants had registered, and 13,000 of them had been placed into civil immigration proceedings. In other cases, community raids appeared to use the information provided to NSEERS to track down immigrants who had registered after their status had expired.

The implementation of NSEERS raised serious concerns under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, because it explicitly targeted men from specific, overwhelmingly Muslim-majority countries. This is different from the current registration effort, which targets certain immigrants who entered the United States without inspection, regardless of nationality. Under NSEERS, criminal prosecution of people for failing to register was not common; now, it is an explicit goal of the administration.

## Fear and Uncertainty

The new registration policy forces "unregistered" immigrants to choose between two risky options. Choosing to submit the designated form to the federal government, once it is available, may put them at risk of being placed in removal proceedings. Choosing not to submit it may put them at risk of future criminal prosecution for failing to register if they are apprehended by ICE at a later point.

Additionally, it raises the possibility that immigrants who are already registered—including those with legal status—may be arrested and prosecuted for failing to carry proof of their registration with them at all times or failing to provide it to law enforcement when asked.

**It is essential that individuals who may be affected by this policy consult with a competent and reputable immigration lawyer, if at all possible, to receive the most appropriate advice for their circumstances.**

Immigrant communities around the United States are already living in fear of the Trump administration's scaled-up immigration enforcement efforts. News of the registration requirement is likely to exacerbate the fear and anxiety in these communities.

Anxiety, especially when stoked by rumors and misinformation, can strike people who are not in fact targeted by a policy; it can also terrorize people (whether targeted or not) to the point of harm for themselves and their families. During the first Trump administration, for example, early reports of a regulation restricting access to legal immigration status for use of certain government benefits (the "public charge" regulation) led to noticeable and persistent declines in the use of public benefits including food stamps and Head Start— including benefits that were not ultimately restricted by the regulation, and persisting after the Biden administration rescinded the regulation.

The American Immigration Council is working to ensure that our communications about this issue give people relevant information to make decisions and avoid terrorizing people who are already very afraid to go about their lives.


**National Immigration Litigation Alliance**
*Immigrant justice through the courts*

**Six Amendments to the Immigration and Nationality Act Made by the**
**Laken Riley Act**
Laken Riley Act, Pub. L. 119-__, __Stat. __ (2025)

The Laken Riley Act has passed both the House and Senate and will become law as soon as Trump signs it. The Act amends the following six provisions of the Immigration and Nationality Act (INA):

- INA 212(d)(5), 8 U.S.C. § 1182(d)(5)
- INA § 235(b), 8 U.S.C. § 1225(b)
- INA § 236, 8 U.S.C. § 1226
- INA § 241(a)(2), 8 U.S.C. § 1231(a)(2)
- INA § 242(f), 8 U.S.C. § 1252(f)
- INA § 243, 8 U.S.C. § 1253

A redlined version of these provisions follows.

**1. INA § 212, 8 U.S.C. § 1182 – Inadmissible aliens**

[…]

**(d) Temporary admission of nonimmigrants**

[…]

(5)

(A) The ~~Attorney General~~ Secretary of Homeland Security may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the ~~Attorney General~~ Secretary of Homeland Security, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter

his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The ~~Attorney General~~ Secretary of Homeland Security may not parole into the United States an alien who is a refugee unless the ~~Attorney General~~ Secretary of Homeland Security determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

(C) The attorney general of a State, or other authorized State officer, alleging a violation of the limitation under subparagraph (A) that parole solely be granted on a case-by-case basis and solely for urgent humanitarian reasons or a significant public benefit, that harms such State or its residents shall have standing to bring an action against the Secretary of Homeland Security on behalf of such State or the residents of such State in an appropriate district court of the United States to obtain appropriate injunctive relief. The court shall advance on the docket and expedite the disposition of a civil action filed under this subparagraph to the greatest extent practicable. For purposes of this subparagraph, a State or its residents shall be considered to have been harmed if the State or its residents experience harm, including financial harm in excess of $100.

**2. INA § 235, 8 U.S.C. § 1225 - Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing**

[…]

**(b) Inspection of applicants for admission**

[…]

(3) Enforcement by Attorney General of a State.
The attorney general of a State, or other authorized State officer, alleging a violation of the detention and removal requirements under paragraph (1) or (2) that harms such State or its residents shall have standing to bring an action against the Secretary of Homeland Security on behalf of such State or the residents of such State in an appropriate district court of the United States to obtain appropriate injunctive relief. The court shall advance on the docket and expedite the disposition of a civil action filed under this paragraph to the greatest extent practicable. For purposes of this paragraph, a State or its residents shall be considered to have been harmed if the State or its residents experience harm, including financial harm in excess of $100.

(~~3~~4) Challenge of decision
The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an immigration judge for a proceeding under section 1229a of this title.

**3. INA § 236, 8 U.S.C. § 1226 - Apprehension and detention of aliens**

[…]

**(c) Detention of criminal aliens**

(1) Custody
The Attorney General shall take into custody any alien who-

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence 1 to a term of imprisonment of at least 1 year, ~~or~~

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, or

(E)
(i) is inadmissible under paragraph (6)(A), (6)(C), or (7) of section 212(a); and

(ii) is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Definition
For purposes of paragraph (1)(E), the terms "burglary", "theft", "larceny", "shoplifting", "assault of a law enforcement officer", and "serious bodily injury" have the meanings given such terms in the jurisdiction in which the acts occurred.

(3) Detainer
The Secretary of Homeland Security shall issue a detainer for an alien described in paragraph (1)(E) and, if the alien is not otherwise detained by Federal, State, or local officials, shall effectively and expeditiously take custody of the alien.

(~~2~~4) Release
The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

[...]

(e) Judicial review
The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention ~~or release~~ of any alien or the ~~grant,~~ revocation~~,~~ or denial of bond or parole.

(f) Enforcement by Attorney General of a State.
The attorney general of a State, or other authorized State officer, alleging an action or decision by the Attorney General or Secretary of Homeland Security under this section to release any alien or grant bond or parole to any alien that harms such State or its residents shall have standing to bring an action against the Attorney General or Secretary of Homeland Security on behalf of such State or the residents of such State in an appropriate district court of the United States to obtain appropriate injunctive relief. The court shall advance on the docket and expedite the disposition of a civil action filed under this subsection to the greatest extent practicable. For purposes of this subsection, a State or its residents shall be considered to have been harmed if the State or its residents experience harm, including financial harm in excess of $100.

**4. INA § 241(a)(2), 8 U.S.C. § 1231(a)(2) - Detention and removal of aliens ordered removed**

[…]

**(a) Detention, release, and removal of aliens ordered removed**

[…]

**(2) Detention**

(A) In general.
During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(B) Enforcement by Attorney General of a State.
The attorney general of a State, or other authorized State officer, alleging a violation of the detention requirement under subparagraph (A) that harms such State or its residents shall have standing to bring an action against the Secretary of Homeland Security on behalf of such State or the residents of such State in an appropriate district court of the United States to obtain appropriate injunctive relief. The court shall advance on the docket and expedite the disposition of a civil action filed under this subparagraph to the greatest extent practicable. For purposes of this subparagraph, a State or its residents shall be considered to have been harmed if the State or its residents experience harm, including financial harm in excess of $100.

**5. INA § 242, 8 U.S.C. § 1252 – Judicial review of orders of removal**

[…]

**(f) Limit on injunctive relief**

(1) In general
Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases
Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(3) Certain actions
Paragraph (1) shall not apply to an action brought pursuant to section 235(b)(3), subsections (e) or (f) of section 236, or section 241(a)(2)(B).

**6. INA § 243, 8 U.S.C. § 1253 – Penalties related to removal**

[…]

(e) Enforcement by Attorney General of a State.
The attorney general of a State, or other authorized State officer, alleging a violation of the requirement to discontinue granting visas to citizens, subjects, nationals, and residents as described in subsection (d) that harms such State or its residents shall have standing to bring an action against the Secretary of State on behalf of such State or the residents of such State in an appropriate district court of the United States to obtain appropriate injunctive relief. The court shall advance on the docket and expedite the disposition of a civil action filed under this subsection to the greatest extent practicable. For purposes of this subsection, a State or its residents shall be considered to have been harmed if the State or its residents experience harm, including financial harm in excess of $100.

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

**Statement of the American Immigration Lawyers Association**
**Submitted to the Senate Judiciary Committee for the December 10, 2024 hearing**
**"How Mass Deportations Will Separate American Families, Harm Our Armed Forces, and Devastate Our Economy"**

**December 10, 2024**

Contact:
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The American Immigration Lawyers Association (AILA), the national bar association of over 16,000 immigration attorneys and law professors, submits this statement to express its concern and opposition to reports of how the Trump administration will engage in massive enforcement operations with the goal of deporting every undocumented person from the country. AILA members practice in every state and frequently assist individuals, families, and businesses impacted by immigration enforcement actions.

The Judiciary Committee hearing is timely given statements by the President-elect and other spokespersons that his administration will conduct wide-spread campaigns to deport millions of undocumented people and will mobilize not only federal immigration authorities but also the national guard and local law enforcement. AILA urges the incoming administration to consider other strategies for managing immigration that will be more effective while still ensuring the people subject to enforcement are treated fairly, humanely and in accordance with the principles of due process guaranteed in the Constitution.

Widespread enforcement operations will have devastating consequences for American businesses, schools, and municipalities, and will not serve America's national interests. Immigrants, including people who are undocumented and their U.S. citizen family members, are essential to our nation. Immigrants live in big cities and small towns in every region. They have children who attend schools and families that worship in temples, churches and mosques. From an economic perspective, immigrants sustain American businesses through their work in every industry and economic sector. In particular, undocumented individuals represent 4.8 percent of the overall U.S. workforce; in the agricultural industry, 13.7 percent of the workforce; in construction, 12.1 percent; and in hospitality, 7.1 percent.[1] The majority pay taxes that, in turn, fund the local education systems and social services in the communities in which they live.

Large-scale enforcement actions will devastate the economy and have the most severe



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consequences on the people being targeted and their families, many who have resided in America for years and have contributed to our country's strength and prosperity. The people who will be targeted will suffer enormous hardship, including apprehensions at their homes, workplaces or in public spaces, detention in jail-like facilities, and ultimately deportation and separation from their families and community. The incoming administration's mass deportation plan will not only harm the direct targets of the actions but also cause chaos and sow fear in American cities and communities.

In economic terms, the nationwide impact of large-scale enforcement actions will be severe. By removing people from their homes and communities, the government will potentially reduce the overall median incomes for mixed-status households by 47 percent, literally driving millions of U.S. citizens into poverty.[2] There are at least 4 million mixed status families living in the country that would be impacted by mass deportations; this figure includes over 5 million children.[3] This will lead to foreclosures on mortgages and evictions of U.S. citizens and many people who rely on the income of their immigrant and undocumented family members.

A report by the American Immigration Council concluded that deportation of approximately 13 million people who are likely to be targeted by the incoming administration would result in massive labor shortages and a dramatic reduction in the U.S. gross domestic product by over $1.1 trillion.[4] Furthermore, such widespread enforcement actions would dramatically reduce U.S. tax revenue: In 2022, undocumented individuals paid $46.8 billion in federal taxes and $29.3 billion in state and local taxes.

Our nation's elected leaders must urgently reform the immigration system, but attempting the costly deportation of millions of people is not the solution. Instead, the incoming administration should focus on enforcement strategies that are effective, fair and humane. The management of migration into and out of the country will be more effectively accomplished by properly resourcing federal immigration agencies to conduct the necessary enforcement functions and to efficiently process visas and other immigration applications. Immigration is a resource that needs to be controlled in an orderly manner to meet the interests of the country and to ensure the success and continuing prosperity of the nation.

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[1] National Immigration Forum, "Mass Deportation in the U.S.: Explainer", September 30, 2024. And https://www.newamericaneconomy.org/issues/undocumented-immigrants/.
[2] National Immigration Forum, "Mass Deportation in the U.S.: Explainer", September 30, 2024. And https://www.newamericaneconomy.org/issues/undocumented-immigrants/.
[3] American Immigration Council, "Mass Deportation: Devastating Costs to America, Its Budget and Economy", October 2024.
[4] American Immigration Council, "Mass Deportation: Devastating Costs to America, Its Budget and Economy", October 2024.

# *STATE v. ZINGIS* – IMPORTANT 2025 UPDATES

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SYLLABUS

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court and may not summarize all portions of the opinion.

**State v. Thomas Zingis (A-66-21) (087132)**

**Argued March 26, 2024 -- Decided August 8, 2024 -- Revised November 7, 2024**

**NORIEGA, J., writing for a unanimous Court.**

In State v. Cassidy, 235 N.J. 482, 486 (2018), the Court addressed the consequences of then-Sergeant Marc Dennis's certification of improperly conducted calibration checks of certain Alcotest machines "used to determine whether a driver's blood alcohol content is above the legal limit," which called into question over 20,000 Alcotest results. In this appeal, the Court addresses issues arising from the notification procedure required after Cassidy.

In August 2018, defendant Thomas Zingis was charged with careless driving and driving while under the influence (DWI). He had a prior DWI conviction in April 2012. In December 2018, a trial was held in the municipal court and Zingis was found guilty of DWI. The State requested that Zingis be sentenced as a second offender due to his April 2012 DWI conviction. Relying on Cassidy, Zingis argued that his first conviction should be disregarded for sentencing purposes because the State failed to prove beyond a reasonable doubt that his 2012 DWI conviction was not predicated on a Dennis-calibrated Alcotest. The State responded by asserting that (1) Camden was not one of the Dennis-affected counties, and (2) Zingis's failure to receive notice, consistent with this Court's order in Cassidy, was proof that he was not a Dennis-affected defendant.

The municipal court accepted the prosecutor's representation and sentenced Zingis as a second DWI offender. On appeal, the Law Division also found Zingis guilty of DWI and rejected his request to be sentenced as a first-time offender.

The Appellate Division affirmed Zingis's conviction but vacated the enhanced sentence. 471 N.J. Super. 590, 608 (App. Div. 2022). The Appellate Division held that the State failed to prove beyond a reasonable doubt that Zingis's 2012 DWI conviction was not based on an inadmissible Alcohol Influence Report (AIR). Id. at 607. The Court granted certification and remanded the matter to a Special Adjudicator for a plenary hearing on two questions: (1) which counties were affected by Dennis's conduct, and (2) what notification was provided to defendants affected by Dennis's conduct. 251 N.J. 502 (2022).

The Special Adjudicator filed a comprehensive 370-page report detailing his findings of fact and conclusions of law, which the Court summarizes. The parties largely agree with the Special Adjudicator's findings and conclusions. Relevant to this appeal, there are two areas of disagreement: (1) the availability of Exhibit S-152 -- a 180-page Excel Spreadsheet that sets forth solution changes and calibrations on all Alcotest Instruments in New Jersey from November 5, 2008 through June 30, 2016 -- and (2) the proper procedure for challenging a prior Dennis-affected DWI conviction when facing enhanced sentencing on a subsequent DWI.

The State asks the Court to accept the Special Adjudicator's factual findings and recommendations with two exceptions: (1) Exhibit S-152's availability should be limited; and (2) the validity of a prior DWI should be pursued through PCR in the municipal court where the prior conviction occurred and not be litigated at sentencing for a successive DWI. The State agrees with the Special Adjudicator that prior to seeking an enhanced DWI sentence, it must inform defendants "that a prior DWI conviction it intends to" rely on "was potentially affected by Dennis's malfeasance." The State contends, however, that this notification obligation extends only to cases confirmed to be Dennis-affected cases, not those in which there is no known evidence that would justify overturning convictions on PCR.

**HELD:** The Court now resolves those limited areas in which the parties could not agree regarding the implementation of the Special Adjudicator's findings and legal conclusions: (1) the proper procedure for challenging a prior Dennis-affected DWI conviction when facing enhanced sentencing on a subsequent DWI; and (2) the appropriate availability of Exhibit S-152.

1. During the initial conference for a DWI matter, the court shall inquire whether the pending matter represents the first or subsequent DWI for a defendant. If the record reflects that the defendant has a prior conviction for DWI, the prosecutor must inform the court, defendant, and defense counsel whether it occurred between the critical dates of November 5, 2008 and April 2016. If so, the court must then schedule a discovery conference for the State to fulfill its obligation and provide to the defendant and counsel, as well as the court, discovery indicating whether the defendant is a Dennis-affected defendant. The prosecutor will accomplish this by using the summons number from the earlier offense to search Exhibit S-152, which will be redacted to include only non-personal identifying information. Once the corresponding entry is located within Exhibit S-152, the prosecutor is to "copy and paste" that row of data into a new document. The Alcotest serial number from that entry must then be compared against the Dennis Calibration Repository, which shall be made publicly available by placing it on a State website and shall also be summarized in a Dennis Calibration Repository Summary. If the State determines that the defendant's prior offense involved a Dennis-affected Alcotest Instrument that produced an evidential BAC reading, corroborated by Exhibit S-152 and the

Dennis Calibration Repository Summary, judges should afford the defendant a reasonable amount of time to decide whether to challenge the prior conviction. If the defendant wishes to challenge that earlier conviction, the defendant shall do so by filing for PCR in the jurisdiction of the previous conviction. If the defendant, after being made aware of the existence of a Dennis-affected matter, chooses to proceed without challenging the earlier conviction, the court will inquire on the record that the defendant's decision is knowing and voluntary, and the matter may proceed in the usual course. The Court calls on judges to resolve PCRs and related new matters as expeditiously as possible. The Court provides detailed guidance on all of these points. (pp. 18-23)

2. With regard to Exhibit S-152, the Court adopts a process that balances the State's concerns for privacy with defendants' due process need for notification. Once a summons number is cross-referenced in Exhibit S-152, it shall be provided to the defendant and defense counsel in discovery. Through that process, the defendant and counsel can see the date and location of offense, summons number, and the defendant's name. The prosecutor must then use the summons number to search Exhibit S-152. Therefore, Exhibit S-152 in its newly redacted form, excluding all personal identifiers, must be publicly released on the State's website. The prior disposition, along with the complete row of data from Exhibit S-152 and the Dennis Calibration Repository Summary, together will be deemed proof beyond a reasonable doubt of whether a defendant's prior DWI conviction is a Dennis-affected matter. (pp. 23-25)

3. The Court adopts the remainder of the Special Adjudicator's findings, which are supported by substantial credible evidence in the record. (p. 25)

**AFFIRMED and REMANDED.**

**CHIEF JUSTICE RABNER and JUSTICES PATTERSON, SOLOMON, PIERRE-LOUIS, WAINER APTER, and FASCIALE join in JUSTICE NORIEGA's opinion.**

SUPREME COURT OF NEW JERSEY

A-66 September Term 2021

087132

State of New Jersey,

Plaintiff-Appellant,

v.

Thomas Zingis,

Defendant-Respondent.

On certification to the Superior Court,
Appellate Division, whose opinion is reported at
471 N.J. Super. 590 (App. Div. 2022).

| Remanded | Special Adjudicator Report | Revised |
|---|---|---|
| July 28, 2022 | September 15, 2023 | November 7, 2024 |
| **Argued** | **Decided** | |
| March 26, 2024 | August 8, 2024 | |

Regina M. Oberholzer, Deputy Attorney General, argued the cause for appellant (Matthew J. Platkin, Attorney General, attorney; Regina M. Oberholzer and Robyn B. Mitchell, Deputy Attorney General, of counsel and on the briefs).

Michael B. Cooke argued the cause for respondent (Michael B. Cooke and The Hernandez Law Firm, attorneys; Michael B. Cooke and Steven Hernandez, on the briefs).

Michael R. Noveck, Assistant Deputy Public Defender, argued the cause for amicus curiae Public Defender of

New Jersey (Jennifer Sellitti, Public Defender, attorney; Michael R. Noveck, of counsel and on the brief).

Jeffrey Evan Gold argued the cause for amicus curiae New Jersey State Bar Association (Timothy F. McGoughran, President, New Jersey State Bar Association, attorneys; Timothy F. McGoughran, of counsel, and Jeffrey Evan Gold, on the brief).

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JUSTICE NORIEGA delivered the opinion of the Court.

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This case calls upon this Court to revisit the consequences that remain from then-Sergeant Marc Dennis's certification of improperly conducted calibration checks of certain Alcotest machines "used to determine whether a driver's blood alcohol content is above the legal limit," which called into question over 20,000 Alcotest results. State v. Cassidy, 235 N.J. 482, 486 (2018). Specifically, defendant Thomas Zingis's matter illuminates a flaw in the notification procedure required after our Cassidy decision.

All parties to this matter have made significant efforts to reach consensus in order to arrive at a fair resolution. With the comprehensive and extraordinary work the Special Adjudicator performed in this case, there remain only two issues on which the parties still have lasting concerns. We now resolve those issues.

I.

We briefly highlight the following facts from the record. We rely heavily on Special Adjudicator's comprehensive report for the full details of the present case and those events predating it.

A.

On August 27, 2018, a Berkeley Township patrolman stopped defendant Thomas Zingis for driving his motorcycle erratically. During the traffic stop, the patrolman became suspicious that Zingis was under the influence and asked him to perform a field sobriety test. Based on his observations, the patrolman concluded Zingis was under the influence of alcohol and arrested him. Zingis was charged with careless driving and driving while under the influence (DWI), contrary to N.J.S.A. 39:4-50. Notably, he had a prior DWI conviction in April 2012 from Collingswood in Camden County.

In December 2018, a trial was held in the municipal court and Zingis was found guilty of DWI. The State requested that Zingis be sentenced as a second offender, pursuant to N.J.S.A. 39:4-50(a)(2), due to his April 2012 DWI conviction. Zingis opposed the State's sentencing recommendation. Relying on our decision in Cassidy, Zingis argued that his first conviction should be disregarded for sentencing purposes because the State failed to prove beyond a reasonable doubt that his 2012 DWI conviction was not

predicated on a Dennis-calibrated Alcotest. The State responded by asserting that (1) Camden was not one of the Dennis-affected counties, and (2) Zingis's failure to receive notice, consistent with this Court's order in Cassidy, was proof that he was not a Dennis-affected defendant.

The municipal court accepted the prosecutor's representation and sentenced Zingis as a second DWI offender pursuant to N.J.S.A. 39:4-50. Zingis successfully moved to stay his sentence pending his appeal to the Law Division.

B.

In October 2020, Zingis appealed to the Law Division. Following a trial de novo, the Law Division also found Zingis guilty of DWI and rejected his request to be sentenced as a first-time offender. Relying on the Special Adjudicator's report in Cassidy, the trial judge found that Dennis's misfeasance was limited to Middlesex, Monmouth, Ocean, Somerset, and Union Counties. The trial judge also viewed the State's failure to notify Zingis of his status as a Dennis-affected defendant to be outcome determinative.

C.

Zingis appealed his conviction and sentence to the Appellate Division. In a published opinion, the court rejected the State's two arguments that (1)

Zingis's prior conviction was not tainted because his name did not appear on the Attorney General's list of Dennis-affected defendants, and (2) Dennis's misconduct did not affect any DWI convictions in Camden County. State v. Zingis, 471 N.J. Super. 590, 606 (App. Div. 2022). The court determined that both the municipal court and the Law Division erred in accepting the prosecutor's assertion and ultimately affirmed the conviction but vacated the enhanced sentence. Id. at 608.

The Appellate Division held that the State failed to prove beyond a reasonable doubt that Zingis's 2012 DWI conviction was not based on an inadmissible Alcohol Influence Report (AIR). Id. at 607. In doing so, the court found that the record did not contain "evidence with respect to how the Attorney General's list . . . was compiled and whether it definitively includes all DWI convictions tainted by Dennis's malfeasance." Id. at 606. Moreover, the court noted that the record lacked support for the prosecutor's assertions and in some instances undermined the State's proffer that all Dennis-affected defendants had been notified. Id. at 606-07. The Appellate Division reasoned that in future cases the State may meet its burden to prove beyond a reasonable doubt that a DWI defendant was not convicted in the first instance based on a faulty AIR with a "more robust record." Id. at 607. Accordingly, the appellate

court remanded to the municipal court to resentence Zingis as a first-time offender. Id. at 608.

The State moved for reconsideration, arguing for the first time that Cassidy imposes an obligation on defendants to seek post-conviction relief (PCR) for any DWI conviction defendants believed to be tainted by an inadmissible AIR, while relieving the State from any burden to prove that a prior DWI conviction was not tainted when seeking a sentencing enhancement.

The Appellate Division considered and rejected both arguments. In its order and statement of reasons, the appellate court found that a defendant's failure to seek PCR should not insulate a prior conviction from scrutiny if the State later aims to rely on it. The court found that the State's position had no support under Cassidy, particularly its argument that it had no obligation to prove whether a prior DWI conviction was premised upon tainted evidence. The court also held that the State's argument that defendants could easily search the publicly available Alcotest Inquiry System (AIS) contradicted its representation to the Law Division court that proving a prior conviction was not tainted by Dennis would be "almost impossible."

D.

We granted the State's petition for certification and motion to stay. 251 N.J. 502 (2022). We remanded the matter to retired Appellate Division Judge

Robert A. Fall as a Special Adjudicator for a plenary hearing to consider and decide two questions: (1) which counties were affected by Dennis's conduct, and (2) what notification was provided to defendants affected by Dennis's conduct. Ibid. We instructed that the Special Adjudicator had the discretion to address any other relevant issues. We invited the Office of the Public Defender (OPD) to participate as amicus curiae. Ibid. The Special Adjudicator granted the New Jersey State Bar Association's (NJSBA) motion to appear as amicus curiae.

After briefing and plenary hearings, the Special Adjudicator filed a comprehensive 370-page report detailing his findings of fact and conclusions of law. Expanding on the two questions in the order from this Court, the Special Adjudicator divided the issues further and concluded, in summary, the following:

> (1) the State did not identify all individuals who were requested to provide breath samples on Alcotest instruments calibrated by Dennis during the relevant time period;
>
> (2) the classification of those defendants entitled to notification of the Court's decision in Cassidy is limited to those who were requested to provide breath samples on an Alcotest instrument calibrated by Dennis that resulted in the reporting of an evidential blood alcohol content (BAC) reading;

(3) the State did not fully provide the ordered notification to all defendants affected by the Court's decision in Cassidy;

(4) there are solutions available that should be implemented to better assure the proper identification of those individuals who have provided breath samples on Alcotest instruments calibrated by Dennis and to provide those individuals with additional notification:

> (a) the use of the proposed "Dennis Calibration Repository,"[1] in conjunction with Exhibit S-152, is the best available method of determining whether an individual was requested to provide breath samples on an Alcotest instrument calibrated by Dennis and an evidential BAC was obtained;
>
> (b) where an enhanced sentence is sought for a DWI conviction on the basis of a prior DWI conviction, the State should be required to provide discovery to defendant and counsel regarding the applicability of a Dennis-affected matter;
>
> (c) where a defendant files an application seeking PCR based on the Court's ruling in Cassidy contending he is a Dennis-affected defendant, discovery should be provided from Exhibit-152 and Exhibit-28, under a protective order, regarding that original conviction;
>
> (d) the State's recommendations regarding additional notification to those individuals identified as Dennis-affected defendants, who have been omitted from several of the spreadsheets produced, are persuasive and should be accomplished.

[1] Exhibit DB/OPD – 28.

II.

With the case before us once more, the parties largely agree with the Special Adjudicator's findings and conclusions. Relevant to this appeal, there are two areas of disagreement: (1) the availability of Exhibit S-152[2] and (2) the proper procedure for challenging a prior Dennis-affected DWI conviction when facing enhanced sentencing on a subsequent DWI.

A.

The State asks this Court to accept the Special Adjudicator's factual findings and recommendations with the following exceptions: (1) Exhibit S-152's availability should be limited; and (2) any suggestion that the validity of a prior DWI may be litigated at sentencing for a successive DWI should be rejected. Instead, the State contends that such a challenge must be pursued through PCR in the municipal court where the prior conviction occurred.

First, with respect to the availability of Exhibit S-152, the State objects to the Special Adjudicator's recommendation that the document be released publicly subject to a protective order as determined by the Court. The State asserts that privacy concerns would remain in the face of such an order.

[2] Exhibit S-152 is an Excel Spreadsheet that the State provided to the Special Adjudicator and parties containing certain information with respect to all Alcotest Instruments used in New Jersey from November 5, 2008 through June 30, 2016. It contains 236,664 subject test records and comprises 25,180 pages.

Namely, the State contends that Exhibit S-152 contains sensitive identifying information of those who are confirmed not to be a Dennis-affected defendant, contrary to this Court's requirement in State v. Chun, 194 N.J. 54 (2008), that sensitive information be redacted in the public AIS. The State argues further that merely subjecting Exhibit S-152 to a protective order would still expose the document to significantly more individuals than currently have access, which the State asserts stands at around twenty-five people across the state. The State argues access to Exhibit S-152 should be limited to "County Prosecutors' Municipal Prosecutor Liaisons -- or another designated Assistant Prosecutor in the County Prosecutors' Offices" -- and not extended to municipal prosecutors, defendants, defense counsel, or the general public.

Second, the State agrees with the Special Adjudicator that prior to seeking an enhanced DWI sentence, it must inform defendants "that a prior DWI conviction it intends to" rely on "was potentially affected by Dennis's malfeasance." The State contends, however, that this notification obligation extends only to cases confirmed to be Dennis-affected cases, not those in which there is no known evidence that would justify overturning convictions on PCR. The State avers that its notification obligation may be satisfied using the Dennis Calibration Repository and a certification from the Municipal

Prosecutor Liaison or the assigned Assistant Prosecutor who maintains Exhibit S-152 for each county, as an officer of the court.

The State disagrees with the Special Adjudicator's report to the extent that the report recommends that the validity of a prior DWI conviction should be litigated at sentencing on a subsequent DWI conviction. The State asserts that any such challenge can proceed only by filing a petition for PCR in the court in which the prior conviction occurred. It further contends that if a defendant first becomes aware of grounds to challenge the validity of a prior DWI in a subsequent DWI case, the second DWI case should be stayed pending the PCR process. According to the State, this Court acknowledged this procedure in Cassidy and thus, it should be adopted here.

B.

Zingis asks us to affirm the Appellate Division's judgment that he should be sentenced as a first-time offender. He asserts that the State must prove beyond a reasonable doubt that prior DWI convictions being used to impose enhanced penalties or otherwise relied upon in subsequent cases are not Dennis-affected cases. He argues that the State failed to prove beyond a reasonable doubt that his prior DWI conviction was not a Dennis-affected conviction. Zingis further contends that nothing in Cassidy, or any other source cited by the State, limits defendants' relief to PCR applications.

C.

Amicus curiae the New Jersey State Bar Association (NJSBA) agrees with the Special Adjudicator's proposed solution of using the Dennis Calibration Repository and Exhibit S-152 to identify Dennis-affected defendants and argues that in discovery, the State must disclose "whether or not Dennis was involved in any predicate DWI related offense that occurred during Dennis's tenure." NJSBA asserts that, to the extent the Special Adjudicator recommends that an individual must file for PCR prior to obtaining any access to the documents, Cassidy does not require the filing of a PCR application "to get notice that Dennis was involved." It contends that such a requirement would result in unnecessary PCR applications.

NJSBA requests that this Court reject the State's proposed modifications to the Special Adjudicator's recommendation of subjecting Exhibit S-152 to a protective order. It contends that (1) Exhibit S-152 should be accessible to defense counsel to allow independent review and that, to account for the State's privacy concerns, an online version could be subject to a protective order through implementing a "click through certification"; and (2) AIS is not a solution to quickly confirm whether Dennis was involved. It also asks that the Court make a partially redacted version of Exhibit S-152 publicly available

-- removing Name, Driver License Number, Issuing State-- to end the Cassidy notice issue.[3]

D.

Amicus curiae OPD disagrees with the State that the State may satisfy its notification obligation with a certification by the prosecutor. It argues instead that the State should be required to provide the actual data contained in Exhibit S-152 pertinent to a defendant facing an enhanced sentence or other collateral penalties based on a prior DWI conviction with an arrest date between November 5, 2008 and April 9, 2016. OPD proposes that the State use this data to make a prima facie showing that the prior matter was not adjudicated based on an Alcotest reading from a Dennis-calibrated machine, and failure to make this showing should result in waiver of any sentencing enhancement. As to the issue of PCR, OPD agrees with the State that any challenge to a Dennis-affected conviction must be made through PCR in the court where the prior

[3] After oral argument, NJSBA drew the Court's attention to the United States Supreme Court's decision in Erlinger v. United States, 602 U.S. ___, 144 S. Ct. 1840 (2024), in which the Court held that whether a defendant's prior convictions were "committed on occasions different from one another" for purposes of 18 U.S.C. § 924(e)(1) must be decided by a unanimous jury, not by a judge at sentencing. See 144 S. Ct. at 1851-52. Erlinger did not hold that the existence of a prior conviction must be found by a unanimous jury, and it is thus not relevant to our disposition here.

conviction occurred. OPD also submits that Zingis should be sentenced as a first-time offender because the prosecutor's assertions about notice and affected counties in this case were incorrect.

III.

A.

The Law Division reviews municipal court judgments de novo. R. 3:23-8(a)(2). Appellate courts "focus[] on whether there is 'sufficient credible evidence . . . in the record' to support the [Law Division's] findings." State v. Robertson, 228 N.J. 138, 148 (2017) (omission in original) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). However, legal rulings are reviewed de novo and not afforded any deference. Ibid. Likewise, when faced with an appeal dealing with a special adjudicator's report, the Court owes no deference to a special adjudicator's legal conclusions but will generally defer to a special adjudicator's credibility findings regarding the testimony of expert witnesses. Cassidy, 235 N.J. at 491. "The Court also accepts the fact findings of a special [adjudicator] to the extent they are supported by 'substantial credible evidence in the record.'" Ibid. (quoting Chun, 194 N.J. at 93).

B.

Rule 7:10-2 governs PCR in municipal court and dictates that any petition for PCR that is not based upon correcting an illegal sentence "shall not

be accepted for filing more than five years after entry of the judgment of conviction or imposition of the sentence sought to be attacked." R. 7:10-2(b)(2). But we note that, in Cassidy, we lifted the stay on pending cases and relaxed Rule 7:10-2(b)(2)'s five-year time bar given that "the State waited approximately a year to notify the [defendants affected by a Dennis-calibrated Alcotest]." 235 N.J. at 498.

IV.

We resolve the limited areas in which the parties could not agree regarding the implementation of the Special Adjudicator's findings and legal conclusions. We begin with a brief review of the Special Adjudicator's two conclusions over which the parties have remaining concerns: (1) the proper procedure for challenging a prior Dennis-affected DWI conviction when facing enhanced sentencing on a subsequent DWI; and (2) the appropriate availability of Exhibit S-152.

First, the Special Adjudicator concluded that when the State seeks an enhanced DWI sentence premised upon a prior DWI conviction that is potentially open to challenge as a Dennis-affected case, "the State has the obligation to provide a defendant . . . information and documentation, prior to imposing any sentence, whether the DWI conviction did, or did not, involve an evidential BAC reading obtained from breath samples provided on an Alcotest

Instrument calibrated by Sergeant Dennis." The Special Adjudicator also found that "an Alcotest Instrument reporting an 'Error Message' and, consequently, no BAC reading, has nothing to do with the fact that Sergeant Dennis calibrated a particular Alcotest Instrument, which is only relevant when an evidential BAC reading was produced." Thus, the Special Adjudicator concluded that "an AIR producing a 'Test Result' that the 'Subject Refused' can be admissible in evidence during a Refusal prosecution."

The Special Adjudicator held that in order to determine whether a defendant is a Dennis-affected defendant, the State should use the Dennis Calibration Repository in conjunction with Exhibit S-152, and that sentencing should not proceed until the State provides the Dennis Calibration Repository and Exhibit S-152 to the defendant, counsel, and the court. The Special Adjudicator also found that this burden applies equally to circumstances in which a defendant files an application for PCR based on the Court's ruling in Cassidy.

To facilitate the exchange of discovery where there is the possibility of a Dennis-affected prior DWI, the Special Adjudicator outlined a procedure relying on Zingis's case as an example:

> First, conducting a search of [Exhibit S-152] discloses, on Row 75536, that Thomas Zingis was arrested on January 13, 2012 (Column A), in the Borough of Collingswood (Column S), in Camden County, and

> charged with DWI. . . . Mr. Zingis provided breath samples on Alcotest Instrument ARUM-0042 (Column B), located at the Collingswood Police Station (Column D), calibrated on October 13, 2011 (Column C), which resulted in an evidential BAC reading of 0.178 (Column U). Turning to [the Dennis Calibration Repository], a review of same discloses that Alcotest Instrument ARUM-0042 is not an Instrument that was calibrated by Sergeant Dennis.

Second, due to sensitive personal information contained within Exhibit S-152, the Special Adjudicator concluded it should be subject to a protective order, available "for access by municipal courts, Superior Courts, Prosecutors, Public Defenders, Defense Counsel and unrepresented Cassidy-affected defendants when either postconviction relief or enhanced sentencing is sought." Regarding the notification issues that have arisen repeatedly in this matter since Dennis's misfeasance was discovered in 2015, the parties have all acknowledged the ineffectiveness of identifying new addresses and seeking out individuals who have heretofore been unidentifiable.[4] Therefore, the Special Adjudicator held that it will be incumbent upon the State to identify these

[4] The Special Adjudicator noted in his findings that "the State has expressed a willingness to mail the second post-Cassidy notification letter to the addresses secured by the AOC for some of those potentially affected defendants who had been omitted from Exhibit S-90 (also Exhibit S-148), and consequently omitted from both Exhibits S-91 and S-83." We agree with the Special Adjudicator's conclusion that this should be accomplished and that the State should proceed with notifying this omitted group of individuals.

individuals when they face collateral consequences from a potentially Dennis-affected conviction. Be it in municipal court or in the Law Division, a collateral consequence that stems from a prior DWI conviction during the period of Dennis's misfeasance raises responsibilities and burdens that the Special Adjudicator concluded the State must now address.

To give effect to those conclusions, we adopt the following measures.

A.

We order that in any case in which the State seeks an enhanced sentence based on a prior DWI conviction with an arrest date between November 5, 2008 and April 9, 2016, the State must inform the court, defendant, and defense counsel whether defendant's prior DWI conviction involved a Dennis-calibrated Alcotest. The State shall rely upon a combination of the publicly accessible Exhibit S-152 and the Dennis Calibration Repository. As discussed more thoroughly below, the State must provide all defendants with a prior DWI during the effective dates the row of Exhibit S-152 that corresponds to that defendant's prior arrest. Given the fallibility of the notification procedures post-Cassidy, the parties will now be entitled to discovery, which is already readily available and capable of unearthing the procedural irregularities caused by Dennis's misfeasance. Such transparency and safeguards will both (1) allow the State to prove beyond a reasonable doubt

whether a defendant is an affected defendant, permitting them to confidently discharge their duty in seeking sentencing enhancements when permitted by law, and (2) enable defendants to defend against such claims.

By statute, municipal prosecutors must review a defendant's prior driving history in order to determine whether a DWI represents their first or subsequent offense before recommending whether enhancements may apply. N.J.S.A. 2B:25-5.1. Thus, the municipal prosecutor will be able to identify whether a defendant's prior record reflects a DWI conviction during the relevant timeframe for a Dennis review.

We now order that during the initial conference for a DWI matter, the court shall inquire whether the pending matter represents the first or subsequent DWI for a defendant. If the record reflects that the defendant has a prior conviction for DWI, the prosecutor must inform the court, defendant, and defense counsel whether it occurred between the critical dates of November 5, 2008 and April 2016, information readily available to the State in the defendant's abstract. If so, we now order that the court must then schedule a discovery conference for the State to fulfill its obligation and provide to the defendant and counsel, as well as the court, discovery indicating whether the defendant is a Dennis-affected defendant.

The prosecutor will accomplish this by using the summons number from the earlier offense to search Exhibit S-152.[5] As described below, that document will be redacted to include only non-personal identifying information. Once the corresponding entry is located within Exhibit S-152, the prosecutor is to "copy and paste" that row of data into a new document.[6] The Alcotest serial number from that entry must then be compared against the Dennis Calibration Repository. The Dennis Calibration Repository is currently a virtual folder containing a portable document format (PDF) file of every AIR in which Dennis was the calibrating officer. There are 1,046 files contained in this virtual folder, each representing one Alcotest serial number and labeled accordingly. The repository shall be made publicly available by placing it on a State website.

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[5] Every municipal court is equipped with access to a defendant's prior court history, including the ability to obtain the summons number for a prior disposition. Upon appointment, municipal prosecutors receive access to the Person Case Search and Manage (PCSAM) system, permitting them to search a defendant's prior court history, which would allow them to access the summons number for use in conjunction with Exhibit S-152.

[6] The Excel spreadsheet program, like most other spreadsheet applications, permits one row of data to be highlighted entirely and, by using the "copy" feature, the entire row of data can be saved and "pasted" into a new document (either a new Excel spreadsheet or a Word document) that allows for the information to be isolated and printed individually, without any remaining reference to the other entries on the spreadsheet.

Additionally, for ease of reference and use in exchanging discovery, the Dennis Calibration Repository shall be summarized in a Dennis Calibration Repository Summary, which shall be created as follows: the State shall compile a document -- in as few pages as possible, preferably in multiple columns, and in a readable font -- that contains a sequential, alphanumeric list of the 1,046 file names, including the instrument serial number (for example, "ARWA-0188"), machine location, and dates of calibration. This Dennis Calibration Repository Summary is to be certified as accurate, and certified copies will be distributed to each municipality for use by the municipal prosecutor.

Once the cross-reference has been completed, the State can identify whether an Alcotest serial number from Exhibit S-152 is a match with an Alcotest serial number from the Dennis Calibration Repository Summary or not. The State must also provide a copy of the Dennis Calibration Repository Summary for the defendant and defense counsel to verify whether the number is or is not listed. If it is determined that the defendant's prior DWI conviction did not involve a Dennis-calibrated Alcotest, the defendant and defense counsel are still provided their copy of the one row of complete data from Exhibit S-152, along with the Dennis Calibration Repository Summary, and the confirming prior disposition revealing the summons number for the

defendant's prior DWI conviction. The matter then proceeds in the normal course, and the defendant may face enhanced sentencing based on the prior DWI.

If the State determines that the defendant's prior offense involved a Dennis-affected Alcotest Instrument that produced an evidential BAC reading, corroborated by Exhibit S-152 and the Dennis Calibration Repository Summary, judges should afford the defendant a reasonable amount of time to decide whether to challenge the prior conviction. If the defendant wishes to challenge that earlier conviction, the defendant shall do so by filing for PCR in the jurisdiction of the previous conviction. A copy of the motion must be provided to the court for the subsequent DWI. Upon receiving the copy of the motion for PCR, the court for the subsequent DWI matter shall stay the disposition of the matter, unless the defendant elects to enter a guilty or both parties consent to a trial, irrespective of the filing of the PCR. All pretrial procedures in the subsequent DWI matter, including timely production of discovery and participation in case management conferences as directed by the court, shall continue during the pendency of the PCR. The goal is to have the subsequent case trial ready when the PCR is resolved.

If the defendant, after being made aware of the existence of a Dennis-affected matter, chooses to proceed without challenging the earlier conviction,

the court will inquire on the record that the defendant's decision is knowing and voluntary, and the matter may proceed in the usual course.

Because of the serious public safety concerns that DWI charges present, we call on judges to resolve PCRs and related new matters as expeditiously as possible.

B.

Exhibit S-152 contains the following information, organized by columns, pertaining to all Alcotests utilized in New Jersey from November 5, 2008 through June 30, 2016: (1) arrest date; (2) arrest time; (3) arrest location; (4) Alcotest instrument serial number; (5) immediately preceding calibration date; (6) location of test; (7) subject's (a) last name, (b) first name, (c) middle initial, (d) date of birth, (e) age, (f) gender, (g) weight, (h) height, (i) driver's license number, and (j) license issuing state; (8) summons number; (9) "final error" (referring to any errors in the test administration, such as subject refusal or control test failure); and (10) "end result" (i.e., any resulting blood alcohol content (BAC) reading). The State seeks a protective order and access granted only to certain stakeholders, including all municipal courts and superior courts, municipal liaisons, and an assistant prosecutor in each county who will coordinate with municipalities in order to provide defendants and counsel with

the relevant discovery. The following process balances the State's concerns for privacy with defendants' due process need for notification.

As discussed previously, municipal prosecutors must review a defendant's driving abstract in every case. Armed with the date of the offense and the defendant's name, the prosecutor -- with the assistance of the municipal court -- can then locate the summons number for any prior DWI. Once a summons number is identified, the disposition for that offense must be preserved; once it is cross-referenced in Exhibit S-152, it shall be provided to the defendant and defense counsel in discovery. Through that process, the defendant and counsel can see the date and location of offense, summons number, and the defendant's name. The prosecutor must then use the summons number to search Exhibit S-152.[7] Exhibit S-152 shall be redacted to exclude the following columns of personal identifying information: (7)(a) last name; (7)(b) first name; (7)(c) middle initial; (7)(d) date of birth; (7)(i) driver's license number; and (7)(j) license issuing state. Exhibit S-152,

[7] Most word processing applications, as well as spreadsheet applications, contain a "find" feature that would permit the person searching for information to search, in moments, an entire document for a given term. Inputting the summons number into the "find" or "search" dialog box would produce the data set sought.

in its newly redacted form, must be publicly released on the State's website.[8] By itself, without personal identifying information, the data in Exhibit S-152 is ineffective; in combination with other pieces of information possessed by the municipal prosecutor and defense counsel, however, the document becomes serviceable. Using Exhibit S-152 in this way retains the subjects' privacy while serving as a valuable tool.[9] The prosecutor must now provide the prior disposition, along with the complete row of data from Exhibit S-152, and the Dennis Calibration Repository Summary in discovery, which together will be deemed proof beyond a reasonable doubt of whether a defendant's prior DWI conviction is a Dennis-affected matter.

V.

We take a moment to commend the parties for their valuable participation and willingness to reach consensus where possible. Additionally, such consensus could not have been possible without the extraordinary efforts

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[8] Defense counsel will also have an independent means of obtaining the same information through the Municipal Court Case Search (MCCS), should they find an independent evaluation of the evidence necessary.

[9] Despite the lengths to which the State, the Special Adjudicator, and this Court go to secure the personal identifying information of the defendants in these matters, it is worth noting that this information is a matter of public record and attainable by anyone who chooses to seek it out. Nonetheless, risking possible embarrassment or encroaching on a defendant's privacy is not the goal, and we therefore adopt these measures to assure that those privacy concerns are honored.

of the Special Adjudicator, whose exceptional report was critical to the resolution of this matter. Because the remainder of his findings are supported by substantial credible evidence in the record, we adopt them.

In the present matter, we affirm the judgment of the Appellate Division as to vacating the sentence. We remand the matter to the municipal court to afford Zingis the benefit of the discovery process outlined herein, and the matter may then proceed consistent with this opinion.

CHIEF JUSTICE RABNER and JUSTICES PATTERSON, SOLOMON, PIERRE-LOUIS, WAINER APTER, and FASCIALE join in JUSTICE NORIEGA's opinion.

# APPENDIX

SUPREME COURT OF NEW JERSEY

C-653 September Term 2021

087132

State of New Jersey,

Plaintiff-Movant,

v.

Thomas Zingis,

Defendant-Respondent.

**REPORT OF FINDINGS OF FACT & CONCLUSIONS OF REMAND COURT**

| On Remand from the Supreme Court of New Jersey: July 28, 2022 | Findings and Conclusions Submitted to Supreme Court: September 15, 2023 |
|---|---|

Thomas R. Clark, Deputy Attorney General, and Rosina A. Rachuba, Deputy Attorney General, appeared on behalf of Plaintiff-Appellant State of New Jersey (Matthew J. Platkin, Attorney General, attorney).

Michael B. Cooke and Steven W. Hernandez appeared on behalf of Defendant-Respondent Thomas Zingis.

Sharon A. Balsamo (New Jersey State Bar Association), Jeffrey Evan Gold and Michael V. Troso (Helmer, Conley & Kasselman, P.A.) and John Menzel appeared on behalf of *amicus curiae* New Jersey State Bar Association.

Michael R. Noveck, Assistant Deputy Public Defender, appeared on behalf of *amicus curiae* The Office of the Public Defender (Joseph E. Krakora, Public Defender).

**FALL, J.A.D. (retired and temporarily assigned on recall)**
**SPECIAL MASTER**

TABLE OF CONTENTS

## I. INTRODUCTION

This report primarily deals with consideration of the following questions remanded to me by the Order of the Supreme Court entered on July 28, 2022:

> (1) Which counties had convictions affected by the conduct of Marc W. Dennis, a coordinator in the New Jersey State Police's Alcohol Drug Testing Unit, as described in State v. Cassidy, 235 N.J. 482 (2018), and
>
> (2) What notification was provided to defendants affected by Dennis's conduct?
>
> [State v. Zingis, 251 N.J. 502, 503 (2022).]

The Court also permitted me discretion to consider other questions deemed relevant to the issues posited. In order to provide the Court with answers to those questions, that Order appointed me as Special Master to

conduct a plenary hearing, to consider applications for leave to participate as *amicus*, and to make findings of fact on the submitted questions. The Court specifically invited the Office of the Public Defender to participate as an *amicus* party.

## II. BACKGROUND

In 2008, the Court found that blood-alcohol content (BAC) breath test results obtained from drivers suspected of driving under the influence of alcohol, analyzed by law enforcement's proper use of the Alcotest 7110 MKIII-C instrument, were admissible in drunk-driving cases to establish a defendant's guilt or innocence. State v. Chun, 194 N.J. 54, 65 (2008). In Chun, the Court also required that Alcotest instruments be recalibrated semi-annually to help ensure accurate measurements of breath samples. Id. at 153.

On November 5, 2008, New Jersey State Police Trooper II Marc W. Dennis was duly certified as a Breath Test Coordinator/Instructor, authorized to perform calibrations on Alcotest 7110 MKIII-C instruments in the State of New Jersey. See Exhibits S-7, S-163 and S-164. Thereafter, he began calibrating Alcotest Instruments at various locations, primarily in Monmouth, Middlesex, Union, Somerset and Ocean Counties. At some point, Dennis was promoted to the rank of Sergeant."

On October 8, 2015, Sergeant First Class (SFC) Thomas J. Snyder, discovered that Dennis had recalibrated Alcotest Instruments located in the City of Asbury Park, the City of Long Branch, and in Marlboro Township without following the "Calibration Check Procedure for Alcotest 7110." At that time, SFC Snyder was the Alcotest Program Manager and supervised the Alcohol Drug Testing Unit. Specifically, SFC Snyder concluded Dennis knowingly had not been checking the simulator solution temperatures with a NIST-traceable thermometer prior to beginning the recalibration procedure, which was a required step in recalibrating an Alcotest Instrument. As a result of an internal investigation, Sergeant Dennis was precluded from performing further recalibrations of Alcotest Instruments after October 8, 2015, and the matter was referred for investigation to the Division of Criminal Justice within the Office of the Attorney General. See Exhibits S-1, S-37 and S-38.

As a result of that investigation, on September 19, 2016, criminal charges were filed by the Division of Criminal Justice against Sergeant Dennis, charging him with third-degree Tampering with Public Records, contrary to N.J.S.A. 2C:28-7, and fourth-degree Falsifying or Tampering with Records, contrary to N.J.S.A 2C:21-4. See Exhibit S-32.

Prior to the filing of those criminal charges, in November or December 2015, the Prosecutor's Supervision and Training Bureau (the "Bureau") within the Division of Criminal Justice was assigned to identify those individuals who had been requested to provide breath samples on Alcotest Instruments that had been calibrated by Sergeant Marc Dennis. See T3, pp. 128-29 (testimony of Deputy Attorney General (DAG) Robyn Mitchell).

At that time, DAG Mitchell was Deputy Chief of the Bureau. When assigned that task, she contacted the Alcohol Drug Testing Unit (ADTU) of the New Jersey State Police, and was advised the ADTU did not maintain copies of the calibration documents from its coordinators, but information concerning the identity of those individuals performing calibrations of Alcotest Instruments could be obtained by the Information Technology Bureau of the State Police accessing the Alcotest Inquiry System database. See T3, pp. 130-31.

In State v. Chun, 194 N.J. 54, 153, cert. denied, 555 U.S. 825, 129 S.Ct. 158, 172 L.Ed 2d 41 (2008), the Supreme Court required the State to create and maintain a centralized Alcotest statewide database. In State v. Chun, 215 N.J. 489, 491 (2013), the Court determined that the Alcotest Inquiry System database was in full compliance with its order of March 17, 2008.

William Donahue, Jr., retired since November 2021, worked for the New Jersey State Police for approximately thirty (30) years. His last position was Supervising Management Improvement Specialist, serving his last four years as Unit Head of the Programming Unit of the State Police's Information Technology Bureau. In 2011, Mr. Donahue wrote the design requirements for the Alcotest Inquiry System database, which contains information extracted from each of the approximately six hundred Alcotest Instruments used throughout New Jersey, which information, presently, is periodically downloaded, through phone-line servers, into that database, which is maintained by the Office of Forensic Sciences of the New Jersey State Police, located in West Trenton, New Jersey.

There are two types of accounts that can access information from the Alcotest Inquiry System database. The first is a "public account," where members of the public can access information through utilization of three different search types. The first is a "Subject Table Search," which would only return "Subject" data, used to find information concerning the administration of a breath-sample test to a particular individual. The second is a "Certification Table Search," which returns certification data specific as to a particular Alcotest Instrument, as to when it was last calibrated, when the last solution change took place, and the name of the coordinator who performed

the work. The third type of public search that can be conducted is an "Activity Query," which is a combination search that would reveal any activity on a particular Alcotest Instrument, whether it was a blood-alcohol test or calibration performed on that Instrument. A fee is charged to the member of the public for each search requested.

The second account type is an "Administrator Account," which is private, based on access granted to law enforcement personnel by the Office of Forensic Sciences of the New Jersey State Police, and there is no fee charged for such access.

At the request of the Prosecutor's Supervision and Training Bureau, Division of Criminal Justice, Mr. Donahue conducted a query, or search, of the Alcotest Inquiry System database for the names of subjects who had been asked to provide breath samples in Driving While Intoxicated cases on Alcotest Instruments that had been calibrated by Sergeant Marc Dennis.[1]

N.J.S.A. 39:4-50.2(a), commonly known as the Implied Consent Statute, provides that any person operating a motor vehicle on any public road, street or highway or quasi-public area in New Jersey is deemed to have given

[1] Although Mr. Donahue could not specifically recall conducting that query, it is clear he did so because, at that time, he was the only person in the Programming Unit of the IT Bureau of the NJSP authorized to conduct such a query.

consent to the taking of breath samples for the purpose of making chemical tests to determine the content of alcohol in that person's blood, as long as a police officer has reasonable grounds to believe that such person has been operating a motor vehicle in violation of the Driving While Intoxicated statute, N.J.S.A. 39:4-50, or N.J.S.A. 39:4-50.14, that latter statute prohibiting a person, who is under the legal age (21) to purchase alcoholic beverages, from operating a motor vehicle with a blood-alcohol concentration (BAC) of 0.01% or more, but less than 0.08%.

Exhibit S-90 is the resulting Excel Spreadsheet created by Mr. Donahue, after conducting a query of the Alcotest Inquiry System database, and is entitled "Spreadsheet Received from NJSP__27,833 Subject Records," purportedly containing the names of all 27,833 potentially-affected individuals who had been requested to provide breath samples for chemical analysis on Alcotest Instruments that had been calibrated by Sergeant Marc Dennis. Exhibit S-90 was, thereafter, delivered to the Division of Criminal Justice within the Attorney General's Office. The tool utilized to create that Excel Spreadsheet is called "PL/SQL Developer," a product developed by Oracle, a technology provider company. However, that Excel Spreadsheet does not reflect the name of the Operator who calibrated the Alcotest Instrument, reflected on each Subject Row of an attempted breath-sample test in Column B

of Exhibit S-90. Moreover, an address for the Subjects listed on each Row are not obtainable from a query of the Alcotest Inquiry System database.

Upon receiving Exhibit S-90 from Mr. Donahue's office on a compact disc, DAG Mitchell downloaded its contents onto her work computer. Her task was to review Exhibit S-90, and determine those individuals who were potentially affected by the failure of Sergeant Dennis to properly recalibrate Alcotest Instruments. The Division of Criminal Justice determined that only those individuals listed on Exhibit S-90 who had been requested to provide breath samples that resulted in the Alcotest Instrument calculating and reporting a Blood-Alcohol Content (BAC) reading had been potentially affected by the malfeasance of Sergeant Dennis.[2] The basis for that conclusion was that, because no BAC reading had been obtained, any conviction for Driving While Intoxicated could not have been based thereon. Upon being entered into evidence, a BAC reading of 0.08%, or higher, constitutes what is known as a per se violation of N.J.S.A. 39:4-50. See State v. Lentini, 240 N.J. Super. 330, 331-32 (App. Div. 1990), certif. denied, 127 N.J. 553 (1991); State v. Foley, 370 N.J. Super. 341, 358 (Law Div. 2003).

[2] It should be noted that conclusion was reached in 2016, prior to the Court's decision in Cassidy.

Accordingly, based on that determination, DAG Mitchell deleted those Subject Rows from S-90, where no BAC reading had been reported in Column U of the Spreadsheet, and she created Exhibit S-91, a new Excel Spreadsheet entitled "Spreadsheet all counties_wo refusals and error msgs_20,667," purportedly representing the 20,667 individuals who were potentially affected by the misconduct of Sergeant Marc Dennis, namely, they had provided breath samples on an Alcotest Instrument that had been calibrated by Dennis and a BAC reading had been reported by that Alcotest Instrument in Column U of Exhibit S-90. Thus, this procedure resulted in the State contending that the number of attempted breath tests affected by the misfeasance of Sergeant Dennis was reduced from 27,833, by 7,166, to 20,667.

DAG Mitchell then reorganized the information contained on Exhibit S-91 by creating five (5) separate Excel Spreadsheets, one for each of the main Counties (Middlesex, Monmouth, Ocean, Somerset and Union), containing those subject individuals who had provided breath samples that resulted in the reporting of BAC readings on Alcotest Instruments located in each of those Counties. DAG Mitchell then electronically placed each of those Excels Spreadsheets on a separate Thumb Drive and provided those Thumb Drives to Elie Honig, Director of the Division of Criminal Justice.

Director Honig then sent a letter, dated September 19, 2016, to Hon. Glenn A. Grant, Administrative Director of the Courts, see Exhibit S-81A, informing Judge Grant that earlier that day, the Division of Criminal Justice had filed criminal charges against Sergeant Marc Dennis, outlining those charges, and stating, in pertinent part:

> The State recognizes that – regardless of scientific necessity – use of the NIST-traceable thermometer is a required procedure that was adopted by the Supreme Court in State v. Chun. The State therefore anticipates that additional legal challenges may be filed regarding the results of any Alcotest instrument that had been calibrated in the past by Dennis. As a coordinator for over seven years, Dennis calibrated Alcotest instruments in Middlesex, Monmouth, Ocean, Somerset, and Union Counties. The State has identified 20,667 individuals who provided evidential breath samples on those instruments. The attached thumb drive contains a county-by-county listing of these cases. This listing includes personal identifying information and accordingly should be handled confidentially.
>
> Given potential legal challenges and the underlying scientific nature of any potential challenges, the State respectfully requests that the Supreme Court issue a Notice to the Bar and appoint a Special Master to handle any litigation arising from the circumstances set forth in this letter. The State believes that appointment of a Special Master will best serve the ends of efficiency and uniformity in addressing these potential cases.

Each Excel Spreadsheet contained on the Thumb Drives provided by Director Honig to Judge Grant has been separately marked into evidence, as follows:

> Exhibit S-81B, Excel Spreadsheet entitled, "Middlesex_Indiv Defts wo refusals and error messages," containing 4,963 Subject Rows of individuals and 21 Columns, or Fields, of information on 318 pages.
>
> Exhibit S-81C, Excel Spreadsheet entitled, "Monmouth_IndivDefts wo refusals and error messages," containing 9,402 Subject Rows of individuals and 21 Columns, or Fields, of information on 603 pages.
>
> Exhibit S-81D, Excel Spreadsheet entitled, "Ocean_IndivDefs wo refusals and error messages," containing 289 Subject Rows of individuals and 21 Columns, or Fields, of information, on 28 pages.
>
> Exhibit S-81E, Excel Spreadsheet entitled, "Somerset_Individual Defts wo refusals and error messages," containing 1,207 Subject Rows of individuals and 21 Columns, or Fields, of information on 78 pages.
>
> Exhibit S-81F, Excel Spreadsheet entitled, "Union_Indviduals Defts wo refusals and error messages," containing 4,806 Subject Rows of individuals and 21 Columns, or Fields of information on 309 pages.

As noted, none of these Excel Spreadsheets delivered to Judge Grant contained addresses of the individuals identified on each Row.

On September 22, 2016, DAG Mitchell sent an email to Assistant Prosecutors in Middlesex, Monmouth, Ocean, Somerset, and Union Counties, confirming a conference call with them earlier that day concerning defendants

potentially-affected by the conduct of Sergeant Dennis, notifying them that Director Honig had requested, in the September 19, 2016 correspondence to Judge Grant, that a Special Master be appointed to handle any litigation arising from the conduct of Sergeant Dennis. Prior to the appointment of a Special Master, DAG Mitchell suggested the following actions be taken:

> 1. Any case that is pre-trial or pending sentencing: seek stays whenever appropriate based upon your discretion.
>
> 2. Any case that is currently mid-trial should be reviewed on a case-by-case basis. The action to be taken will be fact-sensitive; you should use your discretion to take the appropriate action.
>
> 3. Any case that is on a municipal appeal or is before the Appellate Division: seek stays when appropriate based upon your discretion.
>
> 4. If you receive a motion regarding a person who falls under the universe of cases and is currently serving a prison sentence, please forward those to SDAG Rob Czepiel or myself for further review.
>
> [See Exhibit S-2.]

On September 26, 2016, Eileen Cassidy, who had pled guilty to Driving While Intoxicated in Spring Lake Municipal Court on September 8, 2016, based on an evidential breath sample blood-alcohol content results on an Alcotest Instrument calibrated by Sergeant Marc Dennis, filed an application in that Court seeking to withdrawn her guilty plea. State v. Cassidy, 235 N.J.

482, 514-15 (2018) (Appendix, Report of Special Master, Hon. Joseph F. Lisa, P.J.A.D., Retired, on Recall).

On October 4, 2016, Judge Grant advised Director Honig that he had reviewed the September 19, 2016 letter, but a request for appointment of a Special Master should be made directly to the Supreme Court. Id. at 515. On October 17, 2016, the State applied to the Supreme Court for direct certification in the Cassidy matter, and for appointment of a special master. Ibid.

On April 7, 2017, the Court entered an order, granting the State's motion in Cassidy for direct certification, and appointed Judge Lisa as Special Master, remanding the matter for Judge Lisa to consider and decide the question of whether the failure to test the simulator solutions with an NIST-traceable digital thermometer before calibrating an Alcotest instrument undermines or call into question the scientific reliability of breath tests subsequently performed on the Alcotest instrument, and to consider and decide any other questions that the Special Master, in his discretion, deemed relevant to that undertaking. State v. Cassidy, 230 N.J. 232, 233 (2017).

On July 13, 2017, Special Master Judge Lisa issued an order requiring the Attorney General's Office to apprise the court of its efforts to obtain addresses for the individuals referenced in its motion to appoint a Special

Master. See Exhibit S-3. DAG Mitchell had previously spoken with Steven Somogyi, Assistant Administrative Director of the Courts for Municipal Court Services as to whether the Administrative Office of the Courts (AOC) would be able to obtain addresses for the individuals listed on the Excel Spreadsheets sent to Judge Grant in Director Honig's September 19, 2016 letter. Mr. Somogyi advised it might be possible to obtain addresses through queries of the Court's Automated Traffic System (ATS), a computer system that stores all information automatically when a law enforcement officer issues a summons.

Mr. Somogyi then provided Charles Prather, an independent computer expert who performed data analysis work for the AOC, with the Excel Spreadsheets that had been sent to Judge Grant, requesting him to query the Court's ATS database in an attempt to match the summons numbers and other identifying information of the individuals listed on the Spreadsheets to addresses for them. On July 14, 2017, following the entry of Judge Lisa's order, DAG Mitchell sent an email to Mr. Somogyi, asking whether the AOC had obtained the requested addresses so she could report back to Judge Lisa. See Exhibit S-18A.

In undertaking that assigned task, Mr. Prather uploaded the information on the provided Spreadsheets onto the court's recording servers and then "cleaned up" the information to prepare the requested query of the ATS

database. Mr. Prather discovered there were multiple Rows on the Spreadsheets where no driver's license number, or an invalid driver's license number, for the individual was listed on certain Rows of the Spreadsheets, and also contained some duplicate Subject records. He determined the most accurate method to match a subject to an address was matching the driver's license number listed on the Spreadsheets to the driver's license number listed for that individual in the ATS database. Once Mr. Prather eliminated those Rows containing no driver's license number, or an invalid driver's license number, as well as eliminating the duplicate entries, he extracted from the ATS database all DWI summonses that were in the ATS database from 2008 through 2017 into a separate file. He then linked the two files to determine whether there was a matching driver's license number from the uploaded information on the Spreadsheets to a driver's license number in the ATS database. He then also compared the arrest date and date of issuance of the summons, contained on the Spreadsheets provided, to the arrest date and date of issuance of the summons in the file he had created from the ATS database.

That procedure resulted in the creation of an Excel Spreadsheet with two tabs, one with the names and addresses of individuals where the driver's license numbers, arrest dates, and dates of issuance of the summons matched exactly, and a second tab with the names and addresses of individuals that

matched driver's license number and the arrest date and ticket issue dates within two days of each other. See Exhibit S-83. Once that Excel Spreadsheet was prepared, Mr. Prather delivered it directly to Mr. Somogyi.

On August 10, 2017, Mr. Somogyi sent an email to Supervising Deputy Attorney General (SDAG) Robert Czepiel, then Bureau Chief of The Prosecutor's Supervision and Training Bureau in the Division of Criminal Justice, transmitting Exhibit S-83, and stating, in pertinent part:

> Your office previously provided to Municipal Court Services electronic information on approximately 21,000 tickets you had flagged in this matter linking the Alcotest and Trooper Dennis. The information that your office provided included defendants' first name, last name, driver's license number and arrest date. Based on that data, staff from Municipal Court Services created a special report to match the information provided by your office with information in our ATS computer system. My office was able to match approximately 18,000 of those records (out of approximately 21,000) to a ticket in ATS (spreadsheet attached) in which all data points matched – name, license number and ticket issue date (issue date matching the arrest date). These exact matches are included on tab 1 of the attached Excel spreadsheet. The remaining records did not have an exact match.
>
> However, we were able to do some matching on a segment of those remaining cases. Specifically, on tab 2 of the attached Excel file, additional ATS records are reflected which matched first and last name and the license number. These same cases also closely match (within 2 days of the information you provided) the ticket issue date and the arrest date. As these were not exact matches, but still "likely" cases, we elected to

> place them on a second tab of the spreadsheet for further review and research by your team. In total, there were 948 of these "near matches."
>
> [See Exhibit 18B.]

The Excel Spreadsheet in Exhibit S-83 contains 18,249 exact address-to-subject matches on Sheet 1, and 947 partial address-to-subject matches on Sheet 1, for a total of 19,196 addresses of the 20,667 individuals listed on Subject Rows contained in the Exhibit S-91 that had been sent to Administrative Director Grant on September 19, 2016, a difference of 1,471 subject rows where the AOC was unable to locate a matching address in the ATS database for those subjects listed on Exhibit S-91. The address information for each listed Subject Row is contained in columns J through O on each Sheet of Exhibit S-83.

On November 2, 2017, Judge Lisa, Special Master in Cassidy, issued an Order, inter alia, granting "the State's motion for a stay of proceedings in other courts that raise issues potentially affected by the Supreme Court's ultimate determination in this matter, i.e. a DWI prosecution in which a BAC reading derived from an Alcotest device calibrated by coordinator Marc Dennis[.]" See Exhibit S-98.

On December 6, 2017, Judge Grant issued a Notice to the Bar, stating the Supreme Court had granted certification in State v. Cassidy, and stated, in relevant part:

> The Alcotest machines calibrated by Sergeant Dennis during his tenure with the State police were used in over 20,000 DWI prosecutions. Although most of these cases were filed in five counties (Middlesex, Monmouth, Ocean, Somerset and Union Counties), there have been cases in twelve counties total.
>
> * * * *
>
> Additionally, on November 28,[2017][3] Judge Lisa issued a Supplemental Order (attached) providing that the burden for determining whether or not the defendant provided a breath sample on an Alcotest device calibrated by Sergeant Dennis rests with the prosecutor handling the case. The prosecutor is also required to produce and provide documentary evidence of that determination to the defendant and the court. Further, in any proceeding in any court involving a prosecution for an offense in which a prior "Dennis" DWI conviction constitutes a predicate offense that can enhance the gradation or applicable punishment in that new case, or involving a sentence emanating from such a case that has been adjudicated, the burden rests with the prosecutor to determine whether or not the defendant provided a breath sample on an Alcotest device calibrated by Sergeant Dennis in that prior DWI case, and to produce documentary evidence of that determination to the defendant and the court.

[3] A full copy of Judge Lisa's Supplemental Order dated November 28, 2017 is contained in Exhibit S-100.

In State v. Cassidy, 235 N.J. 482, 487 (2018), the Court adopted the 198-page report of its appointed Special Master, retired Appellate Division Presiding Judge Joseph F. Lisa, and ruled that the failure to test the simulator solution of an Alcotest 7110 MKII-C instrument in the recalibration process with an NIST-traceable digital thermometer undermines the reliability of the Alcotest blood-alcohol content readings produced. Ibid. The Court elaborated, as follows:

> During the calibration process, simulator solutions containing varying concentrations of ethanol are used to calibrate the Alcotest and confirm the accuracy of its blood alcohol content readings. The simulator solutions are poured into calibration units, which are glass containers that house a heating component. The calibration units heat the solutions to about 34 degrees Celsius, the generally accepted temperature for human breath, creating a vapor. The vapor is a proxy for human breath. It is essential that the temperature of the solution be accurate in order for the Alcotest's blood alcohol content readings to be correct. The Alcotest's calibration procedure requires the test coordinator to insert a thermometer that produces NIST-traceable temperature measurements into the simulator solution used to calibrate the Alcotest and confirm that the calibration unit heated the solution to temperature within 0.2 degrees of 34 degrees Celsius. The NIST is the federal agency responsible for maintaining and promoting consistent units of measurement. When a thermometer's temperature measurements are "traceable" to the standard measurements of the NIST, those measurements are generally accepted as accurate by the scientific community.

> There are two other temperature probes used during the calibration procedure. Unlike the NIST-traceable thermometer, both of those probes are manufactured and calibrated by Draeger. The first is the "black key probe," which plugs into the Alcotest device and allows the coordinator to access the calibration function. That probe is used to measure each simulator solution's temperature during a series of control tests. The second is the "agency's probe," which also plugs into the Alcotest and is used to measure the temperature of the simulator solution used in the final test to confirm that the Alcotest was calibrated correctly.
>
> [Cassidy, 235 N.J. at 488-49.]

After reviewing and adopting the factual findings of the Special Master, the Court concluded the "the accuracy of the temperature of the simulator solutions used to calibrate the Alcotest is critically important to the fidelity of its readings," id. at 94, and ordered "the State to notify all affected defendants of our decision that breath test results produced by Alcotest machines not calibrated using a NIST-traceable thermometer are inadmissible, so that they may take appropriate action[,]" relaxing the five-year time bar for making an application for post-conviction relief set forth in R. 7:10-2(b)(2). Id. at 498.

On August 27, 2018, Defendant-Respondent Thomas Zingis was issued a summons in the Township of Berkeley, Ocean County, New Jersey, charging him with Driving While Intoxicated, contrary to N.J.S.A. 39:4-50(a). He was also issued a summons charging him with Careless Driving, contrary to N.J.S.A. 39:4-97. Although a blood-alcohol content reading on an Alcotest

Instrument was obtained from breath samples provided by Mr. Zingis, that reading was excluded by the Municipal Court Judge based on a pretrial motion. The matter was tried in Berkeley Township Municipal Court on December 18, 2019 based on observational evidence only, and the Municipal Court Judge convicted Mr. Zingis of Driving While Intoxicated, merging and dismissing the Careless Driving summons. Mr. Zingis had a prior conviction for Driving While Intoxicated in the Borough of Collingswood, Camden County, New Jersey in April 2012, and he moved for sentencing as a first-time offender, arguing "the court should disregard the 2012 conviction because the State failed to produce documentary evidence that [the 2012 conviction] was not based on an Alcotest breath sample test result rendered inadmissible by the holding in Cassidy." Sentencing was adjourned to January 8, 2020.

The Municipal Court Judge rejected defendant's argument, based on representations by the municipal prosecutor that defendant's 2012 conviction did not fall within the Court's ruling in State v. Cassidy because he was not on a list on the Attorney General's website of defendants notified by the State that their conviction for DWI were potentially affected by the conduct of Sergeant March Dennis and, thereby, the misconduct of Dennis did not affect any convictions arising from Camden County. Accordingly, the Municipal Court Judge sentenced Mr. Zingis as a second offender, imposing a two-year

suspension of his driver's license, 48 hours IDRC, a $506.00 fine, $33.00 in costs, a $225.00 DWI surcharge, 3 years of an ignition interlock device, $50.00 VCCB, $75.00 SNSF, 30 days community service, and two days incarceration in the county jail, to be served in the IDRC. The sentence was stayed pending appeal to the Law Division of his conviction and sentence.

On October 20, 2020, the Law Division conducted a trial de novo. The conviction of Mr. Zingis for Driving While Intoxicated was affirmed. The Law Division Judge also affirmed the sentencing of Mr. Zingis as a second offender, noting that the Municipal Court Judge had appropriately taken notice of information on the State's Judiciary website that the conviction of Mr. Zingis in 2012 for Driving While Intoxicated did not involve breath samples provided on an Alcotest Instrument calibrated by Sergeant Marc Dennis. Mr. Zingis filed a timely appeal to the Appellate Division.

In State v. Zingis, 471 N.J. Super. 590, 594 (App. Div. 2022), an opinion issued on Aril 25, 2022, the court affirmed the order of the Law Division, convicting defendant of DWI. However, because the State did not prove beyond a reasonable doubt that the 2012 conviction of Mr. Zingis for DWI was not based on Alcotest breath sample test results rendered inadmissible by the Court's holding in State v. Cassidy, the court vacated his sentence as a second offender, and remanded the matter to the Law Division for resentencing Mr.

Zingis as a first offender. The court found there was reasonable doubt with respect to whether defendant's 2012 DWI conviction was based on false calibration records executed by Sergeant March Dennis, stating in pertinent part:

> The record contains no evidence with respect to how the Attorney General's list was compiled and whether it definitively includes all DWI convictions tainted by Dennis's malfeasance. A notice issued by the judiciary raises doubt about the comprehensive nature of the list. The judiciary's Cassidy website, of which we take judicial notice, N.J.R.E. 201, states that although "notices have been sent to all [defendants] eligible" who have a prior DWI conviction reviewed under Cassidy, "[y]ou may be eligible even if you did not get a notice . . . ." New Jersey Courts: Cassidy DWI Cases, https.//www.njcourts.gov/courts/mcs/Cassidy.html (last visited Apr. 8, 2022). This is an acknowledgement by the judiciary that the list of defendants who received a Cassidy notice from the State is not definitive.
>
> Moreover, two Notices to the Bar issued by the Acting Administrative Director of the Courts, of which we take judicial notice, cast doubt on the proposition that Dennis's misconduct did not affect any DWI conviction arising from Camden County. In a December 6, 2017 Notice to the Bar, the Acting Director stated with respect to cases affected by Dennis's falsification of records, that "[a]lthough most of these cases were filed in five counties (Middlesex, Monmouth, Ocean, Somerset and Union Counties), there have been cases in twelve counties total." Notice to the Bar, "Orders by Judge Lisa as Special Master in State v. Eileen Cassidy Staying Certain Alcotest-Related DWI Cases" (Dec. 6, 2017) (emphasis added). In addition, in a July 22, 2021 Notice to the Bar, the

> Acting Director stated that more than 13,000 DWI convictions were eligible for review under Cassidy, "with most of those cases in four counties (Middlesex, Monmouth, Somerset, Union)." Notice to the Bar and Public, "Review of DWI Convictions Involving Not Properly Calibrated Equipment (State v. Cassidy) - Website to Facilitate Submission of Requests to Review a DWI Conviction" (July 22, 2021) (emphasis added). These notices acknowledge that Dennis's misconduct affected DWI convictions in counties beyond Middlesex, Monmouth, Ocean, Somerset, and Union Counties, which are those most commonly associated with his malfeasance.
>
> [Zingis, 471 N.J. Super. at 606-07. (Emphases in original.]

In its opinion, the Appellate Division panel noted it did "not foreclose the possibility that a more robust record in a future case may establish beyond a reasonably doubt that the State had identified every DWI conviction possibly tainted by Dennis's misconduct, provided notice to the defendant in each of those cases, and compiled a record of such notification." Id. at 607. The court then concluded:

> We note that when followed, the approach in place under Judge Lisa's supplemental order [entered as Special master in Cassidy on November 28, 2017] provided definitive proof that a prior DWI conviction was not affected by Dennis's misconduct. While this approach may be less convenient and efficient for the State than reliance on a list of defendants provided Cassidy notice, the definite nature of which has not been proven, the burden of Dennis's malfeasance as a law enforcement officer falls on the State. Where the State seeks to impose an enhanced sentence, it cannot

> escape on the grounds of convenience and expediency its obligation to prove that the prior conviction on which that enhanced sentence is predicated was not tainted by the previously established misconduct of a police officer.
>
> [Ibid.]

Judge Lisa's November 28, 2017 Order noted that the only definitive way to determine whether or not Sergeant Dennis calibrated an Alcotest Instrument used to take breath samples from a defendant is to obtain the relevant calibration documents for that particular Alcotest Instrument, which should be turned over to the defendant by the State in discovery. Zingis, 471 N.J. Super. at 597.

Following the court's decision in Zingis, the State filed an application for a stay and a motion for reconsideration in the Appellate Division. The Appellate Division considered the State's motion for reconsideration and entered an order on May 26, 2022, found no reason to alter its April 25, 2022 opinion, and denied the State's motion in an order entered on May 26, 2022. In a separate order, entered on that same date, the Appellate Division denied the State's motion for a stay.

The State then filed an application for emergent relief in the Supreme Court, seeking a stay. On June 1, 2022, the Supreme Court entered an order temporarily staying the Appellate Division's opinion pending further order of

the Court, and set forth requirements for the filing of the State's motion for a stay and its petition for certification and briefs, and the defendant's responses thereto.

On July 28, 2022, the Court issued an opinion and order in State v. Zingis, 251 N.J. 502 (2022), granting the State's petition for certification and its motion for a stay and provided, as follows:

> It is further ORDERED that the matter is remanded to a Special Master for a plenary hearing to consider and decide the following questions, along with any other questions that the Special Master, in his discretion, deems relevant to the undertaking: (1) Which counties had convictions affected by the conduct of Marc W. Dennis, a coordinator in the New Jersey State Police's Alcohol Drug Testing Unit, as described in State v. Cassidy, 235 N.J. 482 (2018), and (2) What notification was provided to defendants affected by Dennis's conduct?
>
> It is further ORDERED that the Honorable Robert A. Fall, retired Judge of the Appellate Division, is appointed to serve as the Special Master, with his consent. The Special Master shall have discretion over the remand proceedings and, in addition to submissions from the parties, shall consider applications for leave to participate as amicus. The Court invites the Office of the Public Defender to participate as an amicus party.
>
> It is further ORDERED that, subject to any rulings by the Special Master regarding the proofs to be submitted on remand, defendant and the State shall each present evidence in support of their respective positions. In developing evidence relevant to the questions presented, the parties should seek responsive

> information from the Office of the Attorney General and the Administrative Office of the Courts.
>
> It is further ORDERED that, after the record is developed, the Special Master shall make findings of fact and expeditiously complete and submit a written report of his findings to the Court.
>
> It is further ORDERED that, upon the filing of the Special Master's report on remand, the Clerk of the Court shall establish a supplemental briefing schedule on appeal and shall schedule the matter for oral argument on the record as developed by the Special Master and supplemental briefing.
>
> [Zingis, 251 N.J at 503-04.]

## III. PROCEDURAL HISTORY

Following the Court's July 28, 2022 Order, on August 1, 2022, notice was sent to all counsel of record, along with a copy of my June 21, 2019 Initial Report to the Court, as Special Master in State v. Cassidy, see Exhibit S-31, scheduling a case management conference before this court on August 29, 2022. Robyn S. Mitchell, Deputy Attorney General, counsel for plaintiff-appellant, State of New Jersey, Michael B. Cooke, Esq., counsel for defendant-respondent, Joseph J. Russo, First Assistant Public Defender, and Steven Somogyi, Assistant Director of the Administrative Office of the Courts, for Municipal Court Services, participated in the case management conference, resulting in issuance of a case management order dated August 31, 2022, which provided, as follows:

1. The New Jersey Public Defender shall advise the Special Master on or before September 30, 2022, whether his Office will accept the invitation of the New Jersey Supreme Court to participate as an amicus party in this matter;

2. All applications for participation as an amicus party in this matter, on notice to counsel of record at the addresses listed herein, shall be filed by September 30, 2022, with the Special Master, at: Superior Court of New Jersey, Appellate Division, Monmouth Park Corporate Center, 185 State Highway 36, Suite 1, West Long Branch, New Jersey 07764, with an electronic copy to [redacted]. Within five (5) business days thereafter, counsel of record shall advise the Special Master of any objection or assent to such an application, and the Special master will decide any such application thereafter;

3. The Office of Attorney General shall provide to the Special Master and counsel a copy of the notice and list of 20,667 potentially affected defendants, sent to the Administrative Office Courts following Marc Dennis being criminally charged, referenced in State v. Cassidy, 235 N.J. at 486-87, by not later than September 16, 2022, which notice and list shall be deemed confidential and shall not be disseminated to or shared with anyone or any entity, except counsel of record and the parties, pending further Order. Counsel for the State shall also prepare and file with the Special Master, with copies to counsel of record, by September 16, 2022, a certification outlining the manner in which the referenced 20,667 potentially-affected defendants were identified and compiled;

4. The copy of the referenced Special Master's Initial Report to the New Jersey Supreme Court provided to counsel shall not be disseminated or shared with anyone or any entity, except counsel of record and the parties, pending further Order;

5. Following receipt and review of the aforesaid list of 20,667 potentially affected defendants, the referenced certification, and the aforesaid Initial Report, counsel shall file with the Special Master, with copies to all counsel of record, any further discovery requests by not later than September 30, 2022, with any objections thereto filed with the Special Master and served upon counsel of record by October 7, 2022, after which the Special Master shall issue, if necessary, a Discovery Order;

6. Counsel are encouraged to exchange documentation relevant to the task of the Special Master as delineated in the Order of the Supreme Court entered in this matter on July 27, 2022 and to stipulate to any documents exchanged;

7. The goal of the Special Master is to conduct the plenary hearing set forth in the Court's July 27, 2022 Order sometime in November 2022, and to issue a Report to the Court promptly thereafter; and

8. The following contact information shall be utilized in performance of the requirements set forth in this Order:

Robert A. Fall, J.A.D., Special Master
Superior Court of New Jersey, Appellate Division
Monmouth Park Corporate Center Suite 1, 185 State Route 36, West Long Branch, New Jersey
Telephone: 848-448-0899
email: [redacted]

Michael B. Cooke, Esq.
25-F Main Street
Toms River, New Jersey 08753
Telephone: 732-244-1936
email: mike@attorneycooke.com

Robyn Mitchell, Esq.
Deputy Attorney General
25 Market Street
PO Box 085
Trenton, New Jersey 08625
Telephone: 609-376-2398 (office)
609-422-6320 (cell)
email: mitchellr@njdcj.org

Joseph J. Russo, Esq.
First Assistant Public Defender
25 Market Street
PO Box 850
Trenton, New Jersey 08625-0850
Telephone: 609-984-0094
email: Joseph.Russo@opd.nj.gov

[See Exhibit A.]

On September 16, 2022, DAG Mitchell sent the court and all counsel, the following: a copy of the letter, dated September 19, 2016, from Elie Hong, Director of the Division of Criminal Justice, to the Honorable Glenn A. Grant, Administrative Director of the Courts, see Exhibits S-32 and S-81A; DAG Mitchell's certification, dated September 22, 2022, setting forth the procedures utilized by the State to identify defendants potentially affected by the Court's decision in Cassidy, see Exhibit S-27; and the Excel Spreadsheets attached to the September 19, 2016 letter, containing the State's listing of the defendants potentially-affected by the Court's decision in Cassidy, see Exhibits S-91 and S-81B through 81F.

On September 30, 2022, the Public Defender's Office filed and served a Motion to Participate as *Amicus Curiae*. See Exhibit B. Also on September 30, 2022, defendant-respondent filed and served his First Combined Discovery Demands. See Exhibit C. On October 6, 2022, the State filed and served a request for an extension, to October 21, 2002, to file its reply to the discovery demands, which was granted. See Exhibit D. On October 12, 2022, the New Jersey State Bar Association (NJSBA) filed and served a Motion for Leave to Appear as Amicus Curiae. See Exhibit E.

On October 21, 2022, the State filed and served, (1) a letter, opposing in part, the discovery demands; (2) a letter concerning the Public Defender's motion to appear as amicus curiae; and (3) a letter concerning the motion by NJSBA to appear as amicus curiae. See Exhibit F. Also on October 21, 2022, the NJSBA filed and served, a brief in reply to the State's opposition to the discovery demands and concerning its application to appear as *amicus curiae*. See Exhibit G. On October 27, 2022, the Public Defender filed and served a response to the State's October 21, 2022 letters. See Exbibit H.

On December 5, 2022, I issued an Order, granting the application of the Public Defender and NJSBA to appear as *amicus curiae*, scheduling oral argument on the discovery requests and scheduling a second case management conference, for December 22, 2022. See Exhibit I. On December 20, 2022,

Mr. Gold, on behalf of the NJSBA, sent an email to the court and all counsel, outlining the Bar's position on the discovery issues. See Exhibit J.

Oral argument on the discovery issues, and a second case management conference, were conducted on December 22, 2022. On December 27, 2022, the court issued an Order for Discovery and Second Case Management, and Scheduling Plenary Hearing. See Exhibit K. That Order adjudicated all outstanding discovery requests, requiring them to be satisfied and provided to the court and all counsel by January 17, 2023, and scheduled the plenary hearing to commence on January 31, 2023, to continue on consecutive days until completed. Paragraph 3 of that Order permitted the Public Defender and the NJSBA to file and serve, via email, any additional requests for discovery, by January 4, 2023, with any responses thereto to be filed and served by January 9, 2023.

On January 3, 2023, Mr. Noveck, on behalf of the Office of Public Defender, submitted five (5) requests for discovery, see Exhibit L, as did the NJSBA, see Exhibit M. On that same date, the State filed and served a request for the court to reconsider that portion of the December 27, 2022 Order for Discovery, requiring the State to identify individuals within the NJSP, presently employed or retired, who might provide testimony concerning creation of the Alcotest Inquiry System database. See Exhibit N.

By letter dated January 9, 2023, the State submitted opposition to the applications of the Public Defender and NJSBA for additional discovery. See Exhibit O. In an email dated January 9, 2023, Mr. Noveck filed and served a reply to the State's letter brief. See Exhibit P. On January 10, 2023, the NJSBA filed and served a letter brief in opposition to the State's motion for reconsideration, and a response to the State's opposition for additional discovery. See Exhibit Q.

In letter briefs, and a certification, dated January 12, 2023, the State requested the court review the work records of Sergeant Dennis, ordered to be produced by the December 27, 2023 Order, in camera, and requested an extension of time to produce same. See Exhibit R. On January 16, 2023, the NJSBA filed and served a letter brief addressing the State's opposition to additional discovery and concerning the ordered work records of Sergeant Dennis. See Exhibit S.

On January 17, 2023, the court issued a letter opinion and Order determining the discovery issues raised by counsel, setting discovery deadlines, and adjourning commencement of the plenary hearing to February 15, 2023. See Exhibit T. The Order granted, in part, the application of the State for reconsideration of the December 27, 2022 Order, directing the State

to identify individuals within the Office of Forensic Sciences (OFS), the Information Technology Bureau (ITB), and the Alcohol Drug Testing Unit (ADTU) of the NJSP, and within the Attorney General's Office, presently employed or retired, who will be able to provide testimony concerning the method employed to create the list of defendants potentially affected by the Court's decision in Cassidy, as well as producing representatives of the AOC to provide testimony concerning the method it utilized to determine addresses of those potentially-affected defendants identified in Exhibit S-91. The Order further required the State to identify and provide testimony from witnesses concerning how the list of 18,827 cases impacted by the Court's decision in Cassidy, as contained in the June 21, 2019 Initial Report by the Special Master in Cassidy, see Exhibit S-31, was created, and to provide testimony concerning the notification letters sent to all Cassidy-affected defendants. The Order also required summaries of testimony of witnesses to be presented be supplied to the court and all counsel at least seven (7) days prior to commencement of the plenary hearing. Additionally, the Order required the State to provide, in discovery, all available digital information and spreadsheets pertaining to the 27,833 records noted in DAG Mitchell's September 16, 2022 certification. All other discovery requests were denied. The Order further directed that the work records of Sergeant Dennis, ordered to be produced, be first reviewed by the

court, in camera, with the court, thereafter, to provide counsel with a letter opinion concerning same. All additional discovery was to be produced by February 3, 2023.

Following the State's submission of the work records of Sergeant Dennis, and the court's in camera review of same, on January 19, 2023, the court issued a letter opinion and order, noting that the records supplied are not "work records" that would indicate day-to-day assignments, or work history of Sergeant Dennis, but were, rather, in the nature of "personnel performance" records, which the court deemed irrelevant to the issues presented. See Exhibit U.

On February 6, 2023, Michael B. Cooke, Esq., counsel for defendant-respondent, filed and served a motion for additional discovery, which the court denied, on that date, as being out-of-time. See Exhibit V. On February 6, 2023, the State provided its list of witnesses and summaries of proposed testimony. See Exhibit W.

During the course of this matter, the State provided the court and counsel with voluminous discovery, both in the form of eleven (11) password-protected Thumb Drives, and attachments to various emails. The discovery produced, as well as the exhibits produced during the hearings constitute more than 250,000 pages, and have been placed on a SharePoint site that is available

to the Court, the parties, and all counsel of record. Many of the exhibits contain personal and confidential information and should be protected from public scrutiny.

On February 8, 2023, Michael Noveck, Assistant Deputy Public Defender, requested an adjournment of the plenary hearing, scheduled to commence on February 15, 2023, for a period of two to four weeks to allow review of the voluminous discovery provided. As a result, the court scheduled and conducted a conference call with all counsel, arranged by Sharon Balsamo, Esq., General Counsel for the NJSBA, on February 10, 2023. Prior thereto, Jeffrey Evan Gold, Esq., counsel for the NJSBA, filed and served a response to the adjournment request, joining in same. See Exhibit X. DAG Clark, on behalf of the State, also submitted a letter, dated February 9, 2023, outlining the State's position. See Exhibit Y. After conducting the conference call, the court rescheduled the plenary hearing to commence on March 15, 2023.

On February 13, 2023, the NJSBA sought access to the non-public portion of the Alcotest Inquiry System database, and provided the court with a proposed protective order. See Exhibit Z. On that date, the State filed and served written objections to that request, followed by a detailed letter-brief on February 21, 2023. See Exhibit AA. On February 22, 2023, the NJSBA filed a response to the State's objections. See Exhibit AB.

On February 21, 2023, counsel for the AOC requested the court enter a protective order to safeguard the personal information and documentation provided by the AOC during this proceeding. See Exhibit AE. On February 22, 2023, the court entered a Protective Order, directing that all documentation provided in discovery concerning the personal information of litigants, counsel and potentially-affected defendants shall be deemed confidential, and shall not be disseminated beyond counsel of record without permission of the court. See Exhibit AF.

On February 22, 2023, Mr. Noveck, on behalf of the Public Defender, the NJSBA, and Defendant-Respondent, filed and served a letter-brief in support of its position that the State should be required to provide written, sworn statements from proposed witnesses, William Donahue, William Gronikowski, and Charles Prather, prior to their testimony and commencement of the plenary hearing. See Exhibit AC. On that same date, the NJSBA filed and served its support of the Public Defender's request. See Exhibit AD.

On February 27, 2023, the State filed and served a request, pursuant to N.J.R.E. 807, concerning admission into evidence documents provided in discovery that constitute Public Records, Reports and Findings in accordance with N.J.R.E. 803(c)(8). See Exhibit AG. That request was granted.

On February 28, 2023, the State filed and served a letter-brief concerning the positions of the NJSBA, the Public Defender, and Defendant-Respondent that the State's witnesses, Donahue, Gronikowski, and Prather be deemed experts. See Exhibit AH.

On February 28, 2023, the Public Defender and NJSBA filed and served their arguments in support of access to the non-public portion of the Alcotest Inquiry System database. See Exhibits AI and AJ.

On March 1, 2023, the State filed and served a letter-brief in further opposition to the proposed protective order submitted by the NJSBA, seeking access to the non-public portion of the Alcotest Inquiry System database. See Exhibit AK. On that same date, the NJSBA filed and served additional argument in support of that proposed protective order. See Exhibit AL.

On March 2, 2023, the court issued a written opinion and Order, requiring the State to provide written, sworn statements from witnesses, William Donahue, William Gronikowski, and Charles Prather, and reserving on the request for access to the non-pubic portion of the Alcotest Inquiry System database until conclusion of the testimony of witnesses Donahue and Gronikowski. See Exhibit AM.

On March 3, 2023, the State submitted a summary of the testimony to be provided by Deputy Attorney Robyn Mitchell, and Sergeant First Class Kevin Alcott of the NJSP. See Exhibit AO.

On March 29, 2023, this court issued a letter opinion and order, denying the applications of the NJSBA, Office of Public Defender, and Defendant-Respondent for access to the private portion of the Alcotest Inquiry System database, but requiring the State to arrange for the Alcotest Inquiry System database to be queried, and provide the court and all counsel and Excel Spreadsheet that sets forth solution changes and calibrations on all Alcotest Instruments in New Jersey from November 5, 2008 through June 30, 2016. See Exhibit AS.[4]

As noted, throughout the course of the procedural history of this matter, the State, counsel for Defendant-Respondent, and counsel for *Amici Curiae*, the NJSBA and Office of Public Defender, submitted voluminous exhibits, and I prepared and periodically provided all counsel with copies of Exhibit Lists, assigning designated exhibit numbers to each exhibit for ease of reference during the plenary hearing. Those assigned "Exhibit Numbers" are referenced throughout this court's Report to the Supreme Court, with the prefix

[4] The ordered Excel Spreadsheet was provided and has been marked into evidence as Exhibit S-152, and consists of 236,664 subject test records, containing 25,180 pages.

designation of "S" for the State's exhibits, "DB" for the NJSBA's exhibits, "DPD" for the Office of Public Defender's exhibits, "DZ" for those submitted of behalf of Defendant-Respondent, Thomas Zingis, and "DB/DPD" or joint exhibits submitted by the NJSBA and Public Defender. Exhibits not marked during the plenary hearing, but constituting references in the Procedural History of this Report have been alphabetically marked. All Exhibits are listed in Appendix I of this Report.

Commencement of the plenary hearing was adjourned to March 20, 2023, and a "technology test" concerning the various electronic exhibits to be displayed to the witnesses, the court, and all counsel was conducted at the Middlesex County Courthouse on March 14, 2023.

The plenary hearing was conducted at the Middlesex County Courthouse on the following ten (10) dates: March 20, 21, 22, and 28, 2023; April 25, 26, and 27, 2023; and June 12, 13, and 14, 2023. The transcripts of those hearings are contained in Appendix II of this Report. The court received testimony from fourteen (14) witnesses which is summarized and discussed herein. On July 17, 2023, all counsel filed and served Proposed Findings of Fact and Conclusions of Law. See Exhibits AO, AP, AQ, and AR.

## IV. WITNESSES; TESTIMONY AND ASSESSMENT

### A. State's Witnesses

#### 1. William Donahue, Jr.

William Donahue, Jr., was called as a witness by the State. Mr. Donahue, who retired in November 2021, worked for the New Jersey State Police for approximately thirty (30) years. His position prior to retirement, which he held for four (4) years, was Supervising Management Improvement Specialist, as Head of the Programming Unit of the State Police's Information Technology Bureau. He spent his entire career with the State Police working in the information technology area. His testimony in contained in T1, the March 20, 2023, Transcript, on pages 11-139.

The Court's decision in State v. Chun, 194 N.J. 54, 153, cert. denied, 555 U.S. 825, 129 S.Ct. 158, 172 L.Ed. 2d 41 (2008), required the State to provide a central repository of data from all Alcotest Instruments in New Jersey. Mr. Donahue verified that the Alcotest Inquiry System database was created through collaboration with Drager, the manufacturer of the Alcotest 7110 MKIII-C used in New Jersey; Ayoka Systems, a third-party software developer contracted by Drager; the Office of Forensic Sciences, the Alcohol Drug Testing Unit (ADTU) and the Information Technology Bureau of the New Jersey State Police; and NICUSA, Inc., a company that provides software

and technology services to governmental agencies. As noted, the State has been determined to be in full compliance "with this Court's Order of March 17, 2008, in all respects." State v. Chun, 215 N.J. 489, 491 (2013). Mr. Donahue noted Ayoka created the software that communicates between the servers in West Trenton and the individual Alcotest Instruments and transfers the data retrieved into the database.

In 2011, Mr. Donahue wrote the design requirements for the Alcotest Inquiry System database used by the public, which he described as a web application whereby members of the public can register, receive an account number, and make various inquiries of the Alcotest database. As noted infra., Mr. Donahue explained there are two types of accounts relating to access to that database. The first is a "Public Account," and a fee is charged for the data extracted. The second is an "Administrative Account," which is private, access to which must be granted by the Office of Forensic Sciences of the New Jersey State Police, and there is no fee charged.

Mr. Donahue stated the Alcotest Inquiry System database contains information extracted from each of the approximately 600 Alcotest Instruments used through the State, and is downloaded weekly through dedicated phone-line servers into the database, which is centrally maintained by the Office of Forensic Sciences located at the New Jersey State Police

Headquarters in West Trenton. Upon successfully downloading the data from an Alcotest Instrument, the data in that Alcotest Instrument is deleted so that it will not be replicated during the next weekly download.

Mr. Donahue further explained the Alcotest Inquiry System database contains two groupings of information: (1) Alcotest Subject Records; and (2) Alcotest Instrument Certification records. There are three different search types that can be conducted to extract information from the database. The first is a "Subject Table" search, which would only return subject data. This search would be used to find information concerning the administration of breath-sample testing on an Alcotest Instrument to a particular individual. The second is a "Certification Table" search, which returns certification data, specific to the Alcotest Instrument searched, as to when it was last calibrated, when the solution changes took place, and the name of the State Police Coordinator who performed the work. The third type of search is an "Activity Query," which is a combination inquiry that would look at both Tables and reveal any activity on a specific Alcotest Instrument, whether it was a Blood-Alcohol Content (BAC) test conducted, or calibration work performed, and it would combine that query into the results for that specific request.

During his testimony, Mr. Donahue was shown a copy of Exhibit S-90, the Excel Spreadsheet entitled "Spreadsheet Received from NJSP_27,833

subject records.xlsx." This Spreadsheet, which was identified by Mr. Donahue as a product of the State Police's Information Technology Bureau, is the result of a search of the Alcotest Inquiry System database. It purportedly contains the names of all subject breath tests, 27,833 in number, that were potentially affected by the Supreme Court's decision in State v. Cassidy, 235 N.J. 482 (2018), because the individuals listed therein had been requested to provide breath samples on Alcotest Instruments, in DWI prosecutions, on Alcotest Instruments calibrated by Sergeant Marc Dennis.

Mr. Donahue testified the Excel Spreadsheet contained in Exhibit S-90 "looks like the spreadsheet that I had created," noting that in 2015 or 2016 when it was created, he would have been the only employee of the New Jersey State Police authorized to query the database and create same. However, he could not recall why the Spreadsheet contained in Exhibit S-90 was created, and noted that it does not contain a Column providing the identity of the State Police Operator who calibrated the Alcotest Instruments designated in Column B.

Sheet 2 of Exhibit S-90 contains the "SQL Statement," which is the computer code for the requested search, or "query," of the database. Mr. Donahue testified the tool used to create the search is called "PL/QQL Developer," a product developed by Oracle, a technology-provider company.

"SQL" stands for "Structured Query Language" and is a domain-specific language in programming, designed for managing data stored in a database. See Beaulieu, Alan (April 2009), Mary E. Treseler (ed.) Learning SQL (2nd ed). Sebastopel, CA, USA: O'Reilly. ISBN978-0-596-52083-0. Mr. Donahue explained a "query" is a basic program that requests the database to return anything that matches the criteria placed in the query. A "table" is where the data is located and, within the table, there are "Columns" or "Fields," which are the individual data information for that specific table. In other words, a "table" is where the information is located, and a "query" contains the terms utilized to extract that information, putting that information in another form, such as on an Excel Spreadsheet, which is essentially a "report" of the requested information. He stated Sheet 1 of Exhibit S-90 is the "Report," the results of that search, containing the subject data, for each row, in twenty-one (21) Columns, also knowns as "Fields" of information, alphabetically-designated as A through U, as follows:

| Column (Field) | Information Displayed |
|---|---|
| A | Arrest Date |
| B | Serial Number, Alcotest Instrument |
| C | Calibration Date |
| D | Location of Alcotest Instrument |
| E | Subject's Last Name |
| F | Subject's First Name |
| G | Subject's Middle Initial |
| H | Subject's Date of Birth |

| | |
|---|---|
| I | Subject's Age |
| J | Subject's Gender |
| K | Subject's Weight |
| L | Subject's Height |
| M | Driver's License Number |
| N | Issuing State of License |
| O | Case Number |
| P | Summons Number |
| Q | Arrest Date |
| R | Arrest Time |
| S | Arrest Location Code |
| T | Final Error (if any) |
| U | End Result (BAC reading, if any) |

Although there are 21 Columns in this Spreadsheet, Columns "A" and "Q" contain the same information, the "Arrest Date."

Mr. Donahue acknowledged that a query of the database can provide up to 310 Columns, or Fields, of information concerning each attempt to provide breath samples on a specific Alcotest Instrument, and the individual conducting the search designates, in the SQL query, which Columns, or Fields, of information are requested.

Mr. Donahue testified that in a Public Search, the information contained in Columns E through N, the personal identification information as to each subject, could not be retrieved or accessed.

As noted, all Exhibits have been provided during the discovery, almost all electronically on Thumb Drives or as attachments to emails. During the

plenary hearing, all electronic exhibits were displayed to each witness, all counsel, and to the court, on computer screens.

Mr. Donahue testified that during his career, he worked with Lieutenant Thomas Snyder, an officer in the Alcohol Drug Testing Unit (ADTU) of the State Police on various requests for information from the database. Mr. Donahue identified Exhibit S-78 in evidence, an email dated January 18, 2019, from Lieutenant Snyder to DAG Robyn Mitchell, referencing the request by Lieutenant Snyder for Mr. Donahue to query the Alcotest Inquiry System database and provide an Excel Spreadsheet of all solution changes on all Alcotest Instruments in New Jersey that occurred between November 1, 2008 and January 9, 2016. That requested Excel Spreadsheet, identified by Mr. Donahue, is Exhibit S-92, an Excel Spreadsheet entitled "20190124 Cert Tests Recs 11-1-08 thru 1-9-16-CD Order," and contains all solution changes performed on all Alcotest Instruments in New Jersey, between those two dates, and consists of 22,819 pages containing 68,450 solution change records, by date of solution change and calibration dates on each Alcotest Instrument, with 310 Columns, or Fields, of information as to each row. Notably, Columns AS through AV contain the full name and badge number of the Operator performing the solution change and calibration on each of the 68,450 Rows. A

line-by-line search of Exhibit S-92 reveals that Sergeant Marc Dennis completed calibrations on 1,111 Alcotest Instruments during that time period.

Mr. Donahue explained that the Excel Spreadsheet in Exhibit S-92 displays, on each of the 68,450 Rows, on Columns A, B and C, the start time, the date of the solution change for that specific test record, and the calibration date. A solution change is performed prior to every calibration. He noted that Columns C and L contain the same information, as do Columns B and U. He further explained that the method of determining whether Sergeant Dennis performed a calibration listed on Exhibit S-92 is to highlight Column AS, "Operator Last Name," and then perform a "Sort and Filter" function on that Column by typing in the name "Dennis," which will reveal information that he completed the calibrations on 1,111 Alcotest Instruments. By way of example, Row 66024 shows that Sergeant Dennis performed the calibration on Alcotest Instrument ARWC-0187, located at the Cranford Township Police Station, on October 9, 2015 and, Row 66025 shows, on that same date, he performed the calibration on Alcotest Instrument ARWC-0010, located at the Kenilworth Police Station.

On Cross-examination, Mr. Gold showed Mr. Donahue Exhibit DB-1A, which is a printout of the results of an Activity Query search Mr. Gold conducted of the Alcotest Inquiry System database concerning Alcotest

Instrument ARXA-0037, located in Wall Township Police Station, which shows 24 Rows relating to subjects tested on that Instrument, with all 310 Columns, or Fields, of available information, consisting of 45 pages. The purpose was to show the breadth of information that is available, beyond that contained on Exhibit S-90, when conducting a search pertaining to the breath samples provided by a subject on a particular Alcotest Instrument. Exhibit DB-1B contains the results of that same search and was taped page-to-page, with those Columns highlighted in "Yellow" to show the additional information available from such a search. Mr. Gold also showed Mr. Donahue Exhibit DB-1C, which is the printed-out results of a Subject Table search Mr. Gold conducted of the Alcotest Inquiry System database concerning the testing of 24 subjects on Alcotest Instrument ARAJ-0074, located at the Fair Haven Police Station. That Exhibit contains 21 Columns, or Fields, of information. Mr. Donahue acknowledged the results of the searches in Exhibits DB-1A, DB-1B and DB-1C do not display the identity of the Operator who performed the calibration of the Instrument, only the Operator who performed the breath test because they were searches of the Subject Table. Mr. Donahue explained a search of the Certification Table would be necessary to obtain the identity of the Operator who performed the calibration of the Alcotest Instrument.

When I asked Mr. Donahue whether the identity of the Operator could be extracted from a search of the database if I knew that a particular subject was arrested and requested to provide a breath sample on an Alcotest Instrument on a particular date, he stated:

> Judge, I know you get the record by the date. You can't query the subject's information. But if you specify a date range, it will let you know that the test was given. I know you can return one or the other using the queries that are provided to the public.
>
> [T1, page 88, lines 8-12.]

Thereafter the following colloquy ensued between myself and Mr. Donahue:

> THE COURT: What I'm contemplating is this and the question I have is this, if you know, Mr. Zingis was arrested and blew into a machine within the time frame, between 2008 and 2016 someplace in Camden County. And if he filed an application for post-conviction relief, and if the Court wanted to get the record of who calibrated the machine that he blew into, would they be able to extract that information?
>
> THE WITNESS: I'm Sure.
>
> THE COURT: Okay. All right. So if any person -- any defendant wanted to – counsel wanted to know and the Court authorized it, they could ask the State to produce an Alcotest calibration record for a machine within that time period in any municipality in the State.
>
> THE WITNESS: Yes, there's a query there for the public, there's a third query called the activity query, that would provide you information from both the

> subject table and the certification table in the range that you've requested. Then there probably would have to be some manual comparison by the requester to try to match things up.
>
> THE COURT: All right. But the information could be extracted from the database?
>
> THE WITNESS: And it's provided. Sure it's provided.
>
> [T1, page 88, line 8 to page 89, line 15.]

During cross-examination by Mr. Noveck, Mr. Donahue testified further that he believes he created the SQL Statement contained on the second-listed tab of S-90, which resulted in the Excel Spreadsheet contained on the first-listed tab of Exhibit S-90. He noted this was a search of the Subject Table of the database and did not contain the identity of the Operator who performed the calibration of the Alcotest Instrument on which the test was given. He explained that the query reflected in the SQL Statement on Tab 2 of Exhibit S-90 requested the records for each Alcotest Instrument within the specified date range of November 14, 2008 through May 1, 2016. He noted there were 19 Alcotest Instrument serial numbers listed in the SQL Statement in Tab 2, but there were more than 19 Alcotest Instrument serial numbers listed in the SQL Results in Tab 1. Mr. Donahue testified it appears that the query shown on the "SQL Statement" in Tab 2 does not match the information contained in the "SQL Results" tab of the Exhibit S-90 Spreadsheet. During cross-examination

of Mr. Donahue, Mr. Noveck created Exhibit DPD-1 as a Word formatted document, having extracted it from Tab 2, the "SQL Statement" of Exhibit S-90. The Query requested in that Exhibit contains all 310 available Columns of information, the specified date range of retrieval, and 19 Alcotest Serial Numbers to search. Mr. Noveck confirmed with Mr. Donahue that he believed the Excel Spreadsheet contained in Exhibit S-90 was created from a query he ran of the Alcotest Inquiry System Subject Table. See T1, p. 124, lines 20-24.

However, Mr. Donahue was unable to explain why the SQL Statement on Tab 2 of Exhibit S-90 requested 310 Columns and 21 were returned on the Excel Spreadsheet on Tab 1 thereof, or why a query of 19 Alcotest Instruments was requested in the SQL Statement, yet more than 19 were listed on the Excel Spreadsheet.

The court finds the testimony of Mr. Donahue to be credible, although it was clear he did not recall the reason for the requested query, or specifically conducting the query resulting in creation of the Excel Spreadsheet contained in Exhibit S-90. However, he testified he was the only employee in the IT Unit who would have been authorized to conduct that requested query of the Alcotest Inquiry System database. Accordingly, the court concludes Mr. Donahue conducted the query and produced the Excel Spreadsheet contained in Exhibit S-90.

However, based on the testimony and evidence submitted during the plenary hearing, it is clear that the SQL Statement concerning that query, contained on Tab 2 of Exhibit S-90, was flawed, which will be discussed in some detail infra.

2. William Gronikowski

William Gronikowski was presented by the State as a witness. His testimony is contained in T1, the March 20, 2023, Transcript, on pages 140-173. He has been employed by the New Jersey State Police for approximately twenty-five (25) years, and is currently the Supervisor of Information Technology in the Information and Technology Bureau. He replaced Mr. Donahue upon his retirement.

Toward the end of 2022, SFC Alcott requested Mr. Gronikowski to produce a report that had been previously created by Mr. Donahue. Exhibit S-43 is an email chain between SFC Alcott and Mr. Gronikowski on December 28, 2022. Specifically, SFC Alcott forwarded Mr. Gronikowski the Excel Spreadsheet contained in Exhibit S-92, requesting it be updated to include all Alcotest Instrument Records in the State from December 1, 2005 to December 31, 2017, which was requested by the Attorney General's Office.[5] Mr.

[5] Exhibit S-92 is the Excel Spreadsheet created by Mr. Donahue, containing all Solution Changes and Calibrations performed on all Alcotest Instruments from November 1, 2008, through January 9, 2016.

Gronikowski testified he located the report, and altered the range of dates requested, increasing the date range by one month on each side of the range, produced a query of the Alcotest Inquiry System database, see Exhibit S-45, exported the results onto an Excel Spreadsheet, and emailed it to SFC Alcott on that same date. To generate the query, Mr. Gronikowski used a software program called "Quest" from a product called "Toad," which was similar to "PLL SQL," the software used to produce Exhibit S-92.

That Excel Spreadsheet created by Mr. Gronikowski is Exhibit S-116, entitled "Records11012005_01312018[Compatibility Mode]." It contains all Solution Changes and Calibrations performed on all Alcotest Instruments in New Jersey from November 1, 2005 through January 31, 2018. It consists of two (2) Sheets. Sheet 1 contains 64,999 Solution Changes and Calibrations, and Sheet 2 contains 41,413 Solution Changes and Calibrations for a total of 106,412 during that time range. Each Sheet contains 126 Columns of information for each Row. Column A contains the Serial Number of the Alcotest Instrument, Column H the Calibration date and Column Q the Solution Change Date. Columns AO through AR contain the identity of the Coordinator performing each Solution Change and Calibration. In creating this Spreadsheet, Mr. Gronikowski emphasized he did not alter or change

anything in Exhibit S-92, but simply expanded the date range. Thereafter, Mr. Gronikowski sent an email to DAG Clark, dated January 19, 2023, stating:

> Attached is an email chain from SFC Alcott, this email contained a spreadsheet that was previously supplied to him. I used that information to find the query that produced it. That query was stored on our network drive that Bill Donahue kept other AlcoTest documentation. I then updated the query with the new date range that was requested.
>
> [Exhibit S-74.]

Mr. Gronikowski explained that both Sheets in Exhibit S-116 represent a continuous record of the data requested, and two Sheets were required because that version of Excel has a limit of 65,000 Rows per Sheet, and when that limit is reached, Excel automatically creates a second Sheet. S-116 contains Certification Records extracted from the Alcotest Inquiry System database.

The testimony of Mr. Gronkowski was credible, but limited to the creation of the spreadsheet utilized to determine the identity of the operators who performed Solution Changes in conjunction with the Recalibration of Alcotest Instruments during the indicated time period.

3. Robyn Mitchell

Robyn Mitchell is a Deputy Attorney General. Since January 2023, she has been the Acting Chief of the Supervision and Training Bureau, within the Division of Criminal Justice (DCJ), in the Office of the Attorney General.

Prior to that, she was the Deputy Bureau Chief for ten (10) years. In total, she has been employed by the DCJ for approximately twenty-three (23) years. She was called by the State as a witness during this plenary hearing. The testimony of DAG Mitchell in contained in T3, the March 22, 2023 Transcript, at pages 127-162, in T4, the March 28, 2023 Transcript, at pages 13-199 and 201-230, and in T5, the April 25, 2023 Transcript, at pages 13-164.

In November or December of 2015, after learning of the allegations against Sergeant March Dennis, DAG Mitchell was assigned to assist then-Bureau Chief Robert Czepiel, a Supervising Deputy Attorney General (SDAG), in identifying defendants who provided breath samples on Alcotest Instruments that had been calibrated by Sergeant Dennis. It had been determined that November 5, 2008 was the first date Sergeant Dennis was authorized, as a Breath test Coordinator, to calibrated Alcotest Instruments, and the last date he was authorized to do so was October 9, 2015. See Exhibits S-1 and S-7.

In order to accomplish that task, DAG Mitchell reached out to the Alcohol and Drug Testing Unit (ADTU) of the New Jersey State Police (NJSP), inquiring whether that Unit would be able to determine what Alcotest Instruments were calibrated by Sergeant Dennis during that time period. She was advised that although the ADTU did not maintain copies of all calibration

documents, representatives of the ADTU believed that the Information Technology Bureau of the NJSP could perform a search of the Alcotest Inquiry System database (database) and obtain that information. Accordingly, DAG Mitchell requested the ADTU to perform that search and provided DCJ with a list of those subjects who had been requested to provide breath samples, on Alcotest Instruments calibrated by Sergeant Dennis from November 5, 2008 until six (6) months after October 9, 2015, since she was aware that Alcotest Instruments are required to be recalibrated every six (6) months.

Thereafter, either later in 2015 or early 2016, DAG Mitchell received a compact disc (CD) from the ADTU containing the results of the requested search, an Excel Spreadsheet, listing 27,833 subjects who had been requested to provide breath samples on Alcotest Instruments that had been calibrated by Sergeant Dennis, during the requested time period. DAG Mitchell testified she then downloaded the information on that CD onto her computer at work. Exhibit S-147, marked into evidence during DAG Mitchell's testimony, are her handwritten notes on the CD provided to her by the ADTU.[6] Exhibit S-90 and

[6] Exhibit S-147 contains the date of February 8, 2023, which, as testified by DAG Mitchell, was the date that she provided the CD to DAG Clark to verify that the only information on that CD was the Excel Spreadsheet containing the 27,833 Subject Rows and twenty-one (21) Columns, identical to that contained in Exhibits S-90 and S-148.

Exhibit S-148, entitled "5925_Spreadsheet_Final.xslx," are identi=cal in content, contain the same information.

DAG Mitchell testified she was aware there are over three hundred (300) columns of data that can be retrieved from the database as to each breath test, but was not aware as to why the Excel Spreadsheet provided by the NJSP, contained in Exhibits S-90 and S-148, only contain 20 Columns of information. During her direct examination, DAG Mitchell was shown Exhibit DB-1B, which is a sample Excel Spreadsheet produced by counsel for the New Jersey State Bar Association, extracted from a query of the Alcotest Inquiry System database for information pertaining to a specific Alcotest Instrument. It consists of forty-five (45) pages with three hundred and ten (310) Columns, or Fields, of information as to each Subject Row. That Exhibit has the two hundred and ninety (290) Columns not shown on Exhibits S-90 and S-148, which are highlighted in "Yellow." DAG Mitchell testified that none of the Columns highlighted in "Yellow" were necessary for her to complete the assigned task of identifying those subjects who had been arrested and charged with DWI, were requested to provide breath samples on an Alcotest Instrument that had been calibrated by Sergeant Dennis that resulted in an evidential BAC

reading and, thereby, were potentially affected by the misconduct of Sergeant Dennis.[7]

DAG Mitchell testified upon receipt of Exhibit S-90, she reviewed Column U (End Result), and deleted all Subject Rows where a Blood-Alcohol Content (BAC) reading had not been reported. By way of example, she was referred to Row 27,803, in which Column U contained "dashes," indicating no BAC reading had been obtained during the attempted breath test of that individual, and she testified she deleted that Row. She explained the deletion of that and other like Rows, as follows:

> Because no breath sample, no breath test reading was given. So there was no breath alcohol BAC reading, then any DWI conviction could not have been based on a reading given by an instrument. It had to be either an observation – if there was a conviction.
>
> [T3, p. 140, lines 11-15.]

As a result, DAG Mitchell deleted 7,166 Rows on Exhibit S-90, where no BAC reading had been obtained, either because the Arresting Officer or Operator, after following the procedures set forth in the Implied Consent Statute and preparing the Alcotest Instrument, the subject refused to submit

[7] Again, as noted, the determination by the Attorney General's Office, that only attempted breath tests on Instrument resulting in a BAC reading were potentially affected by the misconduct of Sergeant Dennis, was made prior to the Cassidy litigation in the Supreme Court.

breath samples, or, during the testing procedure, the Operator concluded the conduct of the subject warranted a conclusion the subject had refused to provide breath samples sufficient for analysis, either circumstance resulting in Instrument reporting the absence of a BAC reading in Column U of the Exhibits. In each of those deleted Rows, Column T (Final Error) on Exhibit S-90 contained various error messages, such as "Subject Refused," "Control Test Failed," "Ambient Air Check Error," "Test Terminated," "Mouth Alcohol," "Control Gas Supply," "Interference," "Purging Error," "Blowing Not Allowed," "Simulator Temperature Error," or "Ready to Blow Expired," as the reason for the inability of the Alcotest Instrument, on those Subject Rows, to produce an evidential BAC reading.

Upon completing those deletions, the resulting Excel Spreadsheet prepared by DAG Mitchell, became Exhibit S-91, entitled "Spreadsheet all Counties_wo refusals and error messages_20,667," which then consisted of 20,667 Rows of subjects who provided breath samples on Alcotest Instruments calibrated by Sergeant Dennis where an evidential BAC reading was produced by the Instrument. DAG Mitchell testified she created the title of Exhibit S-91. Upon further questioning, DAG Mitchell testified there is an error on one Row contained in Exhibit S-91, where that Row should have been deleted by her. Specifically, on Row 11523, Column T (Final Error) contains the error

message "Subject Refused," and Column U on that Row does not reflect a BAD reading being obtained. Accordingly, DAG Mitchell testified that Row should have been deleted by her, which would result in Exhibit S-91 actually containing 20,666 subjects, not 20,667.

Upon editing Exhibits S-90 and S-148, and thus creating Exhibit S-91, DAG Mitchell testified she then went through the list of subjects and separated them into those who were tested in each County. She explained, as follows:

> So back then, what I did was, I would bold each row. So, for example, the very first up on here [Exhibit S-91], Row Number 2, it says Fair Haven Police. I would have bolded and gone all the way down to the end of the Fair Haven Police, down, and then I would have gone all the way over to Column U and I opened up another Excel Spreadsheet and I would copy and paste it onto a spreadsheet.
>
> [T3, page 144, line 23 to page 145, line5.]

Using that methodology, DAG Mitchell stated she created five (5) separate Excel Spreadsheets, one for each of the five main Counties, Middlesex, Monmouth, Ocean, Somerset and Union. She then placed each Spreadsheet onto a Thumb Drive, and gave each Thumb Drive to the Prosecutor's Office in the corresponding County. Additionally, DAG Mitchell testified that Elie Honig, then Director of the Division of Criminal Justice, sent a letter to Judge Glenn A. Grant, Administrative Director of the Courts, dated September 19, 2016, see Exhibit S-81A, notifying him that criminal charges

had been filed against Sergeant March Dennis, and 20,667 individuals had provided evidential breath samples on Alcotest Instruments that had been calibrated by Sergeant Dennis. That letter to Judge Grant enclosed Exhibit S-91 and the five (5) referenced Excel Spreadsheets for those five Counties. See Exhibits S-81B (Middlesex County); S-81C (Monmouth County); S-81D (Ocean County); S-81E (Somerset County); and S-81F (union County).

Exhibit S-81B, entitled "Middlesex_IndivDefts wo refusals and error messages," extracted from Exhibit S-91, is an Excel Spreadsheet containing 30 Sheets, or Tabs. Sheet 30 contains 4,963 Rows, consisting of all individuals, listed on Exhibit S-91, who provided breath samples on Alcotest Instruments located in Middlesex County that resulted in the reporting of an evidential BAC reading. It contains 21 Columns of information for each Row. The other 29 Sheets in Exhibit S-81B consist of a breakdown, or sort, of Sheet 30 into one Sheet for each municipality or agency in Middlesex County, containing the names, and the same 21 Columns of information, for those individuals who provided evidential breath samples, at those locations, on Alcotest Instruments calibrated by Sergeant Dennis.

Exhibit S-81C, entitled "Monmouth_Indiv Defts wo refusals and error messages," is an Excel Spreadsheet, extracted from Exhibit S-91, containing 53 Sheets, or Tabs. Sheet 53 contains 9,401 Rows, consisting of all

individuals, listed on Exhibit S-91, who provided breath samples on Alcotest Instruments located in Monmouth County that resulted in the reporting of an evidential BAC reading. It contains 21 Columns of information for each Row. The other 52 Sheets in Exhibit S-81C consist of a breakdown, or sort, of Sheet 53 into one Sheet for each municipality or agency in Monmouth County, containing the names, and the same 21 Columns of information, for those individuals who provided evidential breath samples at those locations, on Alcotest Instruments calibrated by Sergeant Dennis.

Exhibit S-81D, entitled "Ocean_Indiv Defts wo refusals and error messages," is an Excel Spreadsheet, extracted from Exhibit S-91, containing 13 Sheets, or Tabs. Sheet 33 contains 289 Rows, consisting of all individuals, listed on Exhibit S-91, who provided breath samples on Alcotest Instruments located in Ocean County that resulted in the reporting of an evidential BAC reading. It contains 21 Columns of information for each Row. The other 12 Sheets in Exhibit S-81D consist of a breakdown, or sort, of Sheet 13 into one Sheet for each municipality or agency in Ocean County, containing the names, and the same 21 Columns of information, for those individuals who provided evidential breath samples at those locations, on Alcotest Instruments calibrated by Sergeant Dennis.

Exhibit S-81E, the entitled "Somerset_Indiv Defts wo refusals and error messages," is an Excel Spreadsheet, extracted from Exhibit S-91, containing 22 Sheets, or Tabs. Sheet 22 contains 1,207 Rows, consisting of all individuals, listed on Exhibit S-91, who provided breath samples on Alcotest Instruments located in Somerset County that resulted in the reporting of an evidential BAC reading. It contains 21 Columns of information for each Row. The other 21 Sheets in Exhibit S-81E consist of a breakdown, or sort, of Sheet 22 into one Sheet for each municipality or agency in Somerset County, containing the names, and the same 21 Columns of information, for those individuals who provided evidential breath samples at those locations, on Alcotest Instruments calibrated by Sergeant Dennis. It was noted by DAG Mitchell that Row 11523 in Exhibit S-91 was for the individual, [redacted], who was asked to provide breath samples on an Alcotest Instrument located in Hillsborough Township and, because no evidential BAC reading was obtained, is not contained in Exhibit S-81E.

Exhibit S-81F, entitled "Union_Individual Defts wo refusals and error messages," is an Excel Spreadsheet, extracted from Exhibit S-91, containing 25 Sheets, or Tabs. Sheet 25 contains 4,806 Rows, consisting of all individuals, listed on Exhibit S-91, who provided breath samples on Alcotest Instruments located in Union County that resulted in the reporting of an

evidential BAC reading. It contains 21 Columns of information for each Row. The other 24 Sheets in Exhibit S-81F consist of a breakdown, or sort, of Sheet 25 into one Sheet for each municipality or agency in Union County, containing the names, and the same 21 Columns of information, for those individuals who provided evidential breath samples at those locations, on Alcotest Instruments calibrated by Sergeant Dennis.

DAG Mitchell noted there are no addresses for the 20,666 subjects contained on the Exhibit S-91 Excel Spreadsheet, or in the Excel Spreadsheets contained in Exhibits S-81B through 81F. Based on discussions between DAG Mitchell and Steven Somogyi, Assistant AOC Director for Municipal Court Services, and pursuant to Case Management Order I, issued by Special Master Judge Joseph F. Lisa, P.J.A.D. on July 13, 2017, in the then-pending case of State v. Cassidy,[8] the Administrative Office of the Courts (AOC) was in the process of working on obtaining addresses for the subjects contained in Exhibit S-91, and as contained in Exhibits S-81B through -81F, so those subjects could be notified of the pending litigation, which could potentially

[8] ¶4 of that July 13, 2017 Order required the State, by July 27, 2017, to "apprise the court of its efforts to obtain addresses for the 20,667 individuals referenced in its motion to appoint a Special Master and will file any motion the State deems appropriate concerning a directive as to notice to those individuals, including a proposed form of notice."

affect them. See Exhibit 18A (DAG Mitchell's email to Steven Somogyi dated July 14, 2017).

DAG Mitchell testified that, on August 10, 2017, Steven Somogyi sent an email to SDAG Robert Czepiel, Chief of the Supervision and Training Bureau, within the Division of Criminal Justice, copying her, sending him Exhibit S-83, the Excel Spreadsheet entitled "Spreadsheet from AOC_All Addresses_Alcotest ATS Defendant Matches – full matches and partial – to AG," which contained two (2) sheets, as follows: Sheet 1: Full Subject-to-Address Matches, 18,249; and Sheet 2: Partial Subject-to-Address Matches, 947, for address matches for 19,196 of the 20,666 subjects contained in Exhibit S-91. Thus, there were 1,470 Subject Rows in Exhibit S-91 that the AOC was unable to seek, of find, either an exact or partial matching subject-to-address match.

After receiving Exhibit S-83, the Excel Spreadsheet with addresses for the 19,196 subjects, DAG Mitchell testified she utilized that Spreadsheet to create separate Excel Spreadsheets for each of the five (5) main Counties. Exhibit S-84 contains a Spreadsheet she created, entitled "Spreadsheet from AOC_Middlesex County Only," which contains two (2) Sheets. Sheet 1 contains 5,012 Rows of full subject-to-address matches, and fifteen (15) Columns of information for each Row, and Sheet 2 contains 215 Rows of

partial subject-to-address matches for each Row and the same 15 Columns of information, for total subject-to-address matches of 5,227 individuals who provided breath samples on Alcotest Instruments located in Middlesex County, calibrated by Sergeant Dennis, resulting in evidential BAC readings.

Exhibit S-85 contains another Spreadsheet created by DAG Mitchell, entitled "Spreadsheet from AOC_Monmouth County Only," which also contains two (2) Sheets. Sheet 1 contains 7,479 Rows of full subject-to-address matches, and fifteen (15) Columns of information for each Row, and Sheet 2 contains 432 Rows of partial subject-to-address matches for each Row and the same 15 Columns of information, for total subject-to-address matches of 7,911 individuals who provided breath samples on Alcotest Instruments located in Monmouth County, calibrated by Sergeant Dennis, resulting in evidential BAC readings.

Exhibit S-86 contains a Spreadsheet DAG Mitchell created from the information contained in Exhibit S-83, entitled "Spreadsheet from AOC_Ocean County Only," which contains two (2) Sheets. Sheet 1 contains 299 Rows of full subject-to-address matches, and fifteen (15) Columns of information for each Row, and Sheet 2 contains 27 Rows of partial subject-to-address matches for each Row and the same 15 Columns of information, for total subject-to-address matches of 326 individuals who provided breath

samples on Alcotest Instruments located in Ocean County, calibrated by Sergeant Dennis, resulting in evidential BAC readings.

Exhibit S-87 contains another Spreadsheet DAG Mitchell created, also from the information contained in Exhibit S-83, entitled "Spreadsheet from AOC_Somerset County Only," which contains two (2) Sheets. Sheet 1 contains 877 Rows of full subject-to-address matches, and fifteen (15) Columns of information for each Row, and Sheet 2 contains 52 Rows of partial subject-to-address matches for each Row and the same 15 Columns of information, for total subject-to-address matches of 929 individuals who provided breath samples on Alcotest Instruments located in Somerset County, calibrated by Sergeant Dennis, resulting in evidential BAC readings.

Exhibit S-88 contains a Spreadsheet DAG Mitchell created from the information contained in Exhibit S-83, entitled "Spreadsheet from AOC_Union County Only," which contains two (2) Sheets. Sheet 1 contains 4,464 Rows of full subject-to-address matches, and fifteen (15) Columns of information for each Row, and Sheet 2 contains 216 Rows of partial subject-to-address matches for each Row and the same 15 Columns of information, for total subject-to-address matches of 4,680 individuals who provided breath samples on Alcotest Instruments located in Union County, calibrated by Sergeant Dennis, resulting in evidential BAC readings.

After creating these five separate Excel Spreadsheets, DAG Mitchell sent them to each respective County Prosecutors. Specifically, Exhibit S-24A is a copy of an email, dated September 26, 2017, from DAG Mitchell to Assistant Ocean County Prosecutor Kim Pascarella, attaching the Excel Spreadsheet in Exhibit S-86, and stating:

> Please use the names and addresses contained in this spreadsheet to mail to these individuals the "Sgt. Dennis notice letter" that I sent to you yesterday via email. These notice letters should be mailed to these individuals no later than December 15, 2017. Please keep any of the letters that might be returned to you so that we can show that we did attempt to notify said individuals, should the issue arise.

Exhibit S-24B is a copy of an email, also dated September 26, 2017, from DAG Mitchell to Somerset County Assistant Prosecutor Anthony Parenti, attaching the Excel Spreadsheet in Exhibit S-87, containing the same language quoted above in Exhibit S-24A.

Exhibit S-24C is a copy of a series of emails, also dated September 26, 2017, between DAG Mitchell, Assistant Monmouth County Prosecutor Monica do Outeiro, and Jill Lake, an Information Technology employee with DCJ, attaching the Excel Spreadsheet in Exhibit S-85, containing the same language set forth in Exhibit S-24A.

DAG Mitchell testified that although she was unable to locate copies of the similar emails she sent to the Middlesex County and the Union County Prosecutors' Office, she had no doubt they were also sent.

Exhibit S-80 contains a copy of the referenced form letter sent by DAG Mitchell, signed by SDAG Robert Czepiel, Jr., Deputy Chief of the Prosecutors Supervision and Training Bureau, to the Office of the County Prosecutors in each of the five principal Counties. It is dated "December 4, 2018," but DAG Mitchell testified that date was a typographical error and should have been "December 4, 2017." The letter, addressed "To Whom It May Concern," referencing "Notice regarding your DWI case," states as follows:

> Court records indicate that you were arrested for and/or convicted of drunk driving sometime between 2008 and 2016. This letter is to inform you that it is possible there may have been an issue in the proceedings in your DWI case.
>
> Specifically, it has been alleged that on or about October 6, 2015, and on or about October 6, 2015, New Jersey State Police Sergeant Marc Dennis, a former coordinator in the Alcohol Drug Testing Unit, calibrated the Alcotest 7110 MKIII-C ("Alcotest") evidential breath testing instruments in the City of Asbury Park, the City of Long Branch, and the Township of Marlboro, without following the established protocol and then certified that the calibration was done in accordance with the required procedures. Sergeant Dennis's alleged false swearing and improper calibrations of these three instruments

> may call into question all of the calibrations performed by Sergeant Dennis over the course of his career as a coordinator (i.e. 2008-2016), and might possibly entitle you to future relief.
>
> The New Jersey Supreme Court has assigned the Honorable Joseph Lisa, P.J.A.D. (retired and t/a on recall) to preside over a hearing to determine whether Sergeant Dennis's failure to perform a specific step in the established protocol adversely affected the scientific reliability of the calibrations he performed, as well as any evidential breath tests conducted on those Alcotest instruments. The outcome of these legal proceedings, which are now underway, will determine whether you are entitled to future relief.
>
> If you believe that you are presently suffering any adverse consequences from your DWI conviction or pending DWI case, you should consult an attorney to determine if you are entitled to emergent, immediate relief. You will be notified when the above-noted hearing is completed, Judge Lisa's determination as to whether Sergeant Dennis's failure to perform the specific step in the established protocol adversely affected the scientific reliability of the calibrations he performed, and if so, whether you are entitled to relief therefrom.

As noted, this form letter was sent to each of those County Prosecutors' Offices, with the request it be mailed to the subjects at the addresses set forth in Excel Spreadsheets, as set forth in Exhibits S-84 through S-88.

Column A of Exhibit S-83, entitled "Ticket Number," contains the summons number and municipal code for each Row. Upon reviewing Column A in each Row, DAG Mitchell discovered that some of the subjects had not

been arrested in one of the five (5) principal Counties, but had been requested to provide breath samples on Alcotest Instruments within one of those five Counties. She explained it was decided that those subjects should be provided notice letters, mailed directly by the Division of Criminal Justice. Accordingly, DAG Mitchell created a separate Excel Spreadsheet containing the names of those subjects and the addresses used to mail them the notification letter.[9] That Spreadsheet has been marked into evidence as Exhibit S-76A, entitled "Defendants who received notice letter from DCJ," consisting of six (6) Sheets. Sheet 1 contains all subjects arrested in those other Counties, with 113 exact subject-to address matches, and 5 partial subject-to-address matches. The remaining 5 Sheets in Exhibit S-76A contain breakdowns on those full and partial address matches in the other Counties, as follows: Sheet 2 contains 1 full subject-to-address match from an arrest in Burlington County; Sheet 3 contains 70 full subject-to-address matches and 3 partial subject-to-address matches from arrests in Essex County; Sheet 4 contains 1 full subject-to-address match from an arrest in Hudson County; Sheet 5 contains 1 full subject-to-address match in Hunterdon County; and Sheet 6 contains 39 full

[9] These subject-to-address matches were derived from Exhibit S-83, the Excel Spreadsheet sent by the AOC to the DCJ.

subject-to-address matches and 2 partial subject-to-address matches from arrests in Mercer County.

DAG Mitchell testified that Holly Lees, an Executive Administrative Assistant with DCJ, inserted the notice letters into envelopes addressed to the subjects listed in Exhibit S-76A, and attended to their mailing. There then ensued the following colloquy of questioning by DAG Clark of DAG Mitchell:

> Q. What if anything did DCJ do to track any mailings that were returned as undeliverable?
>
> A. To track, nothing.
>
> Q. What effort if any did DCJ make to edit the spreadsheets based on mailings that were undeliverable?
>
> A. We did not do that.
>
> Q. What effort did DCJ make to learn from the five prosecutors' offices the mailings that were returned as undeliverable to those offices, if any?
>
> A. I had heard from some of them that they were receiving envelopes back but I did not ask them to give me a listing of which envelopes were returned to them.
>
> [T4, page 27, line 22 to page 28, line 9.]

DAG Mitchell also testified that Exhibit S-97, a memorandum, dated December 1, 2017, was sent by SDAG Robert Czepiel, Jr. to all County Prosecutors and all County Prosecutors Liaisons. That memorandum attached a letter, dated November 3, 2017, sent by SDAG Czepiel to all County

Prosecutors, concerning the allegations and indictment against Sergeant Dennis, attached the Order issued by Special Master Lisa, in State v. Cassidy, dated November 2, 2017, see Exhibit S-98, granting the State's motion for "a stay of proceedings in other courts that raise issues potentially affected by the Supreme Court's ultimate determination in this matter, i.e. a DWI prosecution in which a BAC reading serviced from an Alcotest device calibrated by coordinator Marc Dennis[,]" and the Order issued by Judge Lisa on November 28, 2017, supplementing the November 2, 2017 Order, see Exhibit S-100, which provided as follows:

> 1. In any proceeding in any court involving a prosecution, conviction or sentence for a DWI offense for which the offense date was between January 1, 2008 and September 30, 2016, it shall be the affirmative obligation of the prosecutor in that proceeding to determine whether or not the defendant provided a breath sample on an Alcotest device that had been calibrated by coordinator Marc Dennis, and to produce documentary evidence of that determination to the defendants and the court;
>
> 2. In any proceeding in any court involving a prosecution for an offense in which a prior DWI conviction constitutes a predicate offense to enhance the gradation or applicable punishment in that subsequent prosecution for another charge, or involving a sentence emanating from such a case that has been adjudicated, it shall be the affirmative obligation of the prosecutor in that proceeding to determine whether or not the defendant provided a breath sample on an Alcotest device that had been calibrated by coordinator Marc Dennis in that prior DWI case, and to produce

> documentary evidence of that determination to the defendant and the court;
>
> IT IS FURTHER ORDERED that the Attorney General shall forthwith provide a copy of this order to all county and municipal prosecutors.

In his Exhibit S-96, December 1, 2017 memorandum, SDAG Czepiel outlined the requirement in paragraph 1 of Judge Lisa's November 28, 2017 Order in Exhibit S-100, and then stated:

> This requirement can be satisfied by obtaining and producing the four calibration documents generated by the Alcotest during the calibration process. Because a "proceeding" is any matter that is pending, if a defendant files a motion after sentencing (e.g., a motion to stay the sentence, a motion to withdraw their guilty plea, a municipal appeal, etc.), the case would then be considered a "proceeding" that triggers the prosecutor's affirmative obligation to make that determination and produce the required documentation. However, the prosecutor is not required to look through every closed case within this timeframe.

In that letter, SDAG Czepiel then addressed the State's obligation set forth in paragraph 2 of the November 28, 2017 Order, stating:

> Please note that such matters may include Driving While Suspended offenses under both N.J.S.A. 39:3-40 and 2C:40-26 if the predicate offense is a Dennis-related DWI. In short, the affirmative obligation imposed by paragraph two of the Supplemental Order to determine whether the underlying DWI is a Dennis-related case impacts all pending DWI and DWS cases throughout the state, regardless of where the pending proceeding is located.

The December 1, 2017, Exhibit S-96, memorandum also notes that because a second or subsequent DWI offense could occur anywhere in the State, the DCJ was providing every County Prosecutor's Office a master list of the names or every individual who was identified as having provided a breath sample on an Alcotest Instrument that had been calibrated by Sergeant Dennis. It noted a meeting of those Assistant Prosecutors who are the Municipal Prosecutors Liaisons was scheduled for December 5, 2017, where a thumb drive of that master list would be distributed.

DAG Mitchell testified that meeting took place on December 5, 2017, and thumb drives of the master list were distributed to the attendees. She stated that because not all Municipal Prosecutor Liaisons attended that meeting, SDAG Czepiel sent letters, dated December 6, 2017, to the Prosecutors' Offices in Essex, Atlantic, Cape May, Cumberland, Ocean, Sussex, Union, and Warren Counties, enclosing a thumb drive containing the Excel Spreadsheets in Exhibits S-91 and S-83, as well as list of Municipal Codes (also contained in Exhibit S-101) to aid in the locations of arrests listed in S-91 and S-83.

DAG Mitchell acknowledged that the Court's November 2018 decision in State v. Cassidy, ordered the State "to notify all affected defendants of our decision that breath test results produced by Alcotest machines not calibrated

using a NIST-traceable thermometer are inadmissible, so that they may take appropriate action." 235 N.J. 482, 498 (2018). Accordingly, she testified the DCJ drafted a form letter that was sent to County Prosecutors in the five principal Counties, in an email dated December 14, 2018, see Exhibit S-80, asking them to mail that form letter to the addresses of the individuals set forth in Exhibits S-84 through S-88. That email also requested them "to keep any of the letters that might be returned to you so that we can show we did attempt to notify these individuals, should the issue arise." That form letter, also signed by SDAG Czepiel, is dated January 24, 2019, addressed "To Whom It May Concern," referencing "Notice regarding your DWI case," and states, as follows:

> You are being provided this notice according to State v. Eileen Cassidy, No. 078390, A-58-16 (N.J. Nov. 13, 2018), so please read this letter carefully as you may be entitled to file a motion for post-conviction relief pursuant to *N.J. Court Rule* 7:10-2. Court records indicate you may have been arrested and/or convicted of Driving While Intoxicated ("DWI") between 2008 and 2016. If you were convicted of DWI and gave a breath test sample on an affected Alcotest instrument, you may be entitled to post-conviction relief.
>
> A letter was previously mailed to you advising that legal proceedings were underway in State v. Eileen Cassidy, regarding a New Jersey State Police sergeant who calibrated several Alcotest instruments and who failed to follow the proper protocol. The legal proceedings are completed. The Court found that the sergeant's failure to follow the established protocol

> aversely affected the scientific reliability of breath tests taken on Alcotest instruments calibrated by him, and ruled that the results from those instruments are inadmissible in court. **Therefore, if you gave a breath sample on an Alcotest instrument calibrated by this sergeant, the results of those breath tests cannot be used as evidence in your DWI case, and you might be entitled to post-conviction relief**. The Administrative Office of the Courts will be setting up procedures for those potentially affected individuals to seek post-conviction relief. Until such time that these procedures are established, you may contact the municipal court where your case was handled if you believe that you might be entitled to relief. You may consult with a private attorney or municipal public defender, if available, to determine whether you are entitled to relief and/or what action if any you should take.
>
> [See Exhibit S-80.]

DAG Mitchell testified the DJC used the same subject-to-address matches set forth in Exhibit 76A for those individuals who had been arrested in Burlington, Essex, Hudson, Hunterdon and Mercer Counties to mail the January 14, 2019 notice letter. Those notification letters were also prepared and mailed by Holly Lees, an Executive Administrative Assistant in the DCJ. DAG Mitchell testified she was not aware as to how many of those mailed notice letters were returned as undeliverable.

DAG Mitchell also testified that she contacted Paul Kramel, who works in the Communications Section of the Office of the Attorney General, and at her request, in beginning of 2019, Mr. Kramel placed the January 14, 2019

notice letter, as well as a listing of the locations of Alcotest Instruments calibrated by Sergeant Dennis, onto the Attorney General's website.

When asked whether there was ever a distinction made, in the Excel Spreadsheets created and distributed, between a Driving While Intoxicated offense heard in Municipal Court or in the Superior Court as part of an Indictment, DAG Mitchell stated:

> We never did. The people that were on the spreadsheets were only those who gave breath samples on instruments that were calibrated by Sergeant Dennis. We never looked at whether or not they were charged in Municipal Court or Superior Court. It was just if they gave a breath sample on an instrument calibrated by Dennis.
>
> [T4, page 45, lines 8-14.]

On cross-examination by Mr. Gold, DAG Mitchell was shown Exhibit S-148, the Excel Spreadsheet received by the DCJ from the Alcohol Drug Testing Unit (ADTU) of the New Jersey State Police, entitled "5925_Spreadsheet_Final," which contains 27,833 Subject Rows and 21 Columns on information as to each Row. DAG Mitchell again verified that none of those Columns contain the identity of the Coordinator who performed the calibration of the Alcotest Instruments, listed in Column B, on the date set forth in Column C. It was noted, however, that "5925" listed in the title of the Exhibit S-148 Spreadsheet, is the badge number of Sergeant Marc Dennis.

DAG Mitchell acknowledged there may be individuals on those 27,833 Rows that are duplicates, appearing more than once because of multiple breath test attempts.

DAG Mitchell was again shown Exhibit S-90, which she stated contained the same information as contained in the Excel Spreadsheet designated as Exhibit S-148. Referring to the second Sheet in Exhibit S-148, the "SQL Statement," which was printed and separately marked as Exhibit DB-13,[10] DAG Mitchell verified that the number of Columns of information available for each breath test attempted from a private search of the Alcotest Inquiry System database, is 310.

In reviewing the nineteen (19) Alcotest Instrument Serial Numbers listed in the SQL Statement in Exhibit DB-13, DAG Mitchell agreed that the listing of those Serial Numbers in Column B on Exhibit S-148, ended with Row 3616, and the remaining Alcotest Serial Numbers appearing in Column B, Rows 3617 through 27834, were not contained on the printout of the SQL Statement Sheet (Exhibit DB-13) of Exhibit S-148. DAG Mitchell testified she was not aware how the query to obtain the Exhibit S-148 Excel Spreadsheet was prepared.

[10] During the hearing, this Exhibit was referred to as DB-12, but it is actually DB-13.

In State v. Chun, 194 N.J. 54, 72-73 (2008), the Court recognized that the Alcotest Instrument is programmed to require that a test subject produce a breath sample that meets four following minimum criteria before the sample is considered to be sufficient for purposes of deriving an accurate test result: (1) minimum volume of 1.5 liters; (2) minimum blowing time of 4.5 seconds; (3) minimum flow rate of 2.5 liters per minute; and (4) that the IR measurement reading achieves a plateau (i.e., the breath alcohol does not differ by more than one percent in 0.25 seconds). However, the Court agreed with the report issued by Special Master, Judge Michael Patrick King, finding there was credible evidence to support lowering the minimum breath volume from 1.5 to 1.2 liters for women over the age of sixty. The Court also noted:

> Although an Alcotest operator has several options if the device reports that the test sample is inadequate, the fact remains that one of them, refusal, carries with it the possibility of severe sanctions. See N.J.S.A. 39:4-50.4a. In the face of abundant evidence in the record that there is an identifiable group in the test population who may be physiologically incapable of complying, the risk of permitting the device to reject samples from members of that group and, by extension, authorizing the issuance of a summons for refusal, is unjust.
>
> [194 N.J. at 77-78.]

The Chun Court then entered an Order, which provided, in part, that the:

> Alcotest 7110 MKIII-C with New Jersey Firmware version 3.11 is sufficiently scientifically reliable, and

> the Alcohol Influence Report (AIR) which sets forth the results of breath tests is admissible as evidence of blood alcohol content (BAC), except that:
>
> * * * *
>
> (3) in each prosecution involving any woman who, at the time of the alleged offense, was over the age of sixty and for whom an AIR was generated with an error message evidencing a breath sample of inadequate volume, the AIR shall not be admissible as evidence in a prosecution for refusal, see N.J.S.A. 39:4-50.4a, unless the woman also provided another breath sample of at least 1.5 liters;
>
> * * * *
>
> B. The firmware shall utilize minimum breath sample criteria as follows: (1) minimum volume of 1.5 liters for all test subjects except for women over sixty years of age, for whom the minimum volume shall be fixed at 1.2 liters; (2) for all subjects, regardless of age or gender, the minimum criteria shall also include (a) a minimum 4.5 second blowing time; (b) a minimum flow rate of 2.5 liters per minute; and (c) a plateau as established by the infrared (IR) measure which does not differ by more than one percent in 0.25 seconds[.]
>
> [194 N.J. at 150-52.]

And, in State v. Chun, 215 N.J. 489 (2013), on the defendants' application for an order in aid of litigant's rights under R. 1:10-3, the Court entered an Order that provided, in part:

> 4. IT IS ORDERED that, in addition to the directive in paragraph in Paragraph 1(A)(3) of this Court's March 17, 2008, Order, concerning the admissibility of Alcotest results for women over the age

> of 60 in prosecutions for refusal, see N.J.S.A. 39:4-50.4a, if the only evidence of refusal is the inadmissible AIR [Alcohol Influence Report], such women may not be charged with, prosecuted for, or convicted of that offense.
>
> [215 N.J. at 492.]

On cross-examination, DAG Mitchell, upon reviewing the Court's decision in Chun, confirmed that when obtaining a breath sample from a subject, the Alcotest Instrument requires the subject to blow into the receptacle at least 1.5 liters of air for at least 4.5 seconds. However, she acknowledged that the Court has ruled that for women over the age of 60, the acceptable minimum volume of air is 1.2 liters, and because the firmware of Alcotest Instruments has not been modified to account for that difference, women over the age of 60 who have not reached the minimum volume of 1.5 liters cannot be charged with a refusal, and operators of Alcotest Instruments have been trained not to charge such a subject with refusal.

Mr. Gold then displayed Exhibit DB-19, an Excel Spreadsheet he created by sorting the data contained in Exhibit S-148, the Spreadsheet entitled "5925_Spreadsheet_Final" by rearranging the columns. The Spreadsheet he created, as DB-19, is entitled "DB-19 courtesy import of DB-17 into MS Excel format (27,833 sorted DL_Last_First_ArrestDate_ArrestTime)." Among the sorted Columns are: Column A, the corresponding Row Number in Exhibit S-

148; Column F, the subject's last name; Column G, the subject's first name; Column H, the arrest date of the subject; Column J, the Summons Number; Column K, the subject's driver's license; Column L, the location of the Alcotest Instrument on which the breath test was attempted; Column M, the "Final Error," if any; Column N, the "End Result," as to whether a BAC Reading was obtained; and Column O, the serial number of the Alcotest Instrument on which the breath test was attempted.

DAG Mitchell was then shown the subject entries [redacted] on Rows 12 and 13 of Exhibit DB-19, which correspond to Rows 26,279 and 25,045 on Exhibit S-148 (also S-90).[11] Those entries, on both Spreadsheets, show the same arrest date and summons number, and that [redacted] was first brought to Freehold Township for a breath test on Alcotest Instrument ARXC-084, but the control test failed, and then was brought to Freehold Borough for a breath test on Alcotest Instrument ARXC-0067, which produced a Blood-Alcohol Content reading of 0.144. However, both Rows also show, in Column K, blank spaces as to whether he had a Driver's License. DAG Mitchell acknowledged that this would be a subject she would have wanted to notify because a BAC reading had been obtained.

[11] Exhibit DB-19 lists the corresponding Rows on Exhibit S-148 (also on Exhibit S-90), as 26,278 and 25,044, but they are actually one Row off, and are Rows 26,279 and 25,045.

However, this is an example where Mr. Prather, according to his testimony, in attempting to match subjects-to-addresses contained on Exhibit S-148 (or S-90), would have resulted in him deleting those entries because he would not have been able to find an address for [redacted] in the ATS database without a driver's license number to cross-check. In fact, the court has reviewed Exhibit S-91, the Excel Spreadsheet prepared by DAG Mitchell, sent to the AOC to find subject-to-address matches, and Row 18,653 does contain the name of [redacted] as being included on the list sent to the AOC for that purpose. Moreover, his name is not included in either Sheet of Exhibit S-85, the Alcotest Spreadsheet entitled "Spreadsheet from AOC_Monmouth County Only," which was received from the AOC as subject-to-address matches. Accordingly, this is an example of a subject who was requested to provide a breath sample on an Alcotest Instrument calibrated by Sergeant Dennis, a BAC reading was obtained, but he was not provided mailed notice in accordance with the Court's decision in State v. Cassidy, 235 N.J. 482, 498 (2018), directing the State "to notify all affected defendants of our decision that breath test results produced by Alcotest machines not calibrated using a NIST-traceable thermometer are inadmissible, so that they may take appropriate action."

Another example on Rows 25 and 26 on Exhibit DB-19 is [redacted]. The corresponding Rows on Exhibit S-148 (and S-90) are 6569 and 6570.[12] Both tests were conducted on Alcotest Instrument ARTL-0015, an Instrument calibrated by Sergeant Dennis. He was tested twice, on July 13, 2015, on that Instrument, at the Sayreville Borough Police Station. The first test produced an end result of "Mouth Alcohol," and the second test produced a BAC reading of 0.147. Again, Row 5004 on Exhibit S-91, the Excel Spreadsheet sent by the DCJ to the AOC, contains the name of [redacted], but because there was no driver's license entry on Column M of Exhibit S-91, his name did not appear as a subject-to-address match on either Sheet of Exhibit S-83 or on Exhibit S-84 and, thus was not mailed notice in accordance with Cassidy, 235 N.J. at 498.

Upon a further review of Column K, "Driver's License Number" on Exhibit DB-19, DAG Mitchell acknowledged there were numerous examples of Rows where no driver's license was contained in that Column, but there were BAC readings listed on many in Column N, "End Result," on those Rows, and because there was no driver's license, on an improper entry listed

[12] Again, Exhibit DB-19 lists the corresponding Rows on Exhibit S-148 (also on Exhibit S-0) as 6,568 and 6,559, whereas they are actually Rows 6,569 and 6,560.

thereon, the AOC was unable to obtain subject-to-address matches, resulting in no mailed notices being sent to them.

As to all these examples, DAG Mitchell acknowledged they would not have been sent mailed notices, but noted that notice of the Court's decision in Cassidy was posted on the website of the Attorney General and the websites of the Prosecutors of both Counties.

DAG Mitchell was also asked to review Rows 328, 329, and 330 on Exhibit DB-19. All three Rows relate to attempted breath tests of the subject [redacted] on July 21, 2014. Row 328 concerns an attempted breath test on Alcotest Instrument ARWC-0062, located at the Scotch Plains Police Station, with the end result in Column M being "Subject Refused." Row 329 documents an attempted breath test on Instrument Alcotest Instrument ARWC-0069, located at the Plainfield Police Department, with an end result in Column M of "Subject Refused," and Row 330 shows an attempted breath test on that same Alcotest Instrument in Plainfield Police Station with an end result in Column M of "Control Test Failed." In all three Rows, no driver's license number is listed on Column K. These same entries are contained in Exhibit S-148 as Rows 16,519, 16,775 and 16,776.[13] DAG Mitchell acknowledged she

[13] As noted, Exhibits S-148 and S-90 are Excel Spreadsheets containing the same information concerning subjects who had been arrested, charged with DWI, and were requested to provide breath samples on Alcotest Instruments,

did not include this subject in Exhibit S-91 because there was no BAC reading obtained on any of those three attempted breath tests. She iterated her task in reviewing Exhibit S-90 (also Exhibit S-148), was to identify those subjects who had provided breath samples on Alcotest Instruments calibrated by Sergeant Dennis where an evidential BAC reading had been obtained based on the breath samples provided. Here, all three attempts to obtain breath samples from [redacted] did not produce a BAC reading and, accordingly, were not included in Exhibit S-91, the Excel Spreadsheet prepared by DAG Mitchell, and sent by the DCJ to the AOC, seeking mailing addresses so that notices of the Indictment of Sergeant Dennis and the then-pending Cassidy case could be sent.

DAG Mitchell testified further that, when reviewing Exhibit S-148, where attempts to obtain breath samples from subjects on Alcotest Instruments that had been calibrated by Sergeant Dennis did not result in a BAC reading, the basis for any DWI conviction could not have been an inadmissible BAC reading and, thus, was not affected by the miscalibration of the Alcotest Instrument by Sergeant Dennis. She did acknowledge that in a refusal prosecution for a violation of N.J.S.A. 39:4-50.4a, The Implied Consent

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pursuant to the Implied Consent Statute, N.J.S.A. 39:4-50.2, that had been calibrated by Sergeant Marc Dennis.

Statute, the Alcohol Influence Report (AIR) produced by an Alcotest Instrument stating "Subject Refused" is admissible.

Mr. Gold also displayed Rows 13,879 and 16,846 on Exhibit S-148 (also on Exhibit S-90), pertaining to two attempts to provide breath samples from the subject [redacted] on October 3, 2015. Rows 13,879 and 16,846 on both Exhibits contain the same Arrest Date and Summons Number in Columns A and P, respectively.[14] Column M on both Rows show no entry for his Driver License Number. Row 13,879 documents an attempt to obtain breath samples from [redacted] on Alcotest Instrument ARWA-0176, located at the Fanwood Police Station, with an Error Message in Column T, stating "Subject Refused." Row 16,846 shows an attempt to obtain breath samples from [redacted] on that same date, using Alcotest Instrument ARWC-0069, located at the Plainfield Police Station, with an Error Message in Column T, Stating "Control Test Failed. Both Instruments were identified as having been calibrated by Sergeant Dennis.

Upon reviewing these two Rows relating to the testing of [redacted], DAG Mitchell testified she assumes that when the Control Test failed on the attempt to obtain breath samples on Alcotest Instrument ARWC-0069 at the

[14] The Transcript, T4, page 185, lines 13-14, refers to Rows 13,878 and 16,845, which is incorrect.

Plainfield Police Station, [redacted] was transported to the Fanwood Police Station for breath sample testing on Alcotest Instrument ARWA-0176, where the operator reported that he had refused to submit to the taking of breath samples for analysis by that Instrument. DAG Mitchell acknowledged that these two Rows on Exhibit S-148 (also on Exhibit S-90) were eliminated by her, and are not contained on Exhibit S-91 because no evidential BAC reading had been obtained. Moreover, even if they had been contained on Exhibit S-91, Mr. Prather from the AOC would have eliminated them from his subject-to-address search because there was no driver's license number listed for [redacted]. DAG Mitchell also noted that when the [redacted] matter went before the Municipal Court on the refusal charge, defendant or his counsel would have been entitled to receive the Alcohol Influence Reports concerning both attempted breath tests, which would document the number of attempts to obtain breath samples and the reason for the failure of the control test.

During cross-examination, Mr. Gold then displayed Rows 12,864 and 23,756 on Exhibit S-148 (also on S-90), pertaining to the arrest of the subject [redacted].[15] Here, Columns A, M, and P, on both Rows, contain the same arrest date, Driver's License Number, and Summons Number. Row

[15] Again, T4, page 191, line 18 states the Rows for [redacted] are 12,863 and 23,755, which are incorrect.

12,864 shows there was an attempt to obtain a breath sample from [redacted] on Alcotest Instrument ARWA-0171, located at the New Jersey State Police Station in Holmdel, and Column T reported there was a "Control Test Failure." Row 23,756 documents there was also an attempt to obtain breath samples from [redacted] on Alcotest Instrument ARXB-0066, located at the Holmdel Police Station, and Column T reported that "Subject Refused." DAG Mitchell acknowledged both Instruments had been calibrated by Sergeant Dennis and, for the same reasons, these Rows were eliminated by her from inclusion in Exhibit S-91 because no evidential BAC reading was obtained on either test. Accordingly, there was no attempt to find an address for [redacted] or notify him concerning the miscalibration of those Instruments by Sergeant Dennis, or the issues pending before, or decided by, the Court in Cassidy.

Mr. Gold also displayed for DAG Mitchell Rows 2407 and 2408[16] on Exhibit S-148 (also on S-90), pertaining to two attempts to obtain breath samples from subject [redacted], both for analysis on Alcotest Instrument ARRL-0019, located at the Woodbridge Township Police Station, on June 15, 2011, with Row 2407 reporting a "Mouth Alcohol" error in Column T, and Row 2408 reporting "Test Terminated" in Column T, with no

[16] T4, page 194, line 13, states the Rows for [redacted] are 2,407 and 2,406, which are also incorrect.

evidential BAC readings reported in Column U on either Row. DAG Mitchell acknowledged these Rows were eliminated by her when creating Exhibit S-91 because there were no BAC readings obtained. She also agreed that more information from a query of the Alcotest Inquiry System database of all 310 Columns of available information, could have reflected how many attempts at providing breath samples were made, the breath volume or blowing length of any such attempts, and whether a single acceptable reading (two are required for an Instrument to report a final BAC reading) was obtained.

DAG Mitchell was then referred to Rows 25,150 and 25,151 on Exhibit S-148 (also on Exhibit S-90), pertaining to subject [redacted].[17] The Arrest Date, Location of the Alcotest Instrument, Driver License Number and Summons Number in Columns A, D, M, and P, respectively, are all the same. Both attempted tests were on Alcotest Instrument ARXC-0069. Row 25,150 reported the Final Error message "Ambient Air Check Error" in Column T, and Row 25,151 reported the Final Error message of "Subject Refused." That Instrument had been calibrated by Sergeant Dennis, and Column U did not report a BAC reading. DAG Mitchell explained that, prior to a breath test, the Alcohol Instrument analyzes the surrounding air to verify it contains no

[17] T4, page 196, refers to those as Rows 25,149 and 25,150, which Mr. Gold stated "is probably one off the Excel Spreadsheet[,]" and he is correct. The actual Rows reviewed from [redacted] are 25,150 and 25,151.

alcohol and if, for example, hand sanitizer containing alcohol is used before the attempted test, the error message "Ambient Air Check Error" will appear, preventing the receipt of breath samples. Again, DAG Mitchell verified that these Rows were eliminated by her in creating Exhibit S-91 because no evidential BAC reading had been obtained.

DAG Mitchell was then shown Rows 3,686 and 6,409 in Exhibit S-148 (also contained on Exhibit S-90) pertaining to subject [redacted].[18] Again, the same Arrest Date, Driver's License Number and Summons Number appear on both Rows in Columns A, M, and P, respectively. In Row 3686, an attempt was made to have [redacted] provide breath samples on Alcotest Instrument ARSC-0059, located at the South Amboy Police Station, with the Final Error message "Subject Refused" appearing in Column T. In Row 6,409, an attempt was made to obtain breath samples from [redacted] on Alcotest Instrument ARTL-0015, located at the Sayreville Borough Police Station, with the Final Error Message, "Control Test Failed" appearing. Again, both breath sample attempts were on Instruments that had been calibrated by Sergeant Dennis, and no evidential BAC readings were reported in Column U. DAG Mitchell again

[18] T4, page 197, lines 17-18, state the Rows as 6,408 and 4,685 on Exhibit S-148. Those are incorrect, the correct Rows being 3,686 and 6,409.

stated these Rows were eliminated by her in creating Exhibit S-91 because no BAC readings had been obtained.

Mr. Gold also displayed and questioned DAG Mitchell concerning a few other Row entries in Exhibits S-148 also appearing on the same Rows in Exhibit S-90, with the same responses from DAG Mitchell that, where no evidential BAC reading was obtained, those Rows were not included by her in creating Exhibit S-91.

DAG Mitchell explained that when conducting a breath test on an Alcotest Instrument, depending on the circumstances that occur, when breath samples are not sufficient to produce an evidential BAC reading, the Operator of the Instrument has the option of choosing "Test Terminated," or "Subject Refused" as the End Result that is then reported on Column U.

This line of questioning of DAG Mitchell is based on the position asserted by the Defendant-Respondent and *Amici*, the New Jersey State Bar and Office of the Public Defender that in instances where an Alcotest Instrument has been calibrated by Sergeant Dennis and an error message produced by that Instrument resulted in no BAC reading being obtained, that case should be deemed to have been included as one affected by the Court's decision in State v. Cassidy. They contend an Alcotest Instrument that had not been properly calibrated cannot function properly and, thereby, the conclusion

by the operator of the test that a subject had refused to submit to a breath test, was suspect, entitling that subject, if convicted of a refusal, to make an application for post-conviction relief. The State has contended that the Court's decision in Cassidy only permits post-conviction relief applications where a subject was convicted, by plea or trial, of Driving While Intoxicated, or some other offense, based on the existence of an evidential BAC reading obtained from breath samples provided on an Alcotest Instrument that had been calibrated by Sergeant Dennis.

DAG Mitchell was then questioned by Mr. Gold concerning Exhibit S-82B, the Excel Spreadsheet entitled "Defendants who received notice letter from DCJ," which contains 6 Sheets. This Spreadsheet concerns notice letters that were sent to subjects who had been asked to provide breath samples on Alcotest Instruments that were not located in any of the 5 principal Counties (Middlesex, Monmouth, Ocean, Somerset and Union). She acknowledged that the subjects listed in those Sheets of Exhibit S-82B were mailed notice letters directly by the Division of Criminal Justice to the addresses contained in Exhibit S-83.

Mr. Cooke, counsel for Defendant-Respondent Zingis, questioned DAG Mitchell concerning Exhibit S-96, the form notification letter signed by Supervising DAG Robert Czepiel in 2017, which was sent to all County

Prosecutors and all Municipal Prosecutor Liaisons. DAG Mitchell explained that letter attached the November 3, 2017 letter, see Exhibit S-97, sent regarding the allegations against Sergeant Dennis and the then-pending case of State v. Cassidy, and also attached the November 2, 2017 Order issued by Special Master, Judge Lisa, see Exhibit S-98, granting a stay of proceedings in other courts that raised issues potentially affected by the ultimate decision of the Court in the Cassidy matter, and that Exhibit S-96 also attached Judge Lisa's Supplemental Order issued on November 28, 2017, see Exhibit S-100, discussed infra.

DAG Mitchell identified, Exhibit DZ-2, which is a letter signed by SDAG Robert Czepiel, dated June 29, 2018, addressed to all County Prosecutors and all County Municipal Prosecutor Liaisons, notifying them that until the Court issues its decision in Cassidy, Judge Lisa's Orders entered on November 2, 2017 and November 28, 2017, remained in effect. DAG Mitchell testified those Orders expired after the Court issued its decision in State v. Cassidy, 235 N.J. 482 on November 23, 2018. She explained that, thereafter, any conviction for Driving While Intoxicated that was based on an evidential BAC reading from an Alcotest Instrument that had been calibrated by Sergeant Dennis, could be challenged because that reading was determined by the Court to be inadmissible.

On questioning by Mr. Noveck, DAG Mitchell stated when she received the Excel Spreadsheet in Exhibit S-148 (also Exhibit S-90) from the Alcohol Drug Testing Unit (ADTU) of the New Jersey State Police, she assumed it contained a listing of all subjects identified, from a query of the Alcotest Inquiry System database, as having been asked to provide breath samples on an Alcotest Instrument that had been calibrated by Sergeant Dennis.

Mr. Noveck then displayed Exhibit S-27, the September 16, 2022 certification executed by DAG Mitchell. In that certification, DAG Mitchell states Sergeant Dennis became a Coordinator, authorized to perform calibrations on Alcotest Instruments, effective November 8, 2008, and that the last calibrations performed by Sergeant Dennis were on or about October 9, 2015. Since calibrations must be performed on each Alcotest Instrument every six months, she concluded the last date a defendant could have provided breath samples on an Instrument calibrated by Sergeant Dennis would have been approximately April 9, 2016. In that certification, she noted the ADTU did not maintain a list of the locations and dates of Alcotest Instruments calibrated by the Coordinators during the time period Sergeant Dennis was performing calibrations and, although calibration documents were left with the agency in which the Alcotest Instrument was located, Coordinators were not required to maintain a copy of the calibrations documents. Therefore, the ADTU did not

have copies of documents concerning calibrations performed by Sergeant Dennis.

In Exhibit S-27, DAG Mitchell certified that based on discussions with representative of the ADTU and the Office of Forensic Science (OFS) within the New Jersey State Police, it was determined the Information Technology Bureau (ITB) would be able to create a list of all subjects who had been requested to provide breath samples on an Alcotest Instrument calibrated by Sergeant Dennis by conducting a search and query of the Alcotest Inquiry System database. DAG Mitchell again noted the result was the creation of Exhibit S-148, the Excel Spreadsheet entitled "5925_Spreadsheet_Final.xslz," which was provided to the DCJ by the ADTU in 2016, containing the names of 27,833 subjects. As testified during direct examination, DAG Mitchell certified, in Exhibit S-27, she deleted all subject rows where no evidential BAC reading was obtained, during the attempted breath testing, in Column U of Exhibit S-148, resulting in 20,667 individuals remaining who had provided breath samples on an Alcotest Instrument calibrated by Sergeant Dennis and were thus potentially affected by his conduct. As noted, that adjustment of the Excel Spreadsheet contained in Exhibits S-90 and S-148 became Exhibit S-91, which was ultimately sent to Judge Grant in September 2016, along with a

county-by-county breakdown of those 20,667 subjects in five separate Excel Spreadsheets, seeking addresses for those 20,667 subjects.

Referring to paragraphs 34 and 35 of Exhibit S-27, DAG Mitchell explained she also worked with the ADTU and ITB in 2019 to obtain a query of the database to create an Excel Spreadsheet of all Solution Changes performed on all Alcotest Instruments in the State from November 1, 2008 through January 9, 2016, in order to isolate solution changes associated with calibrations performed by Sergeant Dennis. The ADTU provided the DCJ with Exhibit S-92, the Excel Spreadsheet entitled "Spreadsheet_All Solution Changes_11-1-08 thru 01-09-16," which consists of 68,450 Rows of solution changes performed during that period, with 130 Columns of information, including the solution change date (Column B), the calibration date (Column C), and the Alcotest Instrument Serial Number (Column E). In that certification, DAG Mitchell states she used Exhibit S-92 to isolate solution changes associated with calibrations performed by Sergeant Dennis to create Excel Spreadsheets, separated by county, of the location of Alcotest Instruments calibrated by Sergeant Dennis, as well as the dates of those calibrations, all of which is contained in Exhibit A to her Exhibit S-27 certification dated September 16, 2022. In her subsequent certification, Exhibit S-125, dated March 1, 2023, DAG Mitchell corrected various errors in

Exhibit A to her Exhibit S-27 certification, which had included some dates and locations that Sergeant Dennis performed a solution change that was not performed in concert with a calibrations, and she attached a "Corrected Exhibit A" to Exhibit S-125 to only include instances where Sergeant Dennis performed solution changes in conjunction with a calibration.[19]

Mr. Noveck displayed Exhibit S-152 during his questioning of DAG Mitchell, which is an Excel Spreadsheet ordered to be created by this court by the court on March 29, 2023, entitled "Subjectsfrom11052008_06302016," containing all subjects who were requested to provide breath samples on Alcotest Instruments in New Jersey from November 5, 2008 through June 30, 2016, consisting of 236,664 Subject Rows and the same 21 Columns of information as contained in Exhibits S-148 and S-90.

Mr. Noveck established, through DAG Mitchell's testimony, that Row 154,920 on Exhibit S-152 relates to an arrest of [redacted] on February 8, 2009 (Column A), and [redacted] provided breath samples on Alcotest Instrument ARWF-0356 (Column B), located in Warren Township Police Station (Column D), which Instrument was calibrated on January 22, 2009 (Column C), and a BAC reading of 0.209 was obtained (Column U). Mr. Noveck then displayed Exhibit S-90 (also Exhibit S-148), and highlighted

[19] A solution change must be performed in conjunction with a calibration.

Rows 18,225 through 18,235 for Alcotest Instrument ARWF-0356 (Column B), located at the Warren Township Police Station (Column D), and calibrated on July 22, 2009 (Column C). Mr. Noveck then highlighted Rows 18,236 through 18,242, which showed calibration dates of January 11, 2010 (Column C) of Alcotest Instrument ARWF-0356 (Column B) in the Warren Township Police Station (Column D), which are all the calibration dates listed for that Alcotest Instrument in Exhibit S-90 (also S-148). Referring to Row 1,836 on Exhibit S-92, Alcotest Instrument ARWF-0356 (Column E), located at the Warren Township Police Station (Column X), was calibrated on January 22, 2009 (Column C) by Sergeant Dennis (Columns AS through AV). However, there is no [redacted] listed on Exhibit S-90 (also Exhibit S-148), despite the fact he provided breath samples on an Alcotest Instrument calibrated by Sergeant Dennis where an evidential BAC reading result was obtained. Accordingly, DAG Mitchell acknowledged [redacted] would not have been contained on the Exhibits S-91 or S-83 Excel Spreadsheets and, hence, not mailed any of the notification letters.

Returning to Exhibit S-152, Mr. Noveck highlighted Rows 154,920 through 154,929, which contain all calibrations of Alcotest Instrument ARWF-0356 (Column B) in Warren Township Police Station (Column D) on January 22, 2009 (Column C), and noted it had been established that Sergeant Dennis

performed that calibration. It was confirmed by DAG Mitchell that Row 154,921 shows that [redacted] (Columns E & F) was arrested on March 1, 2009 (Column A), and tested on that Alcotest Instrument at the Warren Township Police Station, which resulted in a BAC reading of 0.209 (Column U), and this subject also does not appear on Exhibit S-90 (also Exhibit S-148), and also would not have received any of the notification letters.

Mr. Noveck then referred DAG Mitchell to Row 154,922 on Exhibit S-152, pertaining to [redacted] (Columns F & G), who was arrested on March 28, 2009 (Column A), and also provided breath samples on that same Alcotest Instrument at the Warren Township Police Station, calibrated by Sergeant Dennis, which resulted in an evidential BAC reading of 0.139 (Column U). Returning to Exhibit S-90 (also Exhibit S-148), and searching Column E (Last Name) for [redacted] reveals, on Row 19519 a [redacted] was arrested on March 29, 2009 and asked to provide breath samples on Alcotest Instrument ARWJ-0013 (Column B), located at the Watchung Borough Police Station (Column D), with no driver's license number listed in Column M, and an Ambient Air Check Error result appearing in Column T and, hence, no BAC reading obtained in Column U. Other identifying information on both S-90 and S-152 indicate this is the same individual, even though the arrest dates have a one-day difference. DAG Mitchell ultimately agreed, because the summons

numbers on both entries matched, that [redacted] was arrested and brought first to Watchung Police Station for testing and, when that resulted in the Ambient Air Check Error, was then transported for testing at the Warren Township Police Station, where an evidential BAC reading was obtained. The one-day difference is explained by Column Q on Exhibit S-152, which shows an arrest time of 23:54 and Column Q on Exhibit S-90, which shows an arrest time of 00:54. In any event, since Row 19519 on Exhibit S-90 (also on Exhibit S-148) shows no BAC reading on Column U, DAG Mitchell confirmed that Row would have been deleted by her and not be contained on Exhibit S-91. Accordingly, no notification letter would have been sent to him either, because the entry on Row 154,922 for Warren Township does not appear on Exhibit S-90 (also S-148).

Mr. Noveck then displayed Row 154,925 on Exhibit S-152, which shows [redacted] (Columns E & F) was arrested on April 25, 2009 (Column A) and was requested to provide breath samples on that same Alcotest Instrument ARWF-0356 (Column B) at the Warren Township Police Station (Column D), calibrated by Sergeant Dennis on January 22, 2009 (Column C), and an evidential BAC reading of 0.l94 was obtained (Column U). Returning to Exhibit S-90 (also Exhibit S-148), and searching Column E (Last Name) for "[redacted]," discloses that the same [redacted] was arrested more than

five years later on September 26, 2014 (Column A) and requested to provide breath samples on Alcotest Instrument ARTL-0012 (Column B), located at the Union Township Police Station with a BAC reading of 0.258 reported on Column U. However, reviewing Exhibit S-81(F), it appears [redacted] was mailed notification letters at the indicated address, albeit not for the Warren Township matter, which is not listed in Exhibit S-90 (also S-148).

Mr. Noveck then referenced DAG Mitchell's Corrected Exhibit A appended to her March 1, 2023 certification, Exhibit S-125, which states Sergeant Dennis performed the calibration on the Alcotest Instrument ARWF-0400 located at the Highlands Borough Police Station on March 8, 2012. Turning back to Exhibit S-92 (mis-identified in the transcript as S-78), the Excel Spreadsheet containing all solution changes from November 1, 2008 through January 9, 2016, Row 32277 lists the calibration date of March 8, 2012 (Column C) for Alcotest Instrument ARWF-0400 (Column E) at the Highlands Borough Police Station (Column K), performed by Sergeant Dennis (Columns AS through AV). Returning to Exhibit S-152, DAG Mitchell confirmed that Row 167764 shows an arrest date of March 11, 2012 (Column A) for [redacted] (Columns E & F), who was asked to provide breath samples on Alcotest Instrument ARWF-0400 (Column B), calibrated on March 8, 2012 (Column C) by Sergeant Dennis, with a BAC reading reported in

Column U of 0.058, which is below the legal per se limit. Turning back to Exhibit S-90 (also S-148) and filtering for Instrument ARWF-0400 reveals calibrations of that Instrument in Rows 18833 through 19022 (Column B) at the Highlands Borough Police Station (Column D), but yet there are no listed calibration dates of March 8, 2012, contained in Exhibit S-125.

Mr. Noveck also displayed Exhibit S-152, referring DAG Mitchell to Row 167771 (mis-stated on the transcript as "column 16771"), pertaining to the arrest on April 29, 2012 (Column A) of [redacted] (Columns E & F), with a request he provide breath samples on Alcotest Instrument ARWF-0400 (Column B), located at the Highlands Borough Police Station (Column D), calibrated by Sergeant Dennis on March 8, 2012 (Column C), with a resulting evidential BAC reading of 0.204 reported in Column U. Returning to a review of Exhibit S-90 (also S-148), there is no Subject Row listed for [redacted]. Accordingly, not being identified as a subject who provided breath samples on an Alcotest Instrument calibrated by Sergeant Dennis on Exhibit S-90 (also Exhibit S-148), he also would not have been mailed any of the notification letters.

On re-direct, referring to Exhibit DZ-1, The Draeger Alcotest 7110 MKIII-C New Jersey State Police User Manual, DAG Mitchell noted that, on page 36, the Manual instructs:

> If a control check fails, the instrument will abort the test and report the failure. Locate the error and compare it to the "Remedies" section of this guide. The instrument will not proceed until the issue has been resolved and a 'Solution Change' performed. If the issue continues, contact Draeger Safety Diagnostics, Inc.

Referring to pages 40-41 of Exhibit DZ-1, DAG Mitchell also testified there about twenty steps that must be taken when performing a solution change, noting that when a control test fails, it is reasonable for the arresting officer to transport the arrested defendant to a nearby location to have breath samples taken on a different Alcotest Instrument, rather than waiting for another solution change to be performed.

On questioning by Mr. Hernandez concerning mailed notice letters that were returned as being undeliverable, DAG Mitchell agreed that a search of the ATS and ACS databases by the AOC would have reflected whether defendants were represented by counsel during their court appearances. However, she stated there were no discussions by representatives of the Attorney General's Office with representative of the AOC concerning identifying and contacting any attorneys who had represented those defendants if the mailed notices were returned as being undeliverable.

During additional cross-examination by Mr. Gold, DAG Mitchell was again shown Exhibit DB-21, which is an "Alcotest 7110 Calibration Record" for Instrument ARWF-0400, located at the Highland Borough Police Station,

dated March 8, 2012, and signed by Sergeant Dennis. DAG Mitchell confirmed this calibration record is also not contained on Exhibit S-90 (also S-148) or on Exhibit S-91. Upon being shown, again, Exhibit DB-22, an "Alcotest 7110 Calibration Record" for Instrument ARWF-0356, located at the Warren Township Police Station, dated January 22, 2009, and signed by Sergeant Dennis, DAG Michell acknowledged this calibration also does not appear on Exhibits S-90 (also S-148) or on Exhibit S-91.

Mr. Gold then examined DAG Mitchell concerning Exhibit DB-23, which is a PDF spreadsheet file he prepared containing twenty-six (26) subject entries concerning requests by those subjects to provide breath samples on Alcotest Instrument ARWF-0356, located at The Warren Township Police Station, and on Instrument ARWF-0400, located at the Highlands Borough Police Station. Mr. Gold represented he created this spreadsheet by extracting the information contained in Exhibit S-152, the Excel Spreadsheet entitled "Subjectsfrom11052008_06302016," which contains 236,664 Rows of Subjects requested to provide breath samples on all Alcotest Instruments in New Jersey from November 5, 2008 through June 30, 2016.

DB-23 contains the same Columns as in Exhibit S-152, and has added a Column entitled "not in 27k." Upon reviewing Exhibit S-152 and Exhibit DB-23, DAG Mitchell confirmed that none of these Subject Rows are included in

the Exhibit S-90 (also S-148) or S-91 Excel Spreadsheets. The court's review of Exhibit DB-23 discloses that subject [redacted] appears twice. His first attempt to provide breath samples on Alcotest Instrument ARWF-0356 resulted in an Ambient Air Check Error, and his second attempt on that same Instrument produced an evidential BAC reading of 0.117. The subject [redacted] also appears twice. The first breath sample test provided on Alcotest Instrument ARWF-0400 produced a BAC reading of 0.125 and the second breath test sample provided on that same Instrument produced an evidential BAC reading of 0.124. The subject [redacted] also appears twice. The first breath sample test listed provided on Alcotest Instrument ARWF-0400 produced an evidential BAC reading of 0.193 and the second breath sample test listed on that same Instrument produced a BAC reading of 0.203. The subject [redacted] provided breaths samples on Alcotest Instrument ARWF-0400 which produced a "0" BAC reading. The attempted breath sample test on subject [redacted] on Alcotest Instrument ARWF-0400 and on Subject [redacted] on Alcotest Instrument ARWF-0400 both resulted in the Error Messages of "Test Terminated," with no BAC reading recorded. The attempted breath test of subject [redacted] on Alcotest Instrument ARWF-0356 resulted in the Error Message "Subject Refused," as did the attempted breath sample tests of [redacted] and [redacted] on Alcotets

Instrument ARWF-0400, and no BAC readings were obtained on those three attempted tests. The attempted breath tests of the remaining subjects on Exhibit DB-23 resulted in evidential BAC readings, the court noting the BAC readings on the testing of subjects [redacted], and [redacted] were below the statutory, per se, legal limit. During her testimony concerning this Exhibit, DAG Mitchell affixed her initials verifying these Subject Rows are not contained in Exhibits S-90 (also S-148) or S-91 and, accordingly, were not identified as individuals who were requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis, nor were they sent notification letters.

Referring DAG Mitchell to Exhibit S-90 (also S-148), Mr. Gold highlighted Rows 18,225 through 18,242, which pertain to, in Column B, Alcotest Instrument ARWF-0356, located at the Warren Township Police Station. In reviewing Column C, "Calibration Date," DAG Mitchell confirmed that none of those columns contained the calibration date of January 22, 2009, which is the calibration date of that Alcotest Instrument contained on Exhibit DB-23, containing ten (10) subjects who were requested to provide breath samples on that Instrument, which was calibrated by Sergeant Dennis. Exhibit DB-23 is a partial extraction from Exhibit S-152. Stated differently, although Exhibit S-152 confirms that Sergeant Dennis calibrated Alcotest Instrument

ARWF-0356 on January 22, 2009, that calibration date is not contained in the Exhibit S-90 (also S-148) Excel Spreadsheet sent by the NJSP to the Attorney General's Office, which was represented as consisting of all subjects who had been requested to provide breath samples on Alcotest Instrument calibrated by Sergeant Dennis.

Similarly, in reviewing Rows 18,833 through 19,022 on Exhibit S-90 (also S-148), which pertain to, in Column B, Alcotest Instrument ARWF-0400, located at the Highland Borough Police Station, DAG Mitchell confirmed that none of those Rows, in Column C, contain the calibration date of March 8, 2012, which appears on those entries for Instrument ARWF-0400 contained in Exhibit DB-23, containing sixteen (16) subjects who were requested to provide breath samples on that Instrument. As noted, Exhibit DB-23 is a partial extraction from Exhibit S-152. Again, although Exhibit S-152 confirms that Sergeant Dennis calibrated Alcotest Instrument ARWF-0400 on March 8, 2012, that calibration date is not contained in the Exhibit S-90 (also S-148) Excel Spreadsheet sent by the NJSP to the Attorney General's Office.

The court finds the testimony of DAG Mitchell to be credible and candid. During the pendency of the Cassidy litigation, on behalf of the DCJ, she properly requested the NJSP to query the Alcotest Information System database to provide the DCJ with a list of all subjects who had been requested

to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis. The NJSP represented to the DCJ that the Excel Spreadsheet it provided, in Exhibit S-90, fulfilled that request. As the testimony and evidence received in this matter, clearly, it did not. Nonetheless, it was appropriate for DAG Mitchell and the DCJ to, in good faith, rely on that list received from the NJSP as properly identifying all individuals who were potentially affected by the misfeasance of Sergeant Dennis, in performing their subsequent tasks of notifying the Municipal Courts and, thereafter, those identified individuals with an address secured from the AOC, of that misfeasance, concerning the pending Cassidy litigation, and the Court's ultimate decision in that case.

Additionally, as discussed more fully, infra., this court finds it was fully appropriate for DAG Mitchell and the DCJ to eliminate from Exhibit S-90, the list of 27,833 subjects identified as being requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis, those Subject Rows where the "End Result" in Column U did not report an evidential BAC reading, which resulted in the creation of the Excel Spreadsheet contained in Exhibit S-91, which reduced the 27,833 potentially-affected breath tests by 7,166, to 20,667 (actually, as testified, to 20,666) breath tests that resulted in an evidential BAC reading.

Also in good faith, since the Alcotest Information System database does not contain addresses for individuals tested, DAG Mitchell, on behalf of the DCJ, properly requested the AOC to perform a search of its databases in an attempt to secure addresses for the individuals listed in Exhibit S-91, identified as having provided breath samples on Alcotest Instruments calibrated by Sergeant Dennis, where an analysis of those samples resulted in the reporting of an evidential BAC reading. No other public database has been identified as being more comprehensive in order to complete that task. Unfortunately, the AOC was unable to find either exact or partial subject-to-address matches for 1,470 of those 20,666 subjects. Moreover, as will be discussed more fully infra., the addresses that were provided by the AOC were those individual's addresses that existed between 2008 and 2016. As noted in my June 21, 2019 Initial Report to the Court as Special Master in the Cassidy post-conviction relief cases, see Exhibit S-31, some people do, periodically, move to a different address, and that issue will be discussed more fully in the "notification" portion of this Report.

4. Steven Symogyi

Steven Somogyi is the Assistant Director of Municipal Court Services in the Administrative Office of the Courts (AOC), and testified he has worked in the AOC for twenty-nine (29) years. He oversees the Municipal Court

Services Division, and provides support and oversight to more than five hundred (500) Municipal Courts throughout the State of New Jersey.[20] The testimony of Mr. Somogyi is contained in T2, the March 21, 2023 Transcript, on pages 111-219.

At the direction of Special Master, Judge Lisa, in State v. Cassidy, DAG Mitchell contacted Mr. Somogyi and later sent him an email, dated July 14, 2017, requesting a search of the AOC's database for addresses of the 20,667 subjects who had been identified by the New Jersey State Police as being potentially affected by the misfeasance of Sergeant Dennis. See Exhibit S-18A. As noted, paragraph 4 of Judge Lisa's Case Management Order I, dated July 13, 2017, required the State to apprise the court of its efforts to obtain addresses for the 20,667 individuals referenced in its motion to appoint a Special Master. See Exhibit S-113.

Mr. Somogyi testified that upon receipt of Exhibit S-91, he requested Charles Prather, an independent computer expert who worked with the AOC, to perform searches of ATS, the Municipal Court database maintained by the AOC, in an attempt to identify and match those individuals contained in Exhibit S-91 with addresses contained in that database. Mr. Somogyi stated he

[20] It should be noted that after a distinguished career with the Administrative Office of the Courts, Mr. Somogyi has retired, effective August 31, 2023.

worked with Mr. Prather to develop a spreadsheet of the address information they were able to obtain from those databases for those individuals.

Once he and Mr. Prather were able to match as many of those subjects to actual addresses as possible, Mr. Somogyi sent an email to SDAG Czepiel, dated August 10, 2017, attaching the Exhibit S-83 Excel Spreadsheet, containing addresses of those individuals contained on Exhibit S-91 for which his office was able to match addresses. See Exhibits S-18B. Mr. Somogyi explained that Mr. Prather and his staff had attempted to match the information contained in Exhibit S-91 to a case filed in the ATS and ACS databases by utilizing the subjects' names, drivers license numbers, the date of the Alcotest testing, location of same, and summons or complaint numbers. He noted that in some instances an arresting officer does not issue the summons until days after the arrest and breath testing, making matching more difficult. Accordingly, when performing a query of the ATS and ACS databases for matches, Mr. Prather provided for the search to include any listings for summons issued two days after the date of the arrest.

Mr. Somogyi also explained that where a defendant is charged with DWI as a well as a related, indictable, criminal offense, based on the same incident, the case is entered in the criminal Promis Gavel database, and is entered in ATS database as a transfer with the notation "TRAN." He did note there were

some DWI charges that get transferred to the Superior Court, are resolved there, and that disposition does not get entered back into the ATS database. Specifically, with a charge of Driving While Suspended, the suspension due to a DWI conviction, contrary to N.J.S.A. 2C:40-26, a fourth-degree indictable offense, that charge only gets entered into the ATS database if the arresting officer has also charged the defendant with the motor vehicle offense of Driving While Suspended, contrary to N.J.S.A. 39:3-40 and the 2C:4-26 charge, simultaneously. In absence of that circumstance, he explained that when a defendant is charged solely with a violation of N.J.S.A. 2C:4-26, and that underlying conviction for DWI, upon which the license suspension was based, is one potentially affected by the Court's decision in Cassidy, but the ATS database would not contain any records concerning the disposition of the 2C:4-26 case because it never originated in Municipal Court. However, Mr. Somogyi testified that the AOC is able to search for records of defendants who were convicted of a violation of N.J.S.A. 2C:4-26, which could potentially be matched up to a list of cases potentially affected by State v. Cassidy.

Mr. Somogyi testified his office was able to provide Mr. Czepiel an Excel Spreadsheet on August 10, 2017, entitled "Spreadsheet from AOC_All Addresses_Alcotest ATS Defendants Matches – full matches and partial – to AOC," which contains two Sheets. See Exhibit S-83. As has been noted,

Sheet 1 thereof contains 18,249 exact addresses-to-subject matches, and Sheet 2 contains 947 partial addresses-to-subject matches, which he stated were probable matches based on matching most variables utilized in the searches. The address information, for each Row, is contained in Column J of each Sheet of the Spreadsheet. As a result, the AOC was able to provide the Attorney General's Office with addresses for 19,196 of the 20,667 individuals listed in Exhibit S-91, leaving 1,471 subject Rows contained in Exhibit S-91 without a matching address. During cross-examination, Mr. Somogyi acknowledged that by setting the two-day criteria for matching summonses from the date of arrest, there was a possibility some partial-address matches were not identified.

However, on further questioning on cross-examination, in circumstances where a defendant was arrested and charged with DWI in one municipality, but was asked to provide breath samples in another municipality or agency, Mr. Somogyi testified the address search his office conducted would still locate a match for that defendant under the query criteria utilized because the search parameters were the defendant's name, driver's license number, date of arrest, and the Alcotest testing information.

Mr. Somogyi testified his office staff also created Exhibit S-54, which is a 621-page listing of Alcotest records with matching tickets in the ATS database, listed by subjects in each Municipal Court, and County, containing

the name of the defendant, the summons number, the date it was issued, the status of the case, and its then-current disposition. Mr. Somogyi described Exhibit S-54 as a document generated in 2017, following Case Management Order II, issued by Special Master Judge Lisa dated August 17, 2017, see Exhibits S-115 and DB-11, staying the prosecution of Driving While Intoxicated cases that were linked to the then Cassidy case, pending issuance of an opinion by the Supreme Court. He stated Exhibit S-54 was created to assist Municipal Courts in complying with Judge Lisa's Order by identifying potential Cassidy-affected matters pending in their courts.

Mr. Somogyi also identified Exhibit S-118, a 493-page document, which he explained was a "sort" of Exhibit S-54 that provided an alphabetical listing of those defendants listed in S-54, by name. He testified S-118 was developed by his staff to further assist Municipal Courts in identifying defendants who might have a claim, in a pending DWI prosecution, that they had a previous Cassidy-affected conviction potentially subject to being vacated.

Mr. Somogyi testified these lists in Exhibits S-54 and S-118 were developed by Mr. Prather, and were based on the original Excel Spreadsheet, Exhibit S-91, delivered to the AOC by the Attorney General's Office. He noted that the bulk of the defendants listed in Exhibit S-54 had cases in Municipalities within Middlesex, Monmouth, Somerset, Ocean and Union

Counties, with some defendants having cases in Municipal Courts in Atlantic County (2), Bergen County (5), Burlington County (5), Camden County (1), Essex County (80), Hudson County (3), Hunterdon County (6), Mercer County (39), Morris County (6), and Passaic County (1). Again, these are those cases listed where full or partial subjects-to-addresses matches were found by the AOC in their databases, and do not include those in Exhibit S-91 where no match was found.

Mr. Somogyi further noted, based on his staff's analysis of those defendants who had full and partial address matches, and were thereby potentially affected by the Court's decision in State v. Cassidy, there were 13,608 convictions for DWI for those subjects listed on Exhibit S-83. Based on that determination, following the Court's November 2018 decision in Cassidy, notices were prepared and mailed to those defendants, advising them of their right to seek post-conviction relief, and providing them with a form to complete and file with the court. Mr. Somogyi identified a portion of Exhibit S-55, which is an example of the form of notice mailed to those defendants, dated July 14, 2021. That letter also referred the mailed defendants to the New Jersey Judiciary's Cassidy website for more specific information and contained forms to utilize in filing an application for post-conviction relief, which was handled centrally through Middlesex County Court staff. Mr. Somogyi

explained that the list of 13,608 defendants did not include those defendants who pled guilty or were found guilty of a lesser-included offense, such as reckless driving or careless driving, where the DWI charge had been dismissed. Mr. Somogyi also noted that the Supreme Court thereafter issued an Order directing that all Cassidy-based applications for post-conviction relief filed on or after June 1, 2022, be filed, processed and adjudicated in the Municipal Court where the DWI conviction was entered.

On cross-examination, Mr. Somogyi testified that, in addition to the July 14, 2021 mailing, a Notice to the Bar was published in the New Jersey Law Journal and New Jersey Lawyer, essentially containing the same information set forth in the July 14, 2021 notification letter. He further stated that the July 14, 2021 mailing was the only notice mailed by the AOC. He explained that when any mailed notices were received back and being undeliverable, if an updated address was provided by the Post Office, the notice was mailed back out to that corrected address. He acknowledged that if an updated address was not provided, no further steps were taken. Referring to page 14 of my Initial Report, as Special Master in Cassidy-based applications for post-conviction relief, dated June 21, 2019, see Exhibit S-31, noting that the addresses obtained by the AOC were based on summonses issued between 2008 and 2016, and obtaining updated addresses from the Motor Vehicle Commission

might be a possibility where notices are returned as undeliverable, Mr. Somogyi testified he contacted the Motor Vehicle Commission but was unable to arrange that with the Commission. Mr. Somogyi also explained his office did ask the DCJ if it could provide any additional information that would enable the AOC to conduct additional on those defendants where addresses-to-subjects matches could not be obtained, but was informed no such information was available.

Mr. Somogyi made it clear in his testimony that the AOC did not make any determination as to which defendants were potentially affected by the Supreme Court's decision in Cassidy, Rather, he stated, that determination was made by the New Jersey State Police, as memorialized in the Exhibit S-90 Spreadsheet it provided to the Attorney General's Office, and which had further been modified by the Attorney General's Office, as contained in Exhibit S-91, to 20,667, by eliminating individuals where an evidential BAC reading had not been obtained.

The testimony of Mr. Somogyi was credible, candid and forthcoming. His Office simply utilized the Excel Spreadsheets contained in Exhibits S-91 and S-81B through 81F, that were provided by the DCJ to query the court's database system in a good faith attempt to provide addresses for the individuals listed therein. Obviously, that effort was unable to secure

addresses for 1,471 of those individuals and, as will discussed more fully herein, many of the addresses were stale, resulting in numerous notification letters sent by the Offices of County Prosecutors, by the DCJ, by County Prosecutors, and by the AOC being returned as being undeliverable, with no attempts made to secure updated mailing addresses for them, other than Mr. Somogyi's attempt to obtain interface cooperation from the Motor Vehicle Commission.

5. Charles Prather

Charles Prather is an independent data analyst who has been performing work for the AOC since 2011. The testimony of Mr. Prather is contained in T3, the March 22, 2023 Transcript, on pages 17-100. Mr. Prather has worked in the Information Technology field since 1985. Following his graduation from college in 1979, he worked for an insurance company in Philadelphia, where he was trained in data processing and became a Cobalt Programmer, performing work on the company's mainframe, inputting data, building its infrastructure and maintaining it. In his work for the AOC, he performed various tasks requested by the Municipal Court Services Division of the AOC between 2011 and 2018, reporting to Assistant Director, Steven Somogyi. In that capacity, he was primarily responsible for maintaining the Court's Automated Tracking System (ATS) and Automated Criminal Tracking (ACT)

databases. He noted that ATS is a computer system database that stores all information from summonses issued by police officers in New Jersey, consisting of about 100 million records. He explained that a "table" in the database is a repository of information, and a "query" is something that requests and retrieves certain fields of information from that table, which is printed in the form of a "report" that displays the information retrieved based on that query.

With respect to the Cassidy litigation, sometime in 2017 Mr. Somogyi provided Mr. Prather with Exhibit S-91, with a request to match each subject to an address in the court's databases. That file was on a secured thumb drive and Mr. Prather was able to download the Excel Spreadsheet contained in Exhibit S-91 onto his work computer. Each Row on the downloaded Spreadsheet represented a specific blood-alcohol breath test conducted on a subject who had been arrested and charged with DWI, and an evidential BAC reading had been obtained.

Mr. Prather explained that in order to complete that task he had to "clean-up" the data, because here were instances in the downloaded file where the listed driver's license number of many subjects was either absent or invalid, containing "zeroes" or "dashes," which prevented a search of the databases for those subjects. He accomplished that by loading the Spreadsheet

onto the ATS mainframe and then began running queries against it in the form of extraction codes, which were designed to eliminate those Rows where there was no driver's license listed, or an incorrect entry for same, and then using a separate extraction code to remove several duplicate entries identified.

During cross-examination, Mr. Prather was shown a sorting of Column M, "Driver License No." in Exhibit S-91, to illustrate entries where either no driver's license was shown, or an invalid driver's license was contained in Column M. The court also reviewed Column M during Mr. Prather's testimony. By way of example, Rows 82 through 84, Row 92, Rows 99 and 100 on Exhibit S-91 all contain blank spaces where a driver's license number would otherwise be entered. Row 133 contains the entry "00" and Row 606 the entry "0" in Column M, Rows 774, 775 and 775 contain the entry "None" in Column M. These are examples, and there are many other entry examples in Column M, of Rows that Mr. Prather eliminated because he would be unable to match those Subject Rows with a driver's license number in the court's databases. Mr. Prather again testified he discovered duplicate records, where the same information in the file, such as the same summons number or same arrest date of a subject, appeared multiple times. Accordingly, he eliminated approximately 1,300 Rows in Exhibit S-91, where a search of the databases for addresses of those individuals could not be accomplished.

Once the data was "cleaned-up," Mr. Prather began the process of linking the driver's license numbers of each subject in the file to those in the databases, and then compared the arrest date listed in the file to the arrest date contained in the database. He stated that using driver's license number of each subject was the best way to match information in the ATS database. This was done by writing a code, using software called "Web Focus" to query the ATS database. That Software then generated an SQL Statement, a separate Tab or Sheet, on Exhibit S-91. He explained that he then created an Excel Spreadsheet with two Sheets, see Exhibit S-83, which was then sent back to the Division of Criminal Justice on August 10, 2017, see Exhibits S-3 and S-18B. The first Sheet on Exhibit S-83 contained addresses for all subjects where an exact subject-to-address match was achieved, both entries containing the same driver's license number and the same arrest date for 18,249 Subject Rows in Exhibit S-91. The second Sheet contained 947 Subjects Rows from Exhibit S-91, where there was a match for the driver's license number, and the arrest date and summons issuance date were within two days of each other.

Mr. Prather testified that upon completing the Excel Spreadsheet contained in Exhibit S-83, he delivered it to Mr. Somogyi. He also prepared two additional lists at the request of Mr. Somogyi. Mr. Prather identified Exhibit S-54, which is a 621-page PDF file of "Alcotest Records With

Matching Tickets in ATS" for each Municipal Court in each County found from Exhibit S-91. Additionally, he identified Exhibit S-118, a PDF file, entitled "Alco Test Record With Matching Ticket in ATS," which is an alphabetized listing of all the same subjects, consisting of 493 pages, containing the name of the subject, the ticket number, the issuance date of the ticket, the disposition date, the case status, county in which the ticket was issued, and the name of the Municipal Court where the matter was determined.

In summary, Mr. Prather, acknowledged that the AOC was provided with Exhibit S-91, the Excel Spreadsheet containing 20,667 Subjects, that approximately 1,300 were eliminated by his described clean-up of the files, leaving 19,367 Subjects who were queried in the ATS database, which resulted in a total of 19,196 full and partial subject-to-address matches of the 20,667 Subject Rows originally provided to him in Exhibit S-91, a difference of 171 plus the 1,300 where no match could be attempted, or 1,471. See Exhibit S-83. He testified that he did not attempt to match the resulting 171 subjects without matches to addresses through the ACS database because those cases are transferred to the Superior Court, but did note it would be possible to query the ACS database to obtain the names of defendants who are convicted of a certain crime within a designated period of time.

The testimony of Mr. Prather was credible. However, the fact remains that, of the 20,666 individuals contained in Exhibit S-91 for whom addresses were sought, the AOC was unable to locate addresses for 1,471, either because some Subject Rows in Exhibit S-91 were duplicate entries, some listed no driver's license number, or an invalid driver's license making a search for those not possible, and addresses for 171 of the individuals that were searched were not obtainable from the court's databases. Mr. Prather did acknowledge that a search of the ACS database could have been accomplished, that might secure an individual's address or the name of the attorney representing that individual, by conducting a query by the name of a defendant who was convicted of a designated crime, within a designated period of time, but that information had not been requested.

6. Thomas John Snyder

Thomas John Snyder was called as a witness by the State. He is a Lieutenant with the New Jersey State Police, and has been employed by the State Police for more than twenty-four (24) years. The testimony of Lieutenant Snyder is contained in T1, the March 20, 2023 Transcript, on pages 175-255, and in T2, the March 21, 2023 Transcript, on pages 19-108.He is currently Assistant Chief for the Forensic Service Bureau of the State Police, a position he has held for about a year. Prior to that assignment he was the Unit

Head in the State Police's Alcohol Drug Testing Unit (ADTU). He began working in that Unit in February 2006, as a Trooper and, after training, was appointed as a Breath Test Coordinator, performing Solution Changes and Calibrations of Alcotest Instruments in a specific geographic region. He became an instructor on the Training team of the State Police and was promoted to Sergeant. He then became a Project Manager, his main duty being oversight of grants and providing field operation stations and Breath Test Coordinators with supplies, getting their equipment recertified and conducting spot inspections of Alcotest-related documents produced by the Coordinators. At some point, he was promoted to the rank of Lieutenant.

Lieutenant Snyder testified that Trooper Marc Dennis was assigned to the ADTU approximately two years after he had been assigned to the Unit, and was a Breath Test Coordinator in training, under supervision of a Coordinator. After completing his training, Trooper Denis was approved as a Breath Test Coordinator, effective November 5, 2008. See Exhibit S-7. Thereafter, he was permitted to perform solution changes and calibrations of Alcotest Instruments on his own, and was initially assigned to perform those duties in portions of Somerset County, and all of Middlesex and Union Counties. Lieutenant Snyder testified that the last date Dennis was authorized to perform solution changes and calibrations of Alcotest Instruments was October 9, 2015.

Lieutenant Snyder stated that in early October 2015, he learned that Sergeant Dennis may have not been using his NIST-traceable digital thermometer when conducting calibrations of Alcotest Instruments. Referring to Exhibit S-1, Lieutenant Snyder explained he confronted Sergeant Dennis as to Alcotest Instruments located in the Cities of Asbury Park and Long Branch, and in the Township of Marlboro, placing those Instruments out of service until they could be properly recalibrated. He stated Sergeant Dennis would not cooperate with an investigation into that issue, and was precluded from conducting solution changes and calibrations after October 9, 2015. Exhibit S-1 contains an email sent by Lieutenant Snyder to Sergeant Dennis, dated October 9, 2015, outlining the problem, and a State Police Interoffice Communication, dated December 1, 2015, from Lieutenant Tormo, then Unit Head of the ADTU to Major Acevedo, Commanding Officer of the Special Investigations Section, containing the result of the investigation, concluding Sergeant Dennis had knowingly performed recalibrations of the Alcotest Instruments in Asbury Park, Long Branch, and Marlboro Township that were not consistent with the "Calibration Check Procedure for Alcotest 7110," specifically stating "he did not check the simulator solution temperatures with a NIST traceable thermometer prior to beginning the re-calibration procedure."

Lieutenant Snyder then detailed his attempts to obtain calibration documents related to Alcotest Instruments that had been calibrated by Sergeant Dennis. He explained that a copy of calibration documents are required to be kept by each Coordinator, with a copy kept at the Offices of the ADTU. He stated that in early 2023, he discovered that not all of Sergeant Dennis's calibration documents were at the ADTU Offices, so he directed the field Coordinators to go to the location of each Alcotest Instrument and obtain copies of those calibration documents.

Lieutenant Snyder was then shown Exhibits S-102 through S-107, which are calibration records of Sergeant Dennis for Alcotest Instruments locations, respectively, in Middlesex County (S-102), Monmouth County (S-103), New Jersey State Police Stations (S-104), Ocean County (S-105), Somerset County (S-106), and Union County (S-107). Those Exhibits contain actual calibration documents, signed by Sergeant Dennis. For example, Exhibit S-102, contains the calibration documents for twenty-eight (28) Alcotest Instruments located in Middlesex County and, as to each Alcotest Instrument there are a number of calibration documents signed by Sergeant Dennis. By way of further example, as to Alcotest Instrument ARLD-0012, located at the Edison Township Police Station, there are twelve (12) calibration documents, signed by Sergeant Dennis, each one reflecting a calibration date. As to Exhibit S-103, Monmouth

County, there are calibration documents for forty-eight (48) Alcotest Instruments calibrated by Sergeant Dennis on various dates. On Exhibit S-104, New Jersey State Police Stations, there are calibration documents, signed by Sergeant Dennis, for fifteen (15) Alcotest Instruments, calibrated on various dates. On Exhibit S-105, Ocean County, there are calibration documents, signed by Sergeant Dennis, for six (6) Alcotest Instruments, calibrated on various dates. On Exhibit S-106, Somerset County, there are calibration documents, signed by Sergeant Dennis, for twenty (20) Alcotest Instruments, calibrated on various dates. Finally, on Exhibit S-107, Union County, there are calibration documents, signed by Sergeant Dennis, for twenty-three (23) Alcotest Instruments, calibrated on various dates.

Citing to State v. Chun, 194 N.J. 54 (2008), Lieutenant Snyder testified that a "Calibration" of every Alcotest Instrument must be performed, minimally, every six (6) months by a certified Breath Test Coordinator, utilizing the State Police-issued equipment, which consists of a NIST-traceable digital thermometer, a black key temperature probe, and three CU-34 Simulators. A "Solution Change" is a function performed at least very thirty (30) days, or twenty-five (25) breath tests, whichever comes first. He stated a solution change can be performed by any certified Alcotest 7110 Operator, and every agency is responsible for performing their own solution changes.

However, Lieutenant Snyder explained that there are also occasions when a Breath Test Coordinator responds to an agency to perform a solution change. He noted an NIST-traceable digital thermometer is not used during a Solution Change. Additionally, a solution change must be performed prior to each calibration by a Breath Test Coordinator.

Using, as an example, the calibration documents for Alcotest Instrument ARLD-0012, located in Edison Township, contained in Exhibit S-102, performed by Sergeant Dennis on December 12, 2008, consisting of a four-page document, Lieutenant Snyder explained that the first page, entitled "Alcotest 7110 Calibration Record," shows Sergeant Dennis performed the calibration procedure. These are the foundational documents to assure the Instrument is working properly. The second page, entitled "Alcotest 7110 Calibration Certificate Part I – Control Tests," documents that there were three Control Tests successfully conducted with the "Test Passed" entries. Lieutenant Snyder explained that the third page, entitled "Alcotest 7110 Calibration Certificate – Part II – Linearity Tests," is the third component of the recalibration procedure. This test shoots the control solution through the Alcotest Instrument to make sure it is working properly by measuring the temperature of the Simulator Solution. He explained that the fourth page of this document, entitled "Calibration Unit – New Standard Solution Report,"

shows the results of the final step of the recalibration process, where the Coordinator certifies that all tests are within acceptable tolerance, or not, and the Instrument has been recalibrated and is, or is not, ready to accept breath samples for analysis. In this example, the recalibration procedure was successfully completed, and all pages were signed by Sergeant Marc Dennis.

Lieutenant Snyder testified all of the calibration documents contained in Exhibits S-102 through S-107 are maintained in the office of the ADTU on a network drive which contains all calibration records in their files concerning Alcotest Instruments in the five listed Counties and State Police Stations, and all listed Instruments were calibrated by Sergeant Marc Dennis.

During cross-examination by Mr. Hernandez, Lieutenant Snyder stated that the ADTU attempts to have each Breath Test Coordinator assigned to perform calibrations in a specific geographic area, but there are occasions where a Coordinator will recalibrate Alcotest Instruments, based on the needs of the ADTU and as approved by a Supervisor.

He also explained that the CU-34 Simulator is a device, used during a solution change, consisting of a glass jar into which a Simulator Solution, which has an alcohol content of 0.10%, is poured, and it is plugged into the back of the Alcotest Instrument and heated to 34 degrees Celsius, plus or minus .2 degrees. A temperature probe, which is plugged into the Instrument,

is used to monitor the temperature of the solution. At that temperature a vapor is produced which "simulates" human breath, which is measured for alcohol content, which should be 0.10%. If the solution is not within 34 degrees Celsius, plus or minus .2, the Instrument generates an error message.

Lieutenant Snyder stated that during the taking of breath samples from a subject, at least two samples of sufficient volume and duration are required in order to produce an evidential BAC result, and a subject is given up to eleven (11) chances to provide two acceptable breath samples. If proper breath samples are not delivered by the subject, the final error message produced by the Instrument could be "Test Terminated," or "Subject Refused," in the discretion of the Operator who is administering the breath test. Lieutenant Snyder acknowledged there are various circumstances where a conclusion can be reached that a subject has refused to submit to a breath test. The first is where the subject is arrested for DWI, and refuses to submit to breath-sample testing. In that situation, the Instrument is prepared for receipt of breath samples and the Operator records on the Instrument that the "Subject Refused," which becomes part of the record of that attempted breath test. There is also what is referred to as a "blowing refusal," where the subject is blowing too hard or not hard or long enough into the mouthpiece to produce a sample with the required volume, or was blowing into it too soon, i.e., not

following the instructions provided by the Operator or prompts given by the Instrument. However, Lieutenant Snyder stated the error messages generated by the Alcotest Instrument in these circumstances are not caused by the Instrument not properly working, but, rather, are caused by the conduct of the subject. Even when the error message returned is "Interference," Lieutenant Snyder testified it is caused by a chemical in the body of the subject. Lieutenant also stated that the Operator might conclude, and record, that the subject has refused to submit to a breath test where the subject, having provided one breath sample, refuses, at the request of the Operator, to provide anther sample. Accordingly, Lieutenant Snyder acknowledged there could be circumstances where one proper breath sample for analysis was obtained, but the Operator concludes the subject had refused based on the subject's conduct.

On cross-examination by Mr. Gold, Lieutenant Snyder was shown Exhibit S-78, which is an email from him to DAG Robyn Mitchell, dated January 18, 2019. After informing DAG Mitchell that Mr. Donahue had advised him that he would be able to provide an Excel Spreadsheet consisting of all solution changes performed on all Alcotest Instruments in New Jersey during the requested time frame, Lieutenant Snyder provided DAG Mitchell

with answers to questions that she had posed to Captain Salvatore DeGirolamo of the ADTU,[21] stating as follows:

> · Could there be any missing solution forms in the centralized database
>
> ° Yes there could be.
>
> · What is the workaround if there are?
>
> ° The Alcotests are recalibrated every 6 months plus the coordinators also goes back to perform simulator/temperature probe changes (which require a solution change). Therefore, there are numerous solution change reports per Alcotest that will have coordinators names on them. Chances of every solution change being missing would be incredibly remote.
>
> · Can the list include all NJ solution change forms, not just Dennis or SP?
>
> ° Yes, we can get them for all Alcotests throughout the State. It appears we may be able to also break it down by County too. This would allow us to show that Dennis was never in the vast majority of counties to conduct recalibrations.

Lieutenant Snyder testified his focus in early 2019 was on obtaining all Solution Changes performed in the State during the indicated time period because he viewed that as being the best method of determining the identity of Alcotest Instruments calibrated by Sergeant Dennis. He did acknowledge that all of the Solution Change reports might not be contained in the Alcotest

[21] Captain DiGirolamo was the Executive Officer of the ADTU at that time.

Inquiry System database, but that would have no effect on being able to determine the Calibration dates of all Alcotest Instruments.

Lieutenant Snyder was shown pages 16 and 17 of Exhibit DB-4, the 26-page New Jersey Police User Manual for Operators of the Alcotest 7110 MKIII-C Instrument. Those pages are a sample of an Alcohol Influence Report (AIR) that contain a number of error messages as the end results of eleven (11) breath sample tests, which Lieutenant Snyder was asked to explain.

He testified that the error message, "Minimum Volume Not Achieved," appears where the breath sample provided has not achieved a volume of 1.5 liters, noting that the minimum volume required for a female age 60 or older is 1.2 liters, or the duration of the blowing is less than the required 4.5 seconds. He noted the firmware of Alcotest Instruments has not been modified to allow for this differential for females 60 or older, but Operators have been trained to disregard an error message of "Minimum Volume Not Achieved" where the subject is a female age 60 or older and she has met the 1.2 liter-volume requirement.

Regarding the error message, "Ready to Blow Expired," Lieutenant Snyder explained this message is automatically generated by the Instrument where the subject failed to provide a breath sample within the minimum period of time, three minutes, after being prompted to provide the sample. He stated

the error message, "Blowing Time Too Short," will be generated by the Instrument where, even if the minimum volume of the breath sample is achieved, the required "blowing time" was too short. He further explained that the error message, "Blowing Not Allowed," appears where the Instrument detects that the subject was providing a breath sample, but there was an interruption in the blowing by the subject. He testified that the error message, "Blowing Time Too Long," is generated by the Instrument when the subject blows into the mouthpiece too long. In the sample AIR, on page 17 of Exhibit DB-4, it is reported that the subject blew into the Instrument for 34.3 seconds, way beyond the minimum duration of 4.5 seconds.

The seventh breath sample provided in that sample AIR, on page 17 of DB-4, reported that the minimum volume and duration of the blowing was within the required ranges and a Blood-Alcohol Content (BAC) reading of 0.00% was reported. However, two successful tests are required. On the sample AIR reviewed, four additional tests resulted in the error messages discussed, with the AIR reporting, after the eleventh attempt, the "Test Result" being reported as "Test Terminated."

On re-direct, Lieutenant Snyder testified that calibrating an Alcotest Instrument has nothing to do with, and has no effect on, any of those error messages, as those are the result of conduct by the subject at the time the test

was administered. Additionally, Lieutenant Snyder was shown page 11 of Exhibit DB-4, the Drager New Jersey State Police User Manual for the Alcotest 7110 MKIII-C, which is 26 pages in length. Page 11 is titled "Test Data," and the large bracketed box thereon contains 22 items of information the officer administering the test must manually enter into the listed data fields. Thereafter, he explained, the actual operation of the Instrument is done automatically by the firmware prompting the sequence of the testing, and two acceptable breath samples must be received in order to produce a valid, BAC Breath-Alcohol reading that can then be used for evidentiary purposes in a DWI prosecution.

Lieutenant Snyder was also referred to page 21 of the Exhibit DB-4 User Manual, which is titled "Solution Change Test." He explained that the large bracketed box toward the top of that page contains the information that the Alcotest Operator performing the solution change must manually enter into the listed data fields to identify himself or herself, as well as the particular information for the bottle of solution used for the change. He was then shown page 34 of Exhibit DZ-1, which is the Drager New Jersey State Police User Manual-Technical, which is 52 pages in length. That page, titled "System Management," subtitled "Calibrate," lists the steps required by the Beath Test Coordinator to adjust the EC and IR sensors using a certified, new solution,

prior to the calibration. Lieutenant Snyder testified that the first bracketed box on that page contains the data fields that the Breath Test Coordinator must manually enter to identify himself or herself as the Coordinator performing the calibration and the particular solution botte percentage being utilized for that calibration.

Lieutenant Snyder was also shown a two-page redacted Alcohol Influence Report (AIR), contained in Exhibit DB-5, from testing of a subject on Alcotest Instrument ARXD-0007, located at the Keyport Police Station, the date of the test being November 27, 2021, and the calibration of that Instrument reported as June 15, 2021. Although beyond the time period within which Sergeant Dennis was calibrating Alcotest Instruments, Mr. Gold questioned Lieutenant Snyder on this document for illustrative purposes because that AIR ultimately reported the test result as "Subject Refused." On this example, Lieutenant Snyder acknowledged that here were six (6) tests attempted, with Breath Test 4 producing a BAC reading EC Result of 0.138 and an IR Result of 0.137, with the other five (5) tests producing various error messages, with the end result reported, as stated, "Subject Refused." Mr. Gold asked Lieutenant Snyder whether that AIR could be admitted into evidence, to which Lieutenant Snyder replied, "It could be a case-by-case basis but it could be used against the subject." T1, page 240, lines 5-6.

On re-direct, Lieutenant Snyder explained that where there are multiple attempts to obtain two acceptable breath samples without success, the testing officer has discretion as to whether to report the conduct of the subject as a "Refusal" by determining whether the subject has been properly attempting to provide valid breath samples. Lieutenant Snyder testified, however, that has nothing to do with the method of calibration of an Alcotest Instrument.

Lieutenant Snyder was also referred to page 18 of DB-4, which he acknowledged lists eleven (11) errors that can be generated by an Alcotest Instrument that will cause a breath test to be automatically aborted.

On questioning by Mr. Noveck, Lieutenant Snyder acknowledged that although the Alcohol Influence Report (AIR) states the date of the last calibration of the Alcotest Instrument being utilized on the breath test, it does not reflect the identity of the Coordinator who performed that calibration. Lieutenant Snyder explained that to determine the identity of the Coordinator, the actual calibration documents pertaining to the calibration dated listed on the AIR would need to be supplied and reviewed.

On re-cross by Mr. Gold, Lieutenant Snyder was shown a four-page Alcotest 7110 Calibration Record for Instrument ARLD-0012, located in Edison Township Police Station, performed by Sergeant Dennis on June 10, 2009. That Calibration Record is a portion of Exhibit S-102, the Calibration

Records of Sergeant Marc Dennis for Middlesex County, and that four-age record was also marked as Exhibit DB-6. Mr. Gold then displayed Exhibit S-92, the Excel Spreadsheet containing all solution changes on all Alcotest Instruments in New Jersey from November 1, 2008 through January 9, 2006, which contains 68,450 Rows of Solution Changes, listed in chronological order.[22] Scrolling down to June 10, 2009 on Exhibit S-92, the date contained on Exhibit DB-6 (also a portion of Exhibit S-102), there are 35 Rows with June 10, 2009 listed as the Solution Change date (Rows 5528 through 5562), but Instrument ARLD-0012 is not among those listings, and Column AS, the "Operator's Last Name," demonstrates, on Row 5535, that Sergeant Dennis performed a Solution Change and Calibration on Alcotest Instrument ARUL-0064, located at the Edison Township Police Station, on June 10, 2009. In fact, a review of Exhibit S-102 shows, on Row 5748, that Alcotest Instrument ARLD-0012, located at the Edison Township Police Station, had a solution Change and a Calibration performed by Sergeant Dennis on June 18, 2009.

[22] During the plenary hearing, there were occasions when Exhibit S-92 was referred to as "S-78." Exhibit S-78 consists of the email exchanges between Lieutenant Snyder and DAG Mitchell concerning the creation of an Excel Spreadsheet containing all Solution Changes from November 1, 2008, through January 9, 2016, which was referenced in the S-78 email, but not attached thereto, since it was created subsequently. The actual Excel Spreadsheet was marked separately by the court as Exhibit S-92, and was provided by the State, during discovery, on Thumb Drive Number 3.

Mr. Gold then displayed for Lieutenant Snyder Exhibit DB-7, which is a four-page Alcotest 7110 Calibration Record for Instrument ARUL-0055, located at the New Jersey State Police Station in Cranbury, dated May 16, 2011, and signed by Sergeant Dennis. That four-page document is also contained in Exhibit S-104, the "Calibration Records of Sergeant Marc Dennis for each New Jersey State Police Station," under "ARUL-0055 NJSP Cranbury." Turning again to Exhibit S-92, and scrolling down the Rows of dates to May 16, 2011 (Rows 24527 through 24555), Column E does not contain Instrument ARUL-0055 on any of those 29 Rows, and Column AS demonstrates that Sergeant Dennis did not perform a solution change on any of the Instruments contained in those Rows. Although Lieutenant Snyder acknowledged that this was an example of a Calibration Record that does not appear on the record of all solution changes, a further review of Exhibit S-92 reveals, on Row 25347, that Sergeant Dennis performed a solution change and a calibration of Instrument ARUL-0055 on June 16, 2011 (not May 16, 2011).

Exhibit DB-8 was then shown to Lieutenant Snyder. It is a one-page Alcotest 7110 Calibration Record for Alcotest Instrument ARWC-0020, located at the Kean University Police Station, dated March 26, 2013, and signed by Sergeant Dennis. Turning again to Exhibit S-92, and scrolling down to the date March 26, 2013, there are 28 Rows (42072 through 42099)

containing that date, and Lieutenant Snyder acknowledged Instrument ARWC-0020 does not appear as having a solution change on that date. However, a further search of Instrument ARWC-0020 on Exhibit S-92 discloses that Sergeant Dennis conducted a solution change and calibration on that Instrument, at the Kean University Police Station, on October 2, 2012 (Row 37520) and on May 20, 2013 (Row 43520).

The last Alcotest 7110 Calibration Record shown to Lieutenant Snyder was marked as Exhibit DB-9 and is also contained in Exhibit S-104, the PDF file "Calibration Records of Sergeant Marc Dennis for each New Jersey State Police Station," under "Monmouth Station." That one-page document reflects the calibration of Alcotest Instrument ARWC-0064 on July 15, 2013 by Sergeant Dennis. Turning back to Exhibit S-92, and scrolling down to July 15, 2013 (42 Rows, numbers 44949 through 44990), Lieutenant Snyder verified there is no record in that Exhibit of a Solution Change on July 15, 2013 on Instrument ARWC-0064. Thus, this is another incident of a solution change, in connection with the calibration of an Instrument by Sergeant Dennis, not appearing on Exhibit S-92. However, a search of Exhibit S-92 for Instrument ARWC-0064 shows a listing on Row 45002 that a solution change and calibration of that Instrument, in Monmouth Station, was performed by Sergeant Dennis on July 16, 2013, one day after the July 15, 2013 date listed

on Exhibit DB-9. Clearly, the wrong date appears either on Exhibit DB-9 or Exhibit S-92. As has been noted, during a solution change and a calibration, the Operator or the Coordinator is responsible for manually entering certain information into the various data fields prior to performing both a solution change and a calibration. Here, human error is the only plausible explanation for the one-day difference in dates.

Accordingly, on all of these examples of an "Alcotest 7110 Calibration Record," which necessitates a solution change of an Alcotest Instrument immediately before a calibration of that Instrument, performed by Sergeant Marc Dennis, where the date it was performed as listed on that "Record" does not appear in Exhibit S-92, containing all solution changes, as extracted from the Alcotest Inquiry System database, from November 1, 2008 through January 9, 2016, a search by the Court of Exhibit S-92, by the Alcotest Instrument Serial Number (Column E of S-92), disclosed a solution change and a calibration performed by Sergeant Dennis on a date close in close proximity to that appearing on the actual signed "Alcotest 7110 Calibration Record" produced during the cross-examination of Lieutenant Snyder. The import of that is an extraction from Exhibit S-92 does reveal all calibrations performed by Sergeant Dennis, regardless of various date discrepancies, no doubt due to human error when entering information into the various required data fields.

On questioning during recross by Mr. Noveck, Lieutenant Snyder acknowledged that, in a prosecution for a violation of the Implied Consent Statute, N.J.S.A. 39:4-50.2, i.e., a refusal to comply therewith, under circumstances where the refusal violation was based on the testing officer's conclusion that the defendant had failed to properly perform the test, as instructed, the Alcohol Influence Report (AIR) can be admitted into evidence to substantiate that conclusion. Namely, an AIR can be received in evidence for reasons other than documenting a final evidential BAC reading.

During that questioning, Lieutenant Snyder testified concerning the procedure for the downloading solution changes and calibrations performed on Alcotest Instruments onto the Alcotest Inquiry System database. He explained that although this function is currently accomplished through the weekly extraction of that information from each Alcotest Instrument through a telephone modem directly connected into the database, at one point in time, Field Coordinators were manually downloading the memory from each Alcotest Instrument onto two Compact Discs, leaving one Disc at the agency where the Instrument was located, and then transporting the other Disc back to the Office of Forensic Sciences at the State Police Headquarters in West Trenton, and the information on the Compact Disc was the downloaded onto the database. Lieutenant Snyder also acknowledged that certain information

gets entered on each Alcotest Instrument by the Operator or Coordinator when solution changes, calibrations, and breath testing on an Instrument occurs.

In reviewing Exhibit S-92 with Lieutenant Snyder, Mr. Noveck pointed out that on multiple Rows in Column AS, entitled "Operator Last Name," there are numbers, such as 4, 24, 44, 224, and 11A085, appearing, rather than the actual last name of the Operator who conducted the Solution Change. Lieutenant Snyder stated these were the result of manual entry errors by the Operator when entering the information for that data field.[23]

On additional redirect questioning, DAG Clark displayed the "Alcotest 7110 Calibration Record" for Instrument ARLD-0012, located at the Edison Township Police Station, dated June 10, 2009, the four-page document on which Lieutenant Snyder had been questioned earlier, which appears on the Edison Township Police Station portion of Exhibit S-102, "Calibration Records of Sergeant Marc Dennis for each Municipality in Middlesex County." Lieutenant Snyder verified that the Control Test had failed, with the final result notation on the fourth page stating, "Test results are not within acceptable range." Lieutenant Snyder testified this signifies that the recalibration procedure was not completed successfully. He was then shown,

[23] The court, in searching Column AS in Exhibit S-92, counted 21 of those instances, where the identity of the Operator cannot be determined based on the entry errors.

from that same Exhibit, a seven-page "Alcotest 7110 Calibration Record," for that same Alcotest Instrument ARLD-0012, dated June 18, 2009, eight (8) days later, also signed by Sergeant Dennis, which reflects that the calibration procedure was successfully performed on that date. Referring back to Exhibit S-92, Row 5784 reflects that June 18, 2009 Solution Change and Calibration (Columns B and C), was performed by Sergeant Dennis (Column AS).

DAG Clark also displayed "Alcotest 7110 Calibration Record" for Alcotest Instrument ARWC-0020, located at the Kean University Police Station, dated March 26, 2013, the three-page document on which Lieutenant Snyder had also been questioned, contained in Exhibit S-107 under "Kean University." Lieutenant Snyder verified that the Control Test failed and it states "Test results are not within acceptable range." He was then shown the "Alcotest 7110 Calibration Record" for that same Instrument, also contained in Exhibit S-107 under the same heading, which is dated May 20, 2013, signed by Sergeant Dennis, and reflecting that the Calibration procedure was successfully performed. Referring back to Exhibit S-92, Row 43520 shows that May 20, 2013 solution change and calibration (Columns B and C), was performed by Sergeant Dennis (Column AS).

The same review was conducted as to Alcotest Instrument ARWC-0064, located at the Monmouth Station of the New Jersey State Police. As contained

on Exhibit S-104 and in Exhibit DB-9, the full, three-page "Alcotest 7110 Calibration Record," signed by Sergeant Dennis and dated July 15, 2013, shows that the Control Test Failed and states, "Test results are not within acceptable range." Again, turning back to Exhibit S-92, Row 45002 shows that Instrument ARWC-0064 had a solution change and calibration performed on July 16, 2013, by Sergeant Dennis, which is reflected on Exhibit S-104 under the heading "Monmouth Station," as a solution change and calibration being successfully performed by Sergeant Dennis.

DAG Clark then conducted a search for the number "4" on Column AS, "Operator Last Name," and Lieutenant Snyder verified that none of the "4" results contained the "Operator First Name" of "Marc" in Column AT. This court conducted a more thorough review of those entries in Column AS, "Operator's Last Name," Column AT, "Operator's First Name," Column AV, "Operator's Badge Number," Column A, "Solution Change Date," and Column B, "Calibration Date," on Exhibit S-92. The court reviewed each of the 68,451 Rows in Exhibit S-92, and discovered sixty-three (63) entries in Column AS where the name of the Operator appeared either as a number, a single letter, some nomenclature other than a name, or there was a blank in that Column. The court then cross-referenced those entries to not only the Operator's First name in Column AT, but also the Operator Badge Number which appears in

Column AV (the badge number of Sergeant Dennis was 5925), and then to Columns A and B to determine whether any of those sixty-three (63) Rows contained a solution change in conjunction with a calibration of the noted Alcotest Instrument. The table below contains the results of that search and cross-checking:

| **Row Number** | **Column AS Operator's Last Name** | **Column AT Operator's First Name** | **Column AV Operator's Badge #** | **Column A/B Solution Change and Calibration?** |
|---|---|---|---|---|
| 580 | 4 | James | 6907 | NO |
| 834 | 24 | 24 | 799 | NO |
| 1248 | Y | Michael | 1157 | NO |
| 1790 | Y | Benjamin | 265 | NO |
| 3559 | Y | Michael | 7195 | NO |
| 4536 | 41 | Michael | 51 | NO |
| 4670 | 6 | Roger | 8 | NO |
| 4710 | 1 | Glenn | 0178 | NO |
| 5777 | P | Terence | 233 | NO |
| 6722 | Y | Michael | 2613 | NO |
| 8444 | 4 | Darryl | 31 | NO |
| 8532 | 224 | Keith | 06 | NO |
| 8623 | 44 | Donald | 42 | NO |
| 8655 | Y | Jason | 11 | NO |
| 8882 | 24 | 24 | 10 | NO |
| 9413 | 24 | 24 | 10 | NO |
| 9927 | 24 | 24 | 10 | NO |
| 10206 | 4 | Nicholas | 6878 | NO |
| 11186 | 4 | Nicholas | 281 | NO |
| 11355 | Y | Michael | 110 | NO |
| 11583 | Y | Armenti | 37 | NO |
| 11702 | Y | David | 197 | NO |
| 11900 | 4 | David | 4 | NO |
| 12944 | Y | Carmine | 2 | NO |
| 16706 | 4 | Jason | 11 | NO |

| | | | | |
|---|---|---|---|---|
| 17260 | --- | Chris | 127 | NO |
| 18247 | 1 | Rafael | 107 | NO |
| 19805 | Y | Kenneth | 306 | NO |
| 22391 | 44 | Bryan | 189 | NO |
| 22855 | 41 | David | 7040 | NO |
| 25063 | Y | Jeff | 20 | NO |
| 26718 | 4 | Todd | 5492 | NO |
| 27499 | 1 | William | 2326 | NO |
| 28878 | --- | Michael | 20 | NO |
| 30584 | 11A085 | Peter | 058 | NO |
| 31088 | 4 | Terrence | 5870 | NO |
| 32162 | 4 | John | 1358 | NO |
| 33204 | 4 | Steven | 187 | NO |
| 34372 | 44 | Todd | 5492 | NO |
| 36752 | Y | Adam | 7192 | NO |
| 38208 | 148 | McErlean | 148 | NO |
| 41232 | 24 | 24 | 10 | NO |
| 45477 | Y | Junior | 1009 | NO |
| 45576 | 1 | Thomas | 125 | NO |
| 45791 | 4 | Kevin | 31 | NO |
| 47234 | P | Juan | 2106 | NO |
| 48866 | --- | Benjamin | 265 | NO |
| 48969 | E | Joseph | 714 | NO |
| 51464 | 4 | Lt. Joseph | 359 | NO |
| 53289 | P | Glenn | 0178 | NO |
| 54213 | Y | Jeffrey | 127 | NO |
| 54763 | 44 | Lt. Joseph | 359 | No |
| 54871 | P | Louis | 274 | NO |
| 55347 | P | Thomas | 98 | NO |
| 56067 | 4 | Joseph | 156 | NO |
| 57084 | 24 | 24 | 10 | NO |
| 58825 | 4 | Victor | 213 | NO |
| 59016 | 6 | Brian | 7383 | NO |
| 60343 | P | PTL | 9080 | NO |
| 61289 | 1 | Michael | 6411 | NO |
| 62022 | Y | Erik | 288 | NO |
| 63835 | 24 | 24 | 10 | NO |
| 63864 | 4 | Terrence | 233 | NO |

The inference in this exercise was that because of the improper entries by the Operators, perhaps Sergeant Dennis performed a calibration of the Alcotest Instrument listed in one or more of those Rows. However, from a review of the Columns containing the first name and badge number of the Operator, it is highly improbable that Sergeant Dennis performed any of these sixty-three (63) solution changes contained on Exhibit S-92. Moreover, even if he had, every one of these solution changes was not performed in conjunction with a calibration of the listed Alcotest Instrument. There has been credible testimony illustrating that Operators and Coordinators are required to manually input required identification information into certain data fields when performing a solution change, calibration, or both. Moreover, there has been adequate, credible testimony establishing that, for the most part, Breath Test Coordinators only perform solution changes when they are in the process of calibrating an Alcotest Instrument and that local officers of the municipality or agency where the Instrument is located perform the solution changes, unless the periodic calibration of the Instrument is necessary. Accordingly, it is reasonable to conclude that the sixty-one (61) solution changes listed in this table were not performed by certified Breath Test Coordinators.

During additional cross-examination of Lieutenant Snyder, Mr. Gold again displayed Exhibit DB-6, one page of the "Alcotest 7110 Calibration Record" for Instrument ARLD-0012, located in Edison Township Police Station, dated June 10, 2009; Exhibit DB-7, one page of the "Alcotest 7110 Calibration Record" for Instrument ARUL-0055, located at the New Jersey State Police Cranbury Station, dated May 16, 2011; Exhibit DB-8, one page of the "Alcotest 7110 Calibration Record" of Instrument ARWC-0020, located at the Kean University Police Station, dated March 26, 2013; and Exhibit DB-9, one page of the "Alcotest 7110 Calibration Record" for Instrument ARWC-0064, located at the New Jersey Police Monmouth Station, dated July 15, 2013. Lieutenant Snyder again verified these are not contained in the June 10, 2009 Row listings for those dates on Exhibit S-92. Lieutenant Snyder testified that Exhibit S-92 contains all solution changes from November 1, 2008 through January 9, 2016, and those DB Exhibits only contain the first page of the Calibration Records for those Instruments, and he would have to cross-reference the PDF files contained in Exhibits S-102 (Calibration Records of Sergeant Dennis for Middlesex County), S-104 (Calibration Records of Sergeant Dennis for New Jersey State Police Stations), and S-107 (Calibration Records of Sergeant Dennis for Union County) to determine whether the solution change failed and the calibration was unsuccessful.

Then, on additional direct examination, DAG Clark displayed the full, three-page "Alcotest 7110 Calibration Record" for Instrument ARWC-0020, dated March 26, 2013,which is contained within Exhibit S-107 as a part of the PDF files for "Kean University." Lieutenant Snyder reviewed same and testified, as to page 3 thereof, "[t]hat indicates that there was a control test failure on the linearity test on the first .080 percent solution." T2, p. 107, lines 7-9. The full four-page "Alcotest 7110 Calibration Record," which is contained within Exhibit S-102 as part of the PDF files for "Edison Township," was then displayed for Lieutenant Snyder. He reviewed same and testified, "[t]here were control test failures on the control test two both the EC and the IR and control test three both the EC and the IR." T2, p. 107, lines 16-18. Thereafter, DAG Clark displayed the full four-page "Alcotest 7110 Calibration Record" for Instrument ARWC-0064, located at the New Jersey State Police Monmouth Station, dated July 15, 2013, which is contained within Exhibit S-104 as part of the PDF files for "Monmouth Station." Upon reviewing same, Lieutenant Snyder testified that pages 3 and 4 thereof show there was a control test failure on control test 6 of both the EC and IR of the .160 percent solution (Page 3) and control test failures on the linearity test on test five and six, both the E and IR on the .160 percent solution (page 4).

The testimony of Lieutenant Snyder was credible and candid. Based on the requirement that Alcotest Instruments are required to be recalibrated at least every six (6) months, Lieutenant Snyder's testimony clearly established that the period within which an individual could have been requested to provide breath samples on an Alcotest Instrument calibrated by Sergeant Dennis and, thereby, be potentially affected by the Court's decision in State v. Cassidy, was from November 5, 2008, through April 9, 2016.

Also significant is Lieutenant Snyder's credible testimony that the error messages generated by an Alcotest Instrument during an attempted breath test procedure are not caused by the Instrument failing to operate properly but, rather, are caused by the conduct of the subject being tested or by the circumstances surrounding that testing procedure. Although a reported "Control Test Failed" error message could be the result of an improper calibration, without use of a NIST-traceable thermometer to verify the temperature of the solution, it is clear that once that error message appears, the Alcotest Instrument will not function, i.e., it will not permit breath testing to begin and, at a minimum a new solution change must be successfully completed. This further supports the Court's conclusion that the failure of a Coordinator to utilize an NIST-traceable thermometer in the recalibration of an Alcotest Instrument does not affect the ability of the Instrument's sensors to

react and produce an Error Message relating to the actual breath test attempt, which directly relates to the conduct of the subject or environmental conditions.

7. Kevin W. Alcott

The State called Kevin William Alcott as a witness. He is a Sergeant First Class (SFC) with the New Jersey State Police (NJSP), and has worked for the NJSP for eighteen years. He has been assigned to the Alcohol Drug Testing Unit (ADTU) of the Forensic and Technical Services Bureau of the NJSP for the last eight and one-half years. For the last five years, he has been assigned as the Alcotest Project Manager, which includes responsibility for supervising the Coordinators, and assisting them in performance of their jobs, including the calibration of Alcotest instruments. His testimony is contained in T8, the June 12, 2023 Transcript, on pages 113-166, in T9, the June 13, 2023 Transcript, on pages 4-113, and in T10, the June 14, 2023 Transcript, on pages 11-133.

SFC Alcott has been a Breath Test Operator since 2006 and is qualified to train Breath Test Operators. SFC Alcott identified Exhibit S-156, a Certificate issued by Drager, dated March 14, 2012, certifying that he successfully completed the two-day Draeger Safety Diagnostics, Inc. Alcohol Coordinator Training Course on the New Jersey specific Alcotest 7110 MKIII-

C instrument (Alcotest). The Certificate further provides that SFC Alcott is a qualified "Operator Trainer and Maintenance Technician," qualifying him to train and certify Operators in the proper use and operation of, as well as to perform Preventive Maintenance on, the Alcotest.

SFC Alcott explained that in order to perform calibrations on the Alcotest, he was required to take a 40-hour State Police Instructor Training Course concerning operation and maintenance of the Alcotest and pass a written test, as well as completing a Standard Field Sobriety Test 40-hour course He also attended and successfully completed the Borkenstein Drug Course at Indiana University.[24] In addition, he underwent on-the-job training, completing calibrations on the Alcotest under the supervision of a qualified Coordinator. As result, in a letter dated May 21, 2015, from John J. Hoffman, Acting Attorney General, to Colonel Joseph R. Fuentes, Superintendent of the NJSP, then-Trooper II Kevin W. Alcott was approved as a duly certified Breath Test Coordinator/Instructor, effective immediately. See Exhibit S-157A.

SFC Alcott testified he has performed hundreds of calibrations on Alcotest instruments, if not over a thousand, during his career, and is familiar

[24] The Borkenstein Drug Course covers topics related to the pharmacology of drugs and their effects on psychomotor performance and driving. See https://bcahs.indiana.edu/drugcourse/index.html.

with the usage and operation of the Alcotest. Exhibit DZ-1 is a copy of "The Drager User Manual – Technical" of the NJSP for the Alcotest 7110 MKIII-C (Manual). SFC Alcott was shown page 20 of the Manual, which contains an internal schematic drawing of the Alcotest instrument and, utilizing that schematic, he explained in detail the manner in which a breath sample is obtained and analyzed by the Alcotest instrument. See T8 (June 12, 2023 Transcript, page 120, line 6 through page 124, line 10).

SFC Alcott stated that if the breath test is successfully completed, the Alcotest generates and prints out an Alcohol Influence Report (AIR) setting forth the results of the analysis of the subject's breath sample. Additionally, a digital record is created for each breath test conducted, which is maintained on the Alcotest instrument and then digitally downloaded into the Alcotest Inquiry System database. He explained that the Alcotest generates approximately 311 Columns of digital information for each breath sample of which approximately 21 Columns of information are manually entered by the law enforcement officer conducting the breath test, which he described as "identifying information," such as the full name of the subject, driver's license number, date of birth, height, weight, the arrest location, time of arrest, and case number. He stated the remaining information is automatically created and analyzed by the Alcotest instrument itself. He explained there are

approximately 18 Coordinators in the ADTU at any one time, and there are approximately 550 Alcotest instruments currently in use throughout the State. He noted that Coordinators are geographically assigned to perform required periodic recalibrations of Alcotest instruments.

For purposes of the Zingis hearings, SFC Alcott reviewed Exhibit S-90, the Excel Spreadsheet created by William Donahue in 2016, entitled "Spreadsheet Received from NJSP__27833 subject records," for the purpose of determining the calibrations of Alcotest instruments performed by Sergeant Marc Dennis. He reviewed each calibration record for each Alcotest instrument contained in Exhibit S-90. If the Calibration Record was not available, he utilized the digital records in the Alcotest Inquiry System database to identify the Coordinator who conducted the calibration by going to the publicly available system and ran a search for each Alcotest Instrument to determine which Coordinator conducted the solution changes. He explained a solution change always occurs at the end of a Calibration. Based on his review of the entries contained on Exhibit S-90 and those calibration and digital records, SFC Alcott then created, and identified Exhibit S-128, an Excel Spreadsheet entitled "Alcotest Spreadsheet Received from NJSP__27833 subject records." That Spreadsheet contains 27,833 Rows of subject breath tests conducted and 21 Columns, or Fields, of information as to each breath

test, including the calibration date (Column C) of each Alcotest instrument listed in each Row, on Column B. SFC Alcott explained that he color-coded Column C, "Calibration Date" on each Row. Beginning with Row 2 (Row 1 contains the information headings), Column C on Row 2 through Row 7796 are colored in "Green," signifying those 7795 calibrations were conducted on the corresponding Alcotest instruments contained in Column B, entitled "Serial Number," by Sergeant Marc Dennis. The 28 Calibration Dates in Column C on Row 7797 through Row 7824, concerning Alcotest instrument, serial number ARUL-0058, located in the Westfield Police Department, colored-coded in "Red," were not calibrated by Sergeant Marc Dennis. Further reviewing the Calibration dates in Column C of Exhibit S-128, on Row 7825 through Row 27,834, there are an additional 408 Rows color-coded in Red, signifying the corresponding Alcotest instruments contained in Column B, on those Rows, were not calibrated by Sergeant Marc Dennis. SFC Alcott determined that the remaining Alcotest instruments in Column B, totaling 19,568, were calibrated by Sergeant Marc Dennis. Accordingly, 436 subjects listed in Exhibit S-90 (also Exhibit S-148) were asked to provide breath samples for analysis on Alcotest Instruments that were not calibrated by Sergeant Marc Dennis, and 23,397 subjects listed in Exhibit S-90 were asked

to provide breath samples on Alcotest Instruments that were calibrated by Sergeant Marc Dennis.

SFC Alcott testified he then created Exhibit S-129, an Excel Spreadsheet entitled "Alcott Sorted Spreadsheet Received from NJSP__27833 subject records," which constitutes a sorting of Exhibit S-128. He created the S-129 Excel Spreadsheet in order to group together, sequentially, all Alcotest Instruments not calibrated by Sergeant Dennis and all those Alcotest Instruments that were calibrated by Sergeant Dennis. Thereby, Exhibit S-129 contains all 27,833 subject records, sorted as indicated. Row 2 through Row 437, color-coded in "Red," contain the 436 subjects who were asked to provide breath samples taken on Alcotest Instruments that were not calibrated by Sergeant Marc Dennis, and Row 438 through Row 27,834 contain the 27,397 subjects who were asked to provide breath samples on Alcotest Instruments that were calibrated by Sergeant Marc Dennis.

By way of example, SFC Alcott was then shown Exhibit S-130, which is an Excel Spreadsheet he created when analyzing the identity of Coordinators who calibrated Alcotest Instrument ARWJ-0019 located at the North Plainfield Police Department, in order to determine whether the inclusion of entries on Exhibit S-90 (also Exhibit S-148) concerning that particular Alcotest Instrument, as purportedly being calibrated by Sergeant Dennis, was correct

and appropriate. The information contained on S-130 was derived from a search, or query, of the Alcotest Information System database. S-130 contains 31 Rows relating to the history of Alcotest Instrument ARWJ-0019 from July 6, 2012 to February 24, 2014, and 126 Columns of information for each Row. Line 6 thereof, highlighted in "Yellow," relates to a solution change and a calibration of that Instrument on December 11, 2013. Scrolling over to Columns AO through AR, it is evident that Christopher C. Mulch, Badge Number 6806, was the Operator who performed that particular Solution Change and Calibration, not Sergeant Marc Dennis. Accordingly, any subject entry included in Exhibit S-90 (also Exhibit S-148) that relates to that particular solution change and calibration should not have been included on Exhibit S-90 (also Exhibit S-148).

SFC Alcott was then shown Exhibit S-131, an Excel Spreadsheet he created concerning the history of Alcotest Instrument ARWM-0086, located at Ocean Township Police Department, from March 3, 2009 to July 27, 2010. Again, that information was extracted from the Alcotest Information System database from a search, or query, the dates chosen to correspond with certain entries in Exhibit S-90 (also Exhibit S-148) that relate to the relevant time period. As with Exhibit S-130, S-131 contains a number of Rows (here, 28), and the same 126 Columns of information as to each Row. Rows 3 and 10 are

also highlighted in "Yellow," and when one scrolls over to Columns AO through AR, it is clear that Thomas Snyder, not Sergeant Marc Dennis, was the Operator who performed the Solution Change and Calibration of that Alcotest Instrument on January 29, 2010 and August 13, 2009 respectively. Accordingly, as with the example in Exhibit S-130, any subject entry included in Exhibit S-90 (also Exhibit S-134) as an individual who was asked to provide a breath sample on Alcotest Instrument ARWM-0086 based on those solution changes and calibrations should not have been included.

Similar examples relating to the manner in which SFC Alcott was able to complete his analysis of which subject entries contained in Exhibit S-90 (also Exhibit S-148) constitute requests to provide breath samples on Alcotest Instruments calibrated by Sergeant Marc Dennis, and which were not, as set forth in Exhibits S-128 and S-129, are set forth in Exhibits S-132 (Alcotest Instrument ARXA-0061, Shrewsbury Police Department), S-133 (Alcotest Instrument ARWM-0041, South Bound Brook Police Department), S-134 (Alcotest Instrument ARWF-0403, West Long Branch Police Department), and S-135 (Alcotest Instrument ARUL-0058, Westfield Police Department), all Excel Spreadsheets created by SFC Alcott by extracting information from the Alcotest Inquiry System database through a search or query of that system. Row entries color-coded in "Yellow" on those Spreadsheets reflect solution

changes and calibrations on those Alcotest Instruments that were not calibrated by Sergeant Marc Dennis. Accordingly, subject entries contained in S-90 (also Exhibit S-148) as individuals who were asked to provide breath samples on those Alcotest Instruments based on those solution changes and calibrations should not have been included. During this portion of SFC Alcott's testimony, all counsel so stipulated.

SFC Alcott also identified Exhibit S-127, a one-page document with the heading "Alcott Zingis Notes," a document he acknowledged creating. He represented that S-127 reflects the searches, or queries, he conducted of the Alcotest Inquiry System database resulting in his creation of the Excel Spreadsheet contained in Exhibits S-128 through S-135, when concluding that there are a total of 436 subject entries contained in Exhibit S-90 (also Exhibit S-148) should be eliminated.

SFC Alcott then identified Exhibit S-126, an Excel Spreadsheet, entitled "Zingis Project Spreadsheet 2-24-2023," which he created based on a larger Excel Spreadsheet he had requested of William Gronikowski in December 2022 (See Exhibit S-74) and subsequently obtained from him, see Exhibit S-116, containing all solution changes conducted on Alcotest Instruments in New Jersey from November 1, 2008 through January 9, 2016. SFC Alcott testified Exhibit S-126 contains a listing of all solution changes and calibrations

performed by Sergeant Marc Dennis, which he extracted from Exhibit S-92. S-126 contains 1329 Rows and 131 Columns of information. Each Row and Column (Field) is color-coded (reflected at the end of Row 1329), as follows: Orange: "Solution Change not sequential after linearity test;" Green: "Documents Found;" Red: "Documents Not Found;" and Blue: "Documents Found but Incomplete." He explained the entries in Column B, "Start Time" of the solution change, color-coded in Orange, are solution changes without corresponding calibrations. He stated the other Rows in Column B that are the start time of a solution change, color-coded in "Green," indicate he found a corresponding calibration. Those Columns color-coded in "Red" indicate the solution change and calibration documents were not found. Those entries color-coded in "Blue" reflects that part of the documents were found.

SFC Alcott then identified Exhibit S-116, an Excel Spreadsheet entitled "Records 11012005_01312008 [Compatibility Mode]," which consists of 2 sheets. Sheet 1 contains 64,999 Rows and Sheet 2 contains 41,413 Rows. Both Sheets contain the same 126 Columns of information. Column A lists Alcotest Instruments by serial number, Column H, the calibration date, Column Q, the solution change date, and Columns AO through AR, the identity of the Operator who performed the solution change and calibration. Exhibit S-116 is the Excel Spreadsheet created by William Gronikowski as a

result of the December 28, 2022 request of him by SFC Alcott, and contains an extraction from the Alcotest Inquiry System database, through a query, consisting of all solution changes conducted on all Alcotest Instruments in New Jersey from November 1, 2005 through January 31, 2018.

During his direct examination of SFC Alcott, DAG Clark scrolled to Column AO on Sheet 1 of S-116, the "Last Name" of the Operator, and filtered that Column for the name "Dennis." He performed that same operation on both Sheet 1 and Sheet 2 of S-116 to determine which solution changes were performed by Sergeant Marc Dennis, and then determined whether there was a corresponding calibration on the same date as the solution change. He used this information to develop the Excel Spreadsheet contained in Exhibits S-128, S-129, and S-126.

SFC Alcott was then shown hard copies of Exhibit S-121, which are 2 "Breath Testing Instrumentation Service Report" documents concerning Alcotest Instrument serial number ARUL-0055, located at the State Police Station in Cranbury. He noted the May 16, 2011 calibration reflected on the first page does not appear in S-116 because the Instrument failed to upload one solution change file from that date due to an error code, and the Instrument was returned to Draeger for repairs. Draeger replaced the microprocessor and the digital copy of that solution change file, which was then permanently lost.

The June 16, 2011 Calibration on the second page of Exhibit S-121 does appear on the Exhibit S-116 Excel Spreadsheet at line 25347. Filtering the Exhibit S-126 Spreadsheet by the Alcotest Instrument Serial Number ARUL-0055 that appears on Exhibit S-121 discloses that the prior-listed calibration of that Alcotest Instrument was performed on February 7, 2011, but the May 16, 2011 Calibration is not listed, which SFC Alcott explained was because of the repair of Alcotest Instrument ARUL-0055.

SFC Alcott was also shown Exhibit S-152, an Excel Spreadsheet entitled "Subjectsfrom11052008_06302016." That Spreadsheet contains 236,664 Rows of subjects and 21 Columns of information for each subject Row. Column A contains the "Arrest Date" of the subject, Column B is the Alcotest Instrument Serial Number on which the subject was asked to provide a breath sample, Column C is the calibration date, and Columns E through L the name and identity information for the subject. This Spreadsheet contains the names of all subjects who were arrested and charged with Driving While Intoxicated and asked to provide breath samples on the indicated Alcotest Instruments. Column B was then filtered by Alcotest Instrument ARUL-0055 (the Alcotest Instrument contained in Exhibit S-121). This exercise was to determine all subjects who were arrested between March 16, 2011 and June 16, 2011, the dates set forth in the Calibration records for Alcotest Instrument ARUL-0055

set forth in Exhibit S-121. SFC Alcott acknowledged that Row 61,343 of S-152 reflects an arrest date of [redacted] on May 10, 2011, and that Alcotest Instrument ARUL-0055, upon which he was requested to provide a breath sample, was calibrated on June 16, 2011. Row 61,346 of S-152 reflects an arrest date of [redacted] on June 14, 2011, and Alcotest Instrument ARUL-0055, on which she was requested to provide a breath sample, was calibrated on June 16, 2011.

SFC Alcott was then shown Exhibit S-171B, which is an Excel Spreadsheet entitled "ARUL-055 Spreadsheet.2 instances(2) [Protected View]," which he acknowledged creating. This Spreadsheet contains 55 Rows of the history of breath samples requested on Alcotest Instrument ARUL-0055 from April 27, 2011 through August 12, 2011. It contains 310 Columns of information as to each Row, the calibration date contained on Column H, the solution change date on Column Q, and the identify information of the Operator performing the solution change and calibration on Columns AU through AX. Rows 37 and 40 are highlighted in the color "Yellow." SFC Alcott explained he created this Spreadsheet by going to the public database of the Alcotest Inquiry System and conducting a search for Alcotest Instrument ARUL-055 in a certain date range. Since the search was made of the public database, the name of the subject, which would otherwise appear in Columns

AB through AD, was redacted and not available. However, Columns AF through AI on S-171B do provide the subject's age, gender, weight and height.

He then made a comparison of the data contained on Exhibit S-152 (all subjects arrested for Driving While Intoxicated between November 5, 2008 through June 30, 2016 and asked to provide breath samples on Alcotest Instruments), with the data extracted from the database for Alcotest Instrument ARUL-0055 reflected on Exhibit S-171B, using the calibration date, the Summons Number, Case Number, and Subject's age and gender Columns of information. From those comparisons he was able to determine that the information for [redacted] on Row 61,343 in Exhibit S-152, except for the arrest date, matched with the information on Row 40 in Exhibit S-171B. SFC Alcott testified he concluded that the "Arrest Date" contained in Column "AR" in Exhibit S-171B was incorrectly entered into the database by the Operator, because the "Start Time" of the solution change in Column R cannot be changed by the Operator, since it is automatically entered by the Alcotest Instrument. SFC testified the same situation exists as to [redacted]. Comparison of the information in Row 61,346 for [redacted] in Exhibit S-152 matched, except for the arrest date, the identifying information in Row 37 on Exhibit S-171B, and SFC concluded the arrest date appearing in Column "AR" in that Exhibit was also incorrectly entered by the Operator.

Alcotest Instrument ARUL-0055 used in the [redacted] arrest and breath test was calibrated by Alcotest Operator Gregg Anacker, and Alcotest Instrument ARUL-005 used in the [redacted] arrest and breath test was Calibrated by Alcotest Operator Oscar Diaz, as set forth in Columns AN through AQ on Rows 40 and 37, respectively, in Exhibit S-171B. Accordingly, they were properly eliminated as subjects who provided breath samples on an Alcotest Instrument calibrated by Sergeant Marc Dennis.

During the cross-examination of Lieutenant Snyder by Mr. Gold, he had been shown and provided testimony on the following documents: (1) Exhibit DB-6, a Calibration Record of Alcotest Instrument, serial number ARLD-0012, located in the Edison Township Police Department, in Union County, documenting the calibration of that Instrument by Sergeant Marc Dennis on June 10, 2009; (2) Exhibit DB-7, a Calibration Record of Alcotest Instrument, serial number ARUL-0055, located in the New Jersey State Police Barracks in Cranbury, documenting the calibration of that Instrument by Sergeant Marc Dennis on May 16, 2011; (3) Exhibit DB-8, a Calibration Record of Alcotest Instrument, serial number ARWC-0020, located at the Kean University Police Department, in Union County, documenting a calibration of that Instrument by Sergeant Marc Dennis on March 26, 2013; and Exhibit DB-9, a Calibration Record of Alcotest Instrument, serial number ARWC-0064, located at the New

Jersey State Police Barracks, Monmouth Station, documenting a calibration of that Instrument on July 15, 2013 by Sergeant Dennis. See T2, page 43, line 19 to page 71, line 2. These documents were extracted from, and are contained in: (1) as to Exhibit DB-6, Exhibit S-102, "Calibration Records of Sergeant Marc Dennis for each Municipality in Middlesex County;" (2) as to Exhibits DB-7 and DB-9, in Exhibit S-104, "Calibration Records of Sergeant Marc Dennis for each New Jersey State Police Barracks location;" and (3) as to Exhibit DB-8, in Exhibit S-107, "Calibration Records of Sergeant Marc Dennis for each Municipality in Union County." Lieutenant Snyder then reviewed Exhibit S-92, the Excel Spreadsheet entitled "Spreadsheet_All Solution Changes_11-1-08 thru 1-9-16," and testified the Dennis calibrations reflected in Exhibits DB-6, DB-7, DB-8, and DB-9 were not contained on Exhibit S-92.

On direct examination of SFC Alcott, he was shown Exhibit DB-6, the Calibration Record for Alcotest Instrument, serial number ARLD-0012, located in the Edison Township Police Department, calibrated by Sergeant Marc Dennis on June 10, 2009. Returning to Exhibit S-126, the "Zingis Project Spreadsheet 2-24-2023," the color-coded Excel Spreadsheet prepared by him, SFC Alcott testified the calibration of Alcotest Instrument ARLD-0012 by Sergeant Marc Dennis on June 10, 2009 does not appear on his Exhibit S-126 Spreadsheet. SFC Alcott explained that omission was based on

his review of the four-page records for Alcotest Instrument ARLD-0012 contained in the Edison Township PDF file contained in Exhibit S-102, "Calibration Records of Sergeant Marc Dennis for each Municipality in Middlesex County," noting that this was not listed in Exhibit S-126 because the Control Test conducted by Sergeant Dennis failed and, therefore, it was not a valid calibration, and the Instrument could not be utilized to analyze breath samples with a failed solution change. SFC Alcott then reviewed Exhibit S-152, the Excel Spreadsheet entitled "Subjectsfrom 11052008_06302016." A sorting of Column B, "Serial Number" for Alcotest Instrument ARLD-0012 lists calibration records of that Instrument on Rows 3648 through 3830, and SFC Alcott verified there are no arrest dates of any subject relating to the calibration date of June 10, 2009 of Alcotest Instrument ARLD-0012 listed on Exhibit S-152.

With respect to Exhibit DB-8, the Calibration Record for Alcotest Instrument ARWC-0020, dated March 26, 2013, a sorting of Column F, "Serial Number" on Exhibit S-126, the color-coded Excel "Zingis Project Spreadsheet" created by SFC Alcott, for Alcotest Instrument ARWC-0020, discloses there is no calibration for that Instrument on March 26, 2013 appearing in Exhibit S-126. However, again, reviewing the three-page PDF file "ARWC-0020 Kean University" contained in Exhibit S-107, "Calibration

Records of Sergeant Marc Dennis for each Municipality in Union County," discloses the reason for its omission on S-126 is that the Control Test failed, and the Instrument could not be utilized to test breath samples. A further review of Exhibit S-126 discloses that the next successful calibration of Alcotest Instrument ARWC-0020 occurred on May 20, 2013. Reviewing Exhibit S-152, and sorting Column B by Alcotest Instrument ARWC-0020 discloses there are no arrest dates of any subject relating to the calibration date of March 26, 2013.

The same review was conducted by SFC Alcott as to the calibration records contained in Exhibits DB-7 and DB-9, with the same results, namely, a review of Exhibit S-104, "Calibration Records of Sergeant Marc Dennis for each New Jersey State Police barracks location" discloses that the Control Tests failed, they were not contained on Exhibit S-126, and a review of Exhibit S-152 discloses there were no arrests associated with the calibration dates set forth in Exhibits S-7 or S-9.

SFC Alcott was shown Exhibit S-89, another Excel Spreadsheet he created, entitled "Spreadsheet of towns and counties," which he explained contains the serial numbers and location of Alcotest Instruments on which Sergeant Marc Dennis calibrated or conducted solutions changes. He created that Spreadsheet from the data contained in Exhibit S-126. Exhibit S-89

contains 146 Rows and Three Columns of information, as follows: Column A, "Serial Number;" Column B, "Agency;" and Column C, "County." He testified Exhibit S-89 shows that Sergeant Dennis performed solution changes and calibrations in Burlington, Cape May, Mercer, Middlesex, Monmouth, Ocean, Somerset and Union Counties. Referring to Exhibit S-89, SFC Alcott stated that, as to Burlington County, Sergeant Dennis performed solution changes on two Alcotest Instruments located at the Red Lion New Jersey State Police Station; as to Cape May County, he performed solution changes on one Alcotest Instrument located at the New Jersey State Police Station in North Wildwood; and as to Mercer County, he performed solution changes on two Alcotest Instruments located at the New Jersey State Police Station in Hamilton.

Sergeant Alcott then reviewed a sorting of Column F, "Serial Number," on Exhibit S-126 to search for the Serial Numbers of the Alcotest Instruments, listed in Exhibit S-89, for the Red Lion, North Wildwood and Hamilton State Police Stations. As to Alcotest Instrument ARWE-0029 at the Red Lion Station, Exhibit S-126 disclosed, on Row 713, that Sergeant Dennis only performed one solution change on that Instrument, on December 21, 2014, and not a calibration. As to Alcotest Instrument ARWE-0026 at the Red Lion Station, a sorting of Column F on Exhibit S-126 disclosed, on Row 712, that

Sergeant Dennis only performed one solution change on that Instrument, on December 17, 2010, and not a calibration. As to Alcotest Instrument ARWC-0058 at the North Wildwood Station, a sorting of Exhibit S-26 disclosed, on Row 615, that Sergeant Dennis performed both a solution change and a calibration on August 27, 2013. SFC Alcott then reviewed Exhibit S-152, the Excel Spreadsheet entitled "Subjectsfrom 11052008_06302016," and testified a sorting of Column B, "Serial Number," for Alcotest Instrument ARWC-0058 disclosed there were no breath tests conducted on that Instrument relating to the August 27, 2013 calibration by Sergeant Dennis. As to Alcotest Instrument ARWD-0107 at the Hamilton Station, he testified a sorting of that Instrument on Column F of Exhibit S-126 disclosed, on Rows 674 and 675, that Sergeant Dennis performed solution changes, not calibrations, on May 16, 2009 and July 13, 2012, respectively. As to Alcotest Instrument ARWE-0037, also at the Hamilton Station, he testified a sorting of Column F on Exhibit S-126 disclosed, on Rows 719 and 720, that Sergeant Dennis performed solution changes, not calibrations, on October 1, 2010 and July 8, 2011, respectively.

SFC Alcott also reviewed Exhibit S-90 (also Exhibit S-148). Scrolling over to Column T, "Final Error," SFC Alcott explained that Column of information reveals whether there was an error that prevented the Alcotest Instrument from producing an evidential BAC reading. On direct examination,

DAG Clark clicked on the "sort" button on that Excel Spreadsheet to display all the "error" messages on the corresponding Row. SFC Alcott explained that the error "Ambient Air Check Error" appears when the Instrument detects ambient air (atmospheric air), which causes the test to abort, without producing a BAC reading. He testified nothing a Coordinator does during the calibration process could cause that message, stating "[i]t's an automatic function from the instrument." T9, page 16, lines 7-8.

Concerning the error message, "Blowing Not Allowed," SFC Alcott explained if the subject blows into the mouthpiece when not prompted to do so by the Instrument, it will display that final error and abort the test. He testified that nothing the Coordinator does during the calibration of the Instrument can cause that message to appear, as the Instrument automatically displays that error if it detects breath being delivered before the subject is prompted to do so, and a BAC reading would not be produced.

As to the error message, "Control Test Failed," SFC explained that, with a breath test sequence, a control test is conducted before the actual breath sample is received from the subject, and another control test is conducted following receipt and analysis of a subject's breath test. He stated that if either one of those control tests is outside a 5% tolerance of .005, the

Instrument will record that the control test failed and would abort the test without producing a BAC reading.

Concerning the error message "Control Gas Supply," SFC Alcott testified if the Simulator Solution in the Instrument does not deliver gas when it is expected to during a control test, that message appears. He stated that nothing the Coordinator does during the calibration process can cause that error message. He noted this generally occurs during administration of the breath test if the Simulator gets disconnected, among other reasons.

SFC Alcott testified that the error message "Interference" occurs during a breath test if something other than ethanol is being blown into the Instrument. He explained that is automatically determined by the Instrument during a breath test, and there is nothing that a Coordinator can do during the calibration process that could cause that error message.

As to the error message, "Minimum Volume Not Achieved," SFC Alcott testified this message appears if the subject being tested does not meet the minimum requirements for the volume of the breath sample being provided, and there is nothing the Coordinator calibrating the Instrument can do to cause that error message. He explained that the Flow Sensor in the Instrument detects whether the minimum requirements of volume of the breath sample has

been achieved, and there is no involvement with the Flow Sensor in the calibration process.

SFC Alcott testified the error message "Mouth Alcohol" occurs if the Instrument detects a drop in the BAC concentration during receipt of the breath sample. He explained there is an internal algorithm in the firmware of the Instrument that makes that calculation and determines whether "Mouth Alcohol" is present, and nothing during the calibration process can cause that error to occur.

Concerning the error message, "Purging Error," SFC Alcott explained there is an internal pump inside the Alcotest Instrument that pumps room air through the system to clear out any alcohol before the next breath sample is received. If that process fails to clear out any alcohol, this error would appear. He testified there is nothing done by the Coordinator during the calibration process that could cause this error because it is automatically determined by the Instrument if the alcohol is not properly purged.

SFC Alcott testified that with respect to the error message, "Ready to Blow Expired," when the Instrument is ready to receive a breath sample, it prompts the subject to provide it and the subject has three minutes to deliver that breath sample. When the three minutes expires without a breath sample being provide, this error message appears. He explained this protocol is built

into the firmware of the Instrument and there is nothing that a Coordinator can do during the calibration process that could cause this message to appear.

With respect to the error message, "Simulator Temperature Error," SFC Alcott explained that if, during a control test, the simulator temperature is not 34 degrees centigrade, plus or minus .2 degrees, that message will appear. He stated this is an automatic measuring function controlled by the firmware, and nothing done during the calibration process can cause that error.

SFC Alcott then testified concerning the error messages, "Subject Refused," and "Test Terminated." He explained these are determinations made by the breath test Operator during the breath testing sequence. He explained the officer operating the Alcotest Instrument, or the arresting officer, has discretion to determine whether a subject should be cited for a violation of the Implied Consent Statute, requiring a subject arrested for driving while under the influence to submit to a breath test analysis on an Alcotest Instrument. He also stated that when an error message occurs that aborts a test, a solution change is required, which takes close to an hour and a half to restore the Instrument to working order. Accordingly, when an error message occurs, the arresting officer always has discretion to transport the subject to the location of another Alcotest Instrument, such as an adjoining municipality, to conduct another test.

On cross-examination by Mr. Noveck, SFC Alcott acknowledged he was not involved in the creation of Exhibit S-90 (also Exhibit S-148). He testified, although he was asked to analyze the Exhibit S-90 (also Exhibit S-148) list to determine whether every subject listed was asked to provide breath samples on an Alcotest Instrument that had been calibrated by Sergeant Dennis, he was not asked to check whether there were other individuals, not listed on those Exhibits, who had been requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis.

While questioning SFC Alcott, Mr. Noveck displayed Exhibit S-90, and SFC Alcott verified, through a sorting of Column E, "Subject Last Name," that a subject with the last name, [redacted], was not contained in Exhibit S-90. Mr. Noveck then displayed Exhibit S-152, and sorted Column B, "Serial Number" on Exhibit S-152, for Alcotest Instrument ARTL-0023 which displayed, among other calibration dates, June 30, 2019. SFC Alcott acknowledged that Row 44209 on Exhibit S-152 shows that subject [redacted] (Columns E through G) was arrested on November 6, 2008 (Column A) in Bridgewater Township (Column D) and was asked to provide a breath sample on Alcotest Instrument ARTL-0023 (Column B), that Alcotest Instrument having been calibrated on June 30, 2009 (Column C). From his review of Exhibit S-90, it was clear to SFC Alcott that Sergeant Dennis calibrated that Instrument on

June 30, 2009. However, SFC Alcott noted that the arrest date listed in Column A was more than six months before the calibration date. Accordingly, he concluded that the arrest date was incorrectly entered, which would account for this subject being missed for inclusion on the Exhibit S-90 Spreadsheet. That date-entry error by the arresting officer was verified by Exhibit DPD-2A, which is a one-page sheet of a "Municipal Case Search" conducted by Mr. Noveck, which documents that the actual arrest of [redacted] in Bridgewater Township was November 6, 2009. Accordingly, as acknowledged by SFC Alcott, [redacted] should have been included in the Exhibit S-90 Spreadsheet as a person asked to provide a breath sample on an Alcotest Instrument calibrated by Sergeant Dennis. Column U in Exhibit S-152 shows that a BAC reading of 0.132 was obtained, and Exhibit DPD-2A verifies she was convicted on Driving While Intoxicated on March 3, 2010.

Accordingly, the [redacted] case is one that falls within the Court's decision in Cassidy, providing her the rright to notice and the right to file an application for post-conviction relief (PCR). However it should be noted that a careful review of Exhibit DPD-2A reveals that [redacted] was sentenced to a 90-day loss of her driving privileges, which was the sentence imposed, at that time, on what is commonly referred to as a Tier 1 DWI offense. A BAC reading of 0.132 is per se, Tier 2 DWI Offense, which carried with it, at that time, a

license suspension of 6 months. In other words, the actual circumstances at the time of the conviction entered for a Tier 1 DWI offense would have to be examined during a hearing on the PCR application to determine the appropriate adjudication, since plea agreements in DWI cases are prohibited by Guideline 4 in the Appendix to Part VII of the Rules Governing the Courts of New Jersey. Nevertheless, [redacted] should have been included on the Excel Spreadsheet in Exhibit S-91, and was entitled to notice of the Court's decision in Cassidy.

During his cross-examination, Mr. Noveck guided SFC Alcott through a similar analysis concerning [redacted]. Exhibit DPD-2C, the one-page result of another Municipal Court Case Search conducted by Mr. Noveck, discloses that [redacted] was arrested and charged with DWI on May 14, 2010, in Highlands Borough, but the summons was dismissed in Highlands Borough Municipal Court on July 27, 2010. Row 800 of Exhibit S-126 documents that Sergeant Dennis performed a calibration on Alcotest Instrument ARWF-0400 on April 20, 2010, located in the Highlands Borough Police Department. A sorting of Column B, "Serial Number" in Exhibit S-90 for that Instrument, and sorting of Column C, "Calibration Date" in Exhibit S-90 resulted in no matches for the last name of [redacted]. Filtering Column C, "Calibration Date," in Exhibit S-152, for the date of April 20, 2010, reveals, in

Row 167640, that [redacted] was arrested on April 14, 2010 (Column A) in Highlands Borough (Column D), and was requested to provide a breath sample on Alcotest Instrument ARWF-0400, an Instrument calibrated by Sergeant Marc Dennis. However, it is noted that Column U, "End Result," of Row 167640 shows the BAC reading was "Zero," which is consistent with the result of dismissal of the DWI charge reflected in DPD-2C. Accordingly, notwithstanding that [redacted] provided a breath sample on an Alcotest Instrument calibrated by Sergeant Dennis, because of the entry of a dismissal, she would not be entitled to relief under the Court's decision in Cassidy.

Exhibit DPD-2B is a one-page Municipal Court Case Search result concerning defendant [redacted], who was issued a summons for DWI in Highlands Borough on October 31, 2012. A conviction for that offense was entered against her in Highlands Borough Municipal Court on August 20, 2013 and, in addition to fines and penalties, her driving privileges were revoked or a period of seven months. The Excel Spreadsheet constituting Exhibit S-126 discloses, on line 807, that Sergeant Marc Dennis performed a solution change and calibration on Alcotest Instrument ARWF-0400, located in Highlands Borough Police Department, on July 19, 2012. In displaying Exhibit S-90, Mr. Noveck filtered Column B (Serial Number) for all Rows containing Alcotest Instrument ARWF-0400, and then filtered Column C (Calibration Date) for

July 19, 2012. That resulted in the display of ten Rows in Exhibit S-90 (Rows 18833 through 18842) with the matching date of July 19, 2012. Filtering the name "[redacted]" on Column E (Subject Last Name) revealed no matches, namely, [redacted] was not included Exhibit S-90.

Mr. Noveck then, again, displayed for SFC Alcott Exhibit S-152. Filtering Column E (Subject Last Name) for "[redacted]" disclosed Row 167508 containing the name of [redacted], with the same arrest date in Column A and the same Summons Number in Column P as contained on Exhibit DPD-2B, and Column U in Exhibit S-152 shows her breath sample resulted in a BAC reading of 0.188, well over the per se, statutory limitation of a BAC reading of 0.10 for conviction of a Tier 2 DWI offense, which matches the conviction and sentence reflected on Exhibit DPD-2B. Accordingly, [redacted], having provided a breath sample on an Alcotest Instrument calibrated by Sergeant Dennis, was entitled to be included with those defendants who were potentially affected by the Court's decision in State v. Cassidy, yet she was not included in the Exhibit S-90 list compiled by the NJSP, and was therefore not provided mailed notice of the misfeasance of Sergeant Dennis or the Court's decision in Cassidy, which included her right to file an application for post-conviction relief. Additionally, Exhibit DPD-2B also reflects that a warrant was issued for [redacted] arrest on September 5, 2018, which, as of

the date of the Municipal Court Case Search on June 2, 2023, was still outstanding, with bail set and the issuance of a Proposed Suspension Notice, ostensibly for the failure to pay the full amount of the fines, costs and penalties imposed on the conviction.

Mr. Noveck then examined SFC Alcott concerning Exhibit DBP-2D, which is a "Municipal Court Search," conducted by Mr. Noveck in the matter of [redacted] On behalf of [redacted], his attorney filed an application for post-conviction relief based on State v. Cassidy, which is still under consideration, on the issue of whether [redacted] was requested to provide a breath sample on an Alcotest Instrument that had been calibrated by Sergeant Dennis. [redacted] was charged in the Township of Woodbridge with Driving While Intoxicated, in Summons Number SP4 314067 on December 27, 2008. The charge was filed by a New Jersey State Police Trooper. From my experience in handling Cassidy-based PCR applications, the State Police follow record-retention policies, and its records for that matter were destroyed prior to the Court's decision in Cassidy. In that PCR matter, SFC Alcott had been asked by DAG Mitchell to search the Alcotest Information System database for information concerning the [redacted] matter. See Exhibit S-149 (a series of emails in March 2023 between SFC Alcott, William Gronikowski, and DAG Mitchell concerning attempts to locate calibration

documents concerning that matter). The result of the those documented attempts was that SFC Alcott needed to determine the Alcotest Instrument serial number before reaching any conclusions. The Municipal Court Search conducted discloses he pled guilty to that offense in Woodbridge Municipal Court on April 22, 2009, and upon sentencing, in addition to fines, court costs and statutory penalties, the driving privileges of [redacted] were suspended for a period of seven months.

Based on the arrest-date information in the [redacted] matter, December 27, 2008, SFC Alcott testified he requested Mr. Gronikowski to conduct a statewide search (query) of the Alcotest Inquiry System database concerning DWI tickets issued from December 26, 2008 to December 28, 2008. Exhibit S-150 is an Excel Spreadsheet entitled "Subjectsfrom 12282008_12282008," which contains 363 Rows of subjects charge with Driving While Intoxicated and 312 Columns (Fields) of information. SFC Alcott testified the name of [redacted] does not appear on this subject-based Excel Spreadsheet. SFC Alcott was then shown Exhibit S-152, the Excel Spreadsheet entitled "Subjectsfrom 11052008_06302016," which contains 236,664 Rows of subject data, each Row containing 22 Columns (Fields) of information concerning each subject charged with DWI in New Jersey from November 5, 2008, through June 30, 2016. Mr. Noveck filtered

and sorted the name of "[redacted] in Column (Field) E, "Subject Last Name," which SFC Alcott verified produced no results for the name "[redacted]." Mr. Noveck then filtered and sorted the Summons Number contained in Exhibit DPD-2D in Column (Field) P of Exhibit S-152, which SFC verified did not produce any results for that Summons Number.

SFC Alcott also reviewed Exhibit DPD-2D and verified that under "Offense Information" there is a field of information entitled "Alcotest," which is blank (not filled-in). However, this court notes that [redacted] was convicted of DWI upon entry of a plea of guilty, and a seven-month license suspension was imposed, which is the amount of license suspension applicable to a Tier 2 violation upon a finding of a Blood-alcohol content reading of 0.10% or higher. Accordingly, his plea and conviction had to have been based upon breath samples provided and analyzed by an Alcotest Instrument. SFC Alcott testified that when a New Jersey State Trooper arrests someone for DWI, the Trooper usually brings the defendant back to the State Police Station to which he or she is assigned, in order to conduct the breath-samples test. However, SFC Alcott further explained, there is nothing preventing the Trooper from bringing the defendant to a municipal police station for the breath test to be conducted. Accordingly, SFC Alcott concluded, given the absence of State Police Records concerning the arrest of [redacted], including

absence of the Alcohol Influence Report, the fact that [redacted] was pulled over and charged with Driving While Intoxicated does not reveal the location where the Alcotest breath test was conducted.

When asked if he knew any reason why a record of the charging of [redacted] with Driving While Intoxicated, and the testing of his breath on an Alcotest Instrument does not appear in the Alcotest Inquiry System database, SFC Alcott explained there was a time, prior to approximately 2011, that information was not downloaded from each Alcotest Instrument in the State, directly onto the Alcotest Inquiry System database, through a telephone modem, as it has been done from 2011 forward. He testified, as did Lieutenant Snyder, that prior to approximately 2011, breath-testing information from each Alcotest Instrument was downloaded onto a Compact Disc (CD) every six months, and the CD was transported to the Office of Forensic Sciences within the NJSP, which maintains the database, and then downloaded onto the database. He acknowledged that the absence of arrest and breath-testing records for [redacted]. in the Alcotest Inquiry System database may have been because data concerning same was placed on a CD that was never downloaded onto that database. SFC Alcott testified another copy of the CD was retained by the agency in which the Alcotest Instrument was located, but he was unaware as to whether, either the Office of Forensic Sciences or the

local agency, retained the CDs. He also testified that since approximately 2011, and currently, information from each Alcotest Instrument is downloaded through a telephone modem onto the database on a weekly basis.

Mr. Noveck also referred to another Excel Spreadsheet created by SFC Alcott, Exhibit S-171B, entitled "ARUL-0055.2 instances (003)," which contains the records of testing of subjects on that particular Alcotest Instrument. It contains 55 Rows of subjects who were asked to provide breath samples on that Instrument, and 312 Columns of information as to each Subject Row. Rows 37 [redacted] and 40 [redacted] on that Spreadsheet are highlighted in "yellow" because the dates of calibration of that Instrument appearing on Column H (Calibration Date) is June 16, 2011, which occurred after the listed date of arrest of the subject contained on Column AR (Arrest Date), June 14, 2011 as to Row 37, and May 10, 2011 as to Row 40, which is inconsistent. SFC Alcott testified that the calibration date is automatically entered by the Alcotest Instrument, whereas the date of arrest is inputted by the officer conducting the breath test. Accordingly, he concluded, in those two instances, the date of arrest had to have been inaccurately manually entered by the officer conducting the breath test on that Alcotest Instrument.

Mr. Noveck then reviewed with SFC Alcott Exhibit S-90 (also Exhibit S-148). As has been previously noted, Column A on Exhibit S-90 is the "Arrest Date," Column B is the "Serial Number" of the Alcotest Instrument, Column C is the "Calibration Date," and Columns E through G lists the name of the subject tested. SFC Alcott reviewed Row 456 on Exhibit S-90, which lists the arrest date of subject [redacted] as October 4, 2013, and the calibration date of the Alcotest Instrument on which he was tested as June 30, 2014. Similarly, Row 1054 on Exhibit S-90 lists the arrest date of subject [redacted] as March 19, 2010, and the calibration date of the Alcotest Instrument on which he was tested as November 30, 2010. And, Row 1320 on Exhibit S-90 lists the arrest date of subject [redacted] as February 15, 2009, and the calibration date of the Alcotest Instrument on which he was tested as December 28, 2009. These are further instances where the Alcotest Inquiry System database lists dates of arrest occurring before the dates of calibration of the Alcotest Instrument on which those subjects were requested to provide breath samples, SFC Alcott concluding the officer conducting the breath test incorrectly entered the date of arrest. SFC acknowledged if someone attempted to match the arrest date for a subject contained in the Alcotest Inquiry System database to the arrest date of that subject in the

Court's ATS database, in certain case, like those reviewed, they would not be able to obtain a match.

SFC Alcott was then questioned during cross-examination by Mr. Gold. SFC Alcott again verified that his review of Exhibit S-90 disclosed there were 436 subject entries contained thereon that had not provided breath samples on Alcotest Instrument calibrated by Sergeant Marc Dennis, and should not have been included in the Excel Spreadsheet of 27,833 subjects, contained Exhibit S-90. SFC Alcott again testified he created Exhibits S-128 and S-129. Again, Exhibit S-128 contains the same information as contained in Exhibit S-129, rearranged to place the first 436 subject Rows in Exhibit S-128 list, color-coded in "Red," as those subjects who were not asked to provide breath samples on Alcotest Instruments calibrated by Sergeant Marc Dennis.

SFC Alcott was then shown Exhibit DB-17, which was created by Mr. Gold. It is a table of the 27,833 subject records contained in Exhibit S-90, placed in Microsoft Access format. Exhibit DB-19 is that same information but is placed in Microsoft Excel Spreadsheet format. These Exhibits contain a sorted version of Exhibit S-90, sorted by "Driver's License Number (ascending)", then the "Subject's Last Name (ascending)," then the "Subject's First Name (ascending), then "Arrest Date (ascending), and "Arrest Time (ascending)." The "ID" Columns in Exhibit DB-17 and DB-19 have Row

numbers corresponding to the Row numbers contained in Exhibit S-90, less one number for the header line in the Excel Spreadsheet, Exhibit DB-19, but not in the Microsoft Access Spreadsheet, Exhibit DB-17.

In any event, the same 27,833 subject entries that appear in Exhibit S-90 (also Exhibit S-148) appear in Exhibits S-129, S-129, DB-17 and DB-19. For ease and consistency of reference to the various Subject Row numbers, the court will refer to those contained in Exhibits S-90 and S-129 when discussing the cross-examination of SFC Alcott by counsel.

Mr. Gold was able to verify with SFC Alcott several instances on Exhibit S-90 where the arrest date listed was, in time, before the calibration date. In one instance, as to subject [redacted], Row 5219 on Exhibit S-90 displays an arrest date for a DWI offense in the Borough of Dunellen in Middlesex County on February 6, 2015, where it shows breath samples were requested on Alcotest Instrument, Serial Number ARTL-0009, listed as being calibrated on February 10, 2010. Then, Row 5220 on Exhibit S-90 displays the same [redacted] again, with an arrest date for a DWI offense ten days later, on February 16, 2015, again, in the Borough of Dunnellen, with breath samples requested on that same Alcotest Instrument, Serial Number ARTL-0009, again, calibrated on February 10, 2015. The summons number listed in Column P of Exhibit S-90 is the same for both Rows, number E150004545, as

is the time of arrest listed, 22:40, in Column R of Exhibit S-90. SFC Alcott testified these two listings are the same case and, for some unknown reason, it was run twice.

A similar error on Exhibit S-90 relates to the subject, [redacted], who appears on Rows 20546 and 20547 of that Exhibit. Both Rows show a different arrest date for a DWI offense in the Borough of Deal on Column A, on the same Summons Number listed in Column P. Row 20546 displays an arrest date of May 8, 2015, with breath tests requested on Alcotest Instrument Serial Number ARWM-0030, and Row 20547 displays an arrest date of May 5, 2015, with breath tests also requested on that same Alcotest Instrument, Column C listing its calibration date, on both Rows, as May 6, 2010. Thus, again, at least as to Row 20547, the listed arrest date is before the listed calibration date.

Mr. Gold then displayed Exhibit S-83 for SFC Alcott, which is the Excel Spreadsheet entitled "Spreadsheet from AOC_All Addresses_Alcotest AS Defendants Matches – full matches and partial – to AG," and, as previously noted, is an Excel Spreadsheet, containing two Sheets, that contain addresses for those subjects the AOC was able to finding either a full match (18,249) or a partial match (947), through a search of the Court's ATS database, to the 20,667 subjects listed in Exhibit S-91. Mr. Gold then performed a search in

both Sheets of Exhibit S-83 for the subject listed in Row 1783 of Exhibit S-90, [redacted], and the subject listed in Row 1784 of Exhibit S-90, [redacted], resulting in their names not appearing in either Sheet, meaning that an address match for those subjects was not obtained and, hence, those subjects were not provided the notification required by the Court's decision in Cassidy. This information was verified by SFC Alcott.

Mr. Gold then went through, with SFC Alcott, some of the "Final Error" messages contained in Column T of Exhibit S-90. Concerning the error message, "Subject Refused," which appears for multiple subjects in Exhibit S-90. When that error message appears, there is no BAC reading reported in Column U, "End Result," on Exhibit S-90. SFC Alcott explained that if a subject produces any breath samples, the maximum number that subject is permitted is eleven attempts at providing an acceptable sample for analysis. SFC Alcott acknowledged that Exhibit S-90 contains 21 Columns, of Fields, of information for each subject Row, and that from a Review of those 21 Columns it cannot be determined how many times a particular subject attempted to provide a breath sample. SFC Alcott acknowledged that if Exhibit S-90 contained all 310 Columns, or Fields, of information, it could be determined how many breath samples were attempted for any particular subject.

SFC Alcott was then asked about the error message, “Control Test Failed,” which also appears for multiple subjects in Exhibit S-90. Again, when that error message appears, there is no BAC reading reported in Column U, “End Result,” on Exhibit S-90. SFC Alcott acknowledged that it cannot be determined from the Columns contained in Exhibit S-90 whether it was the first or second control test that failed, nor can it be determined how many breath samples were provided by a particular subject. SFC Alcott acknowledged the same conclusion applies to any of the error messages reported in Column T of Exhibit S-90.

SFC Alcott was then questioned concerning Exhibit DB-32, which is a color photograph of a CU-34 Simulator that is utilized with the Alcotest Instrument to conduct the Control Test before and after each breath sample is provided. SFC acknowledged that the CU-34 Simulator is attached to the Alcotest Instrument by a clear tube located at the top of the CU-34, and there is a temperature probe, sometimes referred to as a flat key, that is attached to the back of the CU-34. He explained that the clear tube brings a vapor from the CU-34 Simulator into the Alcotest Instrument. A solution is contained in the jar of the CU-34 Simulator, which is heated to 34 degrees Celsius, plus or minus .2 degrees during each Control test to produce a vapor that is carried into the Alcotest for analysis, simulating human breath.

During his testimony, SFC Alcott explained the calibration process consistent with the Court's description in Cassidy, 235 N.J. at 488-89. SFC Alcott was then shown page 11 of Exhibit DB-4, the "Alcotest 7110 MKIII-C New Jersey State Police User Manual 1.1." That page was separately marked as Exhibit DB-36, and is entitled "Test Data." That page explains that a breath test can be performed when the Alcotest Instrument displays the word "Ready," after which the Operator of the Instrument presses the "orange" start button and begins entering the subject's information displayed in the bracketed portion on Exhibit DB-36, after which the operator can review the information entered and, if satisfied, enter the letter "N" to proceed, after which the Alcotest Instrument will automatically start the Control Test.

SFC Alcott agreed with the testimony given by DAG Mitchell on March 28, 2023, see Exhibit DB-33 (T4 pages 127-28), that if the temperature of the Solution is not properly calibrated, the vapor produced will not properly simulate human breath, the Control Test will fail, and an evidential BAC reading will not be produced, as the Instrument will not be ready to accept breath samples.

SFC Alcott also testified the best evidence to determine whether Sergeant Marc Dennis calibrated a particular Alcotest Instrument would be the actual calibration documents, with his signature and date thereon.

SFC Alcott was then shown Exhibit DB-17, the sorted Excel Spreadsheet of 27,833 subjects created by Mr. Gold; Exhibit S-129, the Excel Spreadsheet created by SFC Alcott of those 27,833 subjects, color-coded in "green" on Rows for those Alcotest Instruments calibrated by Sergeant Dennis, and in "Red" on Rows for those Alcotest Instruments that were not calibrated by Sergeant Dennis; and Exhibit S-90. The first line of questioning related to the subject [redacted]. [redacted] appears on Rows 328, 329, and 330 in Exhibit DB-17; on Rows 16518, 16775 and 16776 in Exhibit S-129, and on Rows 16518, 16775, and 16776 in Exhibit S-90. Row 328 relates to a DWI arrest on July 21, 2014, in Scotch Plains, [redacted] being asked to provide a breath sample on Alcotest Instrument ARWC-0062, calibrated by Sergeant Dennis on May 16, 2014, with an "End Result" stating "Subject Refused." Rows 329 and 330 both relate to an arrest date for a DWI offense on July 21, 2014 in Plainfield, and [redacted] being asked to provide a breath sample on Alcotest Instrument ARWC-0069, calibrated by Sergeant Dennis on May 19, 2014. Column M of Row 329 states "Subject Refused," and Column M of Row 330 states "Control Test Failed." This same information appears in Column T on Rows 16519, 16775 and 16776, respectively, on Exhibit S-129, and on Rows 16519, 16775, and 16776, respectively on Exhibit S-90. No evidential BAC readings were obtain in the three instances.

A similar analysis relates to the subject [redacted]. Rows 17723 and 17724 on Exhibit S-129 reflects the same arrest date for DWI on May 5, 2009 by the Union County Police, with the subject being asked to provide breath samples on Alcotest Instrument ARWE-0083, calibrated by Sergeant Dennis on November 20, 2008, both with an error message listed on Column T as "Control Gas Supply," with no resulting evidential BAC reading. Row 7621 on Exhibit S-129 lists the subject with a last name of [redacted] in Column E, but no first name. However, the birth date of April 16, 1969 in Column H for Row 7621 is the same birth date in Column H for Rows 17723 and 17724 and the same Driver's License Number appears in Column M for all three Rows, so this is the same subject. Both Rows 17723 and 17724 have the same error message, as well, in Column T, "Control Gas Supply," and there is no evidential BAC reading reported in Column U for any of the three subject entries. Additionally, the arrest date reflected in Columns A and Q and arrest time reflected in Column R for all three subject Rows are the same, May 5, 2009 at 23:59, and the Summons Number contained in Column P is the same for all three Rows. [redacted] was asked to provide breath samples on Alcotest Instrument ARWE-0083, located at the Union County Police Station, and both attempted tests resulted in error messages of "Control Gas Supply." He was also asked to provide breath samples on Alcotest Instrument ARUL-

0058, in Westfield Police Station, which resulted in an error message of "Subject Refused," and, again, no BAC reading being reported. The same information is found on Exhibit S-90. SFC Alcott testified it is not uncommon for a subject to be transported to the location of another Alcotest Instrument when an attempt on one Alcotest Instrument is unsuccessful. The sequence of testing at those two locations is not clear.

SFC Alcott was then asked to review Rows 18439, 18440, 18441, and 23086 in Exhibit S-129, the color-coded Excel Spreadsheet prepared by SFC Alcott of all 27,833 subject records, pertaining to [redacted]. All four Rows list the arrest date in Column A as May 15, 2010. Rows 18439, 18440 and 18441 reflect, in Column B, that [redacted] was asked to provide breath samples on Alcotest Instrument ARWF-0388, located in Little Silver Police Station, which was calibrated by Sergeant Dennis on March 26, 2010. Column T, "Final Error" on Rows 18439 and 18440 show an error code, Control Gas Supply," and Column T on Row 18441 show an error code of "Control Test Failed." Row 23086 reflects that [redacted] was also asked to provide breath samples on Alcotest Instrument ARXA-0061, located in the Borough of Shrewsbury Police Station, which was not calibrated by Sergeant Dennis. Column T on that Row reflects an error code, "Control Test Failed." Thus, all four attempts to obtain breath samples from [redacted]

[redacted] were unsuccessful and no BAC readings were obtained. The same information appears on Exhibit S-90. Again, the sequence of testing at those two locations is unknown.

SFC Alcott was also asked to review Rows 7651, 16229, 16230, and 17751 on Exhibit S-129, pertaining to [redacted]. The Arrest Date in Column A for all four Rows is the same, September 20, 2009, as is the Summons Number in Column P, and the Arrest Location in Column S, which is 2020, the Municipal Code for the Town of Westfield. [redacted] was asked to provide breath samples on three separate Alcotest Instruments. Row 7650 shows he was asked to provide breath samples on Alcotest Instrument ARUL-0058, calibrated by Sergeant Dennis, located at the Westfield Police Station. The Error Code appearing in Column T for that Row states "Test Terminated." It would appear that since the arrest location was in the Town of Westfield, that would have been the first attempted test, sequentially. Row 17751 shows that [redacted] was asked to provide breath samples on Alcotest Instrument ARWE-0083, an Instrument calibrated by Sergeant Dennis, located at the Union County Police Station, with Column T showing the error message "Test Terminated." Rows 16229 and 16230 reflect that [redacted] was also asked to provide breath samples on Alcotest Instrument ARWC-0057, also calibrated by Sergeant Dennis, located in Garwood Police

Department. Column T on Row 16229 shows an error message, "Ambient Air Check," and Column T on Row 16230 states "Subject Refused." Since that Column reflects the conclusion of the Operator of the Instrument, or the arresting officer, that [redacted] refused to take the test, contrary to the Implied Consent Statute, it is likely that was, sequentially, the last attempt to obtain breath samples from him. No evidential BAC readings were reported on Column U. The same information is contained in Exhibit S-90.

SFC Alcott was then asked to review Exhibits S-90 and S-129 concerning the subject, [redacted]. The same information for [redacted] appears in each Excel Spreadsheet in those Exhibits, on Rows 1145, 1146, 1147 and 1148. He was arrested, charged with DWI on August 25, 2015, and requested to provide breath samples on Alcotest Instrument ARNK-0037, an Instrument calibrated by Sergeant Dennis, located in the Middlesex Borough Police Station. Column T on each Row displays the error message, "Mouth Alcohol," and no BAC readings were reported on Column U. SFC Alcott testified this indicates [redacted] provided at least one breath sample, on each of the four tests, that triggered the error message "Mouth Alcohol," and each test was automatically aborted. He explained the Alcotest Instrument has an automated algorithm in the firmware that can detect mouth alcohol.

Exhibits S-90 and S-129 were also reviewed concerning the subject, [redacted]. The same information appears for [redacted] in both Excel Spreadsheets in those Exhibits on Rows 3675, 8371, 8372, and 8373. [redacted] was arrested on July 2, 2010, charged with DWI, and requested to provide breath samples on Alcotest Instrument ARUL-0081, calibrated by Sergeant Dennis, located in Perth Amboy Police Station. Three attempts were made, as reflected on Rows 8371, 8372, and 8373, with error messages reported in Column T of "Ambient Air Check Error" on Rows 8371 and 8272, and the error message "Control Test Failed," reported on Row 8373. The "Arrest Location" reported on Column S is "1216," which is the Municipal Code for the City of Perth Amboy. A fourth attempt to obtain breath samples from [redacted], reflected on Row 3675 of those Exhibits, was made on Alcotest Instrument ARSC-0059, located in the South Amboy City Police Station, which resulted in an error message, "Subject Refused." Again, no BAC readings were reported on Row U of those Exhibits.

SFC Alcott was also asked to review Exhibits S-90 and S-129 concerning the subject, [redacted]. The same information appears for [redacted] in both Excel Spreadsheets, on Rows 21364, 21365, 26760, 26887 and 26888. [redacted] was arrested on February 13, 2011, and charged with DWI. He was requested to provide breath samples on three different Alcotest

Instruments, all calibrated by Sergeant Dennis. As reflected on Rows 21364 and 21365, he was asked to provide breath samples twice on Alcotest Instrument ARWM-0087, calibrated on January 19, 2011, located in the Hazlet Township Police Station. Both attempts resulted in the error message, "Control Test Failed." Row 26760 reveals [redacted] was also asked to provide breath samples on Alcotest Instrument ARXD-0007, located at the Keyport Police Station, which also resulted in an error message, "Control Test Failed." Additionally, he was requested to provide breath samples twice on Alcotest Instrument ARXD-0011, located in the Keansburg Police Station, as reflected on Rows 26887 and 26888. Row 26887 displays, in Column T, an error message, Ambient Air Flow Error" and Row 26888 reports the error message, "Control Test Failed." Consequently, there are no evidential BAC readings reported for those five attempts.

Exhibits S-90 and S-129 were then reviewed by SFC Alcott concerning subject [redacted] The same information for [redacted] on Rows 16197, 16198, 17197, 17198 and 17199 is contained on both Excel Spreadsheets in those Exhibits. [redacted] was arrested on August 16, 2014 and charged with DWI. The "Arrest Location" listed in Column S of each Row is "2007," which is the Municipal Code for Hillside Township. [redacted] was asked to provide breath samples on three occasions on Alcotest Instrument ARWE-0023, an

Instrument located in the Hillside Police Station and calibrated by Sergeant Dennis on June 4, 2014. All three attempts resulted in an error code, reported on Column T of each Row, as "Interference." [redacted] was the asked to provide breath samples, on that same date, on Alcotest Instrument ARWC-0020, located at the Kean University Police Station, also calibrated by Sergeant Dennis, on May 19, 2014. Those two attempts are reflected on Rows 16197 and 16198 of both Exhibits, and Column T on both Rows also reported an error message of "Interference." Again, no evidential BAC reading was reported.

The next subject reviewed with SFC Alcott on Exhibits S-90 and S-129 was [redacted]. The same information for him appears on both Excel Spreadsheets contained in those Exhibits, on Rows 17315, 17316 and 17512. [redacted] was arrested and charged with DWI on December 21, 2008, by a New Jersey State Trooper, the offense occurring, as reflected on Column S in each Row, in Edison Township. [redacted] was requested twice to provide breath samples on Alcotest Instrument ARWE-0040, an Instrument located at the New Jersey State Police Station in Somerville, calibrated by Sergeant Dennis on November 29, 2008, as reflected on Rows 17315 and 17316. The first attempt, listed on Row 17315, resulted in an error message reported on Column T as "Ambient Air Check Error," The second attempt, listed on Row

17316, resulted in an error message reported on Column T of "Control Test Failed." [redacted] was also asked to provide breath samples, on that date, on Alcotest Instrument ARWE-0081, also located at that New Jersey State Police Station, and calibrated by Sergeant Dennis on November 28, 2008. That attempt resulted in an error message reported in Column T as "Control Gas Supply." Again, there were no evidential BAC readings reported for any of those attempts.

SFC Alcott was also shown, on Exhibits S-90 and S-129, listings on Rows 19590, 19591, 19592 and 19593 for the subject, [redacted]. The information displayed is the same on both Excel Spreadsheets. [redacted] was arrested on March 21, 2014 and charged with DWI. She was requested to provide breath samples on Alcotest Instrument ARWJ-0014, located in Point Pleasant Police Station, and calibrated by Sergeant Dennis on December 23, 2013, on four attempts, all resulting in the error message, "Mouth Alcohol." No evidential BAC reading was reported in Column T on those Rows.

The next subject reviewed with SFC Alcott during his cross-examination pertaining to Exhibits S-90 and S-129 was [redacted], on Rows 20537, 20538, 20539, 20540 and 21316. [redacted] was arrested on April 20, 2015 and charged with DWI. Column S shows the Arrest Location as 1337, which is the Municipal Code for Ocean Township in Monmouth County. Row

21316 reflects that [redacted] was asked to provide breath samples on Alcotest Instrument ARWN-0086, an Instrument located in Ocean Township Police Station and calibrated by Sergeant Dennis on March 23, 2015. Column T on that Row lists the error code, "Control Test Failed." [redacted] was then asked to provide breath samples on that same date, with fours attempts, on Alcotest Instrument ARWM-0030, an Instrument located in the Borough of Deal Police Station and calibrated by Sergeant Dennis on November 13, 2014. The attempts reflected on Rows 20537, 20538 and 20539 all list an error code in Column T of "Mouth Alcohol." The final attempt, reflected on Row 20540 lists an error code in Column T as "Subject Refused." No evidential BAC readings were reported.

Mr. Gold also displayed, on Exhibits S-90 and S-129, subject [redacted], who appears on Rows 27187, 21359 and 26754 on both Exhibits, with the same identification information. [redacted] was arrested on December 14, 2010 and charged with DWI. Column S states the Arrest Location as 1322, which is the Municipal Code for the Borough of Interlaken. [redacted] was requested to provide breath samples on three separate Alcotest Instruments in an unknown sequence. Row 27187 reflects he was asked to provide breath samples on Alcotest Instrument ARXE-0082, an Instrument calibrated by Sergeant Dennis on September 30, 2010, located at

the Union Beach Police Station. Column T on that Row shows an error message, "Control Test Failed." He was also asked to provide breath samples on Alcotest Instrument ARWM-0087, an Instrument calibrated by Sergeant Dennis on July 22, 2010, and Column T on Row 21359 also reflects the error message, "Control Test Failed." [redacted] was further asked to provide breath samples on Alcotest Instrument on that date on Alcotest Instrument ARXD-0007, an Instrument located at the Keyport Police Station, also calibrated by Sergeant Dennis on July 22, 2010. An error message appears on Column T on that Row as "Test Terminated" and no evidential BAC readings were reported.

Another subject reviewed with SFC Alcott was [redacted], who appears on Rows 23761, 12875 and 8993 of Exhibits S-90 and S-129. [redacted] was arrested on January 5, 2012 and charged with DWI. Column S, "Arrest Location," states the arrest took place in "1318," which is the Municipal Code for Hazlet Township, and the Summons Number in Column P on all Rows is SP5000695, which means he was issued the Summons by a New Jersey State Police Trooper. Row 23761 reflects he was asked to provide breath samples on Alcotest Instrument ARXB-0066, located at the Holmdel Police Station, calibrated by Sergeant Dennis on September 20, 2011. Column T, "Final Error," provides an error message, "Subject Refused." It is likely he

was first asked to provide breath samples on two separate Alcotest Instruments located at the New Jersey State Police Station in Holmdel, as follows: (1) Row 12875, on Alcotest Instrument ARWA-0171; and (2) Row 8993, on Alcotest Instrument ARUM-0057. Both of those Instruments were calibrated by Sergeant Dennis on November 16, 2011, and Column T on both Rows provides the error message, "Control Test Failed." There are no evidential BAC readings reported on those Rows.

SFC Alcott was also asked on cross-examination to review subject [redacted], whose name appears on Rows 23354, 24989 and 24990 on both Exhibit S-90 and S-129. [redacted] was arrested on January 11, 2012 and charged with DWI. Column S on each line of both Excel Spreadsheets lists the "Arrest Location" as 1328, which is the Municipal Code for Manalapan Township. Row 23354 states he was asked to provide breath samples on Alcotest Instrument ARXA-0069, located at the Marlboro Township Police Station, calibrated by Sergeant Dennis on November 1, 2011, and Column T lists the error message, "Control Test Failed." [redacted] was also asked to provide breath samples twice on Alcotest Instrument ARXC-0067, located at the Freehold Borough Police Station, and also calibrated by Sergeant Dennis, on August 31, 2011. Column T on Row 24989 lists the error message, "Control Test Failed," and Column T on Row 24990 lists the error

message, "Control Gas Supply." There are no reported evidential BAC readings on those Rows.

Another subject reviewed on cross-examination of SFC Alcott was [redacted], whose name appears on Rows 9313 and 23880 on Exhibits S-90 and S-129. [redacted] was arrested on May 5, 2013 and charged with DWI. Column S on those Excel Spreadsheets state the "Arrest Location" as 1331, which is the Municipal Code for the Borough of Matawan. [redacted] was asked to provide breath samples on two different Alcotest Instruments, both calibrated by Sergeant Dennis, as follows: (1) Row 9313, Alcotest Instrument ARUM-0057, located at the New Jersey State Police Holmdel Station, calibrated on April 11, 2013, resulting in the error message listed on Column T as "Control Test Failed;" and (2) Row 23880, Alcotest Instrument ARXB-0066, located at the Holmdel Township Police Station, calibrated on March 4, 2013, also resulting in the error message listed in Column T as "Control Test Failed." Again, there are no reported evidential BAC readings on those Rows.

SFC Alcott was then asked on cross-examination to review the testing of subject [redacted], whose name appears on Rows 6930, 6931, 2334 and 3699 on the Excel Spreadsheets in Exhibits S-90 and S-129. [redacted] was arrested on December 15, 2010, and charged with DWI. Column S in all four Rows states the "Arrest Location" as 1201, which is the Municipal Code for

the Borough of Carteret. Rows 6930 and 6931 reflects that [redacted] was requested to provide breath samples twice on Alcotest Instrument ARTL-0026, located at the Borough of Carteret Police Station, calibrated by Sergeant Dennis on July 14, 2010. Both attempts resulted in the error message on Column T, "Control Gas Supply." Row 2334 states that [redacted] was also asked to provide breath samples on Alcotest Instrument ARRL-0019, located at the Woodbridge Township Police Station, calibrated by Sergeant Dennis on July 21, 2010 and Column T lists the error message in Column T on that attempt as "Control Test Failed." [redacted] was also asked to provide breath samples on Alcotest Instrument ARSC-0059, located at the South Amboy City Police Station, also calibrated by Sergeant Dennis, on December 14, 2010, and the error message on Column T for that attempt states "Subject Refused." No evidential BAC readings were reported.

Another subject reviewed with SFC Alcott was [redacted], whose name appears on Rows 2620, 2621, 2622, 2623 and 2624 on the Excel Spreadsheets contained in Exhibits S-90 and S-129. [redacted] was arrested on December 26, 2014 and charged with DWI. Column S on all five Rows lists the Arrest Location as 1225, which is the Municipal Code for Woodbridge Township. These Rows reflect that he was asked to provide breath samples on five separate occasions on the same Alcotest Instrument, Serial Number

ARRL-0019, located at the Woodbridge Township Police Station and calibrated by Sergeant Dennis on October 1, 2014. The attempts on Rows 2620, 2622 and 2623 report the error message on Column T of "Mouth Alcohol." The attempt on Row 2621 reports the error message on Column T as "Blowing Not Allowed," and the attempt on Row 2624 reports the error message on Column T, "Subject Refused." No evidential BAC readings were obtained on those five attempts. With respect to the "Mouth Alcohol" error message, SFC Alcott explained that when that message is reported by the Instrument, Alcotest Operators are trained to wait 20 minutes after receipt of the message before making another attempt to obtain breath samples.

SFC Alcott was also asked questions concerning the subject, [redacted], who appears on Rows 1299 and 3350 of Exhibits S-90 and S-129. [redacted] was arrested on January 23, 2010 and charged with DWI. Column S on both Rows lists the Arrest Location as 1214, which is the Municipal Code for the Township of North Brunswick. Row 1299 shows that [redacted] was requested to provide breath samples on Alcotest Instrument ARNK-0042, located at the Rutgers Police Station, and calibrated by Sergeant Dennis on December 28, 2009. Column T thereof lists the error code, "Control Test Failed." On that date, he was also requested to provide breath samples on Alcotest Instrument ARSC-0007, located at the Highland Park Police Station,

and calibrated by Sergeant Dennis on October 13, 2009. Column T on that Row also reports the error code, "Control Test Failed." There were no evidential BAC readings reported by either Instrument.

Lastly, SFC Alcott reviewed Rows 23313 and 23314 on Exhibits S-90 and S-129 concerning the subject, [redacted]. [redacted] was arrested on June 20, 2011 and charged with DWI. Column S on those Rows lists the Arrest Location as 1328, which is the Municipal Code for Manalapan Township. He was asked to provide breath samples on two occasions on Alcotest Instrument ARXA-0069, located at the Marlboro Township Police Station, and calibrated by Sergeant Dennis on May 11, 2011. Column T on both Rows lists the error code, "Interference." There were no evidential BAC readings reported on either attempt.

As to these examples, SFC Alcott testified that because all 310 Columns are not displayed on the Spreadsheet, it is possible that some BAC readings were obtained but were not acceptable to be reported because of the error messages. SFC Alcott explained that a person could search the Public portion of the Alcotest Inquiry System database, by each Alcotest Instrument, by a specific date range, and obtain copies of all the Alcohol Influence Reports (AIS's) for each Instrument in order to obtain more detailed information than as appears on the Excel Spreadsheets contained in the discussed Exhibits. SFC

Alcott testified that once a Control Test fails on an Alcotest Instrument, the Instrument automatically puts itself out of working order, and a new solution change must be performed to place it back into working order. He explained the Control Test is fundamental to ensuring the reliability of the readings, and if it fails, no breath samples on that Instrument are provided until a solution change occurs and the subsequent Control Test is successful.

Mr. Gold then referenced Exhibit DB-23, which is the Excel Spreadsheet containing the twenty-six (26) subject records identified by DAG Mitchell, during her cross-examination, as not being contained in the original Exhibit S-90 Excel Spreadsheet of 27,833 subjects, who had also been asked to provide breath samples on Alcotest Instruments that had been calibrated by Sergeant Dennis. In other words, they were somehow omitted from the original list in Exhibit S-90 that purportedly had contained all subjects who had been requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis. SFC Alcott acknowledged that during his cross-examination by Mr. Noveck, he confirmed there were an additional three (3) subjects that had not been contained in that Excel Spreadsheet contained in Exhibit S-90 (Subjects [redacted] (DPD-2A); [redacted] (DPD-2B); and [redacted] (DPD-2C)).

Subtracting the 436 subjects, contained in the original Exhibit S-90 Excel Spreadsheet, which SFC Alcott determined had not been requested to provide breath samples on Alcotest Instrument calibrated by Sergeant Dennis, from the 27,833 subject records contained in S-90, results in subjects 27,397. Adding-in the 26 subjects acknowledged by DAG Mitchell as not being contained in S-90, as well as the 3 subjects acknowledged by SFC Alcott as being omitted from S-90, results in a finding that there were 27,426 subjects who had been asked to provide breath samples on Alcotest Instruments calibrated by Sergeant Marc Dennis.

Mr. Gold then referred SFC Alcott to the Joint Exhibit DB/OPD-29, which is an Excel Spreadsheet entitled, "Zingis Index," containing 27,426 Subject Rows and 22 Columns, or Fields, of information, as follows:

A - Rows in State 27,833
B - Arrest Date
C - Driver's License Number
D - Subject Last Name
E - Subject First Name
F - Summons Number
G - Location of Alcotest Instrument
H - Serial Number, Alcotest Instrument
I - Calibration Date
J - Subject Middle Initial
K - Subject Date of Birth
L - Subject Age
M - Subject Gender
N - Subject Weight
O - Subject Height
P - Issuing State of Driver's License

Q - Case Number
R - Arrest Date
S - Arrest Time
T - Arrest Location
U - Final Error
V - End Result (BAC Reading, if any)

That Excel Spreadsheet, Joint Exhibit DB/OPD-29, is arranged chronologically, by Arrest Date, from November 15, 2008 through March 7, 2016, to capture all 27,426 subjects who were requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Marc Dennis, including those not originally contained in Exhibit S-90. SFC Alcott acknowledged that DB/OPD-29 would correct the original list, contained in Exhibit S-90, that had been prepared by the New Jersey State Police and sent to the Office of the Attorney General.

SFC Alcott was then shown Joint Exhibit DP/OPD-28, which is a PDF file entitled "Dennis Calibration Repository," which consists of 1,047 files, on 1,050 pages, each file containing an "Alcotest 7110 Calibration Record" of a specific Alcotest Instrument, located at a specific location, each calibrated by Sergeant Marc Dennis from November 14, 2008 through October 9, 2015.

SFC Alcott then discussed Exhibit S-117, which is an Excel Spreadsheet entitled "Alcott.Copy of Zingis project Spreadsheet 2-2-2023 (002)," which is a color-coded Spreadsheet prepared by SFC Alcott to show all solution changes and calibrations performed by Sergeant Dennis, which he extracted

from the Excel Spreadsheet created by Mr. Gronikowski, based on actual Calibration documents reviewed by SFC Alcott. That Excel Spreadsheet contains 1,328 Rows, one for each Solution Change and Calibration performed on a specific Alcotest Instrument. He color-coded in "Green" those documents he found as to each Alcotest Instrument; color-coded in "Red," for those documents he was not able to find; color-coded in "Blue," for documents he found but were incomplete; and in "Orange," for those documents where the solution change was not sequential after the Linearity test. SFC Alcott acknowledged he was unable to find records for forty-one (41) solution changes and calibrations, because some agencies had destroyed their files or they were missing for other reasons. SFC Alcott agreed where there were partial documents available, it was at least clear that Sergeant Dennis had been at the Alcotest Instrument location on the date indicated, and likely performed the calibration of that Instrument. During questioning, he also agreed, with respect to the missing records, one could query the Alcotest Information System database and go through the 1,328 solution changes and match them up with calibration Dates to determine whether Sergeant Dennis was at that location on dates listed on Column D, "Calibration Date," in Exhibit S-117.

On re-direct by DAG Clark, SFC Alcott was referred to Exhibit DB-5, the four sample Alcohol Influence Reports (AIRs) produced during the March

20, 2023 hearing, and asked questions concerning some of the error messages shown on the two-page AIR, with redacted information, for the age 61 Male, page 2 thereof containing the final result as "Subject Refused." With respect to the error message, "Ready to Blow Expired" on page 1 thereof, SFC Alcott testified that the operator of the Alcotest Instrument has no input in causing that error message to appear, as it is automatically produced by the Instrument when the breath sample is not received within three (3) minutes of the subject being prompted to provide the breath sample. SFC Alcott also testified that the error message, "Minimum Volume Not Achieved," appearing on four (4) breath-sample attempts on pages 1 and 2 of that AIR, is also automatically determined by the Alcotest Instrument itself, based on insufficient volume contained in the breath sample given by the subject.

SFC Alcott was also shown Exhibit DB-34, which is the Excel Spreadsheet prepared by the New Jersey State Bar, entitled "Arrest dates bef calib and not in AOC mailings (003)," consisting of 111 Subject tests that are contained in Exhibit S-90, none of which are purportedly contained in Exhibit S-83, the Excel Spreadsheet created by the Administrative Office of the Courts, entitled "Spreadsheet from AOC_All Addresses_Alcotest ATS Defendants Matches-full matches and partial – to AG," containing two Sheets, Sheet 1 of 18,249 exact subject-to-address matches, and Sheet 2 of 947 partial

subject-to-address matches. Referring to Rows 107 and 108 on Exhibit DB-34, SFC Alcott verified they list the subject on both Rows as [redacted]. Also shown Exhibit S-90, AFC Alcott verified that the same information for [redacted] contained on Exhibit DB-34 is also contained on Rows 14575 and 14576 on Exhibit S-90. SFC Alcott was then shown Exhibit S-83, and verified that Rows 16256 and 16257 on Sheet 1 do, in fact, contain an exact address match for [redacted] as the "Summons Numbers" for her and "First Name" in both Exhibits DB-34, S-90, and S-83, all match, the difference being that her Last Name in Column D on Exhibit S-83 is hyphenated as "[redacted]." The name of [redacted] also appears on Rows 2471 and 2472 on Sheet 1 of Exhibit S-88, the Excel Spreadsheet of exact and partial addresses, prepared by the AOC, entitled "Spreadsheet from AOC_Union County Only." Accordingly, Rows 107 and 108 in Exhibit DB-34 should be removed.

During additional cross-examination, SFC Alcott testified there are many reasons why a Control Test fails, including, but not limited to, an improper seal on the CU-34 Simulator, cold air causing condensation in the Head Space of the Simulator, and an aging fuel cell.

The testimony of SFC Alcott was credible and authoritative, based on his extensive experience with the operation and calibration of Alcotest

Instruments. He clearly demonstrated that the 27,833 subjects contained in Exhibit S-90, identified as being requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis is not fully accurate, as his comprehensive analysis of each Row through referencing the actual calibration documents demonstrates that 436 of those Subject Rows contain attempted breath testing of individuals on Alcotest Instruments that had not been calibrated by Sergeant Dennis.

The testimony of SFC Alcott also demonstrates that Sergeant Dennis did perform Solution Changes in conjunction with Calibrations on Alcotest Instruments located in Burlington, Cape May, Mercer, Middlesex, Monmouth, Ocean, Somerset and Union Counties but did not perform any calibrations of the Alcotest Instrument located in the Borough of Collingswood in Camden County.

It is also noted that although SFC Alcott was asked to review Exhibit S-90 to determine whether Sergeant Dennis actually performed calibrations of the Alcotest Instruments on which the 27,833 listed subjects were asked to provide breath samples, he was not requested to determine whether there were individuals, not listed on Exhibit S-90, who were requested to provide breath samples on Alcotest Instruments that were calibrated by Sergeant Dennis.

However, the court finds it is clear from the candid and credible testimony of SFC Alcott there were many individuals who were requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis who were identified by the query that resulted in the compilation of Exhibit S-90.

Additionally, SFC Alcott's testimony established that a number of Subject Rows in Exhibit S-90 list the "Arrest Date" that, in time, occurred "before" the "Calibration Date" listed in Exhibit S-90, which, based on the testimony, was likely due to manual entry errors.

In addition to SFC Alcott's testimony establishing that 436 Subject Rows in Exhibit S-90 involve subjects who were requested to provide breath samples on Alcotest Instrument that were calibrated by Coordinators other than Sergeant Dennis, it is clear from the testimony of DAG Mitchell, through the questioning by *Amici* counsel, there were 29 individuals that were not included in Exhibit S-90, who were requested to provide breath samples on Alcotest Instruments that were, in fact, calibrated by Sergeant Dennis.

It is also clear to this court that failing to calibrate an Alcotest Instrument with an NIST-traceable thermometer can cause a Control test to fail. See Cassidy, 235 N.J. at 488-89. That is because, without using the NIST-traceable thermometer, it cannot be confirmed that the calibration unit

heated the solution to a temperature within 0.2 degrees of 34 degrees Celsius. However, the fact remains that when a Control Test fails, the Alcotest Instrument automatically aborts the contemplated breath test and, thereby, no evidential BAC reading can be reported, as no breath samples can be provided. However, the other error messages reported are the result of either the conduct of the individual being tested, which activates the Instruments firmware sensors, or some environmental condition. The credible testimony conforms none of that can be affected by the manner in which the Instrument is calibrated. Therefore, the error messages, "Subject Refused," or "Test Terminated" are the result of the exercise of discretion by the Operator or Arresting Officer based on the conduct of the individual being tested and, of course, no evidential BAC reading is reported.

8. Barbara Nolasco

Barbara Nolasco, Administrative Supervisor 3 with the New Jersey Judiciary, was also called to testify by the State. The testimony of Ms. Nolasco is contained in T3, the March 22, 2023 Transcript, at pages 104-126. The State provided an affidavit of Ms. Nolasco during discovery, dated January 23, 2023, which was marked as Exhibit S-57. She is employed by the New Jersey Judiciary as an Administrative Supervisor 3 and currently works in the Jury Programs Unit of the Administrative Office of the Courts (AOC).

Prior to that, Ms. Nolasco was assigned to supervise the Printing and Office Services Unit of the Administrative Office of the Courts, supervising a team of two to three people. She and her staff would receive a file and instructions, would attend to the printing, bring it to the Bell and Howell Inserter instrument in their office, program the machine, load it, and the mailing was then folded and stuffed into an envelope and placed into mail trays, which were then taken to the AOC's Mail Room for the Capitol Post Office to pick-up and mail.

In July 2021, she was tasked by Steven Somogyi, the Assistant AOC Director for Municipal Court Services, with a special project to prepare and mail a certain notification letter, which she identified as Exhibit 55, consisting of a "Notice to All Defendants Impacted by State v. Cassidy," dated July 14, 2021, under the signature of Robert A. Fall, J.A.D., Retired Judge, which provided as follows:

> As you may be aware, on November 13, 2018 the New Jersey Supreme Court determined in State v. Cassidy, 235 N.J. 482 that certain breath samples obtained through the use of the Alcotest 7110 MKIII-C machine between 2008 and 2016 in connection with an arrest for Driving While Under the Influence (DWI) (contrary to N.J.S.A. 39:4-50) are inadmissible in a DWI prosecution. You may have already received a notice from the Office of the Attorney General or the Office of the County Prosecutor, or both, concerning the effect of the Cassidy decision in your case. You are receiving this letter now because you have been identified as a defendant whose case was implicated in the Supreme Court's Cassidy decision.

Due to the number of DWI cases involved, I was appointed by the Supreme Court to act as Special Master to coordinate the management of all affected cases on a statewide basis. Court records indicate that such an inadmissible Alcotest result was obtained in a DWI case in which you either entered a plea of guilty or were found guilty following a trial. You have a right to file a petition for Post-Conviction Relief with the court requesting to have your DWI conviction reviewed by the court.

The Administrative Office of the Courts has created a website specifically designed to assist you in filing your petition for Post-Conviction Relief. **Go to www.njcourts.gov and type "Cassidy DWI Review" in the search bar.** There you will find a form you will need to complete to file your petition, if you so choose, as well as a form to request the services of an attorney to represent you, if you cannot afford to hire your own attorney, and instructions for requesting an interpreter or accommodation for a disability, if needed. The website also contains detailed instructions on how and where to file your petition.

In considering whether to file your petition, you should be aware that a subsequent DWI conviction subjects you to enhanced penalties, including fines, license suspension, surcharges, and possible incarceration. If you have not already done so, you should strongly consider seeking legal representation. If you, or an attorney on your behalf, has already filed an application with the court requesting to vacate your DWI conviction, you do not need to complete and file another petition for Post-Conviction Relief, as a hearing will soon be scheduled to review that application.

Once you have filed your petition, you will receive a Notice of a Hearing that will be scheduled to

> determine whether your petition for Post-Conviction Relief will be granted. If the court grants your petition for Post-Conviction Relief, depending on the position taken by the Attorney General's office, a trial may be conducted on a separate date to determine whether the observations of the arresting police officer and any other witnesses produced by the State, as well as any testimony and evidence produced by you, establishes your guilt beyond a reasonable doubt.
>
> Due to the high number of Cassidy-affected cases, the need to continue following State and Federal health and safety measures brought about by COVID-19, and the need to promote the uniform processing, hearing and adjudication of these matters, all petitions for Post-Conviction Relief (with certain exceptions) will be scheduled for a virtual court hearing. These matters will be heard by a retired Superior Court Judge on recall duty, sitting as a Municipal Court Judge.
>
> As mentioned previously, if you cannot afford an attorney and believe you qualify for the appointment of a Municipal Public Defender to represent you, you may complete the Financial Questionnaire to Establish Indigency found on the website and submit it along with your Petition for Post-Conviction Relief. The questionnaire will be reviewed by my staff and, if you qualify in accordance with the income eligibility guidelines for indigent defense services approved by the Administrative Office of the Courts, the Municipal Public Defender of the municipality where the matter was originally heard will be ordered to represent you in this matter.
>
> [See Exhibit S-57.]

Ms. Nolasco testified these letters were prepared, stuffed into envelopes and mailed in accordance with their procedure. She noted that the envelopes,

as prepared, did not contain a marking requesting "Return to Sender." However, she stated that when the Post Office scans each envelope, if a forwarding address is indicated, Post Office staff automatically forward the letter to the new address. If the envelope cannot be delivered to the address it contains, the envelope will be returned to the sender's address contained on the envelope. Not placing "Return to Sender" allows the Post Office to automatically forward the mailing to a forwarding address if it is contained in their system but, if not, and undeliverable, it is returned to the sender's address.

Exhibit S-55 consists of copies of the aforesaid Notice and mailing addresses that were provided by Mr. Somogyi's Office, derived from the exact and partial subject-to-address Excel Spreadsheet contained in Exhibit S-83. Ms. Nolasco did not have knowledge as to how many letters were mailed.

Ms. Nolasco also had no knowledge as to whether any of the mailed Notice Letters were returned to the AOC as undeliverable, but noted that if some were returned, they would be sent to the Post Office Box listed on the envelopes, which is the Post Office address for the Municipal Court Services Division.

On cross-examination, Ms. Nolasco confirmed there are three possibilities concerning the disposition of the mailing. The first is that the

Post Office determines the listed address is good, the person lives there, and the mail is delivered. The second situation is where the Post Office has a forwarding address and then the letter is sent to that forwarding address. The third is when the address is good, but the person to whom it is addressed does not live there, but the mail is delivered to that address. If the person who lives there puts the envelope back into the mailbox, Post Office delivery personnel would return it back to the Post Office for return to the sender's address. The fourth possibility is where the address is inaccurate, there is no forwarding address, in which situation, the mailed letter is returned to the address of the sender. Ms. Nolasco was not aware whether any of the mailed letters were returned to their Mail Room and then sent to the Municipal Court Services Division.

This court requested the State to determine whether any of the mailed letters were returned to the Municipal Court Services Division as undeliverable and, if so, whether any further follow-up was undertaken to obtain better, updated addresses, and whether any letters returned as undeliverable were still in the possession of the Municipal Court Services Division.

Subsequent to Ms. Nolasco's testimony, on April 17, 2023, DAG Clark sent an email to Susanna Morris, Esq. and Thomas Russo, Esq., counsel for the AOC, requesting information concerning the number of the July 14, 2021

letters that were returned to the AOC. On April 27, 2023, Mr. Russo sent an email to this court, stating as follows:

> Your Honor is kindly urged to note that a review of the AOC's records has revealed the following:
>
> > (a) 13,618 notices were mailed by the AOC on July 4, 2021
> >
> > (b) 2,884 notices were returned to the AOC as being un-deliverable
> >
> > (c) 64 notices were re-mailed using a new address provided by the U.S. Postal Service; of those, two were returned to the AOC as being un-deliverable;
> >
> > (d) 34 notices were re-mailed based upon AOC support staff's belief that an incorrect zip code had been the problem; of those, twenty-five were returned to the AOC as being un-deliverable.
>
> The above data was retrieved from the attached spreadsheet.
>
> Your Honor is also urged to note that the AOC has located, in storage, several boxes of returned mailing; but the exact number of mailings contained in the boxes is unknown at this time.
>
> Kindly advise if Your Honor would like this office to also circulate the above information to all counsel of record in this matter.
>
> [See Exhibit S-163.]

This court replied to Mr. Russo on that date, copying Ms. Morris, requesting that his email be sent to all counsel, which was accomplished. The

Excel Spreadsheet attached to the April 27, 2023 email, also a part of Exhibit S-163, contains the names of the individuals whose July 14, 2021 letter was returned to the AOC as undeliverable, and the addresses to which the letter was mailed.

The testimony of Barbara Nolasco was credible and candid. Although she was not aware of the number of notification letters sent, or the reason for them being sent, subsequent information presented by Thomas Russo, Esq., counsel for the AOC, provided the mailing information and the fact that 2,857 letters were returned as being undeliverable to the addresses contained in Exhibit S-83.

9. Monica do Outeiro

Monica do Outeiro, an Assistant Prosecutor with the Monmouth County Prosecutor's Office, also testified. Her testimony is contained in T6, the April 26, 2023 Transcript, on pages 9-96. Ms. do Outeiro is currently the Director of the Office's Appellate Unit, and serves as its Municipal Prosecutor Liaison. She has been an Assistant Prosecutor since 2007. Prior to her testimony, her certification, dated January 17, 2023, with multiple Exhibits, was submitted by the State during discovery. See Exhibit S-44. As the Municipal Court Liaison, she supervised the County's municipal prosecutors, conveying relevant information to them, and assisting them in answering any questions they may

have concerning issues in their municipal courts, essentially acting in an advisory capacity.

Exhibit A to her certification is a copy of the September 19, 2016 letter sent by Elie Honig, Director of the Division of Criminal Justice of the Attorney General's Office to Judge Grant, Administrative Director of the Courts, concerning the criminal charges filed against Sergeant Dennis, and attaching Exhibit S-90, the Excel Spreadsheet containing the name of subjects identified as having been requested to provide breath samples on Alcotest Instrument calibrated by Sergeant Dennis. Ms. do Outeiro testified her Office was copied on that letter, which provided notice of the issues concerning Sergeant Dennis. Upon receipt of that letter, she forwarded copies of it to all municipal prosecutors in Monmouth County. See Exhibit B to her certification, an email from Ms. do Outeiro dated September 29, 2016 to all municipal prosecutors, which consists of three pages. Ms. do Outeiro testified she sent that email, explaining:

> It was to give them more information about what was happening, again with regard to [the] Sergeant Dennis matter, but also because Sergeant Dennis was the coordinator in Monmouth County at the time of his arrest and charging, we had numerous DWI prosecutions that were pending in municipal court, so it was to give them advice that had been conveyed through the Office of the Attorney General with how they should be handling those active cases, while the Sergeant Dennis matter was sorted out.

[T6, page 18, lines 11 through 20.]

Ms. do Outeiro stated she recalled receiving an Excel Spreadsheet, on a thumb drive, from the Attorney General's Office containing the names and addresses of individuals who had provided breath samples on Alcotest Instrument calibrated by Sergeant Dennis, containing two Sheets. See Exhibit G to Ms. do Oueiro's certification, which is also Exhibit S-85. Sheet 1 of that Spreadsheet contains exact subject-to-address matches of 7,479 individuals, and Sheet 2 contains partial subject-to-address matches of 432 individuals. The court notes there are multiple duplicate listings of subjects on Sheet 1, based on different ticket numbers, see e.g., Rows 13 &14; 16 & 17; 36 & 37; 81 & 82; 10 & 107; 118 & 119; 174 & 175; 209 & 210, et al., and on Sheet 2, Rows 35 & 36; 37 & 38; 39 & 40; 42 & 43; 45 & 46; 52 & 53, et al. When she received Exhibit S-85, Ms. do Outeiro provided the thumb drive to her secretary, who saved the information onto the hard drive of the Monmouth County Prosecutor's Office computer.

Referring to Exhibit C of her certification, Ms. do Outeiro testified she received, along with representatives of the Middlesex, Ocean, Somerset and Union County Prosecutors' Offices, an email from DAG Mitchell dated October 20, 2016, requesting her Office check the original list of subjects provided who had been requested to provide breath samples on Alcotest

Instruments calibrated by Sergeant Dennis, see Exhibit 81C, to determine whether any of those subjects were then currently incarcerated and, if so, requesting her Office send notifications to their attorney of the issues relating to the criminal charges filed against Sergeant Dennis. Exhibit C also contains an email sent by Ms. do Outeiro to Monmouth County First Assistant Prosecutor Lori and Deputy First Assistant Prosecutor Marc LeMieux, sending them DAG Mitchell's October 20, 2016 email.

As a result of DAG Mitchell's inquiry, Ms. do Outeiro identified 1,127 cases of potentially-impacted defendants. She, and her secretary then ran searches through both the Automated Ticket System (ATS) database and the Promis Gavel database to determine whether those subjects had DWI convictions, and as to whether they received a custodial sentence. As a result of those searches, Ms. do Outeiro testified they were able to identify two (2) defendants who were so incarcerated, and she sent notification letters to the attorneys for both, which are dated October 24, 2016, and are contained in Exhibit E to her certification. Those letters attached the September 16, 2016 letter from Director Honig to Judge Grant and requested any applications made by their clients be sent to her as well as DAG Mitchell and SDAG Czepiel.

Ms. do Outeiro identified Exhibit D to her certification as emails from her to all Municipal Prosecutors in Monmouth County, dated October 21,

2016, sending each a list of cases in their Municipal Court as being potentially affected by issues arising from the calibration of Alcotest Instruments by Sergeant Dennis, and requesting that copies of any applications filed on behalf of defendants in those cases be forwarded to her.

Ms. do Outeiro testified that she, as well as representatives of the Prosecutor's Offices in Middlesex, Ocean, Somerset, and Union Counties, received an email from DAG Mitchell, dated September 25, 2017, sending a form notification letter, requesting that letter be sent to all individuals identified as having provided evidential breath samples on Alcotest Instruments calibrated by Sergeant Dennis. That email states a list of addresses for those individuals would be sent to the Monmouth County Prosecutor's Office by the next day, and further stating, "please keep a running list of the names and contact information of any individuals who make inquiries to you as a result of these letters, and provide me with this information 90 days after your letters are mailed." See Exhibit F to Ms. do Outeiro's certification.

Ms. do Outeiro acknowledged that, thereafter, as noted above, her office received the Excel Spreadsheet from the Attorney General's Office contained in Exhibit S-85, and a copy therefore is also included as Exhibit G to her certification. Ms. do Outeiro and her staff sorted the list alphabetically,

eliminated duplicate entries, created a mail merge to generate labels, see Exhibit I to her certification, affixed them to envelopes, prepared a letter, under her signature, dated September 27, 2017, which was then mailed to the all subjects at their addresses contained in Exhibit S-85. Referring to her certification, Ms. do Outeiro stated that 7,480 letters were sent by regular mail.

Following those mailings, Ms. do Outeiro stated she received over 100 telephone calls from individuals and attorneys seeking additional information. She also received telephone calls from individuals who had not received a letter, as well as attorneys whose clients had not received a copy of the letter but believed they should have. She testified that when she received a telephone call from an individual or attorney, she would look them up on the list provided by the Attorney General and, if their address was wrong, she would change it and mail them another letter. If individuals stated they were moving, she would update the downloaded, working list with the new address. If their name was not on the list, she would direct them to contact their attorney. She also stated she received a number of calls from relatives advising the addressees had died.

Ms. do Outeiro stated her office also began receiving letters returned from the Post Office as being undeliverable. She so advised the Attorney General's Office but did not receive any instructions concerning them.

Following the Court's decision in State v. Cassidy, Ms. do Outeiro stated she, as well as representatives of the Prosecutor's Offices in Ocean, Middlesex, Somerset and Union Counties, received an email from DAG Mitchell, dated December 14, 2018, sending a form "Cassidy notice letter" and requesting it be mailed to those individuals in their Counties who have been identified as having provided evidential breath samples on Alcotest Instruments calibrated by Sergeant Dennis, and that the 2017 Excel Spreadsheets would be re-sent to them. See Exhibit J to Ms. do Outeiro's Exhibit S-44 certification.

As a result, Ms. do Outeiro placed that form letter on the stationary of her Office, dated it December 20, 2018, it was signed by the Monmouth County Prosecutor, see Exhibit K to her certification, and mailed it to the addresses contained on the updated list her Office had maintained, see Exhibit L to her certification. Exhibit M to that certification reflects that the December 20, 2018 letter was sent by regular mail to 6,218 individuals. Ms. do Outeiro noted her Office also established an automated message that was played when telephone calls were received, and a copy of the notification letter and other information concerning the Cassidy decision was placed on their Office's website, which also made reference to information being placed on the website of the Monmouth County Bar Association. Information

concerning the Cassidy decision was also placed on the social media account of the Monmouth Cunty Prosecutor's Office. See Exhibit O to her certification. Additionally, Ms. do Outeiro stated that when individuals or attorneys would call seeking further information, she would speak to them.

On cross-examination, Ms. do Outeiro stated the 2017 and 2018 letters that were returned by the Post Office as being undeliverable were initially retained in a box, but that box has since been disposed of. She stated her Office was not given direction by the Attorney General's Office as to what to do with the letters that were returned as being undeliverable. Ms. do Outeiro did not know how many letters on either mailing were returned as undeliverable or contained a forwarding address, but stated those that were undeliverable or contained a forwarding address, were deleted from the master list maintained by their Office, but were not deleted from the Exhibit 85 Excel Spreadsheet. She stated her recollection was that close to 1,000 letters were returned as being undeliverable.

On cross-examination, Mr. Noveck displayed Exhibit S-10, identified as an email from Ms. do Outeiro to DAG Mitchell and SDAG Czepiel, dated December 21, 2018, stating in pertinent part:

> I wanted to let you know that the Cassidy notification letter went out to all affected Monmouth County defendants yesterday. After sending out the initial letter last year, we had many defendants contact us to advise

> of changes of address and, unfortunately, had family members of deceased defendants call us to have their relatives' names removed from the list to prevent further communications. We also had over a thousand letters returned as undeliverable for various reasons; we saved all returned letters. In light of this, the letters that we sent out yesterday reflect these various amendments to the initial list provided to us" addresses were changed when requested and deceased defendants and returned letters were removed from the mailing list. As we did before, we intend to save all letters returned during this second mailing. Additionally, MCPO will soon be posting notification on our website and social media (it will include links to your website as well).

Ms. Mitchell sent a return email to DAG Mitchell later that date, thanking her for sending out the Cassidy notification letter. Ms. do Outeiro again confirmed that her Office received no instructions from the Attorney General's Office as to what to do with the letters returned as being undeliverable. She also clarified that the list of those individuals who were sent the 2018 letter excluded those individuals whose letter had been returned as being undeliverable as a result of the 2017 mailing, with the exception of those individuals who had called, following the 2017 mailing, and provided her Office with updated addresses, in which case their list would be updated to reflect the new address. Ms. do Outeiro confirmed that any mailed letters that were returned as being undeliverable, and not sent to forwarding addresses, have not been retained by the Prosecutor's Office

On questioning by Mr. Troso, Ms. do Outeiro stated she had no understanding as to how the Exhibit S-85 Excel Spreadsheet of potentially-affected individuals was created.

The court finds the testimony of Ms. do Outeiro to be credible and forthright. Clearly, the Monmouth County Prosecutor's Office, as well as the other County Prosecutors' Offices only utilized the lists they were provided by the Attorney General's Office to diligently mail the form letters, also provided by the Attorney General's Office, were given limited instructions concerning how to handle the notification letters returned as being undeliverable. It is noted, those undeliverable letters have been discarded by this Prosecutor's Office.

10. Suzanne Musto

Suzanne Musto, a trial secretary at the Somerset County Prosecutor's Office, also testified. Ms. Musto's "Amended Certification," dated February 13, 2023, was provided by the State during discovery, contains several Exhibits, and has been marked as Exhibit S-138. She has been employed at that Office since January 2017. The testimony of Ms. Musto is contained in T6, the April 26, 2023 Transcript, on pages 98-128.

Referring to her certification, Ms. Musto testified that, on September 26, 2017, Assistant Somerset County Prosecutor Anthony Parenti was sent an

email from DAG Mitchell, see Exhibit B to Mr. Musto's certification, requesting their Office mail a form notice letter provided to all defendants contained on Exhibit S-87, an Excel Spreadsheet sent to their Office of individuals potentially affected by the actions of Sergeant Dennis. That form letter, dated September 6, 2017, is attached to Ms. Musto's certification as Exhibit A. Exhibit S-87, the Spreadsheet Spreadsheet, prepared by the AOC, contains two Sheets. Sheet 1 contains the names and addresses of 877 exact subject-to-address matches, and Sheet 2 contains 52 partial subject-to-address matches. There are a number of duplicate subject entries on Sheet 1, based on different ticket numbers. See, e.g., Rows 51 & 52; 57 & 58; 151 & 152; 205 & 206; 223 & 224; 227 & 228, et. al., and Sheet 2 contains duplicate subject entries on Rows 5 & 6; 22 & 23; 26 & 27; 31 & 32; and 35 & 36.

Ms. Musto explained, based on the form letter provided, a letter dated October 6, 2017, was created on the letterhead of the Somerset County Prosecutor's Office, signed by First Assistant Prosecutor Thomas J. Chirichella. See Exhibit C to her certification. Ms. Musto was tasked with stuffing the addressed envelopes and mailing them by regular mail. She testified that 948 letters were mailed, on or about October 6, 2017, and approximately 175 of those mailed letters were returned as being undeliverable, of which 16 had forwarding addresses. She then re-addressed

and mailed back out those 16 letters. Updated addresses for the remaining returned letters were not sought.

Following the Court's decision in State v. Cassidy in November 2018, Ms. Musto testified their Office was requested by the Attorney General's Office to prepare and mail a second letter, based on another form letter provided to them by the Attorney General's Office. See Exhibit D to Ms. Musto's certification. Accordingly, a second letter was prepared and signed by First Assistant Prosecutor Chirichella, dated December 21, 2018. See Exhibit E to Ms. Musto's certification. She testified that letter was prepared and sent by her to the same subjects and addresses, as listed on Exhibit S-87. Referring to her certification, Ms. Musto stated 206 of those mailed letters were returned as being undeliverable, and 24 contained forwarding addresses, which were re-mailed to those subjects at the forwarding addresses provided. She was not aware that any of those 2017 or 2018 letters, that were re-mailed based on forwarding addresses provided by the Post Office, were again returned as being undeliverable. Ms. Musto also stated that all envelopes returned as being undeliverable on both the 2017 and 2018 mailings have been retained by the their Office in a box inside a filing cabinet.

Although she did not know its specific content, Ms. Musto testified information concerning the letter and the Cassidy decision was placed on the Office's website.

On cross-examination, Ms. Musto did not know what the policy of their Office was concerning notice to incarcerated defendants who may have been affected by the actions of Sergeant Dennis and the Cassidy decision, and she was unaware of any efforts made to provide notice to the attorneys of the subjects whose letters were returned as being undeliverable.

The testimony of Ms. Musto was credible. As with the mailing of all notification letters, there was no attempt to obtain updated addresses for letters that were returned as undeliverable and were unable to be forwarded.

11. Tracey Mannix

Tracey Mannix, Chief Clerk of the Investigation Unit of the Union County Prosecutor's Office also testified. She has worked in that Office for twenty-five (25) years. The testimony of Ms. Mannix is contained in T6, the April 26, 2023 Transcript, on pages 130-164. During that time, she worked with Assistant Union County Prosecutor Michele C. Buckley on the notification letters sent as result of the conduct of Sergeant Dennis, and the Court's decision in State v. Cassidy. Although she has not submitted her own certification, Ms. Mannix has reviewed and was shown the January 23, 2023

Certification of Assistant Prosecutor Buckley, see Exhibit S-73, and the March 8, 2023 certification of Assistant Prosecutor Buckley, see Exhibit S-140.

Referring to those certifications, Ms. Mannix testified their Office received an Excel Spreadsheet from the Attorney General's Office in 2017, containing the names and addresses of defendants who were potentially affected by the conduct of Sergeant Dennis and, ultimately, by the Court's decision in State v. Cassidy. See Exhibit S-88. That Spreadsheet contains two Sheets. Sheet 1 contains the names and addresses of 4,464 exact subject-to-address matches, and Sheet 2 contains 216 partial subject-to-address matches. Sheet 1 contains several duplicate subject listings, based on different ticket numbers. See, e.g., Rows 245 & 246; 265 & 266; 295 & 296; 371 & 372, et al. Sheet 2 also contains several duplicate subject listings. See Rows 31 & 32; 37 & 38; 110 & 111; 119 & 120; 126 & 127; 129 & 130: 133 & 134, et al.

Ms. Mannix testified their Office was requested to mail a form notification letter, prepared and sent to them by the Office of the Attorney General, notifying the subjects contained on Exhibit S-88. She also noted their Office was contacted following the Court's decision in State v. Cassidy in late 2018, and again requested their Office mail out a second notification letter in the form sent to them by the Attorney General's Office. Copies of those letters are attached to Exhibit S-73. The 2017 letter, which is undated, is under the

signature of Thomas K. Isenhour, Acting Union County Prosecutor. The second letter, which is dated, incorrectly, as January 2, 2018, whereas it should be dated January 2, 2019, since it followed the Court's November 13, 2018 decision in Cassidy.

With respect to the 2017 letter, Ms. Mannix stated multiple clerical persons within their Office completed the job of attending to the addressing of the envelopes and stuffing then with the 2017 notification letter. Referring to Assistant Prosecutor Buckley's Exhibit S-140, March 8, 2023, certification, Ms. Mannix confirmed that she had actually counted 846 of those mailed letters returned by the Post Office as being undeliverable. Those that had forwarding addresses were re-mailed to those subjects, but there was no attempt to find better addresses for the remaining undeliverable envelopes, noting their Office has retained them.

As to the second notification letter, sent on or about January 2, 2019, Ms. Mannix stated their Office followed the same procedures as the first letter, using the same addresses on the Excel Spreadsheet provided. Referring to Assistant Prosecutor Buckley's March 8, 2023 certification, Ms. Mannix confirmed that 860 of those second notification letters were returned by the Post Office as being undeliverable. Again, where forwarding addresses were provided, those envelopes were re-addressed and the letters mailed out to the

forwarding addresses. Again, there were no attempts made to find better addresses for the remainder of the 860 subject letters. Ms. Mannix stated that the second notification letter was placed on the website of the Union County Prosecutor's Office.[25]

On cross-examination by Mr. Hernandez, Ms. Mannix testified she did not know how many of the first or second undeliverable letters that had forwarding addresses and were re-mailed, were returned, if any. Mr. Noveck then displayed page four of Exhibit S-17, which is a copy of an email from Ms. Mannix to Doreen Yanik, identified by Ms. Mannix as First Assistant Union County Prosecutor, dated April 19, 2019, stating their Office sent out 4,465 of the second notification letters, guessing that about 60 letters that were returned as being undeliverable, had forwarding addresses, and were re-mailed to those addresses. She noted that the 4,465 number was probably a typographical error, as 4,464 second-notification letters were actually mailed.

With respect to telephone calls received by their Office as a result of the mailings, she testified that Assistant Prosecutor Buckley spoke with most of the callers.

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[25] Although Ms. Mannix repeatedly referred to the certifications of Assistant Prosecutor Buckley, this court is satisfied Ms. Mannix had sufficient personal knowledge and involvement concerning both the 2017 and 2019, and the circumstances surrounding them.

The testimony of Tracey Mannix was credible and, as noted, contained sufficient personal knowledge of the facts she provided.

12. Brian Gillet

Brian Gillet was called as a witness by the State. Mr. Gillet worked as an Assistant Prosecutor at the Middlesex County Prosecutor's Office from January 2005 until November 30, 2021. His testimony is contained in T7, the April 27, 2023 Transcript, on pages 7-89. Currently, he works part-time for that office, assigned to the Megan's Law Unit. In 2016, he was one of two Deputy First Assistant Prosecutors, and his duties included overseeing a number of trial teams, appellate cases, and various special investigations. He was also the Office's Municipal Prosecutor Liaison and, in that capacity, fielded questions from municipal prosecutors, conducted training programs, and held yearly meetings with them on various issues. Frances Mondi of the Middlesex County Prosecutor's Office was his Administrative Assistant, and Robert Scalitti of that Office worked in the Appellate Section performing clerical duties. Ms. Mondi left the Office in January 2020.

With respect to issues concerning Sergeant Dennis, Mr. Gillet recalled receiving information from the Attorney General's Office in September 2016, informing his Office that there were a number of calibrations of Alcotest Instruments that had been performed by Sergeant Dennis in Middlesex County

being called into question due to the filing of criminal complaints filed against Dennis. He recalls being asked by the Attorney General's Office as to whether any defendants were incarcerated from convictions for DWI where Sergeant Dennis had calibrated an Alcotest Instrument utilized in their cases.

Mr. Gillet testified his Office was unable to determine whether defendants identified as having a DWI conviction, and who were incarcerated, also had other, non-DWI convictions, so his Office decided to send direct notification letters to all counsel where their clients were currently incarcerated, had a DWI conviction, and were breath-tested on an Alcotest Instrument calibrated by Sergeant Dennis. Contained within Exhibit S-2 is a copy of an email, dated September 30, 2016, from Mr. Gillet to Assistant Prosecutors in Monmouth, Ocean, Somerset and Union Counties, stating:

> We recently learned that out of the 307 individuals who were issued tickets on Alcotest machines allegedly calibrated by Dennis after 7/1/15, five are incarcerated in our workhouse, some perhaps on other charges not related to DWI. We have determined to make direct notifications to their attorneys so they can make the motions they deem necessary in light of the criminal charges now, rather than later. I enclose a copy of the letter that will be forwarded today. Please feel free to use the letter as you see fit.

Mr. Gillet testified the form notification letter attached to that email was sent to counsel for all defendants incarcerated, who had been charged with a DWI

offense based, in part, on the results from an Alcotest Instrument calibrated by Sergeant Dennis.

Exhibit S-2 contains an email, dated October 7, 2016, from Stephanie Kurowsky, Administrative Assistant to Andrew C. Carey, the Middlesex County Prosecutor, to the Sayreville Municipal Court, copying Mr. Gillet, advising of the criminal complaints filed against Sergeant Dennis, and attaching a list of all DWI arrests between June 1, 2015 and the date of that email, resulting in convictions and the current incarceration of the listed defendants. The email states that all defendants, through counsel, have been notified of the charges filed against Sergeant Dennis, and that any further information would be sent to that court, when available.

DAG Rachuba, who was conducting the direct examination of Mr. Gillet, showed him Exhibit S-139, an undated certification executed by Francine Mondi, provided in discovery. Mr. Gillet stated he had reviewed S-139, was familiar with its contents, and confirmed the procedures and actions taken that are contained in Ms. Mondi's certification. As noted, he identified Ms. Mondi as his former Administrative Assistant, with whom he worked on issues relating to the conduct of Sergeant Dennis and the Cassidy case.

In that certification, Ms. Mondi states the Attorney General's Office sent their Office an Excel Spreadsheet containing the names of 5,013 potentially-

impacted DWI cases, and that, on October 2, 2016, she assisted Mr. Gillet in sending an email to all municipal prosecutors in Middlesex County, asking whether they were aware of any defendants who were incarcerated as the result of an Alcotest Instrument calibrated by Sergeant Dennis, requesting form notification letters be sent to them. Her certification states no one advised of any defendants so incarcerated. Ms. Mondi's certification goes on to states that in reviewing the Spreadsheet containing 5,013 names, she discovered numerous duplicate entries and she assisted in the mailing of notification letters to just over 4,815 potentially-impacted defendants. Mr. Gillet was also shown Exhibit S-47, which he identified as the first letter sent in 2017, but noted that the date contained thereon, January 25, 2023 is wrong and in error, and it should contain a date in 2017. Ms. Mondi's certification states 818 of those letters were returned as being undeliverable and, due to a lack of forwarding addresses for most of them, and the illegibility of forwarding addresses for some, the Middlesex County Prosecutor's Office did not attempt to find more updated addresses for those returned letters and, instead, removed those names and addresses from its list of letter recipients.

Mr. Gillet stated after the Court issued its decision in State v. Cassidy, his Office was contacted by the Attorney General's Office. Exhibit S-8 contains an email, dated December 14, 2018, from DAG Mitchell to, among

others, Mr. Gillet and Middlesex County Prosecutor Andrew Carey, attaching a form notification letter, under the signature of SDAG Robert Czepiel, requesting that letter be sent to the individuals identified on the previous Excel Spreadsheet sent to them as having provided breath samples on Alcotest Instruments calibrated by Sergeant Dennis. Exhibit S-80 contains a copy of the second form notification letter, under Mr. Czepiel's signature, which is dated January 24, 2019. That letter contains, inter alia, the following information concerning the Court's decision in Cassidy:

> The Court found that the sergeant's failure to follow the established protocol adversely affected the scientific reliability of breath tests taken on Alcotest Instruments calibrated by him, and ruled that the results from those instruments are inadmissible in court. **Therefore, if you gave a breath sample on an Alcotest instrument calibrated by this sergeant, the results of those breath tests cannot be used as evidence in your DWI case, and you might be entitled to post-conviction relief.** The Administrative Office of the Courts will be setting up procedures for those potentially affected individuals to seek post-conviction relief. Until such time that these procedures are established, you may contact the municipal court where your case was handled if you believe that you might be entitled to relief. You may consult with a private attorney or municipal public defender, if available, to determine whether you are entitled to relief and/or what action if any you should take.

Upon reviewing Exhibit S-17, Mr. Gillet testified his Office mailed SGAG Czepiel's January 24, 2019 form letter to the 4,815 individuals noted in

Ms. Mondi's certification, which was attended to by Daniele Guerrero of their Office. Referring to Exhibit S-110, Mr. Gillet testified that 1,106 of the those 4,815 mailed notification letters were returned as being undeliverable. Although he was not personally aware of what was done with those 1,106 returned letters, Mr. Gillet stated his Office would have followed the same procedures as it did with the 2017 mailed notification letters, but he was aware that those returned letters that were not mailed back out to any forwarding addresses were placed in the same box as those that were undeliverable from the 2017 mailing. On questioning by the court, Mr. Gillet confirmed that the box containing those undeliverable notification letters is still in the possession of the Middlesex County Prosecutor's Office

Mr. Gillet testified further that the Office of the Attorney General did not advise his Office that any additional steps should be taken concerning obtaining updated addresses for those 2017 or 2019 letters returned as undeliverable, but were told to keep them and put them in a box, which was done by his Office.

In her certification, Ms. Mondi states, following the mailing of the notification letters, she personally answered dozens of telephone calls and emails from potentially-impact defendants and their attorneys, and would check the Excel Spreadsheet containing the 5,013 names and provide them

with the information contained in the form notification letter. He testified he also answered numerous telephone calls concerning Sergeant Dennis and the Cassidy matter. Mr. Gillet stated his Office also developed a "script" to be used during these telephone calls or email inquiries, contained in Exhibit S-111, which is, as follows:

> Please be advised that aside from the letter you received, you can check out website http:www.middlesexcountynj.gov/Government/Departments/PHS/Prosecutor/Pages/main.espx for further information. The Middlesex County Prosecutor's Office cannot provide any legal advice concerning either State v. Cassidy or Sgt. Marc Dennis. You must contact your own attorney. Thank you.

Ms. Mondi also certified the Middlesex County Prosecutor's Office established a page on its website containing a copy of the notification letters, and links to the Cassidy decision, applicable Court Rules, the websites of the Attorney General, the Court, and the Middlesex County Bar Association for additional information. Mr. Gillet confirmed that information, as well.

Mr. Gillet also identified Exhibit S-84 as the Excel Spreadsheet, entitled "Spreadsheet from AOC_Middlesex County Only" as the one that had been prepared by the AOC, derived from Exhibit S-91, and sent from the DCJ to the AOC to find Addresses for Subjects listed therein, which consists of 2 Sheets, as follows: (1) Full Subjects-to-Address Matches, 5,012; and (2) Partial

Subjects-to-Address Matches, 215, which was sent to his Office for the mailing of the notification letters.

On cross-examination by Mr. Hernandez, Mr. Gillet stated his Office made no effort search the Automated Traffic System (ATS) for the name of the individuals identified in Exhibit S-84 in order to identify the names of attorneys that may have represented those individuals so that counsel could be notified. He noted his Office was not asked by the Attorney General's Office to search ATS. As to defendants who were incarcerated, Mr. Gillet stated that in September 2016, his Office identified individuals who were incarcerated and sent notice to their attorneys.

Th testimony of Mr. Gillet was credible and consistent with the testimony of the representatives of the other Prosecutors' Office.

13. Donna Prestia

Donna Prestia, Chief Clerk of the Ocean County Prosecutor's Office was called as a witness by the State. Ms. Prestia's certification, dated January 5, 2023, was identified as Exhibit S-41. Ms. Prestia has retired from that position as of April 1, 2023, having worked in the Ocean County Prosecutor's Office for almost thirty-two (32) years. The testimony of Ms. Prestia is contained in T7, the April 27, 2023 Transcript, at pages 93-129.

Ms. Prestia confirmed that in the fall of 2016, their Office was notified of the criminal charges that were filed against Sergeant Dennis. In an email dated September 26, 2017 (see Exhibit B to Ms. Prestia's certification), DAG Mitchell of the Attorney General's Office sent an Excel Spreadsheet to former Assistant Prosecutor Kim Pascarella of their Office, containing the names and addresses of individuals potentially affected by the alleged misfeasance of Sergeant Dennis. See Exhibit S-86.[26] DAG Mitchell's email referred to a form "Sgt. Dennis notice letter" sent to Mr. Pascarella the day before, and Mr. Pascarella was requested to mail that form letter, which is Exhibit A to Ms. Prestia's certification, to the names and addresses contained on the Excel Spreadsheet by not later than December 15, 2017. Ms. Prestia was given the Spreadsheet by Mr. Pascarella and he requested her to prepare and mail that form letter, which is dated September 25, 2017, to the names and addresses contained on that Spreadsheet. DAG Mitchell's email noted Exhibit S-86 contained 298 exact subject-to-address matches on Sheet one, and 26 partial subject-to-address matches.[27]

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[26] Exhibit B to Ms. Prestia's certification is also Exhibit S-24A.

[27] Sheet 1 of Exhibit S-86 actually contains 299 exact subject-to-address matches, although there are some duplicate subjects listed, based on different ticket numbers. See, e.g., Rows 2 & 3; 5 & 6; 22 & 23; 90 & 91; 100 & 101; 109 & 110; 265 & 266. Sheet 2 actually contains 27 partial subject-to-address matches.

Referring to her certification, Ms. Prestia stated she prepared, and caused to be mailed, by regular mail, 310 form notification letters to the names and addresses on the Excel Spreadsheet. She accounted for the difference in the numbers contained on both sheets of Exhibit S-86, and the 310 mailings, based on the existence of duplicate Subject Rows. Exhibit C to Ms. Prestia's certification contains a copy of one of letters she caused to be mailed, which is dated October 2, 2017, under the signature of Ocean County Prosecutor Joseph D. Coronato. Mr. Prestia stated following that mailing, there were a number of calls concerning same received by the Office, and she left a copy of the form letter with the Office's receptionist so she could guide the callers accordingly.

Referring again to her certification, Ms. Prestia testified approximately 73 letters were returned as undeliverable, of which 17 contained forwarding addresses. She then re-mailed those 17 letters to the forwarding address provided. She testified that, to her knowledge, their Office did not received any instructions from the Attorney General's Office concerning how to handle letter returned as being undeliverable and, other than re-mailing the 17 letters with forwarding addresses, their Office did nothing further to ascertain any additional address information.

Ms. Prestia testified further that in late 2018, following the Court's decision in State v. Cassidy, the Ocean County Prosecutor's Office was again

contacted by the Office of the Attorney General, requesting a second notification letter be mailed to the subjects, and their addresses, as contained on the same Excel Spreadsheet in Exhibit S-86. Exhibit D to Ms. Prestia's certification is a copy of that form notification letter, which is dated December 19, 2018. As requested, Ms. Prestia then prepared the letter, and sent it to the subjects and addresses in Exhibit S-86 by regular mail. Exhibit E to her certification is a copy of one of the form notification letter mailed. Referring to her certification, Ms. Prestia testified she mailed 326 letters, and accounted for the mathematical difference between that number and the 310 first, 2017 mailing, stating "[t]he only discrepancy I can think of is I did not catch the duplicate names on the list this time." T7, page 109, lines 6-7.

Ms. Prestia testified that 82 of those December 19, 2018 letters were returned by the Post Office as being undeliverable, of which 13 contained forwarding addresses, which were then mailed back to the forwarding addresses of those subjects. Notably, Ms. Prestia stated the Ocean County Prosecutor's Office has retained both the 2017 and 2018 envelopes and letters that were returned by the Post Office as being undeliverable.

On cross-examination, Ms. Prestia testified her Office made no attempt to determine whether any of the subjects listed on two Sheets of the Exhibit S-

86 Excel Spreadsheet were represented by attorneys or whether any of them were incarcerated.

With regard to telephone calls received following the mailings, Ms. Prestia stated no legal advice was given and, essentially, the callers were told the same information contained in the form notification letters. If someone called whose name was not on the list, she stated they were referred to the Attorney General's Office. On cross-examination by Mr. Noveck, Ms. Prestia was referred to pages 8 and 9 in Exhibit S-24, which is an email from Mr. Pascarella to DAG Mitchell dated October 6, 2017, to which she was copied, stating "Ocean [C]ounty letters have been mailed (a lot coming back undeliverable). Do you need any type of affidav[it] of mailing from our staff? We are keeping a file[.]" However, Ms. Prestia did not know whether there was ever a response to that email.

The testimony provided by Ms. Prestia was credible. As with the other witness concerning the notification mailings. Her Office received no instructions concerning the handling of both notification letters returnable as being undeliverable. However, with all but the Monmouth Cunty Prosecutor's Office, notification letters returned as being undeliverable have been retained.

B. Witness on Behalf of *Amicus*, New Jersey State Bar Association

1. John Joseph Dell'Aquila

John Joseph Dell'Aquilo was called as a witness by the New Jersey State Bar Association. His testimony in contained in T5, the April 25, 2023 Transcript, at pages 179-250, and in T8, the June 12, 2023 Transcript, on pages 7-111. Mr. Dell'Aquila was employed by the Cherry Hill Police Department as a patrol officer in March of 1976. He was also attending Stockton University, graduating with Bachelor's Degree in Criminal Justice in 1978. He was trained and certified as an operator on the Breathalyzer 900 and 900-A, and participated in numerous DWI cases, either as the arresting officer, a back-up officer, or as Breathalyzer Operator. When he retired from the Cherry Hill Police Department in 2004, he had attained the rank of Lieutenant. At the time of his retirement, he was the Department's Director of Internal Affairs.

In 1986, while still employed by the Cherry Hill Police Department, Mr. Dell'Aquila began attending Rutgers Law School in its evening program, graduating with a Juris Doctor degree in 1990. Immediately following his retirement from the Cherry Hill Police Department in 2004, he was employed by the Division of Criminal Justice within the New Jersey Attorney General's Office, as a Deputy Attorney General (DAG), where he worked until 2011.

As a DAG, Mr. Dell'Aquila was assigned to the Prosecutor's Supervision and Coordination Bureau. He explained that Bureau works with, supervises and coordinates with prosecutors. He worked largely with issues concerning municipal prosecutors, and on some traffic safety issues. Mr. Dell'Aquila is a member of the New Jersey Aggressive Driving Task Force, working with a number of State agencies, including the New Jersey Division of Highway Traffic Safety. He also worked with the Traffic Safety Bureau, the Information Technology Bureau and the Alcohol and Drug Testing Unit of the New Jersey State Police. While a DAG, Mr. Dell'Aquila also served as the Attorney General's representative on the New Jersey Supreme Court Municipal Court Rules Committee.

Mr. Dell'Aquila explained that when he began his employment as a DAG, State v. Foley, 370 N.J. Super. 341 (Law Div. 2003) had been recently decided concerning the scientific reliability of the Alcotest 7110 MKIII-C, and he, thereafter, participated in State v. Chun, 194 N.J. 54 (2008), as one of the Deputy Attorney Generals representing the State, resulting in the Court finding that the Alcotest MKIII-C with New Jersey firmware version 3.11 was sufficiently scientifically reliable. In connection with that representation, he was responsible for coordinating all discovery, working with expert witnesses and preparing witnesses for the hearings that were conducted.

In terms of special training, while a DAG, Mr. Dell'Aquila completed a two-day Draeger Safety Diagnostics, Inc. Operator Training and Preventive Maintenance course on the Alcotest 7110 MKIII-C. Exhibit DB-20 is a Certificate issued by Draeger Safety Diagnostics, Inc., dated October 28, 2004, concerning his successful completion of that Course, which states:

> Completion of this course qualifies this individual to train and certify Operators in the proper use and operation as well as perform Preventive Maintenance on the New Jersey specific Alcotest 7110 MKIII-C.

Mr. Dell'Aquila also testified he attended and successfully completed the five-day course at the Borkenstein School on Alcohol and Traffic Safety at Indiana University.

Mr. Dell'Aquila explained to become certified as a Breath Test Coordinator, both the Draeger two-day course and the Borkenstein five-day course must be attended and successfully completed. He testified that for a police officer to become certified as an Alcotest Operator, the officer had to complete a four-day course and, if previously certified as a Breathalyzer Operator, there was a shorter, one-day conversion course, converting a certified Breathalyzer Operator into a certified Alcotest Operator. However, Mr. Dell'Aquila explained he was not certified as an Alcotest Operator because only a sworn police officer can become certified as such.

During most of his time as a DAG, Mr. Dell'Aquila stated part of his duties involved working with the ADTU in assuring that a candidate for becoming a certified Breath Test Coordinator had all the necessary training and paperwork requirements to submit to the Attorney General for approval.

Mr. Dell'Aquila recalled that he left the Attorney General's Office at the end of June in 2011, and about six month later began working for law firms on the defense side of Driving While Intoxicated issues, initially for a short time with Levow DWI Law, P.C., and then become employed, in April 2012, with Helmer, Conley & Kasselman, P.A., a law firm with several locations throughout the State, that handles, inter alia, the defense of Drunk Driving cases. He became a practicing defense attorney, appearing in Municipal Courts throughout the State, representing clients in various matters, including those charged with DWI. During such representations, he would frequently access the Alcotest Inquiry System database for information concerning his clients' cases.

Mr. Dell'Aquila testified he has participated in various continuing legal education programs as an instructor on DWI issues for the New Jersey Institute for Continuing Legal Education (ICLE), the Garden State Continuing Legal Education, and the New Jersey Association for Justice. He was also an Adjunct Professor at Camden County Community College and Rowan University.

In discussing the workings of the Alcotest 7110 MKIII-C Instrument, Mr. Dell'Aquila explained the components of an Alcotest Instrument consist of the Instrument itself, a CU-34 Simulator, the Simulator Solution, the Temperature Probe, a Printer and a Keyboard. He described the CU-34 Simulator as a component that consists of a jar, containing the Simulator Solution in its lower portion, and a Lid, which has a Heater, an Agitator and a Portal. He explained that the heater is designed to heat the Simulator Solution to a temperature of 34 degrees Celsius, plus or minus two degrees. He stated the Agitator is intended to keep the water-ethanol Solution homogenous, and the Portal is a hole in the Lid through which the Temperature Probe is inserted that reads the temperature of the Solution. Mr. Dell'Aquila testified the Temperature Probe is plugged into the back of the Alcotest Unit to allow the Instrument to determine the temperature of the Simulator Solution. When heated, the Solution creates a "head space vapor" that must contain a 0.10% Blood-Alcohol Content (BAC) to be operable.

Mr. Dell'Aquila testified part of the Calibration of an Alcotest Instrument is the conducting of a Control Test, and a recalibration of every Alcotest Instrument must be completed every six (6) months. In a Control Test, a sample of the Standard Solution is heated and the vapor created is measured to determine whether the 0.10% BAC reading has been obtained. He

noted the Alcotest Instrument uses two separate technologies in taking the measurement, consisting of Infrared (IR) technology, and Electrochemical (EC) technology. During the calibration process, the Instrument performs a Linearity test, which is a function similar to that of the Control Test, but instead of one Simulator Solution, three different Simulator Solutions are utilized to generate a head space vapor at a strength of 0.40%, 0.80%, and 0.160% BAC, measured by both the IR and EC technologies. He stated all of the results of those tests are stored in the Instrument and then printed out in the form of a report, and that stored data is periodically uploaded from each Alcotest Instrument onto the Alcotest Inquiry System database.

Mr. Dell'Aquila testified the uploaded data can be extracted from the database into an Excel Spreadsheet in the form of 310 Columns of information, including the IR and EC measurement results, the time each breath sample is taken, the duration of the blowing of that sample, the start of the time of the blowing, the end time of the blowing, the identifying information of the subject being tested, any error message, the end result, and other information regarding the specific breath test conducted.

Mr. Dell'Aquila was shown the last two pages of Exhibit DB-5, which is an actual Alcohol Influence Report (AIR), with the name and Driver's License number of the subject tested, and the name of the Police Department, redacted.

He confirmed the "Subject" portion of the AIR, containing identifying information of the subject's name, date of birth, gender, height, weight and driver's license number, are fields that are manually entered by the Operator conducting the test, except the "age" is calculated by the Instrument based on the date of birth that is entered. Additionally, all the fields in the "Arresting Officer" section of the AIR are entered manually by the Operator. With respect to the "Instrument" portion of the AIR, although unsure whether the "Serial No." field is entered manually by the Operator, Mr. Dell'Aquila stated the "Location" field would also be entered manually. He noted the middle columns in the Instrument portion of the AIR include the calibration date and solution change date of the Instrument, and the columns to the right of the middle column record how many times the corresponding procedure was done.

Referring to the "Breath Test Information" section in the AIR, Mr. Dell'Aquila explained the operations performed by the Alcotest Instrument are an "Ambient Air Blank," a "Control Test," another "Ambient Air Blank," and then "Breath Test" results, including the EC and IR results, and then another "Ambient Air Blank" prior to the next "Breath Test." He stated that for a breath test result to be admissible, there must be at least two valid breath samples accepted and analyzed by the Instrument. He noted that up to eleven (11) attempts are permitted to provide those two acceptable breath samples.

He explained the breath sample must have a minimum volume of 1.5 liters, produced at a flow rate of 2.5 liters per minute, and must be provided for at least 4.5 seconds, and has to reach the plateau, to be acceptable. He stated that in chemical breath testing, the goal is to obtain the deepest, long air because it most closely approximates the amount of alcohol in the blood, explaining it further, as follows:

> So as a breath presentation is given, it will generally start off low and they call it the breath test curve. It will generally start off low because if you think about blowing into any kind of device, the first thing you do is take a deep breath. You blow in that initial air [which has] less alcohol in it because you sort of purged your mouth and your upper-respiratory system.
>
> As you blow, the level goes up and over time, it continues to climb a gradual curve. At some point in time, you've reached that bottom level that you could achieve and that's called the plateau. And I believe the Alcotest is looking for a plateau when the . . . alcohol content doesn't go up by more than 1 percent in one quarter-second, then it assumes that it has leveled off.
>
> Truly, my understanding is from what [I learned] is that it never truly levels off but it gets to a plateau where it's pretty much level and that's that 1 percent in a quarter-second.
>
> [T5, page 221, line 17 to page 222, line 11.]

Mr. Dell'Aquila explained there are "blowing errors" and errors produced by the Instrument that abort the test and become reported as a final

error. One of the blowing errors he discussed was "Minimum Volume Not Achieved," which is recorded by the Instrument when the subject fails to blow a minimum volume of 1.5 liters of air. He noted that, as per the Court's decision in Chun, women over the age of 60 are only required to blow a volume of 1.2 liters of air, although Alcotest Instruments were never re-programmed to adjust for that difference.

With respect to the blowing error, "Ready to Blow Expired," he explained once the Instrument is ready to accept a breath sample, that sample must be collected within three (3) minutes. If it is not provided within that time period, the Instrument will automatically display that error message. Referring to the sample AIR on page 16 of Exhibit DB-4, the User Manual of the Alcotest MKIII-C, as to the error message "Blowing Time Too Short," Mr. Dell'Aquila stated the subject is required to blow a breath sample into the mouthpiece for a duration of at least 4.5 seconds. Anything shorter, will result in the Instrument generating that error message.

Again referring to that sample AIR on page 16, Mr. Dell'Aquila stated the error message, "Blowing Not Allowed" is generated by when the subject attempts to blow into the mouthpiece before the Instrument is ready to accept the breath sample. He noted that error message can also occur when the subject keeps blowing into the mouthpiece, takes a second breath and starts

blowing again. Referring to page 17 (the second page of that sample AIR on Exhibit DB-4), Mr. Dell'Aquila stated the error message "Blowing Time Too Long" is rare and, although he was unable to state the maximum time that is permitted, he testified that error appears when the subject blows for too long a period of time. He noted he has never seen that error message occur during an attempted breath test.

In discussing these blowing errors, Mr. Dell'Aquila explained when these errors occur, the Operator of the Instrument can continue to require the subject to attempt to provide additional breath samples up to a total of eleven (11) attempts. He also stated where a subject provides one valid breath sample that produces a BAC reading, but there are no further breath samples obtained, the Alcotest Operator has the option of either pressing the "Refusal" or the "Test Terminated" entry button on the Instrument, and the AIR would report the "Test Result" as either "Subject Refused" or "Test Terminated." He testified:

> Test Terminated is supposed to be used when some breath sample attempt has been made. You know, these would be examples of that where somebody blew but they didn't blow enough, they didn't blow long enough, some other issue but they actually presented a breath sample at some level.
>
> [T5, page 231, lines 1-6.]

Mr. Dell'Aquila testified that when he was a DAG, and while in the private practice of law, he has seen instances where Alcotest Operators use the option "Subject Refused" and "Test Terminated" interchangeably.

In discussing errors generated by the Instrument that prohibit any further attempts to provide a breath sample, Mr. Dell'Aquila identified "Control Test Failed." He explained that prior to and at the end of a testing sequence, during a Control Test, the Instrument will draw in the heated vapor and if its measurement of that vapor is not between 0.095 and 0.105 BAC, the "Control Test Failed" message will appear, and the breath test will be aborted.

Mr. Dell'Aquila also testified the message "Control Gas Supply Error" is generated normally where there is a leak in, or a disconnection of, the neoprene hose connecting the CU-34 Simulator to the back of the Instrument. He also stated that the message "Ambient Air Check Error" is produced by the Instrument when it detects that the room air contains some alcohol or other substance. He stated the error message of "Interference" is generated by the Instrument when some other substance, other than ethanol, is detected, such as cleaning fluid. Mr. Dell'Aquila testified the error message "Purging Error" results where the Instrument does not completely purge or blow out the air it has sucked in, stating it could be the result of a mechanical error or where some residual of ethanol remains. With respect to the error message, "Out of

Measuring Range," he stated he has never seen that message, but explained that the Instrument only measures BAC to a certain level. Although unsure what that level is, he stated if the subject's breath sample was analyzed beyond that level, that message would be generated.

On direct examination, Mr. Dell'Aquila was also asked to explain the error message "Test Outside +/- Tolerance." He stated the difference, or tolerance, between the BAC reading generated by the EC and the IR results must be close together and if they are not, the Instrument will generate that error message and the test is aborted. He also testified the error message "Simulator Temperature Error" occurs if the Instrument detects that the Simulator temperature is not 34 degrees Celsius, plus or minus 2 degrees, and therefore would not create the proper vapor.

The court notes those, and other, error messages generated, automatically cause the breath test to be aborted and are listed on page 18 of Exhibit DB-4.

Mr. Del'Aquila then was asked to address the deletion by DAG Mitchell of those Subject Rows in Exhibit S-90 (also Exhibit S-148), where Column T (Final Error) reported that the "Subject Refused" and no BAC reading was thereby reported in Column U (End Result). He testified in such circumstances, without being able to obtain and review all 310 Columns of

information available, it cannot be determined from the 21 Columns contained in those Excel Spreadsheets whether those deleted subjects provided any breath sample or, if so, how many tests were attempted, what the results were, or whether there was a verbal refusal to take the test. Additionally, it cannot be determined whether any women over age 60 provided a breath sample with a volume of less than 1.5 liters. In other words, he explained the actual basis for the conclusion that the subject refused cannot be determined from the 21 Columns contained on Exhibit S-90 (also S-148).

On questioning by Mr. Gold, Mr. Dell'Aquila testified he is presently "Of Counsel" with the Helmer, Conley & Kasselman law firm, with which Mr. Gold and Mr. Troso are affiliated. He explained he is currently on a "Sabbatical" from the firm due to various medical issues.

Mr. Gold displayed Exhibit DB-32 for Mr. Dell'Aquila, which is a color photograph of a CU-34 Simulator.[28] Mr. Dell'Aquila described the CU-34 Simulator as follows:

> Well, this simulator has several parts to it. The bottom part is essentially the glass jar, that holds liquid. The top part . . . has a heating element in it as well as an agitator in it to keep the solution mixed. The heater has a heating element that goes down into it. It also has . . . in this particular one, it has a temperature probe

[28] The Transcript, T8, page 12, line 5, refers to that Exhibit as DB-4, which is incorrect.

> inserted into it. That's a coil wire that goes up and then it comes back down.
>
> Then the tube on the top is just the tube that would normally hook into the back of the Alcotest where a pump inside the Alcotest blows air into the mechanism. . .
>
> * * * *
>
> [T]hat tube . . . basically takes air pumps from the Alcotest into the simulator. Then there's a shorter tube that hooks in, that actually hooks in and takes the gas out of the simulator into the Alcotest.
>
> [T8, page 12, line 24 to page 13, line 21.]

He explained the CU-34 Simulator heats the ethanol alcohol solution in the bottom part of the jar to 34 degrees Centigrade so it produces a vapor that stays in the upper, head space of the jar so that it simulates human breath at a BAC reading of 0.10%. Then, that vapor is pumped into the Alcotest Instrument at the beginning and at the end of the process. He stated in order to achieve that simulated BAC reading, there must be a proper concentration of ethanol alcohol in the simulator solution, and that concentration has to be heated to a temperature of 34 degrees Centigrade, plus or minus .2 degrees. If those two conditions do not exist, an inaccurate sample will be pumped into the Alcotest.

Referring to page 11 of Exhibit DB-4, the Alcotest 7110 MKIII-C User Manual, entitled "Test Data," Mr. Dell'Aquilla testified when the Instrument

displays “Ready,” the Operator presses the “orange” start button, and manually enters the data set forth in prompts listed in the large, boxed-in, fields listed on that page. After entering the data in those fields and, if desired, reviewing the entered date, the Operator then presses the “N” button to proceed, whereupon the Instrument will run a “Control Check,” with the Instrument displaying and completing, the following sequences:

Purging
Ambient Air Check
Air Blank Check
Control Check
Purging
Ambient Air Check
Air Blank Check

Mr. Dell’Aquila explained the purpose of those tests is to check to make sure the Instrument is reading properly. If no error occurs, the Instrument is ready to receive a breath sample and conduct the breath test.

Mr. Gold, then showed Mr. Dell’Aquila an excerpt from the testimony of DAG Mitchell on March 28, 2023, in T4, at page 127, line 17 to page 128, line 1, which reads as follows:

> Q. Well, in other words, if we start with the proposition that the control test is basically the machine simulating a human breath, taking you know a whiff of the simulator to see if its running properly, temperature is very important to the control test as well as the [later] human test, correct?

> A. Yes because if it's - - well, if it's not hitting the right temperature, then it's not going to give the correct vapor to get the correct alcohol reading.

Mr. Dell'Aquila testified he basically agreed with the response provided by DAG Mitchell, stating further if the calibration of an Alcotest Instrument was not properly done, by not using an NIST-traceable thermometer, then all the functions thereafter would be potentially incorrect. Upon further questioning, he stated none of the Control Tests conducted on an Instrument calibrated by Sergeant Dennis could be relied upon.

Regarding use of an Alcohol Influence Report (AIR) produced by an Alcotest Instrument, Mr. Dell'Aquila testified it routinely is admitted into evidence in the prosecution of a DWI case as evidence of a per se violation of N.J.S.A. 39:4-50(a), and can also be used as evidence in refusal prosecution under N.J.S.A. 39:4-50.4a(a).

Mr. Gold also displayed for Mr. Dell'Aquilo, Exhibit DB-15, which is the excerpt of a quote from State v. Chun, 194, N.J. 54, 104-05 (2008), which reads:

> Our conclusion is that the firmware must be revised to accept a minimum breath volume sample of 1.2 liters from women over the age of sixty requires us to consider the impact of this directive for pending prosecutions. In light of the scientific evidence that we have found to be persuasive, in the absence of some other evidence that supports the conclusion that any such individual was capable of providing an

> appropriate sample, by volume, we must assume that she was unable to do so. For these individuals, then, an AIR demonstrating insufficient breath volume may not be used as proof of a charge of refusal. On the other hand, if the AIR demonstrates that a woman over the age of sixty was able to provide at least one sample that was deemed to be sufficient for purposes of the 1.5 liter volume requirement, but she failed to do so on a subsequent attempt, the AIR demonstrating those facts may be utilized as evidence, albeit not conclusive proof, in support of a refusal charge.
>
> [Emphasis added.]

Mr. Dell'Aquilo testified in this quote from Chun, the Court recognized that except for these qualifications, the AIR can be admitted into evidence in a refusal prosecution.

Mr. Gold also displayed Exhibit DB-16 for Mr. Dell'Aquila, which is the following excerpt from State v. Tischio, 107 N.J. 504, 522 (1987):

> Accordingly, we hold that the statute prescribes an offense that is demonstrated solely by a reliable breathalyzer test administered within a reasonable period of time after the defendant is stopped for drunk driving, which test results in the prescribed blood-alcohol level.
>
> [Emphasis contained in Exhibit DB-16.]

Mr. Dell'Aquila agreed where there is an issue whether the breath test was administered within a reasonable time after the defendant is stopped, the AIR would be admissible to demonstrate the time of the arrest and the times the breath tests were administered. He stated in a "reasonable time" issue, this

would be particularly important if an attempt to test the defendant in one location was unsuccessful and the defendant was then transported to another location for additional breath testing. However, he stated if one or more of those Alcotest Instruments had been calibrated by Sergeant Dennis, the resulting AIR, containing those times, would not be reliable.

On cross-examination concerning his employment status, Mr. Dell'Aquila stated he is not formally retired, and the agreement with the Helmer, Conley and Kasselman law firm is he would be placed on a sabbatical leave due his medical issues. He currently performs no work for the firm while on the sabbatical and receives no payment except some money is paid to him for cases he brought to the firm. He testified he is unsure whether he will return to work in the future, or formally tender his resignation.

In terms of his familiarity with the Alcotest MKIII-C, Mr. Dell'Aquila stated he was never certified as an Alcotest Operator but did learn how to operate it from the courses he took and from his participation as one of several counsel for the State in the State v. Chun litigation. On further questioning, Mr. Dell'Aquila acknowledged nothing a Coordinator does when performing the calibration of an Alcotest Instrument is intended to change any of the Instrument's sensors that measure the breath volume or breath time. He also stated he has not performed calibrations on Alcotest Instruments and did not

take the four-day training course for Alcotest Operators offered by Draeger, nor has he ever engaged in the repair of Alcotest Instruments. When asked what facts support a claim that the calibration of an Alcotest Instrument by Sergeant Dennis without use of an NIST-traceable thermometer produces errors that result in the absence of a BAC reading, Mr. Dell'Aquila stated:

> We spoke about that, we were looking at what data needed to be provided and what notice needed to be given. Some of the alcohol reports that were not given, that list of however many, may have data regarding breath samples that were provided which could be exculpatory in a refusal offense, or could provide other evidence related to an instrument - - a test performed by another instrument.
>
> [T8, page 98, lines 7-14.]

On further questioning by Mr. Gold, Mr. Dell'Aquila stated he was receiving no compensation for his testimony in this matter.

The testimony provided by Mr. Dell'Aquila was credible to the extent of his experience and familiarity with the operation and working of the Alcotest MKIII-C Instrument. However, he was not presented or qualified as a witness who could provide expert testimony to address the issue of whether the failure of a Coordinator to utilize an NIST-traceable thermometer in the calibration procedure would result in the Instrument malfunctioning, and generating error messages that could result in the Operator reaching the conclusion that the individual being tested had refused to comply with the Implied Consent

Statute. No competent evidence has been provided that would sustain the position asserted by *Amici* and Defendant-Respondent that Alcotest Instruments calibrated by Sergeant Dennis, presumably without the use of an NIST-traceable thermometer, would cause the firmware sensors of the Instrument to be unable to accurately detect the sufficiency of breath samples provided, or cause other Error Messages to occur. If a Control Test fails, the testing process is aborted, which has nothing to do with the behavior of the subject about to be tested, nor it is it relevant to the issue of a Refusal.

## V. ARGUMENTS AND ISSUES PRESENTED.

Following conclusion of the plenary hearing, on July 17, 2023, counsel for the parties and *amici* submitted the following proposed findings, conclusions and recommendations.

### A. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RECOMMENDATIONS BY THE STATE OF NEW JERSEY:

#### POINT I: ONLY THOSE PERSONS WHOSE BREATH TESTS PRODUCED BLOOD ALCOHOL CONCENTRATION END RESULTS WERE ENTITLED TO GET NOTICE OF THE CASSIDY DECISION.

##### A. Cassidy Granted the Right to Seek Post-Conviction Relief Only to Those Individuals With Per Se DWI Convictions on Alcotest Instruments Calibrated by Dennis.

B. Defendants Convicted of Refusal Always Had the Right, and Ability, to Challenge the Evidence of Their Alleged Violation.

C. The Use of Evidence For One Purpose, Even If It Lacks Sufficient Reliability For Admission For a Different Purpose, Is Not Unique to This Circumstance.

D. To the Extent His Testimony Was Relevant, NJSBA's Witness Confirmed This Analysis of This Issue.

POINT II: ALL RELEVANT FACTS REGARDING THE REASONABLENESS OF A DETENTION WERE KNOWN WHEN THOSE CASES WERE RESOLVED.

POINT III: THE FIVE PRIMARILY AFFECTED COUNTIES PROVIDED SUFFICIENT NOTICE TO POTENTIALLY IMPACTED DEFENDANTS.

RECOMMENDATIONS:

1. Identified Individuals to Whom Notice Was Ever Attempted to Be Delivered.

2. All Persons Who Have Not Yet Filed Petitions For Post-Conviction Relief.

3. State Objections to Recommendations of NJSBA and OPD:

A. General Objections.

B. Objections to Zingis Index.

C. Objections to the Dennis Repository.

B. PROPOSED FINDINGS REQUESTED BY DEFENDANT RESPONDENT, THOMAS ZINGIS:

1. The State Had a Duty to Prove Beyond a Reasonable Doubt That a Previous DUI That It Seeks to Use to Obtain a Sentence to a Second or Subsequent DUI was Not Affected by Trooper Dennis's Misdeeds.

2. The State Failed to Move Into Evidence Any Admissible Proof Of Defendant's Alleged Prior Conviction for DUI and the Appellate Division Decision's Decision to Resentence Defendant As a First Offender Should Be Upheld.

3. The List Compiled by the State Is Not Competent Evidence Because the State Arbitrarily Redacted the List of Those Affected By Marc Dennis's Malfeasance and Because It Is Hearsay Without An Exception.

4. The State's Arbitrary Redaction of its List Precludes the Use of the List As Evidence at Trial Against Defendants and Zingis's Presence or Lack Thereof Should Not Be Reported to the Court.

5. The State Failed In Its Duty Under Cassidy to Provide Notice to Defendants of Their Cassidy Status.

6. Going Forward, the State Should Be Required to Make Notice To Defendants During Discovery in any DUI Prosecution Seeking To Use Prior DUI Convictions from 2008 to 2016.

C. PROPOSED FINDINGS OF FACT FROM *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION:

I. MARC DENNIS IS A WITNESS COMPROMISED AS TO EVERY SUBJECT TEST THAT WAS BASED UPON HIS CALIBRATION.

II. CREATION OF THE 27,833 SUBJECT TESTS SPREADSHEET REMAINS UNKNOWN.

A) The role of the NJSP-ADTU in its creation was never explained.

B) The NJSP-ITU could not authenticate the 27,833 subject test records spreadsheet.

1. Donahue did not recall creating the spreadsheet.

2. The State's non-public database was used to find subject test records and the other parties were not permitted to verify the State's data or methods independently.

3. The SQL query statement attached to the 27,833 spreadsheet did not match the accompanying spreadsheet tab, and that glaring inconsistency remain unexplained.

III. ASSUMING THE STATE'S DATA, THERE ARE 27,426 AIRs AFFECTED BY A DENNIS CALIBRATION.

A) DAG Mitchell deleted 7,166 subject test records from the 27,833 records given to her by the ADTU.

B) Every witness who was asked on the subject agreed that it followed from the findings in Cassidy that every control test, which simulates human breath and relies on the same on proper temperature being set at calibration, would also be unreliable.

C) Since all of the 27,833 subject test records had unreliable control tests begun, all Dennis calibrated machines were not in "good working order," and every one of those subject tests were affected by a Dennis calibration, including the 7,166 the State deleted.

D) Every subject test record in the 27,833 spreadsheet has a corresponding printed AIR that would have been admissible, but for the knowledge that it was calibrated by Dennis, on a number of issues other than a breath test result including, but not limited to, its routine admission on Refusal charges.

E) Even assuming the State's initial data, the actual number of subject tests on machines calibrated by Dennis is 27,426, after additions and deletions.

## IV. THE VARIOUS MAILINGS WERE FLAWED IN EXECUTION, AND, IN ANY EVENT, THEIR CONTENT DID NOT FORECLOSE DEFENDANTS' RIGHTS IN PENDING OR FUTURE CASES.

A) The first mailing, in 2017, voluntarily sent by the State, was contradictory and had a high rate of undeliverables.

1. The DCJ's first letter, in 2017, stated it was about "all the calibrations" as well as Dennis's "false swearing," not just breath tests, but nevertheless was only sent to a list of subjects who had a final breath test on a Dennis machine.

2. The Administrative Office of the Courts (AOC) eliminated 1,468 additional records from what the State handed over, further reducing the subject records to 18,250, with another 948 "questionable."

3. The County Prosecutor's Offices further reduced the subject test records actually mailed to about 17,489 with 2,882 letters returned as undeliverable.

B) The 2018 post *Cassidy* court ordered mailing was tailored to the holding of the particular case and even had a higher rate of undeliverables.

1. The State, well before *Cassidy*, had already limited its list to reported breath tests, then the State chose a case for direct certification (*Cassidy*) that pertained only to reported breath tests, and the second DCJ letter was specific to that case's holding on final breath test readings.

2. In their second mailing, this one court ordered, the State used the same mailing lists created over a year earlier by the AOC, and, unsurprisingly, the undeliverable rate increased from about 17% in the first mailing to about 21% in this *Cassidy* ordered mailing.

C) The 2021 AOC "*Cassidy* PCR Court" notices were a courtesy extended by the Court, in the interests of justice, were narrowly sent only to the most obviously aggrieved defendants under the *Cassidy* holding, and also had a high rate of undeliverables.

## V. THE WAY THAT THE FLAWED *CASSIDY* LISTS WERE USED IN PRACTICE BY PROSECUTORS FOR ENHANCED SENTENCINGS BECKONS THE IMPLEMENTATION OF THE "*ZINGIS* INDEX" AND "DENNIS REPOSITORY" SOLUTION JOINTLY OFFERED AS AN EXHIBIT BY THE NJSBA AND OPD.

A) The flawed *Cassidy* lists were often used to represent to courts and defendants whether Marc Dennis did a calibration, although the best evidence would be the calibration documents.

B) The "*Zingis* Index" and "Dennis Repository" proposed by the NJSBA and the OPD as an Exhibit, placed online, would be a quick and easy way for prosecutors, defense, and courts to know, in minutes, whether a prior was calibrated by Marc Dennis or not, and, if Dennis did the calibration, to have the best available evidence of same printed for record, also in minutes.

PROPOSED CONCLUSIONS OF LAW SUBMITTED BY *AMICUS CURIAE*, THE NEW JERSEY STATE BAR ASSOCIATION:

I. SINCE DENNIS'S CALIBRATION CERTIFICATES WERE HELD PRESUMPTIVELY FALSE IN *CASSIDY*, THEY CANNOT BE ADMITTED AT TRIAL UNDER *CHUN* AS RELIABLE ROUTINE BUSINESS RECORDS, AND SINCE "AIR" ADMISSION REQUIRES ADMISSION OF ITS CALIBRATION CERTIFICATES UNDER *CHUN*, NO DENNIS ASSOCISATED "AIR" IS ADMISSIBLE AS A HEARSAY EXCEPTION, WHETHER FOR PURPOSE OF A BREATH TEST RESULT OR OTHER REASON.

II. SINCE EVERY ALCOTEST "SUBJECT TEST RECORD," AND ITS PRINTED "AIR," HAS AT LEAST ONE CONTROL TEST (A SIMULATED HUMAN BREATH TEST) WHICH REQUIRES A NIST TRACEABLE THERMOMETER IN CALIBRATION PER *CASSIDY*, AND SINCE *CASSIDY* PRESUMES THAT SUCH CALIBRATIONS WERE NOT DONE BY DENNIS, EVERY DENNIS ASSOCIATED AIR IS SCIENTIFICALLY UNRELIABLE AND, THEREFORE, INADMISSIBLE UNDER *CASSIDY*.

## III. THE STATE IS REQUIRED TO DISCLOSE DENNIS MISCONDUCT IN ANY PENDING CASE WHERE THE STATE SEEKS TO ENHANCE A SENTENCE WITH A PRIOR CONVICTION.

A) Prosecutors And Courts Have a Special Obligation To Avoid The Possibility That Evidence Tainted By Police Misconduct is Admitted.

B) *Cassidy* Did Not Concern, Nor Address, The State's Burden When Seeking To Enhance A DWI Sentence With A Prior Conviction Which Might Be Tainted By Dennis's Misconduct.

C) Pursuant to *R.* 7:7-7, The State Has The Obligation In A Pending DWI To Disclose Discovery To Defendants, Which Includes Whether Dennis Calibrated Any Subject Test On Defendant In A Prior Case The State Intends To Rely Upon To Seek An Enhanced Sentence, As Well As Dennis's Criminal Record And Other Materials Affecting His Credibility.

D) Through These *Zingis* Special Master Hearings, We Now Know that (1) The State's Mailing List Did Not Include "Every DWI Conviction Possibly Tainted By Dennis's Misconduct," (2) That Notice Was Not Received By Everyone On That List, And (3) That The State Did Not Create A Record Of Service Sufficient To Prove Actual Receipt Of Any Notice Beyond A Reasonable Doubt.

1. The State's Mailing List Far From Included "Every DWI Conviction Possibly Tainted By Dennis's Misconduct."

2. Notice was also certainly not received by everyone on the State's list, let alone from the AOC's list.

3. The State Did Not Create A Record Of Service Sufficient To Prove Actual Receipt Of Any Notice Beyond A Reasonable Doubt.

IV. THE CONDITIONAL PARAMETERS THAT TRIGGER THE STATE'S OBLIGATION TO PROVIDE ADDITIONAL DISCOVERY AND DETERMINE THE BURDEN OF PROOF.

A) Condition Precedent: The Relevant Date Set Is All 27,426 Subject Test Records, Complete And Unredacted, Subject To Protective Order, If Deemed Necessary.

B) Time Frame: November 1, 2008, To April 1, 2016, Inclusive Of Both Dates.

C) Arrest Locations: Monmouth, Middlesex, Union, Ocean, and Somerset Counties.

D) The Parameters Used To Define The State's Burdens.

1. Outside of Either Time Frame Or Location Parameter, Preponderance Of Evidence Standard.

2. Inside Both Of The Parameters, The Beyond A Reasonable Doubt Standard Must Govern.

V. THE MOST EFFICIENT WAY FOR THE STATE TO ROUTINELY SATISFY ITS DISCOVERY OBLIGATION AND BURDEN OF PROOF IS TO PLACE ONLINE THE FULL AND UNREDACTED 27,426 SUBJECT RECORDS (WITH PROTECTIVE ORDER) ALONG WITH A COMPANION REPOSITORY OF "PDF" COPIES OF SIGNED CALIBRATION RECORDS OR, IF THEY DO NOT EXIST, THE ALCOTEST DATABASE RECORDS FOR MISSING RECORDS.

A) Full Discovery As To The Prior Conviction Would Be The Definitive Solution, But The NJSBA And OPD Have Jointly Suggested An Alternate As An Exhibit That Might Solve The Problem Simply And Effectively.

B) The "*Zingis* Index"

1. Purpose Of The Index, And Possible Expansion.

2. Subject Record Frows Included.

3. Identifying Individual Subjects, Cross Reference.

4. Repository As Companion To Index.

5. Post-Conviction Relief (PCR).

6. The Process Expected.

C) The "Dennis Repository."

## C. PROPOSED FINDINGS OF FACT AND PROPOSED SOLUTIONS PRESENTED BY *AMICUS CURIAE,* THE NEW JERSEY OFFICE OF THE PUBLIC DEFENDER:

I. Proposed Findings of Fact Related to the Remand Question, #1: "Which counties had convictions affected by the conduct of Marc W. Dennis, a coordinator in the New Jersey State Police's Alcohol Drug Testing Unit, as described in State v. Cassidy, 235 N.J. 482 (2018)?"

A. Proposed Solutions Related to Remand Question #1.

II. Proposed Findings of Fact Related to the Remand Question #2: "What notification was provided to defendants affected by Dennis's conduct?"

B. Proposed Solutions Related to Remand Question #2.

## VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

As noted, the Order appointing this court as Special Master directed a plenary hearing be conducted, and then this court should consider and decide which counties had convictions affected by the conduct of Sergeant Dennis, as described in State v. Cassidy, 235 N.J. 482 (2018), and what notification was provided to defendants affected by Dennis's conduct. Using its discretion, this court was also permitted to consider and decide any other questions deemed relevant to that undertaking. State v. Zingis, 251 N.J. 502, 503 (2022).

After considering the testimony provided and the voluminous exhibits presented, as well as the submissions by counsel, this undertaking is transmuted into a discussion of essentially the following five (5) issues:

I. DOES THE COURT'S DECISION IN STATE V. CASSIDY, FINDING THAT "BREATH TEST RESULTS PRODUCED BY ALCOTEST MACHINES NOT CALIBRATED USING A NIST-TRACEABLE THERMOMETER ARE INADMISSIBLE," 235 N.J. AT 498, AFFECT ALL DEFENDANTS WHO WERE REQUESTED TO PROVIDE BREATH SAMPLES ON ALCOTEST INSTRUMENTS CALIBRATED BY STATE POLICE SERGEANT MARC W. DENNIS, REGARDLSS OF WHETHER A BLOOD-ALCOHOL CONTENT (BAC) READING WAS OBTAINED, OR DOES IT ONLY APPLY TO THOSE DEFENDANTS WHO PROVIDED BREATH SAMPLES ON A DENNIS-CALIBRATED INSTRUMENT RESULTING IN THE REPORTING OF A BAC READING?

II. HAS THE STATE PROPERLY IDENTIFIED ALL INDIVIDUALS WHO HAVE BEEN AFFECTED BY THE COURT'S DECISION IN CASSIDY?

III. DID THE STATE PROVIDE SUFFICIENT NOTIFICATION, AS DIRECTED BY THE COURT, TO ALL INDIVIDUALS AFFECTED BY THE COURT'S DECISION IN CASSIDY?

IV. WHAT IS THE OBLIGATION OF THE STATE, ON SENTENCING A DEFENDANT CONVICTED OF DWI, WHERE A PRIOR DWI CONVICTION OCCURRED BETWEEN NOVEMBER 2008 AND APRIL 2016, WHICH PRIOR CONVICTION IS POTENTIALLY AFFECTED BY THE COURTS' DECISION IN CASSIDY?

V. WHAT ARE THE AVAILABLE REMEDIES IN THE EVENT THE COURT DETERMINES THAT THE STATE HAS NOT SUFFICIENTLY COMPLIED WITH THE REQUIREMENTS OF ITS DECISION IN CASSIDY CONCERNING THE IDENTIFICATION ALL DEFENDANTS WHO WERE POTENTIALLY AFFECTED BY ITS DECISION IN CASSIDY OR NOTIFYING THOSE DEFENDANTS AFFECTED ITS BY DECISION, OR BOTH?

**I.**

The first issue was raised by counsel for *amici curiae*, the New Jersey State Bar Association and the Office of the New Jersey Public Defender, joined by counsel for Defendant-Respondent. They essentially contend all individuals, who were asked to provide breath samples on an Alcotest Instrument calibrated by Sergeant Marc W. Dennis, are individuals potentially affected by the Court's decision in Cassidy, regardless of whether an evidential

BAC reading was produced by that Instrument. Most specifically, they focus on situations where a police officer has reasonable grounds to believe an individual has been operating a motor vehicle in violation of N.J.S.A. 39:4-50, requests that individual to provide breath samples on an Alcotest Instrument to determine the content of alcohol in that individual's blood, and the ultimate conclusion, by either the arresting officer or the operator of the Alcotest Instrument, is that the individual has refused to submit to such testing and is thereby charged with a violation of the Implied Consent Law, N.J.S.A. 39:4-50.2(a), which provides, as follows:

> Any person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood; provided, however, that the taking of samples is made in accordance with the provisions of this act and at the request of a police officer who has reasonable grounds to believe that such person has been operating a motor vehicle in violation of the provisions of N.J.S.A. 39:4-50 or N.J.S.A. 39:4-50.14.

The provisions of the Implied Consent Law require that, (1) a record of the taking of such breath samples, disclosing the date and time thereof, as well as the result of any chemical breath test, be made and a copy thereof, upon request, shall be furnished or made available to the person tested, N.J.S.A. 39:4-50.2(b); (2) the person tested shall be permitted to have such breath

samples taken and chemical tests of that person's breath, urine or blood made by a person or physician of that person's own selection, N.J.S.A. 39:4-50.2(c); (3) the police officer shall inform the person tested of that person's rights under subsections (b) and (c) of N.J.S.A. 39:4-50.2, and (4) pursuant to N.J.S.A. 39:4-50.2(e), no person may be made to, or forced to, provide breath samples against resistance by that person, but that person shall be advised of the consequences of refusing to submit to a breath-sample testing on an Alcotest Instrument, set forth in N.J.S.A. 39:4-50.4a.

The testimony and evidence in this matter make clear there are several situations that may result in an individual being charged with a violation of N.J.S.A. 39:4-50.2(a). Page 15 of Exhibit DB-4, the Alcotest 7110 MKIII-C New Jersey State Police User Manual, outlines instructions to the Operator of an Alcotest Instrument concerning, (1) the Termination of a test that was started, (2) Refusals, and (3) Invalid Samples, as follows:

> **Terminations**:
> Termination of a test can be performed in one of two ways:
>
> - To terminate a test prior to a subject providing a sample, press 'R' at the PLEASE BLOW/R> prompt and then select #1.
>
> - To terminate a test following an invalid sample (see table below), select #1 after the option is displayed.

The instrument will perform a 'Control Check' and record "Test Terminated" on the display. The printout will record "Test Terminated" in the Test Result Row and the "Invalid Sample" result (if applicable) in the Error Message column.

*Please see printout of Invalid Samples in the following section.

**Refusals**

A refusal can be performed in one of two ways:

- If the subject refuses to take a test prior to providing a sample, press 'R' at the PLEASE BLOW/R> prompt and then select #2.

- If the subject refuses after providing an invalid sample (see table below), select #2 after the option is displayed.

The instrument will perform a 'Control Check' and record "Subject Refused" on the display. The printout will record "Subject Refused" in the Test Result Row and the "Invalid Sample" result (if applicable) in the Error Message column.

**Invalid Samples**

Any breath interruption or failure to satisfy the minimum requirements of a valid breath sample will result in an 'invalid sample.' The issue will be displayed for a few seconds along with the measurement result (i.e., BLOWING TIME TOO SHORT 2.6s). If an invalid sample was provided, the breath test can be terminated, refused, or continued.

NOTE: If option #3 (continue) is selected, the system will purge and return to the PLEASE BLOW/R prompt.

> The subject is allowed 11 attempts to collect a maximum of 3 valid breath samples.[29]

Most obviously, upon being informed of the provisions of subsections (b), (c), and (d), the person may refuse to provide breath samples for testing. As noted in the Manual, the Operator will then press the button "R" at the "Please Blow" prompt, then select #2, and the Instrument will perform a "Control Check" and record "Subject Refused" on the display panel, and the printout of the Alcohol Influence Report (AIR) will record the "Test Result" as "Subject Refused."

In some circumstances, the breath test is commenced, and the Instrument records that an invalid breath sample has been produced. Page 15 of Exhibit DB-4 provides the following table of Invalid Samples and the Action that can be taken by the Operator:

| **Invalid Samples** | **Action** |
|---|---|
| MINIMUM VOLUME NOT ACHIEVED | Instruct the subject to take a deeper breath and exhale longer. |
| BLOWING TIME TOO SHORT | Instruct the subject to exhale for a longer time and/or at a lower flow rate. |
| BLOWING TIME TOO LONG | Instruct the subject to exhale for a shorter time. |
| BLOWING NOT ALLOWED | Ensure that the subject waits for the PLEASE BLOW/R> prompt before blowing. |

[29] This same information, as well as the following chart, is contained on page 29 of Exhibit DZ-1, the "Alcotest 7110 MKIII-C New Jersey State Police User Manual-Technical."

| | |
|---|---|
| PLATEAU NOT ACHIEVED | Instruct the subject to take a calm, deep breath and repeat the test. |
| READY TO BLOW EXPIRED | Instruct the subject to provide sample within 3 minutes of when PLEASE BLOW/R prompt first appears. |

As noted in the Manual, as well as in the outlined testimony provided on the subject of "Refusals," a subject is permitted eleven (11) attempts to collect a maximum of three (3) valid breath samples. Two (2) valid samples are required for the Instrument to produce a BAC reading as the "End Result" of the testing. When the eleventh attempt has still not produced two (2) valid breath samples for analysis,[30] or the Operator concludes, during the testing, that the subject has refused to provide valid breath samples, the Operator, using training and experience, has the discretion to either terminate the test or follow the procedures for recording that the subject has refused to provide breath samples for analysis. In those circumstances, Column T of Exhibit S-90, the Excel Spreadsheet containing the 27,833 Subject Rows, purportedly containing the names of those individuals who were asked to provide breath samples on an Alcotest Instrument calibrated by Sergeant Dennis, will record the "Error Message," of either "Test Terminated" or "Subject Refused," and

[30] See page 50 of Exhibit DZ-1, noting that when two (2) valid breath samples are collected, and found to be within acceptable tolerances, the firmware of the Instrument begins the chemical analysis of the sample, producing an IR (Infrared measurement) and EC (Electrochemical measurement) result for each valid breath sample.

Column U will record the "End Result" with no evidential BAC reading being displayed.

Page 18 of the Exhibit DB-4 Manual, entitled "Aborted Tests," states the following:

> A test will automatically be aborted whenever the following errors are encountered:
>
> - CTRL GAS SUPPLY
> - AMBIENT AIR CHECK ERR
> - MOUTH ALCOHOL
> - INTERFERENCE
> - OUT OF MEASURING RANGE
> - TESTS OUTSIDE +/- TOL
> - CONTROL TEST FAILED
> - QUICK RESET
> - PURGING ERROR
> - MEMORY FULL
> - SIMULATOR TEMP. ERROR
>
> The instrument will purge the system, run a control check and print the results. The printout will read "TEST RESULT: TEST ABORTED" followed by the error name in the Result Row. The error name will also be printed in the Error Message column on the printout. *Please see the 'Aborted Test Printout' in the following section.[31]

Each of these message errors have been discussed during the credible testimony of SFC Alcott. Additionally, pages 24 and 26 of Exhibit DB-4, entitled "Remedies," contains a chart that lists the "Possible Cause" of twenty-

[31] This same information is contained on page 32 of Exhibit DZ-1, the "Alcotest 7110 MKIII-C New Jersey State Police User Manual-Technical."

five (25) possible "Fault Messages" that may be generated by an Alcotest Instrument, including errors relating to the sufficiency of the breath sample, and aborted tests, the "Possible Cause" of that "Fault Message," and a suggested "Remedy" for each message.[32]

*Amici*, the New Jersey State Bar Association and the Public Defender, as well as Defendant-Respondent, contend an Alcotest Instrument calibrated by Sergeant Marc W. Dennis without the use of an NIST-traceable thermometer is defective and any "Error Messages" generated by that Instrument recording an invalid breath sample, or any of the "Aborted Test" error messages, cannot be relied upon. Thus, they submit, any circumstance where the Instrument records the end result of "Subject Refused," or where no BAC reading has been produced due to an Aborted Test or Error Message, should be deemed a case that falls within the category of an individual potentially affected by the Court's decision in State v. Cassidy, both as to the identification and notification requirements.

This court finds that there has been no competent evidence, expert or otherwise, from which it can be concluded that an Alcotest Instrument calibrated without the use of an NIST-traceable thermometer will not operate

[32] This same information is contained on pages 48-49 of Exhibit DZ-1, the "Alcotest 7110 MKIII-C New Jersey State Police User Manual-Technical."

properly in determining whether the minimum requirements for a valid breath sample have been satisfied, or automatically determining that a test should be aborted. SFC Alcott credibly testified the fact an Alcotest Instrument was calibrated without the use of an NIST-traceable thermometer would have no effect on the ability of the Instrument to detect that the sufficiency of the breath sample provided, or properly record an error message that results in an aborted test. In essence, it is the actual chemical analysis of a breath sample conducted by a Dennis-calibrated Alcotest Instrument, resulting in an evidential BAC reading that could have been used in the prosecution of a subject for a violation of N.J.S.A. 39:4-50 that is tainted and inadmissible, entitling a convicted subject the right to seek post-conviction relief.

As properly noted in the final submission by the State in this matter, in the Report of the Special Master to the Court in Cassidy, Judge Lisa focused on "the scientific reliability of breath test readings used for evidential purposes in DWI cases." 235 N.J. at 501. Moreover, this court finds the testimony of SFC Alcott on this issue to be persuasive. As noted, SFC Alcott is a certified Breath Test Coordinator/Instructor, who has had extensive training, and has conducted hundreds of solution changes and calibrations, and has credibly explained how a subject's breath moves through an Alcotest Instrument during a breath test, identifying the sensors that take the pulmonary measurements

concerning sufficiency of the breath sample, before the breath sample enters the IR cuvette for analysis, noting that no pulmonary readings take place inside the IR cuvette, or after the breath sample leaves the IR cuvette, and the pulmonary sufficiency readings are recorded before any BAC readings. Additionally, SFC Alcott credibly testified the sensors that register the pulmonary sufficiency measurements have nothing to do with the method of calibrating the Instrument, nor are they affected by it. As noted by SFC Alcott, every breath test begins with a Control Test, which can fail for any number of reasons. When a Control Test fails, the Instrument prevents the subject being tested from providing breath samples. That has nothing to do with the pulmonary sufficiency of breath samples that are provided an Instrument, as detected by its sensors.

As noted, *Amicus Curiae*, the New Jersey State Bar, presented testimony from John Dell'Aquila, a retired police officer and former Deputy Attorney General. Upon leaving the Attorney General's Office, Mr. Dell'Aquila worked for the law firm of Helmer, Conley and Kasselman, P.A., primary as a defense counsel in municipal court matters, including the handling of DWI cases. He completed the two-day Draeger Safety Diagnostics, Inc. Operator Training and Preventative Maintenance Course on the Alcotest 7110 MKIII-C and was issued a Certificate, Exhibit DB-20, stating he is qualified to train and certify

Operators in the proper use and operation as well as perform Preventative Maintenance on that Instrument. However, he has never performed calibrations and, because he was not a sworn police officer, was never qualified by the Attorney General to perform calibrations or solution changes, nor has he ever repaired any Alcotest Instrument. He certainly testified to his familiarity with the Alcotest 7110 MKIII-C Instrument and was conversant in its use and operation. However, he was never qualified as an expert, such as the chemistry and physics experts who testified in State v. Chun before Special Master, Judge Michael Patrick King, who might have been able to testify as to whether the calibration of an Alcotest Instrument without using an NIST-traceable thermometer would affect the ability of the instrument's pulmonary sensors to detect the sufficiency of breath samples provided or how it might affect the reliability of "Aborted Test" messages. In fact, Mr. Dell'Aquila acknowledged that all breath calculations are detected automatically by the Instrument. Moreover, as with SFC Alcott, Mr. Dell'Aquila stated the decision, during an attempted breath test, whether to conclude the subject had refused, or to terminate the test, is based on the circumstances that occurred and through the exercise of the opinion and discretion of the police officer administering the test, based on an evaluation of the conduct of the person being requested to provide breath samples. Accordingly, the opinion expressed

by Mr. Dell'Aquila that the calibration of Alcotest Instruments by Sergeant Dennis without use of an NIST-traceable thermometer could affect the conclusion that the subject had refused to comply with the Implied Consent Statute, is without a sufficient factual or expert basis.

Additionally, Exhibit S-128 is the Excel Spreadsheet entitled, "Alcott Sorted Spreadsheet Received from NJSP_27833 subject records," which contains all 27,833 Subject Rows contained in Exhibit S-90, the Rows sorted to reflect, first, those Subject Rows for breath tests that were attempted on Alcotest Instruments that had not been calibrated by Sergeant Dennis, 436 in number and color-coded in "Red," and the remaining 27,397 Subject Rows for breath tests that were attempted on Alcotest Instruments that were calibrated by Sergeant Dennis. A review of those two categories reveals that the percentage of those "Error Messages" listed in Column T for those 436 Subject Rows, which contain subjects who were requested to provide samples on Alcotest Instruments not calibrated by Sergeant Dennis, is comparable, actually slightly less, than the percentage of "Error Messages" listed in Column T for Alcotest Instruments that were, in fact, calibrated by Sergeant Dennis. This further supports this court's conclusion that the fact Sergeant Dennis performed a calibration on an Alcotest Instrument does not affect the pulmonary results regarding the sufficiency of breath samples or aborted test

messages, that produce Error Messages and the consequent absence of an evidential BAC reading.

Accordingly, this court concludes the actions taken by DAG Mitchell, on behalf of the Division of Criminal Justice, of deleting those Subject Rows in Exhibit S-90 where Column U, "End Result," failed to record an evidential BAC reading, was fully appropriate, since no "reading" was produced by a chemical analysis of a breath sample that could be considered admissible in the prosecution of that subject for a violation of N.J.S.A. 39:4-50(a). Although not dispositive, an AIR producing a "Test Result" that the "Subject Refused" can be admissible in evidence during a Refusal prosecution. However, the varying circumstances under which the "Refusal" conclusion of the police officer was based, when that particular Alcotest Instrument had been calibrated by Sergeant Dennis, could have been made evidential and fully contested during trial on a refusal prosecution. This court concludes that an Alcotest Instrument reporting an "Error Message" and, consequently, no BAC reading, has nothing to do with the fact that Sergeant Dennis calibrated a particular Alcotest Instrument, which is only relevant when an evidential BAC reading was produced.

## II.

The second question posed addresses one of the specific issues remanded to this court to conduct a plenary hearing and to make findings and conclusions as to "[w]hich counties had convictions affected by the conduct of Marc W. Dennis, a coordinator in the New Jersey State Police's Alcohol Drug Testing Unit, as described in State v. Cassidy, 235 N.J. 482 (2018)." State v. Zingis, 251 N.J. 251, 252 (2022). Clearly, that issue was framed based on the issue directly presented in Zingis, which involved an adjudication in both the Berkely Township Municipal Court and the Law Division based on a conclusion that Sergeant Dennis had not calibrated Alcotest Instruments in Camden County and, thereby, his prior DWI conviction could not have been potentially affected by the Court's decision in Cassidy.

However, the broader issue addressed herein, which encompasses and addresses the issue as posed by the Court, is how the State compiled its list of those defendants who were requested to provide breath samples on an Alcotest Instrument calibrated by Sergeant Dennis, and whether that compiled list correctly identified all such defendants. As has been noted, in Cassidy, the Court directed "the State to notify all affected defendants of our decision that breath test results produced by Alcotest machines not calibrated using a NIST-traceable thermometer are inadmissible, so that they may take appropriate

action[." 235 N.J. at 498 (Emphasis added). It goes without saying, that in order to provide "notification," it is first necessary to "identify" those entitled to notification. Accordingly, this section of the Report deals with the issue of "identification."

It should be noted that any ultimate decision in an application for post-conviction relief by a defendant to vacate a DWI conviction is not at issue here. That application would be judicially determined on a case-by-case basis, considering all the facts and circumstances, starting with the conclusion that any BAC reading resulting from an analysis of breath samples provided on an Alcotest Instrument calibrated by Sergeant Dennis, was inadmissible. The issue in such a proceeding is whether the evidential BAC reading affected the outcome of the judicial proceeding. Specifically, did the inadmissible BAC reading affect the decision of the defendant to plead guilty to any offense, or was it the basis for an adjudication of guilt, and any resulting conviction. For example, the Court should be aware during this court's handling of over a thousand applications for post-conviction relief pursuant to Cassidy, there were many instances where a defendant was convicted of a lesser-included offense, such as Reckless Driving, contrary to N.J.S.A. 39:4-96, pursuant to a guilty plea to that offense, where a BAC reading had been obtained on a Dennis-calibrated Instrument, and the defendant pled guilty to that lesser-

included offense because of a possible conviction for DWI based on that BAC reading. Depending on the facts and circumstances, in some instances, the conviction to that lesser-included offense was vacated, and in others, post-conviction relief was denied.[33]

Exhibit S-90 (also Exhibit S-148) is the Excel Spreadsheet, prepared by the Information Technology Bureau of the New Jersey State Police based on a query, or search, of the Alcotest Information System database, as requested by the Attorney General's Office, purportedly representing a listing of all individuals who had been requested to provide breath samples, pursuant to the Implied Consent Statute, N.J.S.A. 39:4-50.2(a), on Alcotest Instruments that had been calibrated by Sergeant Marc Dennis. This Spreadsheet contains 27,833 Subject Rows, one for each attempt to obtain breath samples from an

[33] Guideline 4 Guideline 4 of the APPENDIX TO PART VII Rules, incorporated by Rule 7:6-2(d), paragraph A, specifically states that "No plea agreements whatsoever will be allowed in drunken driving or certain drug offense[,]" citing to N.J.S.A. 39:4-50. Judge Carchman, the Acting Administrative Director of the Courts, issued a Memorandum, dated December 4, 2004, to all municipal court judges directing them to engage in a painstaking and detailed inquiry of the Municipal Prosecutor whenever the State seeks to downgrade, amend or dismiss a drunk driving prosecution. That Memorandum is consistent with the Supreme Court's ban on the plea bargaining of drunk driving cases. See State v. Hessen, 145 N.J. 441 (1996). However, there are circumstances where a pea to a lesser-included offense is appropriate, such as the presence of a defense expert report raising serious questions of admissibility of a BAC reading, and the observational evidence is weak, or the officer is unavailable.

individual. It contains twenty-one (21) Columns of information as to each attempted test, including Column U, which reflected whether the attempted breath testing resulted in an evidential Blood-Alcohol Content (BAC) reading that could be utilized in the prosecution of an individual for a DWI offense.

The persuasive evidence and testimony in this matter conclusively establishes that Exhibit S-90 (also Exhibit S-148) does not identify all individuals who had bene requested to provide breath samples on an Alcotest Instrument calibrated by Sergeant Dennis. First, the credible testimony of the State's witness, SFC Kevin Alcott, identified 436 individuals listed in Exhibit S-90 (also Exhibit S-148) who has been requested to provide breath samples on Alcotest Instruments that had not been calibrated by Sergeant Dennis, see Exhibits S-128 and S-129, placing significant doubt about the accuracy of the query conducted of the Alcotest Information System database. In any event, the accuracy of Exhibit S-129 is not contested, and it resulted in the reduction of the 27,833 attempted tests to 27,397.

This court has already found that it was appropriate for DAG Mitchell to reduce that 27,833 number to 20,667, in creating the Excel Spreadsheet, Exhibit S-91, resulting from her deleting those attempted breath tests in Exhibit S-90 (also Exhibit S-148) where there was no resulting evidential BAC reading. As has been noted, Rows 2 through 437 on Exhibit S-128 represent

those 436 attempts to provide breath samples on Alcotest Instrument that had not been calibrated by Sergeant Dennis. A review of those 436 Rows demonstrates that the "End Result" in Column U of S-128 reported no BAC reading in 122 of those 436 Rows, which means that DAG Mitchell would have eliminated those 122 Rows from Exhibit S-90 (also Exhibit S-148) when she created Exhibit S-91. It also means that Exhibit S-91 contains 314 Rows (436 minus 122) of attempted breath tests, represented as being conducted on Alcotest Instruments calibrated by Sergeant Dennis, that were, in fact, attempted on Instruments that were not calibrated by Sergeant Dennis. It is also interesting to note that in 65 of the 314 Rows where a BAC reading was obtained, the BAC reading was either "zero" or below the per se BAC level set forth in N.J.S.A. 39:4-50(a). The import of that finding is not every BAC reading reported in Column U is the basis for a per se DWI conviction.

Additionally, the candid and credible testimony of DAG Mitchell and SFC Alcott further clearly established that Exhibit S-90 (also Exhibit S-148) failed to include 29 individuals who had been requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis.[34] Assuming

[34] Exhibit DB-23 contains a list of twenty-six (26) attempt to provide breath samples, acknowledged by DAG Mitchell as not being contained on the State's list of 27,833 attempts as contained on Exhibit S-90 (also Exhibit S-148). There were an additional three (3) individuals identified by the Office of the Public Defender, contained in Exhibits DPD-2(A), DPD-2(B), and DPD-2(D),

the otherwise accuracy of the list of individuals requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis contained in Exhibit S-90 (also Exhibit S-148), this results in a finding there were at least 27,426 instances where an individual was requested not provide breath samples on an Alcotest Instrument that had been calibrated by Sergeant Dennis. The word "instances" is utilized because the evidence also disclosed there are numerous duplicate entries contained in that 27,426 number, where the same individual, with the same arrest date and summons number was requested to provide breath samples on two, or more, Alcotest Instruments because the first attempt resulted in one of the many error messages in Column T of Exhibit S-90 (also Exhibit S-148). In such circumstances, the individual was either transported to a second, or third, location in an attempt to provide breath samples on one or more different Alcotest Instruments, or retested on the same Instrument.

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resulting in DWI convictions, and having provided breath samples on Alcotest Instruments calibrated by Sergeant Dennis who were not contained on Exhibit S-90 (also Exhibit S-148). This court does note [redacted] identified on Exhibit DPD-2(D), provided breath samples on Alcotest Instrument that resulted in a Tier 2, per se DWI conviction. His conviction is included in this number because the State has been unable to identify the specific Alcotest Instrument on which he was tested, and his conviction should be vacated, since all State Police arrest reports concerning that matter have been destroyed due to record retention rules.

However, it is also clear from the evidence and testimony that the Excel Spreadsheets contained in Exhibit S-90 (also Exhibit S-148) does, at least, properly identify 27,397 breath test attempts on Alcotest Instruments that were calibrated by Sergeant Dennis, see Exhibits S-128 and S-129, and the evidence and testimony has identified another twenty-nine (29) breath test attempts conducted on Alcotest Instruments calibrated by Sergeant Dennis, that were not contained on Exhibit S-90 (also Exhibit S-148). With respect to those twenty-nine (29) individuals, not only were they not "identified" as persons potentially affected by the Court's decision in Cassidy, there was, therefore, no attempt to obtain addresses from them, or to send them notification letters.

Moreover, a review of Exhibit DB-23, the list of those twenty-six (26) individuals who were identified during the hearing as being requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis demonstrates there was no evidential BAC reading obtained on six (6) of those twenty-six (26) entries. Additionally, there are two entries concerning [redacted], reflecting 2 breath-sample attempts by [redacted] on Alcotest Instrument ARWF-0356, located in the Warren Township Police Station, in Somerset County, on the arrest date of May 14, 2009, with the same summons number. The first attempt resulted in the Error Message, "Ambient Air Check Error," but the second attempt resulted in a BAC reading of 0.117. DB-23 also

shows two breath-test attempts by [redacted] on Alcotest Instrument ARWF—0400, located at the Highlands Borough Police Station, on the arrest date of April 6, 2012, same summons number. Each attempt resulted in evidential BAC readings (0.124 and 0.125).

Beyond these findings that Exhibit S-90 (also Exhibit S-148) contains 426 breath-sample attempts on Alcotest Instruments that were not calibrated by Sergeant Dennis, and fails to contain at least 29 breath-sample attempts on Alcotest Instruments calibrated by Sergeant Dennis, the evidence and testimony has also raised a significant issue as to whether the Alcotest Inquiry System database was properly queried (searched) in creating Exhibit S-90 (also Exhibit S-148).

The first Sheet, or Tab, on Exhibit S-90 (also S-148), entitled "SQL Results," contains the Excel Spreadsheet, consisting of 27,833 breath-sample attempts. The second Sheet, or Tab, on that Exhibit, entitled "SQL Statement," is the query (search) purportedly utilized to create that Excel Spreadsheet. During the testimony of Mr. Donahue, Mr. Noveck created a "Word" version of that SQL Statement, see Exhibit DPD-1, and then questioned Mr. Donahue concerning its contents. See T1, page 119, line 17 to page 124, line 24. During that questioning, Mr. Donahue stated he believes the Excel Spreadsheet on Sheet (Tab) 1 was created from a query of the

subject table of the Alcotst Inquiry System database, but he acknowledged that "SQL Statement" does not match the results contained in the Excel Spreadsheet, since were nineteen (19) serial numbers of Alcotest Instruments contained in the query, yet there were many more Alcotest Serial numbers contained on the Excel Spreadsheet, and the query called for 310 Columns, or Fields, of information to be extracted, whereas there are twenty-one (21) Columns contained on the Excel Spreadsheet. Mr. Donahue was unable to recall who asked him to run the query, and a subsequent search of any email or other communications specifically detailing or outlining what was being requested was not produced. See T1, page 124, line 25 to page 130, line 16. Mr. Donahue was unable to recall or explain why the query contained in the SQL Statement on Sheet (Tab) 2 did not match the SQL Results on Sheet 1 (Tab) of Exhibit S-90 (Also Exhibit S-148).

Although Exhibit S-90 (also Exhibit S-148) clearly did identify a significant number of breath-sample attempts on Alcotest Instruments calibrated by Sergeant Dennis, it is clear that it does not fulfill the intent of its creation to identify all breath sample-attempts on Alcotest Instruments calibrated by Sergeant Dennis. Accordingly, the listing contained on those

Exhibit, as well as on Exhibit S-91,[35] cannot not be considered accurate as containing all individuals who provided breath samples on Alcotest Instruments calibrated by Sergeant Dennis where an evidential BAC reading resulted.

**III.**

The third issue concerns whether the State provided sufficient notification, as ordered, to "all affected defendants" of its decision in Cassidy "that breath test results produced by Alcotest machines not calibrated using a NIST-traceable thermometer are inadmissible, so that they may take appropriate action." 235 N.J. at 498 (emphasis added). Given the fact that not all affected defendants were identified, that would not be possible. In any event, the Court did not establish a procedure that would constitute notification that would be sufficient to satisfy that requirement.

As has been noted, even before the Court's decision in Cassidy, once the Attorney General's Office became aware that Sergeant Dennis had not been utilizing a NIST-traceable thermometer when calibrating certain Alcotest

[35] Clearly, Exhibit S-91 contained 314 (436 minus 122) subjects who provided breath samples on Alcotest Instruments not calibrated by Sergeant Dennis, see Exhibits S-128 and S-128, and failed to include 23 breath- sample attempts on Alcotest Instruments that were calibrated by Sergeant Dennis that resulted in the reporting of an evidential BAC reading. See Exhibit DB-23 (26 attempts minus 6 where no BAC reading resulted), and see Exhibits DPB-2(A), DPD-2(B), and DPD-2(D).

Instruments, it began the process of attempting to identify those defendants who had been requested to provide breath samples on all Alcotest Instruments that had been calibrated by Sergeant Dennis, knowing there could be future applications seeking to vacate DWI convictions based on Dennis's misfeasance.

As also noted, that effort consisted of requesting the Information Technology Unit of New Jersey State Police to search the Alcotest Information System database, which it maintained, to identify those individuals who had been requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis. Although there is some uncertainty as to how that request was accomplished, ultimately the Information Technology Unit of the NJSP delivered to the Division of Criminal Justice a listing that was represented as containing all breath sample attempts on Alcotest Instruments calibrated by Sergeant Dennis in the form of an Excel Spreadsheet, marked as Exhibit S-90 (also Exhibit S-148), containing 27,833 breath-sample attempts.

The Attorney General's Office determined that list should be modified to eliminate those breath-sample attempts where no BAC reading resulted, creating Exhibit S-91, resulting in 20,667 breath-sample attempts where a BAC reading was reported. Since Exhibit S-91 did not contain addresses for those individuals who had been identified as providing breath samples on

Alcotest Instruments calibrated by Dennis where a BAC reading resulted,[36] the DCJ reached out to the AOC, seeking a search for addresses of the databases it maintained, by matching the 20,667 subjects to addresses contained in the court's databases.

That task was undertaken by Charles Prather, an independent data analyst working for the AOC. After eliminating those entries on Exhibit S-91 that were duplicates, and those that contained no driver's license number or an invalid driver's license number, Mr. Prather creating a list of 19,367 subject entries extracted from Exhibit S-91 that could be searched in the court's databases for a subject-to-address match. That search resulted in the creation of Exhibit S-83, consisting of two Sheets, or Tabs. Sheet 1 contains 18,249 exact subject-to-address matches, and Sheet 2 contains 947 partial subject-to-address matches, for a total of 19,196 subject-to-address matches provided by the AOC to the DCJ. As noted, that left 1,471 breath-sample attempts, where an evidential BAC reading was reported, where no subject-to-address match was provided in Exhibit S-83. Again, that occurred in 2017, prior to the Court's decision in Cassidy.

[36] The Alcotest Information System database does not contain addresses for individuals who were requested to provide breath samples on Alcotest Instruments.

Thereafter, the DCJ broke down both Sheets in Exhibit S-83 into separate Excel Spreadsheets for the five (5) principal Counties, containing separate Sheets for exact subject-to-address matches and partial subject-to-address matches, see Exhibits S-84 (Middlesex County), S-85 (Monmouth County), S-86 (Ocean County), S-87 (Somerset County), and S-88 (Union County), and a separate Excel Spreadsheet for municipal court cases in other Counties, see Exhibit S-82B.

In 2017, the Prosecutor's Offices in each of those Counties was tasked by the DCJ with mailing a form notification letter it provided, to the individuals with exact and partial addresses contained on Exhibits S-84 through S-88, and the DCJ attended to the mailing of the same notification letter to those individuals with exact and partial matches on Exhibit S-82B. The testimony of representatives from each Prosecutor's Office outlines the number of notification letters mailed in 2017.

Although each County Prosecutor's Office handled the mailings somewhat differently, as noted in this court's discussion of each representative's testimony, several things are clear. First, the addresses provided by the AOC, and thereby utilized by each Prosecutor's Office, were addresses for those individuals that existed as of the date of their arrests, which were between dates ranging from 2008 to 2016. As a result,

approximately 2,912 mailed 2017 notification letters were returned as being undeliverable, as follows: 818 in Middlesex County; approximately 1,000 in Monmouth County; 73 in Ocean County; approximately 175 in Somerset County; and 846 in Union County.

Second, there were a small number of the 2017 notification letters that were returned as undeliverable that contained forwarding addresses, and they were re-mailed to those forwarding addresses.

Third, in some instances, were not sent to subjects where a partial subject-to-address was contained on the Spreadsheets forwarded by DCJ to the County Prosecutors.

Fourth, there were no instructions provided to the County Prosecutor's Offices, regarding those 2017 notification letters, concerning attempts to find updated addresses, other than a request they be retained and, in at least one instance, the undeliverable letters returned have been discarded. There were, in fact, no attempts by either the County Prosecutor's Offices or the DCJ to seek updated addresses for those notification letters returned as being undeliverable.

Following issuance of the Court's November 13, 2018 opinion in Cassidy, the DCJ again tasked each County Prosecutor's Office in the five principal Counties with sending a second form notification letter, provided by

the DCJ, to the same individuals, at the same addresses contained in Exhibits S-84 through S-88. Again, each County Prosecutor's Office handled those post-Cassidy mailings differently, as described by this court's discussion of the testimony provided by each County Prosecutor's representative.

As noted, no updated addresses were provided for those individuals mailed the 2017 notification letters that were returned as being undeliverable. At least as to the Monmouth County Prosecutor's Office, those individuals whose letters were returned as being undeliverable were deleted from Exhibit S-85 prior to the post-Cassidy mailed notification letters. Again, certain facts are evident.

First, there were over 3,000 of the post-Cassidy mailed notification letters returned as being undeliverable, as follows: 1,106 in Middlesex County; less than the 2017 letter but close to a thousand, in Monmouth County; 82 in Ocean County; 206 in Somerset County; and 806 in Union County.

Second, a small number of the post-Cassidy notification letters had forwarding addresses and the letters were re-mailed to those addresses, and although there are no specific numbers concerning the return of any of those as being undeliverable, the number would be small, in any event.

Third, there was no attempt to secure updated addresses for any of the post-Cassidy notification letters that were returned as being undeliverable.

Except for the Monmouth County Prosecutor's Office, which ultimately discarded those letters returned as being undeliverable, the other Prosecutor's Offices did retain them.

There was a third mailing of notification letters that occurred on or about July 14, 2021, following the Court authorizing the creation of a centralized system for receipt , hearing and adjudication of applications for post-conviction relief based on its decision in Cassidy. That mailing is detailed in this court's discussion of the testimony provided by Barbara Nolasco, an Administrative Supervisor with the New Jersey Judiciary. As provided in Exhibit S-63, that July 14, 2019 notification letter was mailed to 13,618 individuals identified as having been convicted of DWI and potentially affected by the Court's decision in Cassidy. Of those mailings, 2,884 were returned as being undeliverable, 64 of those were re-mailed to new addresses provided by the Post Office, of which 2 were returned as undeliverable, and 34 of those originally returned as being undeliverable, where no new address was provided, were re-mailed using a different zip code, of which 25 were returned as being undeliverable.

Again, certain facts are evident. First, the addresses utilized for the 2019 mailing were the same addresses contained in Exhibit S-83, created back in 2017. Second, prior to the 2019 mailing, attempts were made to seek

updated addresses from the Motor Vehicle Commission for those individuals, contained in Exhibit S-83, who had driver's license numbers, but that was not able to be accomplished.

With respect to notification letters directly mailed by the DCJ to those individuals in Counties other than the five principal Counties, identified as being potentially affected by the misconduct of Sergeant Dennis and, ultimately, by the Court's decision in Cassidy, Exhibit S-153, the April 4, 2023 certification of Holly Lees, an Administrative Analyst with the Prosecutors Supervision and Training Bureau of the DCJ, provides certain information. Ms. Lees certified that on December 4, 2017, she mailed notification letters, signed by SDAG Robert Czepiel, to 110 potentially affected individuals to their addresses listed in Exhibit S-83, and that on January 30, 2019, she mailed a post-Cassidy notification letter, also signed by SDAG Czepiel, to those same individuals at the same addresses. There is no mention as to whether any were returned as being undeliverable.

Additionally, in an attempt to provide notice to individuals who were potentially affected by the Court's decision in Cassidy, the testimony and evidence discloses that the AOC placed detailed information concerning that decision on the Court's website. That information was also placed on the website of the Attorney General, and there were several Notice to the Bar

issued by the Court. Additionally, information concerning the Cassidy decision was placed on the websites and social media sites of the County Prosecutors in some of the principal Counties. See Exhibit S-146 (Judiciary's Cassidy website; T2, page 147, lines 12 to page 148, line 2 (Mr. Somogyi's testimony); Exhibit S-27 (DAG Mitchell's certification); Exhibit S-139 (Ms. Mondi's certification); Exhibit S-44 (Ms. do Outeiro's certification).

As noted, the Court did not specify the type of notification to be given to those defendants affected by its decision. However, in general, when an individual is entitled to notice of an event that affects his or her right to make an application for relief, and the address of that individual to which such notice is to be sent is reasonably ascertainable, "constructive notice" alone of that right, such as placement of such notice on a website or in a Notice to the Bar, does not appear to satisfy the requirements of due process. See, e.g., Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798, 103 S.Ct. 2706, 2711, 77 L.Ed.2d 180, 187 (1983); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 515, 70 S.Ct. 652, 658, 94 L.Ed. 865, 874 (1950); New Brunswick Sav. Bank v. Markouski, 123 N.J. 402, 419 (1991). That seems particularly true where a prior conviction, affected by the Court's decision in Cassidy, may constitute the basis for enhanced sentencing if a defendant is

convicted of a subsequent DWI offense and, potentially, faces a term of incarceration.

The right to due process demands a party be given adequate notice and a reasonable opportunity to be heard. Ewing Oil, Inc. v. John T. Burnett, Inc., 441 N.J. Super. 251, 260 (App. Div. 2015). However, due process is not a rigid concept, but flexible and calls for such "procedural protections as the particular situation demands, recognizing that not all situations calling for procedural safeguards require the same kind of procedure." Avant v. Clifford, 67 N.J. 496, 531 (1975).

In Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976), the Court set forth the following balancing test to determine the precise procedural protections mandated by due process:

> [F]irst, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Considering this balancing test, the question that arises is whether updated addresses were, and are, "reasonably ascertainable" upon the exercise of due diligence, for those individuals who were entitled to notice, required under Cassidy, considering that the notification letters were mailed to an

address that existed as of the date of the DWI conviction, which would be between 2008 and 2016, and thousands of those notification letters have been returned by the Postal Service as being undeliverable. In the New Brunswick Sav. Bank v. Markouski decision, the Court identified several factors to be considered when conducting that inquiry. 123 N.J. at 419-20. Although that case involved whether the requirements of due process were satisfied when a sheriff's judgment execution sale of real property, conducted without actual notice to other judgment creditors, vacates the statutory liens of such judgment creditors on the property, its reasoning is somewhat analogous to this situation, considering that the Cassidy decision concerned itself with notification of the due process rights of those defendants who were potentially-affected by the misfeasance of a public police officer that may have resulted in an improper basis being utilized in their conviction. Actual or potential incarceration as a result is a harsh result as it constitutes the deprivation of liberty, particularly in situations where a DWI conviction, based on a BAC reading obtained from breath sample provided on an Alcotest Instrument calibrated by Sergeant Dennis, is sought to be the basis for enhanced sentencing on a subsequent, valid DWI conviction.

Accordingly, the focus in determining whether updated addresses for those individuals who had been identified as being potentially affected by the

Court's decision in Cassidy, where the mailed notification letters returned as being undeliverable, is whether updated addresses were, or are, "reasonably ascertainable" upon the exercise of due diligence. This requires an evaluation of our public repository of addresses. For a New Jersey driver who continues to maintain a license to operate a motor vehicle, following a period of suspension required for a DWI conviction and upon restoration, the New Jersey Motor Vehicle Commission maintains a listing of the addresses of its licensees and a system for updating addresses upon license renewal. See, e.g., N.J.A.C. 13:21-8.2(a), -8.2(b); 13:21-9. It would appear that compiling a list of those individuals whose notification letters were returned as being undeliverable and sending that information to the Motor Vehicle Commission, with a request for a search of current addresses, could potentially, when compared with the undeliverable address, obtain at least some updated addresses for a remailing of the notification letters. Moreover, it would constitute reasonable diligence and not be overburdensome, although the cooperation of the Motor Vehicle Commission, not a party to these proceedings, would have to be obtained. Here, that effort was attempted by Mr. Somogyi concerning the third letter mailed, but was not an available option.

Of course, even then, that method would not be effective concerning convictions of out-of-state licensees. More significantly, the evidence and testimony in this matter discloses that due, in all likelihood to human entry error, the Alcotest Inquiry System database contained numerous entries where either no driver's license, or an invalid driver's license, was listed for an individual, which would make an effective search of the database of the Motor Vehicle Commission's database questionable.

Here, clearly not all individuals potentially affected by the Court's decision in Cassidy were identified by the State and, of those that were identified, addresses for many of them were not secured and notification letters were not sent to them. Moreover, many of the addresses that were obtained were obviously outdated, resulting in thousands of notification letters being returned as being undeliverable. Additionally, there were no efforts to obtain updated addresses for those mailed notification letters that were returned as being undeliverable, and no evidence or suggestions have been presented that updated addresses for those individuals whose notification letters were returned as being undeliverable were, or are, reasonably ascertainable. Even those letters that were not so returned, there is no certainty that the intended addressee actually resided at that address, and received same.

Applying the balancing test set forth in the Matthews decision, first, clearly there is a significant private interest affected by the notification efforts undertaken by the State for those individuals potentially affected by the Court's decision in Cassidy and who were not notified, either because they were not identified among those as being so-affected, or because there were no effective efforts to secure updated addresses for them. Second, there is a significant, identifiable risk to those individuals affected by the Court's decision in Cassidy who were not provided direct notification thereof. That risk implicates not only the potential they may have lost the ability to vacate a conviction that may have been improperly entered against them, but there is a continuing risk to a person that a wrongful conviction could be, or may have been, utilized to enhance the sentence of a subsequent DWI conviction. There is also a stigma inherent in a DWI conviction that might prevent or impede certain employment or appointment opportunities. That risk has to be considered in the light of the probably value, or possibility, if any, of substitute notification.

Finally, our State has an interest in providing justice, particularly where there has been misfeasance by a public official that has potentially led to a conviction, balanced against any fiscal and administrative burdens that any additional procedural requirements would entail.

Should the Court conclude that the notification requirement in its decision in Cassidy has not been sufficiently fulfilled, this court will provide some suggested solutions, designed to provide additional notification, in Section V of this Report.

**IV.**

When a defendant, convicted of DWI, faces imposition of an enhanced sentence based on a prior DWI conviction that occurred during the period of time that Sergeant Dennis had been calibrating Alcotest Instruments, what party has the obligation to establish whether, in the proceedings leading to that prior DWI conviction, the defendant had been requested to provide breath samples for analysis on an Alcotest Instrument that had been calibrated by Sergeant Dennis?[37]

That, of course, was the focal issue before the Berkeley Township Municipal Court in Zingis, as well as the Law Division in the de novo hearing, on appeal from the determination of the Municipal Court Judge that the State had satisfactorily established that Mr. Zingis had not been tested on an Alcotest Instrument calibrated by Sergeant Dennis and, therefore, the Court's

[37] It has been established that Sergeant Dennis was authorized to calibrate Alcotest Instruments from November 5, 2008, up until October 8, 2015. Since Alcotest Instruments must be recalibrated every six months, it is possible an individual could have been requested to provide breath samples up until approximately April 6, 2016.

decision in Cassidy was not applicable. That determination was based on the Municipal Court Judge accepting the State's representations that the portion of Attorney General's website providing information concerning the Cassidy decision, as well as accepting oral representations of the Municipal Prosecutor that he had spoken with the Attorney General's municipal liaison to municipal courts in Ocean County, who stated information from the Attorney General's Office was that Sergeant Dennis had not calibrated any Alcotest Instruments in Camden County, because Dennis-affected convictions occurred in Middlesex, Monmouth, Ocean, Somerset, and Union Counties and, in addition, Mr. Zingis was not on the list to receive notification that his case was potentially affected by the Cassidy decision.

The Municipal Court Judge concluded the defendant's prior DWI conviction in 2012, in a Municipal Court located in Camden County, could not have been affected by the Cassidy decision. After convicting Mr. Zingis if DWI, the Judge imposed an enhanced sentence based on the 2012 DWI conviction. Zingis, 471 N.J. Super. at 598-99.

Mr. Zingis had argued Municipal Court judge should follow the November 28, 2017 Order entered by Judge Lisa, when he was the Special Master in Cassidy, issued prior to the Court's ultimate decision on November 13, 2018, directing that, in pending DWI prosecutions resulting in a

conviction, whenever the State sought to utilize a prior DWI to enhance the sentence imposed, the State had an affirmative obligation to establish whether or not defendant had provided breath samples on an Alcotest Instrument calibrated by Sergeant Dennis in that prior DWI case, and must produce documentary evidence of that determination to the defendant and the court. 471 N.J. Super. at 597; see also Exhibit S-100. Mr. Zingis had also argued that Judge Lisa's Order was followed by a June 19, 2018 letter, sent by the Attorney General's Office to all county prosecutors, implementing that November 28, 2017 Order. Ibid.

The Law Division affirmed the conviction and enhanced sentence imposed, finding that the misfeasance of Sergeant Dennis was limited to those five Counties, and Mr. Zingis had not received notification that his case fell within the boundaries of the Cassidy decision, concluding the Zingis matter was outside what was contemplated by Judge Lisa's Order. Id. at 599-600.

As has been noted, on appeal, the Appellate Division affirmed the DWI conviction, but vacated the enhanced sentence, concluding the State had not produced proof, beyond a reasonable doubt, that the 2012 DWI conviction was not tainted by the misconduct of Sergeant Dennis. Id. at 603. Although the Appellate Division concluded that the November 28, 2017 Order and the Attorney General's June 19, 2018 letter were no longer applicable, 471 N.J.

Super. at 604, the court recognized the approach set forth in Judge Lisa's November 28, 2017 Order did provide definitive proof whether a prior DWI conviction was, or was not, potentially affected by the misfeasance of Sergeant Dennis, further stating:

> While this approach may be less convenient and efficient for the State than reliance on a list of defendants provided Cassidy notice, the definite nature of which has not been proven, the burden of Dennis's malfeasance as a law enforcement officer falls on the State. Where the State seeks to impose an enhanced sentence, it cannot escape on the grounds of convenience and expediency its obligation to prove that the prior conviction on which that enhanced sentence is predicated was not tainted by the previously established misconduct of a police officer.
>
> [Id. at 607.]

Although the court did not foreclose the possibility the State might establish, beyond a reasonable doubt, it has identified every DWI conviction tainted by the misconduct of Sergeant Dennis, and provided them notification of that fact, id. at 607, the evidence and testimony presented to this court has clearly established that the State has not "identified" all defendants potentially affected by that misconduct, nor has it provided effective "notification" to all defendants that it did identify and, certainly, not to those it has not identified. It is also clear that the State did engage in a good faith effort to identify and

notify those defendants who were potentially affected by the Court's decision in Cassidy.

Given the severity of the consequences of being sentenced as a second or subsequent offender, based on a prior DWI conviction that may have been improperly entered due t the misfeasance of a public law enforcement officer, this court concludes the State has the obligation to provide a defendant, subjected to a possible enhanced sentence, information and documentation, prior to imposing any sentence, whether the prior DWI conviction did, or did not, involve an evidential BAC reading obtained from breath samples provided on an Alcotest Instrument calibrated by Sergeant Dennis. In the next section of the Report, this court will provide suggestions designed to satisfy that obligation.

Other than exposure to enhanced sentencing, this court has recognized there are other legal, economic and social consequences to a DWI conviction on the record of an individual that may motivate a post-conviction application to vacate that conviction. However, much of the focus of this hearing revolved around that potential exposure to enhanced sentencing. Accordingly, it should be noted that N.J.S.A. 39:4-50(a)(3) provides, in pertinent part:

> A person who has been convicted of this section need not be charged as a second or subsequent offender in the complaint made against him in order to render him liable to the punishment imposed by this section on

> a second or subsequent offense, but if the second or subsequent offense occurs more than 10 years after the first offense, the court shall treat the second conviction as a first offense for sentencing purposes and if a third offense occurs after more than 10 years after the second offense, the court shall treat the third conviction as a second offense for sentencing purposes.
>
> [Emphasis added.]

This version of the step-down sentencing provision has been in effect since 1981. See L.1981, c. 47, §1. For a discussion of this statutory provision, see State v. Revie, 220 N.J. 126, 128-29 (2014). Additionally, pursuant to State v. Laurick, 120 N.J. 1, 16, cert. denied, 498 U.S. 111, S.Ct. 429, 112 L.Ed.2d 413 (1990), where a prior conviction involves a guilty plea in which the defendant was not represented by counsel, that conviction does not constitute a prior offense for purposes of increasing defendant's custodial sentence, but is counted as a prior offense for purposes of imposing administrative penalties on the defendant. Revie, 220 N.J. at 138.

It should also be noted that, upon vacating a conviction, the State and defendant are returned to their respective positions *status quo ante*. State v. Roddy, 210 N.J. Super. 62, 68 (App. Div. 1986), namely, with a pending DWI charge to be addressed. These factors are mentioned because there has been some discussion during these hearings relating to the relatively small number of Cassidy-based PCR applications that were filed (1,000-1200) during the

centralized Cassidy, post-conviction relief program, in relation to the thousands of individuals identified as potentially being affected by the Court's decision and notified. They are only mentioned because they may weigh in the determination by a Cassidy-identified and notified individual as to whether to file a PCR.

**V.**

Beyond specifically addressing the charges given to this court in its July 28, 2022 Order, see State v. Zingis, 251 N.J. 502, 503 (2022), it is appropriate to suggest potential remedies should the Court accept the findings that: (1) not all defendants potentially affected by its decision in Cassidy have been identified; (2) not all defendants entitled to notification under the Cassidy decision have been notified; and (3) there are potentially severe consequences to the use of a DWI conviction, affected by the misfeasance of Sergeant Dennis, in the form of an enhanced sentence upon a second or subsequent DWI conviction.

All counsel in this matter have been fully attuned to the "solution dilemma" presented to the Court, and all have been extremely diligent in posing potential remedies that will fully serve the interests of justice, whether they fully or partially agree or disagree with the approach, findings and determinations of this court. This court is aware it must balance its findings

with the practical effectiveness, and any administrative burdens incurred, of any suggested solution, the polestar being the obligation to fully serve the interests of justice.

*Amici*, the New Jersey State Bar Association and the New Jersey Office of the Public Defender, have provided the court with Joint Exhibits as constituting potential solutions to address the issue of properly identifying all individuals who have been requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis.

DB/DPD-28,a s discussed infra., is a PDF file that has been titled "Dennis Calibration Repository." It contains the calibration documents of all Alcotest Instruments that were calibrated by Sergeant Dennis from November 14, 2008 through October 9, 2015. It is in printable, pdf. format, and consists of the documents of 1,047 calibrations on 1,069 pages. *Amici* counsel represent this document was compiled directly from the Exhibits submitted by the State during discovery and then placed in PDF format in chronological order, and represents the best evidence to establish whether Sergeant Dennis calibrated a particular Alcotest Instrument, at a particular location, on a particular date and time. They have submitted Exhibit DB/DPD-31, titled "Notes on the 'Dennis Calibration Repository,'" which outlines the content, purpose and potential use of Exhibit DB/DPD-28.

They have also submitted Exhibit DB/DPD-29, an Excel Spreadsheet, titled "Zingis Index." It contains 27,426 Rows of subject defendants and twenty-two Columns (or Fields) of information for each Subject Row. It was created using Exhibit S-90 (also Exhibit S-148), the original Excel Spreadsheet created by the IT Bureau of the NJSP and sent to the DCJ, containing 27,833 Rows of breath-test attempts purportedly conducted on Alcotest Instrument calibrated by Sergeant Dennis, less the 436 breath-test attempts testified to by SFC Alcott as being conducted on Alcotest Instrument that were not calibrated by Sergeant Dennis, see Exhibits S-128 and S-129, plus the 26 attempted breath tests contained in Exhibit DB-23, admittedly conducted on Alcotest Instruments calibrated by Sergeant Dennis, plus the 3 attempted breath tests contained in Exhibits DPD-2(A) [redacted], DPD-2(B) [redacted], and DPD-2(C) [redacted].[38] The additional 26 Rows that were not contained in Exhibit S-90 (also Exhibit S-148) are highlighted in "yellow," and the 3 additional Rows are highlighted in "green" on Exhibit DB/DPD-29.

[38] It should be noted that Exhibit DPD-2(C) demonstrates that the DWI charge filed against [redacted] on May 14, 2010 in Highlands Borough in Summons Number H 20050, was dismissed by the Highlands Borough Municipal Court Judge on July 27, 2010.

The twenty-two Columns, or Fields of information contained on the Exhibit DB/DPD-29 Excel Spreadsheet are:

| | | |
|---|---|---|
| A | - | Row in Exhibit S-90 |
| B | - | Arrest Date |
| C | - | Driver License No. |
| D | - | Subject Last name |
| E | - | Subject First Name |
| F | - | Summons No. |
| G | - | Location |
| H | - | Serial Number of Instrument |
| I | - | Calibration Date |
| J | - | Subject Middle Initial |
| K | - | Subject Date of Birth |
| L | - | Subject Age |
| M | - | Subject Gender |
| N | - | Subject Weight |
| O | - | Subject Height |
| P | - | Issuing State |
| Q | - | Case Number |
| R | - | Arrest Date |
| S | - | Arrest Time |
| T | - | Arrest Location |
| U | - | Final Error |
| V | - | End Result |

The Subject Test Rows contained on the Exhibit DB/DPD-29 Excel Spreadsheet are listed chronologically, in Row B, by arrest date, starting with an arrest date of November 15, 2008, on Row 2, ending with arrest date of March 7, 2016, on Row 27427.

Exhibit DB/DPD-29 does contain those Subject Rows where the attempted breath testing resulted in the reporting on Column U of various "Final Errors" and no evidential BAC reading resulted in Column V. This

court has concluded Rows where no BAC reading was obtained were properly deleted by DAG Mitchell in creating Exhibit S-91. If the Court accepts that finding, then Row 1383 [redacted], Row 12580 ([redacted], and Row 14659 [redacted], as well as all other Rows where there is no BAC reading reported in Column V, should be deleted. This court's review of Exhibit DB/DPD-29 discloses that would result in a total of 7,051 Subject Test Rows being deleted. Another 2,075 breath-test attempts contained in Joint Exhibit DB/DPD-29 resulted in an evidential BAC reading of 0.000. Subtracting those 7,051 Subject Test Rows, and the 2,075 Subject Test Rows, results in 18,300 breath-test Rows remaining, constituting attempted breath tests on Alcotest Instruments calibrated by Sergeant Dennis where an evidential BAC reading was reported.

Additionally, a further review of those remaining 18,300 Subject Test Rows discloses numerous evidential BAC readings that were below the per se BAC level of 0.080. Of course, they were still evidential. Joint Exhibit DB/DPD-29 also contains numerous duplicate, and some triplicate, entries, where there were multiple breath-test attempts on the same Subject, with the same arrest date and summons number. Of those duplicate entries, some resulted in evidential BAC readings and some did not. Moreover, many of the Subject Test Rows reflect individuals who have made PCR applications based

on the Cassidy decision, that have been heard and adjudicated. In any event, should the Court conclude Subject Test Rows where no evidential BAC reading was listed be retained, then the entirety of 27,426 Subject Test Rows would remain.

*Amici*, the New Jersey State Bar Association and the Office of Public Defender, have also submitted Exhibit DB/DPD-30, titled "Notes on 'Zingis Index' to the Repository," which contains the content, purpose and potential use of the "Zingis Index" contained in Exhibit DB/DPD-29.

As noted, Exhibit DB/DPD-28 is presented as containing the calibration documents on all Alcotest Instruments calibrated by Sergeant Dennis, extracted from the discovery provided by the State in this matter, and Exhibit DB/DPD-29 is presented as containing all Subject Test Rows, consisting of all individuals who were requested to provide breath samples on Alcotest Instruments, contained in Exhibit DB/DPD-28, and calibrated by Sergeant Dennis. The following explanation of those Exhibits is contained in Exhibit DB/DPD-31:

> The Zingis index [Exhibit DB/DPD-29] and the Dennis Calibration Repository [Exhibit DB/DPD-28] is intended as a method for parties and the court to be satisfied as to whether a prior conviction that is being used as a sentencing enhancement in a subsequent case is or is not a Dennis case. It is a device for presumptive notice by the State that Dennis was involved in the prior case. It does not alleviate the State's burden to provide

these documents as discovery to the defense. That question is separate and apart from the notices ordered in Cassidy due to the court finding that readings obtained were not admissible. The question is Zingis (not decided in Cassidy) is what evidence the State needs to prove beyond a reasonable doubt, in a case involving enhanced sentencing, that Marc Dennis was not involved in the prior case? Although the question is framed by the burden of proof, the burden is to notice to defense whether the prior involved Marc Dennis, not the ultimate question of what would become of a PCR if filed.

II. THE USE OF THE INDEX AND REPOSITORY

A. ABSTRACT: The MVC abstract contains the dates of all arrests that become convictions. ("V" is the violation date, "O" is the court date if DWI)

B. NJ COURTS PORTAL: That violation date and other information can now be used to go to the public court portal for exact motor vehicle dispositions, including all summon numbers etc. (https://portal.njcourts.gov/webe41/MPAWeb/)

C. ZINGIS INDEX: With the information from that one goes to the repository index and can search any field by name, driver's license, arrest date, summons, and more. (Even an index without any personal information but leaving the summons number would still account for almost all cases being found by just are summons numbers which are public info.) This will yield the broadest notice of whether Dennis was involved in the case.

D. REPOSITORY: The Dennis Calibration repository contains proof that Dennis did the calibration, by means of the best evidence available*. Each PDF is printable and can be

searched in any file system by name, serial number, location, or date.

(*All the information comes directly from the Zingis discovery. There are 1,005 signed PDFs the State provided. There is 1 signed linearity test on the day of calibration (where the signed calibration record is missing) as the next best evidence Dennis. And, in the case of 41 calibration signatures missing, we have imported the actual data from the State's 68K solution change spreadsheet (the third best evidence) directly into a form made into a printable PDF, noting that the signed certification is missing but that the State's AIS indicates that Dennis did the calibration. Those last files 41 are also noted in the file name "AIS only".)

E. THE PROCESS: We would expect the process to take form something like this:

1. that the defense would utilize this index at the beginning of a case to ascertain whether a PCR was required,

2. that the State would use it when providing discovery to satisfy its discovery obligation to provide possibly exculpatory information (i.e., that a possible witness in the case committed malfeasance) and

3. it would assure the court judicial integrity by allowing even on the day of sentencing the court to query the parties as to whether the prior was a Dennis case, and, in the event that it was necessary, the parties could locate the answer to that question within literally minutes by reference to the online repository and index, allowing no uncertainty if sentencing proceeds.

F. TIPS ON SEARCHING THE REPOSITORY:

1. In most windows systems, repository will be a file folder that you can search as any other by a box at the very top right corner

2. In searching for dates, use the format "YYYY-MM-DD".

3. In searching for serial numbers, do not include the dash or hyphen. So ARTL-0008 will be found by searching "ARTL0008"

4. When searching locations, type the most limited version first. For example, start with "Highland" and then narrow when you find out how the file is named. State barracks should all contain "NJSP". HOWEVER, there are instances where "State of New Jersey" is used, so we advise always trying multiple methods if in doubt.

In DB-27, a June 9, 2023 letter to this court, copies to all counsel, Mr. Gold, counsel for the NJSBA, notes the following, concerning the confidentiality of personal identification information:

> As the "Zingis Index" [Exhibit DB/DPD-29] contains personal identifiers previously under protective order in the underlying data, those protections presumptively govern any non-publicly available data therein as well, without further order, unless the court directs otherwise, and the parties are herein advised, therefore, that no subject test, non-public, personal information should be distributed or shared beyond the court

> proceedings, lawyers, and witnesses, unless otherwise ordered or directed by the Court.
>
> The Court and parties have been (or will be shortly) provided with an invitation by Dr. Robert Spangler (rspangler@njsba.com )of the NJSBA to download these materials via a secure site at the State Bar. Once the invitation is received, the parties will have to confirm their email as required, and then receive a code to enter to get into the secure site. Once the code is confirmed, there will be one folder (Repository) containing 1047 files and three other files ( Notes on Repository, Zingis Index, and Notes on Zingis Index) . All four should be downloaded as the secure location will only remain available for a limited time.

In its post-hearing submission, the State had recognized and identified various errors in Exhibit S-90 (also Exhibit S-148). As noted, the Excel Spreadsheet contained in Exhibit S-152, created by the IT Unit of the NJSP at the request of this court, contains a record of all 236,664 breath tests conducted on all Alcotest Instruments in New Jersey from November 5, 2008 and June 30, 2016. In addition to the erroneous inclusion in Exhibit S-90 (also Exhibit S-148) of 436 breath tests that were performed on Alcotest Instruments that were not calibrated by Sergeant Dennis, the State noted that an analysis of Exhibit S-152 during the plenary hearing disclosed there were 26 breath tests conducted on 3 Alcotest Instruments calibrated by Sergeant Dennis that were not included in Exhibit S-90 (also Exhibit S-148).

Those not included are 17 requests to provide breath samples on Dennis-calibrated Alcotest Instrument ARWF-0400, located at the Borough of Highlands Police Station, appearing on Exhibit S-152, and listed on Exhibit DB-23, as follows:

| Row on S-152 | Date | Name | Error? | BAC Reading |
|---|---|---|---|---|
| 167776 | 5-26-12 | [redacted] | None | 0.193 |
| 167777 | 5-26-12 | [redacted] | None | 0.203 |
| 167767 | 4-06-12 | [redacted] | None | 0.125 |
| 167768 | 4-06-12 | [redacted] | None | 0.124 |
| 167769 | 4-15-12 | [redacted] | None | 0.150 |
| 167773 | 5-19-12 | [redacted] | None | 0.174 |
| 167771 | 4-29-12 | [redacted] | None | 0.204 |
| 167772 | 5-06-12 | [redacted] | None | 0.061 |
| 167774 | 5-20-12 | [redacted] | None | 0.000 |
| 167770 | 4-21-12 | [redacted] | Test Term | ----- |
| 167766 | 3-21-12 | [redacted] | Refusal | ----- |
| 167778 | 5-28-12 | [redacted] | Refusal | ----- |
| 167779 | 6-10-12 | [redacted] | Test Term | ----- |
| 167764 | 3-11-12 | [redacted] | None | 0.058 |
| 167775 | 5-26-12 | [redacted] | None | 0.000 |
| 167765 | 3-11-12 | [redacted] | None | 0.000 |
| 167640 | 4-14-10 | [redacted] | None | 0.000[39] |

The State contends those individuals listed where no evidential BAC reading was obtained do not fall under the Court's decision in Cassidy, and were not entitled to be notified. Although the State concedes the remaining individuals on this list, identified as being requested to provide breath samples

[39] [redacted], who was tested under the name of [redacted] (same person) appears in Exhibit DPD-2(C).

on Alcotest Instrument calibrated by Sergeant Dennis, and not included on Exhibit S-90 (also Exhibit S-148) were entitled to notice, because Exhibit DPD-2(C) reflects that the DWI charge field against [redacted] was dismissed, she would not be entitled to notification.

The State also acknowledged there were 10 requests to provide breath samples on Alcotest Instrument ARWF-0356, calibrated by Sergeant Dennis, that are not contained on Exhibit S-90 (Also Exhibit S-148), as follows:

| **Row on S-152** | **Date** | **Name** | **Error?** | **BAC Reading** |
|---|---|---|---|---|
| 154922 | 3-28-09 | [redacted] | None | 0.139 |
| 154928 | 5-14-09 | [redacted] | Ambient Air Chk | ----- |
| 154929 | 5-14-09 | [redacted] | None | 0.117 |
| 154924 | 4-12-09 | [redacted] | Refusal | ----- |
| 154923 | 4-01-09 | [redacted] | None | 0.120 |
| 154926 | 5-10-09 | [redacted] | None | 0.163 |
| 154927 | 5-10-09 | [redacted] | None | 0.034 |
| 154921 | 3-01-09 | [redacted] | None | 0.187 |
| 154925 | 4-25-09 | [redacted] | None | 0.194 |
| 154920 | 2-08-09 | [redacted] | None | 0.209 |

Again, the State contends those individuals listed where the requested breath-sample tests did not result in an evidential BAC reading did not fall within the Court's decision in Cassidy, and were not entitled to notification. The State also noted that two of those individuals, [redacted] and [redacted], were sent the Cassidy notification letters based on different DWI

arrests.[40] The State also notes, although there were no driver's license numbers listed for [redacted] and [redacted], the AOC, at the request of the State during the pendency of this matter, was able to find an address for [redacted], but was unable to locate an address for [redacted]. See Exhibit S-170F.[41]

Additionally, the State acknowledged that [redacted], also was not included on Exhibit S-90 (also Exhibit S-148), although she was requested, on June 30, 2009, to provide breath samples on Alcotest Instrument ARTL-0023, located at the Bridgewater Police Station, calibrated by Sergeant Dennis, see Row 44209 on Exhibit S-152, and Exhibit DPD-2A. There was no error on that testing and a BAC reading of 0.132 resulted.

The State also agrees that the evidence and testimony disclosed that there were multiple instances where, due to human data-entry errors, there were many instances where the date of the arrest entered was, in time, before

[40] There is no indication whether the notification letters sent to [redacted] and [redacted] were among those returnable as being undeliverable.

[41] As noted, based on testimony and information received during the plenary hearings, DAG Clark did reach out to the AOC, requesting a search for addresses of those individuals who had been identified as being requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis, see Exhibit S-170B, and Exhibit S-170F, a two-page list sent back to DAG Mitchell containing the results of that requested search. Addresses for some individuals, but not all, were located and it is not known whether notification letters were subsequently mailed and, if so, whether they were received.

the date of the calibration of the Alcotest Instrument. That error impeded the ability of the AOC to located addresses for those individuals when creating Exhibit S-83, because the "date of arrest" was utilized in its search to locate the correct individual in the court's database.

The State also properly noted that because of these multiple errors of inclusion and exclusion, which were discovered during the plenary hearing, it is unknown whether any of those excluded individuals had a later conviction in a different County.

On the issue of "notification," the State agrees there were never attempts to send notification letters to those individuals, identified during the hearing as having provided breath samples on Alcotest Instruments calibrated by Sergeant Dennis that resulted in BAC readings, but were not included on Exhibit S-90 (also Exhibit S-148). The State notes that includes the 26 individuals noted above, as well as some 76 individuals whose arrest dates were incorrectly entered by arresting officers or Alcotest Instrument officers at the time of testing. Additionally, the testimony of Tracey Mannix (Union County) and Brian Gillet (Middlesex County) was unable to confirm that notification letters were sent to those individuals appearing on Sheet (Tab) 2 of Exhibits S-84 (215 in Middlesex County) and S-88 (216 in Union County). The State

submits that the second, post-Cassidy form notification letter should be mailed to those individuals.

The State correctly points out, despite the obvious deficiencies in being able to fully notify all individuals who were requested to provide breath samples on Alcotest Instruments, calibrated by Sergeant Dennis, and resulting in a BAC reading, there were significant attempts at notification. Those efforts consisted of three mailings, one during the pendency of the Cassidy litigation, another following the Court's decision in Cassidy, and a third during the centralized post-conviction relief application phase. Additionally, the Division of Criminal Justice, the New Jersey State Police, and the Administrative Office of the Courts all placed information concerning the Cassidy decision and the misfeasance of Sergeant Dennis on their websites, as did some of the principal Counties. There were also Notices to the Bar prepared, published and distributed concerning the Cassidy decision and the misfeasance of Sergeant Dennis. Notwithstanding, those notification efforts were not fully effective in terms of notifying "all affected defendants," Cassidy, 235 N.J. at 498.

In its submission, the State highlights the difficulties encountered in providing notice, including the inability of the AOC to locate addresses where either no driver's license, or an invalid driver's license, was contained on

Exhibit S-91. Additionally, attempts by the AOC to updated address information from the Motor Vehicle Commission were unsuccessful and may, or may not, have been effective, and certainly would not have included out-of-state licensees or those who no longer retained driver's licenses.

The solution posed by the State is two-fold. First, those individuals now identified as having provided breath samples on Alcotest Instruments calibrated by Sergeant Dennis, resulting in BAC readings, for which the AOC has secured addresses, should be sent the second, post-Cassidy form notification letter.

Second, the State should make all calibration documents pertaining to calibrations now known to have been conducted by Sergeant Dennis on Alcotest Instruments available to the public on the public Cassidy websites of the Attorney General, the New Jersey State Police, and the Administrative Office of the Courts. The State also suggests that Exhibit S-89, the Excel Spreadsheet, entitled "Spreadsheet of towns and counties," created by SFC Alcott, containing a listing of the serial numbers and locations of Alcotest Instruments that Sergeant Dennis calibrated should also be placed on those public websites.

SFC Alcott testified he created Exhibit S-89 by extracting information from Exhibit S-126, the Excel Spreadsheet created by SFC Alcott, entitled "Zingis Project Spreadsheet 2-24-2023." Exhibit S-89 contains 146 Rows and three Columns of information: Column A, the Alcotest Serial Number; Column B, the Agency where the Instrument is located; and Column C, the County in which Instrument is located. Exhibit S-89 lists Alcotest Instrument, calibrated by Sergeant Dennis in Burlington, Cape May, Mercer, Middlesex, Monmouth, Ocean, Somerset, and Union Counties. SFC Alcott noted, in his testimony, that the Alcotest Instruments listed in Burlington, Cape May, and Mercer Counties are all located in State Police Barracks. Referring to Exhibit S-126, SFC Alcott testified that Sergeant Dennis only performed Solution Changes, not Calibrations, on the two Alcotest Instruments located in Burlington County, and on the two Alcotest Instruments located in Mercer County. Accordingly, the State recommended that Exhibit S-89 be modified by SFC Alcott to remove Rows 2 and 3 ("NJSP – Red Lion – Burlington") and the Rows 5 and 6 ("NJSP – Hamilton – Mercer") because only Solution Changes, not calibrations, were performed on those Instruments by Sergeant Dennis. The State also recommends that SFC Alcott further modify Exhibit S-89 to place the "Calibration Dates" performed by Sergeant Dennis in Column D and to place next to each Calibration date the letter "Y," for "Yes" that the

calibration documents are available in the Alcotest Inquiry System database, the letter "M" to signify the calibration documents are "missing" from the database, and the letter "P" to signify that "some documents are missing" from the database. Those designations could be extracted by SFC Alcott from Exhibit S-126.

The State submits that by using the individual calibration records of Sergeant Dennis on the public websites, and Exhibit S-89, as modified by those suggestions, that would allow any individual, knowing the approximate date and location of arrest, to determine whether his or her breath test was conducted on an Alcotest Instrument calibrated by Sergeant Dennis, and that individual, or counsel, and could search the public portion of the database to obtain the serial number of the Alcotest Instrument on which he or she was tested.

The State also suggests that the public be notified of the availability of that information by the Attorney General and every County Prosecutor's Office issuing a press release and placing same on their websites.

The State maintains that the Excel Spreadsheet contained in Exhibit S-152, which contains 236,664 Subject Rows of all individuals who were requested to provide breath samples on all Alcotest Instruments in New Jersey from November 1, 2004 through June 30, 2016, should not be publicly posted

because it contains personal identification information that should remain confidential. The State does suggest Exhibit S-152 could be distributed to each County Prosecutor's Municipal Court Liaison to verify, for inquiries by individuals, whether the Alcotest Instrument on which they were tested was calibrated by Sergeant Dennis and, if so, where and when.

The State also objects to the joint recommendations by *Amici*, the NJSBA and the Office of Public Defender concerning joint Exhibit DB/DPD-28, the PDF file, "Dennis Calibration Repository," and joint Exhibit DB/DPD-29, the Excel Spreadsheet, "Zingis Index." In addition to its general objections, outlined on pages 98-100 in Exhibit AF, altering or modifying the fee charged for public searches of the database, is beyond the scope of this court's ordered authority, and *Amici* have improperly suggested that a conviction predicated on an Alcohol Influence Report (AIR), generated based on breath tests conducted on an Alcotest Instrument calibrated by Sergeant Dennis, should be automatically vacated. The State contends the "Zingis Index" is objectionable because it contains personal and confidential identification information and, even if removed, was created by counsel, rather than by the State, which is responsible for the content of the public database.

The State also objects to the "Dennis Calibration Repository" because it was created by counsel, usurping a responsibility of the State, and the State

also does not see the usefulness of arranging records by the date of calibration, maintaining that an individuals who obtains a record from the public database will know the serial number of the Alcotest Instrument on which they were tested and then can search the posted Excel Spreadsheet in Exhibit S-152, as modified, to determine whether Sergeant Dennis calibrated that Instrument.

*Amicus*, the Office of the Public Defender, has also submitted some recommendations, correctly observing that the evidence and testimony presented during the hearings established that the list of individuals contained in Exhibit S-90 (also Exhibit S-148) is underinclusive, as it fails to identify all individuals who were requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis, and there are multiple deficiencies in the notification procedures employed by the State in that not all individuals potentially affected by the Court's decision in Cassidy were properly notified that BAC readings produced on Alcotest Instruments that were not calibrated by using an NIST-traceable thermometer were inadmissible, so they could take appropriate action in the form of an application for post-conviction relief.

The recommendations submitted by the Public Defender's Office are focused more on the effect that DWI convictions, based on Alcotest Instruments calibrated by Sergeant Dennis, might have on indictable offenses. Specifically, the post-hearing submission by the Public Defender's Office

expresses concern that the testimony by Mr. Somogyi reveals that a DWI charge, filed in Municipal Court that is related to an indictable offense filed in Superior Court is noted in the court's Automated Traffic System (ATS) database as being transferred to the court's Automated Criminal System (ACS) in the Superior Court  Sometimes, the DWI charge is sent back by the Superior Court for disposition in the Municipal Court, which is then recognized and captured in the ATS database.  However, if the DWI charge is disposed of in the Superior Court in the form of a conviction, there is no tracking of that conviction in the ATS database, other than the notation it had been transferred to the Superior Court.

The Public Defender's Office recommends the Court create a rebuttable presumption that an individual requested to provide breath samples on an Alcotest Instrument that was calibrated between November 5, 2008 and April 9, 2016, was tested on an Instrument that was calibrated by Sergeant Dennis, submitting that:

> In many cases, it will be straightforward for the State or the defense to confirm or rebut the presumption. The primary, and best, evidence regarding the calibrator of the machine will come from the original discovery documents in the underlying municipal court case. If those documents are no longer retained—as apparently took place in the [redacted] matter—then the State must seek other evidence confirming whether or not Dennis calibrated the machine involved in the case. Of course, if the relevant test is contained in the index of

> subject tests involving Dennis-calibrated machines provided by the OPD and the NJSBA, see DB/OPD-29, then it is clear that the matter involved a Dennis-calibrated machine. But even if the relevant test is not contained in that index, the State must provide evidence overcoming the presumption. That evidence could be from the broader AIS data, see S-152, showing that the relevant subject test was provided on a machine not calibrated by Dennis. But if, for whatever reason, the State cannot identify the appropriate subject test—as appears to have happened with [redacted]—then the presumption applies, and the test is presumed to have been conducted on a Dennis-calibrated machine. In this sense, the State is held to account for both the misconduct of its law enforcement employee who failed to appropriately calibrate the machine and its failure to retain sufficient information, either through discovery materials or the AIS, to identify whether the person was tested on a Dennis-calibrated machine.
>
> [See Exhibit AI, page 9.]

The Office of the Public Defender maintains this presumption should at least apply to those cases where an individual was requested to provide breath samples on an Alcotest Instrument located in the five principal Counties of Middlesex, Monmouth, Ocean, Somerset and Union, where Sergeant Dennis performed almost all his calibrations.

Turning to the issue of indictable offenses, the Office of Public Defender also requests this court recommend to the Supreme Court that the AOC be directed to provide the Public Defender with a list of, (1) all individuals convicted of Reckless Vehicular Homicide, contrary to N.J.S.A. 2C:11-5(a),

from November 5, 2008 through October 9, 2017, two years after the last calibration performed by Sergeant Dennis; (2) all individuals convicted of Assault by Auto, contrary to N.J.S.A 2C:12-1(c), from November 5, 2008 through October 9, 2017; (3) all individuals convicted of fourth-degree Driving while license is suspended for a DWI conviction, contrary to N.J.S.A. 2C:40-26, from November 5, 2008, to the present. The Public Defender notes the testimony of Mr. Somogyi confirmed these results can be extracted from the ACS database, and contends

> this information will allow it to identify persons who it may have represented in connection with a Superior Court criminal conviction that may have been tainted by Dennis's misconduct, so that the OPD can advise its clients on how to obtain appropriate relief.
>
> [See Exhibit AI, page 10.]

The Public Defender also asserts the mailing of notices to those addresses identified as existing at the time of the arrests, between 2008 and 2016, and the website posting of information concerning the misfeasance of Sergeant Dennis and the Court's Cassidy decision, were insufficient. The Public Defender does support the State's agreement to mail notices to those individuals identified, during the plenary hearing, as having been requested to provide breaths samples on a Dennis-calibrated Alcotest Instrument, but were

omitted from Exhibit S-90 (also Exhibit S-148), and for which the AOC has now been able to secure addresses for some of them.

In terms of solutions for the "notification" issue, the Public Defender recognizes

> that the task of identifying new addresses for these individuals would be arduous, if it is even possible. Instead, the OPD proposes that the State and Judiciary attempt to identify individuals at the time that they suffer additional collateral consequences from the Dennis-affected conviction.
>
> [See Exhibit AI, pages 14-15.]

The Public Defender maintains if a person is convicted of DWI, and there is a prior DWI conviction that occurred during the period of time Sergeant Dennis was calibrating Alcotest Instruments, thereby subjecting that person to enhanced penalties in a Municipal Court case, the State should be required to make a *prima facie* showing that the prior conviction was not one based on a BAC reading produced by an Alcotest Instrument calibrated by Sergeant Dennis. It contends that same procedure should be followed for criminal matters in Superior Court, where DWI convictions may have collateral consequences.

Essentially, the Public Defender's Office maintains unless the State can establish a *prima facie* case that the DWI conviction at issue was not affected by the Cassidy decision, then it should not be able to proceed with imposing an

enhanced sentence or consider collateral consequences until the defendant has an opportunity to file an application for post-conviction relief and be heard.

Counsel for Defendant-Respondent, Thomas Zingis, contends there has not been advanced a credible method of producing a comprehensive list of all defendants potentially entitled to relief under the Court's decision in Cassidy, nor an effective method of providing them, if identified, with notification of their right to seek relief. Therefore, Defendant-Respondent contends the State should be required to provide notice to any defendant against whom the State intends to utilize a prior DWI conviction entered during the time period Sergeant Dennis was calibrating Alcotest Instruments to enhance the sentence of a defendant convicted of a subsequent DWI offense, and provide full discovery, including the AIR relating to that prior conviction. Additionally, counsel contends the State should not be permitted to move forward with sentencing until the defendant has the opportunity to file for post-conviction relief concerning that prior conviction, and that application has been fully adjudicated.

Based on the evidence and testimony presented during the plenary hearing and the positions and recommendations provided by counsel, this court makes the following findings, conclusions and recommendations:

1. The State Did Not Identify All Individuals Who Were Requested To Provide Breath Samples on Alcotest Instruments Calibrated By Sergeant Marc Dennis. In order to comply with the Order of the Supreme Court State v. Cassidy that the State "notify all affected defendants" of its decision that "breath test results produced by Alcotest machines not calibrated using a NIST-traceable thermometer are inadmissible, so that they may take appropriate action[,]" 235 N.J. at 498 (emphasis added), it first necessary to "identify" those individuals so affected. That task took the form of identifying all defendants who had provided breath samples on Alcotest Instrument calibrated by Sergeant Dennis through a search, or "query," of the Alcotest Information system database.

As has been thoroughly discussed in this Report, although the State attempted, in good faith, to comply with the Court's Order, the search conducted by the Information Technology Bureau of the New Jersey State Police, in the form of the Excel Spreadsheet contained in Exhibit S-90 (also Exhibit S-148), was both overinclusive and underinclusive. Part of the reason for that result was that the "query," listed on the second Sheet, or Tab, of the Spreadsheet as the "SQL Statement," did not match the results contained on the first Sheet, or Tab, the "SQL Results." However, there were a substantial number, almost "all," of those defendants who were identified as having been

requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis.

The thoroughness of the discovery provided by the State, and the diligent efforts of *Amici* counsel have assisted this court in being satisfied that almost all of those individuals who have been requested to provide breath samples on a Dennis-calibrated Alcotest Instrument have been identified, with the elimination of 436 breath-sample attempts, and the inclusion an additional 29 breath-sample requests. There are certain exceptions to the inclusiveness of that conclusion, due to human error. Arresting Officers and Alcotest Operators are required to manually enter informational data into certain fields when both conducting an arrest and in attempting to administer a breath test. Information reflected in police reports and in Alcohol Information Reports (AIRs) and other breath-test informational reports is only accurate to the extent it is accurate when manually entered. The evidence and testimony clearly reveals some instances where that information has been inaccurately entered, such as the date of the arrest, the driver's license number of the individual, the identifying information of the Operator of the Alcotest Instrument, the spelling of the individual's name, and other identification information, and thereby, the resulting data information contained in the Alcotest Information System database will also be inaccurate. There were, for example, numerous instances

where the date of arrest in a Subject Row was listed as occurring prior to the date of the listed calibration date of the Instrument on which the test was performed. See Exhibits S-171A and S-171B.

An additional reason for the potential omission of an individual requested to provide breath samples on an Alcotest Instrument calibrated by Sergeant Dennis in the database is the prior method of downloading all solution change, calibration, breath-testing and identification information onto the Alcotest Information System database. Presently, and since in or about 2011, informational data of breath-test attempts, and results, including subject identification information, has been downloaded periodically into the database directly, and automatically, through a dedicated telephonic modem connecting every Alcotest Instrument in New Jersey to the database located in West Trenton, New Jersey, maintained by the State Police. Prior to that, Operators and Coordinators were required to periodically download that information onto two compact discs, one being retained by the agency location of the Alcotest Instrument, and the other being transported to the New Jersey State Police and manually downloaded onto the database. The testimony and evidence disclosed one instance, that of [redacted] where a Municipal Court Case Search conducted by the Office of the Public Defender, see Exhibit DPD-2(D), disclosed [redacted] was arrested on December 27, 2008, and charged by

a State Trooper with DWI on the New Jersey Turnpike in Woodbridge Township. [redacted] was convicted of DWI on April 22, 2009, based on his plea of guilty. However, a search of Exhibit S-152, the Excel Spreadsheet containing 236,664 subject records of all individuals who were requested to provide breath samples on all Alcotest Instruments in New Jersey between November 5, 2008 and June 30, 2016, discloses there is no record of [redacted] having been requested to provide breath samples. Additionally, [redacted] does not appear on Exhibit S-90 (also Exhibit S-148), or on Exhibit S-150 (Also Exhibit DB-19), the Excel Spreadsheet prepared by Mr. Gronikowski, at the request of SFC Alcott, containing 362 Subject Rows of those individuals who were requested to provide breath samples on all Alcotest Instruments in New Jersey from December 26, 2008 through December 28, 2008, in an effort to located a breath-testing on [redacted]. SFC Alcott, in his testimony, posed the possibility the omission of [redacted] testing from the database was the result of human error due to the prior, compact-disc method of downloading information onto the database, where the information on a particular compact may not have been downloaded onto the database. See T9, page 70, line 17 to page 71, line 5.

2. The Classification Of Those Defendants Entitled To Notification Of The Court's Decision In Cassidy Is Limited To Those Who Were

Requested To Provide Breath Samples On An Alcotest Instrument Calibrated By Sergeant Dennis That Resulted In The Reporting Of An Evidential Blood-Alcohol Content (BAC) Reading. As has been fully considered and discussed in this Report, this court concludes there has been no expert or scientific evidence presented, establishing that an Alcotest Instrument calibrated without the use of a NIST-traceable thermometer would be unable to properly report an Error Message, preventing the Instrument from analyzing breath samples and providing an evidential BAC reading that could have been utilized in the prosecution of the DWI offense, or which could have been utilized to affect a defendant's decision to enter a guilty plea to that offense or another lesser-included, This court recognizes that an AIR reporting a conclusion that the "Subject Refused" to comply with the Implied Consent Statute may be admissible. That conclusion can be based on an actual refusal of an individual, when requested, to submit breath samples, which is recorded by the Operator or Arresting Officer conducting test and, ultimately, that fact is downloaded onto the Alcotest Inquiry System database as, in those situations, the Instrument is prepared and ready to receive breath samples and the subject directly refuses to provide breath samples. A "refusal" conclusion can also be determined when the Operator or Arresting Officer concludes the Subject is refusing to provide the required, sufficient breath samples. Again, in those

circumstances, there has been no expert or scientific evidence or testimony presented establishing that the sensors in the firmware of an Alcotest Instrument are rendered ineffective or inoperable in being able to automatically report whether insufficient breath samples have been provided on an Instrument calibrated without the use of a NIST-traceable thermometer.

3. The State Did Not Fully Provide the Ordered Notification To All Defendants Affected Defendants Of The Court's Decision In Cassidy. The evidence and testimony is clear, as discussed fully in this Report, there were some affected defendants who were not provided direct notification because they were not "identified" as having been requested to provide breath samples on Alcotest Instrument calibrated by Sergeant Dennis and, thereby, were not mailed notification letters concerning the malfeasance of Sergeant Dennis or the Court's decision in Cassidy. The evidence and testimony is also clear there were many individuals, identified in Exhibit S-91 as having provided breath samples on Alcotest Instrument calibrated by Sergeant Dennis resulting in an evidential BAC reading, where the AOC was unable to search for, or locate, a mailing address for those individuals, resulting in that subject not being mailed any of the three notification letters undertaken by the State. Lastly, the evidence and testimony is clear that thousands of those mailed notification letters were returned by the Postal Authorities as being undeliverable and,

other than remailing some of those notification letters to forwarding addresses provided by the Postal Authorities, there were no additional efforts undertaken by the State to secure updated addresses for those undeliverable letters. Moreover, some the addresses that were secured by the AOC were the addresses of individuals on file as of the date of their arrests, between 2008 and 2016, no doubt accounting for the large number of undeliverable notification letter, as this court takes judicial notice that some people do periodically move from one address location to another for many reasons. See Exhibit S-31, page 14.

The evidence and testimony also disclosed, beyond the mailing of three notification letters, there have been attempts to notify Cassidy-affected defendants in the form of notifications of the misfeasance of Sergeant Dennis, and that the Cassidy decision, were placed by the State on the websites of various County Prosecutors, and on the website of the Attorney General. The Judiciary has also placed that information on its website, creating a specific Cassidy website that still exists, and there have been Notices to the Bar and Public concerning the misfeasance of Sergeant Dennis and the Cassidy decision issued and published by the Judiciary. These efforts are in the nature of "constructive notification."

Despite these recognized notification deficiencies discussed herein, there has been no evidence or testimony offered or presented that would provide this court with an acceptable manner of determining reliable, updated addresses for: (1) all those individuals who were not identified as being affected by the Cassidy decision;[42] (2) for all those who have been previously identified as being Cassidy-affected, but the AOC was unable to search for, or find, addresses; and (3) for those individuals whose address was identified, were mailed notification letters, and those letters were returned as being undeliverable.

There has been no additional "public repository" of address information identified that, if accessed, would provide assurance that addresses, or updated addresses, for all individuals identified as being affected by the Court's decision in Cassidy can be secured in order to mail additional notification letters. Although this court has previously identified the repository maintained by the New Jersey Motor Vehicle Commission as a potential source for more updated address information, the Motor Vehicle Commission is not a party to

[42] As has been noted, the names and identifying information of those individuals identified as being Cassidy-affected during the plenary hearing, but having not been included in Exhibits, S-90, S-148 or S-91, were sent by the State to the AOC, which did secure a subject-to-address for some of them, and the State has agreed to mail the post-Cassidy decision form letter to them. That should be accomplished, even though the addresses secured were as of the date of arrest, as any attempted notice is better than none.

this litigation and, even if impleaded for address-search purposes, there is no assurance that addresses for all Cassidy-affected individuals could be obtained, given the lack of driver's license numbers for many individuals in the various Spreadsheets placed into evidence, as well as some affected individuals being out-of-state, or no longer holding a driver's license. Notwithstanding, those limitations, the Court may consider and determine that approach should be undertaken.

This court also takes judicial notice there are multiple private, "people-find" and "background" websites, such as "Spokeo," www.spokeo.com, "truthfinder, www.truthfinder.com, "Been Verified," www.beenverified.com, "Intelius," www.intelius.com, "PeopleLooker," www.peoplelooker.com, "peopleWhiz," www.peoplewiz.com, "peoplefinders," and many others. However, they are private, fee-generating websites, or companies, and there is no assurance, and certainly no evidence, they would be able to secure current addresses for those not previously sent notification letters or those whose mailed notification letters were returned as being undeliverable, and the fiscal and administrative burdens clearly outweigh and potential benefit from their access and use.

4. There Are Solutions Available That Should Be Implemented To Better Assure The Proper Identification Of Those Individuals Who Have

Provided Breath Samples on Alcotest Instrument Calibrated by Sergeant Dennis And To Provide Those Individuals With Additional Notification.

This court has carefully considered the various suggestions and remedies to both the identification and notification issues presented by counsel. What is particularly concerning, as in the Zingis matter, is the circumstance where a prior DWI conviction, that occurred as a result of breath testing between November 2008 and April 2016, is sought to be utilized in sentencing a defendant, convicted of a subsequent DWI offense, to an enhanced sentence under either N.J.S.A. 39:4-50(a)(2) or 39:4-50(b)(3), which includes, inter alia, a period of imprisonment. The issue, of course, is whether that prior conviction is potentially affected by the Court's decision in Cassidy, i.e., was there an evidential BAC reading in that case, obtained on an Alcotest Instrument that was calibrated by Sergeant Dennis. Of significant importance is whether any such DWI conviction, involved an evidential BAC reading obtained on a Dennis-calibrated Alcotest Instrument, even when it is not being utilized by the State in seeking enhanced-penalty sentencing on a subsequent DWI conviction. Even a first DWI conviction has consequences, regardless of whether a subsequent DWI conviction is entered.

Even though it appears all, or almost all, Cassidy-affected individuals have been now identified, but many have not received direct mailing

notification of the misfeasance of Sergeant Dennis and the Court's decision in Cassidy, this court finds there are certain measures that can be taken, designed to serve the interests of justice, as follows:

A. The use of the proposed "Dennis Calibration Repository," contained in Exhibit DB/DPD-28, when used in conjunction with Exhibit S-152, is the best available method of determining whether an individual was requested to provide breath samples on an Alcotest Instrument calibrated by Sergeant Dennis and an evidential BAC reading was obtained. Joint Exhibit DB/DPD-28 contains a listing, in chronological order, the calibration documents of all Alcotest Instruments calibrated by Sergeant Dennis, which was compiled from the discovery documents produced by the State. To the extent the State objects because it was compiled by the efforts of *amici* counsel, that can be remedied by a full review of that exhibit to assure such is the case and, if so, the State can develop its own "mirrored" file containing all calibration documents performed by Sergeant Dennis. That compiled PDF file can be maintained by the Attorney General's Office, placed on its website or, perhaps additionally, be provided to each Municipal Court, County Prosecutor's Office, and each Superior Court. It contains no personal identification information, and can provide virtually instantaneous information

as to whether a particular Alcotest Instrument, at a particular location, was calibrated by Sergeant Dennis, on a particular date.

Exhibit S-152 contains all subject records contained in the Alcotest Information System database, listing 236,664 instances where an individual was requested to provide breath samples on an Alcotest Instrument in the State of New Jersey from November 1, 2008, through June 30, 2016, which fully includes the period of time, and more than six months after, when Sergeant Dennis was calibrating Alcotest Instruments. That document does contain personal identification of those subjects, and its availability should be the subject of a protective order as determined by the Court, which can also determine the scope of its availability. It is a record that should be maintained by the Office of the Attorney General, with access thereto by all Municipal Courts and the Superior Court, with information therefrom provided to defendants and counsel during discovery.

The instant case of State v. Thomas Zingis is a good example of how those documents can be utilized in conclusively determining whether a prior DWI conviction involved an evidential BAC reading from an Alcotest Instrument calibrated by Sergeant Dennis. First, conducting a search of the Excel Spreadsheet in Exhibit S-152 discloses, on Row 75536, that Thomas Zingis was arrested on January 13, 2012 (Column A), in the Borough of

Collingswood (Column S), in Camden County, and charged with DWI. The information on that Row further reveals that, on that date, Mr. Zingis provided breath samples on Alcotest Instrument ARUM-0042 (Column B), located at the Collingswood Police Station (Column D), calibrated on October 13, 2011 (Column C), which resulted in an evidential BAC reading of 0.178 (Column U). Turning to Joint Exhibit DB/DPD, a review of same discloses that Alcotest Instrument ARUM-0042 is not an Instrument that was calibrated by Sergeant Dennis. Accordingly, the inescapable conclusion is Mr. Zingis not an individual affected by the Court's decision in Cassidy. Had this information been provided to the defendant and counsel in discovery, and made available to the Municipal Court Judge, the issue of whether the prior, 2012 DWI conviction could be utilized in sentencing on January 8, 2020 would have been properly resolved.

B. In order to assure that a defendant, convicted of DWI anywhere in this State, either in a Municipal Court or in the Superior Court, linked to an indictable charge, faces circumstances where a prior DWI conviction is sought by the State as the basis for imposition of an enhanced sentence, prior to sentencing, the State should be required to provide discovery to the defendant and counsel, and information to the court, the results of a search of Exhibit S-152 (access to which should be provided to defendant and counsel under a

protective order), and the correlating information contained in Exhibit DB/DPD-28, as reviewed, modified and adopted by the State, which should be provided to defendant and counsel in discovery. There should be no sentencing of a defendant where the State seeks imposition of an enhanced sentence until that process has been completed.

This court is aware that in some very limited circumstances, such as revealed in the [redacted] matter, where there is no record in the database of an attempt to obtain breath samples from a defendant, there may, or may not be, discovery available to assist the court in determining whether or not an enhanced sentence should be imposed, but the burden remains on the State to establish, beyond a reasonable doubt, that the enhanced sentence is warranted.

C. In circumstances where a defendant files an application seeking post-conviction relief based on the Court's ruling in Cassidy, contending he or she was tested on an Alcotest Instrument calibrated by Sergeant Dennis that produced an evidential BAC reading, the defendant should be provided discovery access to Exhibit S-152 under a protective order, and access to Exhibit DB/DPD-28 (as reviewed, modified and adopted by the State), as well as other available discovery relating to the DWI charge and conviction. That

information will provide the court considering the application for post-conviction relief with information on which to base its decision.

D. With respect to additional notification to those individuals identified as providing breath samples on Alcotest Instruments calibrated by Sergeant Dennis that resulted in an evidential BAC reading, this court finds the suggestions by State as being most persuasive.

First, there has been no evidence of testimony presented identifying a database or repository, governmental, public or otherwise, that cold be accessed and searched that would provide a guarantees or assurances that updated addresses could be obtained to facilitate yet another mailing of notification letters. This court is satisfied the State has exercised reasonable diligence, given the available resources, in attempting to secure addresses for those individuals identified as having been requested to provide breath samples on an Alcotest Instrument calibrated by Sergeant Dennis, where an evidential BAC reading was obtained.

The only other notable possibility would be to implead the Motor Vehicle Commission and consider directing it to conduct a search for current addresses in its database for all identified Cassidy-affected defendants. As has been discussed, there has been no testimony or evidence that this approach is viable, or even possible.

Certainly, the State has expressed a willingness to mail the second, post-Cassidy notification letter to the addresses secured by the AOC for some of those potentially-affected defendants who had been omitted from Exhibit S-90 (also Exhibit S-148), and consequently omitted from both Exhibits S-91 and S-83. See Exhibit S-170(F). That should be accomplished.

As noted, it is recommended that the State conduct a review of Joint Exhibit BD/DPD-28 to assure it contains all calibration documents on Alcotest Instruments calibrated by Sergeant Dennis and create a mirror PDF list, modified of not, depending on the results of that review. It is recommended that State-created PDF file be made publicly available on the websites of the Attorney General, the NJSP, and the AOC, following issuance and publication of an explanatory press release and Notice to the Bar and Public.

It is recommended that the Court require the State to make the Excel Spreadsheet contained in Exhibit S-152 available, through a Protective Order that ensures confidentiality of private, identification information, for access by Municipal Courts, Superior Courts, Prosecutors, Public Defenders, Defense Counsel and unrepresented Cassidy-affected defendants when either post-conviction relief or enhanced sentencing is sought. Upon a defendant being identified as an individual potentially affected by the Court's decision in Cassidy this will allow access to the calibration information contained in Joint

Exhibit DB/DPD-28, as modified and adopted by the State, that will determine whether the identified Alcotest Instrument was calibrated by Sergeant Dennis.

As noted, this court additionally recommends that the press release suggested by the State be issued by the Attorney General's Office, with similar press releases issued by each County Prosecutor's Office, and Notice to the Bar and Public be issued by the Court, all of which should be placed on their respective websites.

This court finds these recommendations, given the limitations discussed and available resources, will be the best methods of further identifying individuals potentially affected by the Cassidy decision.

Finally, this court is thankful to all counsel for their assistance, dedication, and suggestions throughout these proceedings.

## APPENDIX II – EXHIBITS

| **Exhibit No.** | **Description** |
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| S-1 | Emails dated 10-09-15 between SFC Snyder and Sergeant Dennis concerning calibrations; and Email dated 12-01-15, from Lieutenant Roberto Tormo to Captain Brendan McIntyre, Bureau Chief, and Matteo Russo, Re: Marc Dennis, attaching an Interoffice Communication dated 12-1-15 from Lieutenant Tormo to Major D. Acevedo, Commanding Officer, Special Investigations Section, copy to Captain McIntyre, advising that SGT Dennis did not properly conduct re-calibrations on certain Alcotest Instruments. |

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| S-2 | Email, dated 9-22-16, from DAG Robyn Mitchell to representatives of County Prosecutors' Offices concerning conference call that day confirming Director of Criminal Justice Honig's request a Special master be assigned to handle all cases arising from the allegations against Sgt Dennis with recommendations, and follow-up emails relating to notification concerning defendants incarcerated relating to convictions based on BAC readings from Alcotest Instruments calibrated by Sergeant Dennis. |
| S-3 | 8-10-17 Email from Steven Somogyi to Assistant AG Robert Czepiel, copy to Steven Bonville, Jennifer Perez, Tina LaLena, DAG Robyn Mitchell, attaching Excel spreadsheet containing the defendant address information sought pursuant to 7-13-17 Case Management Order of Special Master, Judge Joseph Lisa. |
| S-4 | 11-30-18 Email concerning draft of notification letter |
| S-6 | Email Chain dated 1-13-23 concerning notification letters. |
| S-7 | 11-5-08 letter from AG Anne Milgram to Col. Joseph R. Fuentes, Superintendent of the NJ State Police, approving Trooper II Marc W. Dennis #5925 as a duly certified Breath Test Coordinator/Instructor, effective immediately, attaching a copy of his certification card dated 11-5-2008 |
| S-8 | Emails in December 2018 concerning second form notification letters to be mailed by County Prosecutors' Offices, DAG Mitchel asked, "Please keep any of the letters that might be returned to you so that we can show we did attempt to notify these individuals, should the issue arise." |
| S-10 | Email, dated 12-21-18, from Monmouth Country Assistant Prosecutor Monica Do Outeiro to DAG Robyn Mitchell advising her that the Cassidy notification letter went out to all affected Monmouth County defendants yesterday, noting over a thousand letters were returned as undeliverable for various reasons, and were saved, and her Office will be posting notification on its website and social media accounts. |
| S-11 | Emails in December 2018 and January 2019, between DAG Mitchell and Steven Somogyi, concerning Excel Spreadsheets of addresses of potentially-affected defendants |

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| S-13 | Emails dated 1-7-19, between Annmarie Taggart, Assistant Attorney General, Counsel to the Director of DCJ, and Robyn Mitchell, concerning the Cassidy website. |
| S-14 | Emails in January 2019, between DAG Robyn Mitchell and Holly Lees, AG Senior Management Assistant, concerning notification letters following the Court's decision in Cassidy. |
| S-15 | Emails in February 2019, between DAG Mitchell and SFC Thomas Snyder concerning Excel Spreadsheet of all Solution Changes. |
| S-17 | Emails concerning mailing of second notification letter. |
| S-18 | Emails between DAG Mitchell, SDAG Czepiel, and Steven Somogyi in July and August 2017 concerning obtaining addresses for the defendants identified as having been requested to provide breath samples on Alcotest Instruments calibrated by Sergeant Dennis, as contained in the Exhibit S-91 Excel Spreadsheet. |
| S-20 | This is a copy of the State's Motion in State v. Cassidy, dated July 27, 2017, requesting the Supreme Court to issue a Directive requiring the State to provide notice to the 20,667 individuals referenced in the State's Motion to appoint a Special Master in State v. Cassidy. |
| S-21 | This is a copy of the Amicus New Jersey State Bar Association's response to the State's motion for appointment of a Special Master, dated August 4, 2017. |
| S-24 | 9-26-17 and 9-27-17, emails from DAG Robyn Mitchell to the Ocean County Prosecutor's Office, the Somerset County Prosecutor's Office, and the Monmouth County Prosecutor's Office, attaching Excel Spreadsheets containing the names and addresses of individuals, in those counties, who provided breath samples on Alcotest instruments calibrated by Sergeant Marc Dennis between 2008 and 2016, asking each Office to send the "Sgt. Dennis notice letter" sent to them on 9-26-17, mailing same by not later than 12-15-17 and to keep any of the letters that might be returned as undeliverable. |
| S-25 | Letter from Mr. Czepiel to Sharon A. Balsamo, Esq, General Counsel for the State Bar dated 9-6-17 (advising that the County Prosecutors Offices will provide individual notice to the more than 18,000 individuals whose last-known addresses, as found by the ATS system, provided by the |

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| | AOC before 12-15-17 and with regard to those individuals whose addresses were not identified by the AOC through ATS, the State will continue to work with the AOC to find their last known address, and enclosing a copy of the notices to be sent) and dated 9-25-17 (stating he was aware of the State bar's objection to the letter but would be sending the version of the letter sent in the 9-6-17 correspondence). |
| S-26 | This contains several pages of a chart submitted by the State of the municipalities and counties in which Sergeant Marc Dennis performed solution changes on Alcotest instruments. |
| S-27 | This is a certification of DAG Robyn B. Mitchell dated 9-16-22 setting forth the procedure utilized to determine the identity of defendants potentially-affected by the Court's decision in State v. Cassidy; discussing the Alcotest Inquiry System; setting forth the notices sent to identified potentially-affected defendants; and development of the Excel spreadsheet of Solution Changes between 11-1-08 and 1-9-16 from every evidential Alcotest in New Jersey; and contains exhibits setting forth the calibration records of Sergeant Marc Dennis in Middlesex, Monmouth, Ocean, Somerset, Union, Burlington, Cape May, and Mercer Counties. |
| S-28 | Contains handwritten notes of Robyn Mitchell of her telephone conversation with Thomas Snyder and Salvatore DeGirolamo of the State Police, dated 2-8-19, concerning Solution Changes between November 2008 and December 2015 and seven pages of Solution Change records "Updated on 10-31-18" |
| S-30 | This exhibit is noted by the State to contain a DAG Mitchell Mark-up of Mr. Gronikowski's list and of towns and counties |
| S-31 | Initial Report of Special Master Robert A. Fall, J.A.D. in State v. Cassidy dated June 21, 2019. |
| S-32 | (1) Letter from Elie Honig, Director of the AG Division of Criminal Justice to Judge Grant, Administrative Director of the Courts, dated September 19, 2016, requesting the appointment of a Special Master as a result of criminal charges being filed against Sergeant Marc Dennis; (2) Letter from Robyn Mitchell to Robert A. Fall, J.A.D. Special Master appointed following the Court's decision in State v. |

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| | Cassidy, dated September 16, 2022, addressing the August 31, 2022 Case Management Order issued, sending the court and counsel of record (a) a copy of the 9-19-16 letter; (b) the county-by-county listing of the 20,677 individuals referenced in the State's letter to Judge Grant dated 9-19-16;(c) a spreadsheet of the 20,677 potentially-affected defendants; and Robyn Mitchell's 9-16-22 certification. |
| S-33 | Copy of the Order entered by Judge Fall on January 19, 2023, analyzing the records required to be supplied by the State for in camera inspection in the court's December 27, 2022 Order relating to personnel records of Sergeant Marc Dennis. |
| S-34 | This is designated by the State as a New Jersey State Police Alcotest Calibrating unit new standard solution report dated 10-6-15 from Asbury Park signed by Sergeant Dennis. |
| S-36 | This contains a receipt dated 2-14-19 by Robyn Mitchell, received from The New Jersey State Police, of a CD-R containing Excel Spreadsheet with Data Downloads and Solution Change Reports from the Alcotest Inquiry System entitled, "20190124 containing certified test records 11-1-08 through 1-9-16," and one thumb drive containing Excel Spreadsheets with Data Downloads and Solution Change Reports from that same Alcotest Inquiry System. This exhibit also contains a copy of an email from Thomas Snyder of the State Police to Robyn Mitchel dated 1-18-19 concerning fulfillment of the request for those documents – this exhibit also includes another copy of a portion of the handwritten notes set forth in Exhibit 28. |
| S-40 | Several letters of inquiry in October and November 2017 to Monmouth County Prosecutor's Office from attorneys representing defendants receiving first notification letters or otherwise aware of the Alcotest/Sergeant Dennis matter, and replies by that Office. |
| S-41 | Certification of Donna Prestia, Chief Clerk of Ocean County Prosecutor's Office, dated 1-5-23, with exhibits, stating the first notification letter was mailed to 310 potentially-affected defendants on 10-2-17 to those addresses on an Excel Spreadsheet provided by the AG's Office, with approximately 73 letters being returned, of which 17 had forwarding addresses, which were then re-mailed. The |

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| | certification states that on 12-19-18 326 second-notification letters were mailed to potentially-affected defendants, using the same Excel Spreadsheet, noting that the discrepancy between 310 and 326 is that "there may have been duplicate letters that were mailed as several defendants had more than one DWI during the Cassidy timeframe." Of those mailed, 82 were returned as undeliverable, 13 of which had forwarding addresses, and new letters were sent to them between 1-4-19 and 1-9-19. |
| S-42 | List of municipalities and counties where Sergeant Marc Dennis calibrated Alcotest instruments. |
| S-43 | Email dated 12-28-22, between William Gronikowski of the IT Bureau of NJ State Police and SFC Kevin Alcott concerning Solution Change Records for all Alcotest Instruments from 12/1/2005 to 12/31/2017, Mr. Gronikowsi stating his expanded the search by a month on each side of the requested date range, resulting in creation of an Excel Spreadsheet with two sheets, the first containing 65,000 Solution Changes, the other about 44,000 Solution Changes, which became Exhibit S-116. |
| S-44 | Certification of Monica do Outeiro, Assistant Prosecutor Monmouth County, dated 1-17-23, with 6 exhibits thereto, outlining the procedure taken by that office in mailing the notification letters. |
| S-45 | Set forth as "Discovery Burning Summary" provided as "Computer Code for Search Spreadsheet of all Alcotest test 2008 through 2015. |
| S-47 | These are copies of letters, dated January 23, 2023, from the Middlesex County Prosecutor's Office to addressees. The "Discovery Burning Summary" states these are "Middlesex County First Notice Letter" and a review of the content clearly indicates they would have been letter sent in 2017, HOWEVER, the "DATE" listed on each letter is clearly in ERROR. |
| S-49 | Email and letter from DAG Thomas Clark to Judge Fall concerning extension of discovery time period. |
| S-50 | January 17, 2023 Order of Judge Fall on application for reconsideration of discovery ordered and scheduling. |
| S-51 | January 17, 2023 Letter Opinion of Judge Fall. |

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| S-52 | (1) Email 10-21-22 from DAG Clark to Judge Fall, enclosing letters concerning discovery requests of Thomas Zingis and on applications of NJ State Bar and Public Defender for Amicus admission; (2) Email 12-6-22 from Judge Fall to all counsel of record sending 10-21-22 email from DAG Clark to all counsel; (3) Email 12-6-22 from Jeffrey Evan Gold, Esq. to Judge Fall, advising of his representation on behalf of the NJ State Bar; and (4) Email 11-6-22 from Judge Fall to Jeffrey Gold, Esq., and all counsel and court staff regarding Mr. Gold's appearance via Zoom. |
| S-53 | Email 12-27-22, from Judge Fall to all counsel and Mr. Somogyi attaching December 27, 2022 Order for Discovery and Case Management Conference and Plenary Hearing Scheduling; (2) 1-17-23 email from Susanna J. Morris, Esq., AOC Counsel, concerning provision of information from Mr. Somogyi set forth in the 12-27-22 Order, with copy of that Order attached. |
| S-54 | Alcotest Records with Matching Tickets in ATS for all municipalities and counties, prepared by AOC. |
| S-55 | Matching addresses provided by the AOC with a copy of July 14, 2021 notification letter from Judge Fall outlining State v. Cassidy decision, creating of and access to Cassidy/Alcotest website with form to be completed and filed seeking post-conviction relief, and right and procedure to seek counsel representation through Public Defender. |
| S-57 | Certification of Barbara Nolasco, Administrative Supervisor 3 with the State of New Jersey Judiciary, dated 1-23-23, proof of mailing of July 14, 2021 notification letter. |
| S-58 | Email 1-17-23 Judge Fall to all counsel of record sending, January 17, 2023 Opinion. |
| S-59 | August 31, 2022 Case Management Order issued by Judge Fall. |
| S-61 | December 5, 2022 Order granting applications to appear as Amicus Curiae to NJ State bar and Office of the Public Defender, Scheduling a Case Management Conference, and Argument on Discovery Applications. |
| S-63 | 1-19-23 Email from Judge Fall to all counsel sending January 19, 2023 Letter Opinion and Order on Documents Submitted by the State for In-Camera Inspection. |

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| S-64 | Letter from DAG Thomas Clark, Esq., to Judge Fall dated January 9, 2023 concerning the State's position on the additional discovery request. |
| S-66 | January 17, 2023 transmittal letter from DAG Clark to Judge Fall, copies to counsel of record, sending "Personnel Records" of Sergeant Marc Dennis. |
| S-67 | Emails and letter from DAG Thomas Clark, Esq., dated 1-12-23, to Judge Fall and counsel of record concerning request of submission of "Personnel Records" of Sergeant Marc Dennis for in camera review and Judge Fall's response concerning same. |
| S-68 | Email and State's Motion for In-Camera Review of "Personnel Records" of Sergeant Marc Dennis dated 1-12-23. |
| S-69 | Email and letter from Jeffrey Evan Gold, Esq. dated 1-16-23 in opposition to State's Motion for In Camera review. |
| S-71 | Email and January 3, 2023 Letter Brief from DAG Thomas Clark, Esq. to Judge Fall, copies of all counsel concerning motion for reconsideration of December 27, 2022 Oder for Discovery. |
| S-73 | January 25, 2023 Certification of Michele C. Buckley, Assistant Union County Prosecutor, setting forth procedure for mailing of first and second Notification Letters to potentially-affected defendants (See Exhibit 134 Amending this Certification) |
| S-74 | Email 1-19-23 from William Gronikowski, IT Bureau of NJ State Police to DAG Thomas Clark, Esq., stating "Attached is an email chain from SFC Alcott [dated 12-28-22], this email contained a spread sheet that was previously supplied to him. I used that information to find the query that produced it. That query was stored on out network drive that Bill Donahue kept other AlcoTest documentation. I then updated the query with the new date range that was requested." – The referenced spreadsheet is attached to that email. |
| S-76A | Excel Spreadsheet entitled "Defendants who received notice letter from DCJ," from other counties: Total Matches 112, Partial Matches 5: Burlington County – 1 full match; Essex County – 70 full matches, 3 partial matches; Hudson County |

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| | – 1 full match; Hunterdon County – 1 full match; Mercer County – 39 full matches, 2 partial matches |
| S-78 | 1-18-19 Email from Thomas Snyder of the NJ State Police to DAG Robyn Mitchell, copy to Salvatore Degirolamo and Joseph Dellanoce concerning "Solution Changes From Centralized Database", and an Excel Spreadsheet of all the solution changes in the database for the dates requested. |
| S-80 | Email Chain: (1) 12-14-18 Robyn Mitchell to all county prosecutors sending Excel spreadsheet of names and addresses of all potentially-affected defendants; (2) 12-14-18 email from Robyn Mitchell to Holly Lees sending the email she sent to the county prosecutors and additionally stating "there were a couple of hundred 'Sgt. Dennis notice letters' that we mailed because they were defendants who weren't arrested in one of the affected counties but who gave breath samples on a Dennis-affected instrument. I will talk to you on Monday about getting the letters signed by Rob [Czepiel] and getting them out." (3) 1-15-19 from Holly Lees to Robyn Mitchell, "I just realized that I forgot to send this to you. I'm sorry. Here is the Excel spreadsheet that we used last time to mail our notice letters." Contains copies of notice letters sent on 12-4-18 and on 1-24-19. Also contains spreadsheets for all municipalities in counties identified as having potentially-affected defendants. |
| S-81A | This contains (A): a copy of the 9-19-16 letter sent to Judge Grant, Administrative Director of the Courts from Elie Honig, Director of the Division of Criminal Justice following the filing of criminal charges against Sergeant Marc Dennis and stating the State "has identified 20,677 individuals who provided evidential breath samples on those instruments. The attached thumb drive contains a county-by-county listing of these cases." The letter also requests the Supreme Court issue a Notice to the Bar and appoint a Special Master. This exhibit also contains Excel Spreadsheets for each municipality and testing station in Middlesex, Monmouth, Ocean and Union Counties |
| S-81B | Excel Spreadsheet entitled "Middlesex_IndivDefts wo refusals and error messages", containing 4,963 Subject Rows of defendants and 21 Columns. |

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| S-81C | Excel Spreadsheet entitled "Monmouth_IndivDefts wo refusals and error messages" containing 9,402 Subject Rows of Defendants and 21 Columns. |
| S-81D | Excel Spreadsheet entitled "Ocean_IndivDefs wo refusals and error messages" containing 289 Subject Rows of Defendants and 21 Columns. |
| S-81E | Excel Spreadsheet entitled "Somerset_InvidualDefts wo refusals and error messages" containing 1,207 Subject Rows of Defendants and 21 Columns. |
| S-81F | Excel Spreadsheet entitled "Union_IndividualDefts wo refusals and error messages containing 4,806 Subject Rows of Defendants and 21 Columns. |
| S-82A | This exhibit is another copy of the 12-14-18 email from Robyn Mitchell to Holly Lees, with attachments, and also contains a copy of the 12-4-17 and 1-24-19 Notification Letters sent by the Office of Attorney General to potentially-affected defendants from Cassidy decision. |
| S-82B | Excel Spreadsheet entitled "Defendants who received notice letter from DCJ" in Counties other than the five primary Counties, containing Six (6) Sheets: Sheet One - Total Full Address Matches, 113 Subject defendants; Partial Address Matches, 5 Subject defendants; Sheet 2 – Burlington County – 1 Full Address Match; Sheet 3 – Essex County – 69 Full Address Matches; 3 Partial Address Matches; Sheet 4 – Hudson County – 1 Full Address Match; Sheet 5 – Hunterdon County – 1 Full Address Match; Sheet 6 – Mercer County – 38 Full Address Matches; 1 Partial Address Match |
| S-83 | Excel Spreadsheet, entitled "Spreadsheet from AOC All Addresses ATS Defendant Matches-full matches and partial matches to AG" prepared by the AOC of all addresses for potentially-affected defendants in the following Counties: Middlesex, 5,012 exact subject address matches and 215 partial subject address matches, total of 336 Excel pages; Monmouth, 7,479 exact subject address matches and 432 partial subject address matches, total of 510 Excel pages; Ocean, 299 exact subject address matches and 27 partial subject address matches, total of 24 Excel pages; Somerset, 877 exact subject address matches and 52 partial subject address matches, total of 63 Excel pages; and Union, 4,464 |

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| | exact subject address matches and 216 partial subject address matches, total of 300 Excel pages. |
| S-84 | Excel Spreadsheet entitled "Spreadsheet from AOC_Middlesex County Only" from the AOC containing identified addresses for potentially-affected defendants in Middlesex County municipalities, Sheet 1 containing 5,012 exact address matches (321 Pages), and Sheet 2 containing 215 partial address matches (15 Pages) for a total of 5,227 address matches |
| S-85 | Excel spreadsheet entitled "Spreadsheet from AOC_Monmouth County Only" from the AOC containing identified addresses for potentially-affected defendants in Monmouth County municipalities, Sheet 1 containing 7,479 exact address matches (480 Pages), and Sheet 2 containing 432 partial address matches (30 pages) for a total of 7,911 address matches |
| S-86 | Excel spreadsheet entitled "Spreadsheet from AOC_Ocean County Only" from the AOC containing addresses for potentially-affected defendants in Ocean County municipalities, Sheet 1 containing 299 exact address matches (21 pages) and Sheet 2 containing 28 partial address matches (3 pages) for a total of 327 address matches |
| S-87 | Excel spreadsheet entitled "Spreadsheet from AOC_Somerset County Only" from the AOC containing addresses for potentially-affected defendants in Somerset County municipalities, Sheet 1 containing 877 exact address matches (57 Pages) and sheet 2 containing 52 partial address matches (6 Pages) for a total of 929 address matches |
| S-88 | Excel spreadsheet entitled "Spreadsheet from AOC_Union County Only" from the AOC containing addresses for potentially-affected defendants in Union County municipalities, Sheet 1 containing 4,464 exact address matches (285 Pages) and Sheet 2 containing 216 partial address matches (15 Pages) for a total of 4,680 address matches |
| S-89 | Excel spreadsheet of municipalities in Burlington, Cape May, Mercer, Middlesex, Monmouth, Ocean, Somerset and Union Counties where Sergeant Marc Dennis calibrated Alcotest instruments. |

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| S-90 | Excel spreadsheet entitled "Spreadsheet Received from NJSP_27,833 subject records," received from the New Jersey State Police by the Division of Criminal Justice in the Attorney General's Office, containing 27,833 names of potentially-affected defendants. |
| S-91 | Excel spreadsheet entitled Spreadsheet all Counties_wo refusals and error msgs_20,667" of all defendants without breath-sample refusals consisting of 20,666 defendants. |
| S-92 | Excel spreadsheet entitled, "Spreadsheet_All SolutionChanges_11-1-08 thru 01-9-16" of all Solution Changes and calibrations statewide on Alcotest instruments made from 11-1-08 to 1-9-16, containing 68,449 rows for each solution change occurring in all Alcotest Instruments in New Jersey during that period, with 130 Columns (Fields of Information, Columns "AS through AV" indicating the identity of the Operator performing each solution change. |
| S-94 | Email from Carmen Acevedo of the Division of Criminal Justice to representatives of all County Prosecutors' Offices in New Jersey attaching a Memorandum from Supervising DAG Robert Czepiel dated 12-1-17 updating the status of the State v. Cassidy litigation. |
| S-95 | 12-1-17 memorandum from DAG Analisa Sama Holmes to all County Prosecutors, the Director of DCJ, and Colonel Callahan, Acting Superintendent of NJ State Police attaching a copy of the Memorandum updating the status of the State v. Cassidy litigation (portion redacted) |
| S-96 | 12-1-17 memorandum from Supervising DAG Robert Czepiel to all County Prosecutors and all County Municipal Prosecutor Liaisons attaching a 11-3-17 letter he sent concerning allegations against Sergeant Marc Dennis, and attaching an Order dated 11-2-17 granting a stay an Order dated 11-28-17 supplementing that Order and outlining steps taken by the AG's Office |
| S-97 | 11-3-17 memorandum to all County Prosecutors setting forth allegations against Sergeant Marc Dennis and outlining procedures taken by Special Master Judge Joseph Lisa |
| S-98 | Copy of Order issued by Special Master Judge Lisa dated 11-2-17 staying certain proceedings |

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| S-99 | Certification of Special DAG Robert Czepiel dated 10-17-17 in support of the State's motion for a stay |
| S-100 | Copy of Order dated 11-28-17 by Special Master Judge Lisa, supplementing the 11-2-17 Order |
| S-101 | Copy of letters dated 12-6-17 from Supervising DAG Robert Czepiel to County Prosecutors' Offices in Essex, Atlantic, Cape May, , Cumberland, Ocean, Sussex, Union, and Warren Counties enclosing thumb drives containing a master list of every individual identified as having provided a breath sample on a Dennis-calibrated Alcotest instrument; an Excel spreadsheet containing a list of individuals for whom the AOC was able to find a last known address of those individuals; and a list of municipal codes throughout the State. The letter asks County Prosecutors to work with on identifying any affected cases in their County. Also attached is the list of municipal codes. |
| S-102 | Calibration records of Sergeant Marc Dennis for municipalities in Middlesex County |
| S-103 | Calibration records of Sergeant Marc Dennis for municipalities in Monmouth County |
| S-104 | Calibration records of Sergeant Marc Dennis for NJ State Police Barracks Hamilton, Fort Monmouth, Cranbury, Holmdel, Carteret Marine, North Wildwood, Monmouth Station, Point Pleasant, Red Lion, Somerville |
| S-105 | Calibration records of Sergeant Marc Dennis for municipalities in Ocean County |
| S-106 | Calibration records of Sergeant Marc Dennis for municipalities in Somerset County |
| S-107 | Calibration records of Sergeant Marc Dennis for municipalities in Union County |
| S-110 | email dated 2-7-23 from Robert Scaliti of the Middlesex County Prosecutor's Office to DAG Thomas Clark, attaching a sheet, stating "This document has the number of the counted returned Cassidy notification letters I counted." The attachment lists 818 returned letters from the 2017 mailing and 1,106 returned letters from the 2019 mailing. |
| S-111 | Email from Francine Mondi of the Middlesex County Prosecutor's Office dated 2-7-23, sending an email dated 1-22-19 from Diane Johnson of the Middlesex County |

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| | Prosecutor's Office to Andrea Kolody of that office with a copy to Francine Mondi and Daniel Guerrero of that office stating "Below is a script to use in case you receive any calls regarding the DWI letters that were sent. Last year Francine was inundated with calls so Brian developed this script to use again this year. The script states: "Please be advised that aside from the letter you received, you can check our website . . . for further information. The Middlesex County Prosecutor's Office cannot provide any legal advice concerning either State v. Cassidy or Sgt. Marc Dennis. You must contact your own attorney. Thank you." |
| S-112 | This exhibit is a copy of the transcript of a Case Management Conference conducted by Special Master Judge Joseph F. Lisa on July 13, 2017 in State v. Cassidy |
| S-113 | This exhibit is a copy of Case Management Order I issued by Special Master Judge Lisa dated July 13, 2017 |
| S-114 | This exhibit is a copy of the transcript of a Case Management Conference conducted by Special Master Judge Lisa on August 17, 2017 in State v. Cassidy |
| S-115 | This exhibit is a copy of Case Management Order II issued by Special Master Judge Lisa dated August 17, 2017. |
| S-116 | Excel Spreadsheet created by William Gronikowski of New Jersey State Police. entitled "Records11012005_01312018," containing all solution changes on Alcotest Instruments between 11-1-05 and 1-31-18, containing 64,999 lines on Sheet 1, one for each Alcotest Instrument (17,501 Pages), and 41,413 lines on Sheet 2 (11,159 Pages) for a total of (28,652 Pages) |
| S-117 | Spreadsheet entitled "Alcott.Copy of Zingis Project Spreadsheet 2-2-23" created by SFC Kevin Alcott of the New Jersey State Police, color-coded as follows: Yellow: Solution Change not sequential after linearity test; Green: Documents Found; Red: Documents Not Found; and Blue: Documents Found But Not Complete – contains 1,328 Solution-Change lines all solution changes and calibrations performed by Sergeant Marc Dennis, containing 1,329 lines and 131 Columns (Fields) of information as to each Solution Change, columns AT through AW setting forth the name of the Operator who performed the Solution Change, based on the actual calibration documents provided on Thumb Drive |

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| | #4 under cover letter 2-7-23 – This is a color-coded spreadsheet – as per the State's 2-23-23 Letter, line 458 is not correctly colored – while Column B should be in orange, the rest of that line should be in green, not orange. |
| S-118 | "ALCHO TEST RECORDS WITH MATCHING TICKETS IN ATS" .pdf file, obtained from the Administrative Office of the Courts. |
| S-119 | Additional Calibration Records, concerning Alcotest Instrument ARWA-0178, located in Linden Township – inadvertently omitted from Dennis Calibration Records contained on Thumb Drive #4, see Exhibit 107 |
| S-120 | These are additional records concerning solution changes and calibrations of Alcotest Instrument ARWA-0178, located in Linden City, accompanied by a single page inventory of those records – should be considered part of the Dennis Calibration records delivered on Thumb Drive #4 delivered by transmittal letter dated 2-7-23. |
| S-121 | Two (2) "Breath Testing Instrumentation Service Report" documents concerning Alcotest Instrument ARUL-0055, located at New Jersey State Police Station in Cranbury, New Jersey – the calibration of 5-16-11 does not appear on the "Spreadsheet of All Solution Changes from 11-01-08 through 1-09-16 because that Instrument failed to upload one solution change file from 5-31-2011 due to an error code, and returned to Draeger for repairs. Draeger replaced the microprocessor and the digital copy of this solution change file was then permanently lost. The 6-16-11 calibration does appear on that spreadsheet at line 25347. Filtering the spreadsheet by the instrument serial number discloses that the prior listed calibration was performed on 2-7-2011 (see Row 22134) |
| S-122 | Calibration records of Sergeant Marc Dennis, concerning Alcotest Instrument ARWE-0019 located at Winfield Township |
| S-123 | Calibration records of Sergeant Marc Dennis, concerning Alcotest Instrument ARXA-0056, located at Long Branch City |

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| S-124 | Calibration records of Sergeant Marc Dennis, concerning Alcotest Instrument ARXB-0072, located in Tinton Falls Township |
| S-125 | Supplemental Certification of Deputy Attorney General Robyn Mitchell, with Exhibits, dated March 1, 2023 |
| S-126 | Revised, color-coded spreadsheet, entitled "Zingis Project Spreadsheet 2-24-2023," prepared by SFC Kevin Alcott of the New Jersey State Police showing all calibrations and solution changes by Sergeant Marc Dennis – replaces the color-coded spreadsheet provided in Exhibit 107 |
| S-128 | Excel Spreadsheet Excel Spreadsheet Notes, entitled "Alcott Sorted Spreadsheet Received From NJSP_27833 subject records" prepared by New Jersey State Police SFC Kevin Alcott, SQL Sheet containing 27833 lines sorted by Alcotest Instruments with 21 Columns of information, with columns for serial number of each instrument; calibration date; location of instrument; last name, first name and middle initial, date of birth, age, gender, weight, height and driving license number, and issuing state of each person tested; the case number; summons number; arrest date, time, and location; final error, if any; and End Result. Column C, "Calibration Date" has those columns colored-coded in RED indicating Alcotest Instruments Not Calibrated by Sergeant Dennis (436) and color-codes in GREEN for those Alcotest Instruments calibrated by Sergeant Dennis SQL Statement Sheet is the Query Code used to extract that information, |
| S-129 | Excel Spreadsheet entitled Álcott Spreadsheet Received from NJSP_27,833 subject records, with 21 Columns (Fields) of Information with Column C, "Calibration Date" color-coded in Green for Calibrations performed by Sergeant Dennis and color-coded in Red for Calibrations not performed by Sergeant Dennis, |
| S-130 | Excel Spreadsheet of calibration information from Alcotest Instrument Serial Number ARWJ-0019 located in North Plainfield Police Department |
| S-131 | Excel Spreadsheet of calibration information from Alcotest Instrument Serial Number ARWM-0086 located in Ocean Township Police Department |

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| S-132 | Excel Spreadsheet of calibration information from Alcotest Instrument Serial Number ARXA-0061 located in Shrewsbury Police Department |
| S-133 | Excel Spreadsheet of calibration information from Alcotest Instrument Serial Number ARWM-0041 located in South Bound Brook Police Department |
| S-134 | Excel Spreadsheet of calibration information from Alcotest Instrument Serial Number ARWF-0403 located in West Long Branch Police Department |
| S-135 | Excel Spreadsheet of calibration information from Alcotest Instrument Serial Number ARUL-0058 located in Westfield Police Department |
| S-136 | March 2023 Affidavit of William Gronikowski, Supervisor, Information Technology, New Jersey State Police, with attached Exhibits. |
| S-137 | 3-6-23 Affidavit of William Donahue, retired civilian employee of New Jersey State Police, last job title, Supervising Management Improvement Specialist (Programming Unit Head), Information Technology with attached Exhibits. |
| S-138 | Amended Certification of Suzanne Musto, dated 2-13-23, Secretary at Somerset County Prosecutor's Office, concerning Cassidy notification letters, with attached Exhibit of sample notification letter dated 9-6-17, and 9-26-17 email from DAG Robyn Mitchell to Somerset County Assistant Prosecutor Anthony Parenti with attached Excel Spreadsheet of names and addresses of defendants in Somerset County who provided breath samples on Alcotest Instruments calibrated by Sergeant Marc Dennis |
| S-139 | Certification of Francine Mondi, undated, Administrative Assistant in Appellate Unit of Middlesex County Prosecutor's Office, concerning notification to Cassidy-affected defendants. |
| S-140 | Amended Certification of Michele Buckley, dated 3-8-23, Assistant Union County Prosecutor, amended certification contained in Exhibit 73. |
| S-141 | Letter from DAG Thomas Clark to the Court and all Counsel of Record concerning affected defendants in Hudson County, with attached Exhibit, two pages entitled "Alcho Test |

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| | Records with Matching Tickets in ATS," and copy of 2-page email from Steven Somogyi to Thomas Clark dated 3-6-23 |
| S-142 | 1-24-23 Email from Steven Somogyi to the Court and to all Counsel of Record attached a copy of the "Alcho Test Records With Matching Tickets in ATS" for defendants in all municipalities, prepared by the Administrative Office of the Courts based on the list sent to Director Grant by the Office of Attorney General. |
| S-144 | Email to the Court and all Counsel of Record from DAG Rachuba attaching two form Cassidy notification letters from the Union County Prosecutor's Office as additional attachments to Assistant Union County Prosecutor's Amended Certification dated 3-8-23 |
| S-145 | Email to the Court and all counsel of Record containing Certification of Charles Prather, dated 3-13-23, an independent contractor working for the AOC concerning preparation of the spreadsheet of matching Alcotest Addresses from ATS records of AOC on Subject Defendants contained on Excel Spreadsheet received by AOC from the DCJ |
| S-146 | Judiciary Cassidy website. |
| S-147 | Handwritten Notes by DAG Robyn Mitchel concerning CD-rom containing spreadsheet received by DAG Robyn Mitchell from New Jersey State Police (NJSP) containing 27,833 subject lines and 21 columns identified by NJSP as names of defendants who provided breath samples on Alcotest Instruments calibrated by Sergeant Marc Dennis. |
| S-148 | Excel Spreadsheet entitled "5925_Spreadsheet_ Final.xslx," sent to DAG Mitchell at DCJ from NJSP, containing 27,833 lines (including title of column) and 21 Columns identified, as names of defendants who provided breath samples on Alcotest Instruments calibrated by Sergeant Marc Dennis, including some subjects who refused to provide breath samples and some control test failures. This is the same as Exhibit S-90. |
| S-149 | Copies of emails between William Gronikowski and SFC Kevin Alcott of NJSP concerning the search for records relating to [redacted]. |

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| S-150 | Excel Spreadsheet entitled, "Subjectsfrom12262009 _12282009" that William Gronikowski of NJSP delivered to Kevin Alcott of NJSP containing a search of records between December 26, 2008 and December 28, 2008 of defendants providing breath samples on Alcotest Instruments in New Jersey, containing 363 lines (including title of column) and Columns of information, A through KZ, |
| S-151 | Excel Spreadsheet entitled, "Records11012004_ 12312022" containing 147,482 subject records, by Alcotest Instrument, and 128 Columns (Fields) of information, placed by William Gronikowski of the NJSP on the New Jersey State Police computer network at the request Sergeant Alcott of the NJSP in February 2023 consisting of calibration and solution changes of all Alcotest Instruments, from November 1, 2004 through December 31, 2022, Column "H" stating the Calibration Date, Column "Q" the Solution Change Date, and Columns "AO through AR" the identity of the Operator performing those functions. |
| S-152 | Excel Spreadsheet entitled, "Subjectsfrom11052008 _06302016" containing 236,664 subject records from November 5, 2008 through June 30, 2016, of all subject defendants tested, with the same 20 columns as appearing in the original spreadsheet that the NJSP delivered to the Division of Criminal Justice with the Office of the Attorney General in 2016, as required by the March 29, 2023 Order entered by the Special Master. |
| S-153 | Certification of Holy Lees, employee of the Division of Criminal Justice concerning mailings sent to defendants. |
| S-154 | Contains 760 email items, consisting of message, or chains of messages, concerning the daily or weekly itinerary of Sergeant Marc Dennis covering the period November 20, 2009 through October 7, 2015, which were retrieved from archived records of the NJSP. |
| S-155 | An email chain from the NJSP dated 4-12-23 concerning the search concerning the spreadsheets testified by William Donahue he created entitled "5925_Spreadsheet_Final.xlsx" and "20190124CerttestsRecs11-01-08thru1-09-16." |
| S-156 | Certificate dated March 14, 2023, from Drager, certifying Kevin Alcott as successfully completing two-day Draeger Safety Diagnostic, Inc. Alcohol Coordinator Training Course |

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| | on the New Jersey specific Alcotest 7110 MKIII-C, qualifying him as an Operator Trainer and Maintenance Technician qualified to train and certify Operators in the proper use and operation as well as perform Preventative Maintenance on the Alcotest 7110 MKIII-C. |
| S-157 | Certificate of Completion, dated 6-8-21 from Drager, certifying that Kevin Alcott successfully completed the two-day Drager, Inc. Operator Training and Technician Course on the New Jersey-specific Draeger Alcotest 9510, certifying him as a qualified Operator Trainer and Maintenance Technician to train and certify Operators in the proper use and operation of the Drager Alcotest 9510 and to perform maintenance on same. |
| S-158 | November 15, 2022 Drager Record of Attendance of Kevin Alcott regarding attendance at the two-day Licensed New Jersey Attorney and Expert Course on the New Jersey-specific Drager Alcotest 9510. |
| S-159 | Copy of email dated 4-17-23 from Thomas Russo, Esq of the AOC to DAG Clark stating "A review of the AOC's records indicates that 35 mailings were returned as being undeliverable. We should have a response re: the code issue by the end of this week." |
| S-160 | Copy of State v. Tischio, 107 N.J. 504 (1987) |
| S-163 | Copy of 10-21-08 Memorandum from SDAG Hester Agudosi, Chief of Prosecutors Supervision and Coordination Bureau to Attorney General Anne Milgram submitting a request by State Police Superintendent Fuentes for certification of Marc Dennis as a "Breath Test Coordinator/Instructor. |
| S-164 | Copy of 11/17/08 Memorandum from DAG John Dell'Aquilo to Boris Moczula, Acting Director of DCJ attaching a copy of the final version of the letter signed by Attorney General Anne Milgram approving March Dennis as a Breath Test Coordinator/Instructor. |
| S-165 | Copy of Memorandum, dated December 24, 2008, from DAG John Dell'Aquilo to All Municipal Prosecutors Supervisors and All Municipal Prosecutors concerning available training by Drager Safety Diagnostics, Inc. to New Jersey licensed attorneys and experts. |

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| S-166 | Copy of a print-out record from NJSP relating to DAG John Dell'Aquilo concerning his certification as a Breathalyzer Instructor on dates ranging from 9/21/1979 to 4/15/2002. |
| S-167 | Certification of DAG Robyn B. Mitchell dated 5-9-23 clarifying that the name of the Excel Spreadsheet on the CD-rom received from the NJSP labeled "5925_Spreadheet_Final.xlsx" (Exhibit S-148) and Excel Spreadsheet provided by the State in discovery, named "Spreadsheet Received from NJSP_28,833 subject records.xlsx (Exhibit S-90), are identical in content. |
| S-168 | 4/27/23 Email from Thomas Russo, Esq., counsel for the AOC, authored by Susanna J. Morris, Esq., counsel for the AOC, stating that a review of the AOC's records revealed that 13,618 notices were mailed to Cassidy-affected defendants on July 14, 2021; that of those, 2,844 notices were returned from the U.S. Postal Service to the AOC as being undeliverable; that 64 of those returned notices were re-mailed using a new address provided by the U.S. Postal Service, and. of those 64, 2 were returned to the AOC as being undeliverable; and 34 of those 64 notices were re-mailed based upon the AOC support staff's belief that an incorrect zip code had been utilized and, of those 64, 25 were retuned to the AOC as being undeliverable. An Excel Spreadsheet is attached. The AOC has also located several boxes of returned mailings in storage, but the exact number was unknown at the time of this email. |
| S-169 | Transcripts of testimony of NJSP Sergeant Kevin M. Flanagan in State v. Chun hearing before Special Master Michael P. King, P.J.A.D., Retired, On Recall, on November 27, 2006, November 28, 2006, December 4, 2006, and December 5, 2006, the State being represented by DAG John J. Dell'Aquilo. |
| S-170B | Copy of an email from DAG Clark to Susanna Morris, Esq, and Thomas Russo, Esq., counsel for the Administrative Office of the Courts, dated 5-10-23, stating that 23 defendants were identified during the Zingis hearings who provided breath samples on Alcotest Instruments calibrated by Sergeant Marc Dennis but were not included on the original Excel Spreadsheet provided by the New Jersey State Police to the Division of Criminal Justice (S-90 in evidence). |

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| | DAG Clark further stated "3 of the persons in that group received Notice based on other arrests, 2 did not produce a driver's license, 8 people did not have any reading for various reasons, or a reading of zero. I attach an exhibit listing those instances. DAG Clark then asked whether addresses could be extracted from the Automatic Traffic System (ATS) database for eleven of those defendants. |
| S-170C | Copy of a reply email to DAG Clark dated 5-10-23 from Susanna Morris, Esq. stating she and Mr. Russo would review his email and get back to him |
| S-170D | Copy of an email from DAG Clark to Susanna Morris, Esq. and Thomas Russo, Esq., dated 5-24-23, asking for an answer to his 5-10-23 email, and adding the names and driver's license numbers for three additional defendants. DAG Clark also stated: "I separately sent Tom [Russo] noting that while he wrote an email to Judge Fall that [the] AOC originally (July 2021) mailed out 13,618 notices, [the] AOC only delivered 13,615 individual Notice letters that were sent out. Is there an explanation for the discrepancy?" |
| S-170E | Copy of an email from Susanna Morris, Esq. to DAG Clark dated 6-1-23, stating in relevant part: "Attached please find the address information that the AOC was able to locate for the individuals you provided to us in your May 24, and May 10, 2023 emails. As to your request for information regarding the discrepancy on the mailing, please note that the AOC has closely reviewed the matter, however, it cannot explain the reason with any degree of certainty the reason for the discrepancy in numbers concerning the mailed notices. It can only speculate as to possible reasons, which, needless to say, would not serve any meaningful purpose in this matter." |
| S-170F | A two-page list from the AOC, attached to the referenced 6-1-23 email, concerning the results of the requested search of addresses for the defendants requested by DAG Clark. The list contains information for twenty-three (23) defendants with the following columns of information: Defendant's name; Date of Arrest; Municipality of the Violation; Last Known Address; Case Adjudicated? (Y/N); Finding; Date Adjudicated. |
| S-171A | Letter from DAG Clark to the Court, copies to all counsel, supplementing the State's May 1, 2023 Letter concerning the |

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| | testimony of Sergeant Kevin Alcott, stating that "In connection with DB-7, a calibration record pertaining to Alcotest Instrument ARUL-0055, Sergeant Alcott has discovered that S-152, the Subject Record spreadsheet created by William Gronikowski, included inaccurate information on the arrest date for two rows, line 61343 [redacted] and line 61346 [redacted]. |
| S-171B | Spreadsheet prepared by Sergeant Alcott on June 8, 2023 highlighting in Yellow Row 40 [redacted] and Row 37 [redacted] |
| S-172 | Copy of Website of Helmer, Conley & Kasselman Law Firm |
| DB-1A | Printout showing the 310 columns (fields) of data in the Alcotest Subject records database |
| DB-1B | Printed (and attached end-to-end, 45 pages) to show 310 columns of data in the Alcotest Subject Records Table with "Yellow" highlight on the 290 columns not included in the Excel Spreadsheet submitted by the State in discovery. |
| DB-1C | Printing of first 25 rows (and attached end-to-end, 3 pages) of the Excel Spreadsheet submitted by the State in discovery showing the 20 fields, or columns. |
| DB-2 | Copy of Easel drawing showing two separate tables in the State's Alcotest Inquiry System: (1) Alcotest Subject Records; and (2) Alcotest Instrument Records. |
| DB-3 | Printout showing the 310 columns (fields) called for by William Donahue in his "SQL" query of Alcotest Subject records. |
| DB-4 | Alcotest 7110 MKIII-C New Jersey State Police "User Manual Operator" |
| DB-5 | Four Sample "Alcohol Influence Reports. |
| DB-6 | Copy of the "Alcotest 7110 Calibration Record, signed by Marc Dennis on 6-10-09 as to Edison Township Alcotest Instrument ARLD-0012, which record nis not contained within the 68,450 spreadsheet utilized by the State to constitute the "Cassidy List" – identified by Thomas Snyder during his testimony. |
| DB-7 | Copy of the "Alcotest 7110 Calibration Record, signed by Marc Dennis on 5-16-11 as to Cranbury Township Alcotest Instrument ARUL-0055, which record is not contained within the 68,450 spreadsheet utilized by the State to |

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| | constitute the "Cassidy List" – identified by Thomas Snyder during his testimony. ( |
| DB-8 | Copy of the "Alcotest 7110 Calibration Record, signed by Marc Dennis on 3-26-13 as to Kean University Police Alcotest Instrument ARWC-0020, which record is not contained within the 68,450 spreadsheet utilized by the State to constitute the "Cassidy List" – identified by Thomas Snyder during his testimony. |
| DB-9 | Copy of the "Alcotest 7110 Calibration Record, signed by Marc Dennis on 7-15-13 as to Monmouth Station Alcotest Instrument ARWC-0064, which record is not contained within the 68,450 spreadsheet utilized by the State to constitute the "Cassidy List" – identified by Thomas Snyder during his testimony. |
| DB-10 | Copy of S-90, State's "Cassidy List," utilized during cross-examination of Thomas Snyder concerning D-6 through D-9. |
| DB-11 | Copy of Case Management Order II issued by Cassidy Special Master Judge Lisa dated 8-17-17. |
| DB-12 | Copy of State's Excel "5925_Spreadsheet_Final" (from State's Thumb Drive #8) containing 27,833 lines of data, 21 columns (fields) |
| DB-13 | Printed version of SQL query statement from DB-12 (Excel "5925-Spreadsheet Final" with 19 serial numbers. |
| DB-14 | Copy of State's Excel spreadsheet "Subjectsfrom12262008_12282008" (from State's Thumb Drive #8 with 363 lines on 576 pages) |
| DB-15 | Quote from State v. Chun, 194 N.J. 54, at 104-105 (2008) |
| DB-16 | Quote from State v. Tischio, 107 N.J. 504, at 522 (1987). |
| DB-17 | Table of the State's 27,833 subject records in MS Access Format, sorted by Driver's Licenses (ascending), then Last Name (ascending) the First Name (ascending), then Arrest Date (ascending), then Arrest Time (ascending). |
| DB-18 | Screenshot of the sorting being utilized in DB-17. |
| DB-19 | Import of DB-17 into MS Excel Format (sorting of 27,833 records by "DL_Last_First_ArrestDate_ArrestTime,") |
| DB-20 | Drager Certificate certifying that DAG John J. Dell'Aquilo successfully completed the 2-day Draeger Safety Diagnostic, Inc. Operator Training and Preventative Maintenance course on the New Jersey Specific Alcotest 7110 MKIII-C and is |

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| | certified as a Qualified Trainer and Maintenance Technician qualifying him to train and certify Operators in the proper use and operation as well as perform Preventative Maintenance on the Alcotest 7110 MKIII-C. |
| DB-21 | Calibration Record of Alcotest 7110 MKIII-C machine, serial number ARWF-0400, in Highlands Borough, dated 3-8-12, signed by NJSP Trooper Marc Dennis, which is not included in the 27,833 records sent by the ATDU Unit of the NJSP to the DCJ. |
| DB-22 | Calibration Record of Alcotest 7100 MKIII-C machine, serial number ARWF-0356, in Warren Township, dated 1-22-09, signed by NJSP Trooper Marc Dennis, which is not included in the 27,833 records sent by the ATDU Unit of NJSP to the DCJ. |
| DB-23 | Spreadsheet identified by DAG Robyn Mitchell as subject test records as not included in 27,833 subject test records sent to her by the ADTU Unit of the NJSP, initialed by DAG Mitchell. |
| DB-24A | Email dated 9-26-17 from DAG Mitchell to Assistant Ocean County Prosecutor Kim Pascarella attaching Excel Spreadsheet of names and addresses of individuals who provided breath samples on Alcotest instruments calibrated by Sergeant Marc Dennis for mailing of Notice on template letter provided by DCJ. |
| DB-24B | Email dated 9-26-17 from DAG Mitchell to Assistant Somerset County prosecutor Anthony Parenti attaching Excel Spreadsheet of names and addresses of individuals who provided breath samples on Alcotest instruments calibrated by Sergeant Marc Dennis for mailing of Notice on template letter provided by DCJ. |
| DB-24C | Email dated 9-26-17 from DAG Mitchell to Assistant Monmouth County Prosecutor Monica do Outeiro attaching Excel Spreadsheet of names and addresses of individuals who provided breath samples on Alcotest instruments calibrated by Sergeant Marc Dennis for mailing of Notice on template letter provided by DCJ. |
| DB-27 | 6/9/23 Letter to Court from Mr. Gold, copies to all Counsel, attaching proposed Exhibits, “Dennis Calibration Repository,” “Notes on Dennis Calibration Repository,” |

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| | "Zingis Index," and "Notes on Zingis Index," explaining they are joint Exhibits with amicus, Office of the Public Defender, and enclosing Thumb Drive containing same to the Court. |
| DB-32 | Color Photo of CU-34 Simulator. |
| DB-33 | Copy of extract from testimony of DAG Robyn Mitchell during Zingis Plenary Hearing conducted on March 28, 2023, pages 127-128. |
| DB-34 | Excel Spreadsheet of 111 Subject Defendants not contained on S-90 Excel Spreadsheet of 27,833 Subject Defendants represented to having provided breath samples on Alcotest Instruments calibrated by Sergeant Marc Dennis, containing 111 Subject Rows and 23 Columns (Fields) of information. |
| DB-35 | Excerpt from State v. Cassidy decision, pages 78-79. |
| DB-36 | Page 11 of Drager Operator's Manual, which is DB-4 in Evidence. |
| DB-37 | Excel Spreadsheet entitled 08-17 (27K Reduction Table)" containing screen shots of 111 Subject Defendants not on S-90. |
| DB-38 | Example of Alcotest 7110 Calibration Record (Serial Number ARWA-0188, Hillsborough Township Police, with calibration date of 11-14-08) extracted from DB/DPD-31, shown to SFC Kevin Alcott during his testimony. |
| DB-39 | Example of "Missing Signed Calibration Certificate" confirming, from the Alcotest Inquiry System database that calibration of Alcotest Instrument Serial Number ARWA-0180 in Summit Police Department on 10-27-14 was likely performed by Sergeant Marc Dennis, extracted from DB/DPD-31, shown to SFC Kevin Alcott during his testimony. |
| DB/DPD-28 Joint Exhibit | 6/9/23 Thumb Drive- Joint Exhibit – pdf. File entitled "Dennis Calibration Repository" consisting of 1,047 files, each evidencing a calibration record of an Alcotest Instrument by Sergeant Marc Dennis from November 14, 2008 through October 9, 2015, with a total of (1,069 PAGES). BY YEAR: 2008: 29; 2009: 137; 2010: 143: 2011: 152; 2012: 133; 2013: 123; 2014: 212; 2015: 140. Consists of 1,069 pages |

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| DB/DPD-29<br>Joint Exhibit | 6/9/23 Thumb Drive – Joint Exhibit – Excel Spreadsheet entitled "Zingis Index" – this contains 27,426 subject defendant Rows and 22 Columns (Fields) of information for each row – those Columns (Fields) are as follows: A: ROW IN STATE 27,833 EXCEL SPREADSHEET; B: ARREST DATE; C: DRIVER'S LICENSE NUMBER; D: SUBJECT'S LAST NAME; E: SUBJECT'S FIRST NAME; F: SUMMONS NUMBER; G: LOCATION OF ALCOTEST; H: SERIAL NUMBER OF ALCOTEST INSTRUMENT; I: CALIBRATION DATE; J: SUBJECT'S MIDDLE INITIAL; K: SUBJECT'S DATE OF BIRTH; L: SUBJECT'S AGE; M: SUBJECT'S GENDER; N: SUBJECT'S WEIGHT; O: SUBJECT'S HEIGHT; P: ISSUING STATE OF DRIVER'S LICENSE; Q: CASE NUMBER; R: ARREST DATE; S: ARREST TIME; T: ARREST LOCATION; U: FINAL ERROR; V: END RESULT OF TEST. Consists of 5,148 pages |
| DB/DPB-30<br>Joint Exhibit | Joint Exhibit Entitled: "Notes on 'Zingis Index'" to the Repository. |
| DB/DPD-31 | Joint Exhibit Entitled: "Notes on the 'Dennis Calibration Repository.'" |
| DPD-1 | Text of the cell located in the second spreadsheet (labeled "SQL Statement) of States Exhibit S-90 (the 27,833 Alcotest records), copies and pasted into a Microsoft Word document for reference. |
| DPD-2 | (A) Municipal Court Case Search (MCCS) Ticket Detail: [redacted]<br>(B) Municipal Court Case Search (MCCS) Ticket Detail: [redacted]<br>(C) Municipal Court Case Search (MCCS) Ticket Detail: [redacted]<br>(D) Municipal Court Case Search (MCCS) Ticket Detail: [redacted] |
| DZ-1 | Copy of Draeger "User Manual – Technical" of New Jersey State Police for Alcotest 7110 MKIII-C. |
| DZ-2 | Memorandum dated June 29, 2018, signed by DAG Robert Czepiel, sent to all County Prosecutors. |
| A<br>Also, S-59 | August 31, 2022 Case Management Order entered by Judge Fall |

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| B | September 30, 2022 Public Defender's Motion to participate as *Amicus Curiae* |
| C | September 30, 2022 First Discovery Demands by Defendant-Respondent, Thomas Zingis |
| D | October 6, 2022, State's request for an extension of time to reply to discovery demands |
| E | October 12, 2022, Motion by New Jersey State Bar Association For Leave to Participate as *Amicus Curiae* |
| F | October 21, 2022, Submission of State concerning request for discovery and applications to participate as *Amici Curiae* |
| G | October 21, 2022, Reply by NJSBA to submissions by the State |
| H | October 27, 2022, response by Office of Public Defender to State's brief concerning its *Amicus Curiae* application |
| I<br>Also, S-61 | December 5, 2022 Order of Judge Fall, granting the *Amicus Curiae* applications, scheduling argument on discovery issues, and setting a second case management conference |
| J | December 20, 2022 email from NJSBA outlining its position on discovery issues |
| K<br>Also, S-53 | December 27, 2023 Order entered by Judge Fall, adjudicating discovery issues and scheduling plenary hearing |
| L | January 3, 2023, requests by Office of Public Defender for additional discovery |
| M | January 4, 2023, requests by NJSBA for additional discovery |
| N<br>Also, S-71 | January 3, 2023, request by the State to reconsider a portion of discovery determination in December 27, 2022 Order |
| O<br>Also, S-64 | January 9, 2023, opposition letter brief by State to additional discovery requests |
| P | January 9, 2023, email from Office of Public Defender responding to the State's opposition to additional discovery |
| Q | January 10, 2023, letter brief from NJSBA, responding to State's opposition to additional discovery, and to State's reconsideration application |
| R<br>Also, S-67 and S-68 | January 12, 2023, letter brief and certification from State, requesting this court to review work records of Sergeant Dennis, in camera |
| S<br>Also, S-69 | January 16, 2023, letter brief from NJSBA concerning additional discovery and work records of Sergeant Dennis |

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| T<br>Also, S-50<br>and S-51 | January 17, 2023, Letter Opinion and Order entered by Judge Fall determining discovery issues and rescheduling the plenary hearing |
| U<br>Also, S-33<br>and S-66 | January 19, 2023, Letter Opinion and Order entered by Judge Fall concerning work records of Sergeant Dennis |
| V | February 6, 2023, Defendant-Respondent's request for additional discovery and this court's denial of same |
| W | February 6, 2023, submission by the State of list of witnesses and summaries of proposed testimony |
| X | February 9, 2023, letter from NJSBA requesting adjournment of plenary hearing date |
| Y | February 9, 2023, letter from State concerning adjournment request |
| Z | February 13 2023, request of NJSBA and Office of Public Defender for Protective Order for access private portion of Alcotest Inquiry System database |
| AA | February 13, 2023 and February 22, 2023 objections by the State to proposed Protective Order |
| AB | February 22, 2023, response by NJSBA to State's objection to proposed Protective Order |
| AC | February 22, 2023, request by Office of Public Defender that State provide sworn statements from its proposed witnesses in advance of plenary hearing |
| AD | February 22, 2023, position of NJSBA concerning sworn statements in advance of plenary hearing |
| AE | February 21, 2023, request by AOC for Protective Order concerning personal identification information to be disclose in discovery and at the plenary hearing |
| AF | February 22, 2023, Protective Order entered by Judge Fall concerning personal identification information disclosed in discovery and during plenary hearing |
| AG | February 27, 2023, letter from the State containing notice, pursuant to N.J.R.E. 807, concerning admission of "Public Records, Reports and Findings" in accordance with N.J.R.E. 803(c)(8) |

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| AH | February 28, 2023, Letter Brief of State concerning testimony from witnesses Donahue, Gronikowski, and Prather |
| AI | February 28, 2023, Office of Public Defender's position concerning access to private portion of the Alcotest Inquiry System database |
| AJ | February 28, 2023, Reply by NJSBA concerning access to private portion of database |
| AK | March 1, 2023, Letter Brief from State concerning its opposition to access to private portion of database |
| AL | March 1, 2023, additional Reply by NJSBA concerning access to private portion of database |
| AM | March 2, 2023, Letter Opinion and Order entered by Judge Fall, requiring State to provide sworn statements of witnesses Donahue, Gronikowski, and Prather in advance of plenary hearing, and reserving on issue of access to private portion of database |
| AN | March 3, 2023, submission by State of summary of testimony to be provided at the plenary hearing by DAG Mitchell and SFC Alcott |
| AO | July 17, 2023, Proposed Findings of Fact and Conclusions of Law submitted by the State |
| AP | July 17, 2023, Proposed Findings of Fact and Conclusions of Law submitted on behalf of Defendant-Respondent, Thomas Zingis |
| AQ | July 17, 2023, Proposed Findings of Fact and Conclusions of Law submitted by *Amicus Curiae*, the New Jersey State Bar Association |
| AR | July 17, 2023, Proposed Findings of Fact and Conclusions of Law submitted by the New Jersey Office of Public Defender |
| AS | March 29, 2023 Letter Opinion and Order of Judge Fall re: Access to Private Portion of Alcotest Inquiry System database |

EXHIBIT III – TRANSCRIPTS

| NUMBER | DATE |
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| T1 | March 20, 2023 |
| T2 | March 21, 2023 |
| T3 | March 22, 2023 |
| T4 | March 28, 2023 |
| T5 | April 25, 2023 |
| T6 | April 26, 2023 |
| T7 | April 27, 2023 |
| T8 | June 12, 2023 |
| T9 | June 13, 2023 |
| T10 | June 14, 2023 |

**About the Panelists…**

**Lloyd E. Bennett,** The Law Offices of Lloyd E. Bennett, Esq., P.C. in Union City, New Jersey, concentrates his practice in immigration and personal injury matters.

Admitted to practice in New Jersey and before immigration courts nationwide, Mr. Bennett is a Trustee of the Hudson County Bar Association and a member of the New Jersey State Bar Association and the New Jersey Association for Justice. He is a former New Jersey Chapter Chair of the American Immigration Lawyers Association (AILA) and serves as Chair of the Chapter's Immigration and Customs Enforcement (ICE) Section, where he assists with the chapter's annual lobbying day event in Washington, D.C. A lecturer to civic organizations, he contributes to Hudson County magazines and newspapers on immigration issues.

Mr. Bennett received his B.A. from Ithaca College and his J.D. from Seton Hall University School of Law.

**Carolina T. Curbelo,** CurbeloLaw in Ridgefield, New Jersey, concentrates her practice in immigration law and real estate matters. In her immigration work, she represents clients in proceedings before the United States Immigration Courts as well as the U.S. Citizenship and Immigration Services (USCIS) in family-based applications, naturalization and humanitarian visas, as well as removal defense and deportation matters. In her real estate practice she has represented buyers and sellers in residential, commercial and condominium matters, as well as distressed homeowners facing foreclosure.

Ms. Curbelo is admitted to practice in New Jersey and before the United States District Court for the District of New Jersey, the Third Circuit Court of Appeals and the United States Supreme Court. She is a member of the New Jersey State Bar Association, the American Immigration Lawyers Association (AILA), the Hispanic Bar Association of New Jersey (HBA-NJ) and the National Association of Hispanic Real Estate Professionals (NAHREP), and serves as Treasurer of the New Jersey chapter of AILA. She is active in numerous community and legal organizations.

A graduate of Rutgers University, Ms. Curbelo received her J.D. from Vermont Law School, interned for the Honorable Jose L. Linares, United States District Court for the District of New Jersey, and clerked for the Honorable Joseph S. Conte, J.S.C., Bergen County, Civil Division.

**Jennifer DiPillo** is Director of the Crime Victims Law Project in Media, Pennsylvania, where she assists victims of crimes, including sexual assault, stalking, domestic violence, assault, robbery, arson and surviving family members of homicide victims, at no cost to them. Appointed as an arbitrator and Guardian ad Litem by the court, she has also litigated family law matters and supported victims in Title IX hearings.

Ms. DiPillo received her B.A. from Villanova University, where she was elected to *Kappa Kappa Gamma*, and her J.D. from Widener University School of Law.

**Stephen D. Easton,** a trial lawyer and award-winning teacher, is President of Dickinson State University in Dickinson, North Dakota.

Mr. Easton formerly served as the United States Attorney for the District of North Dakota and has tried cases in civil and criminal courts. He spend 4 years as Dean of the University of Wyoming School of Law and was also a professor of law at the University of Missouri Columbia School of Law.

A lecturer for the Professional Education Group (P.E.G.), Mr. Easton is the author of *Attacking Adverse Experts* (ABA) and several other guidebooks for attorneys. He has been published in *The Federal Lawyer*, *The Practical Litigator*, *Stanford Law Review*, *The Wall Street Journal* and *USA Today*, among other publications. He is the recipient of the Richard S. Jacobson Award for Excellence in Teaching Trial Advocacy from the Pound Civil Justice Institute and the Warren E. Burger Prize from the American Inns of Court.

Mr. Easton received his B.A. from Dickinson State University and his J.D. from Stanford Law School.

**Jeffrey Fiorello** is a Partner in Cohn Lifland Pearlman Hermann & Knopf LLP in Saddle Brook, New Jersey, and concentrates his practice in family law mediation, assisting parties in the amicable resolution of their issues concerning custody and parenting time, spousal and child support, college contributions, distribution of assets and debts, and related issues. He has also handled family law litigation, domestic violence, civil litigation and appeals.

Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey, Mr. Fiorello is a Trustee and Past President of the Passaic County Bar Association. He is Past Chair of the Association's Family Law and CLE Sections, and the Association's Activities and Social Committee. Mr. Fiorello is Chair of the New Jersey State Bar Association Family Law Section Executive Committee and Past Chair of the Association's LGBT Section. He has been Co-Chair of the Legislative Committee, has served on the Nominating Committee and has been a Trustee of the Association. He has also been a Panelist for the Matrimonial Early Settlement Program in Passaic County and has served on the District XI Ethics Committee.

Mr. Fiorello is a former member and Barrister of the Northern New Jersey Family Law American Inn of Court. He is the recipient of several honors, including being selected as the 2014 Professional Lawyer of the Year, Passaic County, by the New Jersey Commission on Professionalism in the Law and as the 2015 Passaic County Distinguished Family Law Practitioner of the Year.

Mr. Fiorello received his B.A., *cum laude*, from Rutgers University and his J.D. from Seton Hall University School of Law. He was Judicial Clerk to the Honorable Ralph L. DeLuccia and the Honorable Carol Weaver McCracken, Superior Court of New Jersey.

**Alexandra M. Freed** is an attorney at SeidenFreed LLC with office in Cranford and Pennington, New Jersey, where she concentrates her practice exclusively in family law.

Admitted to practice in New Jersey, Ms. Freed serves on the Executive Committee of the New Jersey State Bar Association's Family Law Section and the Women's Divorce Alliance. She is also a Matrimonial Early Settlement Panelist in Mercer County. She is an associate editor of the

*New Jersey Family Lawyer*, has lectured for ICLE and the New Jersey State Bar Association on family law matters and is the recipient of several honors.

Ms. Freed received her B.A., *cum laude*, from Rutgers College, Rutgers University, where she was elected to *Phi Beta Kappa*. She is an honors graduate of Rutgers School of Law-Camden and while in law school interned with New Jersey Supreme Court Justices Virginia A. Long and Helen E. Hoens. She clerked for the Honorable Catherine Fitzpatrick, Presiding Judge, Family Part, Mercer County.

**Derek M. Freed** is the founding and Managing Partner of SeidenFreed LLC with offices in Cranford and Pennington, New Jersey. He concentrates his practice in matrimonial and family law.

Admitted to practice in New Jersey, Mr. Freed is Past Chair of the New Jersey State Bar Association Family Law Section and was a co-author of the Association's *amicus curiae* brief to the New Jersey Supreme Court on the matters of *Gnall v. Gnall*, *Bisbing v Bisbing* and *Cardali v. Cardali*. He is a Matrimonial Early Settlement Panelist in Mercer and Somerset Counties and a member of the Matrimonial Lawyers Alliance.

The recipient of the New Jersey State Bar Association Distinguished Legislative Service Award in 2023, Mr. Freed serves as Executive Editor of the *New Jersey Family Lawyer* and his articles have appeared in the magazine. He has lectured on family law matters for ICLE, the New Jersey State and Mercer County Bar Associations, and the New Jersey Association for Justice, and is the recipient of several other honors.

Mr. Freed received his B.A. from the College of William and Mary and his J.D., with honors, from Rutgers School of Law-Camden.

**Jeffrey Evan Gold** is Of Counsel to Helmer, Conley & Kasselman, P.A. with a main office in Haddon Heights, New Jersey. He concentrates his practice in drunk driving and criminal law, and is perhaps best known for his work in DUI defense. He has been involved with a number of precedent-setting decisions, including *State v. Foley* (2204), *State v. Chun* (2008), *Chun II* (2013), State v. Cahill (2013), State v. Cassidy (2018) and *State v. Zingis* (2024), among several others.

Admitted to practice in New Jersey and before the Third Circuit Court of Appeals and the United States Supreme Court, Mr. Gold has been a two-time Chair of the New Jersey State Bar Association Municipal Court Practice Section and has been appointed to the New Jersey Supreme Court Trial Certification and Municipal Court Practice Committees as well as the Supreme Court Special Committee on Discovery. He has been Chair of the Burlington County Bench and Bar Criminal Law Committee three times and is a four-time Chair of the Municipal Court Committee. He is also a former Burlington County Assistant Prosecutor.

A former Police Academy instructor on search and seizure matters, Mr. Gold has been a frequent TV analyst and has appeared on NBC, ABC, Fox News, CNN, HLN and Comcast networks. He is the recipient of ICLE's Distinguished Service Award, the NJSBA's Municipal Court Attorney of the Year (3 times) and several NJSBA *Amicus Curiae* Awards, among other honors.

Mr. Gold is a graduate of Rutgers University and Rutgers School of Law-Camden.

**Dion Green** is a survivor of the 2019 mass shooting that occurred in Dayton, Ohio, that claimed the life of his father and many other innocent victims. He is an author, mentor and leader who founded the Fudge Foundation (Flourishing Under Distress Given Encouragement), a 501(c) nonprofit that helps survivors through traumatic experiences with resources and support.

Mr. Green also serves on the Board of Felons With a Future, Upturn Ohio, the Urban Institute Advisory Council and the National Mass Violence Victimization Advisory Council. He is the recipient of multiple awards and recognition, including the Coretta Scott King Legacy Award bestowed by the Coretta Scott King Center for Cultural and Intellectual Freedom in 2022. He has also run for State Representative of Ohio House District 39.

**Lou Hoguet** is President of Landguard Title Services, LLC in Manahawkin, New Jersey. Joining the company as an Account Manager in 2004, he has served as President since 2007.

**Tiffany Keefer** is Director of Operations for H&S Business Partners, an accounting and bookkeeping firm with offices in Voorhees, New Jersey, and Phoenixville, Pennsylvania. She specializes in helping attorneys navigate random audits and financial investigations, and handles the day-to-day accounting of numerous attorney trust and business account records, as well as handling forensic cases on financial matters for attorneys.

Prior to joining H&S, Ms. Keefer worked for nearly 20 years for the State of New Jersey, with the last 12 years at the Office of Attorney Ethics, where she served as a Disciplinary Auditor and Random Compliance Auditor. She conducted more than 100 financial disciplinary investigations and more than 600 random audits of attorney trust and business accounts. She has lectured for ICLE on attorney trust and business accounting and proper record keeping requirements under *Court Rule R*. 1:21-6 and *RPC* 1.15 as well as to the New Jersey Hispanic Bar Association and other groups.

Ms. Keefer received her undergraduate degree from Rutgers University and is a CFE candidate.

**Richard F. Klineberger, III,** Certified as a Criminal Trial Attorney by the Supreme Court of New Jersey, is a Partner in Klineberger & Nussey with offices in Haddonfield, Woodstown and Cape May, New Jersey, and Philadelphia, PA. With more than 24 years of trial experience, he concentrates his practice in complex litigation, including defending professional athletes, recording artists and politicians in criminal matters, and representing victims of sexual abuse and others who have been seriously injured or killed.

Mr. Klineberger is admitted to practice in New Jersey and Pennsylvania, and before the United States District Court for the District of New Jersey and the Eastern District of Pennsylvania, the Third Circuit Court of Appeals, the United States Tax Court and the United States Supreme Court. Past President of the Salem County Bar Association, he is the Salem County Trustee to the New Jersey State Bar Association and a member of the National Association of Criminal Defense Lawyers, the Cape May County Bar Association, the Delaware County Bar Association and the Philadelphia Justinian Society. He has also served on the New Jersey Judicial and Prosecutorial Appointments Committee since 2020 and has lectured for professional organizations.

Mr. Klineberger received his B.A., *magna cum laude*, from Neumann University, where he was Senior Class President, and his J.D. from Temple University School of Law, where he was the recipient of the Barrister Award for Outstanding Performance in Trial Advocacy and several other honors. He clerked for the Honorable Thomas Dempsey, Court of Common Pleas, First Judicial District of Pennsylvania; and for the Honorable Timothy G. Farrell, Superior Court of New Jersey, Salem County.

**Alison C. Leslie,** Certified as a Matrimonial Law Attorney by the Supreme Court of New Jersey, is Managing Partner of the Leslie Law Firm, LLC in Morristown, New Jersey. Concentrating her practice in family law matters, she is also a mediator, arbitrator, Collaborative Law Practitioner and Parent Coordinator.

Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey and the United States Supreme Court, Ms. Leslie has served on the Executive Committee of the New Jersey State Bar Association Family Law Section and has chaired the Section's Young Lawyers Subcommittee. She is Past Chair of the NJSBA Membership and Solo & Smal Firm Sections.

Ms. Leslie is a former Barrister of the Barry Croland Family Law American Inn of Court. She is the author of legal articles and has lectured on family law topics.

Ms. Leslie received her B.A. from Bucknell University, where she was elected to *Kappa Alpha Theta*, and her J.D. from Seton Hall University School of Law.

**Lindsay Lieberman,** Lindsay Lieberman Law and Consulting, in Providence, Rhode Island, represents victims of sexual misconduct, cyber-sex crimes and harassment.

Ms. Lieberman is a former sex crimes prosecutor in Brooklyn, New York, and worked at a leading sexual privacy law firm before opening her own practice. She is the co-author of "Legally Recognizing Coercive Control Can Help Abuse Victims" (*Law360.com*, May 16, 2021) and an Adjunct Professor at Salve Regina University.

Ms. Lieberman received her B.A. from Rutgers University, where she was elected to *Sigma Delta Tau*, and her J.D. from Brooklyn Law School.

**Honorable Louis F. Locascio, JSC (Ret.),** Certified as a Civil and Criminal Trial Attorney by the Supreme Court of New Jersey, practices with The Law Office of Andrew S. Blumer with offices in Freehold and New Brunswick, New Jersey. He has been retained by plaintiff and defense attorneys to mediate and/or arbitrate civil and family law matters.

Retired from the New Jersey Superior Court, where he served in the Civil, Criminal and Family Divisions, Judge Locascio authored approximately 40 judicial opinions (involving civil, criminal and family issues), 20 of which have been published. In the Civil Division he tried or settled every type of case, including personal injury, negligence, breach of contract, employment, discrimination, consumer fraud, condemnation, assault & battery, corporate and commercial disputes, construction site accidents, and medical and legal malpractice; and in the Family

Division he settled numerous cases involving alimony, child support, custody & visitation, equitable distribution, retirement income, re-locations and domestic violence.

Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey and the United States Supreme Court, Judge Locascio has been a member of the Middlesex County and Monmouth Bar Associations. Since retiring, he has published approximately 25 Op Ed articles in the *New Jersey Law Journal* (involving civil, criminal and family issues) and has lectured for ICLE, the American Inns of Court and other organizations.

Judge Locascio received his B.A. from Columbia University and his J.D. from Seton Hall University School of Law, where he was a member of the *Seton Hall Law Review*. He was Law Clerk to the Honorable Harold A. Ackerman, J.S.C.

**Jeffrey S. Mandel,** Certified as a Civil Trial Attorney by the Supreme Court of New Jersey, is Managing Partner of The Law Offices of Jeffrey S. Mandel in Freehold, New Jersey. He concentrates his practice in civil litigation as well as criminal cases, and the firm has represented large companies, mom-and-pop stores, individuals and start-up businesses.

Mr. Mandel's former employers include Day Pitney and Faegre Drinker Biddle & Reath. He has been appointed to the Supreme Court Committees on the Rule of Evidence and the Unauthorized Practice of Law, and the Special Committee on the Duration of Disbarment for Knowing Misappropriation. He has also served as an Ethics Investigator for the District IX Ethics Committee.

Mr. Mandel has taught at Rutgers and Seton Hall Law Schools, and is the author of *New Jersey Appellate Practice*. He is the recipient of the New Jersey State Bar Association Young Lawyer of the Year Award and several other honors.

Mr. Mandel is a graduate of Seton Hall University School of Law.

**Megan S. Murray,** Certified as a Matrimonial Law Attorney by the Supreme Court of New Jersey, is founding Partner of The Family Law Offices of Megan S. Murray in Holmdel, New Jersey, and limits her practice to family law matters.

Ms. Murray is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey. A member of the New Jersey State, Middlesex County and Monmouth Bar Associations, she is Past Chair of the NJSBA's Family Law Section Executive Committee and Past Co-Chair of the Section's Legislation Subcommittee. Ms. Murray is a Fellow of the American Academy of Matrimonial Lawyers (AAML) and an affiliate of the Matrimonial Lawyer's Alliance. She is also Past Chair of the Family Law Committee of the Monmouth Bar Association.

A managing editor of the *New Jersey Family Lawyer*, Ms. Murray is the author of articles which have appeared in the *Middlesex Advocate*, the *New Jersey Law Journal*, *New Jersey Lawyer* and the *New Jersey Family Lawyer*. She is also the co-author of *Divorce in New Jersey*, a practical guide for individuals considering divorce or going through the divorce process. Ms. Murray is the recipient of the 2012 Martin Goldin Award for achievement in the practice of family law as well as the 2013 Young Attorney of the Year Award for Middlesex County, and in 2015 was named a Leader of the Bar by the *New Jersey Law Journal*. She has lectured on family law

topics across the state for the New Jersey State Bar Association and other organizations, and has appeared as a guest speaker on the *Inside the Law* radio show.

Ms. Murray received her B.S., *summa cum laude*, from Boston College and her J.D. from Wake Forest University School of Law, where she was editor of the law school's newspaper. She was Law Clerk to the Honorable Paul A. Kapalko, Presiding Judge, Family Part, Monmouth County.

**Joseph Paravecchia** is First Assistant Prosecutor, Hunterdon County Prosecutor's Office, in Flemington, New Jersey, where he manages the day-to-day operations of the office, supervises the legal staff and handles other administrative duties. He formerly supervised the Grand Jury unit, trained local law enforcement agencies, prosecuted a variety of crimes and offenses, and drafted and submitted legal briefs to, and argued before, the New Jersey Superior Court, the Appellate Division and the New Jersey Supreme Court. Prior to joining the Hunterdon County Prosecutor's Office he was Senior Assistant Prosecutor in the Mercer County Prosecutor's Office in Trenton, New Jersey, where he was assigned to the Trial and Appellate Units.

Admitted to practice in New Jersey and Pennsylvania, and before the United States District Court for the District of New Jersey, the Third Circuit Court of Appeals and the United States Supreme Court, Mr. Paravecchia is Past Chair of the New Jersey State Bar Association's Criminal Law Section, has been a member of the NJSBA Young Lawyer's Division and has been appointed to the NJSBA Legislative, Judicial Administration, Appellate Practice and Government, Public Sector and Public Interest Lawyers Committees. A former member of the Practice of Law Subcommittee of the NJSBA Pandemic Task Force, he sits on the New Jersey Supreme Court Committee on Model Criminal Jury Charges, serves as Treasurer of the First Assistant Prosecutor's Association of New Jersey and previously served as Acting President and Treasurer of the Assistant Prosecutors Association of New Jersey. He is Secretary of the Mercer County Bar Association and a member of the Hunterdon County Bar Association.

Mr. Paravecchia was named the Mercer County Bar Association's 2020 Young Lawyer of the Year and the Crimestoppers of Hunterdon County 2022 Crime Stopper of the Year. He has lectured on criminal law matters for ICLE and the New Jersey State Bar Association.

Mr. Paravecchia received his undergraduate degree from Pennsylvania State University and was a *cum laude* graduate of Ave Maria School of Law, where he served as Publication Manager of the *Law Review*. After law school he clerked for the Honorable Robert C. Billmeier, J.S.C. (Ret.) and the Honorable Andrew J. Smithson, J.S.C. (Ret.), Mercer Vicinage.

**Alan J. Pollack,** the Law Office of Alan J. Pollack Esq. in Newark, New Jersey, was formerly Managing Partner of Frank & Pollack LLC in Newark, New Jersey, and is also Of Counsel to Wilentz, Goldman & Spitzer, P.A. He has practiced immigration law in both New Jersey and New York for more than 25 years and focuses in business immigration, I-9 compliance and complex family visa issues.

Mr. Pollack is a Past Chair of the New Jersey Chapter of the American Immigration Lawyers Association (AILA) and the Immigration Section of the New Jersey State Bar Association. He is a member of the national AILA USCIS Committee and has also been on National AILA's USCIS Field Office Operations Liaison Committee.

Mr. Pollack has been an Adjunct Professor at Montclair State University, where he has taught courses in immigration law and politics, and is an Adjunct Professor at Rutgers Law School-Newark, where he teaches immigration law. He has appeared on television and in the newspaper regarding immigration issues, has lectured both locally (ICLE) and nationally (the AILA Annual Conference) on immigration issues, and has published articles on immigration topics. He is the recipient of several honors.

Mr. Pollack received his B.S., *cum laude*, from Fairleigh Dickinson University and his J.D. from Syracuse University College of Law.

**Thomas H. Prol** is a Member of Sills Cummis & Gross P.C. in Newark, New Jersey, and concentrates his practice in business representation, litigation, environmental, land use, redevelopment and property assessment law. He formerly served as Associate General Counsel and Agency Chief Contracting Officer for New York City's Department of Consumer Affairs, and prior to practicing law was an environmental scientist and enforcement officer for the United States Environmental Protection Agency.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern and Eastern Districts of New York, the Third Circuit Court of Appeals and the United States Supreme Court, Mr. Prol is Past President of the New Jersey State Bar Association, where he served as the Association's first openly gay leader in 2016-17, and a founding Executive Committee member and former Vice Chair of Garden State Equality, the LGBT civil rights organization that was hailed by the *Star-Ledger* as "the most effective grass-roots campaign" in New Jersey. He is Past Vice Chair of the National Lesbian and Gay Law Association (now known as the National LGBT Bar Association) and a former member of the board of the LGBT Bar Association of Greater New York. Mr. Prol is a Fellow of the American Bar Foundation and a delegate and member of the Board of Governors of the American Bar Association. He has been an advocate in support of New Jersey's landmark Anti-Bullying Bill of Rights and other civil rights measures, and argued the defense of that law before the New Jersey Council on Local Mandates as well as appearing and filing numerous friend-of-the-court briefs before the New Jersey Supreme Court and the Third Circuit Court of Appeals, as well as the New Jersey Council on Local Mandates. In 2023 he was appointed Chair of the New Jersey Election Law Enforcement Commission ("ELEC").

Having served as an Adjunct Professor at Seton Hall University School of Law, Mr. Prol is a frequent lecturer for ICLE and the author of numerous articles on environment and development issues, and formerly taught legal writing and appellate advocacy at New York Law School. He has been a monthly columnist in the *New Jersey Law Journal*, teaches a New Jersey practice and ethics course for the Practising Law Institute and is an expert in parliamentary procedure. He has been the recipient of several honors, including the New Jersey State Bar Association's Mel Narol Award (for leadership and advocacy for women and minority lawyers) and the Professional Lawyer of the Year Award bestowed by the New Jersey Commission on Professionalism and the Sussex County Bar Association.

Mr. Prol received his B.A. and M.P.H. in Environmental/Occupational Health from Emory University. He received his J.D. from New York Law School, where he was the recipient of the Daniel Finkelstein Commencement Award for writing and the New York State Bar Association's Law Student Bar Achievement Award for service to the bar. He interned with the United States Attorney's Office and the New York City Commission on Human Rights, and also served two

years in the United States Peace Corps in Nepal, where he directed sanitation units in four government district water and sewerage offices that included Mount Everest.

**Tracy Sanders,** an attorney, author and speaker, is the founder of Natural Hair and Law in Los Angeles, California, an organization which provides publications, workshops and events addressing legal issues related to natural hair in the workplace and schools.

Ms. Sanders is a member of *Alpha Kappa Alpha* Sorority, Inc., and is the author of *Natural Hair Affirmations* and *Natural Hair in the Workplace: What Are Your Rights?* The host of the podcast Legal Talk With Tracy Sanders, she has appeared on TV networks including ABC, CNBC, Fox, MSNBC, TLC and WE; has lectured at Yale University and several law schools; and is an honoree of the Los Angeles Lakers Comerica Bank Women's Business Awards Program as well as the recipient of several other honors.

Ms. Sanders received her B.A. and Masters of Public Administration from the University of South Carolina and her J.D. from Syracuse University College of Law.

**Janna Sheimann** is an associate attorney at the Mercer County Board of Social Services in Trenton, New Jersey. She was formerly Managing Attorney of the Employment Unit at Disability Rights New Jersey.

Ms. Sheimann received her B.F.A. from the University of Miami, where she was Treasurer of *Sigma Alpha Iota*'s *Sigma Chi* Chapter, and her J.D. from New York Law School, where she was the ABA representative for the Student Bar Association.

**Brad Slater** is a Personal Risk Specialist at USI Insurance Services in Middletown, Delaware. He formerly worked for Liberty Mutual Insurance and Bankers Life and Casualty Company.

Mr. Slater received his undergraduate degree from the University of Delaware.

**Michael Troso,** Certified as a Municipal Court Law Attorney by the Supreme Court of New Jersey, is Of Counsel to Helmer, Conley & Kasselman, P.A. in Haddon Heights, New Jersey. His areas of practice include criminal law, municipal court, drunk driving, expungements and juvenile law matters.

Admitted to practice in New Jersey and Pennsylvania, Mr. Troso is a former police officer and investigator with the New Jersey Division of Criminal Justice. He is Certified by Draeger as an Alcotest Operator and is Certified in Drug Evaluation & Classification and in Field Sobriety Testing by the NHTSA. He is a member of the New Jersey State Bar Association, the National College for DUI Defense and the DUI Defense Lawyers Association, and a former member of the Pennsylvania, Bucks County, Burlington County and Camden County Bar Associations.

Mr. Troso received his B.A. from LaSalle University and his J.D. from Rutgers University School of Law.

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# New Jersey State Bar Association Spring Conference 2025

*Neurodiversity in the Workplace*

**Tracy Sanders Rucker, Esq.**

**Janna Sheiman, Esq.**

1

# Introduction – Tracy Sanders Rucke

- Tracy Sanders Rucker, Esq. is an accomplished attorney, author, a Angeles, California. She established Natural Hair and the Law formed to provide publications, workshops, and events addre related to hair texture discrimination in the workplace and sc author of *Natural Hair Affirmations* and *Natural Hair in the Wor Your Rights? Natural Hair in the Workplace: What Are Your Rig* are available for purchase online at Amazon and Barnes &Noble.
- She has been a featured speaker at Yale University, Arizona College of Law, Loyola Law School, Thurgood Marshall School of the Pacific, Sam Houston State University, and Claflin University the *Attorney Tracy Sanders Foundation* to help underserved their education and career goals.
- She appeared on TV networks such as ABC, CNBC, FOX, MSNBC, is the host of a podcast, *Legal Talk With Tracy Sanders*. She ear Arts in Political Science at the University of South Carolina, Administration at the University of South Carolina, Juris Docto University College of Law, and Women's Entrepreneurship Cert University

2

# Introduction – Janna Sheiman, Esq.

- Janna Sheiman's 15+ year legal career began in New York City w
as a special education attorney, fighting on behalf of students wit
free and appropriate public education under the Individuals
Education Act.
- She was part of the team that worked on the *T.K. . NYC Dept. of E*
the Second Circuit found that the failure to consider bullying o
deprivation of FAPE. In New Jersey, Janna has worked on Person
Plaintiffs and Defendants, representing clients in State and Fe
Proceedings.
- For the last four years, she worked at Disability Rights NJ, the
and Advocacy agency, where a large part of her practice w
individuals with disabilities who were seeking job supports
Vocational Rehabilitation agencies. Most recently, she has just jo
County Board of Social Services as an Associate Attorney.

3

# Neurodiversity Terms

| | |
|---|---|
| **Neurodiversity** | A term representing individuals who cognitively proces society considers the norm |
| **Camouflaging** | A behavior that involves trying to act or communicat neurodivergent traits; also known as masking |
| **Impression management** | When an individual tries to influence how a perso controlling the social situation |
| **Reasonable accommodation** | When an organization is allowed to support the empl substantial burden |
| **Workplace accommodation** | Any change or adjustment made to the actual job, processes to allow an individual with a disability to ap job, or access benefits that are available for other indivi |

4

# Neurodiversity Terms

Neurodiversity: a term representing how individuals cognitively process information differently than what society considers normative.

5

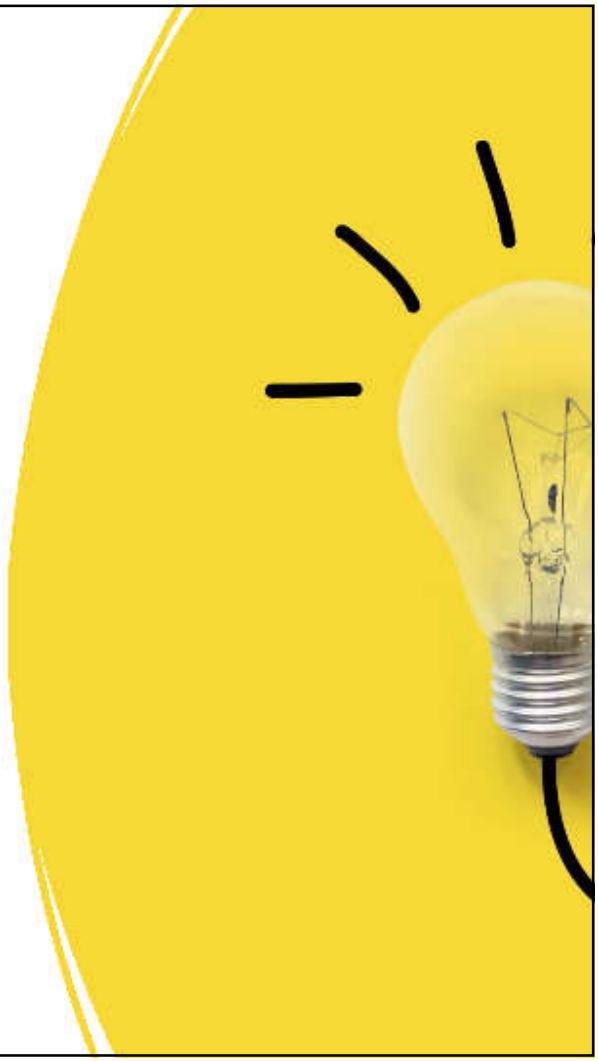
# Neurodiversity Terms

- Neurodiversity is an umbrella term for autism, A
  dysgraphia, and other learning differences
  - Autism: a neurological and developmental disorder t
    people interact with others, communicate, learn, and be
  - Attention Deficit Hyperactivity Disorder (ADHD): a c
    including attention difficulty, hyperactivity, and impulsive
  - Dyslexia: a learning disorder that involves difficulty
    problems identifying speech sounds and learning hov
    letters and words
  - Dysgraphia: a neurological disorder characterized by wr
    Specifically, the disorder causes a person's writing to
    incorrect

6

# Executive Function

Executive function is a set of mental skills that include memory, flexible thinking, and self-control.



7

# Expressive Language

8

# Expressive Language

- Difficulties with expressive language, such as thinking, p asking questions, or being able to speak.
- Lack of eye contact is common, often sending the wrc boredom, lack of confidence, or inattentiveness.
- The use of repetitive or rigid language or even monologue interest.
- Elements of communication, including nonverbal lan neurodivergence.
- Facial expressions, and other non-verbal communication m individuals. This creates a challenge when people are certain reciprocity.
- Homogenous vs Heterogenous behavior: does not mean t any less meaningful.

9

# Relevant Law

- In 2024, the employment-population ratio—the pro
  population that is employed— was 22.7 percent amon
  disability, the U.S. Bureau of Labor Statistics repo
  contrast, the employment-population ratio for tho
  disability was 65.5 percent. The employment-popul
  people with a disability changed little from 2023 to 20
  1.2 percentage-point increase from 2022 to 2023. Th
  population ratio for those without a disability dec
  percentage point in 2024. The unemployment rate for
  disability (7.5 percent) changed little in 2024, while the
  without a disability increased by 0.3 percentage point o
  3.8 percent.

10

# Relevant Law

- (**Please note:** As of 01/20/2025, information in some news releas
date or not reflect current policies).
- "The U.S. Department of Labor today announced that its Office o
Employment Policy (ODEP) has awarded $2 million in funds to Co
University to operate an employer-focused, disability policy deve
technical assistance center.
- The funds will support the first year of a cooperative agreement
prior work of the agency's Employer Assistance and Resource Ne
Disability Inclusion. EARN helps employers, human resources pro
diversity, equity, inclusion and accessibility staff find the resourc
recruit, hire, retain and advance people with disabilities, includir
historically underserved communities."

11

# Relevant Law

- (**Please note:** As of 01/20/2025, information in some news releas
date or not reflect current policies).
- "The Employer Assistance and Resource Network on Disability In
continue its efforts to strengthen America's economy by helping
inclusive workplaces that afford all disabled workers access to go
- ODEP is committed to improving access to good jobs for all Amer
workers. The agency works to develop and influence policies and
increase the number and quality of employment opportunities fo
disabilities."

12

# Relevant Law

- **Americans with Disabilities Act of 1990, As Amended**
- "b) Purpose
- It is the purpose of this chapter—
- (1) to provide a clear and comprehensive national mandate
  elimination of discrimination against individuals with disabili
- (2) to provide clear, strong, consistent, enforceable standar
  discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central r
  the standards established in this chapter on behalf of indivi
  disabilities; and
- (4) to invoke the sweep of congressional authority, includin
  enforce the fourteenth amendment and to regulate commer
  address the major areas of discrimination faced day-to-day
  disabilities."

13

# Relevant Law

- **NJ Office of the Attorney General- Civil Rights:**
- The Department of Law & Public Safety, through its Divisio (LAD), is responsible for enforcing the law.
- People with disabilities generally have the right to obtai housing, education, and goods or services offered to the without discrimination or harassment. How Does the LAD Disability Discrimination? Disability discrimination is again most types of employment ν when you try to rent or buy h real estate or get hotel accommodations when you apply to in most schools or colleges when you shop or enga transactions, or try to get goods or services or use facilitie general public

14

# Relevant Law

- **NJ Office of the Attorney General- Civil Rights:**
- "The term "disability" is very broad under New Jersey includes: any physical disability, infirmity, malf disfigurement caused by bodily injury, birth defect mental, psychological or developmental disability tha conditions that prevent the normal exercise of any bo function or which can be shown to exist through acce laboratory diagnostic tests."

15

# Relevant Law

- **NJ Office of the Attorney General- Civil Rights:**
- "In addition to any disability, you have now, the LAD
  discrimination based on: any disability that someone t
  now any disability you had in the past, or that somec
  had in the past any disability that you might get in the f

16

# Relevant Law

- **NJ Office of the Attorney General- Civil Rights:**
- Disability discrimination is unlawful during the app process: You have the right to apply for and be fairly jobs, apprenticeships and traineeships based on m words, if you are qualified for the job and you can do a things that the job requires, then you should not be considered less qualified than other people who h relevant education, training, certifications, license experience that you have.

17

# Relevant Law

- **NJ Office of the Attorney General- Civil Rights:**
- In addition, employers must provide reasonable accommoc need to apply for the job, to interview for the job, or tc required for the job, unless it would cause them undu employer may not ask any applicant to take a medical ex after making a bona fide offer of employment, but if the em all people hired into a position to take a medical ex employer can make the medical exam a condition of your er employer cannot single you out for a medical exam b disability, and cannot revoke your offer of employment be shows medical conditions that would not prevent you from essential functions of the job.

18

# Relevant Law

- Disability Rights New Jersey (NJ) is a designated protection and according to the Developmental Disabilities Bill of Rights Act 19 to advance the human, civil, and legal rights of people with promote self-determination and inclusion in all facets of commu
- Disability Rights New Jersey is committed to improving t outcomes of people with disabilities. People with disproportionately affected by issues of joblessness and conseq into a cycle of poverty that is difficult to escape without support.

19

# Relevant Law

- To further this, Disability Rights NJ staff are trained on the ADA discrimination laws. Disability Rights NJ provides resources a individuals seeking information about reasonable accommoda navigate the Equal Employment Opportunity Commission discrimination in the workplace. Disability Rights NJ assists in services from the state Vocational Rehabilitation Agencies, Divis Rehabilitation Services, and Commission for the Blind and V Disability Rights NJ ensures access to help individuals secu employment.

20

# Relevant Law

- **Domurat v. Ciba Specialty Chemicals Corp.**
- "The Law does not prohibit discrimination against the han "the nature and extent of the handicap reasonably performance of the particular employment." N.J.S.A. 10 N.J.S.A. 10:5-2.1. (the Law does not "prevent the terminati the employment of any person who in the opinion o reasonably arrived at, is unable to perform adequately his d
- [Clowes, supra, 109 N.J. at 594, 538 A.2d 794.]
- Moreover, an employer may terminate a handicapped emp handicap "in fact impedes job performance. There shoul guessing the employer." Andersen, supra, 89 N.J. at 496, 4

21

# Relevant Law

- **Domurat v. Ciba Specialty Chemicals Corp.**
- "The evidence clearly demonstrated that at the time he v plaintiff was unable or unwilling to perform his job responsi he was returned to a full work schedule on August 25, 1995 medical restrictions indicted by his own treating psychiatr he had rejected substance abuse treatment; he wa delineated responsibilities during his probationary perio granted extensions of time to complete his work.
- Nevertheless, his performance continued to deteriorate finding that plaintiff was not performing the essential func at the time of his termination was adequately supported by

22

# Relevant Law

- **Grande v. St. Clare's Health System**
- As to the first prong of the prima facie case, an e is perceived to have a disability is protected just who actually has a disability.
- The second prong—whether the employee is able a level that meets "legitimate or reasonable expect be evaluated by an objective standard.
- The third prong – suffered a negative employment

23

# Relevant Law

- **Grande v. St. Clare's Health System**
- The fourth prong requires proof that the "emplo replacement with qualifications similar to [the emp thus demonstrating a continued need for the same skills."
- If a plaintiff successfully establishes a prima fa presumption arises that the employer discriminated against the plaintiff."
- The *McDonnell Douglas* analysis a court is to availability of a reasonable accommodation.

24

# Relevant Law

- **Raspa v. Office of Sheriff of County of Gloucester**
- "A county corrections officer developed a disabling d his doctor's words, required that the corrections off environment with minimum to no contact with pris insure minimum risk [to the corrections officer.]" Af corrections officer in several temporary light duty assig three-year period, the county sheriff's office determine not continue to extend light duty work to the permar corrections officer and processed his involunt retirement."

25

# Relevant Law

- **Raspa v. Office of Sheriff of County of Gloucester**
- "We hold that an employee must possess the bona fid qualifications for the job position that employee seek order to trigger an employer's obligation to reasonably the employee to the extent required by the LAD. In th further hold that an employer may reasonably lir assignments to those employees whose disabilities a and that the availability of light duty assignments f disabled employees does not give rise to any addition part of the employer to assign a permanently disab indefinitely to an otherwise restricted light duty assignr

26

# Workplace Accommodation

- Workplace accommodation: any **reasonable** change or adjustment to the actual job, the job environment, or the way of doing things to allow an individual with a disability to apply for a job, secure a job or acquire access to benefits available to other individuals in the workplace.
- Implementation estimate (< $500)

27

# Tips for inclusively working with neuro employees

- A part-time or a modified work schedule
- Noise-canceling headphones
- A checklist of tasks to cut down on distractions and forg

28

# Tips for inclusively working with neuro employees

- Transcription software and screen reader programs
- Service animals
- Remote work

29

# Inclusive Learning & Training in the Workplace

30

# Inclusive Learning & Training in the Workplace

- Neurodivergent employees have different styles in the learn:
- Audio learning style
- Visual learning style
- Kinesthetic learning style
- Tactile learning style

31

# Clarity

- Specifically, employees with autism and ADHD may change of routine
- For best performance, neurodivergent team members information in advance
- Provide an agenda before meeting with employees
- Set clear and written expectations and policies
- Employee handbooks should be updated to includ disability law

32

# Time Management

33

# Time Management

- Neurodivergent employees, specifically autistic, need be very clear, concise, and specific
- Give instructions based on five (**5 Ws)**:
- **Who**, **What**, **When**, **Where**, and **Why**
- Generally, make sure that information is available to needs it
- Netiquette

34

Communication
Cooperation
Collaboration

35

# Create a Sensory Friendly Workplace

36

# Neurodiversity Talent Recruitment

- Government
- Corporations
- Community programs
- Parent and adult support groups
- Specialized education institutions
- Employment agencies
- Higher education institutions

37

# Section 504

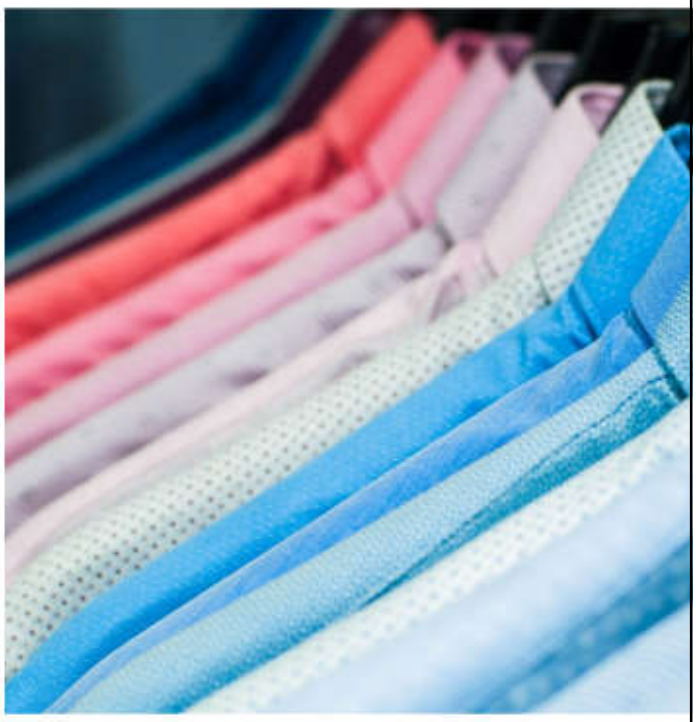
- Section 504 of the Rehabilitation Act of 1973, w
  discrimination on the basis of disability in programs or
  receive federal financial assistance from the U.S. D
  Education. Additional resources are listed below.

- Special Education Laws
- Individuals with Disabilities Act

38

# Dress & Grooming Codes in the Workplace

- Individualism v. dress codes
- Self identify v. "perceived disability"
- Observed behavior and personal appearance like (hairstyle, clothing, body piercings, and hygiene)



39

# Q&A


40