2023 NJSBA Fall Conference

Waiting at the Altar: How Marriage Equality Finally Got Hitched to New Jersey Law

October 21, 2023, is the 10th anniversary of marriage equality in New Jersey. It marks the effective date of Mercer Assignment Judge Mary C. Jacobson's landmark ruling in Garden State Equality v. Dow, 82 A. 3d 336 (Law Div. 2013), holding that New Jersey's marriage laws violated the rights of same-sex couples to equal protection of the law under the New Jersey State Constitution.

Join Past NJSBA President Thomas Prol, a founding executive board member of the Garden State Equality, co-author of the New Jersey marriage equality statute, and a partner at Sills Cummis & Gross and the Hon. Daniel Weiss, who along with his husband John were the lead plaintiff couple in the case, as they share a behind-the-scenes view on that litigation and the grassroots effort to achieve equality for committed couples. They will speak about how Garden State Equality worked with the Gibbons law firm and the national civil rights organization, Lambda Legal, to change the course of history for the LGBT community and others. Judge Weiss will also share his personal story of what led him and his husband to be plaintiffs in the case and contrast their pre-marital rights with those they enjoy today.

Speakers:
Hon. Daniel L. Weiss (Ret)
Thomas H. Prol, Esq., Past NJSBA President
Sills Cummis & Gross, PC, Newark

More Evolution, Less Revolution: LGBTQ Rights Before NJ Courts

New Jersey Law Journal (Online)

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Body

June 28, 2019, marks the 50th anniversary of the Stonewall riots, a violent and raucous demonstration pushing back against a police raid at the Stonewall Inn in Greenwich Village. The rebellion is considered the start of the modern fight for LGBTQ rights in the United States, but New Jersey case law tells us of how that community fought back earlier, albeit in less dramatic fashion, through lawyers before our state courts.

If those who do not study history are condemned to repeat it, lawyers and judges have the primary responsibility to ensure that not only is the past not forgotten, but society grows and evolves from history, especially in the context of civil rights.

Written case law provides us with poignant snapshots of time gone by, recorded in the language and tradition in which it was decided. The history lesson in this article comes against the backdrop of the landmark Aug. 17, 2018, Appellate Division published decision in *Moreland v. Park, 456 N.J. Super. 71 (App. Div. 2018)*. The unanimous panel remarked on the historical inequality that has impacted LGBTQ residents of the Garden State thus:

The notion of same-sex couples and their children constituting a 'familial relationship' worthy of legal recognition was considered by a significant number of our fellow citizens as socially and morally repugnant and legally absurd. The overwhelming number of our fellow citizens now unequivocally reject this shameful, morally untenable bigotry; our laws, both legislatively and through judicial decisions, now recognize and protect the rights of LGBTQ people to equal dignity and treatment under law.

Id. at 83-84. Those words of legal equality for LGBTQ people are a new fixture in New Jersey decisional law. Looking back just 60 years, the journey toward equality for the LGBTQ New Jerseyans was long and rough, begun many years prior by the few courageous advocates who dared to speak out on their behalf.

This analysis could start well before 1956 but we begin then, right in the heart of Asbury Park at a gay bar, a frequent target of law enforcement in the broader scheme of LGBTQ oppression. It was April 6, 1956, and the State Division of Alcoholic Beverage Control ("ABC") commenced a series of inspections of Paddock Bar at 810-812 Cookman Avenue. At a May 4, 1956, enforcement proceeding, the ABC charged:

On April 6, 7, 8, 21 and 22, 1956, you allowed, permitted and suffered your licensed place of business to be conducted in such manner as to become a nuisance in that you allowed, permitted and suffered female impersonators and persons who appeared to be homosexuals in and upon your licensed premises; allowed,

Thomas Prol

permitted and suffered such persons to frequent and congregate in large numbers in and upon your licensed premises; and otherwise conducted your place of business in a manner offensive to common decency and public morals.

Paddock Bar v. Div. of Alcoholic Beverage Control, 46 N.J. Super. 405, 407 (1957).

At trial, Paddock Bar was found in violation and shuttered for 60 days for allowing alleged "homosexuals" to "congregate." They appealed the ruling to the Appellate Division where the court held that their role was to support the ABC and " discourage and prevent not only lewdness, fornication, prostitution, but all forms of licentious practices and immoral indecency on the licensed premises. The primary intent of the regulation is to suppress the Inception of any immoral activity, not to withhold disciplinary action until the actual consummation of the apprehended evil." *Id. at 408* citing *In re Schneider, 12 N.J. Super. 449 (App. Div. 1951)*. (Emphasis added.)

The appellate judges equated the allegedly gay patrons at Paddock Bar with an "adult vagabond, ex-convict, sexual deviate, or prostitute." Id. Even though the appeals court found that there was insufficient support in the record to uphold the charged violation, the panel found them in violation because the men at Paddock Bar acted effeminate which, in 1957, was a hallmark of a gay man at a gay bar:

True, in the present proceeding the evidence was not of the probative quality to establish beyond uncertainty that the specified patrons of the tavern were in actuality homosexuals. Neither was there any proof that any of such individuals indulged in any licentious solicitations on the premises ... [t]he appellant was charged with the misconduct of permitting persons who conspicuously displayed by speech, tone of voice, bodily movements, gestures, and other mannerisms the common characteristics of homosexuals habitually and in inordinate numbers (on one occasion, as many as 45) to congregate at the tavern, which, incidentally, was advertised to be "the gayest spot in town."

Id. The court specifically remarked on the necessity of a public policy to prevent gay men from socializing in public, finding "it is inimical to the preservation of our social and moral welfare to permit public taverns to be converted into recreational fraternity houses for homosexuals or prostitutes." Id. The panel added, "[i]t is the policy and practice of the Division of Alcoholic Beverage Control to nip reasonably apprehended evils while they are in the bud." Id.

Getting around a distinct lack of facts in the record to support the charged violation that the bar patrons were actually gay, the appellate court determined that a "detailed recitation of the informational testimony submitted to the director need not be undertaken." Id. (Emphasis added.) The reason was simple, according to the unanimous court: "If the evidence here failed adequately to prove that the described patrons were in fact homosexuals, it certainly proved that they had the conspicuous guise, demeanor, carriage, and appearance of such personalities. It is often in the plumage that we identify the bird." *Id. at 408-409*. (Emphasis added.)

This 1957 court panel felt compelled to actually describe the "plumage" of gay men:

Illustrative in part is the evidence that these congregated males in a noticeably effeminate pitch of voice addressed each other affectionately as "dearie, honey, doll, and darling." One was overheard to remark, "Well, I think I will wait for my husband." One of the inquisitive investigating agents inquired of the bartender as he ordered a drink, "What are all these guys in here, queers?" The bartender surveyed the customers and replied, "Most of them are." They are said to have manipulated their cigarettes, giggled, and rocked and swayed their posteriors in a maidenly fashion.

Id. at 409. Thus, nearly 62 years prior to the sweeping analysis and landmark holding of LGBTQ equality found in Moreland v. Park, the Appellate Division took a mere nine days after oral arguments to affirm the violation and

penalty against Paddock Bar in the admitted absence of facts based on a stereotypical caricature of gay men as they were standing around drinking at a licensed premises.

Fast-forward a decade to Sept. 11-12, 1967-two years before Stonewall and two months after the July 12-17, 1967, Newark riots-the New Jersey Supreme Court heard from six lawyers in three consolidated cases involving enforcement of morality laws against three gay bars: One Eleven Liquors in New Brunswick, Val's Bar in Atlantic City, and Murphy's Tavern in Newark. The ABC sought to "discipline[] the appellants for permitting apparent homosexuals to congregate at their licensed premises." *One Eleven Liquors v. Division of Alcoholic Beverage Control, 50 N.J. 329, 330 (1967)*. (Emphasis added.)

The NJ Supreme Court took just shy of two months to issue a unanimous opinion that, for the very first time in state history, allowed "well behaved apparent homosexuals" to congregate in bars. *Id. at 341*.

The case focused on the ABC investigator's observation at each bar:

They were conversing and some of them in a lisping tone of voice, and during certain parts of their conversations they used limp-wrist movements to each other. One man would stick his tongue out at another and they would laugh and they would giggle. They were very, very chummy and close. When they drank their drinks, they extended their pinkies in a very dainty manner. They took short sips from their straws; took them quite a long time to finish their drinks ....They were very, very endearing to one another, very very delicate to each other .... They looked in each other's eyes when they conversed. They spoke in low tones like an effeminate male. When walking, getting up from the stools, they very politely excused each other, hold on to the arm and swish and sway down to the other end of the bar and come back. ... [T]heir actions and mannerisms and demeanor appeared to me to be males impersonating females, they appeared to be homosexuals commonly known as queers, fags, fruits and other names.

Id. at 334. The NJ Supreme Court noted that, "there was no charge nor any substantial evidence at the hearing before the director that lewd or immoral conduct was permitted at the licensed premises [and] ... for the most part the patrons were "normally dressed" and showed "very good behavior." Id.

In trying to understand gay men, the 1967 Supreme Court turned to the scholarly publications of the day which discussed that

[A]lthough such establishments are sometimes condemned as breeding grounds of homosexuality, the charge is not convincing. Most of the people who go there (apart from tourists and some "straight" friends) already are involved in the homosexual life. Anyone who wanders in and who is offended by what he sees is perfectly free to leave. The authors of a recent "view from within" emphasize that although an increase in homosexuality may increase the demand for homosexual bars, the bars can scarcely be said to produce homosexuals. Indeed, as these writers go on to suggest, the bars serve to keep homosexuals "in their place"-out of more public places and, to a certain extent, beyond the public view.

Id. at 336. It is fascinating to think that the New Jersey Supreme Court arrived at LGBTQ equality as a vehicle to advance the societal goal of keeping "persons of known homosexual tendencies" out of sight of the general public and together in a room, drunk. They held:

[T]hough in our culture homosexuals are indeed unfortunates, their status does not make them criminals or outlaws. So long as their public behavior violates no legal proscriptions they have the undoubted right to congregate in public. And so long as their public behavior conforms with currently acceptable standards of decency and morality,

they may, at least in the present context, be viewed as having the equal right to congregate within licensed establishments."

Id. Thus, LGBTQ equality began in New Jersey in 1967 with our State Supreme Court declaring equal rights for gay men to be allowed to drink in the same room because it kept them out sight.

Written case law memorializes historic mistreatment of LGBTQ people before the courts and recites important civil rights history we must all understand, appreciate, and build on. Indeed, it is essential so that we can guard against a return to those days of oppression and be better advocates as we bend the moral arc of the universe toward justice for the LGBTQ community.

Thomas H. Prol is a past president of the NJ State Bar Association and the first openly gay leader in its history. He is founding and current board member of Garden State Equality, the largest LGBTQ rights organization in New Jersey and serves in the American Bar Association House of Delegates.

Load-Date: June 21, 2019

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Giving Credit Where Credit Is Due on Marriage Equality in New Jersey

Marriage equality in New Jersey was not gained by any one person or personality. It was a communal project achieved by the work of many in a true "labor of love" that finally got us to the top of the mountain.

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 75 years. A 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 couples 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 the 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 of 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, bah dum bum), 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 nine hours of testimony, yet the December 16, 2021, Senate committee hearing only had five 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 with 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, baring their souls and sharing their truths. These same-sex couples and their families made the political movement into a force by telling their personal stories of suffering, harm and discrimination. Marriage equality in New Jersey was not gained by any one person or personality. It was a communal project achieved by 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. These opinions are his own.

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

RECEIVED
JUN 29 2011
Mercer County Superior Court
CIVIL CASE MANAGEMENT

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: [signature]

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Ex parte State ex rel. Alabama Policy Institute, Ala., March 3, 2015

434 N.J.Super. 163
Superior Court of New Jersey,
Law Division,
Mercer County.

GARDEN STATE EQUALITY; Daniel Weiss; John Grant; Marsha Shapiro; Louise Walpin; Maureen Kilian; Cindy Meneghin; Sarah Kilian Meneghin; Eric Bradshaw; Tevonda Bradshaw; Teverico Bradshaw; Karen Nicholson McFadden; Marcye Nicholson McFadden; Kasey Nicholson McFadden; Maya Nicholson McFadden; Thomas Davidson; Keith Heimann; Marie Heimann Davidson; and Grace Heimann Davidson, Plaintiffs,
v.
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.

Decided Sept. 27, 2013.

Synopsis
Background: Advocacy group and six same-sex couples brought action against State officials, alleging that their status as "civil union" couples, rather than "married" couples entitled to federal marital benefits, unconstitutionally deprived them of the rights and benefits of marriage. Plaintiffs filed motion for summary judgment.

Holdings: The Superior Court, Law Division, Jacobson, A.J.S.C., held that:

[1] issue of whether change in federal law brought about by the United States Supreme Court's decision in *United States v. Windsor* required the State to allow same-sex couples to marry was ripe for review;

[2] plaintiffs had standing to bring claim;

[3] the State engaged in state action, for purposes of **equal** protection analysis, when it created parallel civil marriage and civil union structure for opposite sex and same-sex couples; and

[4] parallel civil marriage and civil union structure barred same-sex couples' access to federal benefits following *Windsor*, visiting inequality upon same-sex civil union couples in violation of state constitutional right to **equal** treatment.

Motion granted; judgment for plaintiffs.

West Headnotes (26)

[1] **Constitutional Law**
Policy

The court must tread lightly when deciding whether to invalidate on constitutional grounds a statutory scheme involving far-reaching consequences and policy considerations.

Cases that cite this headnote

[2] **Constitutional Law**
Proof beyond a reasonable doubt

Courts shall not declare void legislation unless its repugnancy to the constitution is clear beyond a reasonable doubt.

Cases that cite this headnote

[3] **Constitutional Law**
Clearly, positively, or unmistakably unconstitutional
Constitutional Law
Burden of Proof

The burden falls on the party challenging legislation to demonstrate clearly that it violates

a constitutional provision.

Cases that cite this headnote

[4] **Statutes**
Laws of Special, Local, or Private Nature

The Legislature has broad discretion in determining the perimeters of a statutory classification.

Cases that cite this headnote

[5] **Constitutional Law**
Inquiry Into Legislative Judgment
Constitutional Law
Wisdom

It is not the court's task to weigh the efficacy or wisdom of challenged legislation.

Cases that cite this headnote

[6] **Action**
Moot, hypothetical or abstract questions

Ripeness is a justiciability doctrine designed to avoid premature adjudication of abstract disagreements.

Cases that cite this headnote

[7] **Administrative Law and Procedure**
Finality; ripeness

Courts should not interfere with an agency's administrative decision until the decision has been implemented and its effects felt in a concrete way by the challenging parties.

Cases that cite this headnote

[8] **Action**
Moot, hypothetical or abstract questions
Federal Courts
Ripeness; Prematurity

New Jersey state courts have more freedom to decide cases than their federal counterparts, which are limited by constitutionally based ripeness principles. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[9] **Action**
Moot, hypothetical or abstract questions

To determine if a case is ripe for judicial review, the court must evaluate: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties caused by withholding court consideration.

Cases that cite this headnote

[10] **Action**
Moot, hypothetical or abstract questions

Whether an issue is fit for judicial review for purposes of ripeness analysis, courts must first determine whether review would require additional factual development; a case is fit for review if the issues in dispute are purely legal, and thus, appropriate for judicial resolution without developing additional facts.

Cases that cite this headnote

[11] **Declaratory Judgment**

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Future or contingent questions

A declaratory judgment claim is not ripe for adjudication if the facts illustrate that the rights or status of the parties are future, contingent, and uncertain.

Cases that cite this headnote

[12] **Action**
Moot, hypothetical or abstract questions

With respect to the "hardship" prong of the ripeness analysis, courts can assume jurisdiction over a claim only if there is a real and immediate threat of enforcement or harm that would affect the plaintiff.

Cases that cite this headnote

[13] **Declaratory Judgment**
Marital Status

Issue of whether State was constitutionally required to allow same-sex couples to marry was ripe for adjudication in declaratory judgment action following decision of the United States Supreme Court in *United States v. Windsor*, which held that federal marital benefits were available to same-sex couples lawfully married in states that had granted same-sex couples the right to civil marriage; claim presented legal questions requiring no further factual development, couples were currently ineligible for benefits as a result of rules and policies already in place, and issue was one of major public importance. N.J.S.A. Const. Art. 1, par. 1; N.J.S.A. 37:1–28 et seq.

3 Cases that cite this headnote

[14] **Action**
Persons entitled to sue

In order to demonstrate standing, a plaintiff must have a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and there must be a substantial likelihood that the plaintiff will suffer harm in the event of an unfavorable decision.

2 Cases that cite this headnote

[15] **Action**
Persons entitled to sue

New Jersey courts take a broad and liberal approach to the issue of standing.

2 Cases that cite this headnote

[16] **Associations**
Actions by or Against Associations

An association has standing to sue as the sole party plaintiff when it has a real stake in the outcome of the litigation, there is a real adverseness in the proceeding, and the complaint is confined strictly to matters of common interest and does not include any individual grievance which might perhaps be dealt with more appropriately in a proceeding between the individual member and the defendant.

2 Cases that cite this headnote

[17] **Associations**
Actions by or Against Associations

If an individual plaintiff has standing, the organizational plaintiff of which the individual is a member also has standing.

Cases that cite this headnote

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[18] **Declaratory Judgment**
Subjects of relief in general

Lesbian, gay, bisexual, and transgender (LGBT) advocacy group and same-sex "civil union" couples had standing to bring claim against State officials on their claim that change in federal law constitutionally required the State to permit same-sex couples to marry; plaintiffs were currently not eligible to receive certain federal benefits as a result of State's marriage and civil union structure, and members of advocacy group attested that they were currently harmed by their inability to obtain federal benefits. N.J.S.A. Const. Art. 1, par. 1; N.J.S.A. 37:1–28 et seq.

Cases that cite this headnote

[19] **Constitutional Law**
Applicability to Governmental or Private Action; State Action
Constitutional Law
Marriage and civil unions

The State engaged in state action, for purposes of **equal** protection analysis, when it created parallel civil marriage and civil union structure, even though the creation of two distinct labels for opposite-sex couples and same-sex couples was a legitimate legislative choice until such labels became determinative of entitlement to federal benefits following decision of the United States Supreme Court in *United States v. Windsor*, which held that federal marital benefits were available to same-sex couples lawfully married in states that had granted same-sex couples the right to civil marriage. N.J.S.A. Const. Art. 1, par. 1; N.J.S.A. 37:1–28.

7 Cases that cite this headnote

[20] **Constitutional Law**
Federal/state cognates
Constitutional Law
Applicability to Governmental or Private Action; State Action

An **equal** protection claim under both the United States and New Jersey Constitutions requires state action. U.S.C.A. Const.Amend. 14; N.J.S.A. Const. Art. 1, par. 1.

Cases that cite this headnote

[21] **Constitutional Law**
Discrimination and Classification

An analysis of the right to **equal** treatment under the New Jersey Constitution requires the court to balance: (1) the nature of the affected right; (2) the extent to which the governmental restriction intrudes upon it; and (3) the public need for the restriction. N.J.S.A. Const. Art. 1, par. 1.

Cases that cite this headnote

[22] **Constitutional Law**
Statutes and other written regulations and rules

Where a statute is challenged under state constitution because it does not apply evenhandedly to similarly situated people, the means selected by the Legislature must bear a substantial relationship to a legitimate government purpose; a real and substantial relationship between the classification and the governmental purpose which it purportedly serves must be shown to sustain the classification. N.J.S.A. Const. Art. 1, par. 1.

Cases that cite this headnote

[23] **Constitutional Law**
Marriage and civil unions
Marriage and Cohabitation
Sex or Gender; Same-Sex Marriage

Under the New Jersey Constitution, same-sex couples must be provided all of the rights and

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benefits of marriage. N.J.S.A. Const. Art. 1, par. 1.

5 Cases that cite this headnote

[24] **Constitutional Law**
Marriage and civil unions
Marriage and Cohabitation
Sex or Gender; Same-Sex Marriage
Marriage and Cohabitation
Same-sex relationships in general

State's parallel civil marriage and civil union structure, providing two distinct labels for opposite-sex couples and same-sex couples, barred same-sex couples' access to federal benefits following decision of the United States Supreme Court in *United States v. Windsor*, which held that federal marital benefits were available to same-sex couples lawfully married in states that had granted same-sex couples the right to civil marriage, and thus such statutory scheme visited inequality upon same-sex civil union couples in violation of state constitutional right to **equal** treatment. N.J.S.A. Const. Art. 1, par. 1; N.J.S.A. 37:1–28 et seq.

9 Cases that cite this headnote

[25] **States**
Capacity of state to sue in general

The "parens patriae doctrine" precludes a State from initiating a lawsuit without a "quasi-sovereign" interest of its own.

Cases that cite this headnote

[26] **Constitutional Law**
Necessity of Determination

Courts will not determine constitutional questions unless absolutely imperative to resolve issues in litigation.

Cases that cite this headnote

West Codenotes

Held Unconstitutional
N.J.S.A. 37:1–28, 37:1–29, 37:1–30, 37:1–31, 37:1–32, 37:1–33, 37:1–34, 37:1–35, 37:1–36

Recognized as Unconstitutional
1 U.S.C.A. § 7

Attorneys and Law Firms

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Kevin R. Jesperson, Assistant Attorney General, argued the cause for defendants (John J. Hoffman, Acting Attorney General, attorney; Jean P. Reilly, Deputy Attorney General, on the brief).

Ronald K. Chen, Trenton, (Rutgers Constitutional Litigation Clinic Center for Law and Justice), for amici curiae (Edward Barocas (American Civil Liberties Union of New Jersey Foundation), of counsel and on the brief).

JACOBSON, A.J.S.C.

***169** *INTRODUCTION*

Plaintiffs, a lesbian, gay, bisexual, and transgender (LGBT) rights organization called **Garden State Equality**, and six same-sex couples and their children, ask this court to enter summary ***170** judgment in their favor, by holding that the guarantees of **equal** protection contained in both the New Jersey and United States Constitutions require that civil marriage be extended to same-sex couples in New Jersey. Plaintiffs seek a ruling as a matter of constitutional law, not on the basis of a factual record, which is as of yet incomplete, but as a legal matter following the United States Supreme Court's decision in *United States v. Windsor,* ––– *U.S.* ––––, 133 *S.Ct.* 2675, 186 *L.Ed.*2d 808 (2013), which struck down the federal Defense of Marriage Act (DOMA), 1 *U.S.C.A.*

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§ 7. *Windsor* held that the federal government must extend federal marital benefits to same-sex couples who are lawfully married in states that have granted same-sex couples the right to civil marriage. Since New Jersey offers same-sex couples civil unions and not marriage, plaintiffs claim that their status as civil union couples now deprives them of all the rights and benefits of marriage guaranteed to them under the New Jersey Constitution as interpreted by the New Jersey Supreme Court in *Lewis v. Harris,* 188 *N.J.* 415, 908 *A.*2d 196 (2006), and violates the federal Constitution as well. Defendants ("the State") oppose the relief sought, essentially arguing that any deprivation caused to New Jersey civil union couples derives from the actions of the federal government and not from action by the State, which continues to provide **equal** marital rights and benefits to same sex couples though the Civil Union Act, *N.J.S.A.* 37:1–28 to–36. At the heart of the dispute is whether the rationale of *Lewis* requires extending civil marriage to same-sex couples in the wake of *Windsor.*

Whether there is a constitutional right to same-sex marriage is a debate that elicits strong responses from litigants, attorneys, ****340** and the public. The debate has also generated many close decisions by the courts—including the cases the parties rely upon heavily to make their arguments. *Windsor* was a 5–4 decision of the United States Supreme Court. While the New Jersey Supreme Court unanimously found that same-sex couples were entitled to all the rights and benefits of marriage in *Lewis,* the Justices split 4–3 as to whether same-sex couples had a fundamental right to marry under the State Constitution, with the majority ***171** finding no such fundamental right. Even the New Jersey Supreme Court's decision not to hear a motion in aid of litigant's rights in *Lewis,* following a report by the Civil Union Review Commission, led to a 3–3 vote of the Justices. The closeness of these decisions reflects the analytic difficulties faced by courts grappling with the sensitive legal and societal issues raised by these cases.

Justice Albin's opinion in *Lewis* focused on detangling the concept of entitlement to the rights and benefits of marriage from the right to the label of marriage, and limited the decision to the holding that same-sex couples are entitled to all of the rights and benefits of marriage regardless of what the New Jersey Legislature decided to call the same-sex union. *See Lewis, supra,* 188 *N.J.* at 451, 908 *A.*2d 196. The dissenters in *Lewis,* however, would have granted same-sex couples the right to marry in addition to providing the rights and benefits of marriage. Now this court must decide whether the label of marriage can no longer be withheld from same-sex couples—a label that has taken on new significance in light of the *Windsor* decision. While the Court in *Lewis* focused on **equality** of rights and thus did not address "the transformation of the traditional definition of marriage," that definition is now squarely before this court. *Lewis, supra,* 188 *N.J.* at 451, 908 *A.*2d 196.

As noted in *Lewis,* rather than presume the correct legal structure to implement its decision, the Court deferred to the New Jersey Legislature to determine whether to amend the marriage statute to include same-sex couples or to create a separate statutory structure to afford same-sex couples all the rights and benefits of marriage. *Id.* at 457–58, 908 *A.*2d 196. The Legislature chose to create a parallel legal structure and to call the relationship a civil union. The ways in which same-sex unions have been implemented throughout the country have been varied. In some states, same-sex marriage was enacted through legislative action. *See* 79 *Del. Laws* 19 (2013); 2013 *Minn. Laws* 74; 2009 *N.H. Laws* 60 (codified in scattered sections of ch. 457 of *N.H.Rev.Stat. Ann.*); ***172** *N.Y. Dom. Rel. Law* § 10–a (Consol.2011); 2013 *R.I. Pub. Laws* 4; 2009 *Vt. Acts & Resolves* 3. In other states, courts interpreted their constitutions to require same-sex marriage. *See In re Marriage Cases,* 43 *Cal.*4th 757, 76 *Cal.Rptr.*3d 683, 183 *P.*3d 384 (2008)[1] ; *Kerrigan v. Comm'r of Pub. Health,* 289 *Conn.* 135, 957 *A.*2d 407 (2008); *Varnum v. Brien,* 763 *N.W.*2d 862 (Iowa 2009); *Goodridge v. Dep't of Pub. Health,* 440 *Mass.* 309, 798 *N.E.*2d 941 (2003). Recently, same-sex marriage was approved by popular vote in three states. *See* Erik Eckholm, *In Maine and Maryland, Victories at the Ballot Box for Same–Sex Marriage,* N.Y. TIMES, Nov. 7, 2012, at P14; *Gay Marriage Approved by Wash. Voters,* WASHINGTON POST, Nov. 9, 2012, at A12. And, in addition to New ****341** Jersey, two other states currently grant same-sex couples civil unions that provide all or substantially all of the benefits of marriage. *See Colo.Rev.Stat.* § 14–15–102 to–119 (2013); 750 *Il. Comp. Stat.* 75/1 to 75/90 (2013). Many of the states that now have same-sex marriage previously provided for civil unions. The landscape in 2013 is markedly different from the one that existed just seven years ago when *Lewis* was decided.

Many cases involving the right to same-sex marriage have raised thorny procedural issues, particularly as to standing and justiciability. *See Hollingsworth, supra,* ––– *U.S.* at –––, 133 *S.Ct.* at 2668, 186 *L.Ed.*2d at 785 (holding that proposition backers did not have standing to defend California's anti-same-sex marriage referendum); *Windsor, supra,* ––– *U.S.* at –––, 133 *S.Ct.* at 2688, 186 *L.Ed.*2d at 822 (holding that the Bipartisan Legal Advocacy Group had standing to defend DOMA). This case is no exception—the court must be sure that the case is justiciable and properly before the court before it can rule on the merits of plaintiffs' motion. In addition to

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justiciability concerns, the *Windsor* Court also addressed difficult issues of federalism. Here too, ***173** threads of federalism are woven throughout this motion, where plaintiffs are asking a state court to find that a state statutory structure is now illegal under the state constitution as a result of actions taken at the federal level.

The court is also faced with some rather complicated state action concerns. Plaintiffs argue that there is clear state action, maintaining that the State created a label distinct from marriage, and that this label is the cause of significant deprivations to plaintiffs. The State, on the other hand, asserts that the only action it was required to take under *Lewis* was to enact a statute extending the full panoply of rights and benefits of civil marriage to same-sex partners in an area—domestic relations—where the state has primacy and discretion to decide what rights to make available and what label to give to those rights. The State argues that the Civil Union Act met the mandate of *Lewis* and fulfills the State's obligations under the **equal** protection guarantees of the New Jersey and federal Constitutions. In regard to the state action arguments in particular, many of the issues that arise in this case are not only complex, but also unique. As a result, there is a dearth of helpful precedent to guide the court in making its decision. It is into this tangled thicket that this court must venture to resolve the issues raised by plaintiffs' motion.

PROCEDURAL HISTORY

This matter comes before the court by way of a motion for summary judgment filed by plaintiffs, **Garden State Equality** and six same-sex couples and their children, against defendants, the Attorney General of New Jersey, the Commissioner of the New Jersey Department of Human Services, and the Commissioner of the New Jersey Department of Health and Senior Services.[2] ***174** Defendants are responsible for implementing, administering, and enforcing the statutory scheme that, in plaintiffs' view, unconstitutionally denies them the right to marriage. Defendants were sued in their official capacities, and therefore simply stand as an alter ego of ****342** the State. As such, the court will refer to defendants collectively as "the State."

I. *Lewis v. Harris.*

Plaintiffs filed this case to obtain a declaratory judgment that the exclusion of same-sex couples from civil marriage violates Article I, Paragraph 1 of the New Jersey Constitution and the Fourteenth Amendment of the United States Constitution. In 2006, the Supreme Court of New Jersey, in *Lewis, supra,* 188 *N.J.* at 463, 908 *A.*2d 196, held that:

> To comply with the **equal** protection guarantee of Article 1, Paragraph 1 of the New Jersey Constitution, the State must provide to same-sex couples, on **equal** terms, the full rights and benefits enjoyed by heterosexual 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 same-sex civil union any more difficult than it is for heterosexual couples to enter the state of marriage. 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 Court's ruling made clear that same-sex couples must be afforded the same rights and benefits enjoyed by opposite-sex couples in civil marriage under New Jersey law. Rather than mandate same-sex marriage, the Court deferred to the Legislature to decide whether to open the institution of civil marriage to same-sex couples or to devise a parallel statutory scheme that would provide the same rights and benefits to same-sex couples that were afforded to heterosexual couples in civil marriage. *Ibid.*

In response to the *Lewis* decision, the New Jersey Legislature enacted the Civil Union Act ("the Act"). That Act created a parallel system of civil unions for same-sex couples. By law, couples in civil unions are entitled to all of the rights, benefits, and ***175** responsibilities of marriage. *See N.J.S.A.* 37:1–33. However, the Act denied same-sex couples the designation of "marriage" for their relationships. *N.J.S.A.* 37:1–28. As a part of the Act, the Legislature created the Civil Union Review Commission,

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which was charged with studying the effectiveness of civil unions for same-sex couples and to evaluate the Act's success. *See* N.J.S.A. 37:1–36.

On March 18, 2010, the *Lewis* plaintiffs filed a motion in aid of litigant's rights with the Supreme Court, asserting that the Civil Union Act failed to fulfill the Court's mandate and requesting that the Court compel the Legislature to open the institution of civil marriage to same-sex couples. In that motion, those plaintiffs relied upon the Civil Union Review Commission's final report, which had found that separate categorization in civil unions of same-sex couples invites and encourages unequal treatment. *See Lewis v. Harris,* 202 *N.J.* 340, 341, 997 A.2d 227 (2010) (hereinafter "*Lewis II* "). On July 26, 2010, the Court, in a 3–3 decision, denied plaintiffs' motion to enforce litigant's rights, without prejudice. The effect of the denial was to require the plaintiffs to file an action in the Superior Court for the development of a trial-like record. *Id.* at 341, 997 *A.*2d 227 ("The next step should be the development of a record on which those important issues can be resolved quickly.") (Long, J., dissenting).

****343** II. ***Garden State Equality*** *v.* ***Dow***.

On June 29, 2011, plaintiffs in this case filed a four-count complaint with this court. Several of the couples were also plaintiffs in *Lewis,* although the litigants in the two cases are not identical. In the complaint, plaintiffs allege that New Jersey "shunts lesbian and gay couples into the novel and inferior status of 'civil union' while reserving civil marriage only for heterosexual couples." According to plaintiffs, the denial of access to the legal status of "marriage" causes plaintiffs concrete harms and results in the persistent and widespread lack of recognition of their rights in civic and commercial dealings. Much of the complaint details ***176** the ways in which the various plaintiffs have been treated differently as partners in civil unions than they would have been treated if they were married spouses, and the complaint describes the various social, civic, and psychological harms they have experienced as a result. These are factual allegations that would likely require a trial-like record to prove. In addition, paragraph forty-five of the complaint specifically alleges that, "[r]elegating same-sex couples to civil unions hinders their ability to seek marriage-based benefits when Section 3 of the Defense of Marriage Act ... is no longer operative." It is this paragraph, effectuated by the United States Supreme Court's invalidation of DOMA in *Windsor,* that is specifically at issue in this motion, which addresses whether, as a matter of law and not fact, the demise of DOMA requires the State to allow same-sex couples to marry.

In their complaint, plaintiffs assert four constitutional claims: count one asserts a denial of **equal** protection under Article I, Paragraph 1 of the New Jersey Constitution; count two asserts a denial of the fundamental right to marry under Article I, Paragraph 1 of the New Jersey Constitution; count three asserts a denial of **equal** protection under the Fourteenth Amendment to the United States Constitution, in violation of 42 *U.S.C.A.* § 1983; and count four asserts a denial of substantive due process under the Fourteenth Amendment to the United States Constitution, in violation of 42 *U.S.C.A.* § 1983. The relief sought under all counts is the same. Plaintiffs ask the court to require that defendants permit same-sex couples to marry in New Jersey.

On August 10, 2011, the State filed a motion to dismiss the complaint. The Honorable Linda R. Feinberg, A.J.S.C. (ret.), heard oral argument on November 4, 2011. On November 29, 2011, Judge Feinberg entered an order denying the State's motion to dismiss count one and granting the motion to dismiss counts two, three, and four. On December 19, 2011, plaintiffs filed a motion for reconsideration seeking to reinstate count three of the complaint, which was granted on March 7, 2012. Over the last year and a half, the parties have been in the midst of factual ***177** discovery and have been preparing to proceed to expert discovery. Trial was anticipated to resolve factual disputes concerning the treatment of plaintiffs under the Civil Union Act.

III. *United States v. Windsor.*

Meanwhile, on June 26, 2013, the United States Supreme Court invalidated Section 3 of the federal Defense of Marriage Act ("DOMA") in *Windsor, supra,* ––– *U.S.* ––––, 133 *S.Ct.* 2675, 186 *L.Ed.*2d 808. Section 3 had limited the definition of "marriage" in federal law to "a legal union between one man and one woman as husband and wife," and limited the word "spouse" in federal statutes to mean "a person of the opposite sex who is a husband or a wife." *See* 1 *U.S.C.A.* § 7; ****344** *Windsor, supra,* ––– *U.S.* at ––––, 133 *S.Ct.* at 2683, 186 *L.Ed.*2d at 816. In challenging DOMA, Edith Windsor asserted that she had married her now deceased spouse, Thea Spyer, in Canada. That marriage was recognized by the laws of their home State of New York, which also now allows same-sex marriage. Spyer died in February of 2009 and willed her estate to Windsor. Because DOMA did not permit federal recognition of marriages of same-sex couples, Windsor was denied a marital exemption to the federal estate tax, and was required to pay estate taxes in excess of $300,000. Windsor brought suit for a refund and challenged the constitutionality of DOMA. *Windsor,*

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supra, ––– *U.S.* at ––––, 133 *S.Ct.* at 2683–84, 186 *L.Ed.*2d at 816–17. The Supreme Court found that section 3 of DOMA violated the due process and **equal** protection guarantees of the Fifth Amendment to the United States Constitution. The Court concluded that, "[t]he federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." *Id.* at ––––, 133 *S.Ct.* at 2696, 186 *L.Ed.*2d at 830. As a result, federal agencies were required to treat married same-sex couples in the same manner as they treat married opposite-sex couples in the administration of federal programs.

***178** IV. Motion for Summary Judgment.

Plaintiffs brought this motion for summary judgment on July 3, 2013, arguing that the *Windsor* decision changed the legal landscape with respect to this case and requires New Jersey to afford same-sex couples the right to marry. First, plaintiffs argue that *Windsor* requires the federal government to provide **equal** marital benefits to same-sex and heterosexual couples whose marriages are recognized under state law. Because New Jersey does not allow same-sex couples to marry, plaintiffs argue, committed same-sex couples are not being "afforded on **equal** terms the same rights and benefits enjoyed by married opposite-sex couples" as required by *Lewis, supra,* 188 *N.J.* at 457, 908 *A.*2d 196. As such, plaintiffs argue that they are entitled to summary judgment as to count one of the complaint. They ask this court to compel the State to allow same-sex couples to enter into civil marriages in New Jersey.

In addition, plaintiffs argue that the federal constitutional analysis employed by the *Windsor* Court dictates that summary judgment be granted in favor of plaintiffs on count three of the complaint, which alleges a Fourteenth Amendment **equal** protection violation. Plaintiffs argue that New Jersey's Civil Union Act, like DOMA, relegates plaintiffs to second-tier relationships, with disadvantages and a stigma that attaches to this inferior status, resulting in a violation of the **equal** protection clause of the Fourteenth Amendment. Plaintiffs also argue that because of their inability to access federal benefits after the *Windsor* decision, the State's decision to create parallel marriage and civil union structures no longer has a rational basis.

The State argues that plaintiffs' motion is not ripe for adjudication because the extent to which civil union partners in New Jersey will have access to federal benefits is currently unknown. The State's substantive argument is that civil union partners in New Jersey are already entitled to federal benefits as a result of the *Windsor* decision. Thus, the State asserts that it has taken no action to violate *Lewis's* mandate and the New Jersey Constitution. ***179** Instead, the State's argument goes, the reason plaintiffs are injured is because of certain federal agencies' incorrect applications of *Windsor* that exclude civil union partners from benefits now enjoyed by ****345** same-sex married couples. The State also argues that there has been no "state action"—a key element in establishing an **equal** protection violation—and that even if there has been state action, New Jersey has a rational basis for the distinction between civil unions and marriages for same-sex couples. Finally, the State argues that the court should exercise caution before granting summary judgment, as this case has far-reaching consequences, involves significant policy considerations, and, at the very least, requires more factual discovery under *Lewis II.*

The court heard oral argument on the motion for summary judgment on August 15, 2013. On August 28, 2013, responding to the court's invitation at oral argument, plaintiffs submitted a supplemental brief in support of their motion. They argue first that more and more federal agencies are implementing *Windsor* by granting benefits and responsibilities to legally married same-sex couples, while limiting the extension of benefits to only those couples and excluding civil union couples. In response to arguments concerning **Garden State Equality's** lack of standing due to the absence of a concrete injury, plaintiffs also provided affidavits from four **Garden State Equality** members. Two of the affidavits were signed by federal employees with civil union partners who claim to be harmed by the decision of the Office of Personnel Management to exclude civil union partners from employee benefits, and the other two were signed by civil union partners in same-sex relationships with noncitizens, who claim to be harmed by the recent decision of the United States Department of State not to allow them to sponsor their civil union partners for immigration purposes. Plaintiffs further argue that it is appropriate for this court to decide the issues before it, and that the court would not be acting prematurely in entertaining plaintiffs' claims.

The State also submitted a supplemental brief on August 28, 2013, reiterating its opposition to the motion for summary judgment. ***180** It first argues in favor of deferring action to a later date, as there are several bills that have been proposed in Congress to extend federal benefits to couples in civil unions. The State's supplemental brief also argues that principles of federalism and separation of powers preclude this court from granting the remedy requested by plaintiffs. And the State argues that material facts concerning how federal agencies will determine the application of benefits after

Windsor remain unknown, and that therefore ripeness and standing concerns should prevent the court from ruling at this time. Both sides have filed additional letters with the court regarding new post-*Windsor* pronouncements from federal agencies and the recent introduction of bills in Congress requiring federal agencies to treat civil union couples in the same manner as same-sex married couples.

V. Participation by Amicus.

On July 11, 2013, a group of civil rights organizations filed a motion for leave to appear as amicus curiae, including with their motion a proposed brief supporting plaintiffs' motion for summary judgment. Those organizations include the American Civil Liberties Union of New Jersey, the American–Arab Anti–Discrimination Committee, the Asian American Legal Defense and Education Fund, the **Garden** **State** Bar Association, the Hispanic Bar Association of New Jersey, Legal Momentum, and the National Organization for Women of New Jersey (collectively "amici"). On July 19, 2013, the State informed the court that it would not be opposing the filing of the amicus motion, and the State filed a reply to the amicus brief on August 9, 2013.

****346** In their brief, amici argue that New Jersey courts have, in the past, recognized their authority and responsibility to correct legislative action that fails to comply with a previously articulated constitutional mandate. *See, e.g., Abbott v. Burke,* 149 *N.J.* 145, 693 *A.*2d 417 (1997); *Oakwood v. Twp. of Madison,* 72 *N.J.* 481, 371 *A.*2d 1192 (1977); *Robinson v. Cahill,* 69 *N.J.* 133, 351 *A.*2d 713 (1975). Amici further point to several cases in which courts ***181** have monitored the success of legislative actions to provide functional **equality** through the use of parallel systems, and discarded those structures in favor of a unitary system when it was demonstrated that those parallel structures did not compare to the dominant system. For example, amici point to the Virginia Military Institute (VMI) case, in which the Fourth Circuit had initially found that single-gender education at VMI could be justified by its institutional mission, and allowed VMI to create a separate school for women. *United States v. Virginia,* 44 *F.*3d 1229 (4th Cir.1995), *rev'd,* 518 *U.S.* 515, 116 *S.Ct.* 2264, 135 *L.Ed.*2d 735 (1996). The United States Supreme Court subsequently found that scheme unconstitutional, because the women's school was not the **equal** of VMI. *United States v. Virginia,* 518 *U.S.* 515, 555–56, 116 *S.Ct.* 2264, 2286–87, 135 *L.Ed.*2d 735, 765 (1996). Amici also argue that the Legislature has not adequately explained why it chose to create a separate statutory structure for same-sex couples, and that mere reliance on the existence of a history of exclusion of an affected minority group cannot provide a valid reason for continuing that exclusion.

VI. The Federal Response to *Windsor.*

DOMA had restricted the federal government from recognizing legal same-sex marriages authorized by state law, so its invalidation by the United States Supreme Court has caused federal agencies to re-evaluate the extent to which same-sex couples are eligible for federal benefits. The key choice presented to these agencies has been whether to extend benefits to all legal same-sex unions recognized by the states, or only to extend benefits to same-sex couples that are legally married.

Since *Windsor,* the clear trend has been for agencies to limit the extension of benefits to only those same-sex couples in legally recognized marriages. For example, the Office of Personnel Management has noted that it does not intend to extend coverage for health benefits to civil union partners of civilian federal employees. *See* Federal Employee Health Benefit Program Carrier ***182** Letter No.2013–20, from John O'Brien, Director of Healthcare and Insurance, OPM to All Carriers (July 3, 2013), *available at* http://www.opm. gov/healthcare–insurance/healthcare/carriers/2013/2013–20.pdf. In addition, the State Department will only recognize actual marriages when determining spousal eligibility for immigration purposes. *See* U.S. Dep't of State, "U.S. Visas for Same–Sex Spouses: FAQs for Post–Defense of Marriage Act," http://travel.state. gov/visa/frvi/frvi_6036.html (last visited Sept. 27, 2013) ("At this time, only a relationship legally considered to be a marriage in the jurisdiction where it took place establishes eligibility as a spouse for immigration purposes."). And the Federal Election Commission ("FEC") has decided that, for the purposes of campaign finance law, "same-sex couples married under State law are 'spouses' for the purpose of [FEC] regulations." FEC Advisory Opinion 2013–06, at 3 (July 25, 2013).

Following the briefing in this matter but prior to oral argument, two more federal agencies, the Department of Defense and the Wage and Hour Division of the Department of Labor, stated that they would extend benefits only to legally married ****347** same-sex couples. *See* Press Release, American Forces Press Service, DOD Announces Same–Sex Spouse Benefits, (Aug. 14, 2013), *available at* http://www.defense.gov/news/newsarticle.aspx?id=120621 ("[I]n consultation with the Department of Justice and other executive branch agencies, the Defense Department will make spousal and family benefits available ... regardless of sexual orientation, as long as service member-sponsors provide a valid marriage certificate.");

Wage and Hour Division, U.S. Department of Labor, "Fact Sheet # 28F: Qualifying Reasons for Leave under the Family and Medical Leave Act" (2013) (defining spouse for the purposes of the FMLA as "a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including 'common law' marriage and same-sex marriage.").

After oral argument, several more agencies followed suit. The Office of Government Ethics (OGE) issued a Legal Advisory on ***183** August 19, 2013, putting federal employees on notice that the ethics statutes that apply to federal employees will now apply to same-sex spouses and same-sex marriages. *See* "United States Office of Government Ethics Memorandum LA–13–10: Effect of the Supreme Court's Decision in *United States v. Windsor* on the Executive Branch Ethics Program" (Aug. 19, 2013), *available at* http://www.oge.gov/OGE–Advisories/Legal–Advisories/LA–13–10–Effect–of–the–Supreme–Court–s–Decision–in–United–States–v–Windsor–on–the–Executive–Branch–Ethics–Program/. That directive specifically noted that, "[t]he terms 'marriage,' 'spouse,' and 'relative' as used in the federal ethics provisions will continue to be interpreted not to include a federal employee in a civil union, domestic partnership, or other legally recognized relationship other than a marriage," and that the OGE had specifically consulted with the United States Department of Justice in writing the Legal Advisory. *Id.* at 2.

On August 29, 2013, the Internal Revenue Service (IRS) issued a ruling confirming that same-sex married couples will be treated the same as opposite-sex married couples for federal tax purposes, but that civil union couples will be treated differently:

> There are more than two hundred Code provisions and Treasury regulations relating to the internal revenue laws that include the terms "spouse," "marriage" (and derivatives thereof, such as "marries" and "married"), "husband and wife," "husband," and "wife." ... For Federal tax purposes, the term "marriage" does not include registered domestic partnerships, civil unions, or other similar formal relationships recognized under state law that are not denominated as a marriage under that state's law.
>
> [Rev. Rul.2013–17, at 4, 12].

On the same day, the Centers for Medicare & Medicaid Services (CMS) reached the same conclusion. CMS issued a memorandum directing Medicare Advantage organizations to cover services in skilled nursing facilities for "validly married" same-sex spouses, to the same extent that services would be required for opposite-sex spouses. Memorandum from Danielle R. Moon, Director of CMS, "Impact of *United States v. Windsor* on Skilled Nursing Facility Benefits for Medicare Advantage Enrollees," August 29, 2013, *available at* http://www.cms.gov/Medicare/HealthPlans/HealthPlansGenInfo/Downloads/SNF_Benefits_Post_ Windsor.pdf. ***184** CMS determined that the term "spouse" only "includes individuals of the same sex who are lawfully married under ****348** the law of a state, territory, or foreign jurisdiction."[3]

And on September 18, 2013, the Department of Labor issued new guidelines concerning the agency's definitions of "spouse" and "marriage" for the purposes of the Earned Retirement Income Security Act of 1974 ("ERISA"), 29 *U.S.C.A.* § 1001 to –1461. *See* U.S. Department of Labor, "Guidance to Employee Benefit Plans on the Definition of 'Spouse' and 'Marriage' under ERISA and the Supreme Court's Decision in *United States v. Windsor,*" http://www.dol.gov/ebsa/newsroom/tr13–04.html (Sept. 18, 2013). The guidance specifically states that the terms "do not include individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or civil union." *Ibid.* This guidance has a broad scope, because most private sector employee benefits plans are governed by ERISA. *See* U.S. Department of Labor, "Health Benefits, Retirement Standards, and Workers' Compensation: Employee Benefit Plans," http://www.dol.gov/compliance/guide/erisa.htm (last visited Sept. 20, 2013).

To be sure, though the trend seems to be in favor of extending benefits only to legally married same-sex couples, many agencies have not yet announced definitive plans for how to implement the *Windsor* decision. And the Department of Defense (DoD), despite its earlier confirmation in a press release that benefits would be available to validly married same-sex couples, has since suggested that in the future, benefits may be extended to same-sex ***185** civil union couples as well. *See* Proposed Collection; Comment Request, 78 *Fed.Reg.* 54,633 (Sept. 5, 2013) (DoD suggesting that it needs to collect information on same-sex domestic partnerships because "[b]enefits shall be extended to same-sex domestic partners ... once the DoD civilian and his/her same-sex domestic partner have signed a declaration attesting to the existence of their committed relationship"); *see also* Vet Center Services, 78 *Fed.Reg.* 57,067 (Sept. 17, 2013) (to be codified at 38 *C.F.R.* pt. 17) (definition of "family member" for purposes of counseling services at Vet Centers "would encompass domestic partners, spouses,

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children, and parents”).

Finally, several pieces of legislation have been proposed in the United States House of Representatives aimed at requiring federal agencies to extend benefits to same-sex civil union couples as well as to same-sex married couples. *Federal Benefits Equality Act, H.R.* 2834, 113th Cong., 1st Sess. (2013); H.R. 3050, 113th Cong. (1st Sess.2013); *Act to Provide Certain Benefits to Domestic Partners of Federal Employees, H.R.* 3135, 113th Cong. (2013); Press Release, Senator Tammy Baldwin, U.S. Senators Tammy Baldwin and Susan Collins Introduce Bipartisan Legislation to Provide Fairness to Domestic Partners (Sept. 19, 2013), *available at* http://www.baldwin.senate.gov/press-releases/us-senators-tammy-baldwin-and-susan-collins-introduce-bipartisan-legislation-to-provide-fairness-to-domestic-partners.[4]

****349** *STANDARD OF REVIEW*

I. Summary Judgment.

If a court finds that “one party must prevail as a matter of law,” the court “should not hesitate to grant summary judgment.” *Brill* ***186** *v. Guardian Life Ins. Co. of Am.,* 142 *N.J.* 520, 540, 666 *A.*2d 146 (1995). Unlike most motions for summary judgment, this motion is akin to a facial challenge of New Jersey’s refusal to extend marriage to same-sex couples and does not require a determination of whether there is a genuine issue of material fact. Plaintiffs contend that New Jersey’s exclusion of same-sex couples from civil marriage deprives same-sex couples in New Jersey of federal rights accorded to same-sex married couples, and thus violates the Constitutions of New Jersey and the United States. As such, plaintiffs ask this court to rule on a legal issue that they claim can be decided without a hearing to resolve disputed facts. Moreover, the State has raised legal issues regarding jurisdiction and justiciability and requests rulings on these issues without a trial-type hearing.

II. Exercise of Caution.

[1] This court must tread lightly when deciding whether to invalidate a statutory scheme involving far-reaching consequences and policy considerations. When “issues with farreaching [sic] effects are involved, a Court should exercise caution in granting summary judgment.” *See Millison v. E.I. du Pont de Nemours & Co.,* 101 *N.J.* 161, 199, 501 *A.*2d 505 (1985) (Handler, J. dissenting) (citing *Jackson v. Muhlenberg Hosp.,* 53 *N.J.* 138, 249 *A.*2d 65 (1969)). *Jackson,* 53 *N.J.* 138, 249 *A.*2d 65, was a personal injury lawsuit in which the trial court had granted partial summary judgment on a very meager factual record. The Court reversed the grant of summary judgment and remanded for trial, noting that the ruling “would reach far beyond the particular case.” *Id.* at 142, 249 *A.*2d 65 (citation omitted). The State further cites to several other cases remanded to the trial court by the Appellate Division for further factual development where the issues involved significant and/or novel policy considerations. *See Edwards v. McBreen,* 369 *N.J.Super.* 415, 849 *A.*2d 204 (App.Div.2004); *Lusardi v. Curtis Point Property Owners Ass’n,* 138 *N.J.Super.* 44, 350 *A.*2d 242 (App.Div.1975); *Bennett v. T & F Distributing Co.,* 117 *N.J.Super.* 439, 285 *A.*2d 59 (App.Div.1971), *certif. denied,* ***187** 60 *N.J.* 350, 289 *A.*2d 795 (1972). This court is mindful of the significant social and political background of this case. As noted in *Lewis,* this court’s role is necessarily limited to constitutional adjudication, rather than entering the “swift and treacherous currents of social policy.” *Lewis, supra,* 188 *N.J.* at 460, 908 *A.*2d 196.

[2] [3] [4] [5] Moreover, courts shall not “declare void legislation unless its repugnancy to the Constitution is clear beyond a reasonable doubt.” *In re Matter of P.L. 2001,* 186 *N.J.* 368, 392, 895 *A.*2d 1128 (2006) (internal citations omitted). The burden falls on the party challenging the legislation “to demonstrate clearly that it violates a constitutional provision.” *Lewis, supra,* 188 *N.J.* at 459, 908 *A.*2d 196 (citing *Caviglia v. Royal Tours of Am.,* 178 *N.J.* 460, 477, 842 *A.*2d 125 (2004)). The Legislature has broad discretion in determining the “perimeters of a classification.” *Brown v. N.J. Dep’t of Treasury,* 356 *N.J.Super.* 71, 80, 811 *A.*2d 501 (App.Div.2002) (citing *Harvey v. Essex Cnty. Bd. of Freeholders,* 30 *N.J.* 381, 390, 153 *A.*2d 10 (1959)). It is not the court’s task to weigh the “efficacy or wisdom” of the challenged legislation. *Ibid.* (citing *State Farm Mut. Auto. Ins. Co. v. State,* 124 *N.J.* 32, 45, 590 *A.*2d 191 (1991)). In order to prevail on their motion ****350** for summary judgment, plaintiffs must show that New Jersey’s failure to provide same-sex couples with the label of civil marriage, “unmistakably ... run[s] afoul of the Constitution.” *Lewis, supra,* 188 *N.J.* at 459, 908 *A.*2d 196 (refusing to hold that “identical schemes called by different names would create a distinction that would offend Article I, Paragraph 1,” because the court “will not presume that a difference in name alone is of constitutional magnitude”).

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ANALYSIS

I. Plaintiffs' Claims Are Ripe for Review by This Court.

The United States Supreme Court's decision in *Windsor* officially went into effect on July 21, 2013. In addition, on June 26, 2013, ***188** the day of the *Windsor* decision, President Obama directed the Attorney General to work with other Cabinet members to "review all relevant federal statutes to ensure this decision, including its implications for Federal benefits and obligations, is implemented swiftly and smoothly." Press Release, Office of the White House Press Secretary, Statement by the President on the Supreme Court Ruling on the Defense of Marriage Act (June 26, 2013), *available at* http://www.whitehouse. gov/doma-statement. Despite this directive, it is possible that some federal agencies may take a considerable amount of time to change forms, implement procedures, train personnel, and incorporate same-sex couples into their administrative programs. Policy and regulation changes may also be necessary to accommodate the *Windsor* ruling—a process that could take months or years. Because of this circumstance, the State argues that there is not yet a clear position from the federal government as to whether federal benefits will be extended to civil union couples. As a result, the State argues that this motion is not yet ripe for decision by the court and must be denied.

[6] [7] [8] Ripeness is a justiciability doctrine designed to avoid premature adjudication of abstract disagreements. *Abbott Labs. v. Gardner,* 387 *U.S.* 136, 148–49, 87 *S.Ct.* 1507, 1515, 18 *L.Ed.*2d 681, 691 (1967). Courts should not interfere with an agency's administrative decision until the decision has been implemented and its effects felt in a concrete way by the challenging parties. *Ibid.; see also 966 Video, Inc. v. Mayor & Twp. Comm. of Hazlet Twp.,* 299 *N.J.Super.* 501, 515–16, 691 *A.*2d 435 (Law Div.1995). Unlike in federal courts, in New Jersey, "any concern about passing judgment on an abstract injury is tempered by the fact that [New Jersey courts] [are] not limited to the case or controversy requirement imposed on the federal courts by way of Article III of the Federal Constitution." *Comm. to Recall Robert Menendez from the Office of U.S. Senate v. Wells,* 204 *N.J.* 79, 102, 7 *A.*3d 720 (2010) (citing *In re Application of Boardwalk Regency Corp. for Casino License,* 90 *N.J.* 361, 367, 447 *A.*2d 1335, *appeal dismissed,* 459 *U.S.* 1081, 103 *S.Ct.* 562, 74 *L.Ed.*2d 927 (1982)). ***189** New Jersey state courts thus have more freedom to decide cases than their federal counterparts, which are limited by constitutionally based ripeness principles.

[9] [10] [11] [12] To determine if a case is ripe for judicial review, the court must evaluate: 1) the fitness of the issues for judicial decision, and 2) the hardship to the parties caused by withholding court consideration. *K. Hovnanian Co. of N. Central Jersey, Inc. v. N.J. Dep't of Envtl. Prot.,* 379 *N.J.Super.* 1, 9, 876 *A.*2d 847 (App.Div.), *certif. denied,* 185 *N.J.* 390, 886 *A.*2d 661 (2005). As to whether an issue is fit for judicial review, courts must first determine ****351** "whether review would require additional factual development." *Id.* at 10, 876 *A.*2d 847. A case is fit for review if the "issues in dispute are purely legal, and thus, appropriate for judicial resolution without developing additional facts." *Comm. To Recall Robert Menendez, supra,* 204 *N.J.* at 99, 7 *A.*3d 720. A declaratory judgment claim is not ripe for adjudication if the facts illustrate that the rights or status of the parties are "future, contingent, and uncertain." *Indep. Realty Co. v. Twp. of N. Bergen,* 376 *N.J.Super.* 295, 302, 870 *A.*2d 637 (App.Div.2005). With respect to the "hardship" prong of the ripeness analysis, courts can assume jurisdiction over a claim only if there is a "real and immediate" threat of enforcement or harm that would affect the plaintiff. *K. Hovnanian Co., supra,* 379 *N.J.Super.* at 10, 876 *A.*2d 847 (citing *966 Video, Inc., supra,* 299 *N.J.Super.* at 515–16, 691 *A.*2d 435).

The State, relying on federal ripeness decisions, argues that this motion is not yet fit for judicial decision, as many of the federal administrative pronouncements applying the *Windsor* decision are not final and have not "sufficiently crystallized." *See Lake Pilots Ass'n, Inc. v. U.S. Coast Guard,* 257 *F.Supp.*2d 148, 160 (D.D.C.2003), *appeal dismissed,* 359 *F.*3d 624 (D.C.Cir.2004) (citation omitted). The State also argues that plaintiffs cannot show that withholding court consideration will cause a serious enough hardship to merit court review. *See* ***190** *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 *U.S.* 803, 808, 123 *S.Ct.* 2026, 2030, 155 *L.Ed.*2d 1017, 1024–25 (2003); *Am. Petroleum Inst. v. Envtl. Prot. Agency,* 683 *F.*3d 382 (D.C.Cir.2012); *Colwell v. Dep't of Health & Human Servs.,* 558 *F.*3d 1112 (9th Cir.2009). Lastly, the State argues that ripeness is of particular concern here because this case involves the constitutionality of New Jersey's statutory civil marriage and civil union scheme. *See In re Ass'n of Trial Lawyers of Am.,* 228 *N.J.Super.* 180, 184, 549 *A.*2d 446 (App.Div.) ("Deeply embedded in our jurisprudence is the settled principle against resolving disputes in advance of constitutional necessity."), *certif. denied,* 113 *N.J.* 660, 552 *A.*2d 180 (1988).

The State points to several federal cases finding a lack of ripeness in the context of agency action. In *National Park Hospitality Association, supra,* 538 *U.S.* at 810, 123 *S.Ct.* at 2031, 155 *L.Ed.*2d at 1026, the Court held that a perceived conflict between a regulation issued by the National Park Service and the Contract Disputes Act of

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1978 was not ripe for review without a true conflict as applied to concession contracts with the National Park Service. ("[C]oncessioners suffer no practical harm as a result of [the regulation]. All the regulation does is announce the position NPS will take with respect to disputes arising out of concession contracts."). *Ibid.* Similarly, in a recent D.C. Circuit case, *American Petroleum, supra,* 683 *F.*3d at 384, the EPA issued a notice of proposed rulemaking prior to oral argument that would have significantly amended the challenged rule. The court held that because postponing review could conserve judicial resources, the matter was no longer ripe. *Id.* at 386. The court further held that "declining jurisdiction over a dispute while there is still time for the challenging party to 'convince the agency to alter a tentative position' provides the agency 'an opportunity to correct its own mistakes and to apply its expertise,' potentially eliminating the need for (and costs of) judicial review," and further would avoid "inefficient and unnecessary 'piecemeal review.' " *Id.* at 387 (quoting *Pub. Citizen Health Research Group v. FDA,* 740 *F.*2d 21, 30–31 (D.C.Cir.1984)).

The State relies on these and other cases to argue that this motion is unripe and cannot be considered until all agency ****352** actions ***191** concerning how *Windsor* will be applied are sufficiently final. *See Texas v. United States,* 523 *U.S.* 296, 300, 118 *S.Ct.* 1257, 1259–60, 140 *L.Ed.*2d 406, 410–11 (1998) (affirming district court's dismissal of claim that challenged Attorney General's finding that certain sanctions under Texas Educational Code would require pre-clearance under Section 5 of the Voting Rights Act as unripe); *Colwell, supra,* 558 *F.*3d at 1129 (refusing on grounds of prudential ripeness to hear plaintiffs' claims "without knowing the manner in which HHS will apply" its policy); *K. Hovnanian Co., supra,* 379 *N.J.Super.* at 9, 876 *A.*2d 847 (dismissing case as unripe where land use matter was not fully resolved at administrative agency level); *Indep. Realty Co., supra,* 376 *N.J.Super.* at 302, 870 *A.*2d 637 (holding that court could not enter a declaratory judgment as to applicability of zoning regulations where owner had not yet applied for permits and variances needed to build, as the facts were "future, contingent, and uncertain").

Whether this motion is fit for review depends in some ways on how the issue is framed and how that framing affects the remedy available to plaintiffs. Both plaintiffs and the State agree that post-*Windsor* and pursuant to the *Lewis* decision, same-sex couples in New Jersey should be entitled to the full spectrum of federal benefits and responsibilities provided to married couples. Given that, there are at least two potential remedies. The first is the remedy plaintiffs urge: for the State of New Jersey to allow same-sex couples to get married. The second is the remedy the State presents as the core of its opposition: that the federal agencies must recognize that New Jersey civil unions are equivalent to marriage and therefore provide the same spectrum of benefits to New Jersey same-sex couples in civil unions that they must provide, post-*Windsor,* to same-sex married couples. For the State, it is only if that remedy becomes unavailable for plaintiffs that the issues presented in this motion would become ripe for review.[5]

***192** [13] The court is persuaded that plaintiffs' claims are ripe for adjudication. First, plaintiffs' claims are fit for judicial review because, at least in relation to their New Jersey constitutional claim, they present legal questions that require no further factual development. By the terms of the Civil Union Act, same-sex partners in New Jersey are not each other's spouses, and are not married; rather, they are partners in a civil union. As discussed above, though many federal agencies have not yet announced definitive plans for how to implement the *Windsor* decision, several agencies have already determined how they will implement the change in law effectuated by *Windsor.* The Office of Personnel Management, the State Department, Internal Revenue Service, Department of Labor, and the Centers for Medicare and Medicaid have all determined that benefits will be offered only to legally married same-sex couples, and not to civil union couples. As a result, plaintiffs are *currently* ineligible for benefits as a result of rules and policies already in place. Thus, this case is distinguishable ****353** from *American Petroleum, supra,* 683 *F.*3d at 387, where the plaintiffs challenged a proposed rule before it was enacted. The issue of whether the State must act to change its statutory structure for civil unions and marriages is purely a legal one that depends upon the interaction of the *Windsor* decision with the mandates established by the New Jersey Supreme Court in *Lewis.*

To be sure, many federal agencies have not yet announced how they will apply *Windsor* and whether they will provide New Jersey couples in civil unions with federal marriage benefits. Perhaps some will. *See, e.g.,* Proposed Collection; Comment Request, *supra,* 78 *Fed.Reg.* 54,633; Vet Center Services, *supra,* ***193** 78 *Fed.Reg.* 57,067. But the fact that federal agency implementation of *Windsor* is in flux does not mean that this court must defer its decision. At least six federal agencies have explicitly stated that they will provide marriage benefits only to legally married same-sex couples. Consequently, regardless of future fluctuations in the law, plaintiffs are today not eligible for benefits as a result of their "civil union" status mandated by New Jersey law. In particular, the Department of Labor pronounced that the provisions of the Family and Medical Leave Act (FMLA), 29 *U.S.C.* §§ 2601 to 2654, will apply only to spouses in same-sex

marriages.[6] Therefore, if any of the plaintiffs got sick prior to a change in this policy, their partner's employer could refuse to allow the civil union partner to take leave to care for the ill partner under the FMLA. Certainly, the existence of this quandary for plaintiffs is real and requires no further factual development.

Moreover, the conclusion that plaintiffs have presented a legal question fit for review is bolstered by the overall uncertainty created by piecemeal pronouncements from various federal agencies and the potential for a lack of uniformity as to eligibility for marital benefits. Such uncertainty itself has concrete effects on plaintiffs in terms of current decision-making and planning for future eventualities. In essence, plaintiffs' federal benefits are subject to benefit-by-benefit regulation by whatever federal agency is in charge of administering the benefit program. This legal predicament was created by the *Windsor* decision and requires no further factual consideration. As such, the court's adjudication of the motion would not benefit from "further factual development of the issues presented," and is fit for review now. *Ohio Forestry Ass'n v. Sierra Club,* 523 *U.S.* 726, 733, 118 *S.Ct.* 1665, 1670, 140 *L.Ed.*2d 921, 929 (1998).

194** The State has notified the court of proposed legislation that would extend federal marital benefits to civil union couples, and argues that review should be denied in this case because the proposed legislation is proof that the law is "in flux." *See, e.g., Fed. Benefits* ***Equality *Act, H.R.* 2834, 113th Cong., 1st Sess. (2013). However, to accept the State's argument would render every constitutional challenge to any law untenable; the defendants would simply deflect any challenges by asserting that the challenged law may be remedied through legislation at some point in the future. Such a position would be fatal to any enforcement of constitutional protections through the judicial system and cannot be countenanced. *Cf. Bartlett v. Bowen,* 816 *F.*2d 695, 707 (D.C.Cir.1987) ("The delicate balance implicit in the doctrine of separation of powers would be destroyed if Congress were allowed not only to legislate, ****354** but also to judge the constitutionality of its own actions."). For an example of this principle, see *In re Conroy,* 98 *N.J.* 321, 344 n. 2, 486 *A.*2d 1209 (1985), in which the New Jersey Supreme Court resolved difficult issues concerning the termination of life support and the constitutional right to refuse medical treatment, even though there were legislative attempts to address those issues pending in the Legislature at the time. Thus, the existence of pending legislation that may address plaintiffs' concerns does not require postponement of judicial review.

Plaintiffs have also satisfied the "hardship" prong of the test for ripeness. As couples in civil unions, plaintiffs are currently ineligible for at least some of the federal marital rights and benefits that married opposite-sex couples possess. If, as plaintiffs claim, this impact constitutes a violation of the New Jersey Constitution, then their current circumstances result in an "immediate and significant" hardship affecting their constitutional rights. *See, e.g., Elrod v. Burns,* 427 *U.S.* 347, 373, 96 *S.Ct.* 2673, 2690, 49 *L.Ed.*2d 547, 565 (1976) (holding that the loss of First Amendment freedoms, even for a short period of time, "unquestionably constitutes irreparable injury."); ***195** *Davis v. N.J. Dep't of Law & Pub. Safety, Div. of State Police,* 327 *N.J.Super.* 59, 69, 742 *A.*2d 619 (Law Div.1999) (quoting *Elrod, supra,* 427 *U.S.* at 373, 96 *S.Ct.* at 2690, 49 *L.Ed.*2d at 565). *See also Home Builders League of S. Jersey, Inc. v. Evesham,* 174 *N.J.Super.* 252, 257, 416 *A.*2d 81 (Law Div.1980) (where plaintiffs raised constitutional challenge to ordinances and court had to decide whether to expand time for review "in the interests of justice," court assumed jurisdiction, explaining that, "[n]ot only is there a substantial constitutional question alleged ... but, as time goes on, if no restraint of the ordinance requirements is imposed, it could cause continuing harm to plaintiffs and others similarly situated.") Similarly, in this case, if the denial of marriage to same-sex couples now violates the New Jersey Constitution—as plaintiffs contend—then every day the plaintiffs' claims evade judicial review, continuing harm is caused to them.

Moreover, it is uncertain when, if not now, plaintiffs' claims could be ripe for review. As the *Windsor* Court noted, DOMA had affected approximately 1,000 federal statutes and regulations. *Windsor, supra,* ––– *U.S.* at ––––, 133 *S.Ct.* at 2683, 186 *L.Ed.*2d at 816. It is unknown when each of the federal agencies charged with implementing those laws and rules will decide the manner in which they will comply with *Windsor,* and every day that the undecided federal agencies delay their decision, plaintiffs will remain uncertain as to whether their status renders them ineligible for certain federal benefits. In addition, while waiting for agencies to clarify their positions regarding civil union couples, plaintiffs will remain ineligible for marital benefits from the federal agencies that have already decided to exclude them from coverage. And there is no judicially manageable standard to determine when exactly "enough" agencies have implemented *Windsor* to justify judicial review. Leaving review for some indeterminate time when *all* federal agencies have acted would constitute a clear hardship for plaintiffs if, as they claim, their current inability to obtain federal marital benefits amounts to a deprivation of constitutional magnitude. *See Elrod, supra,* 427 *U.S.* at 373, 96 *S.Ct.* at 2690, 49 *L.Ed.*2d at 565.

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***196** As the New Jersey Supreme Court recently confirmed, "this Court is 'not limited to the "case or controversy" requirement imposed on the federal courts by way of Article III of the Federal Constitution.' " *Comm. to Recall Robert Menendez, supra,* 204 *N.J.* at 102–03, 7 *A.*3d 720 ****355** (quoting *In re Application of Boardwalk Regency Corp., supra,* 90 *N.J.* at 367, 447 *A.*2d 1335); *see also In re Ass'n of Trial Lawyers of Am., supra,* 228 *N.J.Super.* at 184, 549 *A.*2d 446 (New Jersey courts have "taken a much more liberal approach on the issues of ... justiciability than have the federal cases."). In *Committee To Recall Robert Menendez, supra,* 204 *N.J.* at 103, 7 *A.*3d 720 the Court found that review was favored because the constitutionality of the challenged law was an issue of "major public importance" (quoting *City of Atl. City v. Laezza,* 80 *N.J.* 255, 266, 403 *A.*2d 465 (1979)). It can hardly be questioned that the case before this court also presents an issue of major public importance. Plaintiffs' challenge to their exclusion from civil marriage raises significant constitutional questions that affect the individual rights of thousands of people in New Jersey.

The *Lewis* Court was clear in its mandate 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." *Lewis, supra,* 188 *N.J.* at 462, 908 *A.*2d 196. Whether, under *Lewis,* the change in federal law brought about by *Windsor* requires the State of New Jersey to allow same-sex couples to marry is a question that is now fit for review by this court.

II. Plaintiffs Have Standing to Bring This Action.

The State has also questioned, briefly in their opposition and again at oral argument, whether any of the plaintiffs have standing to bring this motion, as none of them have been directly denied a federal benefit, nor are they federal employees, members of the military, or persons applying for entry into the United States.

***197** [14] [15] The concept of standing refers to a party's entitlement to maintain an action before the court. *In re Adoption of Baby T.,* 160 *N.J.* 332, 340, 734 *A.*2d 304 (1999); *N.J. Citizen Action v. Riviera Motel Corp.,* 296 *N.J.Super.* 402, 409, 686 *A.*2d 1265 (App.Div.1997), *appeal dismissed as moot,* 152 *N.J.* 361, 704 *A.*2d 1297 (1998). In order to demonstrate standing, a plaintiff must have a "sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and there must be a substantial likelihood that the plaintiff will suffer harm in the event of an unfavorable decision." *N.J. Citizen Action, supra,* 296 *N.J.Super.* at 409–10, 686 *A.*2d 1265 (citing *N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n,* 82 *N.J.* 57, 67, 411 *A.*2d 168 (1980)). New Jersey courts take a broad and liberal approach to the issue of standing. *N.J. Citizen Action, supra,* 296 *N.J.Super.* at 415, 686 *A.*2d 1265.

[16] [17] Applying these principles to associations, courts have concluded that "an association has standing to sue as the sole party plaintiff when it has a real stake in the outcome of the litigation, there is a real adverseness in the proceeding, and the complaint 'is confined strictly to matters of common interest and does not include any individual grievance which might perhaps be dealt with more appropriately in a proceeding between the individual [member] and the [defendant].' " *N.J. Citizen Action, supra,* 296 *N.J.Super.* at 416, 686 *A.*2d 1265 (quoting *Crescent Pk. Tenants Ass'n v. Realty Equities Corp.,* 58 *N.J.* 98, 109, 275 *A.*2d 433 (1971)). Moreover, if an individual plaintiff has standing, the organizational plaintiff of which the individual is a member also has standing. *People For Open Gov't v. Roberts,* 397 *N.J.Super.* 502, 515, 938 *A.*2d 158 (App.Div.2008).

****356** [18] The court is satisfied that plaintiffs have standing to proceed with this action. As the arguments of the parties demonstrate, there is a real adverseness as to the subject matter in dispute. Plaintiffs also have demonstrated a sufficient stake in the outcome of this motion in terms of their seeking eligibility for federal benefits. Moreover, plaintiffs' interests are not overly ***198** general. Rather, both the individual plaintiffs and the membership of **Garden State Equality** are claiming a clear and present harm that will continue indefinitely into the future. As discussed above in the context of ripeness, plaintiffs are currently not eligible to receive certain federal benefits as a result of New Jersey's marriage and civil union structure. In addition, **Garden State Equality** has provided the court with affidavits from four of its members attesting that they are currently harmed by their inability to obtain federal benefits. These affidavits remove all doubt as to the standing of **Garden State Equality**. As a result of these considerations, and given New Jersey's policy of liberal standing requirements, the court is satisfied that both the named individual plaintiffs and **Garden State Equality** have sufficient standing to bring this action.

Discussing justiciability, the New Jersey Supreme Court recently reiterated that:

> Our "liberal rules of standing" are animated by a venerated principle: "In the overall we have given due weight to the interests of individual justice, along with the public interest, always bearing in mind that throughout our law we have been sweepingly rejecting procedural frustrations in favor of just and expeditious

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> determinations on the ultimate merits." And that principle is premised on a core concept of New Jersey jurisprudence, that is, that our rules of procedure were not designed to create an injustice and added complications but, on the contrary, were devised and promulgated for the purpose of promoting reasonable uniformity in the expeditious and even administration of justice.
>
> [*Jen Elec., Inc. v. County of Essex,* 197 *N.J.* 627, 645, 964 *A.*2d 790 (2009) (internal citations omitted)].

The court is satisfied that plaintiffs' motion is justiciable, given the clear and present harm affecting them. The court will therefore turn to the merits of plaintiffs' claims.

III. Plaintiffs Have Alleged Sufficient State Action to Support the Cognizability of their **Equal** Protection Claims Under the United States and New Jersey Constitutions.

[19] The State's strongest argument on the constitutional claims is that any harm imposed on plaintiffs has been imposed by the federal government and not by the State. The question here then is, in light of *Windsor's* mandate that the federal government extend benefits to lawfully married same-sex couples, can the ***199** actions by several federal agencies refusing to grant those same rights to civil union partners render the State liable for the resulting harm? To answer this question requires the court to wade into a thorny thicket with no clear precedential guide.

This court, speaking through Judge Feinberg, has already addressed the question of state action in the context of motions to dismiss the complaint. Plaintiffs had claimed that their civil union status affected their ability to obtain **equal** treatment from private parties such as hospitals and insurance companies. The State moved to dismiss, arguing that plaintiffs had failed to state an **equal** protection claim under either the New Jersey or United States Constitutions because the State had complied with the mandates of *Lewis* and had not engaged in any illegal state actions. Judge Feinberg noted that ****357** state action could be shown by alleging a deprivation "caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible." She continued, saying that, "if you build an infrastructure in which the result is a denial of benefits, that's state action." Transcript of Oral Argument at 19, ***Garden State Equality** v. **Dow***, No. MER–L–1729–11 (Nov. 4, 2011); *see also* ***Garden State Equality** v. **Dow***, No. MER–L–1729–11, 2012 *WL* 540608 at *10, 2012 *N.J.Super. Unpub. LEXIS* 360 at *29 (Law Div. Feb. 21, 2012) (written opinion by Judge Feinberg granting plaintiffs' motion to reconsider and reinstating plaintiffs' federal **equal** protection claim, holding that "[p]laintiffs allege the Civil Union Act and its enforcement by certain state officials, who are named the State, violates the **Equal** Protection Clause of the Fourteenth Amendment. At this juncture, the court is satisfied there is sufficient state action to permit the claim under the Federal **Equal** Protection Clause to proceed."). The court is now faced with the slightly different question of how the federal government, rather than private parties, deals with the state-created infrastructure of civil unions. Given this distinction, the court agrees with the State that Judge Feinberg's previous pronouncements as to state action are not the law of the case for present purposes. However, the court finds Judge ***200** Feinberg's analysis persuasive as to whether the state's creation of a label for same-sex unions other than marriage is in and of itself enough to create state action where that label has concrete effects in regard to the eligibility of New Jersey civil union partners for federal benefits.

In the State's view, *Windsor* does not render New Jersey's parallel marriage and civil union structures invalid. Indeed, the State argues that it has not taken any illegal action since *Lewis* that requires a remedy. Rather, the State interprets *Windsor* to condemn only *federal* action that does not recognize civil unions as equivalent to marriage.[7] A key principle of Justice Kennedy's *Windsor* opinion is that "the Federal Government ... has deferred to state-law policy decisions with respect to domestic relations." *Windsor, supra,* ––– *U.S.* at ––––, 133 *S.Ct.* at 2691, 186 *L.Ed.*2d at 825. Because the federal government incorporates state law definitions of marriage, the State contends, federal agencies must defer to New Jersey's Civil Union Act. That law requires that wherever "in any law, rule, regulation, judicial or administrative proceeding or otherwise, reference is made to 'marriage,' 'husband,' 'wife,' 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' 'widow,' 'widower,' 'widowed' or another word which in a specific context denotes a marital or spousal relationship, the same shall include a civil union." *N.J.S.A.* 37:1–33. The State argues that since domestic relations "has long been regarded as a virtually exclusive province of the States," the federal government must defer to New Jersey's definitions in the realm of domestic relations in determining whether individuals are married for the purposes of federal marriage benefits. *See Windsor, supra,* ––– *U.S.* at ––––, 133 *S.Ct.* at 2691, 186 *L.Ed.*2d at 825. Indeed, Justice Kennedy's *Windsor* opinion makes clear that the federal government cannot deny benefits to individuals upon ***201** whom a state has conferred marriage rights, "a dignity ****358** and status of immense import." *Id.* at ––––, 133 *S.Ct.* at 2692, 186 *L.Ed.*2d at

826 ("What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect."). The State relies on this language to argue that because New Jersey deems civil unions to be equivalent to marriage, the federal government may not treat the two structures as distinct, and must provide marriage benefits to New Jersey couples in civil unions. Because providing federal benefits is solely the responsibility of the federal government, the State contends that the deprivation of such benefits cannot be viewed as state action. As a result, the State argues that plaintiffs' claims are not legally cognizable. In essence, the State argues that plaintiffs are seeking relief from the wrong defendant.

The State relies on precedents arising out of state spending clause obligations that have held that where the "onus of compliance" with individual rights is on the federal government, rather than on the state implementing the program, there is no cause of action under 42 *U.S.C.* § 1983 against that state. *See, e.g., Albiston v. Me. Comm'r of Human Services,* 7 *F.*3d 258, 263 (1st Cir.1993) (holding that if a federal funding statute places onus of compliance with its provisions on the federal government, and there is no direct obligation imposed upon the states, there is no cognizable § 1983 claim against the states). In the case before this court, by contrast, it is New Jersey's definitions of marriage, not the rights inherent in a federal statute, that are at issue. As noted in the *Windsor* opinion, the "definition and regulation of marriage ... has been treated as being within the authority and realm of the separate States." *Windsor, supra,* —— *U.S.* at ——, 133 *S.Ct.* at 2689–90, 186 *L.Ed.*2d at 823.

Plaintiffs object to the argument that the State has not engaged in any action, arguing that the State's action is in creating a structure in which opposite-sex relationships and same-sex relationships are given distinct labels, labels that now matter in the context of federal benefits. According to plaintiffs, the *Windsor* decision to extend federal benefits to same-sex married couples ***202** transformed what was, legally, a legitimate legislative choice under *Lewis* into impermissible state action under the *Lewis* mandate that same-sex couples be afforded the same marriage benefits as heterosexual couples. Plaintiffs point the court to a line of cases in which courts have held that where federal officials' application of a state intestacy law resulted in an unconstitutional denial of benefits, the underlying unconstitutional state law must be invalidated. *See, e.g., Daniels v. Sullivan,* 979 *F.*2d 1516, 1520 (11th Cir.1992) (holding that application of Georgia's intestacy scheme was unconstitutional as applied to plaintiff); *Handley v. Schweiker,* 697 *F.*2d 999, 1003 (11th Cir.1983) (holding Alabama's intestacy law unconstitutional as applied to plaintiff, as it created an "unconstitutional insurmountable barrier" to Social Security benefits). In these cases, however, the state laws were unconstitutional on their own, either facially or as applied to a specific plaintiff. By contrast, in this case, the court must decide whether a state statutory scheme is unconstitutional only because of the manner in which it is applied and incorporated by the federal government.[8]

****359** **[20]** It is axiomatic that an **equal** protection claim under both the United States and New Jersey Constitutions requires state action. *See, e.g., Moose Lodge No. 107 v. Irvis,* 407 *U.S.* 163, 172, 92 *S.Ct.* 1965, 1971, 32 *L.Ed.*2d 627, 637 (1972) (citing *The Civil Rights Cases,* 109 *U.S.* 3, 3 *S.Ct.* 18, 27 *L.Ed.* 835 (1883)); *Doug Grant v. Greate Bay Casino Corp.,* 232 *F.*3d 173, 189 (3d Cir.2000), *cert. denied,* 532 *U.S.* 1038, 121 *S.Ct.* 2000, 149 *L.Ed.*2d 1003 (2001) (holding that plaintiff had no federal or New Jersey **equal** protection claim against casinos because they were not state actors). Much of the Supreme Court's jurisprudence regarding state action revolves around state involvement in otherwise private conduct. ***203** *See Moose Lodge, supra,* 407 *U.S.* at 173, 92 *S.Ct.* at 1971, 32 *L.Ed.*2d at 637 ("Our holdings indicate that where the impetus for discrimination is private, the State must have significantly involved itself with invidious discrimination.") (citation omitted). In *Moose Lodge,* the Court held that there was no state action for the purposes of the Fourteenth Amendment where the State of Pennsylvania issued a liquor license to a private club that refused to serve an African American guest of one of its members. The Court wrote that, "[t]here is no suggestion in this record that Pennsylvania law, either as written or as applied, discriminates against minority groups either in their right to apply for club licenses themselves or in their right to purchase and be served liquor in places of public accommodation." *Id.* at 175–76, 92 *S.Ct.* 1965.

Neither party has pointed the court to an analogous situation where it is the manner in which the federal government applies a state statutory scheme that makes the state's actions unconstitutional. Nor has the court been able to find such a case. However, the reality of the deprivations faced by plaintiffs is that the State has indeed played a role in plaintiffs' alleged constitutional harms. By statutorily creating two distinct labels—marriage for opposite-sex couples and civil unions for same-sex couples—New Jersey civil union partners are excluded from certain federal benefits that legally married same-sex couples are able to enjoy. Consequently, it is not the federal government acting alone that deprives plaintiffs of federal marriage benefits—it is the federal government incorporating a state domestic relations structure to make its determinations, and it is that state structure that plaintiffs challenge in this motion. That structure may not

have been illegal at the time it was created—indeed, the parallel marriage/civil union statutory scheme was specifically sanctioned in advance by *Lewis*—but it was certainly an "action" of the State.

By asserting that only the federal government, and not the State, has engaged in "action" that can be challenged by the plaintiffs, the State implies that since the parallel civil marriage and civil union structure was constitutional at the time the Civil ***204** Union Act was passed, its passage does not constitute "state action" for the purposes of plaintiffs' challenge. The State has not relied on any case law supporting such a premise. In fact, it defies common sense to suggest that the passage of a statute by the New Jersey Legislature is not state action. *See Parks v. Mr. Ford,* 556 *F.*2d 132 (3d Cir.1977) ("Certainly the creation of law is state action.... The enactment of a statute ... must be recognized as state action in its purest form."). Indeed, for the purposes of establishing state action for an **equal** protection analysis, there is no need to reach the constitutionality ****360** of the challenged statutory scheme—the act of creating that statutory scheme is sufficient to constitute state action. *See Lugar v. Edmondson Oil Co.,* 457 *U.S.* 922, 941, 102 *S.Ct.* 2744, 2756, 73 *L.Ed.*2d 482, 498 (1982) ("While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action."). And certainly when the State creates a statutory structure that relies on a particular application of federal law to remain constitutional, a change in that federal law cannot absolve the State from all responsibility for resulting constitutional violations. The court thus rejects the State's argument, and holds that the State engaged in state action when it created a statutory structure that, due to a change in federal law, now disadvantages civil union partners in New Jersey. It is that action-creating a statutory scheme that does not offer same-sex couples the right to civil marriage—that has been challenged by plaintiffs, and it will be analyzed for its validity under **equal** protection principles below.

Before reaching that analysis, however, the State makes further arguments that merit attention. The State points to search and seizure law cases, arguing that this court has no jurisdiction to require federal officials to act in conformity with the New Jersey Constitution. In the realm of search and seizure law, the New Jersey Supreme Court has held that "federal officers acting lawfully and in conformity to federal authority are unconstrained by the State Constitution." ***205** *State v. Knight,* 145 *N.J.* 233, 259, 678 *A.*2d 642 (1996) (citation omitted); *see also State v. Mollica,* 114 *N.J.* 329, 345, 554 *A.*2d 1315 (1989) ("With regard to law-enforcement activities, a state constitution ordinarily governs only the conduct of the state's own agents or others acting under color of state law."). *Mollica* set forth the principle that evidence obtained by federal agents acting on their own, in compliance with the United States Constitution, is admissible against a defendant even if it was obtained in violation of the New Jersey Constitution. *Mollica, supra,* 114 *N.J.* at 347–50, 554 *A.*2d 1315. The State argues that this limiting principle is rooted both in the Supremacy Clause of the federal constitution and in principles of federalism and must extend beyond search and seizure. *See, e.g., McCullough v. Maryland,* 17 *U.S.* 316, 417, 4 *Wheat.* 316, 4 *L.Ed.* 579, 604 (1819) (holding that State of Maryland could not specifically target Bank of the United States for taxation). The State, however, when questioned at oral argument, could not point to any cases outside of the search and seizure context to support its analysis. Moreover, in the case of search and seizure law, the New Jersey Supreme Court has also held that evidence seized by federal officials in violation of the New Jersey Constitution will remain inadmissible if those federal officials were acting "under color of state law or as agents of state law-enforcement authorities." *Mollica, supra,* 114 *N.J.* at 356, 554 *A.*2d 1315. Thus, when the State is involved, there is state action.

The State further argues that *Lewis* itself disavowed the notion that the State constitutional right identified by that Court extended to federal action or statutes. *See Lewis, supra,* 188 *N.J.* at 460 n. 25, 908 *A.*2d 196 ("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."). In that footnote, the *Lewis* Court specifically cited Section 3 of DOMA. This court reads this statement differently than the State. The *Lewis* Court was noting the limitations and context of its decision, rather than explicitly ****361** limiting its decision to whether same-sex couples were entitled to state benefits. Anything the New Jersey Supreme Court did in 2006 could ***206** not change federal law in regard to same-sex couples. Nor is there any other language in *Lewis* that limits the opinion to New Jersey rights and benefits. *Id.* at 457, 908 *A.*2d 196 ("We now hold that 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.").

Justice Kennedy stated quite clearly in the last sentence of *Windsor* that "[t]his opinion and its holding are confined to those lawful marriages." *Windsor, supra,* —— *U.S.* at ––––, 133 *S.Ct.* at 2696, 186 *L.Ed.*2d at 830. A "[s]tate's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import[,]" a status to which the federal government must give deference. *Id.* at ––––, 133 *S.Ct.* at 2705, 186

*L.Ed.*2d at 826. Plaintiffs do not allege here that the State must force the federal government to provide benefits to couples in civil unions. Rather, they allege that the violation of their constitutional rights derives from a state action, that of creating separate systems of marriage and civil unions, dependent upon sexual orientation. This court holds that creation of a status that affects whether same-sex couples can access federal benefits constitutes action on the part of the State. The detriments plaintiffs experience can be traced directly to a state action—that of enacting the Civil Union Act rather than allowing same-sex marriage. As such, the court finds sufficient state action to make plaintiffs' causes of action legally cognizable under both the United States and New Jersey Constitutions.

IV. In the Wake of the *Windsor* Decision, Plaintiffs Have Shown That Civil Union Partners in New Jersey Are Being Denied **Equal** Access to Federal Benefits, Thus Requiring That the Right to Marry be Extended to Same–Sex Couples Under the **Equal** Protection Guarantee of the New Jersey Constitution.

[21] [22] Article I, Paragraph 1 of the New Jersey Constitution provides that, "[a]ll persons are by nature free and independent, ***207** 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." Although Article I, Paragraph 1 does not expressly contain the term "**equal** protection," New Jersey courts "have construed the expansive language of that provision as guaranteeing [that] fundamental right." *Caviglia, supra,* 178 *N.J.* at 472, 842 *A.*2d 125 (citing *Greenberg v. Kimmelman,* 99 *N.J.* 552, 568, 494 *A.*2d 294 (1985)). An analysis of the right to **equal** treatment under the New Jersey Constitution differs slightly from the federal three-tiered **equal** protection analysis. *Greenberg, supra,* 99 *N.J.* at 569, 494 *A.*2d 294. The court must balance: (1) the nature of the affected right; (2) the extent to which the governmental restriction intrudes upon it; and (3) the public need for the restriction. *Lewis, supra,* 188 *N.J.* at 444, 908 *A.*2d 196 (citing *Greenberg, supra,* 99 *N.J.* at 567, 494 *A.*2d 294). Where a statute is challenged because it "does not apply evenhandedly to similarly situated people," the means selected by the Legislature must "bear a substantial relationship to a legitimate government purpose." *Lewis, supra,* 188 *N.J.* at 443, 908 *A.*2d 196; *see also Caviglia, supra,* 178 *N.J.* at 472–74, 842 *A.*2d 125 (holding that New Jersey statute barring ****362** uninsured drivers from recovery of noneconomic damages resulting from automobile accidents did not violate New Jersey's **equal** protection guarantee, as it was a reasonable attempt by Legislature to deter drunk driving, the use of automobiles as weapons, and the uninsured use of automobiles). A "real and substantial relationship between the classification and the governmental purpose which it purportedly serves" must be shown to sustain the classification. *Barone v. Dep't of Human Servs.,* 107 *N.J.* 355, 368, 526 *A.*2d 1055 (1987) (citation omitted) (holding that New Jersey's Pharmaceutical Assistance Act, which granted benefits to financially eligible disabled residents under sixty-five who received certain social security payments, rationally advanced legitimate governmental objective, that of continuing the program's fiscal integrity and maximizing the funds used to provide benefits); *see also* ***208** *Trautmann v. Christie,* 211 *N.J.* 300, 305, 48 *A.*3d 1005 (2012) (upholding a New Jersey law that required drivers with certain permits and probationary licenses to display decals on their vehicles, as the "State has a vital and compelling interest in maintaining highway safety by ensuring that only qualified drivers operate motor vehicles") (citation omitted).

[23] The Supreme Court addressed the application of the New Jersey Constitution's **equal** protection guarantee to same-sex couples in *Lewis, supra,* 188 *N.J.* 415, 908 *A.*2d 196. The Court engaged in the traditional three-part balancing test described above, and applied the "real and substantial relationship" standard. The Court concluded by setting forth a clear rule: under the New Jersey Constitution, same-sex couples must be provided all of the rights and benefits of marriage. *Id.* at 463, 908 *A.*2d 196. Now, as a result of the *Windsor* decision and the subsequent federal implementation of that decision by federal agencies refusing to extend marital benefits to civil union couples, this court must decide how to apply *Lewis,* which remains good law. Indeed, neither side here questions the binding nature of *Lewis* on this court. As a result, the **equal** protection analysis under the New Jersey Constitution in this case simply requires an application of the *Lewis* mandates in light of the changed circumstances brought about by *Windsor.*

A. Requirements of *Lewis.*

In *Lewis, supra,* 188 *N.J.* 415, 908 *A.*2d 196, the New Jersey Supreme Court addressed whether Article I, Paragraph 1 of the New Jersey Constitution requires that committed same-sex couples who wish to marry be given the same legal benefits, privileges, and title of marriage as opposite-sex couples. The Court addressed whether committed same-sex couples had a constitutional right to the benefits and privileges afforded to married

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heterosexual couples under the **equal** protection guarantees of the New Jersey Constitution, and answered that question with a resounding "yes" that garnered unanimous approval from every member of the Court. The Court then considered whether the ***209** Domestic Partnership Act (DPA), which distinguished between opposite-sex and same-sex couples, and provided those same-sex couples with some but not all of the rights of marriage, violated the principle of **equal** rights and benefits for same-sex couples. *Id.* at 447–51, 908 *A.*2d 196. The Court noted that although the DPA provided some rights to same-sex couples, there were many marriage benefits that were still denied to same-sex couples, including ownership of property by tenancy of the entirety, certain survivor benefits, back wages owed to deceased spouses, various tuition assistance programs, tax deductions for medical expenses, the testimonial privilege, and more. *Id.* at 448–49, 908 *A.*2d 196. In addition, the Court held ****363** that there was little to no public need for denying same-sex couples the rights and privileges of marriage. *Id.* at 452, 908 *A.*2d 196. The State had defended its statutory scheme by arguing a need to sustain the traditional definition of marriage, but the Court found that argument unpersuasive in the context of whether couples were entitled to the rights of marriage rather than the label of marriage. *Id.* at 452, 908 *A.*2d 196. Indeed, the Court held that, "[t]here 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." *Ibid.* Moreover, the Court succinctly stated that:

> 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.
> [*Id.* at 457, 908 *A.*2d 196.]

The Court concluded 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, 908 *A.*2d 196.

By a 4–3 vote, however, the Court rejected the claim of the *Lewis* plaintiffs that there is a fundamental right to same-sex ***210** marriage under the due process guarantees of the New Jersey Constitution. The Court examined the evolving expansion of rights for LGBT individuals in New Jersey, noting that New Jersey prohibits discrimination on the basis of sexual orientation, and has been at the forefront of recognizing parental rights of same-sex partners. *Id.* at 444, 908 *A.*2d 196. Because the *Lewis* Court found that same-sex couples were entitled to all of the rights and benefits of marriage, the Court did not reach the question of whether New Jersey's Constitution requires giving committed same-sex couples the label of marriage, writing that "[a] proper respect for a coordinate branch of government counsels that we defer until it has spoken." *Id.* at 460, 908 *A.*2d 196. Thus, the Court deferred to the Legislature to determine how to provide all of the rights and benefits of marriage to same-sex couples, whether by parallel statutory scheme or by including same-sex unions within the definition of marriage. *Id.* at 457–59, 908 *A.*2d 196. The Court noted that, "[a]s long as the classifications do not discriminate arbitrarily between persons who are similarly situated, the matter is one of legislative prerogative." *Id.* at 459, 908 *A.*2d 196. The Legislature was given 180 days from the date of the decision to make a choice between creating a parallel statutory structure or extending marriage to same-sex couples. *Id.* at 463, 908 *A.*2d 196.

At the time of the Court's decision in 2006, only Connecticut and Vermont provided for same-sex civil unions, and Massachusetts provided for same-sex marriage. *Id.* at 454, 908 *A.*2d 196. In the wake of *Lewis,* the New Jersey Legislature adopted the Civil Union Act, thereby making New Jersey the fourth state to extend the rights and benefits of marriage to same-sex couples.

B. The Constitutionality of New Jersey's Decision to Deny Same–Sex Couples the Label of "Marriage" Post-*Windsor.*

[24] In *Windsor,* the Supreme Court of the United States struck down Section 3 ****364** of the Defense of Marriage Act, which had defined marriage as between one man and one woman for the ***211** purposes of federal statutes, rules, and regulations. *Windsor, supra,* ––– *U.S.* ––––, 133 *S.Ct.* 2675, 186 *L.Ed.*2d 808. *Windsor* held that the State of New York had elected to give same-sex couples the right to marry, and therefore, "conferred upon them a dignity and status of immense import." *Id.* at ––––, 133 *S.Ct.* at 2681, 186 *L.Ed.*2d at 826. DOMA was found unconstitutional because it singled out "a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty" and "impose[d] a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper." *Id.* at ––––, 133 *S.Ct.* at

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2695–96, 186 *L.Ed.*2d at 830. As a result of the *Windsor* decision, legally married same-sex couples will have access to the rights and privileges contained in the approximately 1,000 statutes and federal regulations that make reference to a person's marital status. *Id.* at ––––, 133 *S.Ct.* at 2683, 186 *L.Ed.*2d at 816.[9]

Plaintiffs argue that in the wake of the *Windsor* decision, the labels of "marriage" and "spouse" denied to same-sex couples by the terms of the Civil Union Act are no longer mere words. That Act defines "civil unions" as the "legally recognized union of two eligible individuals of the same sex" who "shall receive the same benefits and protections and be subject to the same responsibilities as spouses in a marriage." *N.J.S.A.* 37:1–29. In addition, an individual in a civil union is called a "partner in a civil union couple." *N.J.S.A.* 37:1–29. Plaintiffs argue that because federal statutes and regulations use the terms "marriage" and "spouse," the federal benefits that would be available to them if they were lawfully married are not available to them as partners in a civil ***212** union. As such, plaintiffs contend that the parallel structures of marriage and civil unions in New Jersey no longer comport with the New Jersey Constitution under the holding of *Lewis* because, in order for same-sex couples to access all of the rights and benefits of marriage, New Jersey must allow them to legally define their relationships as marriage.

In response to plaintiffs' arguments under *Lewis* post-*Windsor,* the State argues that *Windsor* in fact mandates that same-sex couples in civil unions receive the same federal benefits to which married couples are entitled. The State points to the language, reasoning, and holding of the *Windsor* decision, arguing that it must be interpreted to afford same-sex couples in civil unions all of the same federal benefits as married couples. The State argues that *Windsor* acknowledges same-sex civil unions as equivalent to same-sex marriages. *See Windsor, supra,* ––– *U.S.* at ––––, 133 *S.Ct.* at 2683, 186 *L.Ed.*2d at 816 ("[DOMA's] definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status."); *Id.* at ––––, 133 *S.Ct.* at 2692, 186 *L.Ed.*2d at 826–27 ("By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions ****365** and same-sex marriages, New York sought to give further protection and dignity to that bond."). However, these two references to civil unions do not equate civil unions to marriage, but rather reference the facts that DOMA did not prevent states from enacting civil union *or* marriage statutes, and that New York recognized same-sex civil unions prior to recognizing same-sex marriages. Indeed, both references emphasize the distinction between the two statuses, rather than their equivalence.

In essence, the State attempts to foist all constitutional responsibility for the ineligibility of civil union couples for some federal benefits on the federal government, arguing that it is the federal government that is improperly not deferring to state law definitions and is therefore violating plaintiffs' constitutional rights. The State's argument is essentially a reiteration, on the merits, of ***213** its argument that "plaintiffs have sued the wrong defendant," which the State raised when contending that there is no state action here. The State argues that since domestic relations are an area that has "long been regarded as a virtually exclusive province of the States," the federal government will and must look to the law of New Jersey to decide who is husband and wife or parent and child.[10] *Windsor, supra,* –––*U.S.* at ––––, 133 *S.Ct.* at 2691, 186 *L.Ed.*2d at 814. Because the Civil Union Act, *N.J.S.A.* 37:1–33, requires that whenever legal reference is made to marriage, husband, wife, spouse, family, and so on, "the same shall include a civil union," the State contends that the federal government must recognize a civil union as a marriage and partners to that civil union as spouses for the purposes of federal benefits.

The New Jersey Attorney General's view, however, is not binding on the federal government, which has already acted through several agencies to exclude civil union partners from eligibility for federal marital benefits. As discussed above, the Office of Personnel Management, Department of State, the Department of Labor, the Internal Revenue Service, and the Centers for Medicaid and Medicare, have stated that they will not be recognizing civil unions, and rather will be confining eligibility for benefits to spouses in lawful marriages. Notably, many of the pronouncements establishing these policies mention consultation ***214** with the Attorney General of the United States. It is fair to infer, then, that legal advice was provided to these agencies regarding the appropriate application of the *Windsor* decision. Indeed, these policies are consistent with the explicit language of *Windsor* limiting its reach to same-sex couples legally married in states authorizing such unions: "[t]his opinion and its holding are confined to those lawful marriages." ****366** *Windsor, supra,* ––– *U.S.* at ––––, 133 *S.Ct.* at 2696, 186 *L.Ed.*2d at 830. Moreover, the recent federal pronouncements have the benefit of consistent and straightforward application. There is, for example, no commonly understood definition of what a "civil union" means. Different states use the term differently. *Compare N.J.S.A.* 37:1–29 (defining "civil union" as a union between members of the same sex) *with* 750 *Il. Comp. Stat.* 75/10 (2013) (defining "civil union" as a union between any persons, including those of the same or opposite sex). And California used the term "domestic

partnership" to confer the rights of marriage on same-sex partners before recent court action required that marriage be extended to same-sex couples. *Cal. Fam.Code* § 297 to –299.6 (Deering 2013); *see also Hollingsworth, supra,* — – *U.S.* ——, 133 *S.Ct.* 2652, 186 *L.Ed.*2d 768.

[25] While it is true that one of the potential remedies that exists to cure the harm identified by plaintiffs is for the federal government to recognize New Jersey civil unions as equivalent to marriage for the purpose of all federal marital rights, privileges and benefits, that remedy is beyond the jurisdiction of this court to compel and would likely require plaintiffs to initiate a multitude of lawsuits with uncertain outcomes or wait indefinitely for Congress to act. Indeed, counsel for the State specifically noted at oral argument that the State itself cannot bring an action against the federal government under its *parens patriae* powers seeking **equal** treatment for New Jersey civil union couples.[11] Consequently, ***215** the litigation burden to challenge the policies and determinations of federal agencies that exclude civil union partners would fall squarely on the shoulders of same-sex couples in New Jersey. According to the State, it would be up to plaintiffs to challenge every agency rule, regulation, and policy that does not provide civil union partners **equal** access to federal marriage benefits. Addressing a similar circumstance under the Domestic Partnership Act, the *Lewis* Court noted the "costly and time consuming" processes for adoption required of same-sex partners that was not required of opposite-sex married couples. The discriminatory burden of that litigation cost was just one of the inequalities the *Lewis* Court sought to redress. Similarly, the United States Supreme Court noted in *Troxel v. Granville,* 530 *U.S.* 57, 75, 120 *S.Ct.* 2054, 2065, 147 *L.Ed.*2d 49, 62 (2000), that "the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial" and remanding would force "the parties into additional litigation that would further burden Granville's parental right." Here too, plaintiffs would suffer hardship in the form of a costly and time-consuming litigation burden not required of opposite-sex married couples should this court withhold review and insist that plaintiffs pursue benefit-by-benefit litigation against the federal agencies. Were plaintiffs forced to wait for the results of federal litigation or congressional action, they would remain ineligible for many federal marital benefits, all while expending time and money on piecemeal litigation that may or may not be successful and may or may not produce uniform rulings. Such a result is inconsistent with the **equality** of benefits guaranteed to same-sex couples by *Lewis.*

The State acknowledged in its brief that "a sizeable, *but indeterminate,* number of the over 1,000 benefits and responsibilities that were inapplicable to civil union couples ****367** because of DOMA are now available to them." (emphasis added).[12] However, *Lewis* counsels ***216** that "committed same-sex couples must be afforded on **equal** terms the same rights and benefits enjoyed by married opposite-sex couples." *Lewis, supra,* 188 *N.J.* at 415, 908 *A.*2d 196. Not a sizeable amount of the benefits, but *all* of the same benefits. Every day that the State does not allow same-sex couples to marry, plaintiffs are being harmed, in violation of the clear directive of *Lewis. See Elrod, supra,* 427 *U.S.* at 373, 96 *S.Ct.* at 2690, 49 *L.Ed.*2d at 565 (holding that the loss of First Amendment freedoms, even for a short period of time, "unquestionably constitutes irreparable injury"). Plaintiffs are ineligible for many federal marital benefits at this moment, and their right to **equal** protection under the New Jersey Constitution should not be delayed until some undeterminable future time. In the face of an injury of constitutional proportions, the court must act to ensure the continuing vitality of *Lewis.*

While the current New Jersey statutory structure challenged by plaintiffs had been in place for years before *Windsor* was decided, the court cannot ignore that the State's current system of classification assigns to same-sex couples a label distinct from marriage—a label that now directly affects the availability of federal marriage benefits to those couples. Following the *Windsor* decision of the United States Supreme Court and the subsequent implementation of that decision by several federal agencies, same-sex couples are only afforded the same rights and benefits enjoyed by opposite-sex married couples if they are married. Since New Jersey currently denies marriage to same-sex couples, same-sex ***217** civil union partners in New Jersey are ineligible for many federal marital benefits. The parallel legal structures created by the New Jersey Legislature therefore no longer provide same-sex couples with **equal** access to the rights and benefits enjoyed by married heterosexual couples, violating the mandate of *Lewis* and the New Jersey Constitution's **equal** protection guarantee. Under these circumstances, the current inequality visited upon same-sex civil union couples offends the New Jersey Constitution, creates an incomplete set of rights that *Lewis* sought to prevent, and is not compatible with "a reasonable conception of basic human dignity." *Lewis, supra,* 188 *N.J.* at 452, 908 *A.*2d 196. Any doctrine urging caution in constitutional adjudication is overcome by such a clear denial of **equal** treatment.

Because plaintiffs, and all same-sex couples in New Jersey, cannot access many federal marital benefits as partners in civil unions, this court holds that New Jersey's denial of marriage to same-sex couples now violates Article 1, Paragraph 1 of the New Jersey Constitution as

interpreted by the New Jersey Supreme Court in *Lewis.* The **equality** demanded by *Lewis* now requires that same-sex couples in New Jersey ****368** be allowed to marry. As a result, the court will grant plaintiffs' motion for summary judgment and will order the State to permit any and all same-sex couples, who otherwise satisfy the requirements for civil marriage, to marry in New Jersey.

[26] Since plaintiffs have shown an **equal** protection violation of the New Jersey Constitution that will be remedied by the court's order requiring the State to provide same-sex couples with access to civil marriage, the court will not pass upon the constitutionality of the Civil Union Act itself. Indeed, plaintiffs' complaint asks for declaratory and injunctive relief holding that same-sex couples have the right to marry and does not specifically request invalidation of the Civil Union Act. Moreover, because the court's ruling is based on New Jersey constitutional grounds and provides the relief sought by plaintiffs, the court will not reach their federal **equal** protection claim. Guided by the principle that "courts of ***218** this state will not determine constitutional questions unless absolutely imperative to resolve issues in litigation," the court will enter final judgment in favor of plaintiffs on the State constitutional claim set forth in count one, and will dismiss the federal constitutional claim set forth in count three as moot. *Shabazz v. N.J. Dep't of Corr.,* 385 *N.J.Super.* 117, 121–22, 896 *A.*2d 473 (App.Div.2006) ("A case is moot if the disputed issue was resolved, at least with respect to the parties who instituted the litigation.") (quoting *Advance Inc. v. Montgomery Twp.,* 351 *N.J.Super.* 160, 166, 797 *A.*2d 216 (App.Div.2002)); *City of Camden v. Whitman,* 325 *N.J.Super.* 236, 243, 738 *A.*2d 969 (App.Div.1999); *Worthington v. Fauver,* 88 *N.J.* 183, 192, 440 *A.*2d 1128 (1982) ("an unnecessary decision on constitutional issues should be avoided."). Therefore, summary judgment will be granted for plaintiffs as to count one of the complaint, count three will be dismissed as moot, and final judgment will be entered in favor of plaintiffs.

To allow the State adequate time to prepare to effectuate this ruling or to pursue appellate remedies, the court directs that it take effect on October 21, 2013.

CONCLUSION

Plaintiffs' motion for summary judgment is granted. Under the New Jersey Supreme Court's opinion in *Lewis, supra,* 188 *N.J.* 415, 908 *A.*2d 196, same-sex couples are entitled to the same rights and benefits as opposite-sex couples. The *Lewis* Court held that the New Jersey Constitution required the State to either grant same-sex couples the right to marry or create a parallel statutory structure that allows those couples to obtain *all* the same rights and benefits that are available to opposite-sex married couples. The New Jersey Legislature chose the latter option when it adopted the Civil Union Act. Since the United States Supreme Court decision in *Windsor, supra,* — *U.S.* ——, 133 *S.Ct.* 2675, 186 *L.Ed.*2d 808, invalidated the Defense of Marriage Act, several federal agencies have acted to extend marital benefits to same-sex married couples. However, the majority of those agencies have ***219** not extended eligibility for those benefits to civil union couples. As a result, New Jersey same-sex couples in civil unions are no longer entitled to all of the same rights and benefits as opposite-sex married couples. Whereas before *Windsor* same-sex couples in New Jersey would have been denied federal benefits regardless of what their relationship was called, these couples are now denied benefits solely as a result of the label placed upon them by the State.

The ineligibility of same-sex couples for federal benefits is currently harming same-sex couples in New Jersey in a wide range of contexts: civil union partners who ****369** are federal employees living in New Jersey are ineligible for marital rights with regard to the federal pension system, all civil union partners who are employees working for businesses to which the FMLA applies may not rely on its statutory protections for spouses, and civil union couples may not access the federal tax benefits that married couples enjoy. And if the trend of federal agencies deeming civil union partners ineligible for benefits continues, plaintiffs will suffer even more, while their opposite-sex New Jersey counterparts continue to receive federal marital benefits for no reason other than the label placed upon their relationships by the State. This unequal treatment requires that New Jersey extend civil marriage to same-sex couples to satisfy the **equal** protection guarantees of the New Jersey Constitution as interpreted by the New Jersey Supreme Court in *Lewis.* Same-sex couples must be allowed to marry in order to obtain **equal** protection of the law under the New Jersey Constitution.

All Citations

434 N.J.Super. 163, 82 A.3d 336

Footnotes

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1 This case was overturned by a popular referendum, known as Proposition 8, that amended the California Constitution to allow marriages only to opposite-sex couples. However, Proposition 8 was later ruled unconstitutional. *See Hollingsworth v. Perry,* ––– *U.S.* ––––, 133 *S.Ct.* 2652, 186 *L.Ed.*2d 768 (2013).

2 At the time this lawsuit was initiated, Paula **Dow** was the Attorney General of New Jersey. However, as of this writing, John J. Hoffman is the Acting Attorney General for the State of New Jersey. Jennifer Velez remains the Commissioner of the New Jersey Department of Human Services, and Mary E. O'Dowd is the Commissioner of the New Jersey Department of Health and Senior Services.

3 The IRS and CMS rulings leave open the possibility that a New Jersey couple could marry in a state that allows same-sex marriages, and then return to New Jersey and be eligible for federal benefits. This is known as the "place of celebration" rule. Rev. Rul.2013–17, at 9; CMS Memorandum, at 2. However, other federal agencies have not adopted this rule, and instead base benefits decisions on the laws of the couple's current domicile. *See, e.g.,* 38 *U.S.C.* § 103(c) (veterans' benefits); 17 *U.S.C.* § 101 (copyrights); 29 *C.F.R.* § 825.122 (FMLA).

4 This court, though unable to predict the likelihood that pending or proposed legislation will eventually become law, notes that the press release announcing the bill sponsored by Senator Baldwin states that she first co-sponsored the bill in the House of Representatives in 1999, and had worked on the bill between 2007 and 2012, without its passing.

5 The State's ripeness argument does not apply to plaintiffs' federal claims. Indeed, plaintiffs' federal **equal** protection claim does not necessarily turn on whether the federal government will provide same-sex couples benefits. Rather, plaintiffs pose a rather simple question: whether New Jersey's parallel structures of civil unions for same-sex couples and marriage for opposite-sex couples have a rational basis; that is, are they rationally related to a legitimate government interest? The State does not make any specific ripeness arguments as to why plaintiffs' federal claim is unripe, other than to point to the need for more factual development.

6 The FMLA covers "eligible employees," which includes all employees, except for those employed either by certain federal agencies or by businesses with fewer than fifty employees within seventy-five miles of a worksite. 29 *U.S.C.* § 2611.

7 The *Lewis* decision addressed only claims under Article 1, Paragraph 1 of the New Jersey Constitution, and did not address any federal constitutional claims. As such, *Lewis* can only be read persuasively and not precedentially for a federal **equal** protection analysis.

8 Plaintiffs have also pointed to *In re Estate of Kolacy,* 332 *N.J.Super.* 593, 598–99, 753 *A.*2d 1257 (Ch.Div.2003). There, the court held that it had jurisdiction to decide a state law intestacy issue that affected whether the plaintiff would be entitled to Social Security benefits. This case shows that New Jersey courts have jurisdiction to decide cases that may have the incidental consequence of determining eligibility for federal benefits.

9 Not raised as an issue here is the distinction sometimes made in federal statutes referencing marriage between the state of celebration (where the marriage took place) and the state of domicile (where the couple lives). *Compare* Rev. Ruling 2013–17 (2013) *with* 38 *U.S.C.* § 103(c) (state of domicile rule for veterans' benefits); 17 *U.S.C.* § 101 (copyrights); 29 *C.F.R.* § 825.122 (FMLA). It is possible that same-sex couples in New Jersey who get married in a different state (*i.e.,* New York or Delaware), may be eligible for those federal benefits if the agencies rely on the state of celebration for eligibility for marriage benefits.

10 In support of this proposition, the State points to a recent decision, *Cozen O'Connor, P.C. v. Tobits,* 56 *Emp. Ben. Cas.* (BNA) 1213, 2013 *WL* 3878688 (E.D.Pa. July 29, 2013). There, the court noted that if a state—Illinois—recognizes a party as the "surviving spouse" for the purposes of ERISA benefits, the federal government must do the same. However, the State's reliance on this case is misguided. In *Cozen,* the court noted that an Illinois probate court had specifically determined that under state law, the plaintiff, who was legally married to her partner in Canada, was the "surviving spouse" of her partner. This holding led to the determination in *Cozen* that the plaintiff was also the "surviving spouse" under the ERISA plan. In this case, however, the issue is that, unlike that Illinois probate court, New Jersey expressly denies use of the label "spouse" to same-sex couples. *Cozen* involved federal deference to Illinois's inclusive definition of "spouse" for a determination of federal benefits; here, New Jersey's exclusive definition of "spouse" is challenged as violative of the New Jersey Constitution.

11 The *parens patriae* doctrine precludes a State from initiating a lawsuit without a "quasi-sovereign" interest of its own. *Alfred L.*

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Snapp & Son v. P.R., 458 *U.S.* 592, 600, 102 *S.Ct.* 3260, 3265, 73 *L.Ed.*2d 995, 1003 (1982).

12 The efficacy of this assertion is belied somewhat by the fact that the majority of federal agencies announcing policies post-*Windsor* have limited federal benefits to legally married same-sex couples. Moreover, if, as the State argues, same-sex couples are *already* entitled to federal benefits after *Windsor,* there would be no need for Congress to consider proposed legislation that would extend federal benefits to civil union couples. *See, e.g., Federal Benefits **Equality** Act, H.R.* 2834, 113th Cong., 1st Sess. (2013); *Act to Provide Certain Benefits to Domestic Partners of Federal Employees, H.R.* 3135, 113th Cong. (2013); Press Release, Senator Tammy Baldwin, U.S. Senators Tammy Baldwin and Susan Collins Introduce Bipartisan Legislation to Provide Fairness to Domestic Partners (Sept. 19, 2013), *available at* http://www.baldwin.senate. gov/press-releases/us-senators-tammy-baldwin-and-susan-collins-introduce-bipartisan-legislation-to-provide-fairness-to-domestic-partners (as cited by the State in its supplemental briefing).

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216 N.J. 314
Supreme Court of New Jersey.

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; Plaintiffs–Respondents,
v.
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–Movants.

Oct. 18, 2013.

Synopsis
Background: Six same-sex couples, their children, and advocacy group brought action against Attorney General and the Commissioners of Departments of Human Services (DHS) and Health and Senior Services (HSS), alleging that civil-union status provided under Civil Union Act did not provide **equal** treatment to same-sex couples. The Superior Court, Law Division, Mercer County, Mary C. Jacobson, J., 2013 WL 5397372, entered summary judgment in favor of plaintiffs, and denied defendants' motion for stay pending appeal. State appealed and sought direct certification, which was granted.

Holdings: The Supreme Court, Rabner, C.J., held that:

[1] State would not suffer irreparable harm without stay;

[2] State did not show a reasonable probability or likelihood of success on the merits;

[3] balance of hardships did not favor granting stay; and

[4] public interest did not support grant of stay.

Motion denied.

West Headnotes (12)

[1] **Appeal and Error**
Application and proceedings thereon

To evaluate an application for a stay pending appeal, Supreme Court in essence considers the soundness of the trial court's ruling and the effect of a stay on the parties and the public.

2 Cases that cite this headnote

[2] **Appeal and Error**
Upon Allowance by Court or Judge

A party seeking a stay pending appeal must demonstrate that (1) relief is needed to prevent irreparable harm, (2) the applicant's claim rests on settled law and has a reasonable probability of succeeding on the merits, and (3) balancing the relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were.

8 Cases that cite this headnote

[3] **Appeal and Error**
Application and proceedings thereon

The party moving for a stay pending appeal has the burden to prove each of the factors for obtaining such relief by clear and convincing evidence.

Cases that cite this headnote

[4] **Appeal and Error**
Grounds for Allowance

In acting only to preserve the status quo, the court considering a motion for stay pending appeal may place less emphasis on a particular factor for determining whether such relief is warranted if another greatly requires the issuance of the remedy.

1 Cases that cite this headnote

[5] **Appeal and Error**
Grounds for Allowance

When a case presents an issue of significant public importance, a court must consider the public interest in addition to the traditional factors for determining whether a stay pending appeal is warranted.

2 Cases that cite this headnote

[6] **Appeal and Error**
Grounds for Allowance

State would not suffer irreparable harm in absence of a stay pending appeal of trial court order granting summary judgment in favor of same-sex couples, their children, and advocacy group, in their action alleging that civil-union status provided under Civil Union Act did not satisfy **Equal** Protection Clause; trial court did not strike down the Civil Union Act, but instead directed the State to allow the couples to enter into civil marriage, and if the plaintiffs were not ultimately successful in their action, county clerks could have been ordered to stop issuing marriage licenses to same-sex couples and taken steps to nullify licenses that were issued. N.J.S.A. Const. Art. 1, par. 1; N.J.S.A. 37:1–28 et seq.

8 Cases that cite this headnote

[7] **Constitutional Law**
Marriage and civil unions
Marriage and Cohabitation
Sex or Gender; Same-Sex Marriage
Marriage and Cohabitation
Same-sex relationships in general

Because the Civil Union Act offers same-sex couples civil unions, but not the option of marriage, and federal agencies provided federal benefits only to married same-sex couples, same-sex couples in New Jersey are deprived of the full rights and benefits the State Constitution guarantees in the **Equal** Protection Clause. N.J.S.A. Const. Art. 1, par. 1; N.J.S.A. 37:1–28 et seq.

9 Cases that cite this headnote

[8] **Appeal and Error**
Grounds for Allowance

State did not show a reasonable probability or likelihood of success on the merits, as required for stay pending appeal of trial court order granting summary judgment in favor of same-sex couples, their children, and advocacy group, in their action alleging that civil-union status provided under Civil Union Act did not satisfy **Equal** Protection Clause; in light of federal agencies' practice of providing federal benefits to only married same-sex couples, Civil Union Act no longer achieved purpose of providing full and **equal** rights and benefits to same-sex couples, federal agencies followed New Jersey rule about who could marry, and State's statutory scheme effectively denied committed same-sex partners in New Jersey the ability to receive federal benefits afforded to married partners. N.J.S.A. Const. Art. 1, par. 1; N.J.S.A. 37:1–28 et seq.

9 Cases that cite this headnote

[9] **Appeal and Error**

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Grounds for Allowance

Balance of hardships did not favor granting stay pending appeal of trial court order granting summary judgment in favor of same-sex couples, their children, and advocacy group, in their action alleging that civil-union status provided under Civil Union Act did not satisfy **Equal** Protection Clause; although the State identified certain abstract harms, those harms were weighed against immediate and concrete violations of the **equal** protection rights of the couples and their children. N.J.S.A. Const. Art. 1, par. 1; N.J.S.A. 37:1–28 et seq.

Cases that cite this headnote

[10] **Appeal and Error**
Grounds for Allowance

Public interest did not support grant of stay pending State's appeal of trial court order granting summary judgment in favor of same-sex couples, their children, and advocacy group, in their action alleging that civil-union status provided under Civil Union Act did not satisfy **Equal** Protection Clause; there was no public interest in depriving a group of New Jersey residents of their constitutional right to **equal** protection while the appeals process unfolded. N.J.S.A. Const. Art. 1, par. 1; N.J.S.A. 37:1–28 et seq.

Cases that cite this headnote

[11] **Courts**
Discretion as to Exercise of Jurisdiction

When courts face questions that have far-reaching social implications, there is a benefit to letting the political process and public discussion proceed first.

Cases that cite this headnote

[12] **Constitutional Law**
Necessity of Determination

Courts should avoid reaching constitutional questions unless required to do so; but, when a party presents a clear case of ongoing unequal treatment, and asks the court to vindicate constitutionally protected rights, a court may not sidestep its obligation to rule for an indefinite amount of time.

Cases that cite this headnote

West Codenotes

Held Unconstitutional
N.J.S.A. 37:1–28, 37:1–33

Recognized as Unconstitutional
1 U.S.C.A. § 7

Attorneys and Law Firms

****1038** Jean P. Reilly, Deputy Attorney General, submitted a brief on behalf of movants (John J. Hoffman, Acting Attorney General, attorney; Kevin R. Jesperson, Assistant Attorney General, of counsel; Ms. Reilly and Robert T. Lougy, Assistant Attorney General, on the briefs).

Lawrence S. Lustberg submitted a brief on behalf of respondents (Gibbons and Lambda Legal, attorneys; Mr. Lustberg, Benjamin Yaster, Newark, and Hayley J. Gorenberg, a member of the New York bar, on the brief).

Opinion

Chief Justice RABNER delivered the opinion of the Court.

***318** In 2006, this Court unanimously held that the New Jersey Constitution guarantees same-sex couples in committed relationships the same rights and benefits as married couples of the opposite sex. *Lewis v. Harris,* 188 *N.J.* 415, 423, 908 *A.*2d 196 (2006). In response, the Legislature passed the Civil Union Act and established "civil unions." *N.J.S.A.* 37:1–28 to –36. Civil unions are meant to guarantee the rights and benefits of marriage, but the law does not allow same-sex partners to "marry." *N.J.S.A.* 37:1–28, –33.

Plaintiffs filed a lawsuit in 2011 and alleged that civil-union status fails to provide equal treatment to same-sex couples. Plaintiffs are Garden State Equality, an advocacy group, and six same-sex couples and their children.

The Supreme Court's recent ruling in *United States v. Windsor,* 570 *U.S.* ––––, 133 *S.Ct.* 2675, 186 *L.Ed.*2d 808 (2013), changed the ***319** contour of the pending lawsuit. In *Windsor,* the Supreme Court struck down part of the federal Defense of Marriage Act (DOMA). *Id.* at ––––, 133 *S.Ct.* at 2696, 186 *L.Ed.*2d at 830. The Court held that DOMA violated the federal Constitution by denying lawfully married same-sex couples the benefits given to married couples of the opposite sex. *Ibid.*

Plaintiffs moved for summary judgment in this case after the decision in *Windsor.* On September 27, 2013, the Honorable Mary C. Jacobson, Assignment Judge of the Superior Court for the Mercer Vicinage, issued a comprehensive, 53–page decision and granted plaintiffs' motion. Judge Jacobson found that in the wake of *Windsor,* civil-union partners are being denied equal access to federal benefits because of the label placed on their relationship. The trial court therefore held that the State must extend the right to civil marriage to same-sex couples. An accompanying order directed that beginning on October 21, 2013, State officials must allow same-sex couples, who otherwise qualify for civil marriage, to marry in New Jersey.

The Attorney General, acting on behalf of the named defendants, moved for a stay ****1039** of the trial court's order. Judge Jacobson denied the motion, and the State now appeals. On October 11, 2013, we granted the State's motion for direct certification and took jurisdiction over the stay motion.

At the heart of this motion are certain core facts and principles. *Lewis* guaranteed same-sex couples equal rights under the State Constitution. After *Windsor,* a number of federal agencies extended marital benefits to same-sex couples who are lawfully married, but not to partners in civil unions. As a result, civil-union partners in New Jersey today do not receive the same benefits as married same-sex couples when it comes to family and medical leave, Medicare, tax and immigration matters, military and veterans' affairs, and other areas. The State Constitution's guarantee of equal protection is therefore not being met.

***320** [1] To evaluate an application for a stay, this Court in essence considers the soundness of the trial court's ruling and the effect of a stay on the parties and the public. *See Crowe v. De Gioia,* 90 *N.J.* 126, 447 *A.*2d 173 (1982). Largely for the reasons stated in Judge Jacobson's opinion dated October 10, 2013, we deny the State's motion for a stay. The State has advanced a number of arguments, but none of them overcome this reality: same-sex couples who cannot marry are not treated equally under the law today. The harm to them is real, not abstract or speculative.

Because, among other reasons, the State has not shown a reasonable probability of success on the merits, the trial court's order—directing State officials to permit same-sex couples, who are otherwise eligible, to enter into civil marriage starting on October 21, 2013—remains in effect.

I.

[2] [3] [4] Applications for a stay pending appeal are governed by the familiar standard outlined in *Crowe. See, e.g., In re Comm'r of Ins. Deferring Certain Claim Payments by N.J.A.F.I.U.A.,* 256 *N.J.Super.* 553, 560, 607 *A.*2d 992 (App.Div.1992). A party seeking a stay must demonstrate that (1) relief is needed to prevent irreparable harm; (2) the applicant's claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the "relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were." *McNeil v. Legis. Apportionment Comm'n,* 176 *N.J.* 484, 486, 825 *A.*2d 1124 (2003) (LaVecchia, J., dissenting) (citing *Crowe, supra,* 90 *N.J.* at 132–34, 447 *A.*2d 173). The moving party has the burden to prove each of the *Crowe* factors by clear and convincing evidence. *Brown v. City of Paterson,* 424 *N.J.Super.* 176, 183 (App.Div.2012) (citation omitted). "In acting only to preserve the status quo, the court may 'place less emphasis on a particular *Crowe* factor if another greatly requires the issuance of the remedy.' " *Ibid.* (citation omitted).

***321** [5] When a case presents an issue of "significant public importance," a court must consider the public interest in addition to the traditional *Crowe* factors. *McNeil, supra,* 176 *N.J.* at 484, 825 *A.*2d 1124.

II.

To provide the necessary backdrop for this motion, we briefly review the principal case law and the Civil Union Act.

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In *Lewis, supra,* seven same-sex couples applied for marriage licenses. 188 *N.J.* at 423–24, 908 *A.*2d 196. Different municipalities denied the requests because State law confined marriage to opposite-sex couples. *Id.* at 424, 908 *A.*2d 196. The couples sued State officials and challenged the constitutionality of the State's marriage laws. *Ibid.* The couples argued that the ****1040** laws violated the **equal** protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, *id.* at 427, 908 *A.*2d 196, which declares that all persons possess "unalienable rights" to enjoy life, liberty, and property, and to pursue happiness.

After reviewing various rights afforded to married but not same-sex couples, *id.* at 448–49, 908 *A.*2d 196, the Court concluded that the State's domestic partnership laws "failed to bridge the inequality gap," *id.* at 448, 908 *A.*2d 196. Because the Court could not "find a legitimate public need for an unequal legal scheme of benefits and privileges that disadvantage[d] committed same-sex couples," *id.* at 453, 908 *A.*2d 196, the Court held that the disparity violated the Constitution's guarantee of **equal** protection, *id.* at 423, 908 *A.*2d 196. The Court therefore directed the State to "provide to committed same-sex couples, *on* ***equal*** *terms,* the *full rights and benefits* enjoyed by heterosexual married couples." *Id.* at 463, 908 *A.*2d 196 (emphases added).

To comply with that holding, the Court deferred to the Legislature to make the following choice: either grant same-sex couples the right to enter into a civil marriage, or "enact a parallel statutory structure" under a different name "so long as the rights ***322** and benefits of civil marriage are made **equally** available to same-sex couples." *Id.* at 423, 463, 908 *A.*2d 196.

The Legislature chose the second option. It enacted the Civil Union Act, which established civil unions in February 2007. *See N.J.S.A.* 37:1–28 to –36. The act provides that civil unions are to be treated the same as marriages. *N.J.S.A.* 37:1–28, –33. The statute, though, does not allow same-sex couples to marry and does not extend the title "marriage" to civil unions.

Four months ago, the Supreme Court decided *Windsor.* The case involved two women, Edith Windsor and Thea Spyer, who began a long-term relationship in 1963 and later married in Canada. *Windsor, supra,* 570 *U.S.* at ——, 133 *S.Ct.* at 2683, 186 *L.Ed.*2d at 816. The State of New York recognized their marriage. *Ibid.*

When Spyer died in 2009, she left her entire estate to Windsor. *Ibid.* The Defense of Marriage Act, however, barred Windsor from claiming the federal estate tax exemption available to surviving spouses. *Ibid.*[1] As a result, Windsor had to pay $363,053 in estate taxes. *Ibid.* After the Internal Revenue Service denied her request for a refund, Windsor filed suit and asserted that DOMA was unconstitutional. *Ibid.*

The Court observed that "[t]he avowed purpose and practical effect of the law ... are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." ***323** *Id.* at ——, 133 *S.Ct.* at 2693, 186 *L.Ed.*2d at 827. The Supreme Court held that DOMA violated basic due process and **equal** protection principles under the Fifth Amendment to the United States Constitution. *Id.* at ——, ——, 133 *S.Ct.* at 2693, 2695, 186 *L.Ed.*2d at 827, 830. By striking down the part of DOMA in question, the Court did not allow federal laws and regulations ****1041** to continue to deny lawfully married same-sex couples the benefits provided to married opposite-sex couples. The Court also stated that its "opinion and its holding are confined to ... lawful marriages." *Id.* at ——, 133 *S.Ct.* at 2696, 186 *L.Ed.*2d at 830.

After *Windsor,* plaintiffs in this case moved for summary judgment, and the trial court granted the motion. Judge Jacobson reasoned that plaintiffs were not eligible for marital benefits that a number of federal agencies had extended to same-sex married couples in light of *Windsor.* She observed that "New Jersey same-sex couples in civil unions" were "now denied benefits solely as a result of the label placed upon them by the State." In her judgment, the harm to same-sex couples in a "wide range of contexts" violated *Lewis* and the State Constitution's guarantee of **equal** protection. That "unequal treatment," she ruled, "require[d] that New Jersey extend civil marriage to same-sex couples."

III.

We turn now to the merits of the State's motion for a stay and consider each of the relevant factors.

A.

[6] The State argues that it will suffer irreparable harm in a number of ways if Judge Jacobson's order is not stayed. First, it claims "an injury to its sovereign interests whenever one of its democratically enacted laws is

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declared unconstitutional." The abstract harm the State alleges begs the ultimate question: if a law is unconstitutional, how is the State harmed by not being able to enforce it? *See* ***324** *Joelner v. Vill. of Wash. Park,* 378 *F.*3d 613, 620 (7th Cir.2004) ("[T]here can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute [.]") (citing *Connection Distrib. Co. v. Reno,* 154 *F.*3d 281, 288 (6th Cir.1998)).

The State relies on other federal cases for the broad proposition it advances. *See Maryland v. King,* ––– *U.S.* ––––, ––––, 133 *S.Ct.* 1, 3, 183 *L.Ed.*2d 667, 670 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,* 434 *U.S.* 1345, 1351, 98 *S.Ct.* 359, 363, 54 *L.Ed.*2d 439, 445 (1977) (Rehnquist, J., in chambers)). But the State cites no New Jersey case law for the principle that enjoining a statute's enforcement always amounts to irreparable harm. In any event, the trial court did not strike down the Civil Union Act; it instead directed the State to allow same-sex couples to enter into civil marriage.

Second, the State contends that "once it grants marriage licenses to even a handful of same-sex couples, it is virtually impossible ... to undo that action later"; the harm would be "irremediable." The State does not explain why that is so. As Judge Jacobson noted, California's experience reveals the opposite. *See Lockyer v. City and Cnty. of San Francisco,* 33 *Cal.*4th 1055, 17 *Cal.Rptr.*3d 225, 95 *P.*3d 459, 464, 494 (2004) (decision by California Supreme Court ordering San Francisco county clerk to stop issuing marriage licenses to same-sex couples and to take specific steps to nullify 4,000 licenses that had already been issued).[2]

The State has presented no explanation for how it is tangibly or actually harmed by allowing same-sex couples to marry. It ****1042** has not made a forceful showing of irreparable harm.

***325** B.

Next, to obtain a stay, the State must demonstrate that its underlying legal claim is settled, and it must show a reasonable probability of success on the merits. *See Crowe, supra,* 90 *N.J.* at 133, 447 *A.*2d 173. The State has not made either showing.

The State flips around the *Crowe* standard and argues that *plaintiffs*' interpretation of *Windsor* and its challenge to the Civil Union Act present unsettled questions of constitutional law. As Judge Jacobson correctly observed, the *Crowe* standard requires the moving party—in this case, the State—to show "that *its* legal right is settled." *See ibid.* Regardless, the State maintains that the premise underlying *Windsor* means that civil-union partners *are* entitled to federal benefits. That interpretation of *Windsor* has not been followed by the United States Department of Justice or any number of federal agencies. The Supreme Court in *Windsor, supra,* declared that its "opinion and its holding are *confined* to ... lawful [same-sex] *marriages.*" 570 *U.S.* at ––––, 133 *S.Ct.* at 2696, 186 *L.Ed.*2d at 830 (emphases added). In the wake of that decision, federal agencies have directed that various benefits be made available to same-sex married couples, but not to civil-union partners. That, in turn, deprives partners in a civil union of the rights and benefits they would receive as married couples. The State's thoughtful position about what federal law should provide cannot substitute for federal action; nor can the State's views bind the federal government.

[7] To assess the State's chance to succeed on the merits and overturn the trial court's judgment, we return to the core principles that frame this case. In *Lewis, supra,* this Court held that 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." 188 *N.J.* at 463, 908 *A.*2d 196. The Legislature, in turn, enacted the Civil Union Act, which allows same-sex couples to enter into a civil union. *See N.J.S.A.* 37:1–28 to –36. The law does not permit ***326** them to marry. *Windsor* then changed the landscape. By striking the part of DOMA that defined marriage as "a legal union between one man and one woman," 1 *U.S.C.A.* § 7, the United States Supreme Court paved the way to extending federal benefits to married same-sex couples. *Windsor, supra,* 570 *U.S.* at ––––, 133 *S.Ct.* at 2696, 186 *L.Ed.*2d at 830. A number of federal agencies responded and now provide various benefits to married same-sex couples. Because State law offers same-sex couples civil unions but not the option of marriage, same-sex couples in New Jersey are now being deprived of the full rights and benefits the State Constitution guarantees.

[8] The State presents three arguments to show that its appeal has a reasonable probability of success. First, the State claims that plaintiffs "will not be able to overcome the highest presumption of constitutional validity that attaches to statutory enactments." Once again, Judge Jacobson did not strike down a statute. The Civil Union

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Act, while it may not see much use in the coming months, remains available for people who choose to use it. Even more important, though, the statute was presumptively valid "so long as" it provided full and **equal** rights and benefits to same-sex couples. *Lewis, supra,* 188 *N.J.* at 423, 908 *A.*2d 196. Based on recent events, the Civil Union Act no longer achieves that purpose.

****1043** Second, the State argues that plaintiffs' "claims fail on federalism grounds." Underlying part of this argument is the State's interpretation of *Windsor,* which, as noted above, is at odds with the practice of the federal government. Although the State claims that the federal government must "defer to the states in matters concerning domestic relations," federal agency rulings are following New Jersey's rule about who may marry.

Third, the State claims that plaintiffs' **equal** protection claim must fail because "the State's action is not legally cognizable." The State argues that it has followed *Lewis* and provided "same-sex couples with all *State* marriage benefits," and that it cannot be responsible for "federal bureaucrats that ... refused to extend federal benefits."

***327** *Lewis* is not limited in that way. The decision recognized that it could not alter federal law, *Lewis, supra,* 188 *N.J.* at 459 n. 25, 908 *A.*2d 196, yet at the same time directed the State to provide same-sex couples "the *full* rights and benefits enjoyed by heterosexual married couples," *id.* at 463, 908 *A.*2d 196 (emphasis added). *Lewis* left it to the Legislature to revise State law in a way that satisfied the Constitution's guarantee of **equal** protection. *Id.* at 457–62, 908 *A.*2d 196. And the State acted in response. It enacted the Civil Union Act and created a structure that allows same-sex couples to enter into a civil union but not to marry. *See N.J.S.A.* 37:1–28 to –36. That structure today provides the framework for decisions by federal authorities. The State's statutory scheme effectively denies committed same-sex partners in New Jersey the ability to receive federal benefits now afforded to married partners. The trial court therefore correctly found cognizable action by the State.

We conclude that the State has not shown a reasonable probability or likelihood of success on the merits.

C.

[9] *Crowe, supra,* also requires that we balance the relative hardships to the parties. 90 *N.J.* at 134, 447 *A.*2d 173. The State identified certain abstract harms that are addressed above. Weighed against them are immediate and concrete violations of plaintiffs' right to **equal** protection under the law. Because plaintiffs cannot marry under State law, they and their children are simply not eligible for a host of federal benefits available to same-sex married couples today.

For example, partners in a civil union cannot receive a number of health related benefits: they cannot claim leave under the Family and Medical Leave Act if a partner becomes sick or is injured;[3] they cannot get coverage for health benefits as a ***328** "spouse" of a federal employee;[4] and they cannot get certain Medicare benefits, including services in a skilled nursing facility for a spouse.[5]

****1044** Unlike same-sex married couples, civil-union partners also cannot file a joint federal tax return;[6] they cannot be considered a "spouse" for immigration purposes;[7] and they cannot participate in a Survivor Benefit Plan as a spouse of an active or retired member of the military.[8] All of these and other examples affect not only partners to a civil union but also their children.

Lewis guarantees **equal** treatment under the law to same-sex couples. That constitutional guarantee is not being met. And the ongoing injury that plaintiffs face today cannot be repaired with an award of money damages at a later time. *See Crowe, supra,* 90 *N.J.* at 132–33, 447 *A.*2d 173 ("Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages."); *see also LaForest v. Former Clean Air* ***329** *Holding Co.,* 376 *F.*3d 48, 55 (2d Cir.2003). Plaintiffs highlight a stark example to demonstrate the point: if a civil-union partner passes away while a stay is in place, his or her surviving partner and any children will forever be denied federal marital protections.

The balance of hardships does not support the motion for a stay.

D.

[10] Finally, because this case presents an issue of significant public importance, we consider the public interest. *McNeil, supra,* 176 *N.J.* at 484, 825 *A.*2d 1124. What is the public's interest in a case like this? Like Judge Jacobson, we can find no public interest in depriving a group of New Jersey residents of their constitutional right to **equal** protection while the appeals process unfolds.

The State cites various cases in which courts have granted

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a stay. *See, e.g., Comm. to Recall Robert Menendez from the Office of U.S. Senator v. Wells,* 413 *N.J.Super.* 435, 458, 995 *A.*2d 1109 (App.Div.2010) (staying order that recall process begin), *rev'd on other grounds,* 204 *N.J.* 79, 7 *A.*3d 720 (2010) (finding State recall process of United States Senator unconstitutional); *PENPAC, Inc. v. Morris Cnty. Mun. Utils. Auth.,* 299 *N.J.Super.* 288, 293, 690 *A.*2d 1094 (App.Div.1997) (staying order that voided government contract for violation of public bidding requirements), *certif. denied,* 150 *N.J.* 28, 695 *A.*2d 670 (1997); *Palamar Constr., Inc. v. Pennsauken,* 196 *N.J.Super.* 241, 245, 482 *A.*2d 174 (App.Div.1983) (same). Those rulings served the public interest in light of the particular circumstances presented.

In other situations, courts have declined to enter a stay in order to protect individual constitutional rights. *See, e.g., Armstrong v. O'Connell,* 416 *F.Supp.* 1325, 1332 (E.D.Wis.1976) (denying stay of order that enjoined defendants from discriminating on basis of race in operation of public schools); *Fortune v. Molpus,* 431 *F.*2d 799, 804 (5th Cir.1970) (vacating single-judge stay of District Court's order directing university officials to permit civil rights activist to speak on campus). We find that the compelling public ***330** interest in this case is to avoid violations of the constitutional guarantee of **equal** treatment for same-sex couples.

****1045** [11] [12] The State argues that we should give the democratic process "a chance to play out" rather than act now. When courts face questions that have far-reaching social implications, *see Lewis, supra,* 188 *N.J.* at 461, 908 *A.*2d 196, there is a benefit to letting the political process and public discussion proceed first. Courts should also "avoid reaching constitutional questions unless required to do so." *Comm. to Recall Menendez, supra,* 204 *N.J.* at 95–96, 7 *A.*3d 720 (citing *Harris v. McRae,* 448 *U.S.* 297, 306–07, 100 *S.Ct.* 2671, 2683, 65 *L.Ed.*2d 784, 798 (1980); *Randolph Town Ctr. v. Cnty. of Morris,* 186 *N.J.* 78, 80, 891 *A.*2d 1202 (2006)). But when a party presents a clear case of ongoing unequal treatment, and asks the court to vindicate constitutionally protected rights, a court may not sidestep its obligation to rule for an indefinite amount of time. Under those circumstances, courts do not have the option to defer.

IV.

We have before us today a motion for a stay. To rule on the stay motion, we applied settled legal standards and determined that the State has not shown a reasonable probability it will succeed on the merits. Additional arguments on the merits will be considered in January 2014.

We conclude that the State has not made the necessary showing to prevail on any of the *Crowe* factors and that the public interest does not favor a stay. We therefore deny the State's motion for a stay. As a result, the trial court's order dated September 27, 2013 remains in full force and effect. State officials shall therefore permit same-sex couples, who are otherwise eligible, to enter into civil marriage beginning on October 21, 2013.

Justices LaVECCHIA, ALBIN, HOENS and PATTERSON and Judges RODRÍGUEZ and CUFF (both temporarily assigned), join in Chief Justice RABNER's opinion.

All Citations

216 N.J. 314, 79 A.3d 1036

Footnotes

1 Section 3 of DOMA defined "marriage" and "spouse": "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 *U.S.C.A.* § 7. DOMA applied to more than "1,000 federal statutes and the whole realm of federal regulations." *Windsor,* 570 *U.S.* at ——, 133 *S.Ct.* at 2690, 186 *L.Ed.*2d at 824. Those laws and regulations "pertain [ ] to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits." *Id.* at ——, 133 *S.Ct.* at 2694, 186 *L.Ed.*2d at 828.

2 Additional history of what occurred in California after 2004 can be found in *Hollingsworth v. Perry,* —— *U.S.* ——, 133 *S.Ct.* 2652, 186 *L.Ed.*2d 768 (2013), and the lower court decisions in the case.

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3 *Fact Sheet # 28F: Qualifying Reasons for Leave Under the Family and Medical Leave Act,* U.S. Dep't of Labor, Wage and Hour Div., http://www. dol. gov/whd/regs/compliance/whdfs28f.pdf (last visited Oct. 17, 2013).

4 Letter from John O'Brien, Dir. of Healthcare and Ins., U.S. Office of Personnel Mgmt., Fed. Emp. Ins. Operations, to All Carriers (July 3, 2013), *available at* http://www.opm.gov/healthcare–insurance/healthcare/carriers/2013/2013–20.pdf.

5 Press Release, U.S. Dep't of Health & Human Servs., HHS Announces First Guidance Implementing Supreme Court's Decision on the Defense of Marriage Act (Aug. 29, 2013), *available at* http://www.hhs. gov/news/press/2013pres/08/20130829a.html; Memorandum from Danielle R. Moon, Dir., Medicare Drug & Health Plan Contract Admin. Grp., to All Medicare Advantage Orgs. (Aug. 29, 2013), *available at* http://hr.cch. com/hld/SNF–Benefits–after–USvWindsorDOMA–decison8–29–13.pdf.

6 Internal Revenue Service, Rev. Rul.2013–17, at 12, http:// www.irs. gov/pub/irs–drop/rr–13–17.pdf (last visited Oct. 17, 2013).

7 *U.S. Visas for Same–Sex Spouses,* Travel.State.Gov, U.S. Dep't of State, http://travel.state.gov/visa/frvi/frvi_6036.html# (last visited Oct. 17, 2013).

8 Press Release, Chief of Naval Personnel Public Affairs, U.S. Dep't of the Navy, Same–Sex Spouses of Military Retirees Now Eligible for Survivor Benefits Program (Sept. 9, 2013, 3:22 PM), *available at* http:// www.navy. mil/submit/display.asp?story_id=76431.

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202 N.J. 340
Supreme Court of New Jersey.

Mark **LEWIS**, et al., Plaintiffs-Movants,
v.
Gwendolyn L. **HARRIS**, etc., et al., Defendants-Respondents.

July 26, 2010.

***340** ORDER

This matter having been opened to the Court by plaintiffs' motion for an order in aid of litigant's rights, *Rule* 1:10-3, and the Court having considered the application, together with the briefs and exhibits filed in support thereof, and for good cause shown, it is hereby ORDERED:

This matter cannot be decided without the development of an appropriate trial-like record. Plaintiffs' motion is therefore denied without prejudice to plaintiffs filing an action in Superior Court and seeking to create a record there. We reach no conclusion on the merits of plaintiffs' allegations regarding the constitutionality of the Civil Union Act, *N.J.S.A.* 37:1-28 to -36.

Justices LONG, LaVECCHIA, and ALBIN, dissenting.

Plaintiffs are six committed same-sex couples who have filed a motion in aid of litigants' rights claiming that almost four years after ***Lewis** v. **Harris***, 188 *N.J.* 415, 908 A.2d 196 (2006), and three-and-one-half years after passage of the Civil Union Act, *N.J.S.A.* 37:1-28 to -36, they still are denied the "full rights and benefits enjoyed by heterosexual married couples" mandated by the equal-protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution. In their papers, plaintiffs detail a host of workplace, public accommodation, family law, economic, and various other "rights and benefits" that, they allege, are not afforded to them despite the Civil Union Act and the command in ***Lewis***.

***341** In addition to certifications by the parties, plaintiffs cite to the report of the Civil Union Review Commission, *N.J.S.A.* 37:1-36, a body established by the Legislature as part of the Civil Union Act to evaluate the Act's success, which concluded that civil unions have failed to deliver the mandate of equality guaranteed by Article I, Paragraph 1. However, plaintiffs' record has not been tested in the crucible of a litigated matter. Thus, we realize that we do not have a sufficient basis for debating the merits of the application, which raises a matter of general public importance and one of constitutional significance.

The next step should be the development of a record on which those important issues can be resolved quickly. At the very least, oral argument would have helped to guide us on the best procedural course for creating such a record.

We are disappointed that three members of the Court have voted to deny the motion without oral argument and that plaintiffs must now begin anew and file a complaint in the Superior Court seeking the relief to which they claim they are entitled. If plaintiffs' allegations are true-and we will not surmise whether they are or are not-then the constitutional inequities should be addressed without any unnecessary delay. Therefore, we ****228** would hope that the proceedings in the Superior Court will be conducted with all deliberate speed.

Chief Justice RABNER and Justices RIVERA-SOTO and HOENS join in the Court's Order. Justices LONG, LaVECCHIA and ALBIN dissent.

All Citations

202 N.J. 340, 997 A.2d 227 (Mem)

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GARDEN STATE EQUALITY v. DOW (2013)

Supreme Court of New Jersey.

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; Plaintiffs–Respondents, v. 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–Movants.

Decided: October 18, 2013

Jean P. Reilly, Deputy Attorney General, submitted a brief on behalf of movants (John J. Hoffman, Acting Attorney General, attorney; Kevin R. Jesperson, Assistant Attorney General, of counsel; Ms. Reilly and Robert T. Lougy, Assistant Attorney General, on the briefs). Lawrence S. Lustberg submitted a brief on behalf of respondents (Gibbons and Lambda Legal, attorneys; Mr. Lustberg, Benjamin Yaster and Hayley J. Gorenberg, a member of the New York bar, on the brief).

In 2006, this Court unanimously held that the New Jersey Constitution guarantees same-sex couples in committed relationships the same rights and benefits as married couples of the opposite sex. Lewis v. Harris, 188 N.J. 415, 423, 908 A.2d 196 (2006). In response, the Legislature passed the Civil Union Act and established “civil unions.” N.J.S.A. 37:1–28 to –36. Civil unions are meant to guarantee the rights and benefits of marriage, but the law does not allow same-sex partners to “marry.” N.J.S.A. 37:1–28, –33.

Plaintiffs filed a lawsuit in 2011 and alleged that civil-union status fails to provide equal treatment to same-sex couples. Plaintiffs are Garden State Equality, an advocacy group, and six same-sex couples and their children.

The Supreme Court's recent ruling in United States v. Windsor, 570 U.S. −−−−, 133 S.Ct. 2675, 186 L. Ed.2d 808 (2013), changed the contour of the pending lawsuit. In Windsor, the Supreme Court struck down part of the federal Defense of Marriage Act (DOMA). Id. at −−−−, 133 S.Ct. at 2696186 L. Ed.2d at 830. The Court held that DOMA violated the federal Constitution by denying lawfully married same-sex couples the benefits given to married couples of the opposite sex. Ibid.

Plaintiffs moved for summary judgment in this case after the decision in Windsor. On September 27, 2013, the Honorable Mary C. Jacobson, Assignment Judge of the Superior Court for the Mercer Vicinage, issued a comprehensive, 53–page decision and granted plaintiffs' motion. Judge Jacobson found that in the wake of Windsor, civil-union partners are being denied equal access to federal benefits because of the label placed on their relationship. The trial court therefore held that the State must extend the right to civil marriage to same-sex couples. An accompanying order directed that beginning on October 21, 2013, State officials must allow same-sex couples, who otherwise qualify for civil marriage, to marry in New Jersey.

The Attorney General, acting on behalf of the named defendants, moved for a stay of the trial court's order. Judge Jacobson denied the motion, and the State now appeals. On October 11, 2013, we granted the State's motion for direct certification and took jurisdiction over the stay motion.

At the heart of this motion are certain core facts and principles. Lewis guaranteed same-sex couples equal rights under the State Constitution. After Windsor, a number of federal agencies extended marital benefits to same-sex couples who are lawfully married, but not to partners in civil unions. As a result, civil-union partners in New Jersey today do not receive the same benefits as married same-sex couples when it comes to family and medical leave, Medicare, tax and immigration matters, military and veterans' affairs, and other areas. The State Constitution's guarantee of equal protection is therefore not being met.

To evaluate an application for a stay, this Court in essence considers the soundness of the trial court's ruling and the effect of a stay on the parties and the public. See Crowe v. De Gioia, 90 N.J. 126, 447 A.2d 173 (1982). Largely for the reasons stated in Judge Jacobson's opinion dated October 10, 2013, we deny the State's motion for a stay. The State has advanced a number of arguments, but none of them overcome this reality: same-sex couples who cannot marry are not treated equally under the law today. The harm to them is real, not abstract or speculative.

Because, among other reasons, the State has not shown a reasonable probability of success on the merits, the trial court's order—directing State officials to permit same-

sex couples, who are otherwise eligible, to enter into civil marriage starting on October 21, 2013—remains in effect.

I.

Applications for a stay pending appeal are governed by the familiar standard outlined in Crowe. See, e.g., In re Comm'r of Ins. Deferring Certain Claim Payments by N.J.I.U.A., 256 N.J.Super. 553, 560, 607 A.2d 992 (App.Div.1992). A party seeking a stay must demonstrate that (1) relief is needed to prevent irreparable harm; (2) the applicant's claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the "relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were." McNeil v. Legis. Apportionment Comm'n, 176 N.J. 484, 486, 825 A.2d 1124 (2003) (LaVecchia, J., dissenting) (citing Crowe, supra, 90 N.J. at 132–34, 447 A.2d 173). The moving party has the burden to prove each of the Crowe factors by clear and convincing evidence. Brown v. City of Paterson, 424 N.J.Super. 176, 183 (App.Div.2012) (citation omitted). "In acting only to preserve the status quo, the court may 'place less emphasis on a particular Crowe factor if another greatly requires the issuance of the remedy." ' Ibid. (citation omitted).

When a case presents an issue of "significant public importance," a court must consider the public interest in addition to the traditional Crowe factors. McNeil, supra, 176 N.J. at 484, 825 A.2d 1124.

II.

To provide the necessary backdrop for this motion, we briefly review the principal case law and the Civil Union Act.

In Lewis, supra, seven same-sex couples applied for marriage licenses. 188 N.J. at 423–24, 908 A.2d 196. Different municipalities denied the requests because State law confined marriage to opposite-sex couples. Id. at 424, 908 A.2d 196. The couples sued State officials and challenged the constitutionality of the State's marriage laws. Ibid. The couples argued that the laws violated the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, id. at 427, 908 A.2d 196, which declares that all persons possess "unalienable rights" to enjoy life, liberty, and property, and to pursue happiness.

After reviewing various rights afforded to married but not same-sex couples, id. at 448–49, 908 A.2d 196, the Court concluded that the State's domestic partnership laws "failed to bridge the inequality gap," id. at 448, 908 A.2d 196. Because the Court could not "find a legitimate public need for an unequal legal scheme of benefits and privileges that disadvantage[d] committed same-sex couples," id. at 453, 908 A.2d 196, the Court held that the disparity violated the Constitution's guarantee of equal protection, id. at 423, 908 A.2d 196. The Court therefore directed the State to "provide to committed same-

sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples." Id. at 463, 908 A.2d 196 (emphases added).

To comply with that holding, the Court deferred to the Legislature to make the following choice: either grant same-sex couples the right to enter into a civil marriage, or "enact a parallel statutory structure" under a different name "so long as the rights and benefits of civil marriage are made equally available to same-sex couples." Id. at 423, 463, 908 A.2d 196.

The Legislature chose the second option. It enacted the Civil Union Act, which established civil unions in February 2007. See N.J.S.A. 37:1–28 to –36. The act provides that civil unions are to be treated the same as marriages. N.J.S.A. 37:1–28, –33. The statute, though, does not allow same-sex couples to marry and does not extend the title "marriage" to civil unions.

Four months ago, the Supreme Court decided Windsor. The case involved two women, Edith Windsor and Thea Spyer, who began a long-term relationship in 1963 and later married in Canada. Windsor, supra, 570 U.S. at ––––, 133 S.Ct. at 2683, 186 L. Ed.2d at 816. The State of New York recognized their marriage. Ibid.

When Spyer died in 2009, she left her entire estate to Windsor. Ibid. The Defense of Marriage Act, however, barred Windsor from claiming the federal estate tax exemption available to surviving spouses. Ibid.[1] As a result, Windsor had to pay $363,053 in estate taxes. Ibid. After the Internal Revenue Service denied her request for a refund, Windsor filed suit and asserted that DOMA was unconstitutional. Ibid.

The Court observed that "[t]he avowed purpose and practical effect of the law . are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." Id. at ––––, 133 S.Ct. at 2693186 L. Ed.2d at 827. The Supreme Court held that DOMA violated basic due process and equal protection principles under the Fifth Amendment to the United States Constitution. Id. at ––––, ––––, 133 S.Ct. at 2693, 2695186 L. Ed.2d at 827, 830. By striking down the part of DOMA in question, the Court did not allow federal laws and regulations to continue to deny lawfully married same-sex couples the benefits provided to married opposite-sex couples. The Court also stated that its "opinion and its holding are confined to . lawful marriages." Id. at ––––, 133 S.Ct. at 2696186 L. Ed.2d at 830.

After Windsor, plaintiffs in this case moved for summary judgment, and the trial court granted the motion. Judge Jacobson reasoned that plaintiffs were not eligible for marital benefits that a number of federal agencies had extended to same-sex married couples in light of Windsor. She observed that "New Jersey same-sex couples in civil unions" were "now denied benefits solely as a result of the label placed upon them by the State." In her judgment, the harm to same-sex couples in a "wide range of contexts" violated Lewis and the State Constitution's guarantee of equal protection. That "unequal

treatment," she ruled, "require[d] that New Jersey extend civil marriage to same-sex couples."

III.

We turn now to the merits of the State's motion for a stay and consider each of the relevant factors.

A.

The State argues that it will suffer irreparable harm in a number of ways if Judge Jacobson's order is not stayed. First, it claims "an injury to its sovereign interests whenever one of its democratically enacted laws is declared unconstitutional." The abstract harm the State alleges begs the ultimate question: if a law is unconstitutional, how is the State harmed by not being able to enforce it? See Joelner v. Vill. of Wash. Park, 378 F.3d 613, 620 (7th Cir.2004) ("[T]here can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute[.]") (citing Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir.1998)).

The State relies on other federal cases for the broad proposition it advances. See Maryland v. King, ––– U.S. 1, ––––, 133 S.Ct. 1, 3, 183 L. Ed.2d 667, 670 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (quoting New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351, 98 S.Ct. 359, 363, 54 L. Ed.2d 439, 445 (1977) (Rehnquist, J., in chambers)). But the State cites no New Jersey case law for the principle that enjoining a statute's enforcement always amounts to irreparable harm. In any event, the trial court did not strike down the Civil Union Act; it instead directed the State to allow same-sex couples to enter into civil marriage.

Second, the State contends that "once it grants marriage licenses to even a handful of same-sex couples, it is virtually impossible . to undo that action later"; the harm would be "irremediable." The State does not explain why that is so. As Judge Jacobson noted, California's experience reveals the opposite. See Lockyer v. City and Cnty. of San Francisco, 33 Cal.4th 1055, 17 Cal.Rptr.3d 225, 95 P.3d 459, 464, 494 (Cal.2004) (decision by California Supreme Court ordering San Francisco county clerk to stop issuing marriage licenses to same-sex couples and to take specific steps to nullify 4,000 licenses that had already been issued).[2]

The State has presented no explanation for how it is tangibly or actually harmed by allowing same-sex couples to marry. It has not made a forceful showing of irreparable harm.

B.

Next, to obtain a stay, the State must demonstrate that its underlying legal claim is settled, and it must show a reasonable probability of success on the merits. See Crowe, supra, 90 N.J . at 133, 447 A.2d 173. The State has not made either showing.

The State flips around the Crowe standard and argues that plaintiffs ' interpretation of Windsor and its challenge to the Civil Union Act present unsettled questions of constitutional law. As Judge Jacobson correctly observed, the Crowe standard requires the moving party—in this case, the State—to show "that its legal right is settled." See ibid. Regardless, the State maintains that the premise underlying Windsor means that civil-union partners are entitled to federal benefits. That interpretation of Windsor has not been followed by the United States Department of Justice or any number of federal agencies. The Supreme Court in Windsor, supra, declared that its "opinion and its holding are confined to . lawful [same-sex] marriages." 570 U.S. at ––––, 133 S.Ct. at 2696, 186 L. Ed.2d at 830 (emphases added). In the wake of that decision, federal agencies have directed that various benefits be made available to same-sex married couples, but not to civil-union partners. That, in turn, deprives partners in a civil union of the rights and benefits they would receive as married couples. The State's thoughtful position about what federal law should provide cannot substitute for federal action; nor can the State's views bind the federal government.

To assess the State's chance to succeed on the merits and overturn the trial court's judgment, we return to the core principles that frame this case. In Lewis, supra, this Court held that 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." 188 N.J. at 463, 908 A.2d 196. The Legislature, in turn, enacted the Civil Union Act, which allows same-sex couples to enter into a civil union. See N.J.S.A. 37:1–28 to –36. The law does not permit them to marry. Windsor then changed the landscape. By striking the part of DOMA that defined marriage as "a legal union between one man and one woman," 1 U.S.C.A. § 7, the United States Supreme Court paved the way to extending federal benefits to married same-sex couples. Windsor, supra, 570 U.S. at ––––, 133 S.Ct. at 2696, 186 L. Ed.2d at 830. A number of federal agencies responded and now provide various benefits to married same-sex couples. Because State law offers same-sex couples civil unions but not the option of marriage, same-sex couples in New Jersey are now being deprived of the full rights and benefits the State Constitution guarantees.

The State presents three arguments to show that its appeal has a reasonable probability of success. First, the State claims that plaintiffs "will not be able to overcome the highest presumption of constitutional validity that attaches to statutory enactments." Once again, Judge Jacobson did not strike down a statute. The Civil Union Act, while it may not see much use in the coming months, remains available for people who choose to use it. Even more important, though, the statute was presumptively valid "so long as" it provided full and equal rights and benefits to same-sex couples. Lewis,

supra, 188 N.J. at 423, 908 A.2d 196. Based on recent events, the Civil Union Act no longer achieves that purpose.

Second, the State argues that plaintiffs' “claims fail on federalism grounds.” Underlying part of this argument is the State's interpretation of Windsor, which, as noted above, is at odds with the practice of the federal government. Although the State claims that the federal government must “defer to the states in matters concerning domestic relations,” federal agency rulings are following New Jersey's rule about who may marry.

Third, the State claims that plaintiffs' equal protection claim must fail because “the State's action is not legally cognizable.” The State argues that it has followed Lewis and provided “same-sex couples with all State marriage benefits,” and that it cannot be responsible for “federal bureaucrats that . refused to extend federal benefits.”

Lewis is not limited in that way. The decision recognized that it could not alter federal law, Lewis, supra, 188 N.J. at 459 n. 25, 908 A.2d 196, yet at the same time directed the State to provide same-sex couples “the full rights and benefits enjoyed by heterosexual married couples,” id. at 463, 908 A.2d 196 (emphasis added). Lewis left it to the Legislature to revise State law in a way that satisfied the Constitution's guarantee of equal protection. Id. at 457–62, 908 A.2d 196. And the State acted in response. It enacted the Civil Union Act and created a structure that allows same-sex couples to enter into a civil union but not to marry. See N.J.S.A. 37:1–28 to –36. That structure today provides the framework for decisions by federal authorities. The State's statutory scheme effectively denies committed same-sex partners in New Jersey the ability to receive federal benefits now afforded to married partners. The trial court therefore correctly found cognizable action by the State.

We conclude that the State has not shown a reasonable probability or likelihood of success on the merits.

C.

Crowe, supra, also requires that we balance the relative hardships to the parties. 90 N.J. at 134, 447 A.2d 173. The State identified certain abstract harms that are addressed above. Weighed against them are immediate and concrete violations of plaintiffs' right to equal protection under the law. Because plaintiffs cannot marry under State law, they and their children are simply not eligible for a host of federal benefits available to same-sex married couples today.

For example, partners in a civil union cannot receive a number of health related benefits: they cannot claim leave under the Family and Medical Leave Act if a partner becomes sick or is injured;[3] they cannot get coverage for health benefits as a “spouse” of a federal employee;[4] and they cannot get certain Medicare benefits, including services in a skilled nursing facility for a spouse.[5]

Unlike same-sex married couples, civil-union partners also cannot file a joint federal tax return;[6] they cannot be considered a “spouse” for immigration purposes;[7] and they cannot participate in a Survivor Benefit Plan as a spouse of an active or retired member of the military.[8] All of these and other examples affect not only partners to a civil union but also their children.

Lewis guarantees equal treatment under the law to same-sex couples. That constitutional guarantee is not being met. And the ongoing injury that plaintiffs face today cannot be repaired with an award of money damages at a later time. See Crowe, supra, 90 N .J. at 132–33, 447 A.2d 173 (“Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages.”); see also Laforest v. Former Clean Air Holding Co., 376 F.3d 48, 55 (2d Cir.2003). Plaintiffs highlight a stark example to demonstrate the point: if a civil-union partner passes away while a stay is in place, his or her surviving partner and any children will forever be denied federal marital protections.

The balance of hardships does not support the motion for a stay.

D.

Finally, because this case presents an issue of significant public importance, we consider the public interest. McNeil, supra, 176 N.J. at 484, 825 A.2d 1124. What is the public's interest in a case like this? Like Judge Jacobson, we can find no public interest in depriving a group of New Jersey residents of their constitutional right to equal protection while the appeals process unfolds.

The State cites various cases in which courts have granted a stay. See, e.g., Comm. to Recall Robert Menendez from the Office of U.S. Senator v. Wells, 413 N.J.Super. 435, 458, 995 A.2d 1109 (App.Div.2010) (staying order that recall process begin), rev'd on other grounds, 204 N.J. 79 (2010) (finding State recall process of United States Senator unconstitutional); Penpac, Inc. v. Morris Cnty. Mun. Utils. Auth., 299 N.J.Super. 288, 293, 690 A.2d 1094 (App.Div.1997) (staying order that voided government contract for violation of public bidding requirements), certif. denied, 150 N.J. 28, 695 A.2d 670 (1997); Palamar Constr., Inc. v. Pennsauken, 196 N.J.Super. 241, 245, 482 A.2d 174 (App.Div.1983) (same). Those rulings served the public interest in light of the particular circumstances presented.

In other situations, courts have declined to enter a stay in order to protect individual constitutional rights. See, e.g., Armstrong v. O'Connell, 416 F.Supp. 1325, 1332 (E.D.Wis.1976) (denying stay of order that enjoined defendants from discriminating on basis of race in operation of public schools); Fortune v. Molpus, 431 F.2d 799, 804 (5th Cir.1970) (vacating single-judge stay of District Court's order directing university officials to permit civil rights activist to speak on campus). We find that the compelling public interest in this case is to avoid violations of the constitutional guarantee of equal treatment for same-sex couples.

The State argues that we should give the democratic process “a chance to play out” rather than act now. When courts face questions that have far-reaching social implications, see Lewis, supra, 188 N.J. at 461, 908 A.2d 196, there is a benefit to letting the political process and public discussion proceed first. Courts should also “avoid reaching constitutional questions unless required to do so.” Comm. to Recall Menendez, supra, 204 N.J. at 95–96 (citing Harris v. McRae, 448 U.S. 297, 306–07, 100 S.Ct. 2671, 2683, 65 L. Ed.2d 784, 798 (1980); Randolph Town Ctr. v. Cnty. of Morris, 186 N.J. 78, 80, 891 A.2d 1202 (2006)). But when a party presents a clear case of ongoing unequal treatment, and asks the court to vindicate constitutionally protected rights, a court may not sidestep its obligation to rule for an indefinite amount of time. Under those circumstances, courts do not have the option to defer.

IV.

We have before us today a motion for a stay. To rule on the stay motion, we applied settled legal standards and determined that the State has not shown a reasonable probability it will succeed on the merits. Additional arguments on the merits will be considered in January 2014.

We conclude that the State has not made the necessary showing to prevail on any of the Crowe factors and that the public interest does not favor a stay. We therefore deny the State's motion for a stay. As a result, the trial court's order dated September 27, 2013 remains in full force and effect. State officials shall therefore permit same-sex couples, who are otherwise eligible, to enter into civil marriage beginning on October 21, 2013.

Chief Justice RABNER delivered the opinion of the Court.

Justices LaVECCHIA, ALBIN, HOENS and PATTERSON and Judges RODRÍGUEZ and CUFF (both temporarily assigned), join in Chief Justice RABNER's opinion.