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,

- 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. MER L-1729-11

Civil Action

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

In *Lewis v. Harris*, 188 *N.J.* 415, 423 (2006), the New Jersey Supreme Court held that "under the equal protection guarantee of Article I, Paragraph 1 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." The Legislature attempted to satisfy this constitutional mandate by enacting the Civil Union Act, by which it asserted that it sought to provide to same-sex couples "all the rights and benefits that married heterosexual couples enjoy." *N.J.S.A.* 37:1-28(d). But New Jersey still refuses to allow same-sex couples to marry. And, after the Supreme Court's decision in *United States v. Windsor*, 570 U.S. ___, (June 26, 2013), it is now clear that states that allow same-sex couples to marry render those couples and their families eligible for the complete, vast array of marital federal rights and benefits. But by contrast, Plaintiffs, whom New Jersey refuses to allow to marry, are not. For the reasons set forth in Plaintiffs' moving brief, this discrimination violates the Constitutions of both New Jersey and the United States.

The State's opposition brief boils down to the argument that because the State deems civil union equivalent to marriage, civil-unioned couples are in fact eligible for federal marital benefits; thus, any deprivation of those benefits is attributable solely to the federal government, and Plaintiffs should patiently await the day when they are, in fact, provided.

As set forth below, this argument is wrong and must be rejected, for the following reasons:

First, as federal law provides, as the developments since *Windsor* show, and as the State itself concedes, in fact, civil-unioned couples are today denied federal marital benefits because New Jersey will not permit them to marry. *Second*, the State's effort to avoid responsibility for its actions by blaming the federal government is contrary to established law, including the law previously pronounced in this case. And *third*, this matter is ripe for decision, as there are no facts in dispute and no legal doctrine that would allow for delay based upon purported "flux" in the law or in society, in the face of established ongoing constitutional violations.

For these reasons, as set forth in more detail below, this Court should award summary judgment to Plaintiffs and enjoin the State from denying marriage to same-sex couples. This inequality, which begins in New Jersey and results in the unequal dispensation of benefits to same-sex couples in this State, should be tolerated no longer.

ARGUMENT

I. THE FEDERAL GOVERNMENT DOES NOT RECOGNIZE CIVIL UNION AS "MARRIAGE."

The gravamen of the State's argument is that it has not violated *Lewis* or federal equal protection, because civil-unioned couples are already "entitled to federal marriage benefits." State Br. 12. But the State stops short of taking the position that civil-unioned couples are treated equally and thus receive *all* federal marriage benefits. Rather, it asserts that "a sizable, but indeterminate, number of the over 1,000 benefits and responsibilities that were inapplicable to civil union couples because of DOMA are now available to them because they are spouses, husbands, wives, widows, or widowers under New Jersey law." *Id.* at 16.

Besides admitting the indisputable fact that civil-unioned couples are denied at least some federal marital benefits, this statement reveals the central problem with the State's argument. Although the State insists that, under New Jersey law, civil-unioned couples have the legal equivalent of marriage and are appropriately designated as spouses, it cannot escape the basic reality that civil-unioned couples are *not* in fact married under New Jersey law and are, accordingly, being denied federal marital benefits.

Specifically, even as the State asserts that the Civil Union Act purports to treat "civil union partners" as equivalent to "spouses" by affording them "the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage," *N.J.S.A.* 37:1-31(a); *see* State Br. 14, the State has consistently and painstakingly distinguished civil union from marriage. It has given the institutions different names and vocabularies. *See N.J.S.A.* 37:1-29 (setting forth terms "civil union" and "civil union couple"); *id.* 37:1-33 (acknowledging terminology of "marriage," including "spouse," "husband," and "wife"). It has assigned them different definitions and eligibility criteria. *Compare Lewis*, 188 *N.J.* at 436 ("New Jersey's civil marriage statues . . . limit marriage to heterosexual couples."), *with N.J.S.A.* 37:1-30(b) (requiring that partners to a civil union "[b]e of the same sex"). And it has consistently differentiated the two in its statutes. *See, e.g., N.J.S.A.* 37:1-2 (providing preconditions for performing "a marriage *or* a civil union" (emphasis added)); *id.* 37:1-13 (providing who is "authorized to solemnize marriages *or* civil unions between such persons as may lawfully enter into the matrimonial relation *or* civil union" (emphasis added)). As a matter of simple statutory construction, then, the two do not share the same meaning. *See generally State v. Rangel*, 213 *N.J.* 500, 509 (2013) ("We do not read one part of a statute in a way

that would render another part redundant or even absurd."). Indeed, to maintain the distinction, the State has gone so far as to "treat[] as civil unions" every marriage of a same-sex couple validly entered in another state. Att'y Gen. Formal Opinion No 3-2007, at 2. Civil union and marriage are not, then, synonyms; rather, by the State's deliberate design, they are different legal statuses, and have been interpreted as such. *See, e.g.*, *Langan v. State Farm Fire & Cas.*, 48 *A.D.*3d 76, 849 *N.Y.S.*2d 105 (N.Y. App. Div. 2007) (denying civil union partner spousal status for purposes of workers' compensation death benefits), *Langan v. St. Vincent's Hosp. of N.Y.*, 25 *A.D.*3d 90, 802 *N.Y.S.*2d 476 (N.Y. App. Div. 2005), *review denied*, 850 *N.E.*2d 672 (N.Y. 2006) (denying civil union partner marital spousal status for purposes of wrongful death statute).

More to the point for purposes of this action, when federal law allocates marital benefits, it looks to State-sanctioned marriages; it does not do so by reference to individuals or couples whom State law purports to treat *as if* married. Rather, Congress identifies benefits recipients in terms of "marriage" and a resulting "spouse," usually without further defining those terms in the way that the State assumes. Nor is the term "spouse" a free-floating, vague term in federal law; instead, it is derived or follows from references to "marriage," and not some other status. Thus, as discussed in Plaintiffs' brief in

support of summary judgment, *see* Pls.' Br. 28-32, a federal employee's "spouse" or "former spouse . . . who has not remarried" may be covered by federal employee health insurance, 5 *U.S.C.* §§ 8901(5), (10)(A) & 8905; a non-citizen "spouse" in a "valid marriage" may obtain a visa for entry into the United States as a citizen's immediate relative, 8 *U.S.C.* §§ 1101(a)(15)(K)(i), 1151(b)(2)(A)(i) & 1204; a "surviving spouse" may obtain armed services survivorship benefits if he or she is a surviving "wife" or "husband" who was "married to [the decedent] for at least one year immediately before [the decedent's] death," 10 *U.S.C.* §§ 1447(7)-(9) & 1448(d); a "spouse" or a "former spouse," may recover domestic support obligations in certain bankruptcy proceedings, 11 *U.S.C.* § 101(14A); a "spouse" may not be taxed for coverage obtained under her spouse's employer-provided health insurance, 26 *U.S.C.* §§ 105(b), 106; the net assets of a student's "spouse" may be counted toward the student's eligibility for federal financial aid, 20 *U.S.C.* § 1087nn(b); and so forth.[1] In these many instances, it must be presumed that Congress "says in [these] statute[s] what it means and means in [these] statute[s] what it says," *Conn. Nat'l Bank v. Germain*, 503 *U.S.* 249, 253-54 (1992)

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[1] As Plaintiffs have previously demonstrated, the Code of Federal Regulations similarly uses the words "marriage" and "spouse" to define federal marital benefits. *See* Pls.' Br. 30-32.

-- namely, that these benefits are available to *spouses* to a lawful *marriage*.

Indeed, in the wake of the Supreme Court's decision in *Windsor*, the federal agencies tasked with enforcing these statutes have adopted just this interpretation. For example, as the State notes, *see* State Br. 24, recent guidelines issued by the United States Office of Personnel Management ("OPM"), provide that federal employment benefits will not be available to employees' civil union partners because they are not "legally married same-sex spouses." U.S. Office of Personnel Mgmt., *Benefits Administration Letter No. 13-2013*, at 1 (July 17, 2013), *available at* http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf (last visited Aug. 9, 2013). Thus, OPM has expressly decided that, post-*Windsor*, "same-sex couples who are in a civil union or other forms of domestic partnership other than marriage will remain ineligible for most Federal benefits programs," *id.* at 2 -- including health insurance, *id.*, life insurance, *id.* at 5, and dental and vision insurance, *id.* at 6 -- because they are not married spouses under State law.

Likewise, the Department of State has, on August 2, 2013, specifically stated that it will recognize "only a relationship legally considered to be a marriage in the jurisdiction where it

took place," for immigration purposes, 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 Aug. 9, 2013), a position that the Department of Justice shares, *see In re Zeleniak*, 26 *I&N Dec.* 158, 160 (BIA July 17, 2013) (holding that a citizen may sponsor his same-sex partner for lawful permanent residence only if they belong to a "legally valid marriage"). Accordingly, today, a New Jersey resident may not sponsor his or her civil union partner's application to reside in the United States, because they are not lawfully married.

To be sure, as Defendants observe and as Plaintiffs' counsel have publicly noted, *see* State Br. 14-15, civil-unioned couples are permitted to obtain spousal benefits under the Social Security Act. But the State fails to appreciate why this is so. Unlike most federal spousal-benefits provisions, the Social Security Act includes unique statutory language allowing benefits to flow to someone who, if not validly married, "nevertheless . . . would, under the laws applied by [State] courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a wife [or] husband." 42 *U.S.C.* § 416(h)(1)(A)(ii). In other words, the Social Security Act includes what Defendants apparently now wish Congress had

enacted everywhere: language specifically authorizing federal marital benefits to be distributed to people whom the State treats *as if* they were married. But, of course, Congress has not chosen to include such a clause elsewhere in the Federal Code. Thus, because the specific language of the Social Security Act is a strictly delineated exception, not an interpretive rule, the State is incorrect that it represents one of an "endless" set of federal marital benefits now available to civil-unioned couples. State Br. 16.[2]

In sum, then, there is no dispute that civil-unioned couples are being denied federal benefits because New Jersey denies them access to marriage.[3] The Defendants' argument fails

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[2] The State also casually posits that federal government integrity rules and provisions of the penal code now "apply to civil union partners in New Jersey, because the State treats them as spouses." State Br. 15. The State, however, does not provide any federal authority for this proposition, and rests instead on its *ipse dixit* that "because the Civil Union Act treats civil union partners as spouses, these protections will apply to them." *Id.* at 16. The State's say-so is cold comfort where federal statutory language and agency interpretations disagree.

[3] Although it does not argue that Plaintiffs lack standing, the State observes that Plaintiffs have not demonstrated that they personally have been deprived of federal benefits. State Br. 24. But as civil-unioned couples unable to marry under New Jersey law, the individual Plaintiffs and GSE's members certainly have "a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that [they] will suffer harm in the event of an unfavorable decision" to give rise to standing under New Jersey law, given the federal government's provision of a wide range of benefits to lawfully married

to acknowledge the essential legal point that, even if New Jersey treats a civil-unioned couple as if they were married, that couple is definitively not married under State law. Plaintiffs, rather, are currently denied federal benefits because marriage is a status distinct and separate from civil union, and, with the exception of the Social Security provision, federal spousal benefits are distributed exclusively according to State-decreed marital status. Thus, the State's effort to "blame the feds" notwithstanding, Plaintiffs' loss of federal benefits derives from the State's barring same-sex couples from marriage and relegating them to civil union, a separate and unequal status under the law.

Moreover, beyond incorrectly arguing that Plaintiffs already receive federal marital benefits based upon their civil unions, the State also contends that "[t]he language, reasoning, and holding of *Windsor* mandate" that the federal government provide marital benefits to civil-unioned couples. State Br.

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spouses only. *In re Camden County*, 170 *N.J.* 439, 449 (2002) (citing *N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n*, 82 *N.J.* 57, 67-69 (1980)). Because Plaintiffs' interests are "not fanciful, not overly generalized, and not philosophical," but are "economic and direct," *id.* at 451, and "because of the public interest and continuing controversy over the validity" of New Jersey's denial of same-sex marriage, *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 320 *N.J. Super.* 174, 203 (App. Div. 1999), *aff'd*, 164 *N.J.* 316 (2000), Plaintiffs' equal protection claims are justiciable.

12. In particular, the State emphasizes that the federal government must "'defer[] to state-law policy decisions with respect to domestic relations,'" *id.* at 13 (quoting *Windsor*, slip op. at 17), including the State's determination "about who is entitled to the benefits of marriage," *id.* at 19. But the State ignores the distinction between this case and *Windsor*, where the Court's ruling arose in the context of New York having granted marriage to same-sex couples and the federal government having refused to recognize those marriages -- a very different situation than one in which the federal government would be called upon to parse a different, non-marital, state-created status.

The State further contends that the federal government violates "'due process and equal protection principles,'" *id.* at 16 (quoting *Windsor*, slip op. at 16), by denying marital benefits to civil-unioned couples on the basis of civil union's "label," without considering the "essence" of this status, *see id.* at 17-18. Thus, the State asserts, civil-unioned couples are "legally entitled to federal spousal benefits," so the State has fulfilled its constitutional responsibilities under the federal and state constitutions. *Id.* at 37.

Even if the Court were to ignore the legal reality of the U.S. Code and administrative provisions sampled in Point I, it

should not be persuaded by the State's crystal-ball argument that *Windsor* will be interpreted to entitle Plaintiffs to 100% of all federal marital benefits. Unfortunately for civil-unioned couples, the U.S. Supreme Court plainly stated that *Windsor*'s "opinion and its holding are confined to those *lawful marriages*" between same-sex couples. *Windsor*, slip op. at 26 (emphasis added). Nor do *Windsor*'s two passing references to civil unions, upon which the State relies, alter the opinion's express scope and effect, let alone treat civil union and marriage as "functional equivalents." State Br. 12. Rather, the Court mentioned civil union solely by way of describing the background facts of the case. *See Windsor*, slip op. at 2 (observing that DOMA did not prevent states from "enacting laws permitting same-sex marriages or civil unions"); *id.* at 20 (observing that New York permitted "same-sex unions" before permitting same-sex marriage).

Plaintiffs agree with the State that domestic relations law is "'a virtually exclusive province of the States'" and that the federal government will normally defer to the State's definition of marriage in dispensing spousal benefits. *Windsor*, slip op. at 16 (quoting *Sosna v. Iowa*, 419 *U.S.* 393, 404 (1975)); *see also id.* at 20 (DOMA constitutes an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage"). But the State improperly posits that no

constitutional violation exists in New Jersey, because this federal deference not only encompasses the State's determination as to who may marry -- the issue in *Windsor* -- but also requires the federal government to analyze and assess an alternative State-created status and extend deference to the State's determination that marriage and civil union are, other than the "label," identical. *See* State Br. 13.

First, as *Windsor* specifically states, deference to State law with regard to marriage is not absolute, but is subject to constitutional limits. *Windsor*, slip op. at 16 (citing *Loving v. Virginia*, 388 *U.S.* 1 (1967)); *see also, e.g., Turner v. Safley*, 482 *U.S.* 78, 94-100 (1987) (denying marriage on the basis of incarcerated status violates federal Constitution).

But, second, the State's argument that *Windsor* requires the federal government to look beyond the words chosen by the State -- "civil union" rather than "marriage" -- ignores the case's discussion of the import of marriage. "[M]arriage," as the U.S. Supreme Court held, "is more than a routine classification for purposes of certain statutory benefits;" it is, rather, a "lawful status" and "a far-reaching acknowledgement of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages." *Windsor*, slip op. at 19-20. Indeed, it is

ironic for the State to suggest that the difference between marriage and civil union is merely semantic, even as it has purposefully denied -- and fought hard in this litigation to continue to deny -- the status of marriage to same-sex couples.[4] If the difference between marriage and civil union is a difference in name only, *see* State Br. 18 ("Here, New Jersey deems civil unions to be the equivalent of marriage, and it is that equivalency, not the label, that is dispositive in entitling civil union partners to all marriage benefits."), then the State in effect concedes that its discriminatory classification cannot withstand even rational-basis scrutiny, when an array of federal benefits hangs in the balance.

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[4] Defendants misconstrue Plaintiffs' reference to the State's "animus," as if Plaintiffs were accusing the State of hostility toward lesbian and gay couples. *See* State Br. 38-39. That, of course, is not Plaintiffs' position at all; rather, in the pages of Plaintiffs' brief cited by the State, Plaintiffs do no more than cite abundant federal law for the proposition that the New Jersey scheme, like DOMA, fails federal constitutional scrutiny because it is, in the words of *Romer v. Evans*, 517 *U.S.* 620, 635 (1996), "a classification of persons undertaken for its own sake." *See* Pls. Br. 43. It is, then, the undeniable *purposefulness* of the State's discrimination in denying marriage to same-sex couples that is properly referred to as "animus" for federal equal protection purposes. *See, e.g., Bray v. Alexandria Women's Health Clinic*, 506 *U.S.* 263, 275-76 (1993) (holding that animus may be demonstrated where defendants "act[ed] at least in part for the very purpose of" depriving plaintiffs' rights). Thus defined, it is a matter fit for decision on summary judgment, as *Windsor* itself demonstrates. *See Windsor v. United States*, 833 *F. Supp.* 2d 394 (S.D.N.Y. 2012) (awarding summary judgment to plaintiff), *aff'd*, 570 *U.S.* ___ (June 26, 2013).

In sum, the State's assertion that civil-unioned couples are eligible for federal marital benefits is belied by the reality that civil-unioned couples are currently unable to access them and that the case for obtaining them remains challenging given the language of the statutes and regulations at issue and, most significantly, the position the federal government has already taken in these contexts distinguishing marriage from civil union. Instead, as Plaintiffs have contended from the outset, there is a single sure way for New Jersey's same-sex couples to obtain benefits equal to married couples: the State must allow them to marry.

II. THE STATE, BY ITS OWN ACTIONS, VIOLATES PLAINTIFFS' CONSTITUTIONAL RIGHTS, AND CANNOT FOIST ITS RESPONSIBILITY NOT TO DISCRIMINATE ONTO THE FEDERAL GOVERNMENT.

The State makes the further claim that it is the federal government, not the State that violates Plaintiffs' right to equal protection by refusing to treat those in civil unions equally. The State's argument, however, attempts to foist the State's responsibility for discriminatorily relegating same-sex couples to civil union onto the federal government, which has historically used marital status, not a newly-created, second-class civil union status, as the basis for eligibility for an array of federal benefits. According to the State, responsibility for Plaintiffs' deprivation of federal benefits lies exclusively with the federal government. The State further suggests that Plaintiffs bring lawsuits against the federal

government demanding federal marriage-based benefits for their civil unions, while the State continues to refuse marriage, the gateway to hundreds of federal benefits, to Plaintiffs. According to the State's logic, Plaintiffs have failed to establish the necessary state action to sustain their equal protection claims. *See* State Br. 30-31 (contending that federal government's denial of benefits cannot "transform[] what is otherwise a legitimate state position into impermissible state action" under federal law); *id.* at 35 (contending that State's liability under New Jersey Constitution cannot depend on "whim of variable federal policies").[5] This argument, of course, merely restates the State's assertion, unsuccessfully pursued previously in this matter, that Plaintiffs have not established state action because the actor denying Plaintiffs equal treatment is a third party, and not the State.

But this Court has correctly rejected this state-action argument twice before. *See* Nov. 4, 2011 Am. Tr. 45-46 (denying

[5] This is a curious argument for Defendants to make since, if they sincerely believed it, one would have expected them to commence affirmative litigation compelling the federal government to recognize New Jersey civil union licenses and afford federal marital benefits to New Jersey same-sex couples -- which, of course, the State has not done. *See generally Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 *U.S.* 592, 608 (1982) (holding that the State has standing to file suit to ensure that "the State and its residents are not excluded from the benefits that are to flow from participation in the federal system"); *N.J.S.A.* § 52:17A-4(h) (providing that Division of Law must "[e]nforce the provisions of the Constitution and all other laws of the State"). In any event, because Defendants' argument cannot be squared with the law of the case or with relevant precedent, it should be rejected.

Defendants' motion to dismiss Plaintiffs' state equal protection claim); Op. Granting Mot. for Recons. 26-27 (holding that Plaintiffs adequately pleaded state action for federal equal protection claim). Accordingly, this is now the settled law of the case, and the State's argument must again be rejected. *See State v. Reldan*, 100 *N.J.* 187, 203 (1985) (holding that law of the case doctrine "requires a decision of law made in a particular case to be respected by all other lower or equal courts during the pendency of that case"); *accord Franklin Med. Assocs. v. Newark Pub. Schs.*, 362 *N.J. Super.* 494, 512 (App. Div. 2003).

Specifically, as this Court, speaking through Judge Feinberg, has already observed:

> [T]he real issue when you're talking about state action is the deprivation must be 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. So, if you build an infrastructure in which the result is a denial of benefits that's state action.
>
> [Nov. 4, 2011 Am. Tr. 18-19.]

Of course, that "infrastructure" resulting in the denial of public benefits is New Jersey's restriction of marriage to different-sex couples -- which, as Judge Feinberg held, establishes the state action necessary for equal protection review. *See* Nov. 4, 2011 Am. Tr. 26 ("But, with regard to equal protection and state action it's the process and the structure

where the individuals were named defendants play a role in the licensing and the processing of civil marriages, and thereby foreclosing that application."). Accordingly, because the Court has already twice dismissed this state-action defense, it should decline the State's attempt to re-litigate it for a third time.

In any case, the State's argument that the validity of State law "cannot hinge on the action . . . or policy of federal officials," State Br. 35, is belied by caselaw. For example, under 42 *U.S.C.* § 402(d), Social Security benefits are paid to a beneficiary's "child" in the event the beneficiary dies; a separate section, 42 *U.S.C.* § 416(h)(2)(A), further defines a beneficiary's "child" by reference to State intestacy law. Thus, as in this case, State law ultimately determines whether a child applicant will receive federal Social Security benefits. *See, e.g., In re Adoption of Baby T.*, 311 *N.J. Super.* 408, 416 (App. Div. 1998) (holding that the absence of "a legally recognized parent-child relationship" under State law will deprive a child of "claims for . . . social security benefits"). But directly contrary to the State's argument, the courts have held that where federal officials' application of State law results in the unconstitutional denial of these benefits, the underlying State law must be invalidated because it -- and not the incorporating federal law -- is the cause of the applicant's injury. Thus, in *Cox v. Schweiker*, 684 *F.*2d 310 (5th Cir. 1982), the Court of Appeals invalidated a Georgia intestacy statute that denied plaintiff the ability to legitimate himself

as a rightful "child" under § 416(h)(2)(A) prior to his father's death, resulting in the loss of Social Security payments. Even though the federal government was the actor denying benefits, the court struck down the underlying *State* law, because its unconstitutional application was deemed to be the cause of plaintiffs' loss of Social Security benefits. *See Cox*, 684 *F.*2d at 322-23; *see also Daniels v. Sullivan*, 979 *F.*2d 1516, 1520 (11th Cir. 1992) (holding that application of Georgia's intestacy scheme resulting in the denial of Social Security benefits was unconstitutional); *Handley v. Schweiker*, 697 *F.*2d 999, 1003, 1006 (11th Cir. 1983) (holding Alabama intestacy law invalid as applied to plaintiff because it created "an unconstitutional insurmountable barrier" to legitimacy and, by extension, to federal Social Security benefits). Indeed, because federal application of State law might result in the unconstitutional denial of Social Security benefits to children, the Social Security Administration now "requir[es] a determination . . . of whether the state intestacy statute is constitutional" before relying on it to deny an application for benefits. *Lawrence v. Chater*, 516 *U.S.* 163, 165 (1996) (per curiam) (internal quotation marks omitted).

These cases affirm what this Court has already held: that state action is established when Plaintiffs' deprivation results from another jurisdiction's application of a "right or privilege created by the state." Nov. 4, 2011 Am. Tr. 18. The State's

argument seeking to blame the federal government for the State's actions must be rejected.

III. JUDICIAL REVIEW SHOULD NOT BE DELAYED.

In sum, Plaintiffs have established that they are denied federal marital benefits, subsequent to and taking into account the *Windsor* decision; and that the State is properly held responsible for this deprivation of Plaintiffs' rights. The only remaining question is whether this Court should enter judgment now or later. The answer should be clear: judgment must enter for Plaintiffs forthwith. The State, however, contends that Plaintiffs' motion is not yet ripe because "the position of . . . various federal agencies is in flux and non-uniform" with respect to federal marital benefits. State Br. 25. But this contention provides no basis for delaying the decision on a matter properly before it, as to which there are no material facts in dispute.[6]

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[6] At the outset, Plaintiffs must correct the State's misleading suggestion that Plaintiffs have publicly admitted that the federal government may need to "take time" to "change regulations" to provide federal benefits to civil-unioned couples. State Br. 21. To the contrary, Plaintiffs' counsel's statements addressed the time required for federal agencies to amend their policies and regulations in order to provide benefits to same-sex marital spouses in lawful marriages. *See, e.g.*, Da2 (discussing how some agencies "may have to change regulations" to adopt the "place of celebration" standard for determining whether a couple is married under State law); Da31 (same). With regard to the issue presented here, Plaintiffs and their counsel have maintained a consistent position since *Windsor*: New Jersey must immediately permit same-sex couples to marry, because civil-unioned couples are being denied federal benefits.

In arguing that Plaintiffs' motion is not ripe, the State relies heavily on federal caselaw. *See* State Br. 26 (citing, *e.g.*, *Nat'l Parks Hospitality v. Dep't of Interior*, 538 U.S. 803, 808 (2003)). But the New Jersey Constitution does not include the equivalent of Article III of the United States Constitution from which federal ripeness doctrine derives. *See In re Application of Boardwalk Regency Corp. for Casino License*, 90 *N.J.* 361, 367-68 (1982). Rather, New Jersey has "historically taken a much more liberal approach on . . . justiciability than have the federal cases," *In re Ass'on of Trial Lawyers of Am.*, 228 *N.J. Super.* 180, 184-85 (App. Div. 1988), and instead abides by the "venerated principle" that due weight be given to "'the interests of individual justice, and the public interest, always bearing in mind that throughout our law we have been sweepingly rejecting procedural frustrations in favor of just and expeditious determinations on the ultimate merits,'" *Jen Elec., Inc. v. County of Essex*, 197 *N.J.* 627, 645 (2009) (quoting *Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 *N.J.* 98, 107-08 (1971)).

Under governing New Jersey law, "[a] case's ripeness depends on two factors: '(1) the fitness of issues for judicial review and (2) the hardship to the parties if judicial review is withheld at this time.'" *Comm. to Recall Robert Menendez From the Office of U.S. Senator v. Wells*, 204 *N.J.* 79, 99 (2010) (quoting *K. Hovnanian Cos. of N. Cent. Jersey, Inc. v. N.J.*

Dep't of Envtl. Prot., 379 *N.J. Super.* 1, 9 (App. Div. 2005)). Here, Plaintiffs satisfy both requirements.

First, Plaintiffs' motion is fit for judicial determination because it presents a purely "'purely legal'" question, *Wells*, 204 *N.J.* at 99 (quoting *Abbott Labs. v. Gardner*, 387 *U.S.* 136, 149 (1967)), "the material facts [of which] are not genuinely in dispute," *Tarabokia v. Structure Tone*, 429 *N.J. Super.* 103, 106 (App. Div. 2012) ("Because the material facts are not genuinely in dispute and the scope of the duty of care is a question of law for the court to decide, the matter is ripe for summary judgment.") (citing, *e.g.*, *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 540 (1995)); *see also R.* 4:46-2 ("The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."). This motion was prompted by two events: (1) the legal sea change wrought by *Windsor*, and (2) federal law and agencies' denial of benefits to civil-unioned couples in *Windsor*'s wake. The former is a development in federal law; the latter turns on the language of federal statutes and regulations, including their interpretation post-*Windsor*. Neither presents any disputed fact warranting delay in deciding Plaintiffs' motion.[7] Rather, because it is settled that

[7] The State claims that Plaintiffs "pepper their brief with facts that are . . . in dispute," thus precluding summary judgment.

same-sex couples are denied federal benefits because New Jersey will not let them marry, *see supra*, Point I, Plaintiffs have established, as a matter of law, that the State has failed to afford same-sex couples "on equal terms the same rights and benefits enjoyed by married opposite-sex couples," in violation of *Lewis*, 188 *N.J.* at 457; and has thereby "single[d] out" and has "impose[d] a disability on the class" of same-sex couples, in violation of *Windsor*, slip op. at 25. Thus, Plaintiffs' motion is ripe for this Court's review.

Second, there can be no doubt that Plaintiffs will suffer significant hardship if judicial review is withheld at this time. Plaintiffs are denied federal benefits and responsibilities such as federal employee health insurance and immigration rights, and stand to lose other federal benefits, including but not limited to tax, veterans affairs, education,

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See State Br. at 12 n.3. But the purported material facts identified by the State simply set forth the procedural history of the case and describe the Complaint. *See id.* (citing Pls.' Br. 6-15). Although facts alleged in the course of this litigation may be disputed, the fact that the parties made these allegations cannot be. Nor, in any event, are there any disputed facts that require resolution in order to decide this motion. As the United States Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242 (1986), "[b] y its very terms, [the summary judgment] standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247-48. Thus, Plaintiffs have not violated *R.* 4:46-2(a), as the State alleges, *see* State Br. 12 n.3, as there are simply no material facts at issue; rather, the Court need look no further than the holding of *Lewis* and the changed legal landscape following the *Windsor* decision.

job placement assistance, employment benefits, and survivors' benefits. *See* Pls' Br. 28-32 (setting forth partial list of federal benefits denied to New Jersey civil union couples). Many of these benefits, if lost, will result in immediate, profound, and irreparable harm. *See, e.g., Golden v. Kelsey-Hayes Co.*, 73 *F.*3d 648, 657 (6th Cir. 1996) (denial of health insurance is irreparable); *Whelan v. Colgan*, 602 *F.*2d 1060, 1062 (2d Cir. 1979) (loss of family medical care is irreparable); *Bedgood v. Cleland*, 521 *F. Supp.* 80, 84 (D. Minn. 1981) (denial of veterans' benefits is irreparable); *Guaman v. Velez*, 421 *N.J. Super.* 239, 255 (App. Div. 2011) (denial of publicly subsidized healthcare is irreparable). And certainly "justice delayed is justice denied," *Watkins v. Nelson*, 163 *N.J.* 235, 258 (2000), where, as remains possible for all civil-unioned couples in New Jersey, a civil union partner dies while the State denies them the right to marry, thus permanently depriving the surviving partner of federal benefits dependent on marital status; in New Jersey, at least, a marriage cannot be posthumously imputed.

Furthermore, it would separately constitute injury to delay decision in this case and, as the State suggests, force Plaintiffs to litigate for their rights in federal court on a statute-by-statute, regulation-by-regulation, or benefit-by-benefit basis. Even assuming that every single one of these rights could eventually be successfully procured through legal action against the federal government -- a questionable proposition at best, as set forth above -- Plaintiffs would

continue to be denied federal benefits pending the outcome of that litigation. And the litigation itself would be a "costly and time-consuming" burden on the Plaintiffs that would not be visited upon similarly situated married couples, thus exacerbating Plaintiffs' constitutional injury. *Lewis*, 188 *N.J.* at 450; *see also Troxel v. Granville*, 530 *U.S.* 57, 75 (2000) (plurality op.) (holding that remanding for further proceedings would be improper where "additional litigation would further burden" plaintiff's constitutional rights); *Wilde v. Wilde*, 341 *N.J. Super.* 381, 395 (App. Div. 2001) (observing that "litigation itself is a burden" upon a party's constitutional rights).

In sum, Plaintiffs' rights to equal protection of the laws should not be delayed until some imagined future time when there is no more "flux." No law or prudential doctrine counsels such delay; if it were the rule, Courts would never act, and rights would never be vindicated. Plaintiffs are today denied their rights and properly seek the Court's intervention in its fundamental role as the protector of constitutional rights. *See Lewis*, 188 *N.J.* at 457 ("Ultimately, we have the responsibility of ensuring that every New Jersey citizen receives the full protection of our State Constitution.").[8]

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[8] Indeed, to withhold judicial review would not only leave same-sex couples without the benefits and rights to which they are entitled until some indeterminate point in the future, but would thereby also undermine public confidence in the judicial system. *Cf. Wells*, 204 *N.J.* at 100 (noting that the uncertainty and instability injecting into the State's electoral scheme

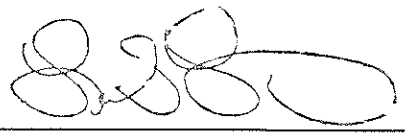
Moreover, as discussed above, in the midst of this "flux," as the State concedes, at least some federal rights are denied the Plaintiffs in this case. This Court should, then, in its role "as the designated last-resort guarantor of the Constitution's command," *Robinson v. Cahill*, 69 *N.J.* 133, 154-55 (1975), decline the State's invitation to delay decision on Plaintiffs' claim to the equal protection of the laws. Plaintiffs are today denied their rights and thus properly seek the Court's decision, utilizing the correct standard, *see* State Br. 9, and proceeding with appropriate caution which the law requires, *id.* at 10-11. There is no legal doctrine that counsels the inaction the State advocates. Plaintiffs' motion for summary judgment should be granted.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment.

"adversely affects public confidence in the integrity of the system").

Respectfully submitted,



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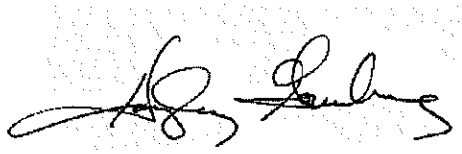

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