GARDEN STATE EQUALITY, ET AL., Plaintiffs, v. 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

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

John J. Hoffman
Acting Attorney General of New Jersey
R.J. Hughes Justice Complex
P.O. Box 112, 25 Market Street
Trenton, New Jersey
609-633-1309

Kevin Jespersen
Assistant Attorney General
Of Counsel

Jean Reilly
Deputy Attorney General
On the Brief

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PRELIMINARY STATEMENT

The Court should deny Plaintiffs' motion for summary judgment for multiple reasons.

First, Plaintiffs premise their request to discard the traditional definition of marriage upon an incorrect and stilted reading of Windsor v. United States. Contrary to Plaintiffs' assertions, the language, reasoning, and holding of Windsor all mandate that civil union partners *are* entitled to the same federal benefits as married couples.

Second, the position of the federal agencies that have to implement Windsor is in flux and non-uniform. The Plaintiffs' motion is therefore unripe, and the Court should reject Plaintiffs' invitation to rule precipitously.

Third, Plaintiffs have the wrong Defendant. If the federal government ultimately adopts an inequitable and restrictive policy that fails to recognize the basic dignity and rights of civil union partners, then it is federal, not State, action that the courts must censure. The federal government cannot refuse to extend marital benefits to civil union couples without running afoul of constitutional principles, violating the historic practice of deferring to state-law policy decisions concerning domestic relations, and ignoring precedent regarding essence and labels.

Fourth, Plaintiffs do not point to a single case wherein the federal government's constitutional default has transformed

what is otherwise a legitimate state position into impermissible state action that can be redressed under § 1983.

Fifth, both State Supreme Court precedent and jurisdictional considerations preclude the Court from holding that the validity of a New Jersey law under the New Jersey Constitution is contingent upon the vagaries of federal policy or the actions of federal officials over whom the State has no control.

Sixth, the above-described reasons provide numerous bases for the continued validity of what the Lewis Court determined to be the State's presumptively rational decision to reserve the name of marriage for heterosexual couples.

The Court should deny Plaintiffs' motion.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

In Lewis v. Harris, the Court was faced with the question of whether the State must provide same-sex couples with all "statutory benefits and privileges available to opposite-sex couples through *New Jersey's civil marriage laws*." 188 N.J. 415, 427 (2006) (emphasis added). The Court analytically de-tangled two threads of Plaintiffs' marriage argument: the benefits of marriage and the name of marriage. Id. at 433. The Court afforded the Legislature two equally constitutional options: amend the marriage statutes to include same-sex couples or, preserving the traditional definition of marriage, create a parallel statutory structure that would provide same-sex couples with all of the same rights and benefits that married couples enjoy under the State's laws. Id. at 423. Because altering the meaning of marriage "would render a profound change in the public consciousness of a social institution of ancient origin" and have "far-reaching social implications," the Court did "not presume that a difference in name alone is of constitutional magnitude." Id. at 456, 462.

The Court acknowledged that neither it nor the Legislature could direct or compel the federal government - a sovereign over which it has no authority, control, or influence - to afford same-sex couples the protections the State Constitution

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[1] The facts and procedural history are inextricably intertwined, and the State has combined them for the convenience of the Court.

provides. Recognizing these jurisprudential limits, the Court accepted that "what we have done and whatever the Legislature may do will not alter federal law." Id. at 460, n.25.

In response to Lewis, the Legislature adopted the Civil Union Act ("Act"), N.J.S.A. 37:1-28 to -36, which provides that "[c]ivil union couples shall have all of the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage." N.J.S.A. 37:1-31. The Act specifically provides:

> 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.]

As explained more fully below, see pp. 12-20, infra, it is this language and intent, combined with the language, rationale, and holding of Windsor, that mandate that the federal government afford civil union couples federal marriage benefits.

Approximately three years after the enactment of the Civil Union Act, the Lewis plaintiffs filed a motion in aid of litigants' rights with the New Jersey Supreme Court. Citing the New Jersey Civil Union Review Commission's ("CURC") Report, see N.J.S.A. 37:1-36, and making allegations substantively identical to

those in Plaintiffs' current Complaint, the Lewis plaintiffs claimed that the Act failed to satisfy the equality mandate in Lewis and sought an Order allowing them to be married. See Da125. The Court denied the motion, refusing to decide the plaintiffs' renewed equal protection claim without the benefit of the "development of an appropriate trial-like record." Lewis v. Harris, 202 N.J. 340, 340 (2010) ("Lewis II"). Even the dissent "realize[d] that we do not have a sufficient basis for debating the merits of the application" because "plaintiffs' record has not been tested in the crucible of a litigated matter." Id. at 341 (Long, J., dissenting).

Subsequently, six same-sex couples, their children, and Garden State Equality, an LGBT advocacy organization, filed the Complaint at issue here.[2] Restating the allegations made in the motion in aid of litigants' rights, the Complaint claims that New Jersey's reservation of the name marriage to the union of one man and one woman constitutes a denial of equal protection under both the New Jersey and federal constitutions, is a denial of the fundamental right to marry under the New Jersey Constitution, and violates federal substantive due process. The State filed a motion to dismiss for failure to state a claim, which the Court granted as to all counts except the State equal protection claim. Da100.

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[2] One couple and their four children later voluntarily dismissed their claims. Da97.

Plaintiffs moved for reconsideration of the dismissal of the federal equal protection claim, and the Court reinstated it. Garden State Equality v. Dow, 2012 N.J. Super. Unpub. LEXIS 360 (Law Div. 2012). Discovery commenced and, at least until the filing of the current motion, was still ongoing. Factual discovery is not yet complete, and expert discovery has not yet begun.

On June 26, 2013, the United States Supreme Court issued its decision in United States v. Windsor, 570 U.S. ___, 133 S. Ct. 2675 (2013). The decision took effect 25 days later on July 21, 2013. See U.S. S. Ct. R. 45(3), 44(1). The Court struck down DOMA because the enactment "frustrate[d]" the "objective" of a state law that "sought to eliminate inequality." Windsor, supra, 570 U.S. at ___ (slip op. at 25). The Court held that "[t]he Federal Government" may not "impose restrictions and disabilities" on persons whom the "State seeks to protect." Id. at ___ (slip op. at 19). The federal government may not diminish, "influence or interfere with state sovereign choices" about whom to treat equally or "discourage enactment" of state laws that protect same-sex couples. Id. at ___ (slip op. at 21). The same logic and rationale that the Court applied to the actions of the federal government and the State of New York apply equally here. Therefore, for the reasons explained more fully below, civil union partners in New Jersey are entitled to all federal marriage benefits.

Plaintiffs filed their summary judgment motion on the heels of the Windsor decision. Although Plaintiffs disclaim that material facts are in dispute, see Pb21, they nevertheless populate their brief with factual allegations from their Complaint, see Pb6-15. A cursory review of the Answer, however, reveals that the State disputes each of these allegations. Therefore, to the extent the Plaintiffs are relying on these allegations, their summary judgment motion fails.

Regardless, critical facts either remain in dispute or are unknown at this time. Not only are the parties at odds regarding whether Windsor entitles civil union partners to federal marriage benefits, but the positions of the various federal agencies that will have to implement Windsor are non-uniform and in flux. Even Plaintiffs' counsel admit that, after Windsor, the Social Security Administration likely will recognize the entitlement of civil union spouses to Social Security and Medicare benefits. See p. 14, infra. Other agencies such as the United States Citizenship and Naturalization Service and the IRS have signaled in the past that they would recognize the entitlement of civil union spouses to federal benefits, but have not yet taken a definitive position in the wake of Windsor. See pp. 22-22, infra. Still yet other federal entities such as the Departments of Defense and of State have not taken any public stance. See p. 24, infra. Finally, one agency, the Office of Personnel Management ("OPM"),

has taken the position that federal employees in civil unions are not entitled to federal health and insurance benefits. See p. 24, infra. For the reasons explained more fully below, see pp. 12-20, infra, OPM's position cannot withstand the test of challenge.

For all of the foregoing reasons and the reasons explained more fully below, the Court should deny Plaintiffs' motion for summary judgment and to reset the schedule by which the Parties are to complete discovery.

ARGUMENT

POINT I

PLAINTIFFS HAVE THE BURDEN OF ESTABLISHING BEYOND A REASONABLE DOUBT THAT THE CIVIL UNION ACT RUNS AFOUL OF THE CONSTITUTION.

A party seeking to invalidate an act of the Legislature must overcome the highest presumption of constitutional validity. "[J]udicial decisions from the time of Chief Justice Marshall reveal an unswerving acceptance of the principle that every possible presumption favors the validity of an act of the Legislature." N.J. Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 8, appeal dismissed sub nom., Borough of E. Rutherford v. N.J. Sports & Exposition Auth., 409 U.S. 943 (1972). Courts must give deference to a legislative enactment unless it is "unmistakably shown to run afoul of the Constitution." Lewis, supra, 188 N.J. at 459; see also Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 285 (1998) (plaintiffs can rebut presumptive constitutionality of statute "only upon a showing" that the alleged violation is "clear beyond a reasonable doubt"), cert. denied, 527 U.S. 1021 (1999). Finally, a court undertaking the "most delicate task" of adjudicating the constitutionality of a statute must do so "with extreme self restraint, and with a deep awareness that the challenged enactment represents the considered action of a body composed of popularly elected representatives." N.J. Sports & Exposition Auth., supra, 61 N.J. at 8.

POINT II

SUPREME COURT PRECEDENT MANDATES THAT A COURT EXERCISE MAXIMUM CAUTION BEFORE GRANTING SUMMARY JUDGMENT IN A CASE THAT HAS FAR-REACHING CONSEQUENCES AND INVOLVES SIGNIFICANT POLICY CONSIDERATIONS.

A court must exercise "maximum caution" when reviewing a summary judgment motion if "the issue is a very important one involving highly significant policy considerations" and the ruling sought "would reach far beyond the particular case." Jackson v. Muhlenberg Hosp., 53 N.J. 138, 142 (1969); see also Millison v. E.I. Du Pont de Nemours & Co., 101 N.J. 161, 199 (1984) (where "issues with far-reaching effects are involved, a court should exercise caution in granting summary judgment"). Here, the Lewis Court has already recognized that the issue of "how to define marriage" has "far-reaching social implications." Lewis, supra, 188 N.J. at 461. Indeed, to "alter" the traditional definition of marriage "would render a profound change in the public consciousness of a social institute of ancient origin." Id. at 461-62.

Further, lower courts have applied this principle of maximum caution in cases with far less social impact. For example, the Appellate Division remanded an automobile injury case because the "issue presents a novel question of law that involves highly significant policy considerations," and facts presently unknown "may shed appreciable light on the subject." See Edwards v.

McBreen, 369 N.J. Super. 415, 423 (App. Div. 2004); see also Lusardi v. Curtis Point Prop. Owners Ass'n, 138 N.J. Super. 44, 51 (App. Div. 1975) (remanding beach access case for development of "full and plenary record" because issue involved an "emerging" area of law and implicated "highly significant policy considerations"). Here, no court has yet interpreted Windsor's applicability to civil unions and it is unknown at this juncture how various federal agencies will implement the decision. In Lewis, Justice Albin warned the Court about wading precipitously into the "swift and treacherous currents of social policy." See Lewis, supra, 188 N.J. at 461. These words hold even more import where, as here, the sands beneath the currents are shifting and unsettled.

Similarly, the Appellate Division affirmed a denial of judgment in a negligent hiring case that hinged on the "definition" of duty, because the issue was a novel one that implicated "conflicting interests" and "countervailing policies." Bennett v. T. & F. Distrib. Co., 117 N.J. Super. 439, 445-46 (App. Div. 1971). Here, the definition of marriage evokes an even broader range of legitimate interests and countervailing considerations, and the case should not be decided summarily or prematurely.

For all of the foregoing reasons, the Court should exercise maximum caution and deny Plaintiffs' motion for summary judgment.[3]

POINT III

UNDER WINDSOR, CIVIL UNION SPOUSES ARE ENTITLED TO FEDERAL MARRIAGE BENEFITS

The language, reasoning, and holding of Windsor mandate that same-sex couples in civil unions receive all of the same federal benefits as married couples. First, Windsor uses the terms "same-sex marriage" and "civil union" as functional equivalents. See Windsor, supra, 570 U.S. at ___ (slip op. at 2) (discussing state enactments "permitting same-sex marriages or civil unions" and then referring to both collectively as "that status"); id. at ___ (slip op. at 20) (noting that by "authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity" to same-sex couples).

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[3] Also, R. 4:46-2(a) could not be clearer: a motion for summary judgment shall include a "statement of material facts [that] shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue." As the Supreme Court has emphasized, "[s]ummary judgment requirements [] are not optional." Lyons v. Twp. of Wayne, 185 N.J. 426, 435 (2005). Because the statement of material facts is "critical" and "entail[s] a relatively undemanding burden," Housel v. Theodoridis, 314 N.J Super. 597, 605 (App. Div. 1998), the rule specifically affords this Court authority to deny the motion "for failure to file the required statement of facts," see R. 4:46-2(a). Plaintiffs cannot simultaneously assert that no material facts are dispute, see Pb21; pepper their brief with facts that are, indeed, in dispute, see Pb6-15; and fail to comply with the Rules of Court intended to prevent that very practice.

Second, Windsor repeatedly emphasizes that "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." Id. at ___ (slip op. at 16); see also slip op. at 17-18 (recognizing "virtually exclusive primacy of the States in the regulation of domestic relations"). "Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." Id. at ___ (slip op. at 17). Precisely because "there is no federal law of domestic relations," courts, when deciding "who is a widow or widower," "husband and wife," "parent and child," must make "reference to the law of the State which created those legal relationships." Id. at ___ (slip op. at 17, 18). Here, it is indisputable that New Jersey law recognizes and intends that, wherever "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." N.J.S.A. 37:1-33.

Because of the breadth and comprehensiveness of this State definition, persons in a civil union and their families are entitled to the plethora of federal benefits that the Windsor Court recognizes are contingent upon "spousal status." See Windsor,

supra, 570 U.S. at ___ (slip op. at 2, 15, 23, 24).[4] For example, "in establishing income-based criteria for Social Security benefits, Congress decided" that "state law would determine who qualifies as an applicant's spouse." Id. at ___ (slip op. at 15). As Lambda Legal, Plaintiffs' attorney, admitted in a post-DOMA, publicly available document, a "couple in a civil union" who lives "in a state that recognizes their relationship" will be entitled to federal Supplemental Security Income ("SSI") if state law treats them as married for purposes of intestate succession. See LGBT Organizations Fact Sheet Series, "After DOMA: Supplemental Security Income for Aged, Blind, and Disabled," at 2. Da21. In New Jersey, civil union couples are considered spouses and have all the same rights as married couples. See N.J.S.A. 37:1-31(a), -3. Thus, under the language and the reasoning of both Windsor and Plaintiffs' attorney, civil union spouses are entitled to federal SSI after the demise of DOMA.

Similarly, to be eligible for Social Security benefits when a partner dies, the applicant must be the "wife, husband, widow, or widower" of the deceased. See 42 U.S.C.A. § 416(h)(1)(A)(ii) (applicant qualifies as "wife, husband, widow,

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[4] The Windsor Court, in noting that DOMA excluded same-sex couples from "over [] 1,000" federal benefits and responsibilities, was relying on a 2004 publication of the Government Accounting Office. See Windsor, supra, 570 U.S. at ___ (slip op. at 2). The State has appended this document for the Court's convenience. See Da58-75.

or widower" of insured for purposes of social security death benefits if state where they live considered them to have same rights as married person for purposes of intestate succession); see also Windsor, supra, 570 U.S. at ___ (slip op. at 24) (recognizing that only "spouse" is entitled to social security death benefits). Once again, New Jersey civil union partners meet this test and are now eligible for these benefits. See N.J.S.A. 37:1-31(a), -33; see also LGBT Organizations Fact Sheet Series, "After DOMA: Social Security Spousal and Family Protections," at 3 (noting "we believe you may make a claim for spousal benefits" if you are "joined in a civil union" and your partner dies). Da43. Further, because the "definition of spouse for purposes of Medicare is tied to" the Social Security definition of "spouse," civil union partners are likewise eligible for Medicare in the post-DOMA world. See LGBT Organizations Fact Sheet Series, "After DOMA: Medicare Spousal Protections," at 2. Da48.

The Windsor Court also notes that DOMA prevented "Government-integrity rules" from applying to "same-sex spouses." Windsor, supra, 570 U.S. at ___ (slip op. at 24), citing 5 U.S.C. App. § 102(a), (e). Now, however, these rules apply to civil union partners in New Jersey, because the State treats them as spouses with all of the same responsibilities as a heterosexual husband or wife and specifically intends that they be included within the definition of "spouse." See N.J.S.A. 37:1-31 (a), -33. Similarly,

the Windsor Court asserted that "[a]lthough a 'spouse' qualifies as a member of a federal law enforcement officer's 'immediate family'" for purposes of the federal penal code, DOMA makes the code's protections "inapplicable to same-sex spouses." Windsor, supra, 570 U.S. at ___ (slip op. at 23-24). Now, however, because the Civil Union Act treats civil union partners as spouses, these protections will apply to them.

The examples are endless. Suffice it to say that a sizable, but indeterminate, number of the over 1,000 benefits and responsibilities that were inapplicable to civil union couples because of DOMA are now available to them because they are spouses, husbands, wives, widows, or widowers under New Jersey law.

Third, the premises underlying Windsor defeat any argument that civil union partners are not entitled to federal benefits that are restricted by word choice to "married" people. The Windsor Court struck down DOMA because "[w]hile New York adopted a law" that "sought to eliminate inequality," DOMA "frustrates that objective." Id. at ___ (slip op. at 25). "By doing so," DOMA "violates basic due process and equal protection principles applicable to the Federal Government." Id. at ___ (slip op. at 20). "The Federal Government" may not "impose restrictions and disabilities" on persons whom the "State seeks to protect." Id. at ___ (slip op. at 19). The federal government may not "influence or interfere with state sovereign choices" or

"discourage enactment" of state laws that protect same-sex couples. Id. at ___ (slip op. at 21). For these very same reasons, any federal policy or directive or interpretation of Windsor that denies benefits to civil union partners violates the due process and equal protection provisions of the United States Constitution as well as New Jersey's sovereignty rights. Windsor requires two conclusions: 1) the federal government may not treat unequally same-sex partners whom New Jersey has declared must be treated equally, and 2) the federal government may not constitutionally deny benefits to same-sex couples to whom New Jersey has extended "all of the same benefits, protections and responsibilities under law" as are granted married couples.[5] N.J.S.A. 37:1-31(a).

Further, any interpretation of Windsor that restricted eligibility for federal benefits to same-sex married couples runs afoul of long-standing precedent that has insisted that courts look to essence, not label. See, e.g., United States v. Chicago, Burlington & Quincy R.R. Co., 237 U.S. 410, 413 (1915) ("controlling test" of "statute's operation lies in the essential nature of the work done rather than the names applied to those engaged in it"); Jordan v. Roche, 228 U.S. 436, 443 (1913)

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[5] Scholars agree. See Posting of Michael Dorf to Dorf on Law, http://www.dorfonlaw.org/ (June 3, 2013), at 2 (any decision by federal government to "elevate each state's decision with respect to the symbolic aspects of the word" marriage "over the practical aspects of the state's law" would be "quite inappropriate on federalism grounds"). Da77.

(applicability of federal tax statute governing distilled spirits "is established by the essential nature" of beverage, "not by its name"); United States v. Rivera, 136 Fed. Appx. 925, 926 (7th Cir. 2005) ("Shakespeare wondered what's in a name?; for purposes of federal criminal law, the answer is 'nothing.' Substance rather than nomenclature matters."). As the Appellate Division colorfully expressed it: "'A rose by any other name is still a rose' and 'Calling a dog's tail a leg will not give the dog five legs.'" 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." Ibid.

Here, New Jersey deems civil unions to be the equivalent of marriage, and it is that equivalency, not the label, that is dispositive in entitling civil union partners to all marriage benefits.

Fourth, the last sentence of the Windsor opinion cannot mean what Plaintiffs contend. As discussed extensively above, the federal government cannot refuse to extend marital benefits to civil union couples without running afoul of constitutional principles, violating the historic practice of deferring to state-law policy decisions concerning domestic relations, and ignoring precedent regarding essence and labels. If the Windsor Court really did mean to exclude civil union partners from the scope of its holding, then the Court itself would be doing what it decried

when discussing Congress' enactment of DOMA. The Court, despite its extensive discourse on deferring to State policy in domestic relations matters, would be "interfering with State sovereign choices" about who is entitled to the benefits of marriage. See Windsor, supra, 570 U.S. at ___ (slip op. at 21); cf. Transcript of Oral Argument at 54, Hollingsworth v. Perry, ___ U.S. ___, 133 S. Ct. 2652 (2013) (No. 12-144) (J. Sotomayor challenging notion that all civil unions must be converted into same-sex marriages, because "there is an irony in that, which is the States that do more have less rights" than States that refuse to recognize rights of same-sex couples in any way). Da131-32. Similarly, if the Windsor Court meant to disenfranchise civil union partners, despite its sweeping language about the rights of same-sex couples, then the Court also would be "discourag[ing] enactment" of state laws that promote their rights. See Windsor, supra, 570 U.S. at ___ (slip op. at 21); Cf. Transcript of Oral Argument at 61, Hollingsworth v. Perry, supra, (J. Breyer arguing that if "State that has a pact [i.e., civil union statute] has to say 'marriage'" then "States that are considering pacts will [] say 'we won't do it'" and that result is "harmful to the gay couple"). Da133-34.

Chief Justice Roberts, in his dissent, provides the best insight as to what the majority meant by confining its holding to "lawful marriages." Rather than intending to drive an implicit wedge between same-sex marriages and civil unions, the majority

meant merely to indicate that is was, consistent with its reasoning throughout, not interfering with the sovereign prerogative of those states that chose not to recognize same-sex marriage. See Windsor, supra, 570 U.S. at ___ (Roberts, C.J. dissenting, slip op. at 2) (noting that as "logical and necessary consequence" of having based its judgment on federalism, majority was making clear that its decision did not dictate that states no longer "utilize the traditional definition of marriage"). The federal government will, consistent with federalism, defer to the states in matters concerning domestic relations.

In short, the language, principles, and premises of Windsor all dictate that civil union partners receive federal marriage benefits.

POINT IV
THE MOTION IS NOT RIPE.

The Windsor decision went into effect on July 21, 2013. See U.S. S. Ct. R. 45(3), 44(1). On the day the decision came out, the President directed members of his Cabinet "to review all relevant federal statutes to ensure this decision, including its implications for Federal benefits and obligations, is implemented swiftly and smoothly." Office of the White House Press Secretary, "Statement by the President on the Supreme Court Ruling on the Defense of Marriage Act" (June 26, 2013). Da81.

Lambda Legal, Plaintiffs' attorney has repeatedly told same-sex married couples that, despite this directive from the President, "federal agencies -- large bureaucracies -- may need and take some time to change forms, implement procedures, train personnel, and efficiently incorporate same-sex couples into the spousal-based system." See LGBT Organizations Fact Sheet Series, "The Supreme Court Ruling On The Defense Of Marriage Act: What It Means," at 1. Da1. Further, some programs may require policy changes, "some of which may take time." Id. at 2. Da2. Moreover, agencies "may have to change regulations, requiring a more lengthy process of proposing new rules and soliciting public comments, or laws." Ibid. Da2. "That process would likely take months." LGBT Organizations Fact Sheet Series, "After DOMA: Benefits and Protections for Civilian Federal Employees and Their Spouses," at 5. Da31. These admissions undermine Plaintiffs' contention that the Court needs to decide this motion without delay and order that same-sex couples be allowed to marry immediately. See Pb46.

Further, by Lambda Legal's own admission, there does not yet appear to be a uniform federal policy regarding the extension of federal benefits to civil union spouses. As discussed above, see pp. 12-20, supra, because civil union partners are deemed spouses under New Jersey law, they are indisputably entitled to Social Security and Medicare benefits, among many others.

Other agencies have not yet announced a definitive policy, but appear to be leaning towards recognizing the entitlement of civil union spouses to federal benefits. For example, on May 11, 2011, a year before the demise of DOMA, Attorney General Holder vacated a decision of the Board of Immigration Appeals ("Board") that would have resulted in the deportation a New Jersey man who was in a civil union. See Matter of Paul Wilson Dorman, Respondent, 25 I & N Decision No. 485 (A.G. 2011). Da96. The General remanded and ordered the Board to determine whether Dorman's "civil union qualifies him to be considered a 'spouse' under New Jersey law," and whether, "absent the requirements of DOMA," Dorman's "civil union would qualify him to be considered a 'spouse' under the Immigration and Nationality Act." Ibid. Da96. Moreover, a federal judge considering the spousal petition of another New Jersey man in a civil union delayed the man's deportation hearing for a year on the basis of the General's "clear signals in the Dorman case." Nyler Abdou, The DOMA Dilemma, Star Ledger, Oct. 14, 2011, at 5. Da86. "Not long after, Immigration and Customs Enforcement made a historic decision to administratively close the deportation proceedings against" the second New Jerseyan. Ibid. Da86.

Similarly, the IRS' position is not clear at this juncture. See LGBT Organizations Fact Sheet Series, "After DOMA: Federal Taxes," at 1, 3 (guidance from IRS regarding whether civil

union spouses can file joint federal tax return is likely "before the next income tax filing deadline" on April 15, 2014; right now, "[i]t is too early to tell"). Nevertheless, the agency appears to be leaning towards recognizing the entitlement of same-sex civil union partners to federal tax benefits. For example, ten months before the Windsor decision, the Office of the Chief Counsel of the IRS issued a letter regarding the filing status of a heterosexual Illinois couple in a civil union. See Letter from Dep't of the Treasury, Internal Revenue Service, Office of the Chief Counsel to Robert Shair, Senior Tax Advisor, H & R Block (Aug. 30, 2011). Da88. The letter stated that "if Illinois treats the parties to an Illinois civil union" as "husband and wife," they are "not precluded from filing" their federal taxes "jointly." Ibid. Although this DOMA-era letter was confined to heterosexual partners in a civil union, there is no legitimate reason why its rationale would not extend to same-sex civil union spouses as well. As discussed extensively above, New Jersey mandates that terms such as husband and wife include same-sex civil union partners.

The State Department, for its part, "enables same-sex couples to obtain passports under the names recognized by their state through their marriages or civil unions." State Dep't Documents and Publ'ns, "Advancing the Human Rights of LGBT Persons Worldwide: A State Department Priority" (June 2, 2013), at 2. Da90. The State Department, however, has not yet issued any

directive concerning whether it will recognize the entitlement of civil union partners to the other federal marriage benefits over which the Department has control.

Still yet other agencies have not explicitly indicated whether they will recognize the entitlement of civil union spouses to federal marriage benefits. See, e.g., Dep't of Defense, "Statement by Secretary Hagel on DOMA Ruling" (June 26, 2013) (noting only that DOD intends to "make the same benefits available to all military spouses -- regardless of sexual orientation"; "[t]hat is now the law and it is the right thing to do") (Da92); LGBT Organizations Fact Sheet Series, "After DOMA: Temporary Assistance for Needy Families," at 1 (persons in a civil union "may be treated as married for TANF purposes"). Da53.

Finally, one federal entity, OPM, has noted that it will "not extend coverage" for health benefits to civil union partners of civilian federal employees. See Federal Employee Health Benefit Program Carrier Letter from John O'Brien, Director of Healthcare and Insurance, OPM to All Carriers (July 3, 2013), at 1. Da93. Several points are worth making. First, none of the individual Plaintiffs here are federal employees. Second, Garden State Equality ("GSE"), the organizational Plaintiff, has not identified in the Complaint any members who are federal employees. Third, GSE has not certified a class and cannot be deemed to speak for all persons in New Jersey in a civil union. Fourth, and most

importantly, OPM's decision violates the constitutional rights of civil union spouses, is contrary to principles of federalism, and runs counter to precedent. See pp. 12-20, supra. As such, it will not withstand the test of challenge. Unfortunately, neither this Court nor the State can hold the federal government accountable for violating the equal protection rights of New Jersey citizens in civil unions.[6]

In short, the only facts that are not disputed here are that it will take some time for the federal government to implement Windsor and the position of the various federal agencies is in flux and non-uniform. Plaintiffs' summary judgment motion is not ripe, and the Court should not decide an issue of significant public importance at this time.

Precedent on this point is incontrovertible. The "basic rationale" of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies," and to withhold judgment "until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967). When reviewing an issue for prudential ripeness, the

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[6] See Alfred L. Snapp & Son v. Puerto Rico, 485 U.S. 592, 606-07 (1982) (discussing when State has standing to sue in parens patriae capacity on behalf of its citizens); Massachusetts v. Mellon, 262 U.S. 447, 486 (1923) (same).

court must "evaluate 1) the fitness of the issues for judicial decision and 2) the hardship to the parties of withholding court consideration." Nat'l Parks Hospitality Ass'n v. Dep't of Interior, 528 U.S. 803, 808 (2003).

The fitness prong "is primarily meant to protect" the "court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." Am. Petroleum Inst. v. Envtl. Prot. Agency, 683 F.3d 382, 387 (D.C. Cir. 2012). A "claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1996); see also Indep. Realty Co. v. Twp. of N. Bergen, 376 N.J. Super. 295, 302 (App. Div. 2005) (claim not ripe for adjudication if facts are "future, contingent, and uncertain"). Instead of engaging in "judicial preview," the court should postpone review "until the policy in question has sufficiently crystallized by taking on a more definite form" and the "agency's action is sufficiently final." Lake Pilots Ass'n, Inc. v. United States Coast Guard, 257 F. Supp. 2d 148, 161-62 (D.D.C. 2003). See Colwell v. Dep't of Health and Human Servs., 558 F.3d 1112 (9th Cir. 2009) (refusing on grounds of prudential ripeness to hear plaintiffs' claims "without knowing the manner in which HHS will apply" its policy); Eternal Word Television Network v. Sebelius, 2013 U.S. Dist. LEXIS 41184, at *63 (N.D. Ala. 2013) (refusing on prudential ripeness grounds to

decide plaintiff's constitutional challenge to contraception mandate of Affordable Care Act because federal government was "in the middle of a rulemaking process which might altogether alleviate the alleged harm"). It is simply not the court's job "to speculate as to possible impacts of possible outcomes." TOCA Producers v. Fed. Energy Regulatory Comm'n, 411 F.3d 262, 267 (D.C. Cir. 2005).

The hardship prong also poses a high hurdle for Plaintiffs. "Considerations of hardship that might result from delaying review will rarely overcome the finality and fitness problems inherent in attempts to review tentative positions." Am. Petroleum, supra, 683 F.3d at 389. Further, the Supreme Court has squarely rejected the proposition that "mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis." Nat'l Parks, supra, 528 U.S. at 811. Rather, plaintiffs "must show that postponing review imposes a hardship on them that is immediate, direct, and significant." Colwell, supra, 558 F.3d at 1128.

Moreover, ripeness "considerations have particular efficacy in the context of a challenge to the constitutionality of a statute." In re Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180, 183 (App. Div.), certif. denied, 113 N.J. 660 (1988). "Deeply embedded in our jurisprudence is the settled principle against resolving disputes in advance of constitutional necessity." Ibid. Courts have therefore not hesitated to dismiss unripe

constitutional claims. See, e.g., Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 199-200 (1985) (applying ripeness principles to support dismissal of claim "even if viewed as a question of due process under the Fourteenth Amendment"); Rezem Family Assoc. v. Borough of Millstone, 423 N.J. Super. 103, 117 (App. Div. 2011) (dismissing as unripe claim arising under Fourteenth Amendment); K. Hovnanian Co. of N. Central Jersey, Inc. v. New Jersey Dep't of Envtl. Prot., 379 N.J. Super. 1, 9 (App. Div.) (dismissing complaint on grounds of ripeness and failure to exhaust remedies even though plaintiff made "constitutional contentions"), certif. denied, 185 N.J. 390 (2005); M.D. v. J.I., 2010 N.J. Super. Unpub. LEXIS 1652, at *15 (App. Div. 2010) (addressing hardship prong and noting that "there must be a real and immediate threat" to "party seeking review where constitutional imperatives are involved").[7] Da101.

Here, the position of the various federal agencies is in flux and non-uniform, and the federal government has yet to apply any policy in a concrete and cognizable setting. For all of these reasons, Plaintiffs' constitutional challenge is not ripe.

[7] The State is unaware of any unpublished decisions with a contrary holding.

POINT V

PLAINTIFFS' EQUAL PROTECTION CLAIMS FAIL BECAUSE THE STATE'S ACTION IS NOT LEGALLY COGNIZABLE AND, EVEN IF IT WERE, IT HAS A RATIONAL BASIS.

The State's action is not legally cognizable under § 1983. Further, this Court lacks power to use the State Constitution as a basis for vindicating the right of citizens to benefits within the control of the federal government. Finally, even if State action did exist for purposes of the federal or State Constitution, Plaintiffs' equal protection claims would still fail because the State's action is rationally based and in accord with the Lewis decision.

A. Plaintiffs' Federal Equal Protection Claim Fails Because of a Lack of Legally Cognizable State Action.

In Lewis, the Supreme Court acknowledged that it could not "escape the reality that the shared societal meaning of marriage – passed down through the common law into our statutory law – has always been the union of a man and a woman." Lewis, supra, 188 N.J. at 460. The Court therefore refused to hold that "same sex partners have a constitutional right to define their relationship by the name of marriage." Id. at 444. Because "alter[ing] that meaning would render a profound change in the public consciousness of a social institution of ancient origin" and have "far-reaching social implications," the Court would "not

presume that a difference in name alone is of constitutional magnitude." Id. at 456, 462.

The only thing that has changed between the Lewis decision and now is that the Windsor decision has come down. Windsor, however, did not render Lewis invalid. To the contrary, Windsor, when evaluating plaintiff's federal equal protection claim, indicted federal action and left intact the states' historic and exclusive prerogative to define domestic relations. See, e.g., Windsor, supra, 570 U.S. at ___ (slip op. at 17-18, 25-26). This staunch theme of state sovereignty strongly counsels that states that retain the traditional definition of marriage are entitled to judicial respect for their decision.

If, for political or other reasons, the federal government ultimately fails to extend Plaintiffs the federal benefits and protections to which they are entitled after the Windsor decision, then the *federal* government will have acted in contravention of the United States Constitution, contrary to principles of federalism, and counter to precedent. See Point III, supra. Plaintiffs do not – and cannot – point to a single case wherein the federal government's constitutional default has transformed what is otherwise a legitimate state position into impermissible state action that can be redressed under § 1983. To the contrary, courts have refused to find legally cognizable state action for purposes of § 1983 when the federal government is the

primary actor and bears the onus of compliance. See, e.g., Albiston v. Maine Comm'r Human Servs., 7 F.3d 258, 263 (1st Cir. 1993) (noting "in the ambiguous context of shared state-federal obligations" that, if "default in the performance of a federally-retained obligation" breaches plaintiff's rights, then there is no "§ 1983 cognizability" with regards to state action); Stowell v. Ives, 976 F.2d 65, 70 (1st Cir. 1992) (holding that, when "onus of compliance" is on the federal government, "no cause of action under § 1983 can flourish" against state). The whole purpose of § 1983's state action requirement is to avoid imposition of responsibility on a state for conduct it cannot control.

B. Plaintiffs' State Equal Protection Claim Fails Because the Protection that the State Constitution Controls Only the Actions of Agents of the State.

Discussing the reach of the State Constitution, the New Jersey Supreme Court held that the "protections afforded by the constitution of a sovereign entity control only the actions of the agents of that sovereign." State v. Knight, 145 N.J. 233, 259 (1996); see also State v. Torres, 262 P.3d 1006, 1014 (Haw. 2011) ("protections afforded" by state constitution "control the actions only of the agents of that sovereign entity"); New Mexico v. Cardenas-Alvarez, 25 P.3d 225, 235 (N.M. 2001) ("Bill of Rights provision contained within a state constitution serves to protect against abuse of power by that sovereign."). This Court therefore lacks power to use the State Constitution as a basis for

vindicating the rights of State citizens to federal benefits that federal officials, acting pursuant to federal law, refuse to provide.

As the United States Supreme Court explained: "Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of *its particular government* as its judgment dictated." Barron v. Mayor of Baltimore, 32 U.S. 243, 247 (1833) (emphasis added). These "limitations on power" are "naturally, and, we think, necessarily applicable to the government created by the instrument," not to "distinct governments, framed by different persons and for different purposes." See ibid.

This principle limiting the application of a state constitution is rooted both in the Supremacy Clause and in federalism. The Supremacy Clause of the federal Constitution states the "essential principle" that "the laws of the United States [are] dominant over those of any state." Mayo v. United States, 319 U.S. 441, 445 (1943). "A corollary to this principle is that the activities of the Federal Government are free from regulation by any state." Ibid.; see also McCullough v. Maryland, 17 U.S. 316, 417 (1819) ("It is of the very essence of supremacy to remove all obstacles to" federal action, and "so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence"). "No other adjustment of

competing enactments or legal principles is possible." Mayo, supra, 319 U.S. at 445. As Justice Brennan explained: "Just as state law may not authorize federal agents to violate" the federal Constitution, "neither may state law undertake to limit the extent to which federal authority can be exercised." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971).

As the New Jersey Supreme Court pithily held: "Stated simply, state constitutions do not control federal action." State v. Mollica, 114 N.J. 329, 347 (1989); see also Knight, supra, 145 N.J. at 259 ("Federal officers" acting pursuant to "federal authority" are "unconstrained by the State Constitution"). For this reason, when a case involves "actions by federal officials based on federal statutes, we see no basis to invoke our State Constitution, even though these" federal actions "may impact" the constitutional "rights of New Jersey citizens." State v. Green, 346 N.J. Super. 87, 101 (App. Div. 2001); see also State v. Evers, 175 N.J. 355, 371 (2003) (rejecting criminal defendant's State constitutional privacy claim premised on out-of-state official's seizure of evidence because "[n]o purpose would be served by applying New Jersey's constitutional standards to people and places over whom the sovereign power of the State has no control"). "Recognition of this inherent jurisdictional limitation on the application of the state constitution is consonant with principles

of federalism." Mollica, supra, 114 N.J. at 352; see also State v. Stelzner, 257 N.J. Super. 219, 237 (App. Div. 1992) (acknowledging lack of any "jurisprudential principle requiring, or even permitting," courts "to give extraterritorial effect to our Constitution"); Cardenas-Alvarez, supra, 25 P.3d at 306 ("State has no method to extend the reach" of its constitution "to federal action").

The Lewis Court recognized this jurisdictional limitation, disavowing the notion that the State constitutional right the Court had identified extended to federal action or statutes. See Lewis, supra, 188 N.J. at 460 n.25 ("what we have done and whatever the Legislature may do will not alter federal law"). The Court's ruling was correctly confined to the question whether the State must provide same-sex couples with all "statutory benefits and privileges available to opposite-sex couples through *New Jersey's civil marriage laws*." Lewis, supra, 188 N.J. at 427 (emphasis added); see also id. at 422 (focusing on "our laws"); id. at 438 (looking to various laws "in this State"); id. at 448-49 (examining "extent to which New Jersey's laws" do not provide same-sex couples with benefits and privileges married couples have under State law). In other words, the equal protection guarantee identified in Lewis was, in explicit and necessary terms, a right limited in scope, definition, and aspiration to State law. And the right remains thus. This Court is not free either to ignore the

jurisdictional limitations of the State Constitution or to rewrite a constituent part of the Lewis decision. Plaintiffs, in urging this Court to hold the State responsible for the federal government's alleged refusal to extend benefits to civil union partners, are ultimately asking this Court not to enforce Lewis, but rather to expand it impermissibly.

Stated in obverse terms, the validity of a State law under the State Constitution cannot hinge upon the action, inaction, or policy of federal officials over whom the State has no control. Plaintiffs do not proffer a single case that holds otherwise. Nor can they. Under Plaintiffs' theory, State judicial decisions would flip-flop endlessly at the whim of variable federal policies, resulting in chaos and, effectively, the concession that the State Constitution has no independent application. For example, if Plaintiffs' premise were correct, then, theoretically, the Civil Union Act could be valid under the State Constitution prior to Windsor; invalid at some indeterminate point post-DOMA because the Obama Administration interprets Windsor to preclude the provisions of federal benefits to civil union spouses; then valid again at some even later date if the Administration's policy changes or if a subsequent administration refuses to interpret Windsor in such a cramped, hypertextual way. The "Court should not place a stamp of approval on such a flip-flop approach to constitutional interpretation." See State v. Fortin, 198 N.J. 619,

637 (2009) (Albin, J., dissenting); cf. Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985) ("By developing an interpretation of the New Jersey Constitution that is not irrevocably bound by federal analysis, we . . . avoid the necessity of adjusting our construction of the state constitution to accommodate every change in federal analysis of the United States Constitution.")

C. The State's Action is Rationally Based and in Accord with the Lewis Decision.

Plaintiffs concede, for purposes of this motion only, that the Court should apply the rational basis test.[8] See Pb41 n.4. Under this standard of review, the burden is on the party challenging a statute to "negate every conceivable basis which may reasonably support the legislative action." Fair Housing Council, Inc. v. New Jersey Real Estate Comm'n, 141 N.J. Super. 334, 338 (App. Div.), certif. denied, 71 N.J. 526 (1976); see also Heller v. Doe, 509 U.S. 312, 320 (1993) (emphasizing that "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it").

Here, even if Plaintiffs were able to meet their burden of proving action legally cognizable under the State or federal

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[8] This is the correct test. Neither the Windsor Court nor the Romer Court adopts an intermediate or strict scrutiny level of review. Moreover, Windsor depends for its central propositions on Dep't of Agric. v. Moreno, 413 U.S. 528, 533-35 (1973), which applied rational basis review. See Windsor, supra, 570 U.S. at ___ (slip op. at 20). See also State's Brief in Response to Amici (extensively discussing standard of review).

Constitution, their equal protection claims would still fail because the State's position is rationally based and in accord with the Lewis decision. As discussed in detail above, see pp. 3, 29, supra, the Lewis Court presumed that it is constitutionally permissible to preserve the definition of marriage that has "reigned for centuries." See Lewis, supra, 188 N.J. at 460. The present circumstances provide numerous reasons why the State's presumptively rational decision to reserve the name of marriage for heterosexual couples is still valid.

First, as discussed extensively above, see Point III, civil union partners are legally entitled to federal spousal benefits. It is therefore rational for the State to refuse to sacrifice its sovereign prerogative to define marriage when such sacrifice is unnecessary.

Second, Plaintiffs' claim is not ripe at this juncture, see Point IV, supra, and it would be irrational for the State to change its presumptively valid definition of marriage on the basis of facts that are future, contingent, and uncertain.

Third, if the Obama Administration fails to extend federal marriage benefits to civil union partners, then the federal government, not the State, will have violated Plaintiffs' equal protection rights. See Point III, supra. Plaintiffs cannot point to any judicial authority for holding the State responsible for the constitutional dereliction of another Sovereign over whom it has no

control, with whom it has no nexus, and with whom it is not jointly acting. In the absence of any such precedent, it is rational for the State to continue to adhere to its presumptively valid definition of marriage.

Fourth, Plaintiffs have an expeditious and complete remedy for any failure of the federal administration to extend federal marriage benefits to civil union partners. Plaintiffs can file an emergent motion in federal court seeking a declaration that they are legally entitled to such benefits.[9]

Fifth, Plaintiffs cite several recent United States Supreme Court decisions that decry animus against same-sex individuals; however, both the Lewis decision and the Civil Union Act conclusively establish that no such animus against gays and lesbians exists in New Jersey. For example, Plaintiffs cite a "desire to harm," an alleged exclusion from "protection from the law," and an attempt to "demean[]," "disparage," and "injure." See Pb42-44. Preliminarily, animus is a question of fact that is not properly decided in a summary judgment context. Further, in the Lewis decision, the Supreme Court affirmed that, "significantly, New Jersey's Legislature has been at the forefront of combating sexual orientation discrimination and advancing equality of treatment towards gays and lesbians." Lewis, supra, 188 N.J. at

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[9] The United States' sovereign immunity precludes it from being named a necessary third party in this State case.

445; see also id. at 456 (noting "[e]quality of treatment is a dominant theme of our laws"). The Civil Union Act bears this out, comprehensively granting civil union couples "all of the same benefits, protections and responsibilities under law" as married couples. N.J.S.A. 31:1-31. The Court should reject Plaintiffs' animus argument.

Sixth, Plaintiffs' equal protection argument diverges from Lewis in an even more significant way. The Lewis Court analytically de-tangled two threads of Plaintiffs' marriage argument: the benefits of marriage and the name of marriage. Lewis, supra, 188 N.J. at 433. Plaintiffs claim that this dichotomy is baseless and that one cannot be achieved without the other. However, as demonstrated above, Plaintiffs' construct is flawed. After the Windsor Court struck down DOMA, Plaintiffs are entitled to federal marriage benefits. See pp. 12-20, supra. And, should those benefits be denied, Plaintiffs have a ready remedy in federal court against the federal government. See p. 38, supra. The Court should reject Plaintiffs' invitation to depart from Lewis by conflating what are still two distinct issues.

Seventh, in Lewis II, supra, the Court denied the plaintiffs' motion in aid of litigants' rights, refusing to decide the plaintiffs' renewed equal protection claim without the benefit of the "development of an appropriate trial-like record." 202 N.J. at 340. Even the dissent "realize[d] that we do not have a

sufficient basis for debating the merits of the application," because "plaintiffs' record has not been tested in the crucible of a litigated matter." Id. at 341.

Here, Plaintiffs, by virtue of this summary judgment motion, seek to side-step the Supreme Court's mandate concerning the need for a factual record. Once again, they seek to have their equal protection claim decided in abstraction. Consonant with the Supreme Court's directive, this Court should deny the motion and set a new fact and expert discovery schedule so that the Supreme Court has the record it views as necessary.

For all of the foregoing reasons, Plaintiffs' State and federal equal protection claims fail.

CONCLUSION

The Court should deny the motion for summary judgment.

Respectfully submitted,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: Jean P. Reilly
Jean P. Reilly
Deputy Attorney General

Dated: August 2, 2013