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VIA FEDERAL EXPRESS

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:

Per our conversation with Your Honor's Chambers, Plaintiffs respectfully write to update Section 1 of their August 28, 2013 Supplemental Submission to the Court. In particular, on page 9, footnote 3 of Plaintiffs' letter to the Court, Plaintiffs discussed a Congressional Research Service publication which discussed the likely tax implications of the Supreme Court's decision in *Windsor*. As Your Honor likely knows, last week (and specifically, on Thursday August 29, 2013, the Internal Revenue Service (IRS) issued Revenue Ruling 2013-17 and guidance documents. Rev. Rul. 2013-17, http://www.irs.gov/pub/irs-drop/rr-13-17.pdf (last visited Aug. 30, 2013). That ruling confirms that same-sex couples married in any jurisdiction will be treated equally to different-sex married couples for federal tax purposes, but that civil-unioned couples (or couples in any other status) will be treated differently -- that is, unequally.

Specifically, the IRS makes clear that nonmarital legal statuses, whether entered by same- or different-sex couples, will not trigger marital tax treatment. The Revenue Ruling states:

> For Federal tax purposes, the term "marriage" does not include registered domestic partnerships, civil unions, or other similar formal relationships recognized under state law that are not denominated as a marriage under that state's law, and the terms "spouse," "husband and wife," "husband," and "wife" do not include individuals who have entered into such a formal relationship. This conclusion applies regardless of whether individuals who have entered into such relationships are of the opposite sex or the same sex."

[*Id.* at 12.]

Lest it be unclear, the IRS also issued a document which begin by stating, "The following questions and answers provide information to individuals of the same sex and opposite sex who are in registered domestic partnerships, civil unions or other similar formal relationships that are not marriages under state law. These individuals are not considered as married or spouses for federal tax purposes." IRS, *Answers to Frequently Asked Questions for Registered Domestic Partners and Individuals in Civil Unions* (Aug. 29, 2013), http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Registered-Domestic-Partners-and-Individuals-in-Civil-Unions (last visited Aug. 30, 2013). The breadth of this ruling is enormous. As the IRS guidance notes, "There are more than two hundred Code provisions and Treasury regulations relating to the internal revenue laws that include the terms 'spouse,' 'marriage' (and derivatives thereof, such as 'marries' and 'married'), 'husband and wife,' 'husband,' and 'wife.'" Rev. Rul. 2013-17, 4. "The ruling applies to all federal tax provisions where marriage is a factor, including filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an IRA and claiming the earned income tax credit or child tax credit." IRS, *Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized For Federal Tax Purposes; Ruling Provides Certainty, Benefits and Protections Under Federal Tax Law for Same-Sex Married Couples* (August 29, 2013) (http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes;-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples).

Likewise, and also on August 29, 2013, the Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS), Center for Medicare, also issued guidance to the effect that "Medicare Advantage (MA) organizations must cover services in a skilled nursing facility (SNF) in which a validly married same sex spouse resides to the extent that they would be required to cover the services if an opposite sex spouse resided in the SNF." HHS, CMS, *SUBJECT: Impact of United States v. Windsor on Skilled Nursing Facility Benefits for Medicare Advantage Enrollees – IMMEDIATE ACTION REQUIRED*, http://www.washingtonblade.com/content/files/2013/08/SNF-Benefits-after-US-v-Windsor-DOMA-decison-8-29-13-.pdf (last visited Aug. 30, 2013); United States Department of Health and Human Services, *HHS announces first guidance implementing Supreme Court's decision on the Defense of Marriage Act* (August 29, 2013), http://www.hhs.gov/news/press/2013pres/08/20130829/a.html. Significantly, the guidance states that it is "based on the Supreme Court's decision in *Windsor*" and provides the CMS conclusion that "the term 'spouse' in section 1852(l)(4)(A)(iii) [of the Social Security Act] includes individuals of the same sex who are lawfully married under the law of a state, territory, or foreign jurisdiction." *Id.* Thus, for purposes of Medicare too, federal benefits are based upon marriage -- yet another example which emerged subsequent to Plaintiffs' supplemental submission.

The IRS Revenue Ruling also states, "Consistent with the longstanding position expressed in Revenue Ruling 58-66, the Service has determined to interpret the Code as incorporating a general rule, for Federal tax purposes, that recognizes the validity of a same-sex marriage that was valid in the state where it was entered into, regardless of the married couple's place of domicile." Rev. Rul. 2013-17, 9. Likewise, the Medicare guidance, in addition to making clear that its "analysis applies to individuals of the same sex who are domiciled in a state or territory that recognizes their relationship as a marriage," goes on to state that "[i]t also applies to individuals of the same sex who were legally married in a state or other jurisdiction without regard to whether they are domiciled in a state or territory that recognizes their relationship as a marriage." Thus, under either of these provisions, a same-sex New Jersey couple could marry in New York and thereby realize these federal benefits of marriage. But, of course, this does not excuse New Jersey's discrimination, for at least three reasons.

First, and most practically, as the State knows from the discovery in which it has already engaged, the named individual Plaintiffs (as well as members of plaintiff Garden State Equality who filed certifications attached to Plaintiffs' supplemental submission of earlier this week) include couples who are not currently married in any jurisdiction. Moreover, any who were married elsewhere less than three years ago, including several named Plaintiff couples (as the State also knows from the depositions it conducted) and various GSE members, cannot gain retroactive tax benefits to the same degree as couples who have been able to marry, again highlighting the inequality between civil union and marriage.[1]

Second, many federal benefits, by the terms of the applicable statutes and regulations, turn not on the place of celebration rule announced by the IRS, and included in the Medicare guidance, but upon place of domicile. *See, e.g.*, 38 *U.S.C.* § 103(c) (regarding veterans' benefits) ("In determining whether or not a person is or was a spouse of a veteran, their marriage shall be proven as valid for purposes of all laws administered by the Secretary according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued."); 17 *U.S.C.* § 101 (regarding copyrights) (defining "widow" or "widower" as "the author's surviving spouse under the law of the author's domicile as the time of his or her death"); 5 *C.F.R.* § 1651.5 (regarding thrift savings plans) ("The state law of the participant's domicile will be used to determine whether the participant was married at the time of death."); 38 *C.F.R.* § 3.1(j) (regarding Armed Forces Education Assistance) (defining marriage as "a marriage valid under the law of the place where the parties resided at the time of the marriage, or the law of the place where the parties resided when the right to benefits accrued"); 29 *C.F.R.* § 825.122 (regarding Family and Medical Leave) (defining

[1] Nor, in any event, may every couple who wishes to marry do so. Some may not have the wherewithal, given the cost. Others may not be permitted to travel, as is the case with, for example, prisoners, who retain the right to marry, *see Turner v. Safley*, 482 *U.S.* 78 (1987), though not to travel. And, most fundamentally, the requirement of travel to another state to marry is not, of course, imposed upon different-sex couples, only upon same-sex couples, again highlighting the discrimination here at issue.

spouse as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides"); 20 *C.F.R.* § 222.11 (regarding Railroad Employees Retirement ("husband, wife, or widow[er]" is governed by "the law of the State in which the employee has or had a permanent home"). Thus, for purposes of these benefits, at least, traveling to another state to marry will be of no assistance.

Third, and most fundamentally, the law is not and cannot be that a state, like New Jersey, is excused from acting unconstitutionally just because a neighboring State chooses a constitutional path. Indeed, a long line of cases so hold. Plaintiffs would point the Court, in particular, to the United States Supreme Court's decision in *Missouri ex rel. Gaines v. Canada*, 305 *U.S.* 337 (1938), where the Court addressed whether Missouri's refusal to allow black students to attend law school at the University of Missouri could be excused because the state provided for those students to attend law school in adjacent states. The Court held that:

> The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.
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> The equal protection of the laws is "a pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369. Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon

> the States severally as governmental entities, -- each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system. It seems to be implicit in respondents' argument that if other States did not provide courses for legal education, it would nevertheless be the constitutional duty of Missouri when it supplied such courses for white students to make equivalent provision for negroes. But that plain duty would exist because it rested upon the State independently of the action of other States. We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination but cannot serve to validate it.
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> [*Gaines*, 305 *U.S.* at 349-50.]

See also Jackson Women's Health Organization v. Currier, 2013 *WL* 1624365, at *5 (S.D. Miss. Apr. 15, 2013) (granting preliminary injunction against State's action in closing its only abortion provider because "the court is not persuaded that this burden is adequately ameliorated by the possible availability of abortions in surrounding states"); *Jackson Women's Health Org., Inc. v. Amy*, 330 *F. Supp. 2d* 820, 823 (S.D. Miss. 2004) (same); *WomanCare of Southfield, P.C. v. Granholm*, 143 *F. Supp. 2d* 827, 846-48 (E.D. Mich. 2000) (same); *Richmond Med. Ctr. for Women v. Gilmore*, 11 *F. Supp. 2d* 795, 809, 829 (E.D. Va. 1998) (same). Nor, of course, is the New Jersey Constitution satisfied because New York (or some other state) does not discriminate. Indeed, the Supreme Court made that clear in *Lewis*, in holding that New Jersey's discrimination could not be justified by the laws of other states, 188 *N.J.* at 453-57; nor, by the same token, can it be excused by the fact that other states do *not* discriminate.

The fact is that the State is the only issuer of marriage licenses; the federal government does not confer marriages (or civil unions, domestic partnerships, reciprocal beneficiary statuses or any other such legal union). Metaphorically, as stated at oral argument, Tr. 62, with every marriage New Jersey allows, it hands a couple not just a license or a label, but a bucket of vouchers for marriage-based benefits and protections. To different-sex couples, the State bestows a bucket brimming with every single state and federal benefit. But for same-sex couples, New Jersey dispenses only the vouchers for state benefits, withholding those for federal protections and telling lesbian and gay couples that they are free to pursue a remedy somewhere

else. This patently unequal treatment is unconstitutional and actively endangers civil-unioned same-sex couples and their families every day it is allowed to continue.

Moreover, time is of the essence. If a civil union partner is incapacitated or dies, there will be no chance for a marriage ever to be entered into. Additionally, the new IRS ruling references the general three-year statute of limitations to file a refund claim: "refund claims can still be filed for tax years 2010, 2011 and 2012." *Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized For Federal Tax Purposes*; *see also* Rev. Rul. 2013-17 at 13-14, but that window of time to evaluate past financial records and prepare amended returns will steadily close. Certainly, there is no reason to await the most speculative outcome of federal legislation (particularly given federal legislators' prior actions in enacting, and then defending, DOMA), even as federal agency after federal agency makes patent the inequality which Plaintiffs claim. Summary judgment should be granted.

Respectfully submitted,

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LSL:leo

cc: Kevin R. Jespersen, Esq., Asst. Attorney General (by electronic mail and first class mail)
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