

October 27, 2006

**TO:** Interested Parties

**FROM:** Rachel Laser, Director of the Culture Project; Matt Nosanchuk, Senior Research Fellow

**SUBJECT:** Information About the New Jersey Court Decision

The Supreme Court of New Jersey announced yesterday in Lewis v. Harris, that under the state constitution's equal protection clause, committed same-sex couples in New Jersey are entitled to the same legal protections as heterosexual married couples. The court left it up to the legislature to determine what to call this new relationship status (i.e. "marriage" or "civil union").

This decision, coming fewer than two weeks before the 2006 elections, has spawned a wide variety of responses. Some in the gay advocacy community, such as a spokesperson for the Human Rights Campaign, view the decision positively, no matter what happens in the legislature: "They get to decide whether it's chocolate or double-chocolate chip." Others in the same community, like Garden State Equality, have denounced the decision as second-class treatment: "we get to go from the back of the bus to the middle of the bus." On the other side, social conservatives such as Senator Brownback have described the decision as deepening "the constitutional crisis with respect to the protection of traditional marriage" and warned about "huge social changes" being "forced by the courts."

The political commentators have been busy too. Some view the decision as benefiting conservatives, because it potentially mobilizes the conservative base once again in this year's election. Others, however, think that the decision, which stops short of establishing a right to marry, will do little to elevate the issue of gay marriage in an atmosphere in which this issue pales in comparison to Iraq and terrorism.

The decision's proximity to the election, however, together with the still-recent Foley scandal, means that progressive electeds and candidates must be prepared to comment. Below is some information that can help inform a response.

**1. The New Jersey Court Did Not Conclude That Same-Sex Couples Have the Right To Marry.**

To be clear, the court stopped short of concluding that same-sex couples have a right to marry. Instead, the court found that same-sex couples are entitled to the same protections that heterosexual married couples have in New Jersey, but it deliberately left the name of the relationship status to the legislature. In 1999, the Vermont Supreme Court similarly directed that legislature to "craft an appropriate means of addressing" its decision that same-sex couples should not be denied the protections incident to marriage in their state. A year later,

the Vermont Legislature passed a civil unions law. The Massachusetts highest state court, by contrast, found in 2003 that same-sex couples have the right to marry.

**2. The Decision Invites Legal Protections for Same-Sex Couples Consistent with President Bush's Own Views on Same-Sex Relationships.**

One likely outcome of the Lewis v. Harris decision is that the New Jersey Legislature will pass a civil unions law. In 2004, President Bush said in an interview on ABC: "I don't think we should deny people rights to a civil union, a legal arrangement, if that's what a state chooses to do."

**3. The Majority of Justices on the Supreme Court of New Jersey Are Republican Appointees.**

Four of the seven Justices on the New Jersey Supreme Court (at the time of the Lewis v. Harris decision) are Republican appointees (by Governor Christine Todd Whitman): Chief Justice Poritz, and Justices LaVecchia, Long, and Zazzali.

**4. All Three Justices Supporting the Minority Opinion (Concurring and Dissenting), Which Would Go Farther than the Majority Opinion, are Republican-Appointed.**

The concurring and dissenting opinion is authored and joined by three Republican-appointed Justices (Chief Justice Poritz, with Justices Long and Zazzali). This minority opinion goes farther than the majority opinion in two respects. First, and most importantly, it asserts that committed same-sex couples have the right to marry in New Jersey. Second, it roots that right not only in the equal protection clause of the state constitution (where the majority opinion locates the right to same-sex couple legal protections incident to heterosexual marriage), but also in the state constitution's due process liberty clause. By contrast, three of the four Justices in the majority opinion, which does not assert the right to same-sex marriage, were appointed by Democrats.

**5. Same-Sex Marriage is Banned in Nearly Every State.**

Forty-five states have passed laws expressly banning same-sex marriage, and 19 states have amended their constitutions to ban it (only Massachusetts has legalized same-sex marriage). New Jersey has neither. Indeed, as the Court noted, New Jersey already had an extensive body of law ensuring gay equality, such as a robust anti-discrimination law and a domestic partnerships law. Moreover, it is simply false to suggest that any change in New Jersey law will impact other states—the federal Defense of Marriage Act provides that no state has to recognize same-sex marriage legalized in any other state. It also bars same-sex couples from access to federal marriage benefits.

**6. The Decision Does Not Require Any Religious Institution to Recognize Same-Sex Relationships.**

No religious institution would be forced to perform or recognize the new status for same-sex relationships created as a result of this decision.