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' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR A STAY

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PRELIMINARY STATEMENT

In a thorough opinion that fairly considered every argument presented, this Court held that "[s]ame-sex couples must be allowed to marry in order to obtain equal protection of the law under the New Jersey Constitution." *Garden State Equality, et al. v. Dow, et al.*, Docket No. L-1729-11 (hereinafter, "*GSE*"), slip op. at 53. (L. Div. September 27, 2013). That decision was clearly correct. As the Court concluded, the decision of the Supreme Court of New Jersey in *Lewis v. Harris*, 188 *N.J.* 415 (2006), required that "[t]o comply with the equal protection guarantee of Article 1, Paragraph 1 of the New Jersey Constitution, the State must provide to same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual couples." *Lewis*, 188 *N.J.* at 463, *cited in GSE*, slip op. at 7. In response, the Legislature enacted civil union; seven years later, same-sex couples in New Jersey still cannot marry.

Meanwhile, on June 26, 2013, the United States Supreme Court decided *United States v. Windsor*, ___ *U.S.* ___, 133 *S. Ct.* 2675 (2013). As this Court recognized, in *Windsor*, the Court "struck down Section 3 of the Defense of Marriage Act, which had defined marriage as between one man and one woman for the purposes of federal statutes, rules and regulations." *GSE*, slip op. at 45 (citing *Windsor, supra*). As this Court correctly

described it, "[a]s a result of the *Windsor* decision, legally married same-sex couples will have access to the rights and privileges contained in the approximately one thousand statutes and regulations that make reference to a person's marital status." *GSE*, slip op. at 45 (citing *Windsor*, 133 *S. Ct.* at 2683). But in New Jersey, same-sex couples cannot marry and thus are today denied those rights and privileges, though they would have them if only the State did not bar them from marriage and limit them to the status of civil union. Indeed, as the Plaintiffs have shown, and the Court has found, federal agencies including the Office of Personnel Management, the State Department, the Federal Election Commission, the Department of Defense, the Department of Labor, the Office of Government Ethics, the Internal Revenue Service, and the Centers for Medicare & Medicaid Services have all, following *Windsor*, "limit[ed] the extension of benefits to only those same-sex couples in legally recognized marriages." *GSE*, slip op. at 15; *see id.* at 15-18 (discussing agency actions).

The result is that, as this Court held, "plaintiffs are today not eligible for benefits as a result of their 'civil union' status mandated by New Jersey law." *GSE*, slip op. at 26. And "[e]very day that the State does not allow same-sex couples to marry, plaintiffs are being harmed, in violation of the clear

directive of *Lewis*." *GSE*, slip op. at 50. As the Court concluded:

> The ineligibility of same-sex couples for federal benefits is currently harming same-sex couples in New Jersey in a wide range of contexts: civil union partners who are federal employees living in New Jersey are ineligible for marital rights with regard to the federal pension system, all civil union partners who are employees working for businesses to which the Family and Medical Leave Act applies may not rely on its statutory protections for spouses, and civil union couples may not access the federal tax benefits that married couples enjoy. And if the trend of federal agencies deeming civil union partners ineligible for benefits continues, plaintiffs will suffer even more, while their opposite-sex New Jersey counterparts continue to receive federal marital benefits for no reason other than the label placed upon their relationships by the State. This unequal treatment requires that New Jersey extend civil marriage to same-sex couples to satisfy the equal protection guarantee of the New Jersey Constitution as interpreted by the New Jersey Supreme Court in *Lewis*. Same-sex couples must be allowed to marry in order to obtain equal protection of the law under the New Jersey Constitution.
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> [*GSE*, slip op. at 53].

As a result, this Court ordered that "Effective October 21, 2013, Defendants, or such officials of the State of New Jersey as are empowered to do so, shall permit any and all same-sex couples, who otherwise satisfy the requirements to enter into civil marriage, to marry in New Jersey." The State now moves to stay this Court's Order pending appeal. In doing so, however,

it fails to bear its burden of showing, by clear and convincing evidence, that the familiar requirements for such a stay, derived from *Crowe v. De Gioia*, 90 *N.J.* 126, 132-34 (1982), have been satisfied. Instead, it seeks to elide those requirements, and substitute for them a *per se* rule that would provide for an automatic stay in any case of "significant public importance," and in any case in which "constitutional issues are in dispute." State's Brief in Support of Motion for a Stay Pending Resolution of Claims on Appeal (hereinafter, "State Br.") at 2-3. But that is not, of course, the law.

To the contrary, as set forth in further detail below, in order for a stay to be appropriate, the State must show that (1) it would face irreparable harm from enforcement of the judgment pending appeal; (2) a meritorious issue is presented; and (3) the State is likely to prevail on appeal. *Avila v. Retailers & Mfrs. Distribution*, 355 *N.J. Super.* 350, 354 (App. Div. 2002) (citing *Crowe*, 90 *N.J.* at 133). Additionally, the case law makes clear that the State must demonstrate that the balancing of hardships favors the granting of a stay. *Crowe*, 90 *N.J.* at 134. Finally, when, as here, "an issue of significant public importance is raised," the standards informing the grant of a stay "must include not only the traditional factors applicable to disputes between private parties but also, and most paramount, considerations of the public interest." *McNeil v.*

Legislative Apportionment Comm'n of N.J., 176 *N.J.* 484, 484 (2003). That is, in cases such as this one, the public interest is yet another factor for the Court's consideration, since courts "'may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Brown v. City of Paterson*, 424 *N.J. Super.* 176, 183 (App. Div. 2012) (quoting *Waste Mgmt. v. Union County Utils.*, 399 *N.J. Super.* 508, 520-21 (App. Div. 2008)).

For the reasons set forth below, the mandated analysis requires that the Court deny the State's motion for a stay. *First*, the State has failed to make any showing of irreparable harm, relying instead on an argument, unsupported by any New Jersey law, that irreparable harm flows *automatically* from any injunction against the State. Nor is this extraordinary assertion established by the federal cases that the State cites.

Second, even assuming that this case presents an unsettled question of constitutional law -- a dubious proposition given the clarity of the holding in *Lewis* which is at the root of the issue -- the State's argument that matters of constitutional law must always be decided by the Supreme Court is unmoored from precedent and, in any event, says nothing about the necessity for a stay. Nor are the snippets quoted from the Court's opinion, in which the Court described the importance of the case

and commented upon the legal challenges presented in deciding it, a basis for a stay. Rather, these pasted-together phrases are culled from the Court's painstaking explanation of how it carefully and systematically analyzed the law and reached a decision that, at the end of the day, was based upon a simple syllogism: the Supreme Court of New Jersey guaranteed same-sex couples equal rights; after *Windsor*, they do not receive equal rights because the State does not permit them to marry; therefore, the State has violated New Jersey Constitution's equal protection guarantee.

Third, the State is not, in fact, likely to succeed on the merits. Each of the State's contentions was fully briefed, carefully explored at oral argument, thoughtfully analyzed by the Court and ultimately, properly decided in a lengthy, clear, scholarly opinion. The State's primary argument -- that the Plaintiffs' deprivation of federal benefits cannot give rise to a State constitutional claim even when based upon the State's classification -- was fully explored by the Court, after briefing which, contrary to the State's claim, bore directly on the issue. Nor is the State's interpretation of *Windsor* correct; it is certainly not the interpretation adopted by any of the federal agencies that have considered it.

Fourth, the State does not even attempt the required balancing of the equities, instead collapsing that requirement

into an argument that the postponement it seeks is finite and that, in any event, the democratic process should have "a chance to play out." State Br. at 22. But no hardship to the State from allowing same-sex couples to marry has been shown. Meanwhile, the hardships suffered by the Plaintiffs who cannot obtain important, sometimes essential, federal benefits because the State will not permit them to marry, are ongoing, very real, often irreparable and will, as the Court pointed out, be experienced by the Plaintiffs and other same-sex couples in New Jersey every single day.

Fifth, and finally, the public interest also requires that a stay be denied. Certainly, that this case presents an issue of public importance does not, *per se*, require the issuance of a stay. Moreover, to allow the State to violate the Plaintiffs' constitutional rights can never be in the public interest. Rather, the converse is true: implementation of the Court's order, to protect the Plaintiffs and their families, is what truly serves the public interest. Indeed, as the Court pointed out, denying marriage is what engenders irreparable harm. *See GSE*, slip op. at 50.

In sum, there is simply no basis for a stay of this Court's decision. Accordingly, the State's motion should be denied.

ARGUMENT

I. THE COURT SHOULD DENY DEFENDANT'S MOTION FOR A STAY.

A. Legal Standard

In deciding a motion for a stay pending appeal, courts in New Jersey "measure the equities by the standard utilized in the granting of a preliminary injunction," as set out in *Crowe v. De Gioia*, 90 *N.J.* 126, 132-34 (1982). *Avila*, 355 *N.J. Super.* at 354. Thus, to determine whether to grant a stay pending appeal,[1] this Court must, as the State recognizes, utilize the familiar *Crowe* four-prong test: "(1) whether [a stay] is 'necessary to prevent irreparable harm'; (2) whether 'the legal right underlying [the applicant's] claim is unsettled'; (3) whether the applicant has made 'a preliminary showing of a reasonable probability of ultimate success on the merits'; and (4) 'the relative hardship to the parties in granting or denying relief.'" *Rinaldo v. RLR Inv., LLC*, 387 *N.J. Super.* 387, 395 (App. Div. 2006) (quoting *Crowe*, 90 *N.J.* at 132-34)).[2]

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[1] Whether a Court grants a stay, or other injunctive relief, is sometimes referred to as a question of whether to "preserve the status quo," but, regardless of whether it is called a stay, injunction, or preserving the status quo, New Jersey courts apply the same *Crowe* factors as are discussed below in deciding a motion like this one. *See, e.g., Brown v. Paterson*, 424 *N.J. Super.* 176, 183-88 (2012).

[2] Sometimes the test is articulated as a three-prong one, combining the second and third prongs. Thus, in *McNeil v. Legislative Apportionment Comm'n of N.J.*, 176 *N.J.* 484 (2003), Justice LaVecchia, in dissent, summarized the test as follows: "[w]hen seeking the equitable relief of a stay pending appeal of

Each of these *Crowe* "factors 'must be clearly and convincingly demonstrated'" by the party seeking relief. *Brown v. City of Paterson*, 424 *N.J. Super.* at 183 (quoting *Waste Mgmt.*, 399 *N.J. Super.* at 520-21). *See also Waste Mgmt.*, 399 *N.J. Super.* at 520 ("it is generally understood that all the *Crowe* factors must weigh in favor" of relief)). Finally, when, as here, "an issue of significant public importance is raised," the standards informing the grant of a stay "must include not only the traditional factors applicable to disputes between private parties but also, and most paramount, considerations of the public interest." *McNeil*, 176 *N.J.* at 484. That is, in cases such as this one, the public interest is yet another factor for the Court's consideration, since courts "'may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Brown*, 424 *N.J. Super.* at 183 (quoting *Waste Mgmt.*, 399 *N.J. Super.* at 520-21). That is, "when the public interest is greatly affected, a court may withhold relief despite a substantial showing of irreparable injury to the applicant." *Waste Mgmt.*, 399 *N.J.*

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a judgment, a movant must demonstrate that: (1) irreparable harm will result from enforcement of the judgment pending appeal; (2) the appeal presents a meritorious issue, and movant has a likelihood of success on the merits; and (3) assessment of the relative hardship to the parties reveals that greater harm would occur if a stay is not granted than if it were." *Id.* at 486 (LaVecchia, J., dissenting) (citing *Crowe*, 90 *N.J.* at 132-34).

Super. at 520 (citing *Yakus v. United States*, 321 *U.S.* 414, 440 (1944)).

B. Irreparable Harm

The State fails to proffer, let alone fulfill, the first requirement for a stay pending appeal: irreparable harm. Indeed, it does not even attempt to show that it will suffer harm should the Plaintiffs be permitted to marry. Instead it contends, based upon citations to non-precedential federal law, that a stay must be granted based upon a *per se* rule that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." State Br. at 4 (quoting *Maryland v. King*, 133 *S. Ct.* 1, 4 (2012) (Roberts, Circuit Justice, in chambers) (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 *U.S.* 1345, 1351 (1977) (Rehnquist, J., in chambers)), as cited by *Coalition for Economic Equality v. Wilson*, 122 *F.3d* 718, 719 (1997)). But New Jersey law, which obviously governs this application, contains no such *per se* rule; indeed, previous State efforts to obtain a stay based upon this precedent have been rejected. *See DePascale v. State*, 211 *N.J.* 40, 47 (2012) (noting that the trial court denied a stay below, in *DePascale v. State*, No. MER-L-1893-11 (N.J. Super. Ct. Law Div. Oct. 26, 2011) (denying stay pending appeal where State relied on *New Motor Vehicle Board* to argue that the State suffers irreparable

harm whenever a court enjoins a State statute)). *See also Madison Teachers, Inc. v. Walker*, No. 11CV3774 (Wisc. Circ. Ct. Branch 10, Dane County Oct. 22, 2012) (decision and order denying motion for stay pending appeal) (holding that State failed to show irreparable harm absent a stay where it relied on *New Motor Vehicle Board* to argue that irreparable harm to the State is inherent when a statute is enjoined). Moreover, such chambers opinions as *Maryland v. King* and *New Motor Vehicle Bd.* are, as a matter of law, not precedential. *See* Lois J. Scali, *Prediction-Making in the Supreme Court: The Granting of Stays by Individual Justices*, 32 *UCLA L. Rev.* 1020, 1046 (1985) ("In-chambers opinions on stays have no precedential effect on either the lower courts or the Supreme Court."); *Territorial Court of Virgin Islands v. Richards*, 674 *F. Supp.* 180, 181 n.2 (D.V.I. 1987) (same).[3]

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[3] Further, the stay in *New Motor Vehicle Bd.* was not, in fact, based entirely upon the *per se* rule urged by the State; rather, Justice Rehnquist based it at least in part upon the merits, writing that he was also staying enforcement of the order at issue because there was no liberty interest at stake. 434 *U.S.* at 1347-48 ("the District Court was wrong when it decided that an automobile manufacturer has a 'liberty' interest protected by the Due Process Clause of the Fourteenth Amendment to locate a dealership wherever it pleases, and was also wrong when it concluded that such a protected liberty interest could be infringed only after the sort of hearing which is required prior to ceasing a constitutionally protected property interest"). Likewise, in *Maryland v. King*, Chief Justice Roberts granted a stay, in part, based an additional "ongoing and concrete harm to [the State's] law enforcement and public safety interests," and not based solely on the theoretical harm imposed on the State by

All of that said, New Jersey courts simply do not, as the State would have it, automatically grant stays wherever there is an injunction against enforcement of a State statute.[4] To the contrary, New Jersey courts have repeatedly denied requests from the State to stay orders enjoining the enforcement of State statutes. *See In re Plan for the Abolition of the Council on Affordable Housing*, 214 *N.J.* 444, 455 (2013) (both the Appellate Division and the Supreme Court denied State motions to stay the court's invalidation of Reorganization Plan No. 001-2011 issued by the Governor); *DePascale*, 211 *N.J.* at 47 (both the trial court and the Appellate Division denied State motions for a stay pending appeal of a final order enjoining the Pension and Health Care Benefits Act, *L.* 2011, *c.* 78, because it violated the New Jersey Constitution); *Am. Trucking Ass'ns v. State*, 180 *N.J.* 377, 383-84 (2004) (Tax Court and Appellate Division denied State motions for a stay preventing the State from collecting

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the injunction preventing the State from enforcing its statutes. 133 *S. Ct.* at 3-4.

[4] By contrast, New York provides for just such stays, by statute. See *N.Y. Civ. Prac. L. & R.* § 5519(a)(1) (McKinney 1999). But no New Jersey statute, Court Rule, or case so provides, though the New York experience suggests that they could have done so were that the State's intent. *See Courvoisier v. Harley Davidson*, 162 N.J. 153, 162 n.4 (1999) (citing a provision of *N.Y. Civ. Prac. L. & R.* § 5519 in noting that New Jersey's Court Rules could have similarly explicitly provided for a partial stay in certain circumstances).

transporter fees under a hazardous waste transporter registration fee regulation promulgated pursuant to *N.J.S.A.* 13:1E-18); *Roman Check Cashing v. N.J. Dep't of Banking & Ins.*, 169 *N.J.* 105, 109 (2001) (Supreme Court denied request from New Jersey Department of Banking and Insurance for a stay of judgment enjoining enforcement of *N.J.S.A.* 17:15A-41(e)).

Understandably, the State cannot cite a single New Jersey case to support its position that barring enforcement of an unconstitutional State enactment harms the State at all, let alone inflicts irreparable harm upon it. Indeed, the State's argument is not even faithful to what the Court has actually done. In fact, the Court's opinion is careful *not* to enjoin the operation of the Civil Union Act. *GSE*, slip op. at 51. Should the Court's Order go into effect, both marriages and civil unions may go on as before; but, per the Court's Order, same-sex couples will also be permitted to marry. It is hard, under these circumstances, to ascertain the harm to the State, let alone any irreparable harm, that would flow from implementation of that Order. Indeed, as set forth in further detail below, *see infra*, Section I.E, the only actual and irreparable harms that would result are those imposed upon the Plaintiffs should they not be permitted to marry, for they would be deprived not only of their federal rights but, as the Court held, of their

constitutional rights as well. The State's motion for a stay should be denied.

C. **Meritorious Issue**

For the purpose of determining whether a stay should be granted, the second *Crowe* factor is that the movant must demonstrate that "a meritorious issue is presented." *Avila*, 355 *N.J.* at 354 (citing *Crowe*, 90 *N.J.* at 133). This means that a stay should be denied "when the legal right underlying [movant's] claim is unsettled." *Crowe*, 90 *N.J.* at 133. Where, then, the movant does *not* show that its "underlying legal claim" is "settled as a matter of law," this factor counsels against granting a stay. *Id.* *See also Community Hosp. Group Inc. v. More*, 365 N.J. Super. 84, 94-95 (App. Div. 2003) (noting that "[t]he second [*Crowe*] prong requires that the legal right underlying the applicant's claim be settled as a matter of law" (citing *Crowe*, 90 *N.J.* at 133)), *rev'd* in part on other grounds, 183 N.J. 36 (2005). Here, the State makes no attempt to demonstrate that the "legal right" underlying the request for a stay - that Plaintiffs may be denied the equal rights and benefits described in *Lewis* based upon the State's refusal to allow them to marry - is settled. Instead, the State, here the moving party, seeks to shift the burden to Plaintiffs to show that their claims are based on unsettled questions of constitutional law. *See* State Br. at 5 (arguing that "The Court

Should Grant a Stay Because Plaintiffs' Claim Raises Unsettled Question of Constitutional Law."). For the reasons set forth in the Court's opinion, and summarized in section I.D, below, discussing the likelihood of success on the merits, the Plaintiffs have borne and continue to successfully bear that burden. But the law requires *the State* to show that its claim is "settled as a matter of law." This it has not done, and cannot do.

Nor is the case law cited by the State helpful to its argument. Only one of the three cases that the State cites in support of its argument even discusses a stay, and that case, *Bowen v. Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, Circuit Justice, in chambers), is not, as set forth above, precedential, *see supra* at 11, and is certainly not controlling here.[5] And the other two cases on which the State relies, *De Vesa v. Dorsey*, 134 *N.J.* 420 (1993) (per curiam) (Pollock, J., concurring), and *Worthington v. Fauver*, 88 *N.J.* 183 (1982),[6] are wholly irrelevant to this Court's determination of a stay.

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[5] Moreover, in *Bowen*, Chief Justice Rehnquist noted that there was a "'fair prospect' that the Court will ultimately reverse the judgment below." 483 *U.S.* at 1305. For the reasons set forth *infra*, Section I.D, addressing the likelihood of success on the merits, that is not the case here.

[6] As noted, the cite to *De Vesa* is to a concurring opinion, and moreover one that does not opine that "[c]onstitutional interpretation is a 'delicate exercise'" as the State says, State Br. at 6, but rather discusses *Baker v. Carr*, 369 *U.S.*

The State is, as discussed below, unlikely to succeed on the merits. But the Court need not even reach that issue, for the State fails to fulfill the second *Crowe* requirement: that its claim is settled as a matter of law. Nor is the State correct that constitutional claims may only be decided by the Supreme Court, let alone that stays are required. Indeed, as Plaintiffs show above, stays have been denied in many important constitutional cases, after rigorous application of the *Crowe* factors. *See supra* at 12-13. The State's motion for a stay should be denied.

D. Likelihood of Success on the Merits

The Defendants have not shown the "reasonable probability of success on the merits" required to secure a stay of the Court's order requiring the State to begin issuing marriage licenses on October 21, 2013. *Guaman v. Velez*, 421 *N.J. Super.* 186, 211 (1962), and notes that "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government . . . is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *De Vesa*, 134 *N.J.* at 429. It says nothing about the standards for determining whether a stay should be granted, in a case (regarding the exercise of senatorial courtesy) that was uniquely political. Likewise, *Worthington v. Fauver*, 88 *N.J.* 183 (1982), does not discuss stays; nor does it stand broadly for the proposition that lower court decisions regarding constitutional questions are inherently vulnerable on appeal. Certainly, these cases require trial courts to exercise care in rendering constitutional decisions. This Court's 53-page opinion does just that.

239, 248 (App. Div. 2011). In its supporting brief, the State essentially re-litigates the arguments that this Court has rejected, without offering any explanation as to why it is likely that an appellate court would disagree. Specifically, the State argues that it is likely to prevail because this Court's decision (1) did not presume that the State's marriage laws are constitutional, (2) is inconsistent with federalism principles, and (3) erroneously found State action. All of these issues were exhaustively briefed by the parties in their submissions before and after argument, and were thoroughly examined and addressed by the Court. None of the State's arguments warrants a finding that this Court's decision and order are reasonably likely to be upset on appeal.

First, although the State insinuates that, in ruling for the Plaintiffs, the Court failed to apply the presumption of constitutionality for legislative enactments, *see* State Br. at 7-8, it cannot be seriously disputed that the Court proceeded cautiously and only found an equal protection violation after carefully considering each of the parties' arguments and concluding that the Plaintiffs had demonstrated that violation "'clearly'" and "'beyond a reasonable doubt.'" *GSE*, slip op. 20 (quoting *In re Matter of P.L. 2001*, 186 *N.J.* 368, 392 (2006); *Lewis*, 188 *N.J.* at 459)). Indeed, the Court devoted an entire section of its opinion to the need to "exercise . . . caution"

in just this manner. *Id.* at 19. And the State is wrong when it accuses the Court of erroneously assigning the ultimate burden of persuasion to the Defendants. *See* State Br. 8. Rather, when the Court observed that the State "could not point to any cases outside of the search and seizure context to support its analysis," *GSE* slip op. 39, it did so only to confirm that it had canvassed all of the precedent cited by the State and to explain why those decisions did not undermine Plaintiffs' case for state action.

Second, the Court should reject the State's theory that "Plaintiffs' claims will fail on federalism grounds" because *Windsor* requires the federal government to provide all marital rights, benefits, and privileges to civil-unioned couples. *See* State Br. 8-13. In concluding that the denial of federal benefits to same-sex couples violates *Lewis*'s equality mandate, this Court carefully analyzed but then correctly rejected, as a matter of law, the State's argument for three reasons: (1) Defendants' argument that federal agencies must provide spousal benefits to civil-unioned couples cannot be squared with *Windsor*'s express disclaimer that "'[t]his opinion and its holding are confined to those lawful marriages,'" *GSE* slip op. 48 (quoting *Windsor*, 133 *S. Ct.* at 2696); (2) requiring civil-unioned couples to litigate this argument in federal court on a benefit-by-benefit basis would itself impose a burden in

violation of *Lewis*, *id.* at 48-49; and, ultimately, (3) because, as a matter of fact, same-sex couples are not receiving "*all* of the same benefits" as different-sex couples, "plaintiffs are being harmed, in violation of the clear directive of *Lewis*," *id.* at 50 (emphasis in original). Though it argues that this Court's decision will be reversed on federalism grounds, the State completely ignores the latter two holdings -- that equal protection is violated if the Plaintiffs are forced to litigate in federal court and if they continue to be denied the same benefits as married couples. On that basis alone, the State has not sustained its burden to show a likelihood of success on appeal. Still, however, the State's discussion of *Windsor* is erroneous and merits the following response.

The State argues, as it did in opposing summary judgment, that the differences between "marriage" and "civil union," and "spouse" and "civil union partner" are semantic, and that the terms are interchangeable under New Jersey law. But, as before, the State goes too far when it suggests that the terms' legal equivalency under State law implies that they are actually the same thing.

The Civil Union Act provides that"

> Whenever in any law, rule, regulation, judicial or administrative proceeding or otherwise, reference is made to "marriage," "husband," "wife," "spouse," "family," "immediate family," "dependent," "next of kin," "widow," "widower,"

> "widowed" or another word which in a specific context denotes a marital or spousal relationship, the same shall include a civil union pursuant to the provisions of this act.
>
> [*N.J.S.A.* 37:1-33.]

Thus, the Act does not alter the definition of marital spouse to include civil union partners; instead, it amends New Jersey law to recognize civil union partners as a distinct class of people who must be treated *as if* they are spouses. Accordingly, as this Court held, "[b]y the terms of the Civil Union Act, same-sex partners are not each other's spouses," even if they are supposed to be treated like spouses. *GSE*, slip op. at 25; *see also id.* at 47, n.10 ("New Jersey expressly denies use of the label 'spouse' to same-sex couples.").[7]

Defendants are similarly incorrect that the federal government's respect for New Jersey's statutory distinction between civil union and marriage "runs afoul of long-standing precedent that has insisted that courts look to essence, not label." State Br. 10 (citing *United States v. Chicago, Burlington & Quincy R.R. Co.*, 237 *U.S.* 410, 413 (1915); *Jordan v. Roche*, 228 *U.S.* 436, 443 (1913)). The parties have previously briefed this point, and this Court understandably

[7] Thus, as the Court already noted, the State's continued reliance on *Cozen O'Connor, P.C. v. Tobits*, 2013 U.S. Dist. LEXIS 105507 (E.D. Pa. July 29, 2013), is misplaced. *See GSE* slip op. 47 n.10. That trial level Pennsylvania case concerned a couple with a preexisting valid marriage subsequently assessed pursuant to the law not of New Jersey, but of Illinois.

found the State's cited cases unpersuasive, insofar as those century-old decisions all concern whether greater statutory categories encompass lesser subcategories. *See Chicago, Burlington & Quincy R.R. Co.*, 237 *U.S.* at 412 (concluding that the statutory term "all trains" encompasses transfer trains); *Jordan*, 228 *U.S.* at 444 (concluding that the statutory term "distilled spirits" encompasses rum). Civil union, of course, is not a subcategory or type of marriage, but is separate and distinct from marriage. That is, New Jersey does not give marriage licenses to same-sex couples; it gives them civil union licenses. At most, the cases the State cites would, perhaps, support the conclusion that common-law marriage, marriage between cousins, and marriages at particularly young ages (all of which are sanctioned to different degrees by different states in the country) are types of "marriage," and thus should all be regarded as marriages by the federal government if so regarded by the pertinent State -- which is precisely what the federal government is doing post-*Windsor*, as the Plaintiffs have shown in their submissions setting forth the positions of the various federal agencies following the Supreme Court's decision.

The State's position that the Court should look to substance and not form, including its citation to *Terenzio v. Nelson*, 107 *N.J. Super.* 223, 227 (App. Div. 1969) ("A name or label attached to something will not per se change the essential

nature of the object."), *cited in* State Br. at 11, is ironic indeed. For it is the State that has taken pains, throughout this litigation, to maintain the very labels for which it now tries to shift the blame to the federal government, including in its current effort to seek a stay and thus continue to bar the Plaintiffs from marriage.

Finally, the State greatly overstates the case that federal agencies must treat civil union as they would marriage, lest they "'influence or interfere with State sovereign choices' about who is entitled to the benefits of marriage" in violation of *Windsor*. State Br. at 12 (quoting *Windsor*, 133 *S. Ct.* at 2693). In fact, the passage from *Windsor* which the State cites actually says that the federal government may not "influence or interfere with State sovereign choices *about who may be married*," *Windsor*, 133 *S. Ct.* at 2693 (emphasis added), which is entirely consistent with the Court's statement that *Windsor*'s "opinion and its holding are confined to those lawful marriages," *id.* at 2696.[8]

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[8] The State's strained argument that this Court's interpretation of *Windsor* would "discourage enactment" of state laws that promote the rights of same sex-couples also quotes the Supreme Court incompletely, and misleadingly. *See* State Br. at 12 (citing *Windsor*, 133 *S. Ct.* at 2693. In fact, the passage at issue notes that DOMA was enacted "to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted." *Windsor*, 133 *S. Ct.* at 2693. Obviously, this passage says nothing about civil union, or some other category less than

Here, the federal government is exerting no such influence or otherwise interfering with State affairs; rather, it is merely following the State's determination as to who may marry, in keeping with federal tradition, as discussed in *Windsor*. *See id.* at 2693 (criticizing "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage"). Nor, for that matter, does Chief Justice Roberts' dissent in *Windsor* show that the Supreme Court intended for federal agencies to treat State-created parallel statuses, such as civil union, as marriage. The State's argument to the contrary notwithstanding, there is simply no discussion in his dissent about federal treatment of civil union -- or, for that matter, the validity of traditional-marriage statutes under *state* constitutions. Indeed, though the State relies upon it, Chief Justice Roberts' dissent specifically disagrees with the State's position regarding the significance of the penultimate sentence of the majority opinion, discussed above. *See id.* at 2697 (Roberts, C.J., dissenting) ("In my view, though, the disclaimer is a logical and necessary consequence of the argument the majority has chosen to adopt.").

Third and finally, the State argues that Plaintiffs' equal protection claims will fail on appeal because "the State's

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marriage, but focuses on a state government's decisionmaking about whom it will allow to marry.

action is not legally cognizable." State Br. at 13. This Court, however, carefully considered and rejected this argument, holding, as did Judge Feinberg during earlier motion practice in this case, that state action exists where, as here, New Jersey has passed a statute defining who may marry and the federal government, consistent with *Windsor*, has adopted that State definition. *GSE*, slip op. 37. Indeed, as the Court noted, "it defies common sense to suggest that the passage of a statute by the New Jersey Legislature is not state action." *Id.* Nevertheless, the State contends that this commonsense reasoning will not survive appeal. The State is mistaken.

The State criticizes the Court's decision on the ground that, as the decision candidly acknowledged, the Court was unable to find a case involving "an analogous situation where it is the manner in which the federal government applies a state statutory scheme that makes the state's action unconstitutional." *Id.*; *see* State Br. 13. Respectfully, Plaintiffs maintain that the cases they have cited support the finding of state action. Specifically, the Plaintiffs have cited cases holding that where a State label and statutory scheme triggers discrimination by third parties, including but not limited to the federal government, the State's enactment of those laws is sufficient to establish state action. *See* Pls.' Reply Br. in Support of Mot. for Summ. J. at 18-19 (citing,

e.g., *Cox v. Schweiker*, 684 *F.*2d 310 (5th Cir. 1982)); Pls.' Supplement (Aug. 28, 2013) at 12-15 (citing, *e.g.*, *Anderson v. Martin*, 375 *U.S.* 399 (1964); *Sanchez v. Dep't of Human Servs.*, 314 *N.J. Super.* 11 (App. Div. 1998); *In re Estate of Kolacy*, 332 *N.J. Super.* 593 (Ch. Div. 2000)). The Plaintiffs have also cited cases where State family law judgments have turned on federal policy, such as where determinations of a child's best interests are made in light of the federal benefits that will be available to her. *See* Pls.' Supplement (Aug. 28, 2013) at 15-16 (citing, *e.g.*, *Fazilat v. Feldstein*, 180 *N.J.* 74 (2004); *In re Parentage of the Child of Kimberly Robinson*, 383 *N.J. Super.* 165 (Ch. Div. 2005)). But even if the Court is correct that there is not a decision squarely on point, it does not follow that State is entitled to a stay. To the contrary, it is the State's burden to show likelihood of success, and the absence of precisely analogous precedent one way or the other undermines the State's assertion that it will succeed on appeal. *See, e.g.*, *Crowe*, 90 *N.J.* at 133 ("[T]emporary relief should be withheld when the legal right underlying [movant's] claim is unsettled."); *Hiering v. Jackson*, 248 *N.J. Super.* 37, 39 (L. Div. 1990) (denying equitable relief where "the law was uncertain with respect to [movants'] likelihood of success on the merits"), *aff'd*, 248 *N.J. Super.* 9 (App. Div. 1991).

Because the State lacks precedent directly supporting its State action defense, it resorts to arguing that it would upset our federal structure for *Lewis*' s constitutional mandate to turn on federal agency actions. The State, however, twists the federalism cases it cites beyond recognition. For example, the State asserts that, by denying spousal benefits to civil-unioned couples, federal agencies are "'commandeering the legislative processes of the states.'" State Br. 16 (quoting *New York v. United States*, 505 *U.S.* 144, 161 (1992)). This is a curious claim for the State to make, since, to date, the Legislature has failed to enact marriage equality on its own accord, much less under some hypothesized, coercive federal mandate "directly compelling [New Jersey] to enact and enforce a federal regulatory program." *New York*, 505 *U.S.* at 161 (internal quotation marks omitted). The reality is that no such "commandeering" has taken place, and the Tenth Amendment cases cited by the State are completely inapposite.[9]

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[9] Nor is it the case that if federal agencies entirely reversed their current course and provided all federal benefits to couples in civil unions, that would somehow result in a "flip-flop approach to constitutional interpretation." State Br. at 21 (internal quotation marks omitted). Certainly, whether one is denied rights -- in this case, federal rights -- as a result of State law, will determine if that State law is constitutional: if the rights are denied on a discriminatory basis, there is a constitutional violation; if they are not, there is none. But that does not tether the State constitution to the federal -- only the question of constitutionality to

Nor can it be seriously contended that a finding of state action here will confuse New Jersey's citizens as to who is "accountable" for same-sex couples' denial of federal benefits. *See* State Br. 15-16. For one thing, the State's primacy in defining who may marry, and thereby receive federal spousal benefits, is not in dispute; as the Supreme Court has held, marriage eligibility falls within the "virtually exclusive province of the States." *Windsor*, 133 *S. Ct.* at 2691 (internal quotation marks omitted). Even more, though, the purpose of the state action requirement is to hold the State accountable "'when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 *U.S.* 288, 295 (2001) (quoting *Blum v. Yaretsky*, 457 *U.S.* 991, 1004 (1982)). Thus, the State has it exactly backwards: the Court's finding of state action enhances, rather than impedes, government accountability, and places responsibility for Plaintiffs' discriminatory treatment exactly where it belongs -- at the doorstep of the State, which does not allow Plaintiffs to marry.

Next, the State argues that "[b]ecause the State Constitution only mandates the provision of equal State benefits to all State citizens, the *Lewis* Court took no account of the

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whether there really is an unequal dispensation of rights, as *Lewis* proscribed.

extra-jurisdictional effects of the two options the Court presented to the Legislature." State Br. at 17.[10] That is, the State re-argues the point made in its earlier briefs that because the Supreme Court specifically noted in *Lewis* that "whatever the Legislature may do will not alter federal law, which only confers marriage rights and privileges to opposite-sex married couples," *Lewis*, 188 *N.J.* at 460 n.25 (citing 1 *U.S.C.* § 7), it follows that the federal effects of the State's discrimination cannot be considered in assessing the constitutionality of that State action. But this Court correctly read that provision of *Lewis* as indicating the "limitations and context of [the Supreme Court's] decision, rather than explicitly limiting its decision to whether same-sex couples were entitled to state benefits." *GSE*, slip op. at 39. *Lewis* therefore did not foreclose the Plaintiffs' claims, but only noted that, while DOMA remained the law of the land, same-

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[10] The State also argues that *Lewis* should be limited to New Jersey state rights because "even though the *Lewis* Court was aware that Massachusetts had enacted same-sex marriage, the Court did not concern itself with whether New Jerseyans who were in a civil union and who moved to or traveled through Massachusetts would be disadvantaged with respect to divorce, child custody, birth certificates for adopted children, hospital privileges, etc." State Br. at 17 (citation omitted). But the question of how states regard marriages, civil unions, or domestic partnerships entered into in other states is a matter of the separate, established doctrine of comity, and that state-to-state doctrine is not a part of the *Lewis* decision and has no bearing on this Court's decision, which addresses access to federal benefits.

sex couples in New Jersey would not receive equal federal benefits pursuant to the *Lewis* decision. *Lewis*, 188 *N.J.* at 460 n.25. With the demise of DOMA, of course, that is no longer the case and today, it is the State's "domestic relations structure" that, as this Court found, causes the denial of those benefits and privileges. *GSE* slip op. 37.

Last, the State reiterates its argument that this case parallels the search and seizure decisions it cited in opposing summary judgment. *See* State Br. 18-19; State Br. in Opp'n to Summ. J. 33-34. The State, however, overlooks the "vital, significant condition" the Supreme Court set in those cases: that, before evidence obtained by federal officials in violation of New Jersey law may be admitted at trial, "it is essential that the federal action deemed lawful under federal standards not be alloyed by any state action or responsibility." *State v. Mollica*, 114 *N.J.* 329, 355 (1989). But such "alloy[ing]" is exactly what is occurring here: the federal government, in accordance with *Windsor*, uses the State's definition of marriage, which excludes same-sex couples. *See Windsor*, 133 *S. Ct.* 2693, 2696. As this Court noted, "it defies common sense" to say that the State has not acted where it has created the very statutory scheme from which Plaintiffs' discriminatory treatment derives. *GSE* slip op. 37. And the Court was correct in its holding that:

> By statutorily creating two distinct labels -- marriage for opposite-sex couples and civil unions for same-sex couples -- New Jersey civil union partners are excluded from certain federal benefits that legally married same-sex couples are able to enjoy. Consequently, it is not the federal government acting alone that deprives plaintiffs of federal marriage benefits -- it is the federal government incorporating a state domestic relations structure to make its determinations, and it is that state structure that plaintiffs challenge.
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> [*Id.*]

With regard to each of the points raised in its motion, the State has not shown it is likely to prevail. Accordingly, the motion for a stay should be denied.

E. Balance of Hardships

The next step in the court's analysis requires balancing the parties' relative hardships. *See Crowe*, 90 *N.J.* at 134; *Glassboro v. Gloucester Cnty. Bd. of Chosen Freeholders*, 199 *N.J. Super.* 91, 100 (App. Div.) (describing this step of deciding motion for a stay as requiring a "balance of the equities whether conceived as the relative degree of hardship facing the [plaintiffs] if no action were taken or the relative ability of [defendants] to cope with the judicial remedy imposed"), *aff'd*, 100 *N.J.* 134 (1985). In its motion, the State contends that this balance favors granting a stay because the State would be irreparably harmed "if a lower tribunal precipitously reverses the legislatively chosen course" of

denying same-sex couples the right to marry and relegating them to civil union status. State Br. 22. Plaintiffs have already explained why the State is wrong when it asserts that any injunction against the State automatically constitutes irreparable harm. *See supra* at 10-13. But even if the State were correct that it would be, in some theoretical or abstract sense, irreparably harmed absent a stay in this case, the State's analysis of the balance of the hardships is fatally flawed because it completely ignores the other side of the ledger, *i.e.*, the hardships that will be visited upon Plaintiffs should the Court enter the requested stay. When this balancing is properly performed and both sides' hardships are actually considered, the scale tips decidedly in Plaintiffs' favor. Accordingly, the State's application for a stay should be denied.

In their briefing and supplemental submissions in support of summary judgment, Plaintiffs identified a number of federal benefits that (a) are denied them because of their civil union status, and (b) cannot be monetarily redressed after the fact. As explained below, these deprivations, and the resulting hardships, will continue, and be exacerbated, if this Court enters a stay.

To begin, the Plaintiffs are being denied federal benefits that will result in immediate, permanent, and irreparable

injury. Indeed, in holding that this case was ripe for review, the Court observed one such non-economic benefit: the Plaintiffs' inability to claim leave under the Family and Medical Leave Act ("FMLA"). *See GSE* slip op. 26. Specifically, the Court observed that the U.S. Department of Labor has restricted FMLA eligibility to "spouses in same-sex marriages," such that "if any of the plaintiffs got sick prior to a change in this policy, their partner's employer could refuse to allow the civil union partner to take leave to care for the ill partner under the FMLA." *Id.* *See generally* U.S. Dep't 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.htm (last visited Oct. 1, 2013) (defining "spouse" to include "same-sex marriage," but not civil union). The real and always substantial risk that a civil union partner might fall ill or be injured certainly persists during any period in which the Plaintiffs cannot marry. And in the unfortunate event of such illness or injury, if a civil union partner is denied FMLA leave by his employer, the attending hardship will be irreparable: no monetary relief will make up for the time she was unable to spend caring for her loved one.

Similarly, because New Jersey denies same-sex couples the right to marry, a person cannot sponsor her non-citizen civil

union partner to reside with her in the United States. *See GSE* slip op. 15; U.S. Dep't of State, *U.S. Visas for Same-Sex Spouses: FAQs for Post-Defense of Marriage Act* (Aug. 2, 2013), http://travel.state.gov/visa/frvi/frvi_6036.html (last visited Oct. 2, 2013) ("At this time, only a relationship legally considered to be a marriage in the jurisdiction where it took place establishes eligibility as a spouse for immigration purposes."). Obviously, the time during which a couple is separated would be a significant, irreparable hardship that cannot be retroactively restored -- it is lost forever. *See Andreiu v. Ashcroft*, 253 *F.*3d 477, 484 (9th Cir. 2001) (en banc) (recognizing "separation from family members" and attendant "potential economic hardship" as factors to weigh in determining whether non-citizen will be irreparably harmed if removed from the United States).

Certainly, in the event that a civil union partner dies without being married in New Jersey, the surviving partner will forever lose federal spousal survivorship benefits -- a real, concrete, irreparable hardship. After all, once a person dies, his surviving civil union partner cannot enter into a marriage with him posthumously. *See N.J.S.A.* 37:1-10 ("[N]o marriage . . . shall be valid unless the contracting parties shall have obtained a marriage license[.]"). To take one stark example of this irreparable loss of benefits, unmarried

individuals whose civil union partners serve in the military are not entitled to be buried in a national cemetery because they are not deemed "spouses" or "surviving spouses." *See* U.S. Dep't of Veterans Affairs, Nat'l Cemetery Admin., *Interments in Department of Veterans Affairs (VA) National Cemeteries*, at 7 (Jan. 2011), www.cem.va.gov/CEM/pdf/IS1_Jan_2011.pdf (last visited Oct. 1, 2013) (providing that a veteran's "spouse" or "surviving spouse" is eligible for internment in a national cemetery); Letter from Eric H. Holder, Jr., U.S. Attorney General, to John Boehner, Speaker, U.S. House of Representatives, at 1 (Sept. 4, 2013), http://www.justice.gov/iso/opa/resources/557201394151530910116.pdf (last visited Oct. 1, 2013) (informing Congress that the Executive will extend spousal veterans benefits only to couples "legally married under state law"). Thus, if an individual serving in the armed forces dies before he can marry his civil union partner under New Jersey law, his surviving partner will be permanently barred from being interred alongside him. Plainly, this is an extraordinary hardship which cannot be redressed, after the fact, with money. A stay, then, only heightens the very real risk that this kind of hardship will become a reality.

Likewise, the Plaintiffs stand to lose significant tax benefits that would accrue if they were married. That is,

because New Jersey same-sex couples are restricted to civil union, a "formal relationship[] recognized under state law that [is] not denominated as a marriage under that state's law," they are not recognized as "spouses," nor is their relationship recognized as a "marriage" by the Internal Revenue Service. Rev. Rul. 2013-17, at 12, http://www.irs.gov/pub/irs-drop/rr-13-17.pdf (last visited Oct. 2, 2013); *accord GSE* slip op. 16-17. Accordingly, in the event that a civil union partner dies before New Jersey allows marriage without discrimination on the basis of sexual orientation, any possible marital tax benefits will be lost forever, since, as mentioned *supra*, a couple cannot be married posthumously. Further, if the Plaintiffs are barred from marrying during this calendar year, they will not be able to file their 2013 federal tax returns jointly as married couples and will thus lose a year of eligibility for federal spousal benefits.[11]

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[11] Nor can plaintiffs sue for a tax refund, as Edith Windsor did, since she was, in fact, married -- as they would not be. And any argument that, as the State contends, *Windsor* requires the federal government to treat civil-unioned couples as if they are married, *see* State Br. 9, is, the Court held, both inconsistent with the language of the United States Supreme Court's opinion and belied by the way in which agencies have, predictably, interpreted that language. *GSE*, slip op. at 46-48. Moreover, as this Court also recognized, adopting the State's position would require same-sex couples to incur the burden of litigating to clarify their rights, which is itself an independent hardship that would be visited upon Plaintiffs if a stay were granted. *See id.* at 49 ("[P]laintiffs would suffer hardship in the form of a costly and time-consuming litigation burden not required of

Moreover, many of the economic injuries that will be visited upon Plaintiffs will pose a most significant hardship. This is so, for example, with respect to subsistence benefits necessary to a person's everyday living. *See, e.g., Kildare v. Saenz*, 325 *F.*3d 1078, 1083 (9th Cir. 2003) (holding that "economic hardship," including loss of "necessities," is irreparable). For example, because New Jersey will not permit same-sex couples to marry, an individual who is dependent on a civil union partner's livelihood is substantially at risk of losing essential federal survivorship benefits in the event that the partner dies while they are only civil-unioned and not married. Among this at-risk group are civil union partners of service members, who, in the event of their partner's death, would be forever barred from participating in the military's survivor benefits plan. *See* 10 *U.S.C.* §§ 1447(7)-(9) & 1448 (limiting survivorship benefits to a "husband" or "wife" who was "married to [the decedent] for at least one year immediately before [the decedent's] death"). And, in light of the Department of Labor's recent ruling that the Earned Retirement Income Security Act of 1974 ("ERISA") does not require spousal benefits to be provided to "individuals in a formal relationship

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opposite-sex married couples should this court withhold review and insist that plaintiffs pursue benefit-by-benefit litigation against the federal agencies.") (citing *Troxel v Granville*, 530 *U.S.* 57, 75 (2000)).

recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or a civil union," surviving civil union partners will not be able to receive ERISA-governed benefits that only go to surviving marital spouses. U.S. Dep't of Labor, Emp. Benefits Sec. Admin., *Technical Release 2013-04* (Sept. 18, 2013); *accord GSE* slip op. 17. This deprivation stands to adversely affect a significant number of individuals in New Jersey, since ERISA governs "most private sector employee benefits plans." U.S. Dep't of Labor, *Health Benefits, Retirement Standards, and Workers' Compensation: Employee Benefits Plans* (Sept. 2009), http://www.dol.gov/compliance/guide/erisa.htm (last visited Oct. 2, 2013).

So too are civil union partners of federal employees at risk of permanently losing access to survivor benefits and annuities. *See* 8 *C.F.R.* §§ 843.102, 843.301-843.314 (defining benefits and annuities available to "spouse" or "former spouse" of federal employee, *i.e.*, an individual who is part of a lawful "marriage").[12] Moreover, these civil union partners are denied potentially critical spousal healthcare benefits that would be available if they were able to marry. *See GSE* slip op. 15; U.S.

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[12] Some of the benefits accorded on the basis of marriage directly benefit other members of the spouse's family, including parents and children. *See, e.g.*, Plaintiffs' Supplemental (Aug. 28, 2013) 3-4.

Office of Personnel Mgmt., *Benefits Administration Letter No. 13-203: 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 Oct. 2, 2013) (permitting same-sex spouses to receive federal employee health, dental, and life insurance, but concluding that "same-sex couples who are in a civil union or other forms of domestic partnership other than marriage will remain ineligible" for these programs). Likewise, civil union partners are ineligible for spousal coverage under Medicare. *See GSE* slip op. 17; U.S. Dep't of Health & Human Servs., *HHS Announces First Guidance Implementing Supreme Court's Decision on the Defense of Marriage Act* (Aug. 29, 2013), http://www.hhs.gov/news/press/2013pres/08/20130829a.html (last visited Oct. 2, 2013).

Courts have consistently found the denial of these sorts of essential economic benefits to be irreparable and to merit equitable relief. *See, e.g., Laforest v. Former Clean Air Holding Co.*, 376 *F.*3d 48, 55 (2d Cir. 2003) (affirming district court determination that reductions in retirees' benefits plan were irreparable because, among other hardships, they imposed "severe financial hardship" and limited the beneficiaries' ability to "purchase life's necessities"); *Golden v. Kelsey-Hayes Co.*, 73 *F.*3d 648, 657 (6th Cir. 1996) (holding that loss

of retirement benefits was irreparable because it causes dire financial hardship to individuals living on limited or fixed incomes); *Whelan v. Colgan*, 602 *F.*2d 1060, 1062 (2d Cir. 1979) (holding that loss of employer-provided family health insurance was irreparable); *Musto v. Am. Gen. Corp.*, 615 *F. Supp.* 1483, 1504-05 (M.D. Tenn. 1985) (holding that increase in retirees' health insurance premiums constituted irreparable harm), *rev'd on other grounds*, 861 *F.*2d 897 (1988); *Guaman*, 421 *N.J. Super.* at 255 (denial of publicly subsidized healthcare is irreparable). Thus, the Plaintiffs have established that there is a substantial likelihood that they and other civil-unioned couples will suffer irreparable injury, since they will not receive spousal benefits relating to family and medical leave, immigration, military and veterans' affairs, retirement, federal employment, and Medicare.[13] Certainly, if the Court's Order is

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[13] The discussion above is limited to those federal benefits for which agencies have promulgated interpretative regulations and guidelines since *Windsor*'s decision. Thus, it covers only a fraction of the total number of federal benefits currently being denied civil-unioned couples. As the Plaintiffs described in their opening summary judgment brief, *see* Pls.' Br. in Support of Mot. for Summ. J. 28-32, there are scores of other rights that civil-unioned couples are unlikely to receive because the benefits are reserved to "spouses" or parties to a lawful "marriage." As just a few examples, under the plain language of the governing statutes and regulations, same-sex couples cannot pool their income for purposes of applying for federal education financial aid, *see* 20 *U.S.C.* § 1087nn(b), and cannot apply for public safety officers' benefits, in the event that a civil union partner qualifies and is disabled or dies in the line of duty, *see* 28 *C.F.R.* § 32.3. The resulting hardships are patent.

stayed, they will suffer hardship for which they cannot retroactively be made whole even if they are later allowed to marry.

By contrast, the State has identified no hardship whatsoever that it will suffer from the denial to Plaintiffs of their *federal* benefits. Instead of addressing that essential legal requirement, the State claims that the balance of hardships weighs in favor of granting a stay because it may not take long for Congress to pass legislation providing equal federal benefits to civil-unioned couples or for the State Supreme Court to rule. State Br. 22. But there is no support for this legislative speculation as a basis for a stay, nor is there support for the proposition that Congress will ever pass legislation granting civil-unioned couples federal marital benefits, much less do so before the appeals process in this case has concluded. Indeed, although the State attempts to analogize the current circumstances to *Lewis*, where the Legislature passed the Civil Union Act within months after the Supreme Court's decision granting same-sex couples equal rights, *see id.*, there the Supreme Court *ordered* the Legislature to enact legislation granting same-sex couples equal rights within 180 days, *see Lewis*, 188 *N.J.* at 463. Of course, here there is

no such judicial mandate requiring Congress to act within a certain time period to ensure that New Jersey same-sex couples are treated equally. As this Court correctly explained, with respect to why constitutional adjudication is appropriate now, not later:

> [T]o accept the State's argument would render every constitutional challenge to any law untenable; the defendants would simply deflect any challenges by asserting that the challenged law may be remedied through legislation at some point in the future. Such a position would be fatal to any enforcement of constitutional protections through the judicial system and cannot be countenanced.
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> [*GSE* slip op. at 27.]

In the end, it is the State's burden to prove its entitlement to a stay pending appeal, including that the balance of hardships favor such equitable relief, and to do so "clearly and convincingly." *Brown*, 424 *N.J. Super.* at 183 (internal quotation marks omitted). The State has not met its burden, for reasons that this Court has already expressed. In holding that same-sex couples are currently denied their constitutional right to equal treatment and ordering that New Jersey begin issuing them marriage licenses, this Court recognized that "[e]very day that the State does not allow same-sex couples to marry, plaintiffs are being harmed, in violation of the clear directive of *Lewis*." *GSE* slip op. 50. Specifically, every day that same-

sex couples cannot marry is a day they do not have -- and risk permanently losing -- vital benefits relating to their health, income, quality of life, personal and financial security, and family stability. In stark contrast, the State asserts no real hardships at all, let alone equities that compare. Rather, as this Court held, the Plaintiffs' "right to equal protection under the New Jersey Constitution should not be delayed until some undeterminable future time," whether that time comes as a result of legislation or because of higher-level judicial decisionmaking. *Id.*

The balance of the hardships plainly tips in the Plaintiffs' favor. Accordingly, this Court should deny the State's motion.

F. The Public Interest

To grant a stay when "an issue of significant public importance is raised," *McNeil*, 176 *N.J.* at 484, "a judge must find that the movant has demonstrated . . . that the public interest will not be harmed" as a result of the stay, *Waste Mgmt.*, 399 *N.J. Super.* at 519-20. Here, the State fails to assert, let alone demonstrate, that the public interest will be unharmed by the stay it seeks. Instead, the State contends that courts should always grant stays in cases of public importance, or involving constitutional issues, without consideration of

whether granting a stay would in fact be in the public interest. *See* State Br. at 2-4.

Once again, none of the caselaw cited by the State supports its argument. In each of the cases upon which the State relies, stays were granted because doing so best served the interest of the public, under the specific circumstances of those cases. *See McNeil*, 176 *N.J.* at 484 (granting stay because the Court was "satisfied that the public interest [was] best served" by granting the stay so that the election at issue could go forward); *Penpac, Inc. v. Morris Cnty. Mun. Utils. Auth.*, 299 *N.J. Super.* 288 (App. Div. 1997) (granting stay based upon public interest in competitive bidding); *Palamar Constr., Inc. v. Twp. Of Pennsauken*, 196 *N.J. Super.* 241 (App. Div. 1983) (same). *Cf. Brown*, 424 *N.J. Super.* at 188 (granting stay of order dismissing judge in order to vindicate the public interest in judicial independence); *Statewide Hi-Way Safety, Inc. v. N.J. Dep't of Transp.*, 283 *N.J. Super.* 223, 225, 227-28, 232-33 (App. Div. 1995) (denying a stay, in the bidding context, where it would "be contrary to the public interest to void the contract already awarded").

The other cases upon which the State relies, see State Br. at 3-4, are likewise readily distinguishable. In *Committee to Recall Robert Menendez from the Office of U.S. Senator v. Wells*, 204 *N.J.* 79 (2010) (per curiam), the Court stayed its decision

not because the matter was one of public interest but because there was no necessity for it to determine the validity of the recall provision in the State Constitution as applied to a United States Senator unless and until the Committee collected the approximately 1,300,000 signatures needed for the recall. *Id.* at 145. And in *Lanco, Inc. v. Dir., Div. of Taxation*, 379 *N.J. Super.* 562, 573 n.5 (App. Div. 2005), the Court stayed an order remanding a matter to the Tax Court in order not to have the matter proceed in the Tax Court while the pertinent legal issues were being adjudicated at the same time in the Supreme Court.

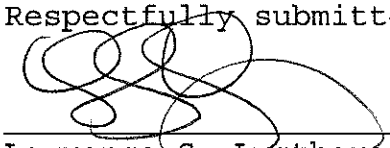
Here, public interest considerations weigh heavily in favor of denying a stay because allowing the State to violate the Plaintiffs' right to equal protection under the laws, as discussed *supra* __, cannot serve the public interest. Rather, permitting the Plaintiffs to marry, and thus to access federal rights and benefits on an equal basis with different-sex couples, thereby protecting Plaintiffs and their families, is what truly serves the public interest. The State's motion for stay should be denied.

CONCLUSION

In sum, an assessment of purported irreparable harm to the State absent a stay, the State's lack of likelihood of success

on appeal, the balance of harms, and the public interest reveals that there is no basis for this Court to postpone the day when same-sex couples can marry and in fact receive the equal rights and benefits to which they are entitled under the New Jersey Constitution. For the foregoing reasons, the Court should deny the State's motion for a stay.

Respectfully submitted,



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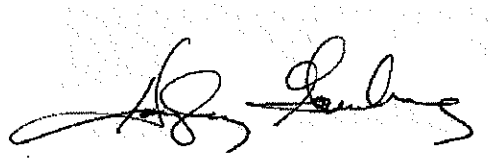

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Dated: October 4, 2013

GARDEN STATE EQUALITY; *et al.*, 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

CERTIFICATION OF SERVICE

I hereby certify under penalty of perjury that on this 4th day of October, 2013, I caused to be served two true and correct copies of Plaintiffs' Brief in Opposition to Defendants' Motion for a Stay by electronic mail and first class mail upon the following:

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I hereby certify that the foregoing statements made by me are true to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By: _____
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Dated: October 4, 2013