

## Commentary

# The New Jersey Legislature Needs to Codify Marriage Equality

By Bill Singer

On Sept. 27, 2013, Hon. Mary Jacobson, sitting in the Superior Court in Trenton, ruled in *Garden State Equality v. Dow*, 434 N.J. Super. 163 (Law Div. 2013), that New Jersey's exclusion of same-sex couples from civil marriage violated the equal protection guarantee of the New Jersey Constitution. Judge Jacobson found the legislative "fix" of creating civil unions, a parallel, "separate, but equal" status for same-sex couples failed to meet the intent of the 2006 New Jersey Supreme Court decision in *Lewis v. Harris*, 188 N.J. 415 (2006). The *Harris* court unanimously held that that same-sex couples are entitled to all of the same rights, privileges, and obligations of marriage as opposite-sex couples.

Reacting to Judge Jacobson's ruling, then Governor Chris Christie immediately sought to quash it by seeking a stay from the New Jersey Supreme Court. That court denied the stay request. Ultimately, the State dropped its appeal.

Same-sex couples in New Jersey immediately started to marry.

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In 2015, in a 5-4 decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the United States Supreme Court held that same-sex marriage is a fundamental right and that all states are required to allow same-sex couples to marry.

Two justices on the Supreme Court have continued to decry and question the *Obergefell* decision. In a dissent on a denial of certiorari in October 2020, Justice Thomas, joined by Justice Alito, delivered a fiery, four-page critique of *Obergefell*, stating that the holding gave same-sex couples a constitutional right to marry thereby giving priority to LGBT rights over religious freedom. "The Court read a right to same-sex marriage into the Fourteenth Amendment, even

though that right is found nowhere in the text." *Davis v. Ermold*, 592 U.S. \_\_\_\_ (2020). Justice Thomas said that these matters were best left to states to decide how best to accommodate the "religious liberty of the many Americans who believe that marriage is a sacred institution between one man and one woman."

And in the much-watched December 2021 oral argument in the Mississippi abortion case, *Dobbs v. Jackson*, Justice Amy Coney Barrett voiced her opinion that respect for precedent in a prior legal case, known as *stare decisis*, is "not an inexorable command."

Given the present composition of the United States Supreme Court, many advances made by the LGBTQ+ community could be reversed.

Were *Obergefell* to be overturned, where would that leave same-sex couples in New Jersey? As a lawyer who represents many members of the LGBTQ+ community, I get asked repeatedly if their marriages are at risk. Could the courts change their minds? Could their marriages be invalidated? Will same-sex couples lose the right to marry in the future?

Were *Obergefell* reversed, the right of same-sex couples in New Jersey to marry would rely solely on the slender thread of a decision by a Mercer County trial court judge. A trial judge in another county could find differently. An appellate court could deliver an opinion overruling Judge Jacobson. In other words, marriage equality in New Jersey is at risk.

Right now, there is legislation pending before the New Jersey Legislature to correct this situation. The proposed bills will codify the right to marry on a gender-neutral basis. S-3416 and A-5367 are short, but powerful. Senator Steve Sweeney is the prime Senate sponsor, Assemblywoman Valerie Vainieri Huttel is the Assembly prime sponsor. If enacted, New Jersey laws will state that any two people, regardless of gender identity, are allowed to marry.

The present Legislature has an opportunity during this lame duck session to codify the landmark decision of Judge Jacobson. That action will remove any doubt and uncertainty. It will underscore the State's commitment to marriage equality. It's time. ■