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State of New Jersey
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JOHN J. HOFFMAN
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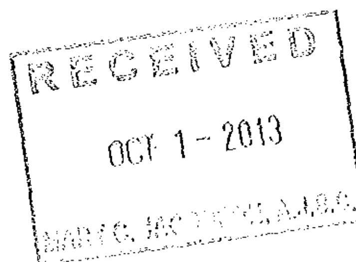
October 1, 2013

Via Hand Delivery

Honorable Mary C. Jacobson, A.J.S.C.
New Criminal Courthouse
Mercer County Superior Court
400 South Warren Street, 4th Floor
Trenton, NJ 08650



Re: Garden State Equality v. Dow
Docket No. MER-L-1729-11

Dear Judge Jacobson:

Enclosed please find two courtesy copies of the Defendants' Notice of Motion for a Stay, brief in support thereof, and Proposed Order in the above-captioned case.

Sincerely yours,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
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October 1, 2013

Via Hand Delivery

Clerk of the Court
Superior Court of New Jersey
Mercer County Civil Courts Building
175 S. Broad Street
Trenton, NJ 08650-0068

Re: Garden State Equality v. Dow
Docket no. MER-1-1729-11

Dear Sir or Madame Clerk:

Attached please find the original and three copies of the Defendants' Notice of Motion for a Stay, brief in support thereof, and Proposed Order. Please stamp one copy "filed" and return it to the messenger. Also enclosed are the original and one copy of the Certificate of Service.

Sincerely yours,

John J. Hoffman
Acting Attorney General of New Jersey

By: Jean P. Reilly
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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 NOTICE OF MOTION TO STAY ORDER PENDING APPEAL

Pursuant to R. 2:9-5, John J. Hoffman, Acting Attorney General of New Jersey, attorney for Defendants, Jean Reilly appearing, hereby moves the Court to stay, pending final resolution of the underlying constitutional issues on appeal, its Order that issued on September 27, 2013, mandating that the State permit same-sex couples to marry beginning October 21, 2013. In support of this motion, the State will rely upon its brief filed herewith.

Respectfully submitted,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: Jean P. Reilly

Jean P. Reilly
Deputy Attorney General

Date: October 1, 2013

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 SUPPORT OF MOTION FOR A STAY PENDING RESOLUTION OF CLAIMS ON APPEAL

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PRELIMINARY STATEMENT

On September 27, 2013, the Court issued an Order mandating that, beginning October 21, 2013, the State issue marriage licenses to same-sex couples. For the reasons articulated below and pursuant to Rule 2:9-5(b), the State makes an emergent motion asking this Court to stay this extraordinary remedy pending final resolution of Plaintiffs' claim on appeal.

In granting summary judgment, this Court acknowledged that the case posed "analytic difficulties," required "grappling" with "sensitive legal and societal issues," and raised "thorny procedural" concerns. Slip op. at 3, 5. The Court further noted that the case involved "difficult issues of federalism" and raised "rather complicated state action concerns." Id. at 5. Because "many of the issues that arise in this case are not only complex, but also unique," the Court had to venture into a "tangled thicket" with "no clear precedential guide." Id. at 6, 32. Finally, the Court recognized that the debate over same-sex marriage "elicits strong responses" and has "generated many close decisions by the courts." Id. at 3. Individually and cumulatively, these considerations militate in favor of the Court staying its Order. When novel constitutional issues with highly significant policy considerations, far-reaching implications, and countervailing principles are involved, a lower tribunal should make every effort to facilitate meaningful appellate review.

Here, the State has already filed a Notice of Appeal with the Appellate Division and has submitted a letter the Clerk of the Supreme Court indicating that the State will seek direct certification. The State therefore requests that the Court stay its Order mandating same-sex marriage until the Supreme Court, the ultimate arbiter of substantial constitutional issues of first impression, renders its decision.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

To avoid needless repetition, the State relies upon the procedural history and counterstatement of facts contained in its August 2, 2013 Brief in Opposition to Summary Judgment.

LEGAL ARGUMENT

THE COURT SHOULD STAY ITS ORDER PENDING RESOLUTION OF THE MERITS ON APPEAL BECAUSE THE GRAVITY OF THE ISSUE MANDATES THAT THE APPELLATE COURTS BE ALLOWED A MEANINGFUL OPPORTUNITY TO REVIEW THE COURT'S RULING, AND THE CROWE FACTORS WEIGH IN FAVOR OF THE STATE.

"The standards informing the grant of a stay when an issue of significant public importance is raised must include not only the traditional [Crowe] factors applicable to disputes between private parties but also, and most paramount, considerations of the public interest." McNeil v. Legislative Apportionment Comm'n, 176 N.J. 484, 484 (2003). Here, the Supreme Court has already determined that the issue of "how to define marriage" has "far-reaching social implications." Lewis v. Harris, 188 N.J. 415, 461.

Indeed, to "alter" the traditional definition of marriage "would render a profound change in the public consciousness of a social institution of ancient origin." Id. at 461-62. This Court has itself acknowledged the "sensitive legal and societal issues" that this case raises. Slip Op. at 3. Appellate courts have granted a stay in cases with far less social impact. See, e.g., Penpac, Inc. v. Morris County Mun. Utils. Auth., 299 N.J. Super. 288, 293 (App. Div. 1997) (noting it had granted stay in waste management case "due to the public interest involved"); Palamar Constr., Inc. v. Pennsauken, 196 N.J. Super. 241, 245 (App. Div. 1983) (noting it had granted stay in contract bidding case "because of the public interest involved").

That constitutional issues are in dispute serves to heighten rather than diminish the necessity for a stay. See McNeill, supra, 176 N.J. at 484 (granting stay in case involving constitutional issue because of "paramount" consideration of "public interest"); Comm. To Recall Robert Menendez from the Office of U.S. Senator v. Wells, 413 N.J. Super. 435, 458 (App. Div. 2010) (noting that, "as we have addressed a substantial constitutional issue, we stay our decision until such time as defendants or Senator Menendez files a notice of appeal, or petition for certification . . . in which instance the stay shall remain in effect until the Supreme Court acts"); Lanco, Inc. v. Director, Div. of Taxation, 379 N.J. Super. 562, 573 n.5 (App. Div. 2005)

(holding in tax case that, "because of the constitutional issue involved, we stay the remand if plaintiff files a timely direct appeal or, to be safe in case the Supreme Court does not consider the issue 'substantial, . . . pending decision on a petition for certification"). In short, the issue of whether to retain the millennia-old definition of marriage is of such social import that this Court should stay its Order until the appellate courts have had a chance to review the novel constitutional in an orderly and meaningful manner.

The Court should also stay its Order because the Crowe factors weigh in favor of the State.

A. In the Absence of a Stay, the State Will Suffer Irreparable Injury.

The State will suffer irreparable injury if the Court does not stay its Order pending ultimate resolution of the merits on appeal. "'Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" Maryland v. King, 133 S. Ct. 1, 4 (2012) (Roberts, C.J., in chambers) quoting New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); see also Coalition for Economic Equality v. Wilson, 122 F.3d 718, 719 (9th Cir. 1997) (noting "it is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined").

Here, both branches of the Legislature, in enacting the Civil Union Act, decided to retain the name marriage for heterosexual couples. In so doing, the Legislature selected an option that the Supreme Court held to be presumptively constitutional and in accord with the millennia-old societal understanding of marriage. See Lewis, supra, 188 N.J. at 423. If the Court single-handedly, without guiding precedent and without input from the Supreme Court, reverses this course and overrides the intent of the democratically elected branch, the State will suffer irreparable harm.

Moreover, this Court's decision tills constitutional ground not previously furrowed. Never before has any court at any level declared that the validity of a State statute under the State Constitution depends on the vicissitudes of a third party actor with whom the State has no nexus and over whom it has no control. Such a ruling has widespread federalism implications that radiate far beyond the context of same-sex marriage. If the constitutionality of a State statute does not inhere in itself, then no statute is safe from federal manipulation, conscious or inadvertent.

B. The Court Should Grant a Stay Because Plaintiffs' Claim Raises Unsettled Questions of Constitutional Law.

The Court should grant the State's motion for a stay because Plaintiffs' interpretation of the meaning of Windsor and their challenge to the Civil Union Act present unsettled questions

of constitutional law. This Court itself acknowledged that it had to "wade into a thorny thicket with no clear precedential guide" and that "many of the issues that arise in this case are not only complex, but also unique." Slip op. at 6, 32. The Court admitted that neither it nor the Plaintiffs could find any case that held that "the manner in which the federal government applies a state statutory scheme" can render the "state's actions unconstitutional." Id. at 37. When novel, complex constitutional issues are at stake, prudence mandates that a lower tribunal stay its Order and await Supreme Court analysis instead of overturning the established system on the basis of its opinion alone.

Constitutional interpretation is a "delicate exercise," De Vesa v. Dorsey, 88 N.J. 420, 429 (1993); and a lower court should be hesitant to "restrict the legitimate operation of representative democracy," see Worthington v. Fauver, 88 N.J. 183, 206 (1982), by mandating a change in law on the basis of that court's constitutional interpretation.[1] Rather, lower tribunals should allow the Supreme Court, the ultimate arbiter of substantial Constitutional issues, to definitively determine the contested issue and allow that court, if it deems necessary, to take the

---

[1] This hesitation is all the more warranted where, as here, the Supreme Court will inevitably decide the underlying constitutional issue. See R. 2:2-1(a)(1) (providing for appeal as of right to the Supreme Court in cases "involving a substantial question arising under" the State Constitution).

drastic step of rejecting on constitutional grounds a statutory structure that bears both legislative and executive approval. Cf. Bowers v. Kendrick, 483 U.S. 1304, 1304 (1987) (Rehnquist, J., in chambers) ("It has been the unvarying practice of this Court . . . [to] decide on the merits all cases in which a single district judge declares an Act of Congress unconstitutional. In virtually all of these cases the court has granted a stay if requested to do so by the Government."). For all of the foregoing reasons, this Court should stay its Order.

C. The Court Should Stay Its Order Pending Resolution of the Merits on Appeal Because the State has a Reasonable Probability of Ultimate Success.

With all due respect for the holding of this Court, the State is able to make the requisite showing of reasonable probability of success on appeal.

1. Plaintiffs will not be able to overcome the highest presumption of constitutional validity that attaches to statutory enactments.

"[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).

Here, while acknowledging this standard and this burden, the Court ruled for Plaintiffs even though they could cite no precedent to support their theory that "the manner in which the federal government applies" a state statutory structure "makes the state's actions unconstitutional." Slip op. at 37. The Court also impermissibly shifted the burden from the Plaintiffs to the State when the Court asserted that the State "could not point to any cases outside the search and seizure context to support its analysis." Id. at 39. On appeal, Plaintiffs will not be able to overcome the highest presumption of constitutional validity that the appellate courts must afford the State's statutory scheme.

2. Plaintiffs' claims will fail on federalism grounds.

Plaintiffs' theory, which the Court adopted, is flawed in several respects. First, and respectfully, the Court erred when it asserted that the State's view that a civil union is the legal equivalent of marriage under State law "is not binding on the federal government." Id. at 47. Windsor repeatedly emphasizes that "regulation of domestic relations is an area that has long

been regarded as a virtually exclusive province of the States. "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's Civil Union Act 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.

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" in the area of domestic relations 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. N.J.S.A. 37:1-31(a).

Second, neither Plaintiffs nor the Court address the State's point that 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)

(applicability of federal tax statute governing distilled spirits "is established by the essential nature" of beverage, "not by its name"). 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.

Third, it is incorrect that "[b]y the terms of the Civil Union Act, same-sex partners are not each other's spouses." Slip op. at 25. The Act expressly provides that "spouse" and "spousal relationship" "shall include a civil union." See N.J.S.A. 37:1-33. Therefore, the attempt to distinguish Cozen O'Connor on the basis of the word spouse, see slip op. at 47 n.10, is misplaced. See Cozen O'Connor, P.C. v. Tobits, 2013 U.S. Dist. LEXIS 105507, *20 (E.D. Pa. July 29, 2013) (ruling in favor of surviving civil union partner in ERISA dispute and noting that "[p]ost-Windsor, where a state recognizes a party as a surviving spouse, the federal government must do the same").

Fourth, the last sentence of the Windsor opinion cannot mean what the Court concludes. 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 would also be "discourage[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.

3. Plaintiffs' equal protection claims fail because the State's action is not legally cognizable, and the Court lacks power to use the State Constitution as the basis for vindicating the right of a State citizen to federal benefits.

First, the State's action is not legally cognizable. If the federal government ultimately does not extend to 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. Plaintiffs do not point to a single case, and the Court could not find any, see slip op. at 37, wherein the federal government's constitutional

default has transformed an otherwise legitimate state position into impermissible state action that a court can redress. The whole purpose of a state action requirement is to avoid imposition of responsibility on a state for conduct it cannot control.

Second, the Court misperceived the scope and extent of the State's jurisdictional argument when the Court said that the State contends that "this Court has no jurisdiction to require federal officials to act in conformity with the New Jersey Constitution." Id. at 38. Rather, the core of the State's jurisdictional argument is that the Court lacks power to use the State Constitution as a basis for vindicating the right of State citizens to federal benefits that federal officials, acting pursuant to federal law, refuse to provide.

The equal protection right that the Supreme Court identified in Lewis mandates that the Legislature "remedy the equal protection disparities that currently exist *in our statutory scheme*." Lewis v. Harris, 188 N.J. 415, 459 (2006) (emphasis added); see also id. at 454-55 (noting that Vermont Supreme Court "held that same-sex couples are entitled to 'obtain the same benefits and protections afforded by *Vermont law* to married opposite-sex couples'") (quoting Baker v. Vermont, 744 A.2d 864, 870 (Vt. 1999) (emphasis added)). This limitation of both the right and the remedy was neither an accident of pleading nor a

result of judicial inadvertence. Rather, the limitation was borne of constitutional necessity.

The Framers established "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." Printz v. United States, 521 U.S. 898, 920 (1997). In the constitutional compact between a State and its citizens, the mutual rights of the latter and the obligations of the former extend no further than the provision of benefits and privileges under State statutory law. This constraint recognizes the limits of the federal system wherein each sovereign acts within its "proper sphere of authority." See id. at 928. The division of "authority between federal and state governments" is "for the protection of individuals." New York v. United States, 505 U.S. 144, 181 (1992). By creating distinct spheres within which each sovereign operates, the federal system contemplates that each sovereign will "be accountable to its own citizens." Printz, supra, 521 U.S. at 920.

Here, however, Plaintiffs attempt to use this Court as a fulcrum and the pronouncements of federal agencies as a lever to overturn a State legislative enactment that, properly confined to its own sphere, provides same-sex couples with all State marriage benefits. See Tr. at 11:7-9 (Plaintiffs conceding for purpose of summary judgment motion that under New Jersey law civil union is

"equivalent" to marriage). DSa6. Under Plaintiffs' desired scenario, and in contravention of the federalist principles upon which our nation was based, no one would be accountable to the citizens of this State for the decision to alter fundamentally a social institution of ancient origin. Not the State Legislature, that was overridden, and not the federal bureaucrats that, in contravention of federal principles of equal protection, refused to extend federal benefits.

Further, it is axiomatic that Congress may not "commandeer the legislative processes of the States," New York, supra, 505 U.S. at 161, and federal courts must leave state courts "free and unfettered" in interpreting State constitutions, see Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940). Nevertheless, Plaintiffs attempt to use the mere policy pronouncements of a smattering of federal agencies to coerce the State into permitting same-sex marriage. Plaintiff's position is "fundamentally incompatible with our constitutional system of dual sovereignty." See Printz, supra, 521 U.S. at 935; see also Windsor, supra, 570 U.S. ___ (slip op. at 21-22) (federal government may not "put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws"). Unable to point to any precedent that would allow such a remarkable result, Plaintiffs seek refuge in the equality-mandate of Lewis.

While principles of federalism and the Supremacy Clause of the federal Constitution provide horizontal restraints on the operation of the State Constitution, Article III, section 1 of the State Constitution serves as a vertical constraint. The Legislature may not, consistent with separation of power principles, be held constitutionally accountable for the extra-territorial ramifications of its enactments. Notably, even though the Lewis Court was aware that Massachusetts had enacted same-sex marriage, see Lewis, supra, 188 N.J. at 454, the Court did not concern itself with whether New Jerseyans who were in a civil union and who moved to or travelled though Massachusetts would be disadvantaged with respect to divorce, child custody, birth certificates for adopted children, hospital privileges, etc. Because the State Constitution only mandates the provision of equal State benefits to all State citizens, the Lewis Court took no account of the extra-jurisdictional effects of the two options the Court presented to the Legislature.

For this Court to hold otherwise on the basis of the vicissitudes of third-party sovereigns over whom the State has no control would be to usurp the legislative prerogative to set policy. Neither in their briefs nor at oral argument could the Plaintiffs point to a single case that stood for the proposition that a State court could, on the basis of extra-territorial

consequences, hold unconstitutional a State statutory structure that was otherwise constitutional.

To the contrary, a judicial remedy must hew closely to and must not exceed the scope of the constitutional right. "The courts are not the guardians of the rights of the people of the State, unless those rights are secured by some constitutional provision which comes within the judicial cognizance." See Thomas Cooley, A Treatise on the Constitutional Limitations 168 (1868). The New Jersey Supreme Court recognized this principle in the search and seizure cases that the State cited in its initial brief. See Db33-34. In those cases, the federal action, while permissible under federal law, nevertheless violated the State's constitutional sensibilities regarding the privacy rights of citizens. However, because State officials had not violated the accused's rights under State law, the Court, in case after case, withheld the remedy of suppression. See, e.g., State v. Green, 346 N.J. Super. 87, 101 (App. Div. 2001) (holding that when 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. Mollica, 114 N.J. 329, 347 (1989) ("Stated simply, state constitutions do not control federal action."); 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"). In short, "[r]ecognition 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").

No precedent supports the blanket statement that "when the State is involved, there is state action." Slip op. at 39. Here, the federal agencies that are denying benefits to same-sex couples are not agents of the State and are not acting under color of State law. To the contrary, they are acting in disregard of both State law, which deems civil union spouses as entitled to all the rights and benefits of marriage, and federal principles of equal protection.

Plaintiffs, in an attempt to distinguish the holdings of the search and seizure cases, speak of the civil union label as the "state action" that the Court is allowed to remedy. See Tr. at 61:22-25. DSa31. The relevant action for State constitutional purposes, however, is whether the Legislature has granted committed same-sex couples all of the "statutory benefits and privileges

available to opposite-sex couples through New Jersey's civil marriage laws." Lewis, supra, 188 N.J. at 427. 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 was not free either to ignore the jurisdictional limitations of the State Constitution or to rewrite a constituent part of the Lewis decision. This Court did not enforce Lewis, but rather expanded it impermissibly; this Court did not enforce the State's equal protection guarantee, but rather expanded it impermissibly. The collateral effect of the Legislature's action on the benefits that third-party sovereigns offer is irrelevant for purposes of determining the constitutionality of the State's retention of the name marriage for heterosexual couples. Neither Plaintiffs nor the Court could point to a single case that stands for the contrary proposition, and Plaintiffs thus failed to meet their burden of proof.

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. 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 State's reservation of the name marriage for heterosexual couples 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 Congress clarifies that civil union spouses are entitled to federal marriage benefits 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.").

D. The Court Should Grant a Stay Because the Equities Weigh in Favor of the State.

Both the public interest and a balancing of the equities favor granting a stay. In issuing its decision, the Court rejected the notion that pending legislation should be allowed to defer judicial review indefinitely. Here, however, in the context of a

stay motion, the calculus is different. The State is not requesting an indefinite postponement, but rather only a stay pending ultimate resolution of the merits on appeal. In Lewis, the Supreme Court, as this Court noted, see slip op. at 49, gave the Legislature 180 days to act. This Court should afford Congress, if not six months, at least until the Supreme Court renders its decision. The public interest demands that the Court at least give the democratic process a chance to play out rather than insisting that, in three weeks, the State take drastic and, some would argue, irrevocable action that either an act of Congress or a decision of the Supreme Court later proves to be unnecessary. This is especially so where multiple, bipartisan bills that would render Plaintiffs' claims moot are pending in both chambers of Congress. The State will suffer irreparable harm if a lower tribunal precipitously reverses the legislatively chosen course.

CONCLUSION

For the foregoing reasons, the Court should stay its Order pending definitive resolution of Plaintiffs' claim on appeal.

Respectfully submitted,

John J. Hoffman
Acting Attorney General of New Jersey

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

Dated: October 1, 2013

<table>
<tr>
<td>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.</td>
<td>SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY
DOCKET NO. MER-L-1729-11

<u>Civil Action</u>

[PROPOSED] ORDER GRANTING STAY PENDING APPEAL</td>
</tr>
</table>

Upon consideration of the Motion by Defendant State of New Jersey to stay the Court's decision pending final resolution on appeal of the underlying constitutional issues, and it appearing to the Court that such Order is necessary and appropriate due to the public importance of the issue, unsettled nature of the matter, and potential for irreparable harm, and for good cause shown,

IT IS on this _____ day of ___________________________, 2013,

ORDERED as follows:

The State's Motion to Stay the Court's September 27, 2013 Merits Order is **GRANTED**. The Merits Order is hereby **STAYED** pending resolution of the underlying constitutional issues on appeal.

____

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

Dated: ____________, 2013

This Motion ___ was ___ was not opposed.

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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 CERTIFICATION OF SERVICE

RUTH M. WELLS, pursuant to R. 1:4-4(b) certifies:

1. I am a legal secretary in the Division of Law, Department of Law and Public Safety, State of New Jersey.

2. On October 1, 2013, at the direction of Jean Reilly, Deputy Attorney General, I caused to be delivered by Hand an original and five copies of the State's Notice of Emergent Motion to Stay Pending Appeal, Defendants' Brief in Support of Emergent Motion for a Stay Pending Resolution of Claims on Appeal, Proposed Order and my Certification of Service to:

Clerk of the Court
Superior Court of New Jersey
Mercer County Civil Courts Building
175 S. Broad Street
Trenton, NJ 08625-0970

3. On October 1, 2013, at the direction of Jean Reilly, Deputy Attorney General, I caused to be delivered by Hand two copies of the State's Notice of Emergent Motion to Stay Pending Appeal, Defendants' Brief in Support of Emergent Motion for a Stay Pending Resolution of Claims on Appeal, Proposed Order and my Certification of Service to:

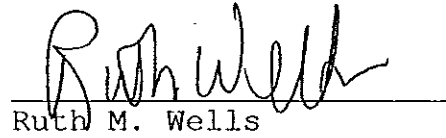
Honorable Mary C. Jacobson, A.J.S.C.
New Criminal Courthouse
Mercer County Superior Court
400 South Warren Street
4th Floor
Trenton, NJ 08650

4. On October 1, 2013, at the direction of Jean Reilly, Deputy Attorney General, I caused to be delivered by Email and Overnight Mail two copies of the State's Notice of Emergent Motion to Stay Pending Appeal, Defendants' Brief in Support of Emergent Motion for a Stay Pending Resolution of Claims on Appeal, Proposed Order and my Certification of Service to:

Lawrence S. Lustberg, Esq.
Gibbons P.C.
One Gateway Center
Newark, NJ 07102-5310

Hayley J. Gorenberg, Esq.
Lambda Legal
120 Wall Street
19th Floor
New York, NY 10005

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

By: 
Ruth M. Wells

Dated: October 1, 2013