SUPREME COURT OF NEW JERSEY
DOCKET NO: A-19-14 (074685)

ROBERT SMITH, Plaintiff- Respondent v. MILLVILLE RESCUE SQUAD and JOHN REDDEN, Defendants-Appellants	**CIVIL ACTION** ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, DOCKET NO. A1717-12T3 SAT BELOW: HON. CARMEN H. ALVAREZ, J.A.D. HON. MITCHEL E. OSTRER, J.A.D. ON APPEAL FROM: LAW DIVISION, CUMBERLAND COUNTY DOCKET NO. CUM-L-113-08 SAT BELOW: HON. RICHARD J. GEIGER, J.S.C.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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PRELIMINARY STATEMENT

For the first time since the Legislature amended New Jersey's Law Against Discrimination to prohibit marital status discrimination nearly 45 years ago, this Court has the opportunity to address the scope of discrimination that the amendment made unlawful.

Amicus curiae, the American Civil Liberties Union of New Jersey (ACLU-NJ), respectfully submits this brief to address the issues presented by this appeal because it is of significant public importance that the Law Against Discrimination (LAD) is interpreted broadly, to prohibit discrimination against individuals based on invidious stereotypes. The Court's decision will guide how marital status discrimination is proscribed in the context of public accommodations and housing. It also has the potential to have an impact on the way that other protections offered by the Law Against Discrimination are interpreted.

As Defendants frame it, there are two issues before the court: whether the term "marital status" includes the life stages preliminary to marriage and divorce (in this case, it involves assumptions about how spouses will act regarding impending divorce); and whether the prohibition on marital status discrimination forbids employment decisions based on the

"identity" of a worker's spouse (in this case, the claim involves the impending divorce of plaintiff from a coworker). Dp3[1]

Amicus respectfully submits that the purpose and history of the LAD require that the protection against disparate treatment based on stereotypes related to marriage includes protection against stereotypes related to an impending marriage or impending divorce. As to the second question, *amicus* suggests that this case does not invite a broad pronouncement that marital status claims be extended or limited in all cases that implicate the person to whom a complainant is married. The Court is called upon, however, to address whether employers whose hiring practices permit the employment of relatives, including spouses, may thereafter discriminate against those who are in the process of changing their marital status in relation to another employee. This Court should make clear that employers cannot.

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[1] "Dp" refers to Defendant's Petition for Certification to this Court dated July 28, 2014. "Da" refers to the Appendix filed therewith. "Drb" refers to Defendant's Reply Brief in Further Support of the Petition for Certification dated September 19, 2014.

STATEMENT OF FACTS & PROCEDURAL HISTORY

For the purposes of this appeal, *amicus curiae* ACLU-NJ, accepts the facts and procedural history as found by the Appellate Division, *Smith v. Millville Rescue Squad*, Docket No. 1717-12T3 (App. Div. June 27, 2014) (unpublished opinion), with the following additions:

Defendants filed a Petition for Certification, which this Court granted on October 20, 2014, and filed on October 24, 2014. *Smith v. Millville Rescue Squad*, 101 *A.3d* 1083 (N.J. 2014).

The ACLU-NJ filed a Motion for Leave to Appear as *Amicus Curiae* simultaneously with this brief. *R.* 1:13-9.

ARGUMENT

I. THE NEW JERSEY LAW AGAINST DISCRIMINATION REFLECT'S NEW JERSEY'S STRONG PUBLIC POLICY AGAINST DISCRIMINATION AND MUST BE CONSTRUED TO MAXIMIZE ITS ANTI-DISCRIMINATORY IMPACT

As "a society which prides itself on judging each individual by his or her merits," New Jersey "has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society." *Peper v. Princeton Univ. Bd. of Trs.*, 77 *N.J.* 55, 80 (1978).

The New Jersey Law Against Discrimination was first enacted in 1945 with a purpose that is "nothing less than the eradication 'of the cancer of discrimination.'" *Fuchilla v. Layman*, 109 *N.J.* 319, 334 (1988) (quoting *Jackson v. Concord Co.*, 54 *N.J.* 113, 124 (1969)). Over the years, the New Jersey Legislature has amended the LAD "as part of a gradual legislative response directed toward eliminating forms of discrimination not theretofore banned by statute." *Peper*, 77 *N.J.* at 68.

The Legislature has recognized that it is a civil right to have the opportunity to obtain employment and access public accommodations and housing "without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, nationality, sex, gender identity or expression or

source of lawful income used for rental or mortgage payments, subject only to conditions and limitations applicable alike to all persons." *N.J.S.A.* 10:5-4.

In addition to the discrimination identified in the legislative findings, the LAD has been amended to offer protection from employment discrimination based on the following criteria: civil union status, domestic partnership status, pregnancy, military service, atypical hereditary cellular or blood traits, genetic information, or because of an employee's refusal to submit to a genetic test or make available the results of a genetic test to an employer. *N.J.S.A.* 10:5-12(a).[2]

The Legislature has declared that acts of discrimination against New Jerseyans "are matters of concern to the government of the State" not only because discrimination threatens individual rights and privileges, but also because it "menaces the institutions and foundation of a free democratic State." *N.J.S.A.* 10:5-3.

Concordant with the LAD's legislative findings, this Court has pointed out that "prevention of unlawful discrimination

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[2] Though *N.J.S.A.* 10:5-4 has been amended to include "familial status" discrimination, it is not identified as an "unlawful employment practice" by *N.J.S.A.* 10:5-12(a). *See also* New Jersey Division on Civil Rights, "Know the Law", available at http://www.nj.gov/oag/dcr/law.html (last visited January 6, 2015) (indicating that familial status discrimination is only prohibited in the housing context).

vindicates not only the rights of individuals but also the vital interests of the State." *David v. Vesta Co.*, 45 *N.J.* 301, 327 (1965) (describing such discrimination as "a public wrong and not merely the basis of a private grievance").

Because unlawful discrimination undermines important public policies, the Court has described the Law Against Discrimination as remedial legislation and instructed that it be "construed with that high degree of liberality which comports with the preeminent social significance of its purposes and objects." *Andersen v. Exxon Co.*, 89 *N.J.* 483, 495 (1982) (internal citation and quotation marks omitted). *See also Viscik v. Fowler Equip. Co.*, 173 *N.J.* 1, 13 (2002) (holding that the overarching goals of the LAD are to be achieved through a liberal construction of its provisions); *Bergen Community Bank v. Sisler*, 157 *N.J.* 188, 199 (1999) (holding that the Court is "constrained by the principle that state anti-discrimination laws, as social remedial legislation, are deserving of a liberal construction"); *Lehmann v. Toys 'R' Us*, 132 *N.J.* 587, 609 (1993) (rejecting narrow application of the LAD "[g]iven the breadth of individual and societal harms that flow from discrimination and harassment").

When considering employment discrimination in particular, this Court has found that broadly construing the LAD is consistent with its underlying purpose of "discourage[ing] the

use of categories in employment decisions which ignore the individual characteristics of particular applicants." *Bergen Community Bank*, 157 *N.J.* at 216 (quoting *Ogden v. Bureau of Labor*, 682 *P.2d* 802, 810 (Or. Ct. App. 1984). "Employment discrimination is not just a matter between employer and employee. The public interest in a discrimination-free work place infuses the inquiry." *Fuchilla*, 109 *N.J.* at 335.

II. THE LAW AGAINST DISCRIMINATION PREVENTS DISCRIMINATION BASED UPON MARITAL STATUS, INCLUDING VARIOUS STAGES OF THE MARRIAGE OR DIVORCE PROCESS.

In 1970, the New Jersey Legislature amended the Law Against Discrimination to prohibit discrimination based upon a person's marital status. *See* L. 1970 c. 80, § 9. Relevant to the present case, the LAD specifies that it is an unlawful employment practice for an employer to discharge an employee because of his or her marital status. *N.J.S.A.* 10:5-12(a). The LAD, however, protects against marital status discrimination, like other forms of discrimination, beyond the employment context. The scope of protections afforded to individuals on the basis of their marital status will affect how people are treated in the context of union membership, job postings, public accommodations, club membership, renting or buying property, and obtaining loans or lines of credit. *N.J.S.A.* 10:5-12.

The LAD does not provide a definition for the term "marital status," and as the Appellate Division noted, there is scant legislative history. *Smith*, Slip op. at 15 (noting that the amendment was made without recorded explanation). At least 20 other states offer some form of protection from discrimination based on marital status discrimination. Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 Wayne L. Rev. 1, 15 (2000). Like New Jersey, many states have not defined the term. *Id.* at 16-17; *see, e.g.*, Conn. Gen. Stat. § 46a-60; 19 Del. Code Ann. § 710-711. In states with statutes that define "marital status", the definitions are not limited to merely whether a person is married or unmarried. *See, e.g.*, Minn. Stat. Ann. § 363.01 subd. 24 ("whether a person is single, married, remarried, divorced, separated, or a surviving spouse and, in employment cases, includes protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse"); Wash. Rev. Code. § 49.60.040(7) (1998) ("the legal status of being married, single, separated, divorced, or widowed"); 775 Ill. Comp. Stat. Ann. 5/1-103(J) ("the legal status of being married, single, separated, divorced or widowed"); Md. Ann. Code art. 49B, § 20 ("the state of being single, married, separated, divorced, or widowed"); Wis. Stat.

Ann. § 111.32(12) ("the status of being married, single, divorced, separated or widowed").

In considering employer anti-nepotism policies, the highest courts in Hawaii, Montana, and Washington have held that marital status discrimination reaches adverse treatment based on a spouse's identity. *Ross v. Stouffer Hotel Co.*, 816 *P.2d* 302 (Haw. 1991) (finding that a "no spouse" policy violated anti-discrimination law); *Thompson v. Board of Trustees, School Dist. No. 12*, 627 *P.2d* 1229 (Mont. 1981) (holding that a policy prohibiting school administrators from being married to district employees amounted to unlawful marital discrimination); *Washington Water Power Co. v. Washington State Human Rights Comm'n*, 586 *P.2d* 1149 (1978) (affirming regulation defining marital status discrimination to include identity of spouse). In contrast, the highest courts in Alaska, Michigan and New York have ruled that marital status protections do not prohibit anti-nepotism rules. *Muller v. BP Exploration (Alaska)*, 923 P.2d 783 (Alaska 1996) (holding statute to prohibit discrimination against a person based on his or her condition of being married or unmarried, not on the identity of one's spouse); *Whirlpool Corp. v. Civil Rights Comm'n*, 390 *N.W.2d* 625 (Mich. 1986) (holding that "no-spouse rule" is not marital status discrimination and not based on stereotypical views of married people); *Manhattan Pizza Hut, Inc. v. New York State Human*

Rights Appeal Board, 415 *N.E.2d* 950 (N.Y. 1980) (holding that marital status does not reach the identity of a person's present or former spouse).

In the nearly 45 years since the LAD was amended to include marital status protections, New Jersey's appellate courts have published only three decisions regarding its application. *See Thomson v. Sanborn's Motor Express*, 154 *N.J. Super.* 555 (App. Div. 1977); *Slohoda v. United Parcel Service, Inc.*, 193 *N.J. Super.* 586 (1984); *Slohoda v. United Parcel Service, Inc.*, 207 *N.J. Super* 145 (App. Div.), *certif. denied*, 104 *N.J.* 400 (1986) (*Slohoda* II).

In *Thomson v. Sanborn's Motor Express*, the Appellate Division considered whether a company's "no relatives" policy violated the Law Against Discrimination. Thomson had been fired solely because she worked in the same location as her husband in violation of the company's policy. 154 *N.J. Super.* at 560-61. Rejecting her claim, the *Thomson* court held that the relevant provisions of the LAD, *N.J.S.A.* 10:5-4 and *N.J.S.A.* 10:5-12(a), "were not designed to prohibit employment discrimination based upon specific family relationships" and did not amount to marital status discrimination *Id.* at 561.[3] *See also Luecht v.*

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[3] The version of *N.J.S.A.* 10:5-4 that the *Thomson* court considered did not include "familial status" which was added in 1992. *See* L. 1992 c. 146.

Custom Index, No. A-5285-99T5 (*N.J. Super.* App. Div. May 21, 2001) (attached to Defendants' Appellate Division Brief) (holding that plaintiff was not discharged because she was a married person but because of to whom she was married).[4]

Though the *Thomson* court stated that employers may not make adverse employment decisions based "on the fact that an individual is either married or single," it did not suggest that unlawful discrimination was limited to those two aspects of marital status. 154 *N.J. Super.* at 560. Given the facts of *Thomson*, the court was not called upon to consider whether discrimination based on divorce, separation, or engagement was actionable.

The court in *Slohoda* faced a different question: does an employer engage in marital status discrimination by firing an employee who is married and engages in sexual activity outside of wedlock but not firing those who are single? 193 *N.J. Super.* at 589-90. The Appellate Division answered in the affirmative, holding that "if an employer's discharge policy is based in significant part on an employee's marital status, a discharge resulting from such policy violated [the LAD]." *Id.* at 590 (reversing and remanding grant of summary judgment). The court

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[4] *Amicus* was unable to find any record that the Court has an opportunity to review petitions for certification in *Thomson, Luecht,* or other unpublished decisions.

pointed out that if such a policy existed, marital status would be the controlling factor and analogized to other forms of discrimination (*e.g.*, it would be a violation of the LAD's prohibitions against sex discrimination if only women were discharged for "illicit relationships" out of wedlock). *Id.*

The Appellate Division affirmed its holding when it revisited the matter in *Slohoda II*. The specific discrimination claim was that plaintiff had been fired for living with a fellow UPS employee while he was married to another woman and would not have been fired had he been single. 207 *N.J. Super.* at 148. The trial court involuntarily dismissed the action at the close of plaintiff's case after the plaintiff failed to prove that other unmarried UPS employees were permitted to live together without adverse employment consequences. *Id.* After reviewing the record, the court reversed and remanded for a new trial, holding that the plaintiff had made out a *prima facie* case of marital status discrimination and that defendants had not met their burden of establishing its non-discriminatory reason for terminating his employment. *Id.* at 153, 156.

A. Case Law and Public Policy Support Ensuring the Law Against Discrimination Protects All Stages Related to One's Marriage.

Because "this Court has been scrupulous in its insistence that the Law Against Discrimination be applied to the full

extent of its facial coverage," *Peper*, 77 *N.J.* at 87 (internal citations omitted), it was appropriate for the Appellate Division to hold that the LAD's prohibitions against "marital status" discrimination protect people who are married, single, divorced or widowed, and at stages preliminary to these statuses. *Smith*, slip op. at 18-19. The Appellate Division's inclusive definition of "marital status" comports with the wide range of experiences New Jerseyans have regarding their relationships.

Employers, landlords, and businesses engage in discrimination that is just as pernicious when it is against a person about to be married or divorced as it is when the discrimination is against a person who has a marriage license or a divorce decree. As a Michigan appellate court noted, "there would be nothing to stop an unscrupulous employer who wanted to have only single persons on staff from discharging them as soon as they began to make plans for a wedding, and then asserting that, because the marriage had not been effectuated, there was no discrimination." *Veenstra v. Washtenaw Country Club*, 2004 Mich. App. LEXIS 1081, 6, (Mich. Ct. App. Apr. 27, 2004). *See also Muller*, 923 P.2d at 786 (evaluating marital discrimination claim of engaged couple).

The Defendants have suggested that the Appellate Division's formulation of marital status discrimination could result in

employers running afoul of the LAD based on "actions that have nothing to do with traditional notions of marital status." Drb5. This concern seems to misapprehend an underlying purpose of the LAD, *i.e.*, to ensure that traditional notions do not rule the day, and that fair treatment for individuals prevails over archaic stereotypes and outmoded assumptions. *See generally*, *Dale v. Boy Scouts of America*, 160 *N.J.* 562, 618-19 (1999), *rev'd on other grounds*, 530 *U.S.* 640 (2000). Moreover, this Court does not "deny legal redress to the victims of discrimination and harassment merely because the perpetrators may be unaware of the illegality of their conduct." *Lehmann*, 132 *N.J.* at 602 (announcing legal standards for sexual harassment claims under the LAD).

Thus, since the present matter involves a claim that the Defendant fired the Plaintiff based on the fact that he would be engaging in divorce proceedings, it involves a claim that falls within the definition of "marital status" protection of the LAD.

B. The LAD does not permit discrimination based upon expected conduct relating to one's status.

"The story of discrimination is the story of stereotypes that limit the potential of men, women, and children who belong to excluded groups." *Dale*, 160 *N.J.* at 618. The trial court below concluded that the Plaintiff was fired because of the "expected impact of the divorce proceeding on plaintiff" and

"the anticipated adverse impact . . . on his job performance and the workplace" and because he had not "avoid[ed] the contemplated emotional turmoil." Da36-37. It mistakenly held that such reasons did not give rise to a claim for marital status discrimination and erroneously suggested that employers could fire an employee for "expected conduct." Da38. As the Appellate Division pointed out, Defendants would have been able to take action based on *actual* conduct, but not on fears based on stereotypes. Slip op. at 20. The very purpose of the Law Against Discrimination is to root out expectations based on bias. Just like this Court would not tolerate an employer not hiring married women because he anticipated that they would become pregnant and seek leave, it cannot countenance the Defendants' expectations or anticipation regarding the conduct of divorcing people that is not rooted in their actual work performance or in facts. While the employer in this instance may be able to present such evidence on remand (*e.g.*, if he can show that the plaintiff has taken inappropriate actions against his spouse in the work context or that employees have already "chosen sides" and this has caused significant disruptions of work[5]), the Court is currently faced with an appeal of an

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[5] *Amicus* does not suggest that such a showing can easily be made here, especially considering that the two divorcing employees

involuntary dismissal motion pursuant to *R.* 4:37(b)(2) and *R.* 4:40-1, for which Plaintiff must only establish a *prima facie* case of discrimination, which he has done.

This Court has already held that "undifferentiated fears and generalities" about a protected class amounts to unlawful discrimination under the LAD. In *Andersen v. Exxon Co.*, 89 *N.J.* 483 (1982), this Court held that an employer was not reasonable to conclude that a plaintiff could not work as a truck driver because of an unrelated disability. *Id.* at 495. The Court held that Exxon's "undifferentiated fears and generalities" about a disability did not justify the adverse employment decision. *Id.* at 497. "[P]rejudice in the sense of judgment or opinion formed before the facts are known is the fountainhead of discrimination engulfing medical disabilities which prove on examination to be unrelated to job performance or to be non-existent." *Id.* at 495-96 n.2 (quoting *Barnes v. Washington Natural Gas Co.* 591 *P.2d* 461 (Ct. App. Wash. 1979)).

After *Andersen*, the LAD was found to protect people who have been discriminated against because their prospective employer perceives that a normal and non-disabling condition was actually a disability. *Rogers v. Campbell Foundry Co.* 185 *N.J.* 109, 113 (App. Div. 1982); *Poff v. Caro*, 228 *N.J. Super.* 370

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had been separated (while continuing to work for Defendants) for several months. Slip op. at 4-5.

(Law Div. 1987) (finding that a landlord discriminated against gay men because of fear that they would contract a disability, *i.e.*, AIDS). The Appellate Division also observed that "[d]istinguishing between actual handicaps and perceived handicaps makes no sense" because the outcome would be that a landlord is prohibited from refusing to rent to a racial minority but allowed to refuse to rent to a person perceived to be a racial minority. *Cowher v. Carson & Roberts*, 425 *N.J. Super.* 285, 295 (App. Div. 2012).[6]

This Court must ensure that people who are transitioning between marital statuses are likewise not discriminated against based on stereotypes or generalizations. Indeed, under the LAD an employer would not be permitted to fire someone who became a widow solely because he read a study that stated most widowed people do not regain their same levels of productivity. Hypothetically, even if a scientifically-validated study of such existed, the LAD would ensure that people within a protected status are treated not as an undifferentiated whole, but instead

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[6] The Appellate Division has also determined that the LAD provides protections for an employee who was not Jewish but was perceived as Jewish and subjected to an anti-Semitic hostile environment. *Cowher*, 425 *N.J. Super.* at 297. This application is distinguished from people who are protected because of their perceived sexual orientation, which is specifically included in the statute. *See N.J.S.A.* 10:5-5(hh) (defining "sexual orientation" to include "being perceived . . . by others as having such an orientation").

judged as individuals. *Peper v. Princeton Univ. Bd. of Trs.*, 77 *N.J.* at 80; *Jansen v. Food Circus Supermarkets, Inc.*, 110 N.J. 363, 378 (1988) ("[t]he essence of discrimination . . . is the formulation of opinions about others not on their individual merits, but on their membership in a class with assumed characteristics"). The same is true when dealing with generalizations related to divorce and divorce proceedings. Simply put, the LAD does not permit actions based on generalities related to the protected status. As the Court has noted, the LAD requires employers to "judg[e] each individual by his or her merits." *Peper, 77 N.J. at 80.*

C. A Narrow Reading of Discrimination Protections for Transitional Periods Would Leave Gaps in the Prohibitions Against Discrimination.

This case is of special concern to *Amicus* because, if the Law Against Discrimination were read to not cover periods of transition before and after marriage, such a construction could affect how courts view other types of discrimination claims. Depending on the outcome and language of the holding of this case, it could leave considerable gaps in the protections of the LAD, where landlords and employers would be free to engage in the type of bigotry that the LAD was enacted to prevent.

There are several categories of unlawful discrimination in the LAD that are for characteristics that are not static or

immutable. As may be obvious, the ruling in this matter will affect how courts view the reach of the LAD's prohibition on discrimination based on civil union status and domestic partnership status. Less obvious are the effects that a narrow reading of the LAD could have on other characteristics that may change over time, including protections to people based on their military service, gender identity, and religion. Each of these may have preliminary "stages" during which an employer or landlord might engage in discrimination. Were this Court to hold that the LAD protects only against discrimination based on whether one is married or divorced but does not cover discrimination based on assumptions or prejudices during the period of time one transitions from being married to being divorced, its implications would significantly undermine the protections of the LAD.

In the case of protection against discrimination based on religious beliefs, people who transition from one (or no) religious or faith to another (or none) may be affected. Clearly, the LAD prohibits an employer or landlord from discriminating against someone who is Catholic. But what about someone who is considering converting? If an employer learns that an employee has become a catechumen with the intention to become Catholic, could he fire her because of he anticipates that she will begin to proselytize in the workplace? A decision

that fails to protect people who move between marital statuses could by implication affect those moving between faiths.

Similarly, military status is not fixed. The LAD does permit employers "to refuse to accept for employment an applicant who has received a notice of induction or orders to report for active duty in the armed forces." *N.J.S.A.* 10:5-12(a). However, if the proscription against discrimination based on military service does not include the time preliminary to serving, there will be gaps in protection from discrimination. Thus, an employee who is not hired because he is a member of the National Guard would be protected by the LAD, but a well-performing employee who is fired for applying to join the National Guard (but not yet accepted) would not be protected.

For people who face gender identity discrimination, transitional periods can be an especially vulnerable time in which they are susceptible to discrimination. The addition to the Law Against Discrimination in 2006 to prohibit discrimination based on gender identity or expression is among the more recent amendments to the statutes and suggests that the Legislature believed that the LAD already covers periods of transition.

The LAD defines "gender identity" as "having or being perceived as having a gender related identity or expression

whether or not stereotypically associated with a person's assigned sex at birth." *N.J.S.A.* 10:5-5(rr). Narrowly read, the LAD covers the gender identity one has. However, like marital status, gender identity may not be static. If courts did not allow for the LAD to encompass the times during which a person's outward gender identity could change, the results would, again, make no sense. An employer would be prohibited from refusing to hire someone based on their existing gender identity but could lawfully refuse to hire someone who revealed they planned to change their gender identity. The latter scenario is illustrated by the case of Diane Schroer who was a decorated veteran that applied for a job with the Library of Congress and presented as a male during her job interview. *Schroer v. Billington*, 577 *F. Supp.2d* 293, 295 (D.D.C. 2008). Her job offer was withdrawn after (and because) she advised her employer that she would be starting her job as a woman. *Id.* The amendments to the LAD were clearly meant to address this type of discrimination. Indeed, the Legislature specifically indicated that they sought to codify the decision made by the Appellate Division in *Enriquez v. West Jersey Health Systems*, 342 *N.J. Super.* 501 (2001), *certif. denied* 170 *N.J.* 211 (2001), which permitted a doctor to assert an LAD claim after being fired for outwardly transitioning from male to female. *See* Senate Judiciary Statement to Bill No. 362 (Nov. 13, 2006).

That the Legislature clearly intended to capture periods of transition by the term "gender identity and expression" and that they made the amendment to the LAD without referencing such transitions, suggests that the Legislature contemplated that the LAD *already* covers periods of transition.

To meet the remedial goals of the LAD and to prohibit the discriminatory practices that the Legislature intended to capture, this Court should affirm the Appellate Division's formulation of marital status discrimination, and affirm that the protected categories of the LAD protect not merely a status, but the transitions and stages associated with that status.

III. THE LAW AGAINST DISCRIMINATION PROHIBITS AN EMPLOYER FROM DISCRIMINATING AGAINST RELATED EMPLOYEES BASED ON THEIR MARITAL STATUS.

As the Appellate Division explained, this case presents a situation where "an employer allowed married couples on its payroll, but not divorcing couples" and held that such a practice violates the LAD. Slip op. at 22. This Court should affirm the Appellate Division's holding that employers who accept the presence of married couples in the work place cannot penalize them for divorcing. Id. at 21. By holding otherwise, the Court would be approving of interference in the most personal and intimate decisions a person can make. *Cf. Lewis v. Harris*, 188 *N.J.* 415, 466 (2006) (Poritz, J., dissenting) ("the

decision whether and whom to marry is among life's momentous acts of self-definition")(quoting *Goodridge v. Dep't. of Pub. Health*, 798 *N.E.* 2d 941, 954-55 (Mass. 2003)).

This case does not raise, and this Court need not address, the broader question of whether the LAD's prohibitions against marital status discrimination reaches employer anti-nepotism policies that limit the ability of married people to work together (or other forms of employer actions that implicate the person to whom a complainant is married). *Cf. Thomson,* 154 *N.J. Super* 555 (LAD does not prohibit "no relatives" policy in which employer may fire employee because of marriage to another employee).

Just as the Appellate Division's decision indicates, this Court need not disturb the holding of *Thomson* to find that LAD prohibits an employer from taking action against an employee solely based on his legal status in relation to another employee, once the company has already opted to permit the spouses as coworkers.

It should be noted, however, that when faced with creating a rule for marital status discrimination claims, California's appellate courts have declined to categorically exclude from protection those matters that involve adverse actions that pertain not the mere status, but rather to the "identity" of one's spouse (*e.g.*, that one's spouse is a coworker or works for

a rival). *Chen v. Cnty. of Orange*, 116 *Cal. Rptr.2d* 786, 796-801 (Ct. App. 2002); *see also Hope Internat. Univ. v. Superior Court*, 14 *Cal. Rptr.3d* 643, 659-661 (Ct. App. 2004). In *Chen*, the court examined marital status discrimination trends in depth and identified three categories: clear cases (*e.g.*, refusing to hire unwed mothers, granting maternity to leave to married teachers only), antinepotism cases, and "conduit" cases ("in which "the plaintiff is the object of adverse action because of something about his or her spouse, independent of whether the spouse works for the same employer, as such"). 116 *Cal. Rptr.*2d at 798-99.

The court rejected rigid characterizations of the anti-nepotism cases as broad and narrow (*i.e.*, prohibiting and permitting, respectively, anti-nepotism policies). *Id.* at 800 n.20. The court also identified the "semantic problem" with using "identity" to define the scope of marital status discrimination because of its ambiguity allowing for both generic and particular situations, *i.e.*, it can refer "to one's spouse as a generic coworker, supervisor, or supervisee, as well as situations where a spouse is a particular person." *Id.* The court concluded:

> [W]e do not, unlike other cases that have addressed this area, attempt to formulate any generalized rules about whether California's marital status discrimination statute should be construed broadly as

> distinct from according to its plain meaning, or whether the statute implicates or does not implicate the 'identity' of one's spouse.

Id. at 800 n.20. Such an approach would be consistent with the LAD's remedial purpose by allowing for it to be applied to "the full extent of its facial coverage." *Peper*, 77 *N.J.* at 87.

A. An Employer Who Does Not Prohibit Married Coworkers May Not Prohibit Divorcing Coworkers.

The Appellate Division correctly determined that Defendants committed unlawful discrimination if they hire married coworkers but fire divorcing ones. Slip op. at 22. In such a situation, the "identity" of the spouse is not implicated; rather, what is implicated is the disparity in a policy whereby a couple who is married may work for the same employer, but a couple who is divorcing may not. Even if the Court reaches the question of spousal "identity" (which it should not) and holds that claims that implicate "who" a person is married to cannot be brought, the Defendants here still violate the LAD. Defendants treated married and divorcing employees differently: they ignored the identities of the spouses of married employees, but took them into account for divorcing employees. Employers may not use one rule for married employees and a different rule for divorcing ones. *See, e.g., Slohoda*, 193 *N.J. Super.* 586 (precluding an

employer having one rule for married employees and a separate rule for single employees).

B. An Employer Who Hires Other Types of Relatives May Not Discriminate Against Employees Related Based on Marital Status.

The facts in this matter suggest an additional way to frame the particular LAD claim: as prohibiting employers from discriminating against married coworkers compared to other related coworkers. That is, are coworkers who are related in ways other than marriage but become estranged treated differently than married couples who become estranged? An employee should be able to pursue a claim that an employer penalizes married coworkers but not other related coworkers whose relationships fail. An example is that two siblings could work for the same employer, become estranged and sever ties with each other while both remain employed. An employer would unlawfully discriminate by ignoring that failed relationship - which has just as much potential for impacting the workplace - but firing an employee because his failed relationship requires that he change his marital status.[7]

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[7] It is worth noting that the coworker siblings or other related employees who have a falling out would not have any obligation to report to an employer their estrangement. Divorce, however, is different. Employers may come by that information by virtue of their human resource functions, and some may even have policies that require employees to advise them if their marital

C. As with other LAD Actions, Employers Will Have an Opportunity to Present Evidence of Legitimate, Nondiscriminatory Reasons for the Adverse Employment Action.

The Appellate Division appropriately concluded that Plaintiff had established discriminatory marital status animus by direct evidence. Slip op. at 24 (citing *Bergen Commercial Bank*, 157 *N.J.* at 209-10). Regardless of whether a plaintiff's claim for marital status employment discrimination is based upon direct evidence or relies upon the four-part burden-shifting analysis required for circumstantial evidence, *see McDonnell Douglas Corp v. Green*, 411 *U.S.* 792 (1972), employers will have an opportunity to proffer legitimate non-discriminatory reasons for their decision (*i.e.*, that the termination was for existing legitimate reasons specific to *this* particular employee rather than anticipated conduct that was based on generalizations related to Plaintiff's impending divorce).

Because the record in this case is limited to Plaintiff's proffer, the Court must accept the evidence supporting

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status changes. For example, when a person gets a divorce, she may be legally required or otherwise need to disclose the change in status to either terminate health insurance coverage for her former spouse or enroll herself in health insurance coverage, adjust her payroll deductions, or change her beneficiary designations. Thus, the two siblings who sever ties may be able to avoid revealing their relationship status to their employer. Married coworkers generally do not have that option.

Plaintiff's claims as true and accord him the benefit of all reasonable and legitimate inferences. *Verdicchio v. Ricca*, 179 *N.J.* 1, 30 (2004). With this guiding standard, the record demonstrates that Defendants made an adverse employment decision because of stereotypes about divorcing employees and not because of any actual workplace conduct. The Defendants were on notice regarding the status of the Plaintiff's marriage for eight months prior to the termination and the lack of discipline, counseling, or other action during that time only bolsters this conclusion.

CONCLUSION

For the reasons set forth above, *amicus* ACLU-NJ respectfully submits that this Court should affirm the Appellate Division's decision concluding that Plaintiff established a *prima facie* case of discrimination based on marital status.

Respectfully submitted,

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