

SUPREME COURT OF NEW JERSEY
Docket No. 073328

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.

ON DIRECT CERTIFICATION FROM
THE SUPERIOR COURT OF NEW
JERSEY, LAW DIVISION
MERCER COUNTY

Docket No. L-1729-11

Sat below:

Hon. Mary C. Jacobson, A.J.S.C.

**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S
MOTION FOR A STAY**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
ARGUMENT	5
I. THE COURT SHOULD DENY THE STATE'S MOTION FOR A STAY	5
A. Legal Standard	5
B. Irreparable Harm	6
C. Settled Claim/ Likelihood of Success on the Merits	8
D. Balance of Hardships	17
E. The Public Interest	23
CONCLUSION	25

TABLE OF AUTHORITIES

PAGE(S)

CASES

Anderson v. Martin,
375 U.S. 399 (1964)13

Andrieu v. Ashcroft,
253 F.3d 477, 484 (9th Cir. 2001)21

Blum v. Yaretsky,
457 U.S. 991 (1982)16

*Brentwood Acad. v. Tenn. Secondary Sch. Athletic
Ass'n*,
531 U.S. 288 (2001)16

Brown v. City of Paterson,
424 N.J. Super. 176 (App. Div. 2012)6, 23

Brown v. City of Paterson,
424 N.J. Super. at 1836

Cox v. Schweiker,
684 F.2d 310 (5th Cir. 1982)13

Cozen O'Connor, P.C. v. Tobits,
2013 U.S. Dist. LEXIS 105507 (E.D. Pa. July 29, 2013)12

Crowe v. De Gioia,
90 N.J. 126 (1982)passim

Garden State Equality, et al. v. Dow, et al.,
Docket No. L-1729-11, 53. (L. Div. September 27,
2013)1

*Glassboro v. Gloucester Cnty. Bd. of Chosen
Freeholders*,
199 N.J. Super. 91 (App. Div.) *aff'd*, 100 N.J. 134
(1985)17

Golden v. Kelsey-Hayes Co.,
73 F.3d 648 (6th Cir. 1996)21

Guaman v. Velez,
421 N.J. Super. 239 (App. Div. 2011)8, 21

<i>In re Estate of Kolacy,</i> 332 N.J. Super. 593 (Ch. Div. 2000)	13
<i>In re Matter of P.L. 2001,</i> 186 N.J. 368 (2006)	9
<i>Joelner v. Village of Washington Park,</i> 378 F.3d 613 (7th Cir. 2004)	7
<i>Jordan v. Roche,</i> 228 U.S. 436 (1913)	12
<i>Kildare v. Saenz,</i> 325 F.3d 1078 (9th Cir. 2003)	21
<i>Laforest v. Former Clean Air Holding Co.,</i> 376 F.3d 48 (2d Cir. 2003)	21
<i>Lewis v. Harris,</i> 188 N.J. 415 (2006)	passim
<i>McNeil v. Legislative Apportionment Comm'n of N.J.,</i> 176 N.J. 484 (2003)	6, 23
<i>New York v. United States,</i> 505 U.S. 144 (1992)	15
<i>Penpac, Inc. v. Morris County Mun. Utilities Authority,</i> 299 N.J. Super. 288 (App. Div. 1997)	23
<i>Perry v. Schwarzenegger,</i> 704 F.Supp. 2d 921, 1003 (N.D. Cal. 2010) rev'd on other grounds, 671 F.2d 1052 (9 th Cir. 2012)	7
<i>Roman Check Cashing v. N.J. Dep't of Banking & Ins.,</i> 169 N.J. 105 (2001)	7
<i>Sanchez v. Dep't of Human Servs.,</i> 314 N.J. Super. 11 (App. Div. 1998)	13
<i>State v. Mollica,</i> 114 N.J. 329 (1989)	15
<i>United States v. Chicago, Burlington & Quincy R.R. Co.,</i> 237 U.S. 410 (1915)	12
<i>United States v. Windsor, ___ U.S. ___,</i> 133 S. Ct. 2675 (2013)	passim

Waste Mgmt. v. Union County Utils.,
399 N.J. Super. 508 (App. Div. 2008)6

Whelan v. Colgan,
602 F.2d 1060 (2d Cir. 1979)21

STATUTES

1 U.S.C. § 716

10 U.S.C. §§ 1447(7)-(9) & 144820

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<http://www.hhs.gov/news/press/2013pres/08/20130829a.html> (last visited Oct. 10, 2013)19

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Benefits Administration Letter No. 13-203: Coverage of Same-Sex Spouses (July 17, 2013),
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Wage and Hour Division, Fact Sheet # 28F: Qualifying Reasons for Leave Under the Family and Medical Leave Act,
<http://www.dol.gov/whd/regs/compliance/whdfs28f.htm> (last visited Oct. 10, 2013)19

U.S. Dep’t of State,
U.S. Visas for Same-Sex Spouses: FAQs for Post-Defense of Marriage Act (Aug. 2, 2013),

http://travel.state.gov/visa/frvi/frvi_6036.html
(last visited Oct. 10, 2013).....19

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Interments in Department of Veterans Affairs (VA)
National Cemeteries, at 7 (Jan. 2011),
www.cem.va.gov/CEM/pdf/IS1_Jan_2011.pdf (last visited
Oct. 10, 2013).....20

REGULATIONS

C.F.R. §§ 843.102, 843.301-843.31420

PRELIMINARY STATEMENT

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

Meanwhile, on June 26, 2013, the United States Supreme Court decided *United States v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675 (2013). In *Windsor*, the Court "struck down Section 3 of the Defense of Marriage Act, which had defined marriage as between one man and one woman for the purposes of federal statutes, rules, and regulations." GSE 44-45 (citing *Windsor, supra*). The trial court correctly described it: "As a result of the *Windsor* decision, legally married same-sex couples will have access to the rights and privileges contained in the approximately one thousand statutes and regulations that make reference to a person's marital status." GSE 45 (citing *Windsor*, 133 S. Ct. at 2683). But in New

Jersey, same-sex couples cannot marry and thus are denied federal rights and privileges that they and their families would otherwise have -- if only the State did not bar them from marriage and limit them to the status of civil union. Indeed, as the trial court found, federal agencies including the Office of Personnel Management, the State Department, the Federal Election Commission, the Department of Defense, the Department of Labor, the Office of Government Ethics, the Internal Revenue Service, and the Centers for Medicare & Medicaid Services have all, following *Windsor*, "limit[ed] the extension of benefits to only those same-sex couples in legally recognized marriages." *GSE* 15; see *id.* at 15-19 (discussing agency actions).

The result is that, as the trial court found, "plaintiffs are today not eligible for benefits as a result of their 'civil union' status mandated by New Jersey law." *GSE* 26. And "[e]very day that the State does not allow same-sex couples to marry, plaintiffs are being harmed, in violation of the clear directive of *Lewis*." *GSE* 50. As the Court concluded:

The ineligibility of same-sex couples for federal benefits is currently harming same-sex couples in New Jersey in a wide range of contexts: civil union partners who are federal employees living in New Jersey are ineligible for marital rights with regard to the federal pension system, all civil union partners who are employees working for businesses to which the Family and Medical Leave Act applies may not rely on its statutory protections for spouses, and civil union couples may not access the federal tax benefits that married couples enjoy. And if the trend of federal agencies deeming civil union partners ineligible for benefits continues, plaintiffs will suffer even more, while their opposite-sex New Jersey counterparts continue to

receive federal marital benefits for no reason other than the label placed upon their relationships by the State. This unequal treatment requires that New Jersey extend civil marriage to same-sex couples to satisfy the equal protection guarantee of the New Jersey Constitution as interpreted by the New Jersey Supreme Court in *Lewis*. Same-sex couples must be allowed to marry in order to obtain equal protection of the law under the New Jersey Constitution.

[GSE 53.]

As a result, the court below ordered that the State allow same-sex couples to marry, effective October 21, 2013. The court subsequently rejected the State's effort to stay that Order pending appeal. Carefully applying the requirements for such a stay set forth in *Crowe v. De Gioia*, 90 N.J. 126, 132-34 (1982), and its progeny, the court held:

Enforcing the Order will not cause the State to suffer irreparable harm, the State does not have a likelihood of succeeding on appeal, and a balancing of the equities heavily favors rejecting the motion for a stay. Plaintiffs would suffer many hardships of constitutional magnitude if the stay were to be issued, but the State has not demonstrated how it would suffer in any meaningful way if the Order is enforced. And there is no support for the proposition that, in the absence of any of the other factors informing whether to grant a motion for a stay, such a motion should be granted simply because a matter of great public interest is involved. Because the State has not satisfied its burden of showing that it is entitled to a stay of the Order, its motion for a stay is denied.

[Statement of Reasons Supporting the Denial of the State's Application for a Stay (hereinafter "SR") 17.]

For the reasons set forth below, the trial court was correct. And the Court's renewed motion still fails to satisfy the legal

requirements for a stay. *First*, the State again fails to establish irreparable harm, continuing to argue that such harm flows *automatically* from any injunction against the State, or can be imputed from allowing same-sex marriages to occur, both contentions that were correctly rejected by the trial court.

Second, as the trial court also held, the State has failed to make the required showing under *Crowe* that the legal right underlying its claim is settled; indeed, the State goes to great lengths to argue that the legal issues here presented are unsettled, contending that this demands a stay, although that is clearly not the law. Nor, as the trial court held, does the State bear its burden of showing a likelihood of success on the merits, also a required element of the relief it seeks. Indeed, the State does not and cannot deny the simple syllogism upon which Plaintiffs' argument relies: that the Supreme Court of New Jersey guaranteed same-sex couples equal rights; that after *Windsor*, they do not receive equal rights because the State does not permit them to marry; and that therefore, the State has violated the New Jersey Constitution's equal protection guarantee. The State's primary argument -- that it is not responsible for Plaintiffs' deprivation of federal benefits even when that deprivation is based upon the State's classification -- was fully explored by the trial court and twice rejected, both on the merits and as a basis for a stay. Nor is the State's interpretation of *Windsor* correct; it is certainly not the interpretation adopted by any of the federal agencies that have considered it.

Third, as the trial court recognized, the required balancing of the equities favors enforcing the Order, given the hardships suffered by the Plaintiffs, who cannot obtain important, sometimes essential, federal benefits because the State will not permit them to marry, as contrasted to the "incorporeal harm" invoked by the State. SR 11. The court correctly found that the State did not make "any showing that by simply permitting a new group of people to engage in marriage, and thereby allowing them access to federal marital benefits, the State will suffer any concrete injury or significant administrative burden." *Id.*

Fourth, and finally, the trial court correctly found that the public interest requires that a stay be denied, as "there is no 'public interest' in depriving a class of New Jersey residents their constitutional rights while appellate review is pursued." SR 16. The State's motion should be denied.

ARGUMENT

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

A. Legal Standard

The trial court correctly set forth the standard for determining a motion for a stay pending appeal; indeed, the State agrees that this Court must utilize the familiar test set forth in *Crowe*, 90 N.J. at 132-34, and described by the trial court: "A stay application should be granted only when: 1) such relief is necessary to prevent irreparable harm; 2) the applicant presents a settled underlying claim and makes a showing of reasonable

probability of success on the merits; and 3) a balancing of the relative hardships of the parties favors granting injunctive relief because 'greater harm would occur if a stay is not granted than if it were.'" SR 3 (citing *McNeil v. Legislative Apportionment Comm'n of N.J.*, 176 N.J. 484, 486 (2003) (LaVecchia, J., dissenting) (citing *Crowe*, 90 N.J. at 132-34)). See State Br. 4.

Each of these *Crowe* "factors 'must be clearly and convincingly demonstrated'" by the party seeking relief. *Brown v. City of Paterson*, 424 N.J. Super. 176, 183 (App. Div. 2012) (quoting *Waste Mgmt. v. Union County Utils.*, 399 N.J. Super. 508, 520 (App. Div. 2008)). Finally, when, as here, "an issue of significant public importance is raised," the standards informing the grant of a stay "must include not only the traditional factors applicable to disputes between private parties but also, and most paramount, considerations of the public interest." *McNeil*, 176 N.J. at 484.

B. Irreparable Harm

The State makes the same arguments regarding irreparable harm here as it did in its briefing below. Specifically, the State again contends that there is irreparable harm *whenever* a state statute is enjoined. The trial court correctly rejected this argument, both because "the Order did not strike down any statute, and did not enjoin the State from enforcing any existing statutes," SR 3-4, and because, even if its Order were interpreted to enjoin the State from enforcing a statute, there is no state

law authority for the *per se* rule proposed by the State. *Id.* at 4-5 (citing *Roman Check Cashing v. N.J. Dep't of Banking & Ins.*, 169 N.J. 105, 109 (2001)). Furthermore, the court specifically rejected the State's reliance on federal cases for this proposition, correctly holding that "there can be no irreparable harm to a [government] when it is prevented from enforcing an unconstitutional statute because 'it is always in the public interest' to protect constitutional liberties." *Id.* at 5 (quoting *Joelner v. Village of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004)).

Finally, the State's argument that it will suffer irreparable harm if any same-sex couples marry because those marriage licenses will be "virtually impossible . . . to undo" later, State Br. 7, was also carefully considered and correctly rejected by the trial court, which found that "the State ha[d] not explained exactly how allowing some same-sex couples to marry to assure them access to equal rights pending appellate review would cause any harm to the State, or why any eventual deprivation of that right would be ineffectual should it be ordered by an appellate court." SR 6. Indeed, the trial court pointed out that "the California experience teaches that marriage can be extended to same-sex couples in a state and then removed without dire consequences to the state." *Id.* (citing *Perry v. Schwarzenegger*, 704 F.Supp. 2d 921, 928, 1003 (N.D. Cal. 2010), *aff'd*, 671 F.3d 1052 (9th Cir. 2012)). In any event since, as set forth below, it is unlikely that the State will succeed on the merits of overturning the trial court's ruling, this situation is unlikely to occur.

In sum, the State has not demonstrated any irreparable harm. And any purported harm the State alleges "simply cannot justify depriving Plaintiffs and other same-sex couples of equality" under the law. SR 7. The State's motion for a stay should be denied.

C. Settled Claim/ Likelihood of Success on the Merits

In seeking a stay, the movant must demonstrate that its "underlying legal claim" is "settled as a matter of law." *Crowe*, 90 N.J. at 133. Thus, a stay must be denied "when the legal right underlying [movant's] claim is unsettled." *Crowe*, 90 N.J. at 133. Here, the State makes no attempt to demonstrate that the law underlying its request for a stay is settled. To the contrary, it expressly argues that "Respondent's Claim Raises Unsettled Question of Constitutional Law." State Br. 7. See also *id.* at 1 (discussing trial court opinion). But, as the trial court held, *Crowe* "requires that the applicant seeking injunctive relief show that *its* legal right is settled." SR 7 (emphasis in original). For the reasons set forth in the Court's opinion, and discussed below, the State has not and cannot make this showing. Indeed, if anything, it is the Plaintiffs' claim that is settled since, after *Windsor*, same-sex couples are denied federal rights because New Jersey refuses to allow them to marry, and under *Lewis*, this denial violates the New Jersey Constitution's equal protection guarantee.

Certainly, the State not shown the "reasonable probability of success on the merits" required for a stay. *Guaman v. Velez*, 421 N.J. Super. 239, 248 (App. Div. 2011). In its brief, the State

argues that it is likely to prevail because this Court's decision (1) did not presume that the State's marriage laws are constitutional, (2) is inconsistent with federalism principles, and (3) erroneously found State action. But all of these issues were thoroughly examined and addressed by the court below, and none warrants a finding that its decision is reasonably likely to be upset on appeal.

First, the State's argument that, in ruling for the Plaintiffs, the trial court failed to apply a presumption of constitutionality for legislative enactments, see State Br. 8-9, is belied by the opinion of the court below, which demonstrates that it proceeded with great caution and only found an equal protection violation after carefully considering each of the parties' arguments and concluding that the Plaintiffs had demonstrated that violation "'clearly'" and "'beyond a reasonable doubt.'" GSE 20 (quoting *In re Matter of P.L. 2001*, 186 N.J. 368, 392 (2006); *Lewis*, 188 N.J. at 459)). Indeed, the court devoted an entire section of its opinion to the need to "exercise caution" in just this manner. GSE 19.¹ Nor did the trial court's accurate observation that the State "could not point to any cases outside of the search and seizure context to support its analysis," GSE 39, impermissibly shift the burden from Plaintiffs to the State; rather, it merely documented that the court had canvassed all of

¹ The court did so notwithstanding that, as it explained in denying the State's motion for a stay, it is not at all clear that the presumption of constitutionality applies where, as here, Plaintiffs have never, in fact, asked the Court to strike down a statute. See SR 8.

the precedents cited by the State and found none that supported the State's argument that its creation of a scheme barring same-sex couples from marriage somehow does not constitute state action.

Second, the State argues that "Respondents' claims fail on federalism grounds" because *Windsor* requires the federal government to provide all marital rights, benefits, and privileges to civil-unioned couples. See State Br. 9-14. The trial court correctly rejected this argument, based upon both the express language of *Windsor* limiting its holding to marriage, see *GSE* 48 (quoting *Windsor*, 133 *S. Ct.* at 2696 ("[t]his opinion and its holding are confined to . . . lawful marriages")), and the numerous determinations of federal agencies since *Windsor*, which have consistently interpreted that language to provide federal marital benefits to couples in marriages but not those in civil unions. *GSE* 47-48. Finally, the trial court also correctly rejected the State's suggestion that civil-unioned couples ought to litigate for their federal rights and benefits, holding that "plaintiffs would suffer hardship in the form of a costly and time-consuming litigation burden not required of opposite-sex married couples," *id.* at 48-49, compounding the equal protection violation enunciated by this Court in *Lewis*.

The State argues that federal agencies must treat civil union as they would marriage, lest they "'influence or interfere with State sovereign choices'" about who is entitled to the benefits of marriage in violation of *Windsor*. State Br. 11 (quoting *Windsor*, 133 *S. Ct.* at 2693). But the passage from *Windsor* that the State

cites actually says that the federal government may not "influence or interfere with State sovereign choices about who may be married," *Windsor*, 133 S. Ct. at 2693 (emphasis added), and thus reinforces the Court's statement that *Windsor's* "opinion and its holding are confined to those lawful marriages," *id.* at 2696.²

Here, the federal government is exerting no such influence or otherwise interfering with State affairs; rather, it is merely following the State's determination as to who may marry, as discussed in *Windsor*. See *id.* at 2693 (criticizing "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage"). Nor, for that matter, does Chief Justice Roberts' dissent in *Windsor* show that the Supreme Court intended for federal agencies to treat state-created parallel statuses, such as civil union, as marriage. The State's argument to the contrary notwithstanding, see State Br. 14, that dissent says nothing about federal treatment of civil union, and specifically disagrees with the State's position, State Br. 13, that the penultimate sentence of the *Windsor* majority opinion does not mean what it says. See *Windsor*, 133 S. Ct. at 2697 (Roberts,

² The State also purports to quote *Windsor* for the proposition that the federal government may not, consistent with federalism, "'discourage enactment' of state laws that protect same-sex couples." State Br. 11 (citing *Windsor*, 133 S. Ct. at 2693). But properly read in its entirety, the passage at issue actually states that DOMA was enacted "to discourage enactment of *state same-sex marriage laws* and to restrict the freedom and choice of couples *married* under those laws if they are enacted." *Windsor*, 133 S. Ct. at 2693 (emphasis added). Again, this passage discusses State decisionmaking about whom it will allow to marry; consistent with its limited holding, it says nothing about civil union, or any category other than marriage.

C.J., dissenting) ("In my view . . . , the disclaimer is a logical and necessary consequence of the argument the majority has chosen to adopt.").³

The State argues that if Plaintiffs litigated their rights to federal benefits they would win, because "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." State Br. 11. But the State's position that the Court should look to substance and not form is ironic indeed. For it is the State that has taken pains, throughout this litigation, to maintain the very labels for which it now tries to shift the blame to the federal government, including in its current effort to seek a stay and thus continue to bar the Plaintiffs from marriage.⁴

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

³ For the same reason, as the trial court noted, the State's continued reliance on *Cozen O'Connor, P.C. v. Tobits*, 2013 U.S. Dist. LEXIS 105507 (E.D. Pa. July 29, 2013), is misplaced. See GSE 47 n.10. That trial-level Pennsylvania case concerned a couple with a preexisting valid marriage subsequently assessed pursuant to the law not of New Jersey, but of Illinois.

⁴ Nor, for that matter, is civil union a type of marriage in the way that, as in the State's inapposite citations, see State Br. 11-12, a transfer train is a "train," see *United States v. Chicago, Burlington & Quincy R.R. Co.*, 237 U.S. 410, 412 (1915); or rum is a "distilled spirit." *Jordan v. Roche*, 228 U.S. 436, 444 (1913). Rather, civil union and marriage are not mere labels, but are separate and exclusive legal relationships under New Jersey law; indeed, that separateness and exclusivity is precisely what the State is fighting to maintain here.

is not legally cognizable." State Br. 14. Specifically, the State argues that Plaintiffs have failed to show state action. *Id.* at 15. But, as the trial concluded, "it defies common sense to suggest that the passage of a statute by the New Jersey Legislature is not state action," *GSE* 37, and the State is unable to show why this Court would disagree and instead adopt the counterintuitive position that the State urges.

The State contends that "Respondents do not point to a single case, and the court below could not find any, wherein the federal government's constitutional default has transformed an otherwise legitimate state position into impermissible state action that a court can redress." State Br. 15 (citing *GSE* 37). But even assuming this is true,⁵ the absence of precisely analogous precedent one way or the other actually undermines the State's motion because, as set forth above, a stay should be denied "when the legal right underlying [movant's] claim is unsettled." *Crowe*, 90 *N.J.* at 133.

The State insists that the trial court's decision is an affront to federalism, because "the Court lacks power to use the

⁵ In fact, Plaintiffs provided powerful support for the common-sense finding of state action under these circumstances. Specifically, when a State label and statutory scheme triggers discrimination by third parties, including but not limited to the federal government, the State's enactment of those laws is sufficient to establish state action. See Pls.' Reply Br. in Support of Mot. for Summ. J. at 18-19 (citing, e.g., *Cox v. Schweiker*, 684 *F.2d* 310 (5th Cir. 1982)); Pls.' Supplement (Aug. 28, 2013) at 12-15 (citing, e.g., *Anderson v. Martin*, 375 *U.S.* 399 (1964); *Sanchez v. Dep't of Human Servs.*, 314 *N.J. Super.* 11 (App. Div. 1998); *In re Estate of Kolacy*, 332 *N.J. Super.* 593 (Ch. Div. 2000)).

State Constitution as a basis for vindicating the right of State citizens to federal benefits that federal officials, acting pursuant to their interpretation of federal law, refuse to provide." State Br. 15. But the State ignores, in a way that the trial court decision did not, that the federal benefits at issue are denied precisely because *the State* refuses to allow same-sex couples in New Jersey to marry. As the trial court concluded:

. . . the reality of the deprivations faced by plaintiffs is that the State has indeed played a role in plaintiffs' alleged constitutional harms. By statutorily creating two distinct labels—marriage for opposite-sex couples and civil unions for same-sex couples—New Jersey civil union partners are excluded from certain federal benefits that legally married same-sex couples are able to enjoy. Consequently, it is not the federal government acting alone that deprives plaintiffs of federal marriage benefits—it is the federal government incorporating a state domestic relations structure to make its determinations, and it is that state structure that plaintiffs challenge in this motion. That structure may not have been illegal at the time it was created—indeed, the parallel marriage/civil union statutory scheme was specifically sanctioned in advance by *Lewis*—but it was certainly an "action" of the State.

[GSE 37].

Lacking any precedent whatsoever with which to rebut this holding,⁶ the State resorts to arguing that federal agencies may

⁶ The State seeks to rely upon search and seizure decisions holding that evidence obtained in violation of the New Jersey Constitution may be admitted at trial when that evidence was obtained by federal law enforcement officers. See State Br. 19-20. But the State overlooks the "vital, significant condition" the Supreme Court set: that, before such evidence may be introduced, "it is essential that the federal action . . . not be alloyed by any

not "commandeer the legislative processes of the States," State Br. 17 (quoting *New York v. United States*, 505 U.S. 144, 161 (1992)), contending that "Respondents succeeded in using the mere policy pronouncements of a smattering of federal agencies to coerce the State into permitting same-sex marriage," State Br. 17, and that "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," *id.* at 21. But that is a curious argument indeed when these federal agency pronouncements are entirely based upon the State's decision *not* to permit same-sex marriage, and the State controls those actions by virtue of the labels that it chooses to utilize. By no means is this case about a coercive federal mandate "directly compelling [New Jersey] to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 161 (internal quotation marks omitted). Nor can it be seriously contended that a finding of state action here will confuse New Jersey's citizens as to who is "accountable" for denying same-sex couples federal marital benefits and, accordingly, the trial court's order that same-sex couples be permitted to marry. See State Br. 17. The whole purpose of the state action requirement is to hold the State accountable "when

state action or responsibility." *State v. Mollica*, 114 N.J. 329, 355 (1989). But such "alloy[ing]" is exactly the case here, where the State has limited marriage to different-sex couples and, in accordance with *Windsor*, the federal government has used that State marriage definition in administering federal benefits. See *Windsor*, 133 S. Ct. 2693, 2696. Certainly, the search and seizure decisions do not establish that the State is reasonably likely to succeed on appeal.

it can be said that the State is responsible for the specific conduct of which the plaintiff complains.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)), and the court's finding of state action enhances, rather than impedes, government accountability by placing responsibility for Plaintiffs' discriminatory treatment exactly where it belongs: at the State's doorstep.⁷

Finally, the State posits that "the State Constitution only mandates the provision of equal State benefits," and that *Lewis* does not require the State to ensure that same-sex couples receive "extra-territorial" (here, federal) benefits. State Br. 18, 22. But *Lewis* held no such thing. At most, *Lewis* states that "whatever the Legislature may do will not alter federal law, which only confers marriage rights and privileges to opposite-sex married couples." 188 N.J. at 460 n.25 (citing 1 U.S.C. § 7). The court below correctly understood this as the *Lewis* Court "noting the limitations and context of its decision, rather than explicitly limiting its decision to whether same-sex couples were

⁷ Nor is it the case that if federal agencies entirely reversed their current course and provided all federal benefits to couples in civil unions, that would somehow result in a "flip-flop approach to constitutional interpretation." State Br. 22. Certainly, whether one is denied rights -- in this case, federal rights -- as a result of State law, will determine if that State law is constitutional: if the rights are denied on a discriminatory basis, there is a constitutional violation; if they are not, there is none. But that does not tether the State constitution to the federal -- only the question of constitutionality as to whether there really is an unequal dispensation of rights, as *Lewis* proscribed.

entitled to state benefits." GSE 39. *Lewis*, then, does not foreclose the Plaintiffs' claims, but only observes that, while Section 3 of the Defense of Marriage Act ("DOMA") remained the law of the land, same-sex couples in New Jersey could not receive equal federal benefits, regardless of what the State did. *Lewis*, 188 N.J. at 460 n.25. With the demise of DOMA, of course, that is no longer the case and today, notwithstanding the State's arguments to the contrary, it is the State-created "domestic relations structure" that has caused same-sex couples to be denied federal benefits. GSE 37. Accordingly, because the State has not shown it is likely to prevail on any of its points, it has failed to sustain its burden and the motion for a stay should be denied.

D. Balance of Hardships

The next step in the Court's analysis requires balancing the parties' relative hardships. See *Crowe*, 90 N.J. at 134; *Glassboro v. Gloucester Cnty. Bd. of Chosen Freeholders*, 199 N.J. Super. 91, 100 (App. Div. 1985) (describing this step of deciding a motion for a stay as requiring a "balance of the equities whether conceived as the relative degree of hardship facing the [plaintiffs] if no action were taken or the relative ability of [defendants] to cope with the judicial remedy imposed"), *aff'd*, 100 N.J. 134 (1985). In its motion, the State contends that this balance favors granting a stay because the State would be irreparably harmed. Plaintiffs have already explained why the State's claim of irreparable harm lacks merit. But even if the State were correct that it would be, in some theoretical or

abstract sense, irreparably harmed absent a stay, its analysis of the balance of the hardships is fatally flawed because it completely ignores the other side of the ledger, *i.e.*, the hardships that will be visited upon Plaintiffs should the Court enter the requested stay. The State's failure is particularly striking in light of the trial court's denial of the State's stay application "largely because of the irreparable harm that would be caused to Plaintiffs by the granting of a stay." SR 2. As the trial court found, a proper balancing that actually considers both sides' hardships tips the scale decidedly in Plaintiffs' favor. Accordingly, the State's application for a stay should be denied.

In granting summary judgment to Plaintiffs, the trial court observed that, "[s]ince *Windsor*, the clear trend has been for [federal] agencies to limit the extension of benefits to only those same-sex couples in legally recognized marriages," and thus deny those benefits to civil-unioned couples. GSE 15. In particular, the trial court identified the U.S. Office of Personnel Management, Department of State, Federal Election Commission, Department of Defense, Department of Labor, Internal Revenue Service, and Office of Government Ethics as agencies that restrict federal marital benefits to same-sex couples. See GSE 15-18; SR 10.

These denials of federal benefits to Plaintiffs constitute an ongoing, irreparable, and dire harm. As the Supreme Court recognized, the deprivation of federal marital benefits burdens

same-sex couples and their families "in visible and public ways . . . from the mundane to the profound." *Windsor*, 133 S. Ct. at 2694. For example, because New Jersey will not allow same-sex couples to marry:

- An individual may not claim leave under the Family and Medical Leave Act in the event his civil union partner becomes sick or is injured, see GSE 26; U.S. Dep't of Labor, Wage and Hour Division, Fact Sheet # 28F: Qualifying Reasons for Leave Under the Family and Medical Leave Act, <http://www.dol.gov/whd/regs/compliance/whdfs28f.htm> (last visited Oct. 15, 2013);
- An individual may not sponsor her non-citizen civil union partner to reside with her in the United States, see GSE 15; U.S. Dep't of State, *U.S. Visas for Same-Sex Spouses: FAQs for Post-Defense of Marriage Act* (Aug. 2, 2013), http://travel.state.gov/visa/frvi/frvi_6036.html (last visited Oct. 15, 2013);
- A civil union partner may not receive health insurance coverage as the "spouse" of a federal employee, see GSE 15; U.S. Office of Personnel Mgmt., Benefits Administration Letter No. 13-203: Coverage of Same-Sex Spouses (July 17, 2013), <http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf> (last visited Oct. 15, 2013);
- A civil union partner is ineligible for skilled nursing care spousal coverage under Medicare, see GSE 17; U.S. Dep't of Health & Human Servs., *HHS Announces First Guidance Implementing Supreme Court's Decision on the Defense of Marriage Act* (Aug. 29, 2013), <http://www.hhs.gov/news/press/2013pres/08/20130829a.html> (last visited Oct. 15, 2013);
- If they cannot marry this year, as they could not if a stay is granted, civil union partners will

not be able to file a 2013 joint federal tax return, see GSE 16-17; Internal Revenue Service, Rev. Rul. 2013-17, at 12, <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf> (last visited Oct. 15, 2013); and

- In the event that an individual survives his or her civil union partner, the surviving partner may not receive federal survivorship benefits, including, but not limited to, veterans' benefits, see 10 U.S.C. §§ 1447(7)-(9) & 1448 (survivor benefits); U.S. Dep't of Veterans Affairs, Nat'l Cemetery Admin., *Interments in Department of Veterans Affairs (VA) National Cemeteries*, at 7 (Jan. 2011), www.cem.va.gov/CEM/pdf/IS1_Jan_2011.pdf (last visited Oct. 15, 2013) (burial rights); tax benefits, see GSE 16-17; Rev. Rul. 2013-17, at 12; federal employee annuities, see 8 C.F.R. §§ 843.102, 843.301-843.314; and pension and healthcare benefits under the Earned Retirement Income Security Act of 1974, see GSE 17; U.S. Dep't of Labor, Emp. Benefits Sec. Admin., *Technical Release 2013-04* (Sept. 18, 2013), <http://www.dol.gov/ebsa/newsroom/tr13-04.html> (last visited Oct. 15, 2013).⁸

These federal benefits touch upon a couple's fundamental personal, familial, and financial security, and their denial is irreparable; as the trial court concluded, "it is difficult -- if not impossible -- to see how they can properly be remedied through a recovery of money damages in the future." SR 11. See also

⁸ These are just representative examples, from agencies that have promulgated interpretative regulations and guidelines since *Windsor's* decision. They represent but a fraction of the federal benefits denied civil-unioned couples. There are scores of others that were set forth in the merits briefing below: for example, under the plain language of the governing statutes and regulations, same-sex couples cannot apply for public safety officers' benefits if a qualified civil union partner is disabled or dies in the line of duty, see 28 C.F.R. § 32.3. The resulting hardships are patent.

Laforest v. Former Clean Air Holding Co., 376 F.3d 48, 55 (2d Cir. 2003) (reduction in retirees' benefits plan limiting ability to "purchase life's necessities" is irreparable); *Kildare v. Saenz*, 325 F.3d 1078, 1083 (9th Cir. 2003) ("economic hardship," including loss of "necessities," is irreparable); *Andreiu v. Ashcroft*, 253 F.3d 477, 484 (9th Cir. 2001) (en banc) ("separation from family members" and attendant "potential economic hardship" caused by adverse immigration decision are irreparable); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 657 (6th Cir. 1996) (loss of retirement benefits is irreparable); *Whelan v. Colgan*, 602 F.2d 1060, 1062 (2d Cir. 1979) (loss of family health insurance is irreparable); *Guaman v. Velez*, 421 N.J. Super. at 255 (denial of publicly subsidized healthcare is irreparable). And, of course, should a civil union partner die awaiting the right to marry, his or her surviving partner and any children will forever be denied federal marital protections; marriage cannot be posthumously effected in New Jersey. See N.J.S.A. 37:1-10 ("[N]o marriage ... shall be valid unless the contracting parties shall have obtained a marriage license[.]").

The State contends, however, that these injuries are "speculative," since Congress⁹ or federal agencies might change current law to extend federal marital benefits to civil-unioned couples. But if anything is speculative, it is the State's

⁹ At a time when Congress has had immense, historic trouble coming to an agreement on terms to keep the federal government operating or to pay our nation's debt, it strains credulity to believe that federal legislation granting civil-unioned couples marital benefits will be enacted any time soon.

wishful thinking that Plaintiffs' claims will be cured by federal legislative or regulatory intervention. As the trial court observed, to date neither the U.S. Attorney General nor any federal agency has adopted the State's argument that *Windsor* requires the federal government to provide marital benefits to civil-unioned couples. SR 7.

More fundamentally, though, this Court cannot ignore the undeniable reality that "New Jersey civil union couples are currently suffering constitutional injuries as a result of the status imposed on them by the State and the marital benefits denied to them by federal agencies as a result of that status." SR 13. In light of these ongoing harms, this Court should not delay the trial court's order premised upon Defendant's wish that another governmental organ will cure Plaintiffs' unconstitutional treatment. To the contrary, Plaintiffs' "right to equal protection under the New Jersey Constitution should not be delayed until some undeterminable future time," whether that time comes as a result of legislation, *GSE* 27, or because of higher-level judicial decisionmaking. *GSE* 50.

In sum, the State does not even attempt to disprove that which is in fact certain: "Every day that the State does not allow same-sex couples to marry, plaintiffs are being harmed, in violation of the clear directive of *Lewis*." *GSE* 50. Particularly given that the State, as set forth above, has not demonstrated its own irreparable harm should a stay be denied, the State has fallen well short of carrying its burden to show "clearly and convincingly" that the balance of hardships tips in its favor.

Brown, 424 N.J. Super. at 183 (internal quotation marks omitted). The State's motion should be denied.

E. The Public Interest

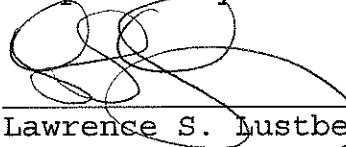
The State offers no new arguments in support of its contention that this Court should grant a stay simply because this case involves constitutional issues that have "social impact." State Br. 4. Instead, the State again seems to argue that if a case involves a constitutional issue or the public interest, that fact automatically outweighs all *Crowe* factors and requires a stay. But the trial court correctly rejected this contention, because "the 'public interest' concern must be analyzed in addition to the 'traditional factors.'" SR 14-15 (L. Div. Oct. 10, 2013) (citing *McNeil*, 176 N.J. at 484 (noting that the standards informing the grant of a stay "must include not only the traditional factors . . . but also . . . considerations of the public interest")). Moreover, the trial court analyzed exactly the same cases that the State cites here and correctly observed that "due to the particular factual circumstances of each case, issuing the stay was in the public interest." SR 15-16. Thus, for example, stays have been granted to further a specific public interest "in protecting the integrity of the bidding process," SR 15 (citing *Penpac, Inc. v. Morris County Mun. Utilities Authority*, 299 N.J. Super. 288, 294 (App. Div. 1997), so that an election could go forward, *McNeil*, 176 N.J. at 484, or to vindicate the public interest in judicial independence, *Brown*, 424 N.J. Super. at 188. Here, by contrast, no such concrete public interest that

would be furthered by a stay is identified. At most, the State contends that there is a public interest in giving "the democratic and judicial process a chance to play out." State Br. 24. But, as the trial court held, "the time for completion of appellate review is completely uncertain," and the prospect that legislation will resolve the issue is even more speculative. SR 13. Thus, it is correct that, "[a]lthough laws may change in the future, such relief for Plaintiffs is uncertain at best. What is certain is that New Jersey civil union couples are currently suffering constitutional injuries as a result of the status imposed on them by the State and the marital benefits denied to them by federal agencies as a result of that status." *Id.* Meanwhile, "granting a stay would simply allow the State to continue to violate the equal protection rights of New Jersey same-sex couples, which can hardly be considered a public interest." *Id.* at 16-17. The State's motion for a stay should be denied.

CONCLUSION

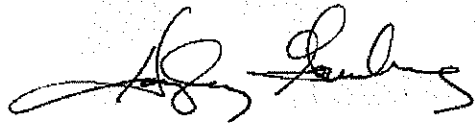
An assessment of purported irreparable harm to the State absent a stay, the State's lack of likelihood of success on appeal, the balance of harms, and the public interest reveals that there is no basis for this Court to postpone the day when same-sex couples can marry and receive the equal rights and benefits to which they are entitled under this Court's decision in *Lewis*. The Court should deny the State's motion for a stay.

Respectfully submitted,



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