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August 28, 2013

Honorable Mary C. Jacobson, A.J.S.C.
Superior Court of New Jersey – Civil Division
Mercer County Criminal Courthouse
400 South Warren Street
Trenton, New Jersey 08608

Re: *Garden State Equality, et al. v. Dow, et al.*
Docket No. MER L-1729-11

Dear Judge Jacobson:

Please accept this letter brief as the supplement the Court invited the parties to submit at the conclusion of the August 15, 2013 oral argument on Plaintiffs' motion for summary judgment in the above-captioned matter.[1] This submission (a) sets forth the determinations of those federal agencies that have to date issued directives implementing the *United States v. Windsor* decision striking Section 3 of the federal Defense of Marriage Act as unconstitutional; (b) discusses the issue of standing raised by the Court at oral argument; (c) addresses Your Honor's concern regarding the appropriateness of a State Court addressing an issue that bears upon the provision of federal benefits; and (d) establishes that the Court, by granting summary judgment, would not be acting prematurely, and that postponing a decision would work an injustice. For the reasons set forth below, as well as those provided in Plaintiffs' Brief and Reply Brief in support of their motion for summary judgment and discussed at oral argument, the motion for summary judgment should be granted, and same-sex couples in New Jersey, including Plaintiffs, should be permitted to marry.

[1] For the convenience of the Court and counsel, the transcript of that oral argument (hereinafter "Tr.") is provided herewith.

1. Agency Actions

As promised at oral argument, Tr. 12, Plaintiffs here provide information regarding the federal agency directives following the *Windsor* decision that clearly and definitively exclude unmarried same-sex couples. The harms[2] are already significant, and they are growing each day:

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[2] In addition to benefits and protections linked to marriage but not civil union, federal responsibilities also track marriage, and are not applied to another legal status, like civil union. For example, on August 19, 2013, the federal Office of Government Ethics (OGE) issued its post-*Windsor* Legal Advisory, which "interprets the terms 'marriage' and 'spouse' to include a same-sex marriage and a same-sex spouse where those terms appear in federal ethics provisions...." and "now similarly interprets the term 'relative' to include a same-sex spouse when used in federal ethics provisions. For example, OGE now construes 18 U.S.C. § 208, the primary criminal conflict of interest statute, to impute the financial interests of a federal employee's same-sex spouse to the employee. Likewise, OGE deems a federal employee's same-sex spouse to be an 'eligible person' with regard to the issuance of a Certificate of Divestiture. 5 C.F.R. § 2634.1003." United States Office of Government Ethics, LA-13-10: Effect of the Supreme Court's Decision in United States v. Windsor on the Executive Branch Ethics Program, *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/ (last visited Aug. 27, 2013). Significantly, the Office of Government Ethics specifically directs that legal statuses other than marriage have different and lesser implications: "Note that a civil union, domestic partnership, or other legally recognized relationship other than a marriage may trigger the impartiality provisions of the Standards of Ethical Conduct for Employees of the Executive Branch. See 5 C.F.R. part 2635, subpart E. An employee who is in a domestic partnership or civil union has a 'covered relationship' with his or her partner. *See* 5 C.F.R. § 2635.502(a)." *Id.*, n.3. But legal marriage, now regardless of sexual orientation, is the sole trigger for the most extensive relationship-linked requirements and responsibilities. As the agency stated:

> The Supreme Court's decision addressed the constitutionality of a statute that defined "marriage" and "spouse" for purposes of federal law to include only opposite-sex couples. The 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.
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> OGE has consulted with the U.S. Department of Justice regarding this legal advisory and will now begin applying this interpretation to the substantive conflicts of interest and financial disclosure programs that OGE administers under the federal ethics provisions. [*Id.* (emphasis added; footnote omitted)]

(A) Federal Employees' Marital Benefits

On July 17, 2013, the Office of Personnel Management ("OPM") issued its post-*Windsor* directive governing federal marital benefits for the same-sex married spouses of federal employees, as well as their children. *See* United States Office of Personnel Management, *Benefits Administration Letter, Coverage of Same-Sex Spouses* (July 17, 2013), http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf (last visited Aug. 27, 2013); *see also* United States Office of Personnel Management, *Guidance on the Extension of Benefits to Married Gay and Lesbian Federal Employees, Annuitants, and Their Families*, (June 28, 2013), http://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=5700 (last visited August 27, 2013). The Benefits Administration Letter details the range of significant health care, long-term care, and other benefits and protections available to the same-sex spouses of married federal employees, their children, and even their parents; these three generations are covered based on marriage, but excluded when the family's legal status is civil union. The Letter states: "The Supreme Court's decision addressed the constitutionality of a statute that defined "marriage" and "spouse" for purposes of federal law to include only opposite-sex couples. Therefore, *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.* (emphasis added). These benefits include health insurance (the presence of which may permanently affect one's quality of life), and life insurance, which cannot be awarded posthumously, since one may not marry a dead person. *See infra* at 11.

The post-*Windsor* OPM directive specifically delineates marriage – not civil union or domestic partnership – as the sole legal status that provides families of federal employees with coverage under the Federal Employees Health Benefits (FEHB) Program. United States Office of Personnel Management, *Benefits Administration Letter, Coverage of Same-Sex Spouses* (July 17, 2013) ("As a result of the Supreme Court's decision, legally married same-sex spouses will now be eligible family members under a Self and Family enrollment.... This decision does not extend coverage to registered domestic partners or individuals in civil unions."). In addition to same-sex spouses, children and stepchildren can receive benefits – but only in the case of parental marriage. *Id.* ("In addition, the children of same-sex marriages will be treated in the same manner as those of opposite-sex marriages and will be eligible family members according to the same eligibility guidelines. This includes coverage for children of same-sex spouses as stepchildren.") And the fact that the directive was "effective immediately" (*id.*) means that postponing access to marriage has already deprived the families of these federal employees from the coverage that would otherwise be theirs, if only New Jersey did not discriminate.

Along the same lines, Federal Employees Group Life Insurance ("FEGLI") would provide security to same-sex marital spouses and children of federal employees, if New Jersey allowed them to marry:

> Legally married same-sex spouses and children of legal same-sex marriages are now eligible family members under the FEGLI Program. This means that same-sex spouses and children of same-sex marriages are covered under Option C life insurance and the order of precedence in the same manner as opposite-sex spouses and children of opposite-sex marriages.... *This decision does not extend to registered domestic partners or individuals in a civil union.* These changes to eligibility are effective immediately.
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> [*Id.* (emphasis added)]

The Federal Employees Dental and Vision Program (FEDVIP) follows suit:

> As a result of the Supreme Court decision, legally married same-sex spouses will now be eligible family members under a Self and Family enrollment or a Self Plus One enrollment.... *This decision does not extend FEDVIP coverage to registered domestic partners or individuals in civil unions.*
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> [*Id.* (emphasis added)]

Again, the deprivation visited upon the families of New Jersey lesbian and gay federal employees extends to their children. *Id.* ("In addition, the children of same-sex marriages will be treated in the same manner as those of opposite-sex marriages and will be eligible family members according to the same eligibility guidelines. This includes coverage for children of same-sex spouses as stepchildren."). And in the case of the Federal Long-Term Care Insurance Program (FLTCIP), the deprivations linked to New Jersey's marriage discrimination extend to the parents of a lesbian or gay federal employee's family. See *id.* ("Yes, parents of legally married same-sex spouses will be eligible as qualified relatives of Federal employees, postal employees, or active members of the Uniformed Services, just as the parents of opposite-sex spouses are."). Finally, the Federal Flexible Spending Accounts (FSAFEDS) that could cover reimbursement for eligible health care expenses incurred by spouses or related children are likewise restricted to marriage. *Id.*

(B) Immigration Benefits

On August 2, 2013, the United States Department of State released its post-*Windsor* immigration directive. The "Frequently Asked Questions" section left no doubt about the agency's exclusion of civil-unioned binational couples from certain critical privileges, including sponsorship of one's spouse:

> Q: I am in a civil union or domestic partnership; will this be treated the same as a marriage?
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> A: 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.
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> [U.S. Department of State, *U.S. Visas for Same-Sex Spouses* (August 2, 2013), http://travel.state.gov/visa/frvi/frvi_6036.html (last visited August 27, 2013)]

The comprehensive coverage for married same-sex couples as well as stepchildren through marriage was equally clear:

> Q: How does the Supreme Court's *Windsor v. United States* decision impact immigration law?
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> A: The Supreme Court has found section 3 of the Defense of Marriage Act (DOMA) unconstitutional. Effective immediately, U.S. embassies and consulates will adjudicate visa applications that are based on a same-sex marriage in the same way that we adjudicate applications for opposite gender spouses. This means that the same sex spouse of a visa applicant coming to the U.S. for any purpose – including work, study, international exchange or as a legal immigrant – will be eligible for a derivative visa. Likewise, stepchildren acquired through same sex marriages can also qualify as beneficiaries or for derivative status.
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> [*Id.*]

The benefits at issue are available immediately for married same-sex binational couples. *See* U.S. Citizenship and Immigration Services, *Same-Sex Marriages,* Q4 and A4, *http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2543215c310af310VgnVCM100000082ca60aRCRD&vgnextchannel=2543215c310af310VgnVCM100000082ca60aRCRD* (last visited August 27, 2013). Moreover, previously submitted

applications (*e.g.*, petitions for an alien relative) that were denied solely because of DOMA may be reopened and the consequences revisited – but only in cases of marriage. See *id.*, Q5 and A5. And denials of work authorizations may be revisited as well -- if same-sex binational couples are married. *Id.* In sum, the immigration implications of access to marriage are extensive. As the guidance states:

> Under the U.S. immigration laws, eligibility for a wide range of benefits depends on the meanings of the terms "marriage" or "spouse." Examples include (but are not limited to) an alien who seeks to qualify as a spouse accompanying or following to join a family-sponsored immigrant, an employment-based immigrant, certain subcategories of nonimmigrants, or an alien who has been granted refugee status or asylum. In all of these cases, a same-sex marriage will be treated exactly the same as an opposite-sex marriage.
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> [*Id.*, A6.]

Likewise, immigration eligibility of children, parents, and siblings of the same-sex spouse often hinges on marriage. *See id.*, A7 ("There are some situations in which either the individual's own marriage, or that of his or her parents, can affect whether the individual will qualify as a 'child,' a 'son or daughter,' a 'parent,' or a 'brother or sister' of a U.S. citizen or of a lawful permanent resident. In these cases, same-sex marriages will be treated exactly the same as opposite-sex marriages.").

Further, marriage reduces time limits on residency requirements for immigration purposes:

> As a general matter, naturalization requires five years of residence in the United States following admission as a lawful permanent resident. But, according to the immigration laws, naturalization is available after a required residence period of three years, if during that three year period you have been living in "marital union" with a U.S. citizen "spouse" and your spouse has been a United States citizen. For this purpose, same-sex marriages will be treated exactly the same as opposite-sex marriages.
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> [*Id.*, A8.]

Finally, for some discretionary waivers of inadmissibility, a relationship by marriage is a prerequisite: "Whenever the immigration laws condition eligibility for a waiver on the existence

of a 'marriage' or status as a 'spouse,' same-sex marriages will be treated exactly the same as opposite-sex marriages." *Id.*, A9. Civil unions are not mentioned, except to expressly distinguish them from marriage with regard to one's eligibility as a spouse for immigration purposes. *Id.*

(C) Federal Family and Medical Leave Act Benefits

On August 9, 2013, the United States Department of Labor released a *Windsor*-related fact sheet making clear that the Family and Medical Leave Act, 29 *U.S.C.* § 2601 *et seq.*, which requires that an employee be permitted to take leave "[t]o care for the employee's spouse…who has a serious health condition," now covers a same-sex married spouse. In that fact sheet, the Department of Labor explicitly states that, for purposes of the Act, "Spouse means 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." U.S. Department of Labor, Wage and Hour Division, *Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act*, *http://www.dol.gov/whd/regs/compliance/whdfs28f.pdf*, (last visited August 27, 2013). This protection is especially significant for families that include members of the military, for whom additional protections connected to certain "exigencies" are provided -- but only in the case of marital spouses. *Id.*

(D) Rights and Benefits for Same-Sex Married Military Spouses

On August 13, 2013, the Secretary of Defense made clear that marital benefits would be extended on equal terms to same-sex and different-sex spouses of members of the military:

> It is now the Department's policy to treat all married military personnel equally. The Department will construe the words "spouse" and "marriage" to include same-sex spouses and marriages, and the Department will work to make the same benefits available to all military spouses, regardless of whether they are in same-sex or opposite-sex marriages. . . . . It is my expectation that all spousal and family benefits, including identification cards, will be made available to same-sex spouses no later than September 3, 2013.

United States Secretary of Defense Chuck Hagel, *Memorandum for Secretaries of the Military Departments Under Secretary of Defense for Personnel and Readiness, SUBJECT: Extending Benefits to the Same-Sex Spouses of Military Members*, *http://www.defense.gov/home/features/2013/docs/Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf* (last visited Aug, 27, 2013). At the same time, the Department of Defense

made clear that it requires a couple to be married to in order to obtain these benefits. The Secretary directed that

> As the Supreme Court's ruling has made it possible for same-sex couples to marry and be afforded benefits available to any military spouse and family, I have determined, consistent with the unanimous advice of the Joint Chiefs of Staff, that the extension of benefits to the same-sex domestic partners of military members is no longer necessary to remedy the inequity that was caused by section 3 of the Defense of Marriage Act.
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> [*Id.*]

That is, the Department of Defense withdrew benefits to same-sex partners of members of the military in a status other than marriage (and benefits to their children, as well) after *Windsor*. Indeed, in express recognition of both the gravity and time-sensitivity of the protections at issue, denied to those who are not married, service members who reside in jurisdictions that do not allow marriage are specifically allowed "non-chargeable leave for the purpose of traveling to a jurisdiction where such a marriage may occur. This will provide accelerated access to the full range of benefits offered to married military couples throughout the department, and help level the playing field between opposite-sex and same-sex couples seeking to be married." United States Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), *News Release, "DOD Announces Same-Sex Spouse Benefits,"* http://www.defense.gov/releases/release.aspx?releaseid=16203 (last visited Aug. 27, 2103). Thus, the directive makes clear that marriage is required, even if one must travel to obtain it; it does not authorize acquisition of or recognition of civil union for purposes of federal military spousal or family benefits. *See also* Under Secretary of Defense Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services, *Further Guidance on Extending Benefits to Same-Sex Spouses of Military Members*, 1 (August 13, 2013), *http://www.defense.gov/home/features/2013/docs/Further-Guidance-on-Extending-Benefits-to-Same-Sex-Spouses-of-Military-M.pdf* (last visited Aug. 27, 2013). And it makes clear that time is of the essence: "the Defense Department will make spousal and family benefits available no later than September 3, 2013, regardless of sexual orientation, as long as service member-sponsors provide a valid marriage certificate." *See* United States Secretary of Defense Chuck Hagel, *Memorandum for Secretaries of the Military Departments Under Secretary of Defense for Personnel and Readiness*. Thus, the federal outlay of federal benefits is consistent: "For civilian benefits administered government-wide to federal employees, the Department of Defense will follow the Office of Personnel Management and the Department of Labor's guidance to ensure that the same benefits currently available to heterosexual spouses are also available to legally

married same-sex couples." U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), *News Release, "DOD Announces Same-Sex Spouse Benefits."* [3]

In sum, the rollout of benefits and protections for married same-sex spouses and their families following the *Windsor* decision is far-reaching and time-sensitive, and the bar to access through marriage affects the health, well-being, and family integrity of couples, their children, and even their parents. The *Lewis* decision and federal equal protection dictate the ineluctable conclusion: each day same-sex couples are denied the rights that would be theirs simply by virtue of New Jersey's allowing them to marry is another day they are unnecessarily and unlawfully injured. Summary judgment should be granted.

2. Standing

At oral argument, Your Honor expressed concern regarding whether Plaintiffs have standing to move for summary judgment on the ground that, post-*Windsor*, same-sex couples in New Jersey are being denied federal marital benefits. Plaintiffs wish to respond to this concern and respectfully contend that, for the reasons set forth below and on the basis of the attached affidavits, Plaintiffs' motion is clearly justiciable.

Unlike federal courts, which are bound by the "case or controversy" requirement of Article III of the U.S. Constitution, "New Jersey courts always have employed 'liberal rules of standing,'" *Jen Elec., Inc. v. County of Essex*, 197 *N.J.* 627, 645 (2009) (quoting *N.J. Builders Ass'n v. Bernards Township*, 219 *N.J. Super.* 539, 539 (App. Div. 1986), *aff'd*, 108 *N.J.* 223 (1987)). Indeed, the state's courts have applied those rules especially "permissively" in "public

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[3] While the full tax implications of *Windsor* remain to be seen, at least one government source believes that the same analysis will apply to the tax code. The Congressional Research Service ("CRS") has already published what it has described as "an overview of the potential federal tax implications for same-sex married couples of the U.S. Supreme Court (SCOTUS) ruling in *United States v. Windsor*, with a focus on the federal income tax. Estate taxes are also discussed." Margot L. Crandall-Hollick, Molly F. Sherlock, and Carol A. Pettit, "*The Potential Federal Tax Implications of* United States v. Windsor *(Striking Section 3 of the Defense of Marriage Act (DOMA)): Selected Issues*," 1 (July 18, 2013) http://taxprof.typepad.com/files/crs_doma.pdf (last visited Aug. 27, 2013) (footnotes omitted). Noting that, as of 2004, "there were 198 sections of the Internal Revenue Code (IRC) in which marital status was a factor," *id.* at 1 n.6, the CRS also emphasizes, "It is important to note that a civil union is a legal protection conferred at the state, not the federal level. As such a variety of benefits discussed in this report may not apply to civil unions." Id. at 2 n.10. Those benefits (or burdens) include earned income tax credits, child and dependent care credits, child tax credits, education tax credits, and adoption credits -- all critical provisions that turn on marriage, which New Jersey neither allows nor recognizes.

interest and group litigation," *NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp.*, 421 *N.J. Super.* 404, 442 (App. Div. 2011), *appeal dismissed*, 213 *N.J.* 47 (2013) (quoting *In re Six Month Extension of N.J.A.C. 5:91-1*, 372 *N.J. Super.* 61, 86 (App. Div. 2004), *certif. denied*, 182 *N.J.* 630 (2005)) (internal quotation marks omitted). Accordingly, New Jersey courts disfavor rigid application of standing doctrine and, instead, abide 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.*, 197 *N.J.* at 645 (quoting *Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 *N.J.* 98, 107-08 (1971)).

Thus, "[t]o possess standing in a case, a party must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." *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)). Plaintiffs here meet each of these requirements.

First, Plaintiffs have a sufficient stake in the outcome of the litigation, insofar as they wish to obtain New Jersey marriage licenses and thereby gain the full panoply of federal benefits available only to married couples. That desire to be married, and thereby receive economic benefits and other legal rights and privileges, makes Plaintiffs far more than "total strangers or casual interlopers;" instead, they are parties with an "obvious . . . interest in the effect" of New Jersey's denial of marriage on themselves and others similarly situated. *N.J. State Chamber of Commerce*, 82 *N.J.* at 67-68; *see also N.J. Builders Ass'n*, 108 *N.J.* at 227 (holding that developers had sufficient stake to challenge ordinance that would deprive them of their land's future economic benefits); *In re Martin*, 90 *N.J.* 295, 308 (1982) (holding that denial of a license establishes a sufficient stake for standing analysis). And, insofar as New Jersey's denial of marriage adversely affects Garden State Equality's members and its interests in obtaining equal treatment for same-sex couples, GSE has a sufficient stake to sue as an organizational plaintiff. *See, e.g.*, *N.J. Builders Ass'n*, 108 *N.J.* at 227 (holding that trade association had standing where its members would be adversely affected by challenged ordinance's application); *Common Cause v. N.J. Election Law Enforcement Comm'n*, 74 *N.J.* 231, 235-36 (1977) (concluding that organization had standing to challenge law that adversely affected its membership and declared interests); *N.J. Dental Ass'n v. Metro. Life Ins. Co.*, 424 *N.J. Super.* 160, 167 (App. Div. 2012), *cert. denied*, 210 *N.J.* 261 (2012) ("[A]n organization whose members are aggrieved and have interests that are sufficiently adverse has standing to challenge agency action on behalf of its members.").

Second, because Defendants prohibit Plaintiffs, and indeed all same-sex couples, from obtaining marriage licenses, there is genuine adverseness between the parties. *See, e.g.*, *In re Martin*, 90 *N.J.* at 308 (holding that a "license denial constitutes . . . real adverseness with

respect to the subject matter of the litigation" (quoting *Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 *N.J.* 98, 107 (1971)) (internal quotation marks omitted)); *Trombetta v. Mayor & Comm'rs of Atlantic City*, 181 *N.J. Super.* 203, 222 (Law Div. 1981) (holding that defendants' denial of license injured plaintiff and created adverseness sufficient to establish standing), *aff'd*, 187 *N.J. Super.* 351 (App. Div. 1982).

Third, there is a substantial likelihood that Plaintiffs will suffer harm in the event of an unfavorable decision. Every civil-unioned couple in New Jersey is currently denied federal marital benefits relating to events that are substantially likely to occur in a person's life, such as illness or death. Thus, should an individual suffer a serious health condition, his or her civil union partner would not be entitled to take leave from employment under the federal Family and Medical Leave Act because the Department of Labor does not identify a civil union partner as a "spouse" entitled to FMLA benefits. *See* U.S. Dep't of Labor, *Fact Sheet #28F: Qualifying Reasons for Leave Under the Family and Medical Leave Act*, 2 (Aug. 2013), http://www.dol.gov/whd/regs/compliance/whdfs28f.pdf (last visited Aug. 26, 2013) (defining "spouse" as a "husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including . . . same-sex marriage"). Further, if a civil union partner dies while New Jersey maintains its prohibition against marriage for same-sex couples, the surviving partner is unable to access federal survivorship benefits. In fact, those benefits will be lost forever, because New Jersey will not impute a marriage to a couple who did not obtain a marriage license before a partner's death. *See N.J.S.A.* 37:1-10 (providing that a marriage may only be recognized where a couple has "obtained a marriage license as required" by State law).

Although no one can foresee whether a person will seek family medical leave under the federal law or the precise timing of when a person will claim survivorship benefits, certainty of injury is not the standard by which standing is adjudged. Rather, standing only requires a "substantial likelihood of harm," and Plaintiffs need not prove to a "certainty" or otherwise "guarantee" that, in fact, New Jersey's denial of marriage will injure them in precisely this manner. *Home Builders League of S. Jersey, Inc. v. Township of Berlin*, 81 *N.J.* 127, 134-35 (1979). Here, the overwhelming probability that Plaintiffs will need, and be unable to claim, family medical leave or survivorship benefits -- as just two examples -- in their lifetimes "comports with common experience, is reasonably to be believed, and shows a sufficient adverse effect." *N.J. State Chamber of Commerce*, 82 *N.J.* at 67. Thus, Plaintiffs satisfy the final "substantial likelihood of harm" prong.

But even beyond the hardships that will befall both the named Plaintiffs and many GSE members, given the inevitability of illness and death, Plaintiffs' affidavits filed herewith

establish that same-sex couples are today being denied federal marital benefits.[4] Specifically, GSE members Carol Lynes and Erwynn Umali attest that they are employed by the federal government and cannot obtain employment benefits available to other married couples. *See* Aff. of Carol Lynes (Exh. A); Aff. of Erwynn Umali (Exh. B). Additionally, GSE members Marita Begley and Pamela A. Capaldi attest that, unlike married spouses, they cannot sponsor their non-citizen civil union partners for immigration purposes. *See* Aff. of Marita Begley (Exh. C); Aff. of Pamela A. Capaldi, Exh. D). These deprivations of federal benefits are "not fanciful, not overly generalized, and not philosophical," but are "economic and direct." *In re Camden County*, 170 *N.J.* at 451. Accordingly, they are sufficient to demonstrate the substantial likelihood of injury necessary for standing.

Finally, even if the Court somehow deemed Plaintiffs' personal interests inadequate in and of themselves, the Court should find any standing requirement satisfied based upon the "strong public interest" in the adjudication of their claims. *N.J. State Chamber of Commerce*, 82 *N.J.* at 68. As New Jersey courts have repeatedly held, "[w]here the public interest is involved, only a slight additional private interest is necessary to confer standing." *Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum*, 84 *N.J.* 137, 144 (1980); *accord Right to Choose v. Byrne*, 91 *N.J.* 287, 313 (1982); *People for Open Gov't v. Roberts*, 397 *N.J. Super.* 502, 510 (App. Div. 2008). Here, the public interest in the constitutional question of whether New Jersey may bar same-sex couples from marriage is obvious and cannot be seriously disputed. *See, e.g., Jordan v. Horsemen's & Benevolent & Protective Ass'n*, 90 *N.J.* 422, 432 (1982) (identifying "constitutional challenge[s]" as "issues of great public interest" for purposes of standing analysis). Accordingly, based upon "the public interest and continuing controversy over the validity" of New Jersey's denial of access to marriage to same-sex couples alone, Plaintiffs possess sufficient standing as a matter of New Jersey law, even if this Court were to deem their personal interests slight. *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 320 *N.J. Super.* 174, 238 (App. Div. 1999), *aff'd*, 164 *N.J.* 316 (2000).

3. The Court's Authority to Rule

At oral argument, Your Honor asked both parties what role, if any, a State court may play with regard to the administration of federal benefits. *See* Tr. 15, 43-44, 52-53, 64-65. As Plaintiffs understand Your Honor's question, the Court is concerned with two issues. *First*, may state courts decide questions of state law if those questions control or influence the federal government's allocation of public benefits? And if so, then, *second*, may State courts take into

[4] These straightforward affidavits are filed in specific response to the Court's inquiries at oral argument. *See* Tr. 11-15. Though they are not necessary to confer standing, Plaintiffs here provide them and respectfully submit that, in any event, they do not set forth any facts that are reasonably subject to dispute, and thus do not preclude entry of summary judgment. *See infra* at 20 (discussing summary judgment standards).

account the action or policy of the federal government when construing State law? Plaintiffs respectfully contend that the answer to both questions must be "yes."

As Your Honor recognized at oral argument -- and as the State emphasized at length in its brief, *see* State Br. 31-34 -- a State cannot regulate the federal government's activities. *See* Tr. 15:20-23 ("How can you blame the New Jersey Legislature for the actions of federal agencies? I don't have the jurisdiction over the federal agencies to order them to treat civil unions differently."); *Mayo v. United States*, 319 *U.S.* 441, 445 (1943) ("[A]ctivities of the Federal Government are free from regulation by any State."); *State v. Mollica*, 114 *N.J.* 329, 352 (1989) ("[S]tate constitutions do not control federal action."). But the Court would err were it to conclude that New Jersey courts therefore may not decide cases where jurisdiction lies, because they affect, or even control, the dispensation of federal benefits. To the contrary, it is well established that where, as here, the federal government relies on State law to determine who may obtain federal benefits, State courts may adjudicate State law questions that determine eligibility for those benefits.

For example, in *In re Estate of Kolacy*, 332 *N.J. Super.* 593 (Ch. Div. 2000), the Chancery Division granted a motion for a declaration that twin children conceived by *in vitro* fertilization after their biological father's death were the father's legitimate children -- a then-undecided question of State law. That motion was brought solely to help their mother "pursu[e] her claims and those of the children through appellate process within the Social Security Administration, and, if necessary, . . . in the federal courts." *Id.* at 597. In *Kolacy*, the State -- which defended New Jersey's intestacy laws against the plaintiff's constitutional challenge, *id.* at 595 -- made the same argument that it does here: "that it would be an inappropriate intrusion on federal adjudicatory processes for [the Court] to become involved in determining the [twin girls'] status" under State law, *id.* at 597. The Court, in a decision that has been cited with approval by the Supreme Court, *see Fazilat v. Feldstein*, 180 *N.J.* 74, 87-88 (2004), rejected that argument, observing that, even if the decision to award Social Security benefits is ultimately one made by the federal government, "[f]ederal courts routinely look to state courts for authoritative rulings with respect to state law" and "it would clearly be unfortunate for those federal adjudicatory processes to reach a result based in part upon an incorrect determination by federal tribunals of New Jersey law." *Id.* at 598. Thus, the Court deemed it "appropriate" to decide the plaintiff's motion, including her claim that New Jersey's intestacy laws would be unconstitutional if they denied the twin girls the right to inherit their deceased father's estate and thus to receive federal Social Security survivorship benefits. *Id.* at 598-600.

Indeed, in the Social Security context, where eligibility hinges on the interpretation of State intestacy law, *see* 42 *U.S.C.* § 416(h)(1)(A)(ii), (2)(A); Pls.' Reply Br. 8, 18-19, it is common for State courts to adjudicate questions regarding the proper construction of such determinative State law. *See, e.g.*, *Finley v. Astrue*, *372 Ark.* 103 (2008) (determining that, for purposes of State intestacy law and Social Security Act, child conceived by *in vitro* fertilization

after biological father's death may not inherit father's estate); *Eng Khabbaz v. Comm'r*, 155 N.H. 798 (2007) (same); *Pierce v. Sec'y*, 254 *A.*2d 46 (Me. 1969) (determining that, for purposes of State intestacy law and Social Security Act, common-law widow may not inherit decedent's estate); *Woodward v. Comm'r*, 435 Mass. 536 (2002) (determining that, for purposes of State intestacy law and Social Security Act, child conceived by *in vitro* fertilization after biological father's death may inherit father's estate); *Peffley-Warner v. Bowen*, 778 *P.*2d 1022 (Wash. 1989) (determining that, for purposes of State intestacy law and Social Security Act, longstanding "meretricious" non-marital relationship does not entitle a purported common-law widow to inherit decedent's estate). As these examples make plain, State law -- and State court litigation regarding the validity or interpretation of that law -- may be determinative with regard to the dispensation of federal benefits. While obtaining federal benefits is one of the purposes of this litigation, that does not mean that it is inappropriate for State courts to decide cases which are properly before them.

Similarly, State law often controls access to federal benefits distributed through various welfare programs and Medicaid, as to which State courts undoubtedly have authority to decide questions of State law affecting access to those benefits. Thus, for example, New Jersey courts have adjudicated challenges to State laws prohibiting psychological or *de facto* parents from obtaining federal Temporary Assistance for Needy Family ("TANF") benefits on a child's behalf, *see M.F. v. Dep't of Human Servs.*, 395 *N.J. Super.* 18 (App. Div. 2007); restricting eligibility for increased TANF payments when a family has a new child, *see Sojourner A. v. Dep't of Human Servs.*, 177 *N.J.* 318 (2003); denying recent residents eligibility to receive full TANF benefits; *see Sanchez v. Dep't of Human Servs.*, 314 *N.J. Super.* 11 (App. Div. 1998); imposing a time limit for receiving federal Aid to Families with Dependent Children emergency assistance benefits, *see Franklin v. N.J. Dep't of Human Servs.*, 111 *N.J.* 1 (1988): and prohibiting federal reimbursement of Medicaid funds for certain healthcare expenses, *see Dougherty v. Dep't of Human Servs.*, 91 *N.J.* 1 (1982). In all of these cases, State courts' review and application of State law determined the amount of federal benefits to which applicants were entitled. In none of these cases did the courts decline to decide the issues before them because they would, by doing so, control the allocation of federal benefits.

In sum, then, although States lack the authority to regulate federal agencies, where the federal government relies upon State law to determine eligibility for federal benefits, State courts appropriately decide challenges to those State laws to the extent that they impede or deny access to those federal benefits. That, of course, is precisely this case. *Windsor* makes clear that federal programs awarding benefits on the basis of marital or spousal status generally rely on State determinations as to who may marry, in accordance with the tradition of federal "defer[ence] to state-law policy decisions with respect to domestic relations." *Windsor*, slip op. at 17. Plaintiffs here cannot access numerous federal benefits because they cannot marry under New Jersey law. Their challenge to the State's refusal to allow them to marry under the New Jersey and U.S. Constitutions is, then, no different than the constitutional challenges entertained by the State

court in *Kolacy*, 332 *N.J. Super.* at 600, 603-05 (construing New Jersey intestacy law to include plaintiff's children as lawful heirs, and thus avoiding constitutional challenge), *Sojourner A.*, 177 *N.J.* at 337 (holding that State did not violate New Jersey Constitution by capping TANF payments based on family's number of children at time of applying for benefits), and *Sanchez*, 314 *N.J. Super.* at 29-32 (invalidating State durational residency requirement for obtaining full federal welfare benefits), among other cases challenging State law in an effort to gain access to federal benefits. Likewise this Court, should not decline to decide Plaintiffs' constitutional claims because they are based upon the argument that New Jersey's classification unconstitutionally deprives them of the full array of federal benefits that married couples receive.

The State, however, argues that "the validity of a State law under the State constitution cannot hinge" on federal agencies' denial of benefits to civil-unioned couples. State Br. 35. But this argument has already been decided by this Court (speaking through Judge Feinberg), which specifically rejected the State's previous arguments that it cannot be responsible for how third parties, *including other governments*, respond to civil unions.[5] *See* Pls.' Reply Br. 17-18. But, even more to the point, New Jersey courts frequently consider existing federal policy when deciding questions of State law -- including in the context of domestic relations. Thus, when deciding the reasonableness of ordering DNA testing in a paternity suit, State courts have weighed the benefits that federal agencies will afford a child if paternity can be established by that testing. *See M.A. v. Estate of A.C.*, 274 *N.J. Super.* 245, 255-56 (Ch. Div. 1993) (holding that request for DNA testing to establish paternity was reasonable because of "the potential economic and medical benefits [the child] may derive therefrom," including federal "social security benefits" and "veteran's benefits and/or pension benefits"). Similarly, in construing the New Jersey Artificial Insemination Act, *N.J.S.A.* 9:17-44 to declare a non-birthing woman in a domestic partnership the parent of the couple's child, the Chancery Division took into account the child's best interests, including the child's "entitle[ment] to insurance and social security benefits" that the federal government would not award in absence of the requested court order. *In re Parentage of the Child of Kimberly Robinson*, 383 *N.J. Super.* 165, 169, 174-75 (Ch. Div.

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[5] The State's argument that it is merely applying an innocuous label, *see* State Br. 17-18; Tr. 38, fails as well, for the reasons previously explicated by Plaintiffs, *see* Pls.' Reply Br. 11-14, in addition to those set forth by the United States Supreme Court when it confronted this very contention in *Anderson v. Martin*, 375 U.S. 399 (1964). *Anderson* concerned a state statute that directed all electoral candidates on a ballot to be identified by race. Louisiana disclaimed any responsibility for labeling candidates, arguing that any ensuing discrimination should be attributed to the private persons who discriminated. In holding that the state statute violated the federal Equal Protection Clause, the Supreme Court determined that it impermissibly "promote[d] the ultimate discrimination, which is sufficient to make it invalid." *Id.* at 404. The same is true here, where New Jersey has labeled the formalized legal status available to same-sex couples as different from that available to different-sex couples, and thereby promotes the discrimination for which it complains the federal government should solely be responsible.

2005). Indeed, it is standard practice for courts to weigh the federal benefits that will be available to a child when deciding the sensitive, State-governed matter of parentage. In fact, the New Jersey Supreme Court has reversed the Appellate Division for *not* considering how "a declaration of paternity may entitle a child to social security, veteran's or pension benefits" under federal law. *Fazilat v. Feldstein*, 180 *N.J.* at 87-88.

These cases make clear that it is both common and altogether appropriate for State courts to consider how their decisions on matters of State law will affect an individual's eligibility for federal benefits -- precisely the issue raised by Plaintiffs here. Indeed, these cases further elucidate the principles that animated this Court's previous rejections of the State's state-action argument. It follows that the State is responsible when its refusal to allow a couple to marry results in the denial of a federal benefit distributed on the basis of that State law. In sum, this Court is fully empowered to decide whether the denial of marriage to Plaintiffs constitutes unequal treatment because it results in the deprivation of federal marital benefits.

4. Timing

At oral argument on August 15, 2013, Your Honor stated that the Court was "very concerned about whether this is the right time to bring this case when I know the Supreme Court wanted a factual record and the facts in terms of what federal agencies may be doing are in flux." Tr. 8. Relatedly, the Court also asked whether "in a matter of such far reaching social consequences as same-sex mariage, it ought to be decided by the political process, by democratic process rather than by a judge." *Id.* at 29. The State echoed this concern. In response to the Court's query as to "what are the particular dangers from the State's point of view of this Court deciding a facial challenge without further factual development either as to what federal agencies are doing or the discovery process that you're all in the midst of?" the State responded that "the federal system has not fully developed a law on this yet. We don't know where the federal government ultimately will stand … we're dealing with over 1,000 different federal benefits, we don't have a factual context, we don't have any authoritative interpretation of whether or not what the federal government is doing is correct or incorrect or is consistent with *Windsor* or inconsistent with *Windsor*. We would be stepping into a very fast-flowing stream where the footing is very uncertain." *Id.* at 55-57.

Plaintiffs, who have, as the Court noted, been fully engaged in discovery with regard to the allegations of their Complaint, appreciate the Court's concerns and did not lightly or impulsively move for summary judgment in this matter. To the contrary, as set forth in their moving and reply papers, Pls.' Br. 22-25; Pls'. Reply Br. at 22-23, and at oral argument, Tr. 9, 71-72, they respectfully submit that no further factual development is necessary, or desirable in view of the delay that it would engender, with real harm to Plaintiffs' rights -- either as a matter of legal doctrine, or based upon the Supreme Court's decision denying the motion in aid of litigants' rights filed in *Lewis*. This is so for four reasons:

First, as is set forth in section 1, *supra*, numerous federal agencies are interpreting their governing statutes and regulations to provide federal marital benefits to those who are actually married, but not to those who are civil-unioned.[6] This is, as we have argued, not surprising, given both the plain language of those statutes and regulations at issue and the specific language of the *Windsor* decision, including its concluding sentence. But it is also unnecessary to Plaintiffs' argument, because *Lewis*, by its terms, holds 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." 188 *N.J.* at 457. Accordingly, the Court held that "[t]o comply with this constitutional mandate, the Legislature must either amend the marriage statutes to include same-sex couples or create a parallel statutory structure, which will provide for, on equal terms, the rights and benefits enjoyed and burdens and obligations borne by married couples." *Id.* at 423. As a result of the decision in *Windsor*, which requires that federal benefits be given on equal terms to all who are married, and the agency decisions described above which make clear that a myriad of federal benefits may not be enjoyed by those couples who are in civil unions, instead of marriages, it is now clear that the equality mandated by *Lewis* is now definitively denied based on the Plaintiffs' State-created status. Whether the Family and Medical Leave Act benefits that the Department of Labor has made clear apply to marriages but not civil unions; or the life and health insurance benefits that may only be enjoyed by the spouses of married -- but not civil-unioned -- federal employees; or the ability to sponsor a spouse for immigration purposes, as delineated by the Department of State; or some other federal rights and benefits,[7] today the

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[6] The State urges Plaintiffs to challenge these determinations, but ignores that, were they to do so, courts would pay them "Chevron deference," *i.e.*, under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 *U.S.* 837, 843-45 (1984), courts defer to agency decisions unless they are "arbitrary, capricious, or manifestly contrary to the statute." *In re RCN of NY*, 186 *N.J.* 83, 93 (2006) (quoting *Chevron*, 467 *U.S.* at 844). *See also Glukowsky v. Equity One, Inc.*, 180 *N.J.* 49, 65 (2004) ("A court generally must defer to a regulatory agency's decision, unless the agency acts outside the scope of its authority or arbitrarily.").

[7] The State, as Plaintiffs have argued, has effectively conceded that same-sex couples in New Jersey will be deprived of at least some federal benefits. *See* St. Br. 16 ("Suffice it to say 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."). But unless all benefits are provided "on equal terms," the mandate of *Lewis* is violated. Indeed, *Lewis* held as much in concluding that "[a]lthough under the Domestic Partnership Act same-sex couples are provided with a number of important rights, they still are denied many benefits and privileges accorded to their similarly situated heterosexual counterparts." 118 *N.J.* at 448. *See id.* at 448-50 (listing certain of "the rights afforded to married couples but denied to committed same-sex couples").

promise of equality guaranteed by the Supreme Court is an empty one. And the Legislature's assurance that "[c]ivil union couples shall have all of the same benefits, protections and responsibilities under law ... as are granted to spouses in a marriage," *N.J.S.A.* 37:1-31(a), is simply false, for the truth is that federal benefits do not flow to New Jersey's civil union couples as they do to married ones, as a matter of law and not of disputed facts that could in any way benefit from further litigation.

Second, while it is true that, as Your Honor pointed out at oral argument, *see* Tr. 7, the Supreme Court denied the motion in aid of litigants' rights filed by the *Lewis* Plaintiffs, stating that "[t]his matter cannot be decided without the development of an appropriate trial like record," 202 *N.J.* 340 (2010), the "matter" that was before the Court on that motion was not the "matter" that now presents itself for decision. Rather, that motion argued that, as summarized in its Preliminary Statement,

> the Plaintiffs and other committed lesbian and gay partners in New Jersey live in second-class circumstances, relegated to the demonstrably inferior, state-created status of civil unions. Because of the novel legal construct to which they have been consigned, same-sex couples face a persistent and widespread lack of recognition of their rights in commercial and civic dealings. They are blocked from seeing their loved ones during medical emergencies. They find it harder to get medical coverage and care than do their married counterparts, as their state-imposed status has encouraged employers to exclude them from coverage. Their separate status is a badge that reveals their sexual orientation whether they want to or not, in situations ranging from job interviews to jury service, invading their privacy and exposing them to additional discrimination. They are vulnerable when traveling outside the borders of New Jersey, because the designation of "civil union" is an anomaly that does not currently exist in any other state. Finally, the children of same-sex couples are unfairly and significantly prejudiced by the unequal and inferior legal and social status that experience has proven to civil unions to be.
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> [Pls.' Br. in Support of Motion in Aid of Litigants' Rights (3/18/10) 2.]

The motion in aid of litigants' rights, which tracks those aspects of Plaintiffs' Complaint which are *not* the subject of this motion,[8] at no point raised the issue that is here before the Court. In other words, it never put federal marriage-linked rights for same-sex couples at issue. Nor could it have, since the entire *Lewis* case, filed in 2002, began and ended in a context in which the federal Defense of Marriage Act ("DOMA"), 110 Stat. 2419 (1996), and particularly section 3 thereof, 1 U.S.C. § 7, defined marriage as "a legal union between one man and one woman as husband and wife" for purposes of federal law.[9] The present motion, by contrast, follows upon the drastic and dispositive change in the legal environment occasioned by the United States Supreme Court's decision in *Windsor*, invalidating DOMA -- the consequences of which could not have been argued by the Plaintiffs or considered by the New Jersey Supreme Court at the time of the motion in aid of litigants' rights in *Lewis*. That is, the *Lewis* Plaintiffs could not have and did not argue that, as a matter of law, the State's refusal to allow them to marry denied them access to myriad federal rights. Thus, the issue that is the sole focus of Plaintiffs' summary judgment motion post-dates and is entirely distinct from the factual issues raised in the *Lewis* Plaintiffs' motion in aid of litigants' rights. With regard to the present issue, there are no disputed facts: after *Windsor*, the *Lewis* equality mandate cannot be met unless New Jersey allows same-sex couples to marry. The New Jersey Supreme Court did not have that issue before it, and did not demand "the development of an appropriate trial-like record" with regard to post-DOMA federal benefits. Indeed, as set forth below, no such record is necessary.[10]

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[8] This would include the entirety of the Complaint other than Paragraph 45, which foresaw and alleged precisely the problem here presented, that same-sex couples of New Jersey, as a matter of law rather than facts in need of development, "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."

[9] That is why, as noted at oral argument, Tr. 65 the Court in *Lewis* stated 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." 188 *N.J.* at 459 n.25 (citing DOMA § 3, 1 *U.S.C.* § 7). Obviously, with the invalidation of that section of DOMA, that is no longer an obstacle to the Court's action, the State's incomplete citation to *Lewis* notwithstanding, *see* State Br. 34 (failing to note that the quote relied upon the invalidated provision of DOMA).

[10] By analogy, Plaintiffs here would likewise be able to move for summary judgment if, for example, the Legislature, at some point after the decision on the *Lewis* Plaintiffs' motion in aid of litigants' rights, repealed portions of the Civil Union Act listing "legal benefits, protections and responsibilities," *N.J.S.A.* 37:1-32 (5), to specifically delete subsection (d) "adoption law and procedures," subsection (p) "the home ownership rights of a surviving spouse," or subsection (v) "laws related to tuition assistance for higher education for surviving spouses or children," or if the Legislature affirmatively designated a new set of marriage-only rights. Under such

Likewise, the Court pointed out, in Your Honor's colloquy with the State, that in *Hollingsworth v. Perry*, 133 *S. Ct.* 2652 (2013), there had been complete discovery and "a full-blown trial." Tr. 59. But of course, the lower court proceedings in *Perry*, like the motion in aid of litigants rights in *Lewis*, pre-dated the Supreme Court's decision in *Windsor* and the pure issue of law that arises as a result thereof: whether marriage and civil union are equal given that the former provides access to the full range of federal benefits, while the latter does not. A trial-like record was required in *Perry* because factual findings were required with regard to such issues as, for example, whether domestic partnerships lack the social meaning associated with marriage. *Perry v. Brown*, 671 *F.*3d 1052, 1069 n.4 (9th Cir. 2012), *vacated on other grounds*, *Hollingsworth v. Perry*, 133 *S. Ct.* 2652 (2013). These issues are similar to those raised in the *Lewis* Plaintiffs' motion in aid of litigants' rights and in those aspects of the Complaint in this matter which have been the subject of discovery, but are not the subject of this motion. By contrast, the issue here before the Court is a strictly legal one that does not require any such factual development, and is ripe for decision now, as a matter of law.

Third, the fact that we are in the midst of discovery on some matters as to which there are disputes of fact does not render this matter inappropriate for summary judgment. As this Court is of course aware, a motion for summary judgment must be granted if "there is no genuine issue as to any material fact challenged" and "the moving party is entitled to a judgment or order as a matter of law." *R.* 4:46-2(c). Thus, the Court "should deny a summary judgment motion *only* where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520, 529 (1995). That is, where "'one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." *Id. at* 540 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 252 (1986)); *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.*, 189 *N.J.* 436, 445-46 (2007) (describing the summary judgment "inquiry [a]s 'whether . . . one party must prevail as a matter of law.'" (quoting *Brill*, 142 *N.J.* at 540)). That is, a matter "is ripe for summary judgment" if "the material facts are not genuinely in dispute" and the only remaining questions for the Court are questions of law. *Tarabokia v. Structure Tone*, 429 *N.J. Super.* 103, 106 (App. Div. 2012). And, of course, summary judgment may be rendered even if there is a genuine issue of material fact that would preclude the entry of summary judgment on other issues. *Eli B. Halpern, M.D., P.A. Pension Trust v. Tannenbaum*, 207 *N.J. Super.* 314, 316 (Law Div. 1985)

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circumstances, the equality mandated by *Lewis* would indisputably be lacking, and the fact that the New Jersey Supreme Court, in adjudicating the motion in aid of litigants' rights in 2010, required the development of a trial-like record with regard to the matters raised in that motion would not prevent Plaintiffs from obtaining summary judgment, as a matter of law, on the new issue presented. Indeed, with no possible disputed issue of fact, and daily harm being visited upon Plaintiffs as a result of the discriminatory provision of law, summary judgment would be required. The same is, of course, the case here, and now.

("A summary judgment or order, interlocutory in character, may be rendered on any issue in the action . . . although there is a genuine factual dispute as to any other issue . . . ."(quoting *R.* 4:46-2)).

In this case, summary judgment is appropriate here and now because, today, strictly as a matter of law, New Jersey's exclusion of same-sex couples from marriage violates the Equal Protection guarantee of the New Jersey Constitution, as enunciated in *Lewis*. Instead, New Jersey's statutory scheme indisputably denies same-sex couples at least some -- and likely a broad array of -- federal rights and benefits that are available only to those who are, as a matter of state law, married. This is simply not disputed. Indeed, beyond the agency determinations to which Plaintiffs point, the State has conceded numerous times, *see* State Br. 24; Tr. 45, 50, 56, 60, that same-sex couples in New Jersey are not receiving every federal benefit and privilege that is afforded to their married heterosexual counterparts. Nor, as discussed above, would a contrary determination by one or more agencies create a disputed issue of fact, as even the unequal dispensation of one benefit would violate the *Lewis* mandate.

Furthermore, for the reasons set forth in Plaintiffs' motion for summary judgment, and strictly as a matter of law, New Jersey's exclusion of same-sex couples from marriage is also ripe for summary judgment on Plaintiffs' claim that the classification violates their right to equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. Certainly, no fact-finding is required to determine that it is irrational to at once require and proclaim equality with regard to the benefits and rights given to committed same-sex couples, as New Jersey does, and at the same time discriminate in ways that, as in *Windsor*, result in the denial to Plaintiffs of so many significant rights, benefits, and obligations. Indeed, determining whether the rational basis test is met is often a matter of law, appropriate for determination on summary judgment. *See, e.g.*, *Heller v. Doe*, 509 *U.S.* 312, 318 (1993) (noting that the district court granted summary judgment because differences in treatment lacked a rational basis); *Reno v. Flores*, 507 *U.S.* 292, 296 (1993) (noting that the district court granted summary judgment on equal protection claim that challenged treatment had no rational basis); *WHS Realty Co. v. Town of Morristown*, 283 *N.J. Super.* 139, 161 (App. Div. 1995) (noting that a summary judgment motion could be granted if the court found that the government interest had no rational basis); *Quiban v. United States Veterans Admin.*, 724 *F. Supp.* 993, 1000 (D.D.C. 1989) ("once the Court determined there was no rational basis for the statute, no genuine issues of material fact remained and plaintiff was entitled to judgment as a matter of law. Thus summary judgment for plaintiff was proper.").

In sum, this matter is ripe for summary judgment because there is no genuine issue as to any material fact. Specifically, there is no genuine issue as to whether same- and different-sex couples in New Jersey receive the same rights: they do not. Neither discovery nor a trial-like proceeding is needed to further develop the record with regard to these issues, or will shed any further light upon them. Rather, withholding judgment on their behalf would subject Plaintiffs

and, indeed, all same-sex couples in New Jersey to not only real but unnecessary hardship. Summary judgment should be granted.

Fourth, and finally, even assuming the question of whether civil unions will, as a matter of federal law, be treated as marriages is, as the State argues, "in flux" -- a proposition that is doubtful given the specific holding of *Windsor*, the plain language of the applicable statutes and regulations, and the caselaw previously cited by Plaintiffs distinguishing between marriage and civil union, *see* Pls.' Reply Br. 5 (citing *Langan v. State Farm Fire & Cas.*, 48 *A.D.*3d 76, 849 *N.Y.S.*2d 105 (N.Y. App. Div. 2007); *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)), and the opinion of agencies that have addressed the issue -- such flux does not provide any jurisprudential basis for the Court to stay its hand when presented with a matter that may be decided as a matter of law. The United States Supreme Court provides perhaps the best example of this principle, expressly conditioning its power to grant certiorari on the "flux" engendered by decisional conflicts between courts, *see S. Ct. R.* 10(a) - (c), and deciding matters -- including matters similar to this one -- in the face of rapidly evolving social and legal developments. *See, e.g., Loving v. Virginia*, 388 *U.S.* 1, 6 n.5 (discussing changes in antimiscegenation laws, including that "[o]ver the past 15 years, 14 States have repealed laws outlawing interracial marriages"). Likewise in New Jersey. *See, e.g., Robinson v. Cahill*, 69 *N.J.* 133, 147 (1975) (entering appropriate remedial order notwithstanding ongoing legislative developments, because "the judicial department has imposed upon it the solemn duty to interpret the laws in the last resort. However delicate that duty may be we are not at liberty to surrender, or ignore, or to waive it.") (quoting *Asbury Park Press, Inc. v. Woodley*, 33 *N.J.* 1, 12 (1960)). Thus, however controversial, "[i]t is the singular situation of the judiciary that issues before it must be met and decided when presented. In this forum, action is inescapable for a court necessarily acts whether it grants or denies relief." *Ridgefield Park v. Bergen County Board of Taxation*, 31 *N.J.* 420, 426 (1960) (citing *Switz v. Middletown Township*, 23 *N.J.* 580 (1957)). That is all that Plaintiffs request here.

The Court, however, probed whether the matter "ought to be decided by the political process." Tr. 29. Specifically, Your Honor pointed out that, given the filing of Plaintiffs' motion so soon after the Supreme Court decision in *Windsor*, "the New Jersey Legislature has not had the opportunity to look at *Windsor*, to see whether that would have effect in the political process." *Id.*[11] But here, the Legislature has acted, passing marriage equality on February 16,

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[11] The Court also pointed to the majority opinion in *Lewis*, which "took the dissenters in *Lewis* to task for not letting this play out in the legislative process." Tr. 29. It is true, of course that the majority opinion allowed the Legislature at least initially to determine whether to "either amend the marriage statutes to include same-sex couples or enact a parallel 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." 188 *N.J.* at 463. This motion addresses the purely

2012, *see* S. 1, 215th Leg. (N.J. 2012), only to see the Governor veto it the next day. Moreover, on the day that the Supreme Court announced its decision in *Windsor*, New Jersey Governor Chris Christie said that *Windsor* "was wrong" and "has no effect on New Jersey at all," and specifically vowed to veto any bill allowing same-sex couples to marry in New Jersey. *Ask the Governor* (TownSquare Media, New Jersey 101.5 broadcast June 26, 2013). To be sure, the Legislature might, hypothetically, one day override the Governor's veto, but that possibility is speculative and, in any event, as the Court stated in *Kolacy*, discussed above, is not a basis for the Court to abdicate its responsibility to decide the matter before it. Confronting the same contentions as the Court faces here, the *Kolacy* Court wrote:

> The State has urged that courts should not entertain actions such as the present one, but should wait until the Legislature has dealt with the kinds of issues presented by this case. As indicated above, I think it would be helpful for the Legislature to deal with these kinds of issues. In the meanwhile, life goes on, and people come into the courts seeking redress for present problems. We judges cannot simply put those problems on hold in the hope that some day (which may never come) the Legislature will deal with the problem in question. Simple justice requires us to do the best we can with the statutory law which is presently available.
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> [332 *N.J. Super.* at 602.]

The same is true here, lest Plaintiffs be deprived of federal rights that will deprive them of such critical benefits as life and health insurance, citizenship, the ability to care for loved ones in need, and the assets that flow to the rightful survivor of one who dies. The loss of many of these benefits is irreparable. *See* Pls.' Reply Br. 24. And their denial to Plaintiffs is unconstitutional.

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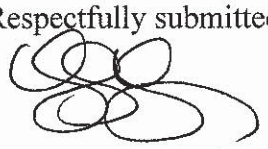
legal question whether, after *Windsor*, and in light of the federal benefits that are denied same-sex couples in New Jersey because they are relegated to civil union, the "parallel structure" can be said to fulfill the mandate in *Lewis*. Another trip to the Legislature is not required to answer the question: it does not. *Cf.*, *Abbott v. Burke*, 196 *N.J.* 544, 551-52 (2008) (*Abbott XIX*) (determining that, given that the legislation at issue was the product of prior remedial orders of the Court, the statute's "constitutionality, which otherwise would be presumptive, must be approached differently").

Summary judgment should be granted.

Respectfully submitted,



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