

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 SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

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I.
PRELIMINARY STATEMENT

Plaintiffs today move for summary judgment to secure state-sanctioned marriage, the unique gateway to the full array of federal marital benefits necessary to provide equality for New Jersey's same-sex couples and their children. In *Lewis v. Harris*, 188 N.J. 415, 427 (2006), the New Jersey Supreme Court ruled that the State government violated the New Jersey Constitution by denying same-sex couples the rights, benefits, and responsibilities that marriage provides to different-sex couples. The Court was clear: "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution" because "denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of *Article I, Paragraph 1.*" *Id.* at 423.

In response to the Supreme Court's mandate, the Legislature enacted the Civil Union Act, by which it expressly sought to provide to same-sex couples "all the rights and benefits that married heterosexual couples enjoy," N.J.S.A. 37:1-28(d). This lawsuit challenges whether the continuing bar against marriage for same-sex couples, even in the presence of the Civil Union Act, satisfies the mandate of *Lewis*. Were the matter to proceed

to trial, Plaintiffs -- Garden State Equality ("GSE"), New Jersey's largest organization advocating for lesbian, gay, bisexual, and transgender ("LGBT") rights, and six same-sex couples and their children -- are prepared to demonstrate that New Jersey's exclusion of same-sex couples from the institution of civil marriage and relegation to the inferior status of civil union violates the equal protection guarantees of both the State and Federal Constitutions by subjecting them to unequal treatment and lack of recognition in public accommodations and civic life; providing unequal workplace benefits and family law protections; saddling them with disparate and unfair financial burdens; triggering discrimination by private individuals; and imposing stigma, psychological harm, and dignitary harm.

After the Supreme Court's decision last week in *United States v. Windsor*, No. 12-307, 570 U.S. ____ (June 26, 2013), invalidating Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, a trial in this matter is no longer necessary. Under *Windsor*, married same-sex couples in states that respect their marriages are eligible for the complete, vast array of federal rights, benefits, and obligations. But for Plaintiffs and other same-sex couples in New Jersey who may access only civil union, full federal benefits are unavailable, by the terms of the applicable federal provisions. The result is the clearest possible violation of *Lewis*, and of the New Jersey

constitutional guarantee upon which it rests: by relegating same-sex couples in New Jersey to civil union, the State denies them equal rights and benefits.

After *Windsor*, this discrimination also violates the Equal Protection Clause of the Fourteenth Amendment as a matter of law. In *Lewis*, in the language of the Civil Union Act, and even in the official pronouncements of the State's Chief Executive, New Jersey has in no uncertain terms pronounced that its law and policy mandate equality. As a result of the Supreme Court's decision in *Windsor*, summary judgment is now appropriate on the federal claim as well, without a trial on the many compelling facts that demonstrate how the New Jersey statutory scheme otherwise deprives Plaintiffs of equality. Although at trial, Plaintiffs would show that the State's discrimination is subject to -- and fails -- heightened scrutiny, the State's relegation of same-sex couples to civil union fails any level of scrutiny, as a matter of law.

After *Windsor*, no material disputed facts require resolution to rule in Plaintiffs' favor. State-sanctioned marriage provides the key to the full array of federal marital benefits. With federal benefits available to those who are validly married and recognized as such, the discrimination manifest in relegating same-sex couples to civil union establishes the clearest possible violation of the state

constitutional guarantee articulated by *Lewis*. And by denying same-sex couples equal federal rights, even as it pronounces the State's commitment to equality between same- and different-sex couples, the New Jersey statutory scheme shows itself to be unjustifiable discrimination, in violation of the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs' motion for summary judgment should be granted.

II.
STATEMENT OF FACTS

A. *Lewis v. Harris*

On June 26, 2002, six same-sex couples filed a complaint seeking a declaration that New Jersey's refusal to allow them to marry violated the Due Process and Equal Protection guarantees of Article I, Paragraph 1 of the New Jersey Constitution of 1947 and an injunction compelling the State to grant them marriage licenses. *Lewis v. Harris*, 188 N.J. 415, 427 (2006). The trial court granted summary judgment to the State, *id.* at 428, a decision which was affirmed by a divided panel of the Superior Court of New Jersey, Appellate Division, *Lewis v. Harris*, 378 N.J. Super. 168 (App. Div. 2005).

On October 25, 2006, the Supreme Court of New Jersey reversed, concluding that New Jersey's failure to afford same-sex couples the same rights, privileges, and duties as different-sex couples violated the State's equal protection

guarantee. *Lewis*, 188 N.J. at 423, 457. The Court held that "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution" because "denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of *Article I, Paragraph 1.*" *Id.* at 423. The Supreme Court held that same-sex couples in New Jersey faced regular "social indignities and economic difficulties . . . due to the inferior legal standing of their relationships compared to that of married couples," including higher health care premiums, denial of health care coverage, and the refusal of hospitals and medical care providers to recognize same-sex partners as family members during health care crises. *Id.* at 426. And the Court concluded that the State had "failed to show a public need for [its] disparate treatment" of same-sex couples in New Jersey. *Id.* at 457. Accordingly, the Court held that "denying to committed same-sex couples the financial and social benefits and privileges given to their married heterosexual counterparts" violates the equal protection guarantee of the New Jersey Constitution. *Id.* Accordingly, in words that determine the motion now before the Court, the New Jersey Supreme Court held that, "under the equal protection guarantee of *Article I, Paragraph 1 of the New Jersey Constitution*, committed same-sex

couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples." *Id.* To remedy this constitutional violation, the Supreme Court directed the State to "either amend the marriage statutes to include same-sex couples or enact a parallel statutory 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." *Id.* at 463.

In response to *Lewis*, on December 12, 2006, the New Jersey Legislature, stating its intent "to comply with the constitutional mandate set forth" in *Lewis*, enacted the Civil Union Act, *N.J.S.A.* 37:1-28(e), by which it expressly sought to provide to same-sex couples "all the rights and benefits that married heterosexual couples enjoy," *N.J.S.A.* 37:1-28(d). Specifically, the Act, which only applies to same-sex couples,¹ directs that "[c]ivil union couples shall have all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage." *N.J.S.A.* 37:1-31(a).

The Legislature contemporaneously established the New Jersey Civil Union Review Commission ("CURC" or "the

¹ "'Civil union' means the legally recognized union of two eligible individuals of the same sex established pursuant to this act." *N.J.S.A.* 37:1-29.

Commission"), which it charged with evaluating "the effectiveness of the [Civil Union] act," collecting "information about the act's effectiveness from members of the public, State agencies and private and public sector businesses and organizations," determining "whether additional protections are needed," and determining "the effect on same-sex couples, their children and other family members of being provided civil unions rather than marriage." N.J.S.A. 37:1-36(c). The Commission was required "to report its findings and recommendations" to the Legislature and the Governor on a semi-annual basis. N.J.S.A. 37:1-36(g).

In February 2008, the CURC issued an interim report setting forth its preliminary finding that the Civil Union Act failed to comply with the constitutional requirements of *Lewis*. The Commission cited evidence that the Civil Union Act was not guaranteeing to same-sex couples the full rights and benefits enjoyed by heterosexual married couples in the State. N.J. CURC, *First Interim Report of the New Jersey Civil Union Review Commission* (Feb. 19, 2008) ("*Interim Report*"), available at <http://www.state.nj.us/lps/dcr/downloads/1st-InterimReport-CURC.pdf> (last visited Feb. 21, 2013). For example, the Commission detailed significant disparities between the legal protections and benefits afforded to couples in civil unions in New Jersey and those permitted to marry, with respect to

employment and health care, and cited evidence that same-sex couples and their children face the stigma of "second-class legal status." *Id.* at 4, 9-13.

Six months later, the CURC issued its final report, in which it unanimously concluded that the Civil Union Act's creation of a parallel civil union status "invites and encourages unequal treatment of same-sex couples and their children" and "demonstrates that the provisioning of the rights of marriage through the separate status of civil unions perpetuates the unequal treatment of committed same-sex couples." N.J. CURC, *The Legal, Medical, Economic & Social Consequences of New Jersey's Civil Union Law 1-2* (Dec. 10, 2008) ("*Final Report*"), available at <http://www.nj.gov/lps/dcr/downloads/CURC-Final-Report-.pdf> (last visited Feb. 21, 2013). In light of "the overwhelming evidence presented to the Commission," the CURC unanimously recommended to the Legislature and Governor that the law be amended "to allow same-sex couples to marry," and that it be done "expeditiously because any delay in marriage equality will harm all the people of New Jersey." *Id.* at 3.

New Jersey's political branches have thus far rejected this recommendation. A bill providing for marriage equality cleared the Senate Judiciary Committee in 2009, see S. 1967, 213th Leg., 2d Reg. Sess. (N.J. 2009) (introduced as amended by the N.J.

Senate Judiciary Committee), but the full Senate refused to pass the measure, New Jersey Bill Tracking, 2008 Bill Tracking N.J. S.B. 1967 (LEXIS) (noting that the last action of S. 1967 was the failure to pass the Senate on January 7, 2010). More recently, on February 16, 2012, the New Jersey Legislature passed a marriage equality bill, S. 1, 215th Leg. (N.J. 2012), but it was vetoed by Governor Chris Christie. See *Governor Chris Christie's Veto Statement*, NY TIMES (Feb. 17, 2012), <http://www.nytimes.com/interactive/2012/02/18/nyregion/christies-veto-of-same-sex-marriage-bill.html?ref=nyregion> (last visited on July 1, 2013).

Meanwhile, same-sex couples in New Jersey returned to the courts. Specifically, on March 18, 2010, the plaintiffs in *Lewis* filed a motion in aid of litigants' rights with the New Jersey Supreme Court, under *N.J. Court Rule 1:10-3*. In that motion, the *Lewis* plaintiffs contended that the CURC's findings, as well as evidence adduced by the Legislature during hearings on the marriage equality bill pending in 2009, conclusively demonstrated that the State's Civil Union Act violated the equal protection principle announced in *Lewis*. For example, the motion detailed the *Lewis* plaintiffs' experiences under the Civil Union Act, including that they continued to lack workplace benefits and protections equal to their married counterparts; that they continued to face unequal treatment and a lack of

recognition in public accommodations and civic life; that the maintenance of a separate civil union status harmed their children; and that the unequal treatment resulting from civil union status caused them psychological and dignitary harm.

Pls.' Br. Mot. Aid of Litigants' Rts. 24-69. Thus, the *Lewis* plaintiffs argued, they were entitled to relief from the New Jersey Supreme Court in the form of an order permitting them and all other same-sex couples to marry in the State.

On July 26, 2010, the Court, by a 3-3 vote, denied the motion without prejudice to the matter being raised in a new lawsuit. *Lewis v. Harris*, 202 N.J. 340 (2010). Specifically, the Court determined that "[t]his matter cannot be decided without the development of an appropriate trial-like record. Plaintiffs' motion is therefore denied without prejudice to Plaintiffs filing an action in Superior Court and seeking to create a record there." *Id.* Three Justices dissented, expressing disappointment "that plaintiffs must now begin anew and file a complaint in the Superior Court seeking the relief to which they claim they are entitled." *Id.* (Long, LeVecchia and Albin, JJ., dissenting). The dissent expressed its "hope that the proceedings in the Superior Court will be conducted with all deliberate speed." *Id.*

B. Garden State Equality v. Dow

Same-sex couples accepted the Court's invitation. Thus, on June 29, 2011, Garden State Equality, New Jersey's largest organization advocating for lesbian, gay, bisexual, and transgender ("LGBT") rights, and six same-sex couples (including two of the same-sex couples who were plaintiffs in *Lewis*) and their children filed this suit, alleging that New Jersey's exclusion of same-sex couples from the institution of civil marriage, and relegation of them to the inferior status of civil unions, violates the equal protection and due process guarantees of Article I, Paragraph 1 of the New Jersey Constitution and of the Fourteenth Amendment to the Constitution of the United States. The instant litigation focuses on the harms that have been visited upon them by "their exclusion from civil marriage, and thereby from the legal status of 'marriage' and 'spouse.'" Compl. ¶¶ 1, 2.

Specifically, Plaintiffs allege in their Complaint in this matter that "New Jersey shunts lesbian and gay couples into the novel and inferior status of 'civil union,' while reserving civil marriage only for heterosexual couples." Compl. ¶ 2. Plaintiffs claim that this "separate and inherently unequal statutory scheme singles out lesbians and gay men for inferior treatment on the basis of their sexual orientation and sex, and also has a profoundly stigmatizing effect on them, their

children, and on other lesbian and gay New Jerseyans." Compl.

¶ 2. Plaintiffs go on to allege that:

They are denied workplace benefits and protections equal to those accorded to married couples. They are blocked from seeing their loved ones during medical emergencies. Their exclusion from marriage deprives them of certainty in their legal rights and status, and burdens them and their families with the resulting financial consequences. Their separate status is a badge that requires that they reveal their sexual orientation whether they wish to or not, in situations such as job interviews and jury service, invading their privacy and exposing them to additional discrimination. The segregation of lesbian and gay couples into a novel legal status, like other classifications unrelated to a person's ability to perform or contribute to society, also wrongly enshrines in the law the view that lesbian and gay individuals are not as worthy or deserving as others, causing dignitary and psychic harms.

[Compl. ¶ 3.]

Plaintiffs state, in their Complaint, that they are harmed because New Jersey's exclusion of same-sex couples from civil marriage triggers unequal treatment and lack of recognition in public accommodations and civic life and imposes unequal workplace benefits and protections, lack of family law protection, and disparate and unfair financial burdens. It also encourages discrimination by private individuals, and causes stigma, psychological harm, dignitary harm, and additional specific harms to children. Compl. ¶¶ 30-57.

Anticipating that federal discrimination under DOMA would end in the near future, as came to pass with the Supreme Court's decision in *United States v. Windsor*, No. 12-307, 570 *U.S.* ____ (June 26, 2013), Plaintiffs alleged in the Complaint that same-sex couples in New Jersey "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." Compl. ¶ 45.

Plaintiffs alleged that these inequalities "contravene[] the Supreme Court of New Jersey's directive that 'the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution'" and that "[t]his treatment also violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States." Compl. ¶ 3 (quoting *Lewis*, 188 *N.J.* at 423). The Complaint was comprised of four claims: (1) denial of equal protection under Article I, Paragraph 1 of the New Jersey Constitution; (2) denial of the fundamental right to marry protected by Article I, Paragraph 1 of the New Jersey Constitution; (3) denial of equal protection under the Fourteenth Amendment to the United States Constitution, in violation of 42 *U.S.C.* §1983; and (4) denial of substantive due

process under the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. §1983.

The State moved to dismiss the Complaint, arguing that Plaintiffs failed to state a claim, because the Supreme Court in *Lewis* held that there was no fundamental right to "same-sex marriage." Thus, contended the State, the statutory structure of civil unions created by the legislature purportedly complies with the constitutional requirements enunciated in *Lewis*. Def' s Br. 1-2, 9-24. The trial court (Feinberg, A.J.S.C.) denied this motion, in part, in a ruling from the bench, noting that "[i]n *Lewis v. Harris* Justice Albin clearly articulated that there had to be equal rights, equal benefits and equal protection." The court continued:

When I read *Lewis v. Harris* I don't read that as being the end of that chapter. I read it where if, in fact, those benefits are not realized, despite well-intentioned members of the legislature, if the structure that was created and the structure with regarding to marriage licenses, if there was disparity, if there was unequal treatment that that would have to be resolved.

And I don't think that *Lewis v. Harris* foreclosed the opportunity for the plaintiffs to come back and have ability to have a hearing and a record to establish any inequities. I don't think that the Court can remain silent and take no action if despite well-intentioned efforts by the legislature, same-sex couples still, and I don't know, but assuming, giving them all reasonable inferences at this point on a motion to dismiss, if, in fact, at the end

of the day the result is that those benefits are not equal and the protections are not equal.

So, clearly Count 1 survives . . .

[Mot. to Dismiss Hr'g Tr. 45-46, Nov. 4, 2011.]

Although it agreed with Plaintiffs that they stated a claim for relief in Count One of the Complaint, alleging the denial of equal protection mandated by Article I, Paragraph 1 of the New Jersey Constitution, this Court initially granted the State's motion for summary judgment on Counts Two through Four, alleging a violation of the fundamental right to marry under the state and federal constitutions (Counts Two and Four) and of the equal protection clause of the Fourteenth Amendment to the United States Constitution (Count Three). Plaintiffs moved for reconsideration, seeking reinstatement of their federal equal protection claim. On February 21, 2012, that motion was granted. See *Garden State Equality v. Dow*, No. MER-L-1729-11, N.J. Super. Unpub. LEXIS 360 (N.J. Super. Ct. Law Div. Feb. 21, 2012).

The case is currently in the midst of discovery.

C. *United States v. Windsor*

In *United States v. Windsor*, No. 12-307, 570 U.S. _____ (June 26, 2013), the Supreme Court invalidated Section 3 of the Defense of Marriage Act ("DOMA"), which limited the definition of "marriage" in federal law to "a legal union between one man

and one woman as husband and wife," and limited the word "spouse" in federal statutes "to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (quoted in *Windsor*, slip op. at 2). Edith Windsor and her deceased spouse, Thea Spyer, met in 1963 in New York City. The couple thereafter entered into a registered domestic partnership there and later were married in Canada, a marriage recognized by the laws of New York, which also now permits marriage without discrimination based upon sexual orientation. *Windsor*, slip op. at 14. In February 2009, Spyer died and willed her estate to Windsor. Because DOMA's Section 3 did not permit federal recognition of marriages of same-sex couples, Windsor was denied a marital exemption to the federal estate tax, and was required to pay \$363,053 in estate taxes. Windsor brought suit for a refund and challenged the constitutionality of DOMA. *Id.* at 2-3.

In evaluating the constitutionality of Section 3 of DOMA, the Supreme Court recognized that New York's decision to allow same-sex couples to marry "conferred upon them a dignity and status of immense import." *Id.* at 18. Indeed, the Court recognized that "marriage is more than a routine classification for purposes of certain statutory benefits." *Id.* at 19. The Court wrote:

Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form "but

one element in a personal bond that is more enduring." *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgement of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

[*Id.* at 19-20.]

DOMA, the Supreme Court held, "seeks to injure the very class New York seeks to protect." *Id.* at 20. Specifically, "[t]he avowed purpose and practical effect" of DOMA was to "impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the State." *Id.* at 21. The Court noted that, as a result of DOMA, marriages of same-sex couples recognized by any State would be "treated as second-class marriages for purposes of federal law." *Id.* at 22. The Supreme Court continued, noting that DOMA's levying of inequality permeated many aspects of federal law, affecting over 1,000 federal statutes and numerous regulations "pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and

veterans' benefits." *Id.* Specifically, the Court found that DOMA burdens married same-sex couples in "visible and public ways . . . from the mundane to the profound," including preventing same-sex couples from receiving certain government healthcare benefits, depriving them of "the Bankruptcy Code's special protections for domestic-support obligations," forcing them to "follow a complicated procedure" to file joint tax returns, and even barring them from "being buried together in veterans' cemeteries." *Id.* at 23. The Court noted that DOMA's "unequal effects" extended to the criminal laws, *id.* at 23-24, and to ethics rules, *id.* at 24. And it expressed concern that DOMA "brings financial harm to children of same-sex couples" by taxing health care benefits provided to same-sex spouses and denying death benefits which "are an integral part of family security," even as it changes the calculus for computing federal financial aid eligibility. *Id.* at 24.

In sum, the Court said, "DOMA writes inequality into the entire United States Code." *Id.* at 22. And in doing so, held the Court, DOMA "identif[ies] a subset of state-sanctioned marriages and make[s] them unequal." *Id.* at 22. Specifically,

By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law, but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it

proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal protection. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U.S. at 558, and whose relationships the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

[*Id.* at 22-23.]

The Supreme Court held that all of these facts "more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage." *Id.* at 25. It found DOMA therefore to violate the Due Process and Equal Protection guarantees of the Fifth Amendment to the Constitution, emphasizing that

DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that

their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.

[*Id.* at 25-26.]

The Court further noted that "[t]his opinion and its holding are confined to those lawful marriages," *id.* at 26; in other words, *Windsor* made clear that those who are not married, including those consigned instead to civil unions, are not entitled to the federal rights, benefits, protections, and responsibilities that the *Windsor* decision extends to those who are married.

The United States Supreme Court's decision in *Windsor* changes the legal landscape applicable to this case in at least two critical ways. First, and most obviously, the federal government now must provide all of the federal benefits, privileges, obligations, and responsibilities of marriage on an equal basis to married heterosexual and married same-sex couples alike in marriages recognized under state law. But New Jersey denies these numerous federal benefits to same-sex couples in New Jersey, including the membership of Plaintiff Garden State Equality and the individual Plaintiff couples in this matter, because the State does not allow same-sex couples to marry. The

result is that, contrary to the New Jersey Supreme Court's mandate in *Lewis*, committed same-sex couples are not "afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples." 188 N.J. at 457. Accordingly, summary judgment must now be granted on Count One of the Complaint.

And second, the federal equal protection analysis employed by the *Windsor* Court independently dictates the result here, for precisely the same harms that were visited upon Edith Windsor by DOMA are now visited upon the Plaintiffs in this matter by the Civil Union Act. That Act, like DOMA, relegates Plaintiffs here to "a second-tier" relationship, with all of the disadvantage and stigma that attaches to this inferior status. *Windsor*, slip op. at 23. And it does so for no good reason, given the State's determination -- both judicial and legislative -- that they *should* be treated equally.

III. ARGUMENT

After The United States Supreme Court's Decision In *Windsor*, There Is No Issue Of Fact That Requires A Trial: New Jersey's Exclusion Of Same-Sex Couples From Marriage Violates The Constitutions Of New Jersey And Of The United States.

The Court should enter Summary Judgment in favor Of Plaintiffs because, after the United States Supreme Court's decision in *Windsor*, there is no issue of fact that requires a trial: New Jersey's exclusion of same-sex couples from marriage

deprives these couples of the federal rights that are accorded married couples and thus violates the Constitutions of New Jersey and of the United States.²

A. Summary Judgment Standard

Summary judgment must be entered if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Plaintiffs recognize, of course, that in determining whether summary judgment is appropriate, the Court must view the evidence "in the light most favorable to the non-moving party," *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 523 (1995), and "'accord[s] him [or her] the benefit of all legitimate inferences which can be deduced therefrom.'" *Id.* at 535 (quoting Sylvia B. Pressler & Peter G. Verniero, *Current N.J. Court Rules*, comment on R. 4:40-2(2013)).

If the Court finds "'that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." *Id.* at 540; *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.*, 189 N.J. 436, 445-46 (2007) (noting that the summary judgment "inquiry is 'whether . . . one party must

² Plaintiffs obviously do not waive their right to complete discovery and a full presentation of evidence at trial, should summary judgment be denied.

prevail as a matter of law.' " (quoting *Brill*, 142 N.J. at 540)); *DeAngelis v. Hill*, 180 N.J. 1, 12 (2004) ("When the evidence is 'so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." (quoting *Brill*, 142 N.J. at 540)); *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000) ("the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986) (internal quotation marks omitted) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986))); *Kristiansen v. Morgan*, 153 N.J. 298, 317-18 (1998) ("when . . . one party must prevail as a matter of law,' the trial court should readily grant summary judgment" (quoting *Brill*, 142 N.J. at 540)). 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.'" *Id.* at 529.

Here, summary judgment is appropriate because, while there are numerous disputed issues of fact with regard to the allegations of the Complaint, after *Windsor*, there is absolutely no dispute as to any material fact. Indeed, the Court's determination of this motion does not depend on any facts at all, except to the extent that the change in the law effected by

Windsor -- as a result of which the full range of federal benefits would now be available to Plaintiffs if they were able to marry in New Jersey, see *Windsor*, slip op. at 23-25 -- is somehow deemed a "fact." Of course, even if it were a fact, it would be an undisputed one that allows but one conclusion: because same sex couples in New Jersey are not allowed to marry, and can only enter into civil unions, they are denied numerous federal rights that are accorded all married couples, whether same- or different-sex. Thus, as a matter of law, their exclusion from marriage, also an undisputed fact,³ violates the mandate of *Lewis* that "committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples." *Lewis*, 188 N.J. at 457. Summary judgment on plaintiffs' state equal protection claim (Count One) must, then, be granted. The State discriminates against couples in civil unions by denying them the right to marry, and through that governmental action, bars them from the gateway to numerous federal benefits and privileges discussed in *Windsor* and below. And it does so without even a rational basis, given its commitment, expressed in both judicial and legislative

³ See N.J.S.A. 37:1-1 to 37:2-41 (civil marriage statutes limiting marriage to heterosexual couples); *Lewis*, 188 N.J. at 436-37 ("New Jersey's civil marriage statutes, N.J.S.A. 37:1-1 to 37:2-41 . . . limit marriage to heterosexual couples. That limitation is clear from the use of gender-specific language in the text of various statutes.").

determinations, to treat same- and different-sex couples equally. Accordingly, summary judgment must be granted on Count Three, Plaintiffs' federal equal protection claim, as well.

B. After Windsor, New Jersey's exclusion of same-sex couples from marriage violates the Equal Protection guarantee of the New Jersey Constitution, as enunciated in Lewis, as a matter of law.

In *Lewis v. Harris*, 188 N.J. 415 (2006), the New Jersey Supreme Court definitively held that "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution," because "denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of Article I, Paragraph 1." *Id.* at 423. The Court observed that same-sex couples in New Jersey faced regular "social indignities and economic difficulties . . . due to the inferior legal standing of their relationships compared to that of married couples." *Id.* at 426. It emphasized that this "[d]isparate treatment of same-sex couples, moreover, directly disadvantages their children." *Id.* at 452. The Court held that there was no rational basis or "legitimate public need for an unequal legal scheme of benefits and privileges that disadvantages committed same-sex couples." *Id.* at 452-53. Accordingly, the Court ruled, "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." *Id.* at 457.

The New Jersey Supreme Court allowed the Legislature in the first instance to fashion a remedy to cure the inequality. *Id.* at 463. The Legislature chose not to permit same-sex couples to marry and instead enacted a purportedly parallel statutory structure by allowing same-sex couples to enter into "civil union." Since enacting the Civil Union Act, and even in the face of evidence demonstrating that civil union has proven not to be equal to marriage, *see supra* at 7-9 (discussing the reports of the Civil Union Review Commission), the Legislature, and later the Governor, have refused to permit same-sex couples to marry (both in 2010, when the Senate refused to pass a measure that would permit same-sex couples to marry, and in February 2012, when the Governor vetoed a marriage equality bill that the New Jersey Legislature had passed). Thus, today, same-sex couples still cannot marry in New Jersey. "Marriage" in the state is available to different-sex couples only -- and only they may use the term "spouse" -- while same-sex couples are relegated to "civil unions," are labeled "civil union couples," and are deemed "partners in a civil union couple," by the terms of the statute. *See N.J.S.A. 37:1-29.* Indeed, to this day and in this very lawsuit, the State continues to fight vigorously to

exclude same-sex couples from lawful marriage in New Jersey. See, e.g., Def's Br. Opp. to Pls.' Mot. Reconsid.; Mot. to Dismiss Hr'g Tr., Nov. 4, 2011; Def's Br. Mot. to Dismiss; Def's Answer to Compl. In sum, there can be no question but that, in New Jersey, civil unions are not marriages and civil union partners are not married spouses.

In the wake of *Windsor*, these labels are inarguably, and as a matter of law, far more than mere words. New Jersey's exclusion of same-sex couples from lawful marriage deprives these couples, including the individual Plaintiffs and members of Plaintiff Garden State Equality of numerous federal protections, benefits, and responsibilities of marriage that *Windsor* makes available to married couples -- different- and same-sex alike. Specifically, with the invalidation of Section 3 of DOMA, the federal government now must provide equal access, without discrimination on the basis of sexual orientation, to the marital rights, benefits, and obligations contained in "over 1,000 federal statutes and the whole realm of federal regulations." *Windsor*, slip op. at 16, 22. But many of these benefits, by the terms of the statutes or regulations that govern them, are denied to same-sex couples in New Jersey because the State does not allow them to marry. The resulting violation of *Lewis'* mandate that "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, is patent.

Windsor itself catalogues some of the rights at stake. Among the federal benefits mentioned by the Supreme Court that were, prior to *Windsor*, denied to married same-sex couples as a result of DOMA, and are still denied those who only have entered a civil union, are the following:

- Government healthcare benefits, *Windsor*, slip op. at 23 (citing 5 U.S.C. §8901(5) (requiring that a person be a "member of the family" to obtain certain healthcare benefits and providing that "member of the family means the spouse of an employee"), and 5 U.S.C. §8905 (requiring that a person be a "former spouse" to obtain certain healthcare benefits));
- The Bankruptcy Code's special protections for domestic-support obligations, *Windsor*, slip op. at 23 (citing 11 U.S.C. §101(14A) (requiring that a person be a spouse" or "former spouse" in order to have a domestic support obligation owed to or recoverable by the person in certain bankruptcy proceedings), 11 U.S.C. §507(a)(1)(A) (requiring that a person be a spouse" or "former spouse" in order for the person's domestic support obligation expenses or claims to have priority in certain bankruptcy proceedings), and 11 U.S.C. §523(a)(15) (requiring that a person be a spouse" or "former spouse" in order for an individual debtor not to be discharged from any debt due to a domestic support obligation));
- Tax benefits, including that married same-sex couples will no longer be forced to follow a complicated procedure to file their state and federal returns jointly, *Windsor*, slip op. at 23 (citing Technical Bulletin TB-55 (referring to "a taxpayer-spouse" and providing that, "[b]ecause the federal government does not recognize same sex marriage or civil unions, a same sex couple is required to recompute their federal return for Vermont tax purposes only as either Married Filing Jointly or as Married Filing Separately"));

- The right to be buried together in veterans' cemeteries, *Windsor*, slip op. at 23 (citing National Cemetery Administration Directive 3210/1, p. 37 (June 4, 2008) (noting that, under 38 U.S.C. §§101(3), (31), "individuals in a same-sex civil union or marriage are not eligible for burial in a national cemetery or State veterans cemetery that receives federal grant funding based on being the spouse or surviving spouse of a same-sex veteran"));
- The federal penal code provision that makes it a crime to assault, kidnap, or murder an immediate family member of a U.S. official, U.S. judge, or a Federal law enforcement officer, with the intent of retaliating against that official, *Windsor*, slip op. at 23-24 (citing 18 U.S.C. §115(a)(1) (limiting the crime's definition of "immediate family member" to "spouse, parent, brother or sister, child or person to whom he stands in loco parentis; or any other person living in his household and related to him by blood or marriage"));
- Relief from the unfavorable tax treatment that results from taxing health benefits provided by employers to workers' same-sex spouses, to the detriment of children of these couples who suffer financial harm due to higher health care costs that result, *Windsor*, slip op. at 24 (citing 26 U.S.C. §106 (limiting Employer MSA contributions required to be shown on return to the amount contributed by employers to the "Archer MSAs of such individual or such individual's spouse"); IRS Private Letter Ruling 9850011 (Sept. 10, 1998) (providing that "[a]n employee's same-sex domestic partner does not qualify as the 'spouse' of the employee for purposes of the [Internal Revenue] Code" and that "Employer-provided coverage [and reimbursements] under an accident or health plan for personal injuries or sickness incurred by individuals other than the employee, his or her spouse, or his or her dependents, as defined in section 152 of the Code, is not excludible from the employee's gross income under section 106 of the Code"));
- The appropriate calculation of federal financial aid eligibility, *Windsor*, slip op. at 24 (citing 20 U.S.C. §1087nn(b) (limiting the data elements considered in determining expected family contributions to the

available income and the net assets of "the student and the student's spouse")); and

- Federal ethics rules, *Windsor*, slip op. at 24 (citing 2 U.S.C. §31-2(a)(1) (prohibiting members, officers, and employees of the Senate, "or the spouse or dependent thereof," from accepting certain gifts); 18 U.S.C. §208(a) (prohibiting certain Government employees and officers from participating in certain decisions regarding matters in which "his spouse" has a financial interest); 5 U.S.C. App. §102(a) (excluding certain liabilities owed to or owed by a reporting individual's "spouse," certain mortgages, purchases, sales, and exchanges regarding a personal residence of a "spouse," transactions with a "spouse," required of certain officials); 5 U.S.C. App. §102(e) (referring to "spouse" and "marriage"))).

Beyond the benefits and obligations specifically mentioned in *Windsor*, all of which now apply only to those who are married, see *Windsor*, slip op. at 26 ("This opinion and its holding are confined to . . . lawful marriages."), a plethora of additional federal benefits previously denied by DOMA are now, as a result of *Windsor*, afforded to married same-sex couples, but not to same-sex couples who have only entered civil unions in New Jersey. For example, civil-unioned couples are currently precluded by the terms of the pertinent federal statutes and regulations from:

- Obtaining certain survivor annuities. See 5 C.F.R. 831.603, 31.651 (restricting certain survivor annuities to "current spouse," "former spouse," and "marriage"); 5 C.F.R. 843.102, 843.301-843.314 (limiting certain Federal Employees Retirement System death and survivor benefits to "current spouse," "former spouse," a person who is or was "married" to the employee).

- Obtaining certain protections from discrimination under the Equal Credit Opportunity Act. See 12 C.F.R. 202.2, 202.4-202.8 (limiting prohibition on discrimination regarding credit transactions to "marital status," "married," "unmarried," "separated," or "spouse"); 12 C.F.R. 1002.2, 1002.4-1002.8 (containing prohibition on discrimination regarding credit transactions to "marital status," "married," "unmarried," "separated," or "spouse").
- Obtaining certain employees' benefits. See 20 C.F.R. 10.415, 10.410 (limits certain death benefits based on "marriage" and "spouse"); 20 C.F.R. 219.30 (providing that evidence of "marriage" is required for certain railroad retirement benefits); 20 C.F.R. 222.35 (requiring "marriage" or "spouse" for certain claimants to be considered a stepchild to obtain certain railroad retirement benefits); 20 C.F.R. 222.41 (requiring that a claimant be "married" for certain claimant to be considered a parent to obtain certain railroad retirement benefits).
- Obtaining certain public welfare benefits. See 45 C.F.R. 155.300 (requiring that certain tax filers be "married" to be eligible for certain exchange participation and insurance affordability programs); 45 C.F.R. 233.90 (includes information regarding a child's "married" parent as a factor for Aid to Families with Dependent Children ("AFDC") determinations); 45 C.F.R. 237.50 (providing that certain "married" people are parents for purposes of AFDC recipient count); 45 C.F.R. 505.3 (providing that who qualifies as a child or a parent to obtain certain benefits under Title I of the War Claims Act of 1948, as amended, depends, in part, on "married," "spouse," and "marriage").
- Obtaining certain wildlife and fisheries benefits. See 50 C.F.R. 660.11 (limiting "direct financial interest," for purposes of eligibility for benefits, to an "interest held by an individual, partnership, or corporation or an individual's spouse, immediate family member or parent").
- Obtaining certain Family and Medical Leave Act ("FMLA") benefits. See 29 C.F.R. 825.122 (requiring

that one be a "spouse," have a "marriage," or be "married" for certain coverage under FMLA).

- Obtaining certain pensions, bonuses, and veterans' relief. See 38 C.F.R. 3.1, 3.3 (providing requirements regarding "marriage" or "spouse" for certain veterans' pension, compensation, and dependency and indemnity compensation).
- Obtaining certain types of agricultural loans. See 7 U.S.C. §1922 (limiting eligibility for certain real estate loans based on "marriage"); 7 U.S.C. §1941 (limits eligibility for certain operating loans based on "marriage"); 7 U.S.C. §1961 (limiting eligibility for certain emergency loans based on "marriage").
- Obtaining certain armed forces benefits. See 10 U.S.C. §1784a (limiting certain education and training opportunities based on whether a person is a "spouse" or is "married" to a member of the armed forces).
- Obtaining certain public safety officers' death benefits. See 28 C.F.R. 32.3 (limiting public safety officers' death benefits based on whether a person is a "spouse" or in a "marriage"); 42 U.S.C. §3796(a) (limiting certain public safety officers' death benefits to the "surviving spouse" of the officer); 42 U.S.C. §3796d(3) (providing that the benefit is to allow the beneficiary to "attain the vocational and educational status which they would have attained had a parent or spouse not been killed or disabled in the line of duty"); 42 U.S.C. §3796d-1(a)(1) (providing for financial assistance to a "spouse" of an officer in certain circumstances); 28 C.F.R. 32.3 (providing that who qualifies as a child of a public safety officer can depend on whether there is a "marriage" and whether someone is a "spouse"); 28 C.F.R. 32.33 (providing that who qualifies as a dependent of a public safety officer depends upon whether the person was the officer's "spouse").

Windsor extends these federal benefits, privileges, and duties of marriage, along with an extensive array of others, to married same-sex couples. New Jersey, however, precludes same-

sex couples from obtaining important federal benefits, privileges, and duties of marriage by not allowing them to marry. "Civil unions," regardless of New Jersey's stated intention that they provide equal rights, do not fall within the language of these legal provisions or, for that matter, within the scope of the Supreme Court's holding in *Windsor*. The consequence is clear. New Jersey's statutory scheme excludes same-sex couples from the federal rights that now accompany valid marriages regardless of sexual orientation, in violation of the constitutional rule of *Lewis* that "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution" because "denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee of Article I, Paragraph 1." *Lewis*, 188 N.J. at 423.

After *Windsor*, it is undeniable that, once again, "under our current laws, committed same-sex couples and their children are not afforded the benefits and protections available to similar heterosexual households." *Id.* at 451. Specifically, New Jersey's determination not to allow the plaintiffs here to marry denies them a host of federal statutory rights and, in doing so, violates the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, pursuant to which,

under *Lewis*, "committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples." *Id.* at 457. This, of course, engenders "the unequal dispensation of benefits and privileges to one of two similarly situated classes of people" that *Lewis* expressly declared unconstitutional. *Id.* at 451. But, as the Court held in *Lewis*, "every statutory right and benefit conferred to heterosexual couples through civil marriage must be made available to committed same-sex couples." *Id.* at 462. Those rights and benefits now include the full array of federal protections and responsibilities for which state-conferred marriages are the exclusive gateway for different-sex or same-sex couples alike. *Id.* Yet, the Plaintiffs are denied access to these federal benefits because New Jersey bars them from marriage.

Moreover, as the New Jersey Supreme Court made clear in *Lewis*, and the United States Supreme Court echoed in *Windsor*, Plaintiffs are harmed not only by being barred from the many federal statutory benefits to which they would be entitled were they not prohibited from marrying, but New Jersey's exclusion of Plaintiffs from marriage also causes them and their children "indignities, embarrassment, and anguish." *Id.* at 426. As the New Jersey Supreme Court recognized, when same-sex couples are denied the rights afforded to married heterosexuals, they

experience "social indignities . . . due to the inferior legal standing of their relationships compared to that of married couples." *Id.* Indeed, the New Jersey Supreme Court explicitly recognized the particular emotional harm that same-sex couples experience when they are denied the equal protection of the law, *id.* at 452, acknowledging that affording same-sex couples the same rights and benefits that flow to similarly situated heterosexual couples is not only required under the equal protection guarantee of Article I, Paragraph 1, but is "directly related to any reasonable conception of basic human dignity." *Id.* at 426. See also *Romeo v. Seton Hall Univ.*, 378 N.J. Super. 384, 391 (App. Div. 2005) (recognizing that legislative prohibitions against discrimination are intended to prevent individuals from being deprived of "basic human dignity"); *Tarr v. Bob Ciasulli's Mack Auto Mall, Inc.*, 360 N.J. Super. 265, 280-81 (App. Div. 2003), *aff'd*, 181 N.J. 70 (2004) (recognizing that the Supreme Court has held that the harm arising from discrimination includes "embarrassment, humiliation, and other intangible injuries.").

The United States Supreme Court recognized this reality, as well, in *Windsor*, stating that the status of marriage "is more than a routine classification for purposes of certain statutory benefits," *Windsor*, slip op. at 19, but instead, "is a far-reaching legal acknowledgment of the intimate relationship

between two people." *Id.* at 20. Significantly, for purposes of this motion, the United States Supreme Court in *Windsor* recognized exactly that which the New Jersey Supreme Court saw in *Lewis*: that denying same-sex couples the federal benefits described above, and many, many more, "impose[s] a disadvantage, a separate status and so a stigma" upon those couples, *id.* at 21, rendering their relationships "second-class." *Id.* at 22.

For the reasons set forth in section C, below, that treatment engenders a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. It is completely irrational, given New Jersey's professed commitment, set forth in both the Supreme Court decision in *Lewis* and the Civil Union Act itself, to equality for same-sex couples. But, as a matter of state constitutional law, the violation is manifest: after *Windsor*, there simply can be no question but that same-sex couples in New Jersey are denied the equal benefits expressly guaranteed by *Lewis*, thus inflicting precisely the indignity which the New Jersey Supreme Court, in that opinion, abhorred.

In sum, New Jersey's refusal to allow same-sex couples to marry should be found unconstitutional and Plaintiffs here, and all other same-sex couples in New Jersey should be permitted to marry, and thus to realize the federal benefits that today flow

only to married couples, as well as the dignity that goes along with being treated equally.

C. New Jersey's exclusion of same-sex couples from marriage violates Plaintiffs' right to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Although *Windsor* addressed a federal statute, the Defense of Marriage Act, the Supreme Court there reiterated the principle that "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, slip op. at 16 (citing *Loving v. Virginia*, 3 U.S. 1 (1967)).

For the reasons set forth below, New Jersey fails to do so. Instead, by excluding same-sex couples, including Plaintiffs, from marriage, and instead relegating them to civil union, it denies them the numerous rights and benefits discussed above, and many more, even as it claims that State law provides for equality between same- and different-sex couples. This fails even the most forgiving scrutiny, for it is completely irrational, and not justified by the interests upon which the State relies in its vain effort to justify this discrimination. For this reason, the New Jersey scheme violates the Federal, as well as the State, constitution, and must be voided.

The starting point for analysis under *Windsor* is, of course, State law. In *Windsor*, the law at issue was that of the

State of New York, which at first recognized out-of-state marriages and later conferred the right to marry to same-sex couples. *Windsor*, slip op. at 13-14, 19. In doing so, as discussed above, New York "sought to give further protection and dignity" to these marriages, "to give their lawful conduct a lawful status," and to provide "a far-reaching acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages." *Id.* at 19-20.

New Jersey, of course, neither recognizes out-of-state marriages of same-sex couples, nor allows same-sex couples to marry. But that is not the end of the inquiry, though the State will undoubtedly argue that it is. For New Jersey, even as it denies same-sex couples the right to marry, at the same time proclaims, both as a matter of state constitutional law and of statute, that it grants them all of the protections and dignities of marriage. Thus, in *Lewis*, the New Jersey Supreme Court declared the law of this State: "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. Nor was this mere judicial fiat: in enacting the Civil Union Act, the New Jersey Legislature sought to provide to same-sex couples "all the

rights and benefits that married heterosexual couples enjoy," N.J.S.A. 37:1-28(d). Specifically, the Act directs that "[c]ivil union couples shall have all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage." N.J.S.A. 37:1-31(a). Indeed, the Legislature declared that promoting committed same-sex relationships and eliminating hardships that same-sex couples may face "is necessary and proper and reaffirms this State's obligation to insure equality for all the citizens of New Jersey." N.J.S.A. 37:1-28(c). The Legislature sought to expand the rights and benefits afforded to lesbian and gay couples "in order to provide these couples with all the rights and benefits that married heterosexual couples enjoy." N.J.S.A. 37:1-28(d). In doing so, it declared its unequivocal intent to insure "equality under the laws for all New Jersey citizens by providing same-sex couples with the same rights and benefits as heterosexual couples who choose to marry." N.J.S.A. 37:1-28(f). And this commitment is not limited to the judicial and legislative branches of New Jersey government. Even as he has stood in the way of marriage equality, Governor Chris Christie has stated his commitment to the equal treatment of same-sex couples: "I have been just as adamant that same-sex couples in

a civil union deserve the very same rights and benefits enjoyed by married couples -- as well as the strict enforcement of those rights and benefits." *Governor Chris Christie's Veto Statement*, NY TIMES (Feb. 17, 2012), <http://www.nytimes.com/interactive/2012/02/18/nyregion/christies-veto-of-same-sex-marriage-bill.html?ref=nyregion> (last visited July 1, 2013). Indeed, New Jersey's commitment to equality is at the heart of the State's defense of this case. See, e.g., Def's Br. Mot. to Dismiss at 1 ("equal protection requires that committed same-sex couples be afforded the full panoply of legal rights afforded married couples . . . The sister branches of government responded in full satisfaction of the constitutional mandate"); *id.* at 12 (arguing that the Civil Union Act affords "committed same-sex couples the same legal rights and benefits of married couples").

As set forth above, by refusing to allow marriage, the State fails to live up to this promise, thus violating the New Jersey Constitution. But the promise itself bears upon the federal equal protection analysis here, just as it did in New York. As a matter of constitutional law, it simply cannot be rational to at once proclaim equality, 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.

Rational basis review, the lowest level of scrutiny, requires that "a law must bear a rational relationship to a legitimate governmental purpose."⁴ *Romer v. Evans*, 517 U.S. 620, 635 (1996) (citing *Kadrmas v. Dickinson Public Schs.*, 487 U.S. 450, 462 (1988)). Even the rational basis test requires that a purported justification for a challenged statute have some footing in reality. *Id.* at 632-33; *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 321 (1993) (even rational basis review requires governmental interests to have "some footing in the realities of the subject addressed by the legislation."). Additionally,

⁴ Plaintiffs, of course, have here asserted that a higher level of scrutiny applies to New Jersey's exclusion of same-sex couples from marriage, both because a classification based on sexual orientation is a "suspect classification" and because marriage is a "fundamental right." If intermediate scrutiny is applied, for example, the exclusion "fails unless it is substantially related to a sufficiently important governmental interest." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985). See Pls.' Br. Mot. Reconsid. 2, 7-8, 14-16; *GSE v. Dow*, 2012 N.J. Super. Unpub. LEXIS 360, at *8, *14 (noting Plaintiffs argued that "heightened scrutiny applies to the Federal Equal Protection claim since sexual orientation is considered a suspect class" and noting the "United States Supreme Court's inclusion of classifications based on sex with those subject to heightened judicial scrutiny"). Plaintiffs do not abandon that argument by virtue of this motion. But, under *Windsor*, and as set forth herein, rational basis review is sufficient to reach the conclusion that Plaintiffs seek. Should this matter proceed to trial, however, Plaintiffs will establish the applicability of heightened scrutiny, under which the State's discrimination will be even more obviously unconstitutional. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 961 (N.D. Cal. 2010) ("As explained in detail in the equal protection analysis, Proposition 8 cannot withstand rational basis review. Still less can Proposition 8 survive the strict scrutiny required by plaintiffs' due process claim.").

courts apply more searching rational basis review "[w]hen a law exhibits such a desire to harm a politically unpopular group" or where "the challenged legislation inhibits personal relationships." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (collecting cases).⁵

Here, there is no rational basis, sufficient for Fourteenth Amendment purposes, to justify the discrimination that is at the core of what New Jersey does by excluding same-sex couples from marriage. The analogy to *Romer v. Evans*, 517 U.S. 620 (1996), cited by the Court in *Windsor*, slip op. at 19-20, is instructive. There the Court struck down "Amendment 2," which had repealed state ordinances prohibiting discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Romer*, 517 U.S. at 624. The Supreme Court held that

⁵ Of course, the question whether to apply a rational basis test or heightened scrutiny is at issue for the federal equal protection claim only. For purposes of the State equal protection claim discussed in section III(B), *supra*, the test is a more "flexible one, measuring the importance of the right against the need for the governmental restriction." *Lewis*, 188 N.J. at 443 (citing cases). "Under that approach, each claim is examined 'on a continuum that reflects the nature of the burdened right and the importance of the government restriction.' Accordingly, 'the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right.' Unless the public need justifies statutorily limiting the exercise of a claimed right, the State's action is deemed arbitrary." *Id.* (citations omitted).

The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive; "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

[*Id.* at 631-32 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).]

See also *Windsor*, slip op. at 19. That is, as the *Romer* Court concluded, "a classification of persons undertaken for its own sake, [is] something the Equal Protection Clause does not permit." 517 U.S. at 635.

Of course, such a classification is precisely what is at issue here, where New Jersey has categorically refused to allow same-sex couples to marry, even as it proclaims that, as in New York, these couples should be treated equally. The result is precisely the same as that which the Court found offensive, as a matter of Equal Protection, in *Windsor*. Like DOMA, the Civil Union Act "singles out a class of persons deemed by a State entitled to recognition and protection to enhance their liberty" and "[i]t imposes a disability on the class." *Windsor*, slip op. at 24. Like DOMA, the "purpose and practical effect" of the New Jersey scheme is "to impose a disadvantage, a separate status, and so a stigma upon all who enter into" civil unions by treating those unions "as second-class" relationships, which are

"less respected than" marriage. *Id.* at 21-22. As with DOMA, having "two contradictory . . . regimes within the same state . . . tells those couples, and all the world that their [civil unions] are unworthy of federal protection." *Id.* at 22-23. And just like with DOMA, "[t]he differentiation" effected by New Jersey's scheme

demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U.S. 558, and whose relationship the State seeks to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

[*Id.* at 23].

And finally, just as in New York -- indeed, particularly in New Jersey given its professed commitment to equality for same-sex couples in judicial, legislative, and even executive pronouncements -- "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State," here by its "sought to protect in personhood and dignity." *Id.* at 25-26.

As the Supreme Court reiterated in *Windsor*, "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically

unpopular group cannot' justify disparate treatment of that group." *Id.* at 20 (quoting *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973)). See also *Romer*, 517 U.S. at 635. But such disparate treatment is, of course, at the core of what New Jersey has done here, by refusing to allow same-sex couples to marry for one reason and one reason only: because they are same-sex couples, and not different-sex.

Given New Jersey's declaration that same-sex couples should be treated on equal terms with different-sex couples, the denial of federal rights to the former, by virtue of not allowing them to marry, simply cannot be justified. Indeed, *Lewis* itself expressly held that there was no "rational basis," no "governmental purpose," and no "legitimate public need" for an unequal legal scheme that disadvantaged committed same-sex couples. *Lewis*, 188 N.J. at 452-53; see *GSE v. Dow*, 2012 N.J. Super. Unpub. LEXIS 360, at *24 ("The Court in *Lewis* previously found that there is no legitimate governmental purpose for denying same-sex couples the same benefits and responsibilities afforded to their heterosexual counterparts.").


In sum, three things are clear: first, New Jersey discriminates against same-sex couples by excluding them from marriage; second, it does so even as it professes the equality of different- and same-sex couples; and third, that the results of this illegitimate discrimination are the same as the results

of the discrimination effected by DOMA and rejected by the Supreme Court in *Windsor* -- the denial of numerous federal rights and the indignity and stigma of second-class status. Under these circumstances, and employing the analysis set forth in *Windsor*, the Court must, as a matter of law, enter judgment for the Plaintiffs on Count Three of the Complaint as well, and allow them to marry. Their motion should be granted.

IV.
CONCLUSION

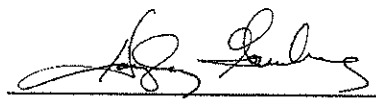
For all of these reasons, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment on Counts One and Three of the Complaint and order that New Jersey allow same-sex couples to marry.

Respectfully submitted,



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