SUPREME COURT OF THE STATE OF NEW JERSEY

MARK LEWIS and DENNIS WINSLOW; SAUNDRA HEATH and CLARITA ALICIA TOBY; CRAIG HUTCHISON and CHRIS LODEWYKS; MAUREEN KILIAN and CINDY MENEGHIN; SARAH and SUYIN LAEL; MARILYN MANEELY and DIANE MARINI; and KAREN and MARCYE NICHOLSON-MCFADDEN,

Plaintiffs,

v.

GWENDOLYN L. HARRIS, in her official capacity as Commissioner of the New Jersey Department of Human Services; CLIFTON R. LACY, in his official capacity as the Commissioner of the New Jersey Department of Health and Senior Services; and JOSEPH KOMOSINSKI, in his official capacity as Acting State Registrar of Vital Statistics of the New Jersey State Department of Health and Senior Services,

Defendants-Respondents.

Docket No. 58,389

Appellate Division Docket No. A-2244-03T5

Sat Below:
Hon. Skillman, P.J.A.D., Collester, J.A.D., and Parrillo, J.A.D.

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION IN AID OF LITIGANTS' RIGHTS

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PRELIMINARY STATEMENT

More than three years ago, this Court ruled that the State, by denying Plaintiffs "the financial and social benefits and privileges given to their married heterosexual counterparts," violated their rights under Article I, Paragraph 1 of the New Jersey Constitution. *Lewis v. Harris*, 188 *N.J.* 415, 463 (2006). The Court required the State to remedy this unconstitutionally unequal treatment. Specifically, the Court held, "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." *Id.* at 463. Plaintiffs here seek to enforce this constitutional mandate.

The State has responded that Plaintiffs' motion is inappropriate because the Legislature fully complied with the *Lewis* mandate by passing the Civil Union Act, *N.J.S.A.* 37:1-28, *et seq.* ("the Act"), and that Plaintiffs must bring a new lawsuit if they wish to test the constitutionality of the Actt. The Court's decision, however, required the State not merely to enact legislation, but to ensure that same-sex couples in fact receive equal rights and benefits. This motion appropriately seeks to measure whether the State has, in fact, complied with the Court's remedial order.

The State has not complied. Under the State-created designation of civil unions, individuals in same-sex relationships receive fewer workplace benefits and protections than their married counterparts. Pl. Br. 23-31;[1] *Lewis*, 188 *N.J.* at 426, 429. They continue to experience an "inequality gap," *id.* at 426, including the denial of benefits "customarily extended to family members," *id.* at 448-49; Pl. Br. 34-38. They continue to be denied rights of access and privacy in health care settings. Pl. Br. 38-42; *Lewis* 188 *N.J.* at 426. Plaintiffs' families and children are financially disadvantaged due to their unequal legal status. Pl. Br. 50-52;. *Lewis*, 188 *N.J.* 450-53. These arguments are appropriately raised in a motion in aid of litigants rights under *R.* 1:10-3, the proper mechanism by which to test the State's compliance with this Court's earlier, remedial order.

Although the State responds that the inequality Plaintiffs identify results from the failure to gain social acceptance and not from any State action, Def. Br. 27-35, it is the State's action in relegating Plaintiffs to the new and different institution of civil unions, while allowing different-sex couples to marry, that has caused and fostered the unequal

[1] Throughout this Reply Brief, the Brief in Support of Plaintiffs' Motion in Aid of Litigants' Rights will be cited as "Pl. Br.," and the State's Brief in Opposition will be cited as "Def. Br." Citations to Exhibits filed with the Brief in Support of Plaintiffs' Motion in Aid of Litigants' Rights will be to "Pl. Ex."

treatment. The extensive record before the Court, consisting of Plaintiffs' Affidavits and the record complied by the Civil Union Review Commission ("CURC"), the body charged by the Legislature with ascertaining the effectiveness of the Act in complying with *Lewis*, shows, in no uncertain terms, that Plaintiffs have not received "the full rights and benefits enjoyed by heterosexual couples" as required by *Lewis*.

Finally, the State contends that as a matter of separation of powers, this Court ought not address Plaintiffs' Motion. But as this Court has recognized, "[u]ltimately," it has "the responsibility of ensuring that every New Jersey citizen receives the full protection of our State Constitution." 188 *N.J.* at 457. Plaintiffs today request only that the Court fulfill that responsibility and exercise its established power to enforce its own mandate and, if necessary, to order further factual development by appointing a special master.

This Court has determined that Plaintiffs have already suffered the deprivation of their Constitutional rights. They should not have to experience any further delay in realizing the equality to which they are entitled. Their motion in aid of litigants' rights should be granted.

ARGUMENT

I. PLAINTIFFS RETURN TO THE COURT SEEKING NO MORE AND NO LESS THAN ENFORCEMENT OF THEIR MANDATED EQUAL RIGHTS REMEDY.

In 2006, this Court required that the State "provide to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples." *Lewis*, 188 *N.J.* at 463. Nonetheless, the record shows numerous ways in which the State has denied committed same-sex couples, including Plaintiffs, the full measure of equality mandated by the Court in its order, including the following:

(1) Because the State consigns same-sex couples to civil unions, those couples are denied benefits and workplace protections, including health insurance for partners. *See* Pl. Br. 24-31; *see also* Pl. Ex. 10, ¶ 10 (Affidavit of Suyin Lael); Pl. Ex. 15 at 42-44, 64-69, 79, 98 (CURC Hr'g Tr., Sept. 26, 2007); Pl. Ex. 16 at 15 (CURC Hr'g Tr., Oct. 10, 2007); Pl. Ex. 17 at 74-75 (CURC Hr'g Tr., Oct. 24, 2007); Pl. Ex. 18 at 132-33 (CURC Hr'g Tr., Mar. 19, 2008); Pl. Ex. 20 at 40-41 (CURC Hr'g Tr., May 21, 2008); Pl. Ex. 23 at 54-55 (CURC Hr'g Tr. Oct. 15, 2008); Pl. Ex. 27 at 97 (S. Jud. Comm. Hr'g, Dec. 7, 2009); Pl. Ex. 14 at 6, 11-13 (Final Report of the New Jersey Civil Union Review Comm'n);

(2) The State makes civil-unioned same-sex couples vulnerable in the workplace and elsewhere because they must

reveal their sexual orientation in order to inquire about and secure benefits for their families. *See* Pl. Br. 33-34; *see also* Pl. Ex. 27 at 60, 185;

(3) Because the State denies them marriage and relegates them to a novel status, civil-unioned same-sex couples face a lack of recognition in public life, affecting their interactions with government officials, in agencies ranging from the division of motor vehicles, to jury duty, to the numerous public entities that require financial disclosures. *See* Pl. Br. 34-38; *see also* Pl. Ex. 15 at 18; Pl. Ex. 16 at 67-68, 107; Pl. Ex. 17 at 47, 61-63; Pl. Ex. 18 at 7-10, 164-65; Pl. Ex. 27 at 183; Pl. Ex. 14 at 9, 14;

(4) The State's refusal to provide same-sex couples the same relationship status it grants to different-sex couples causes lesbian and gay New Jerseyans to be denied rights of access in healthcare settings. *See* Pl. Br. 38-42; *see also* Pl. Ex. 16 at 67-68, 107; Pl. Ex. 17 at 61-63; Pl. Ex. 20 (CURC Hr'g Tr., May 21, 2008); Pl. Ex. 23 at 40-47; Pl. Ex. 27 at 183;

(5) When they travel out of state, same-sex couples' rights are threatened, because the novel legal status into which the State has forced them is not recognized in other jurisdictions. *See* Pl. Br. 42-44; *see also* Pl. Ex. 10 (Aff. Karen Nicholson-McFadden); Pl. Ex. 14 at 9-11, 35-37;

(6) The State's refusal to provide equal access to marriage, notwithstanding the demonstrated failure of civil unions, deprives civil-unioned same-sex couples of various family law protections. These couples must rely upon a patchwork of judicial decisions, administrative and regulatory pronouncements, and Attorney General opinions with regard to matters such as dissolution for irreconcilable differences, dissolution in other jurisdictions, and the reaffirmation process. *See* Pl. Br. 45-49; *see also* Pl. Ex. 17 at 12-13; Pl. Ex. 18 at 13; Pl. Ex. 22 at 15-16, 26-28 (CURC Hr'g Tr., July 16, 2008); Pl. Ex. 23 at 21-22. Same-sex couples and their children are also financially disadvantaged by being restricted to civil unions, as they are forced to incur added legal costs to attain family law protections. *See* Pl. Br. 50-52; *see also* Pl. Ex. 15 at 85; Pl. Ex. 19 at 32-33 (CURC Hr'g Tr., Apr. 16, 2008); Pl. Ex. 14 at 14, 24;

(7) The State causes psychological and dignitary harm to same-sex couples by relegating them to the unequal status of civil unions. *See* Pl. Br. 64-69; *see also* Pl. Ex. 1 (Aff. Mark Lewis); Pl. Ex. 2 (Aff Dennis Winslow); Pl. Ex. 3 (Aff. Saundra Heath); Pl. Ex. 4 (Aff. Alicia Toby); Pl. Ex. 5 (Aff. Craig Hutchison); Pl. Ex. 6 (Aff. Chris Lodewyks); Pl. Ex. 8 (Aff. Cindy Meneghin); Pl. Ex. 9 (Aff.

Sarah Lael); Pl. Ex. 12 (Aff. Marcye Nicholson-McFadden); Pl. Ex. 15; Pl. Ex. 16; Pl. Ex. 17; Pl. Ex. 14 at 9;

(8) The State harms children by sending the message that certain parents are not good enough to be married, stigmatizing families of same-sex couples, and denying such families equal recognition and security. *See* Pl. Br. 55-63; *see also* Pl. Ex. 10; Pl. Ex. 7 (Aff. Maureen Kilian); Pl. Ex. 11 (Aff. of Karen Nicholson-McFadden); Pl. Ex. 19 at 44-45; Pl. Ex. 27 at 113; Pl. Ex. 14 at 2, 22-23, 35, 36.

These examples from the extensive record before the Court demonstrate that the persistent inequities of civil unions constitute far more than a lack of "social acceptance," Def. Br. 21, 29, or "simply the legal term used to describe the relationship," Def. Br. 29. Rather, the record shows that the Legislature has not only failed to comply with the Court's prior holding in this matter, but has actually exacerbated the constitutional inequity which the Court recognized by relegating same-sex couples to an institution which has been shown to be inherently and irremediably different from and inferior to marriage. *See* Pl. Br. 37. Plaintiffs do not deny that some progress has been achieved through the separate legal scheme, but they seek the full measure of equality that the Court has ruled they are due. Significantly, in doing so, Plaintiffs do

not ask the Court to "substitute its judgment on social policy issues for that of the Legislature," Def. Br. 25, but rather to enforce the Court's own mandate. The motion before the Court should be granted.

A. The Enactment of Legislation in the Wake of the Court's Decision Does Not Satisfy the Equality Mandate of *Lewis*.

Contrary to the State's contention, Def. Br. 20, the mere passage of the Civil Union Act within the time frame specified by the Court does not satisfy the Court's mandate of equality. Indeed, the Court expressly prohibited the State from resorting to anything other than a status that would truly provide full equality. Although, as the State points out, the Court stated, "[w]e will not *presume* that a separate statutory scheme, which uses a title other than marriage, contravenes equal protection principles," it made clear that this was true only "so long as the rights and benefits of civil marriage are made equally available to same-sex couples." *Lewis*, 188 *N.J.* at 423 (emphasis added). Three years later, it is now inescapably clear that the separate statutory civil union scheme does not give same-sex couples the equal rights and benefits of civil marriage the Court guaranteed.

To be sure, in 2006, the Court declined to rule that a separate statutory scheme would necessarily fail to provide equality. *Lewis*, 188 *N.J.* at 459 ("Because this State has no

experience with a civil union construct that provides equal rights and benefits to same-sex couples, we will not *speculate* that identical schemes called by different names would create a distinction that would offend Article I, Paragraph 1") (emphasis added). The theoretical possibility that a separate status might be adequate was not, however, a constitutional endorsement of such a separate status were it not actually to provide the equality the Court mandated. Thus, while the Court did not, in 2006, specifically prohibit a remedy other than marriage, it also did not pre-judge a separate scheme to be constitutionally equal. The State misunderstands the Court's opinion when it suggests otherwise, and fails to appreciate the significance of the record developed by the CURC, the Senate Judiciary Committee, and Plaintiffs.

Nor is it a defense to this motion that the Legislature "intended" to furnish equality by enacting civil unions. Def. Br. 8, 10. As this Court recognized in *Abbott v. Burke*, the Legislature's mere passage of legislation in response to an order of this Court does not mean that the Legislature has complied with a constitutional mandate. *149 N.J.* 145, 185, 202 (1997) (*"Abbott IV"*). There, the Court found that provisions of a statute enacted by the Legislature in response to the Court's decision in *Abbott v. Burke*, 136 *N.J.* 444 (1994) (*"Abbott III"*), failed to satisfy the Court's mandate because the State failed

to *actually* remedy the conditions that violated the New Jersey Constitution's thorough and efficient education clause. 149 *N.J.* at 185. Here, because the Court ordered the State not simply to attempt to provide equality, but to actually do so, the Legislature's intent in passing the Civil Union law is irrelevant. That is, because there is no good faith exception to compliance with the decrees of the Court, the only question here is whether the State has in fact provided the relief in fact ordered by the Court.[2] As the record shows, they have not.

Certainly, that relief is not provided by the mere passage of *any* legislation. Nor, contrary to the State's argument, Def. Br. 23-25, does *Robinson v. Cahill*, 69 *N.J.* 449 (1976) ("*Robinson V*"), stand for the proposition that the State may satisfy the mandate of the Court by passing a statute, irrespective of its substance. Indeed, in *Robinson V*, the Court, in fact, fully addressed the question of whether the Public School Education Act of 1975, *c.* 212, *L.* 1975 ("Act of

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[2] While the State posits that there was no willful disobedience or recalcitrance in the face of the Court's mandate, Def. Br. 18, 20, *R.* 1:10-3 does not contain any willfulness requirement. Even if it did, however, it is perhaps, notable that the Court, in its prior ruling, assumed that if the Legislature did not afford same-sex couples the right to marry, "it probably will state its purpose and reasons for enacting such legislation." *Lewis*, 188 *N.J.* at 459-60. In fact, however, the Legislature did not offer any explanation when it created the civil union designation exclusively for same sex couples, and has not done so to date. Moreover, given the unaddressed inequities of which it became aware as a result of the CURC's evaluation and its own hearings, the Legislature's failure to act could reasonably be held to demonstrate willfulness or recalcitrance in denying same-sex couples full equality.

1975") comported with the its earlier decision in *Robinson v. Cahill*, 62, *N.J.* 473 (1973) ("*Robinson I*"). With passage of the Act of 1975, the Legislature supplied "a plan intended to meet all aspects of a thorough and efficient education." *Robinson V*, 69 *N.J.* at 455. Thus, in *Robinson V*, the Court was able to assure itself from the face of the statute that its earlier directive had been met. That is, the constitutional deficiency identified in *Robinson I* was the lack of a comprehensive statute; the enactment of a comprehensive statute cured that deficiency.

Here, by contrast, the Court has required more than the passage of Legislation: it has articulated the substance of the equal protection guarantee to be afforded same-sex couples in relation to marriage. Thus, it held that the law must cease the "unequal dispensation of benefits and privileges to one of two similarly situated classes of people," 188 *N.J.* at 451. The law, this Court stated, cannot be a "system of disparate treatment," *id.* at 453, under which same-sex couples are denied "workplace protections" including health insurance for partners, family leave time, and other benefits, *id.* at 449; access to partners during medical emergencies, *id.* at 426; family law protections, *id.* at 450; and tuition benefits, *id.* at 449. The Legislative remedy, the Court determined, cannot continue to expose same-sex couples and their children to "economic and

financial inequities" that disadvantage them in relation to their married counterparts. *Id.* at 450-51.

As the State observes, in *Robinson* the "Court remained involved only until it was satisfied that the Legislature had enacted and funded legislation *that remedied the constitutional violation.*" Def. Br. 23-24 (emphasis added). Plaintiffs here seek no greater Court involvement than that. The record presented by Plaintiffs shows that the Civil Union Act has failed to furnish their equal rights in a number of settings, from the medical and healthcare context to schools and professional settings, among others. Plaintiffs simply seek the relief the Court has already directed: the equality the Court determined they are due.

B. Plaintiffs Seek Equal Rights, Not Just a Name or Social Acceptance.

The State's argument to the contrary notwithstanding, Plaintiffs do not, by this motion, seek a particular "legal term used to describe the relationship," Def. Br. 29, or "social acceptance." Def. Br. 21, 29. Rather, the gravamen of Plaintiffs' motion is that, based upon the facts as they have evolved since the Court's decision, the parallel scheme enacted by the Legislature deprives them of far more than a name. The record shows that, while the label of "marriage" triggers the recognition of rights, civil unions have shown themselves to

engender confusion and discrimination, even years after the status was created. For example, the record establishes that New Jersey's civil union status deprives committed same-sex couples, including Plaintiffs, of equal workplace benefits, because the State-created designation is often interpreted to fall outside standard health insurance plan language and negotiated contractual terms. Pl. Br. 23-31, 37; *see also* Br. on Behalf of Amicus Curiae Commc'n Workers of Am., AFL-CIO at 11. The revelations imposed by the State-created civil union designation also compromise constitutional privacy rights: civil unions require Plaintiffs and other committed same-sex couples to reveal their sexual orientation in situations ranging from initial job interviews, to myriad routine but required forms, to jury service, because to answer questions accurately, they are forced to disclose that they are in a status that the State has created only for gay men and lesbians.[3] *See Sterling v. Borough of Minersville*, 232 *F.*3d 190, 197 (3d Cir. 2000) (police officer's threat to disclose suspected sexual orientation of arrestee to family member violated constitutional right to privacy).

[3] While the Court previously indicated that same-sex couples might be able to call their relationships whatever they wished, *Lewis*, 188 *N.J.* at 461, in practice that has not been an option when forms or questions require those in civil unions to respond under penalty of perjury. *See, e.g.*, Pl. Ex. 14 at 9, 15; Pl. Ex. 15 at 98-99; *see also* Br. of Amicus Curiae N.J. State Bar. Ass'n at 26-27.

In addition, as experience in New Jersey has now shown, and as the high courts of other states have recognized in the period since this Court's 2006 decision, "drawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples, and by reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership – pose a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry"). *In re Marriage Cases*, 43 *Cal.*4th 757, 830-31, (2008); *see also Kerrigan v. Commissioner of Public Health*, 289 *Conn.* 135, 152 (2008) ("We do not doubt that the civil union law was designed to benefit same sex couples by providing them with legal rights that they previously did not have. If, however, the intended effect of a law is to treat politically unpopular or historically disfavored minorities differently from persons in the majority or favored class, [ ] the very existence of the classification gives credence to the perception that separate treatment is warranted for the same illegitimate reasons that gave rise to the past discrimination in the first place.").

Here, the Legislature itself mandated the formation of the CURC to

> (1) evaluate the implementation, operation and effectiveness of the act; (2) collect information about the act's effectiveness from members of the public, State agencies and private and public sector businesses and organizations; (3) determine whether additional protections are needed; (4) collect information about the recognition and treatment of civil unions by other states and jurisdictions including the procedures for dissolution; (5) evaluate the effect on same-sex couples, their children and other family members being provided civil unions rather than marriage[,]

[*N.J.S.A.* 37:1-36(c).]

Thus, it is all the more obvious that the question of whether civil unions would provide equality was just that: a question. Plaintiffs, having lived with the consequences of civil unions for three years, properly return with this motion.

C. The Novel, State-Created "Civil Union" Designation Triggers Discrimination by Third Parties for Which the State Is Responsible.

Contrary to the Attorney General's assertion, Def. Br. 27, the fact that third parties administer some of the unequal treatment civil-unioned couples experience does not mean that State action and responsibility are absent. Rather, the record shows that it is the State's relegation of same-sex couples to a novel status particular only to gay men and lesbians that has triggered confusion and discrimination, disadvantaging those

couples and their families, and failing to provide equality. The government cannot label people in a way that promotes discrimination and absolve itself of the resulting inequities.

For example, in *Anderson v. Martin*, 375 *U.S.* 399 (1964), the Supreme Court of the United States examined a state's requirement that candidates for office be labeled by race. *Id.* at 401. The Court rejected the contention that the State's labeling of candidates could be separated from the resulting discrimination by voters, explaining that, although the State did not "[i]n the abstract" discriminate, by requiring a label, the State focused third parties on the racial identity of the individual. *Id.* at 432-33. As the Court explained, "placing the power of the State" behind a classification that induces prejudice constitutes state action. *Id.* at 433. "The crucial factor is the interplay of governmental and private action . . . ." *Id.* at 403 (quoting *NAACP v. Alabama*, 357 *U.S.* 449, 463 (1958)). Similarly, when the identity-specific label that Plaintiffs wear, courtesy of the State, triggers the discrimination by others that Plaintiffs have now shown, the State is responsible for the discrimination that it has, in essence, encouraged. By analogy, if the State were now to require that lesbian and gay adults raising their own children—with all the legal rights and obligations of parents—be designated "guardians" or "childcare givers" rather than

"parents," it would be likely that school personnel, medical professionals and others would treat those parents unequally with regard to their relationship with their children, and would treat their children unequally with regard to their relationship and access to their parents. Experience reflected in the record has shown that the State-imposed civil union designation likewise triggers unequal treatment in violation of this Court's mandate.

II. PLAINTIFFS' MOTION FOR COMPLIANCE WITH THE COURT'S ORDER COMPORTS WITH "SEPARATION OF POWERS."

Contrary to the State's assertion, Def. Br. 36-40, and particularly given that the Legislature has refused to respond to the demonstrated failure of the legislation it adopted in response to the Court's order, Plaintiffs' motion to this Court, including the potential appointment of a Special Master, creates no issue whatsoever of separation of powers as between the Legislature and the Judiciary.

Almost four years after the Court ordered the State to "provide to same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples," 188 *N.J.* at 463, Plaintiffs come before this Court in a new posture, on the sole issue of compliance. In this context, the State's attempt to rely on the Court's initial deference to the Legislature is inappropriate, given the intervening record of

enduring inequalities under the civil union legislation.[4] Nor is it fair for the State to argue that Plaintiffs are attempting by this motion, which is provided for in the Rules of Court, to "short-circuit the democratic process," Def. Br. 22, when they and other same-sex couples have in fact fully engaged with the legislative process for years, but encountered a Legislature that refuses to provide what the Court ordered, notwithstanding the proof presented to it of the failure of its initial action.

In sum, it is only at this clearly defined stage, after the Legislature has declined an opportunity to fully comply with the mandate of the Court, that Plaintiffs seek Court enforcement of the 2006 decree. The Court has granted the Legislature deference, of which the Legislature has fully availed itself, when it said it would not direct marriage "*[b]efore* the Legislature has been given the opportunity to act," *Lewis*, 188 *N.J.* at 460 (emphasis added), and that "[a] proper respect for a coordinate branch of government counsels that we defer *until it has spoken*," *id.* at 460 (emphasis added); *see also id.* ("[W]e believe that our democratically elected representatives should be *given a chance* to address the issue under the constitutional mandate set forth in this opinion.") (emphasis added). It is

[4]Plaintiffs' motion is not a challenge to the constitutionality of the Civil Union Act *per se*; rather, Plaintiffs have moved to enforce the *Lewis* ruling because they have not received the full measure of equality that the Court previously ordered. Accordingly, the State's reliance upon cases requiring deference to legislative classifications, Def. Br. 6-7, are unresponsive at this stage of the proceedings.

only now, almost four years after the Court's mandate, and more than three years since the ensuing enactment of a partial remedy, and following the Legislature's refusal to cure demonstrated inequality, that Plaintiffs are compelled to move to the next stage of their litigation. The Legislature has been "given the opportunity to act," "has spoken," and has been more than "given a chance," *id.* at 460, but has refused to comply with the Court's mandate. Under these circumstances, Plaintiffs' motion does no damage to the concept of separation of powers.[5]

III. PLAINTIFFS' MOTION IN AID OF LITIGANTS' RIGHTS SATISFIES THE REQUIREMENTS OF *R.* 1:10-3 AND IS OTHERWISE PROCEDURALLY APPROPRIATE.

The State errs in contending that Plaintiffs may not move in aid of litigants' rights because the Court did not issue a formal order and did not expressly retain jurisdiction.

[5] As the State concedes, the Legislature acknowledged "thousands" of contacts. Def. Br. 14 n.3. To the extent that those contacts were from those who oppose equality for same-sex couples, they are not germane to this analysis, as the Court has already ruled that, under the New Jersey Constitution, these couples must be provided with equality. That "ultimately, the record failed to persuade a majority of the Senate," Def. Br. 15, rather than providing an argument against Plaintiffs, is precisely why this Court is faced with the need to act. The State's citation to the dissent in *McCutcheon v. State Bld. Auth.*, 13 *N.J.* 46, 79 (1953) (Jacobs, J., dissenting), *see* Def. Br. 20, for the proposition that the Legislature has a duty to protect "the liberties and welfare of the people in quite as great a degree as the courts" simply points up the necessity for judicial protection of a disfavored minority when the popularly-elected Legislature has failed to live up to that ideal. Moreover, that more people have not filed administrative complaints, Def. Br. 13, does not establish that equality has been achieved. Rather, the record compiled here, including Plaintiffs' affidavits, the numerous specified complaints presented in CURC testimony, and the complaints made at the Senate Judiciary Committee's hearing demonstrate the unequal treatment caused by relegating same-sex couples to civil unions rather than marriage.

Likewise, the State's argument that, for the Court to consider the inequality manifest on this record, Plaintiffs must bring a new, as-applied challenge, misunderstands the Court's earlier opinion. Plaintiffs have proceeded by way of motion in aid of litigants rights because, quite simply, the State has not complied with this Court's mandate.

A. A Formal Order Is Not Necessary to Support a Motion in Aid of Litigants' Rights under *R.* 1:10-3.

The State's assertion that Plaintiffs do not satisfy "the fundamental requirements of a motion in aid of litigants' rights" because the Court did not accompany its opinion in *Lewis* with a formal order or judgment, Def. Br. 17-18, is without merit. No such requirement exists in the text of *R.* 1:10-3, nor would such a requirement comport with *R.* 2:11-3, which relieves appellate courts in New Jersey from the need to enter a formal judgment or order where an opinion is issued.

While "[t]he *sine qua non* for an action in aid of litigant's rights . . . is an order or judgment," *Haynoski v. Haynoski*, 254 *N.J. Super.* 408, 414 (App. Div. 1993), the Rules governing appellate courts in New Jersey make clear that this "order or judgment" emerges from the Court's opinion. Thus, the Rules specify that "[t]he court shall file a written opinion upon the final determination of every appeal," *R.* 2:11-3(a), and that "[t]he opinion of the appellate court shall include its

judgment, *and no other form of judgment shall be required,*" *R.* 2:11-3(b) (emphasis added). *See also Robinson v. Cahill*, 67 *N.J.* 35, 35 (1975) ("*Robinson III*") (noting that earlier opinion of Court constituted its judgment).

Thus, the Court's opinion in *Lewis* constitutes the requisite order or judgment. *See Abbott v. Burke*, 149 *N.J.* 145 (1997) ("*Abbott IV*") (granting motion in aid of litigants' rights where legislative response did not comport with requirements of earlier opinion, unaccompanied by formal order). Here, the Court's opinion certainly constituted an "order" to the Legislature, directing the Legislature to act within 180 days to "provide to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual couples," 188 *N.J.* at 463, and setting forth the standards by which the Legislature's actions would be judged. *See, e.g.*, 188 *N.J.* at 449 (discussing need for "workplace protections," including health insurance coverage, for members of same-sex couples); *id.* at 449-50 (discussing need for family law protections, including orderly dissolution and support, for same-sex relationships); *id.* at 450-51 (discussing need to remedy "economic and financial inequities" borne by same-sex couples and their children). Accordingly, Plaintiffs' Motion in Aid of Litigants' Rights is properly before the Court.

B. Retention of Jurisdiction Is Not a Requirement Under *R.* 1:10-3.

The State's further argument that this motion is unwarranted because the Court did not expressly retain jurisdiction, Def. Br. 21-22, is likewise wholly unsupported by the text of *R.* 1:10-3. The Rule imposes no such requirement, and as Plaintiffs have pointed out, Pl. Br. 78-79, this Court has often considered motions like this one without an express retention of jurisdiction. *See Abbott v. Burke*, 163 *N.J.* 95, 101 (2000) ("*Abbott VI*"); *Abbott v. Burke*, 170 *N.J.* 537, 540, 564 (2002) ("*Abbott VIII*").

For example, in *Abbott VI*, the Plaintiffs sought compliance with the Court's directives in its preceding decision in *Abbott V*, 153 *N.J.* 480 (1998). Although the Court had expressly retained jurisdiction after remanding in *Abbott IV*, 149 *N.J.* 145 (1997), *Abbott V* was, by contrast, an opinion directing relief, in which the Court did not retain jurisdiction. 153 *N.J.* 480. Nonetheless, the Court granted in part a motion under *R.* 1:10-3, and even considered a motion to intervene brought by the Speaker of the General Assembly, seeking clarification of *Abbott V*, though it had not expressly retained jurisdiction to do so. *See Abbott VII*, 164 *N.J.* 84, 89 (2000). And again, in *Abbott VIII*, the Court considered whether "the Commissioner of Education ha[d] failed to comply with the Court's mandate in *Abbott V*,"

170 *N.J.* at 540, although again it had not specifically retained jurisdiction in *Abbott V.* Consistent with the language of the rule and this Court's practice, the State's contention that an express retention of jurisdiction is a prerequisite to an application under *R.* 1:10-3 is without merit.

C. The State's Characterization of Plaintiffs' Motion as an As-Applied Challenge Does Not Preclude Relief.

The State's attempt to construe Plaintiffs motion as an as-applied challenge that somehow precludes relief via this mechanism, Def. Br. 24-25, is incorrect. The record, including extensive proof created at the behest of the Legislature, establishes the State's failure to comply with this Court's mandate to provide rights for same-sex couples equal to those provided to different-sex couples. Thus, a motion pursuant to *R.* 1:10-3 in this case (which originated and succeeded as a facial challenge to the then-existing unequal statutory scheme), is an appropriate means of challenging the State's failure to comply with the Court's order, irrespective of any attempt to label the effort as "facial" or "as applied."

Here, the pending motion calls upon the Court to determine whether the State has, "provide[d] to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples," *Lewis*, 188 *N.J.* at 463, as this Court ordered. The record before the Court shows that the State

has not. It is neither helpful to the Court nor dictates any particular result to denominate this challenge either "facial" or "as-applied." The substantial record eviscerates any concern about any risk of premature adjudication, *see Abbott v. Burke*, 199 *N.J.* 140, 234 (2009) ("*Abbott XX*") (quoting *Sabri v. United States*, 541 *U.S.* 600, 609 (2004)).[6] The interests of justice, including the venerated principle that delaying the enjoyment of established rights wreaks its own harms, also weigh against forcing Plaintiffs to suffer years of further discrimination. *See Lewis*, 188 *N.J.* at 463 (recognizing that the constitution does not permit equal treatment to be indeterminately delayed); *see also Watkins v. Nelson*, 163 *N.J.* 235, 258 (2000) ("[J]ustice delayed is justice denied; slow justice is not good justice. Neither can be tolerated."). As a result, the State's argument that Plaintiffs' motion should be denied, because it amounts to an as-applied challenge must be rejected.

To require that Plaintiffs initiate a new process seeking the same equality remedy they have already won would fundamentally undermine litigants' rights, after these litigants have already secured an ordered remedy that simply has not been provided. The Legislature's refusal to act in the face of proof

[6] It is also the case that appellate courts have decided as-applied challenges in "irregular" procedural postures on the basis of records sufficient for resolution, where justice so required. *See, e.g., Wilde v. Wilde*, 341 *N.J. Super.* 381, 387 (App. Div. 2001) (using original jurisdiction under *R.* 2:10-5 to resolve request for grandparent visitation).

cannot preclude direct judicial enforcement. In fact, the motion in aid of litigants' rights, like the contempt mechanism, is specifically designed to allow litigants to avert bringing successive cases (and clogging the courts) in order to obtain a previously mandated remedy. *See* Tracy A. Thomas, *Ubi Jus, Ibi Remedium: the Fundamental Right to a Remedy Under Due Process*, 41 San Diego L. Rev. 1633 (2004) ("Our judicial system – both federal and state – is premised on the universally accepted principle that court judgments have meaning and that judicial pronouncements will be backed up by all necessary enforcement actions that may be required to ensure compliance with the law") (citing *Florida v. Georgia*, 58 *U.S.* (17 How.) 478, 481 (1854)); *see also* Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. Davis. L. Rev. 673, 690 n. 92 (2001) ("[T]he power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist."); *see also DeRolph v. State*, 728 *N.E.*2d 993, 100-03 (Ohio 2000) ("courts *do* possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then

constitutional. If it did not, then the power to find a particular act unconstitutional would be a nullity.")

In sum, the Plaintiff's motion in aid of litigants' rights is both necessary and procedurally appropriate. It satisfies the conditions set forth in *R.* 1:10-3, and the factual record supports Plaintiffs' claim that the State has not complied with this Court's ruling in *Lewis v. Harris.* Civil unions have not provided Plaintiffs and other same-sex couples equal rights. The Court has concluded that Plaintiffs merit more than this status has proven capable of providing: equality. Accordingly, the Court should direct the only remedy it is now clear can satisfy the Constitution: eliminating discrimination in civil marriage.

Respectfully submitted,

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MARK LEWIS, et al., Appellants, v. GWENDOLYN L. HARRIS, et al., Respondents.	**SUPREME COURT OF NEW JERSEY** **Docket No. 58,389** **Civil Action** Appeal From the Superior Court of New Jersey, Appellate Division Docket No. A2244-03T5 Sat Below: Hon. Skillman, P.J.A.D., Collester, J.A.D., and Parrillo, J.A.D.

CERTIFICATION OF SERVICE

I hereby certify under penalty of perjury that on this 23 day of June 2010, I served two true and correct copies of a Reply Brief in Support of Plaintiffs-Appellants' Motion in Aid of Litigants' Rights, filed herewith, by electronic mail and federal express on counsel for all parties as follows:

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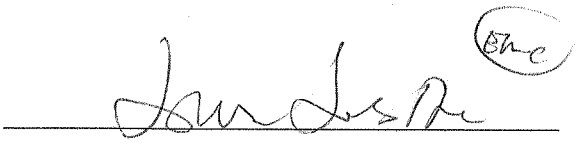

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Dated: June 23, 2010