

SUPREME COURT OF THE STATE OF NEW JERSEY

MARK LEWIS and DENNIS WINSLOW;
SAUNDRA HEATH and CLARITA ALICIA
TOBY; CRAIG HUTCHISON and CHRIS
LODEWYKS; MAUREEN KILIAN and
CINDY MENEHIN; SARAH and SUYIN
LAEL; MARILYN MANEELY and DIANE
MARINI; and KAREN and MARCYE
NICHOLSON-MCFADDEN,

Plaintiffs-Appellants,
v.

GWENDOLYN L. HARRIS, in her
official capacity as Commissioner
of the New Jersey Department of
Human Services; CLIFTON R. LACY,
in his official capacity as the
Commissioner of the New Jersey
Department of Health and Senior
Services; and JOSEPH KOMOSINSKI,
in his official capacity as
Acting State Registrar of Vital
Statistics of the New Jersey
State Department of Health and
Senior Services,

Defendants-Respondents.

Docket No. 58,389

Appellate Division Docket No.
A-2244-03T5

Sat Below:
Hon. Skillman, P.J.A.D.,
Collester, J.A.D., and
Parrillo, J.A.D.

**BRIEF IN SUPPORT OF PLAINTIFFS'
MOTION IN AID OF LITIGANTS' RIGHTS**

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PRELIMINARY STATEMENT

Plaintiffs are six committed same-sex couples, some raising children together, who were held by this Court in *Lewis v. Harris*, 188 N.J. 415 (2006), to have been denied their constitutional entitlement to the “full rights and benefits enjoyed by heterosexual married couples.”¹ *Id.* at 463. They return to this Court to enforce, through this Motion in Aid of Litigants’ Rights, the Court’s unfulfilled mandate of more than three years ago, which directed the State to provide to same-sex couples the full rights, benefits, and obligations of marriage, on terms equal to those afforded different-sex couples. Earlier in their case, the Court held “that denying to committed same-sex couples the financial and social benefits and privileges given to their married heterosexual counterparts” violates the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution of 1947. *Id.* at 463. The Court consequently directed the Legislature to provide to same-sex couples the full rights and benefits of marriage within 180 days. *Id.* at 460, 463.

Charged with curing that identified inequality, the Legislature devised civil unions. More than three years later, the Plaintiffs and other committed lesbian and gay partners in

¹ The seventh couple, Diane Marini and Marilyn Maneely, cannot join the motion, because, as the Court is aware, their fourteen-year committed relationship ended when cancer claimed Ms. Maneely’s life in late 2005.

New Jersey live in second-class circumstances, relegated to the demonstrably inferior, state-created status of civil unions. Because of the novel legal construct to which they have been consigned, same-sex couples face a persistent and widespread lack of recognition of their rights in commercial and civic dealings. They are blocked from seeing their loved ones during medical emergencies. They find it harder to get medical coverage and care than do their married counterparts, as their state-imposed status has encouraged employers to exclude them from coverage. Their separate status is a badge that reveals their sexual orientation whether they want to or not, in situations ranging from job interviews to jury service, invading their privacy and exposing them to additional discrimination. They are vulnerable when traveling outside the borders of New Jersey, because the designation of "civil union" is an anomaly that does not currently exist in any other state. Finally, the children of same-sex couples are unfairly and significantly prejudiced by the unequal and inferior legal and social status that experience has proven to civil unions to be.

The New Jersey Legislature, in creating, maintaining, and refusing, even after further legislative consideration, to eliminate this unequal status, has failed to fulfill the mandate of *Lewis*. In enacting the Civil Union Act, *N.J.S.A. 37:1-28, et seq.* ("the Act"), the Legislature – concerned that an alternate

statutory structure might be ineluctably unequal, and thus fail to satisfy the *Lewis* mandate – also created the Civil Union Review Commission (“CURC” or “Commission”) specifically in order to assess compliance with *Lewis*, N.J.S.A. 37:1-36. But, as set forth in detail below, the Legislature has ignored the findings of the CURC, demonstrating that the “separate categorization” of civil unions has failed to deliver the mandate of equality to same-sex couples in the State. N.J. Civ. Union Rev. Comm., *Final Report of the New Jersey Civil Union Review Commission, The Legal, Medical, Economic, & Social Consequences of New Jersey’s Civil Union Law*, 1 (Dec. 10, 2008) [hereinafter *Final Report*], Ex. 14.² The CURC reached this conclusion after compiling and considering an extensive evidentiary record that identified numerous ways in which same-sex couples in civil unions and their children face discrimination, stigma, and unequal treatment with respect to healthcare, employment benefits, family law protections, and other legal and civic functions within the state. The Commission therefore unanimously recommended to the Legislature and the Governor that the law be expeditiously amended “to allow same-sex couples to marry.” *Id.* at 3. The Legislature has disregarded the Commission’s unanimous and urgent exhortation, in spite of the clear record

² Available at <http://www.state.nj.us/lps/dcr/downloads/CURC-Final-Report-.pdf>.

of inequality, reinforced through extensive testimony and written submissions in a hearing before the Senate Judiciary Committee, see N.J. S. Jud. Comm. Hr'g (Dec. 7, 2009) (transcript attached as Ex. 27). In short, the Legislature has failed to comply with the Court's mandate in *Lewis*.

Earlier, in deference to the Legislature, and "[b]ecause the State has no experience with a civil union construct," this Court did not "presume that a separate statutory scheme, which uses a title other than marriage, contravenes equal protection principles." *Lewis*, 188 N.J. at 423. However, in making clear that equal protection requires that, "in distinguishing between two classes of people," legislation must "bear a substantial relationship to a legitimate governmental purpose," *id.* at 443, the Court implicitly recognized that future experience could demonstrate "that identical schemes called by different names would create a distinction that would offend Article I, Paragraph 1." *Id.* at 459. Although the Court in 2006 would not speculate "that a difference in name alone is of constitutional magnitude," *id.*, the Court is now confronted with a record that makes undeniably clear that the distinction between civil unions and marriages in New Jersey is more than just nomenclature: rather, it amounts to an "unequal dispensation of benefits and privileges to one of two similarly situated classes of people," *id.* at 451, in violation of the New Jersey Constitution.

Because the Legislature has ignored the findings and refused to follow the recommendations of the very Commission it created in order to assure compliance with *Lewis*, it is now plain that enforcement of the constitutional mandate can only be effected by this Court. Plaintiffs therefore respectfully request that this Court exercise its authority under *R. 1:10-3*, and in accordance with its constitutional responsibility, act in aid of litigants' rights, in order to assure the State's compliance with its directive. See *Abbott v. Burke*, 149 N.J. 145, 202 (1997) ("*Abbott IV*") (granting motion in aid of litigant's rights to correct inadequate legislative response to constitutional decision of Court).

In light of the record developed at the Legislature's insistence in order to measure whether the Civil Union Act has achieved compliance with *Lewis*, the only way true meaning can be given to the equal protection guarantee pronounced in this Court's landmark *Lewis* decision is for the Court to take action. Experience has shown that the Act, although purporting to extend rights and benefits equivalent to those of marriage, has in reality relegated same-sex couples to an inferior legal and social status that begets still further inequality. The Court must require the State to finally and fully adhere to this Court's judgment mandating equality for same-sex couples and their children. The record makes clear that there is but one

way to achieve the equality required by *Lewis*: same-sex couples must be permitted to marry.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs are six lesbian and gay New Jersey couples in long-term committed relationships; many are parents raising their children together. *Lewis*, 188 N.J. at 423-26. On June 26, 2002, Plaintiffs filed a complaint seeking a declaration that the State's denial to them of marriage licenses violated the due process and equal protection guarantees of Article I, Paragraph 1 of the New Jersey Constitution, which assures liberty and equality to all people. *Id.* at 427. Plaintiffs also sought an injunction ordering the State to issue such licenses. *Id.*

After the parties filed cross-motions for summary judgment, the trial court, in an order entered November 20, 2003, granted summary judgment to the State. *Id.* at 428. On appeal, the Appellate Division, with one judge concurring and another dissenting, issued an opinion affirming the trial court's judgment. *Lewis v. Harris*, 378 N.J. Super. 168 (App. Div. 2005). Plaintiffs appealed as of right to this Court. *Lewis*, 188 N.J. at 431.

On October 25, 2006, the Court affirmed the Appellate Division's ruling with respect to substantive due process, but reversed its ruling as to equal protection. *Id.* at 423, 457.

The Court concluded that same-sex couples in New Jersey faced regular “social indignities and economic difficulties . . . due to the inferior legal standing of their relationships compared to that of married couples[.]” *Id.* at 426. The Court noted, for example, that same-sex couples in New Jersey faced higher health care premiums, denial of health care coverage, and the refusal of hospitals and medical care providers to recognize them as family members when confronting health care crises. *Id.* Recognizing that the Court has the ultimate “responsibility of ensuring that every New Jersey citizen,” including “the disfavored and the disadvantaged,” receives the full protection of the Constitution, the Court concluded that the State had “failed to show a public need for [its] disparate treatment” of same-sex couples in New Jersey. *Id.* at 457. In the absence of a legitimate governmental purpose, the Court held that “denying to committed same-sex couples the financial and social benefits and privileges given to their married heterosexual counterparts,” violates the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution. *Id.*

To remedy this constitutional violation, the Court directed the State to “either amend the marriage statutes to include same-sex couples or enact a parallel statutory structure by another name, in which same-sex couples would not only enjoy the rights and benefits, but also bear the burdens and obligations of civil

marriage.” *Id.* at 463. In recognition that same-sex couples in New Jersey should not have to wait indefinitely for the equality to which they are constitutionally entitled, the Court instructed the State to comply with the constitutional mandate within 180 days of its decision. *Id.*

As set forth above, the Court made clear that a scheme other than marriage would only comply with the constitutional mandate of *Lewis* “so long as” the rights and benefits of marriage were “made equally available to same-sex couples” in the State. *Id.* at 423. Thus, although the Court held that the Legislature “should be given a chance to address the issue under the constitutional mandate set forth in [its] opinion,” it implicitly recognized that purportedly “identical schemes called by different names” could be shown to create “a distinction that would offend Article I, Paragraph 1” of the New Jersey Constitution. *Id.* at 459.

In response to *Lewis*, on December 12, 2006, the Legislature enacted the Civil Union Act, L. 2006, c. 103 (effective February 19, 2007), stating its intent “to comply with the constitutional mandate set forth” in *Lewis*, N.J.S.A. 37:1-28(e), and purporting to provide to same-sex couples “all the rights and benefits that married heterosexual couples enjoy,” N.J.S.A. 37:1-28(d). In doing so, the Legislature provided no explanation for selecting civil unions over marriage. *Cf. Lewis*, 188 N.J. at 459-60 (“If

the Legislature creates a separate statutory structure for same-sex couples by a name other than marriage, it probably will state its purpose and reasons[.]").³

The Act directs that "[c]ivil union couples shall have all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage." *N.J.S.A.* 37:1-31(a). The Act also contains a "catch-all" provision, directing that whenever reference is made to a variety of terms such as "spouse," "family," "widow," etc., "the same shall include a civil union." *N.J.S.A.* 37:1-33. The Legislature further provided a "list of legal benefits, protections and responsibilities of spouses [that] shall apply in like manner to civil union couples." *N.J.S.A.* 37:1-32.⁴

³ Although the Legislature opted to create an alternate statutory scheme rather than to enact marriage equality, the statement of intent accompanying the Act confusingly creates the impression that the Legislature had chosen both options. See *N.J.S.A.* 37:1-28(f) ("The Legislature has chosen to establish civil unions by amending the current marriage statute to include same-sex couples.").

⁴ Notably, many of the specific statutory provisions identified by the Court in *Lewis* as being exclusionary of same-sex couples still contain no reference to civil unions. Compare 188 *N.J.* at 449 with *N.J.S.A.* 46:3-17.2 (providing for ownership as tenants by the entirety); *N.J.S.A.* 34:11-4.5 (providing for back wages owed to a deceased spouse); *N.J.S.A.* 54A:3-3(a) (providing for tax deductions for spousal medical expenses); and *N.J.S.A.* 46:15-10(j) (providing for an exemption from the realty transfer fee for deeds between spouses). Though *N.J.S.A.* 35:1-33 contains a "catch-all" provision, those reading these specific statutory provisions may draw the incorrect conclusion that the delineated benefits do not apply to those in civil unions.

But the Legislature – just like this Court in *Lewis*, 188 N.J. at 459 – implicitly recognized that creating a novel, separate statutory scheme could fail to meet the Court’s mandate and the requirements of the Constitution. Indeed, by contemporaneously establishing the New Jersey Civil Union Review Commission and charging that entity with organizing “as soon as possible,” N.J.S.A. 37:1-36(d), to evaluate “the effectiveness of the act” and “determine whether additional protections are needed” in order to comply with the constitutional mandate of *Lewis*, the Legislature expressly contemplated that, even if it took infinite care to ensure exacting parity in the creation of the Civil Union Act, a separate scheme could still fall short of the equality mandated by *Lewis*. N.J.S.A. 37:1-36(c)(1) & (3). In particular, the Legislature directed the Commission to evaluate “the effect” of providing same-sex couples “civil unions rather than marriage.” N.J.S.A. 37:1-36(c)(5) & (6). Additionally, in order to ensure compliance with *Lewis*’s mandate, the Legislature required the Commission “to report its findings and recommendations” to the Legislature and the Governor on a semi-annual basis. N.J.S.A. 37:1-36(g). Thus, by its own provisions, enacted in direct response to *Lewis*, the Act recognized the constitutional need to assess whether its protections would be adequate, and in particular whether it would have “the effect” of providing equality.

In February 2008, the CURC issued an interim report setting forth its preliminary finding that the Civil Union Act was failing to comply with the constitutional requirements of *Lewis*. The Commission cited developing but already powerful evidence that the Civil Union Act was not guaranteeing to same-sex couples the full rights and benefits enjoyed by heterosexual married couples in the State. N.J. Civ. Union Rev. Comm., *First Interim Report of the New Jersey Civil Union Review Commission* (Feb. 19, 2008) [hereinafter *Interim Report*], Ex. 13.⁵ For example, the Commission detailed significant disparities in legal protections and benefits afforded to couples in civil unions in New Jersey with respect to employment and health care, and cited evidence that same-sex couples and their children face the stigma of “second-class legal status.” *Id.* at 4, 9-13. Although these interim findings were reported to the Legislature so that it could take the action required by *Lewis*, and in spite of this Court’s mandate to the Legislature to provide equal treatment to same-sex couples within 180 days of that decision, the Legislature failed to act to remedy these problems after the interim report issued.

Six months later, and in the absence of any remedial action from the Legislature, the CURC issued its final report. After

⁵ Available at <http://www.state.nj.us/lps/dcr/downloads/1st-InterimReport-CURC.pdf>.

"eighteen public meetings, 26 hours of oral testimony and hundreds of pages of written submission from more than 150 witnesses," the Commission unanimously concluded "that the separate categorization established by the Civil Union Act invites and encourages unequal treatment of same-sex couples and their children" and "demonstrates that the provisioning of the rights of marriage through the separate status of civil unions perpetuates the unequal treatment of committed same-sex couples." *Final Report* at 1-2. The Commission concluded in no uncertain terms that the legislative response to *Lewis* had failed to comply with the constitutional mandate set forth in that opinion. In light of "the overwhelming evidence presented to the Commission," it unanimously recommended to the Legislature and the Governor that the law be amended "to allow same-sex couples to marry" and that it be done "expeditiously because any delay in marriage equality will harm all the people of New Jersey." *Id.* at 3.

In spite of these findings and the call for urgent action by the Commission, in the year that followed issuance of the final report, the Legislature failed to take the action required by *Lewis*. A bill providing for marriage equality cleared the Senate Judiciary Committee, but the full Senate refused to pass the

measure.⁶ This refusal occurred even though the Legislature heard firsthand examples of the inequality experienced by same-sex couples under the Act when considering the proposed legislation.

For example, then-Public Advocate Ronald Chen testified that the separate statutory structure of civil unions has “flaws that are so fundamental that they cannot be remedied by a partial fix,” N.J. S. Jud. Comm. Hr’g (Dec. 7, 2009), Ex. 27 at 47, that “treating the institution of civil unions differently than marriage is what is causing the problem,” *id.*, and further that “[t]he mental health and well-being of thousands of New Jersey children who are raised by gay and lesbian parents are being harmed,” *id.* at 42. Allen Etish, then-President of the New Jersey State Bar Association, added that “[t]he passage of time has unequivocally shown” that the Civil Union Act is “a convoluted, burdensome, and flawed statutory scheme” that “does not gran[t] the same legal rights as [are granted to] married heterosexual couples and families” in matters of family law,

⁶ Senate Bill 1967, the Freedom of Religion and Equality in Civil Marriage Act, was approved by the Senate Judiciary Committee by a vote of 7 to 6 on December 7, 2009. See Mary Fuchs, *N.J. Senate Judiciary Committee Approves Gay Marriage Bill*, Star-Ledger, Dec. 7, 2009. It was defeated by a vote of 20 to 14 in the Senate. See *N.J. Senate Rejects Bill Legalizing Gay Marriage*, Star-Ledger, Jan. 7, 2010. An identical bill introduced in the Assembly, Assembly Bill No. 4384, was understood to have stronger support in that chamber. See Daniel Kocieniewski, *New Jersey Marriage Vote Cancelled*, N.Y. Times, Dec. 9, 2009. Current New Jersey Governor Chris Christie had made public his opposition to allowing same-sex couples to marry. See *N.J. Gay Marriage Debate Heats Up Following Christie Governor’s Race Victory*, Star-Ledger (Nov. 4, 2009).

estate planning, and labor and unemployment issues. *Id.* at 64-65.

The Legislature also received evidence from other jurisdictions confirming that more time with civil unions will not cure the problem. The flaws of a civil union scheme are not attributable merely to the novelty and unfamiliarity of the civil union designation. See N.J. S. Jud. Comm. Hr'g (Dec. 7, 2009) (Test. of Diane Snelling, Vt. State Sen.), Ex. 27 at 49 (stating that Vermont's civil union law "did not provide full equality, and left many Vermont same-sex couples and their children as second-class citizens"); see also Sept. 26, 2007 CURC Hr'g at 33-36 (Test. of Beth Robinson), Ex. 15 (introducing written statement)⁷ and Ltr. of Beth Robinson (Sept. 26, 2007), Ex. 25 at 1 (reporting that "[i]t's been over seven years since Vermont's civil union law took effect" yet "gay and lesbian couples in Vermont are still denied a host of critical legal protections that our laws provide to heterosexual, married couples") (read into CURC hearing record). The Commission found that

Even if, given enough time, civil unions are understood to provide rights and responsibilities equivalent to those provided in marriage, they send a message to the public: same-sex couples are not equal to opposite sex married couples in the eyes of

⁷ Throughout this Brief in Support of Plaintiffs' Motion, citations to testimony given at various hearings before the Civil Union Review Commission, transcripts of which may be found at www.state.nj.us/lps/dcr/curc.html and in the Appendix, refer to the page within the exhibit rather than the transcript page.

the law, that they are “not good enough” to warrant true equality. . . . [C]ivil unions will not be recognized by the general public as the equivalent of marriage in New Jersey with the passage of time.

[*Final Report* at 2].

Thus, “provisioning . . . rights of marriage through the separate status of civil unions perpetuates the unequal treatment of committed same-sex couples” and their children. *Id.*

Indeed, several members of the Legislature candidly acknowledged that the Civil Union Act “has not proven to work,” N.J. S. Jud. Comm. Hr’g (Dec. 7, 2009) (statement of Sen. Christopher “Kip” Bateman), Ex. 27 at 202, and has had “unintended consequences,” *id.* at 199 (statement of Sen. Gerald Cardinale) (acknowledging that “civil union is not an easily understood term”). Others noted that by virtue of the “separate and, in major . . . areas, very unequal” status of civil unions, *id.* at 72 (statement of Sen. Nia Gill), “same sex couples are facing patterns of discrimination,” *id.* at 4 (statement of Sen. Loretta Weinberg); see also N.J. S. Floor Debate, S 1967 (Jan. 7, 2010), (transcript at 26, attached as Ex. 28) (statement of Sen. Barbara Buono) (“Three years later, what is clear to me is that civil unions fail to provide the equal protection that our Constitution mandates”). Even those legislators who did not support the extension of marriage to same-sex couples recognized the need for further remedial action. See *id.* at 18 (statement

of Sen. Gerald Cardinale) (acknowledging that “the problems that were presented to us by folks who are in a civil union” requires legislative fix); see also Mary Fuchs, *N.J. Senate Republicans Opposing Gay Marriage Suggest Strengthening Civil Union Law*, Star Ledger (Dec. 18, 2009) (describing acknowledgements by state senators, including Minority Leader Tom Kean (R-Dist. 21), that “New Jersey’s civil union law is not always understood or followed”).⁸

In the face of this evidence, the Legislature chose to do nothing, consigning Plaintiffs, as well as thousands of lesbians and gay men, and their children, to a second-class status that perpetuates discrimination. See *Lewis*, 188 N.J. at 453 (noting existence of more than 16,000 same-sex couples in committed relationships in New Jersey). Plaintiffs seek relief from this Court because, despite the Court’s mandate in *Lewis*, they continue to suffer from inequality.

For example, 60-year-old Plaintiff Chris Lodewyks, who has been in a committed relationship with his partner Craig Hutchison for 38 years, found that his civil union is often not even recognized. Aff. of Chris Lodewyks ¶¶4, 7-8, Ex. 6. This was true from the moment the couple sought to enter a civil union and has persisted to this day. When Mr. Lodewyks went to the

⁸ Available at http://www.nj.com/news/index.ssf/2009/12/republicans_renew_effort_to_op.html

couple's local city hall, the clerk there was unfamiliar with what a civil union was or how to issue a license, and required Mr. Lodewyks and Mr. Hutchison to advocate for themselves even to enter a civil union. *Id.* ¶4. What should have been "a special day" for the couple was marred by confusion and frustration. *Id.* ¶4. Mr. Lodewyks feels that civil unions so lack the respect and status reserved for marriage that the term civil union actually "devalues [their] relationship." *Id.* ¶8.

Likewise, Marcye Nicholson-McFadden and Karen Nicholson-McFadden, who are the owners and managers of an executive search business and have been in a committed relationship for 20 years, experience similar indignities when having to explain their civil union status to insurance companies, accountants, doctors, and school officials. Aff. of Karen Nicholson-McFadden ¶¶ 5, 7-9, Ex. 11. Like Mr. Lodewyks and Mr. Hutchison, the couple does not celebrate their civil union anniversary. Aff. of Karen Nicholson-McFadden ¶3, Aff. of Chris Lodewyks ¶4. As Marcye explains, even after the couple entered a civil union, they continue to face barriers to equal treatment and persistent stress and frustration as they endeavor to teach their children that their "relationship is just as valuable as a married relationship, that [their] family is just as valuable as others." Aff. of Marcye Nicholson-McFadden ¶11.

Plaintiffs Cindy Meneghin and Maureen Kilian, who have been in a committed relationship for 35 years, have experienced similar struggles for recognition of their civil union and long-term, committed relationship. Ms. Meneghin's experience demonstrates in particular that the Civil Union Act has failed to remedy the vulnerability of same-sex couples when confronted with medical crises: Ms. Meneghin unfortunately experienced two serious medical situations involving trips to the emergency room, one before and one after her civil union, and found that in both situations the medical staff failed to recognize the status and rights of her partner, causing great and unnecessary anxiety in exacerbation of her underlying medical condition. Aff. of Cindy Meneghin ¶¶7-8, Ex. 8. For the couple, the struggle to explain their relationship at doctors' offices, hospitals, schools, and elsewhere is not simply an inconvenience they can avoid. They must speak up in order to accurately reflect that each is "the key person above all others" who has the authority to speak for and help her partner in times of crises, and that they "are both parents . . . and can speak for" their children. *Id.* at ¶¶7, 17. But having to do so sends a constant message to the couple that their family is not legitimate, which Ms. Meneghin describes as "insulting and very demeaning." *Id.* ¶17.

Indeed, all of the Plaintiffs share the sentiment of lead Plaintiff Mark Lewis, who has experienced New Jersey's civil

union designation as degrading: "When asked 'are you married,' time and again, I have to answer, 'no, but . . .'" and instead struggle to explain what a civil union is and what it means. . . . There is no way around it. I'm denied marriage and relegated to a civil union, so I am compelled to declare myself a second-rate citizen every day of my life." Aff. of Mark Lewis ¶10, Ex. 1. Lewis, who has been in a relationship for 17 years with his partner Dennis Winslow, hoped that his civil union would "provide much of the security we had been seeking." *Id.* ¶2, 8. He found, however, that after entering a civil union, "too often, that is not the case." *Id.* Whether his rights as a civil union partner are recognized and respected "is completely arbitrary and dependent on individuals' attitude toward us," a precarious position that he characterizes as "the difference between rights and luck." *Id.* He further notes, "When other people say that they have gotten married, people usually simply say, 'Congratulations!' but we have never had anybody congratulate us on our civil union." *Id.* 4.

These stories are reflective of the experiences of each of the Plaintiffs. See Exhibits 1 to 12. And, as the CURC Report makes clear, Plaintiffs' experiences are typical of those of thousands of same-sex couples and their children in New Jersey. Accordingly, Plaintiffs now file this Motion for Relief in Aid of Litigants' Rights pursuant to R. 1:10-3, seeking an order

compelling the State to comply with what this Court previously ordered in *Lewis*: full equality for committed same-sex couples in New Jersey. It is now clear that *Lewis*'s mandate can be implemented only by allowing same-sex couples to marry.

ARGUMENT

I. THE STATE HAS FAILED TO PROVIDE EQUALITY AS GUARANTEED IN AND MANDATED BY *LEWIS V. HARRIS*.

As the findings and conclusions of the Civil Union Review Commission establish, more than three years after the decision in *Lewis*, the State has not complied with this Court's judgment mandating equality for same-sex couples in New Jersey. Instead, New Jersey's three-year experiment with the Civil Union Act has demonstrated that equality can never, in fact, be fully realized by relegating same-sex couples to a state-created separate status, and excluding them from marriage.

New Jersey's experience, in the period since *Lewis*, demonstrates that the difference between marriage and civil unions is not one of mere nomenclature. Rather, as the Commission found, same-sex couples routinely encounter significant obstacles in the exercise of their commercial and civic rights, including problems obtaining equivalent medical treatment, health benefits and workplace protections, and receiving the rights accorded others by family law. *Final Report* at 11-15. Same-sex couples also face enduring uncertainty about their rights and treatment, which is inherent in the novel legal status and cumbersome scheme that the Legislature created in an attempt to provide purportedly equal benefits. This confusing scheme can lead to the added burden

and expense of litigation to obtain even the most basic rights to which same-sex couples in civil unions are constitutionally entitled. Finally, these burdens, which do not affect heterosexual couples who are permitted to participate in civil marriage, unfairly disadvantage the children of same-sex couples.

The inequality presently experienced by same-sex couples, we now know, derives from the separate and inferior status of civil unions. See N.J. S. Jud. Comm. Hr'g (Dec. 7, 2009) (Test. of then-Public Advocate Ronald Chen), Ex. 27 at 47 (noting that "treating the institution of civil unions differently than marriage is what is causing the problem"). Certainly, as *Lewis* recognized, courts "cannot guarantee social acceptance." 188 N.J. at 462. However, the Court did find that the "social indignities" faced daily by same-sex couples "due to the inferior legal standing of their relationships" was constitutionally significant. 188 N.J. at 426. It further recognized that it is the obligation of courts to "ensure equal treatment" before the law. *Id.*; see also *Goodridge v. Massachusetts*, 798 N.E.2d 941, 968 (Mass. 2003) ("'Private biases may be outside the reach of the law, but the law cannot directly or indirectly, give them effect.'")(quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). Here, the record shows that the Legislature's creation of civil unions has engendered a

separate, inferior status for same-sex relationships in violation of *Lewis*. See Sept. 26, 2007 CURC Hr'g at 53 (Test. of Thomas Walton), Ex. 15 (explaining that if he and civil union partner are discriminated against "it should be based on [someone's] own ignorance and bias and not because they've had someone saying from the government that it's okay to do so"); accord *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 417 (Conn. 2008) (agreeing that "the legislature, in establishing a statutory scheme consigning same-sex couples to civil unions, has relegated them to an inferior status, in essence, declaring them to be unworthy of the institution of marriage"); *In re Marriage Cases*, 183 P.3d 384, 445-46 (Cal. 2008) (citing *Interim Report* at 6-18 and concluding that separate institution "imping[es] upon the right of [same-sex] couples to have their family relationship accorded respect and dignity equal to that accorded . . . opposite-sex couples").

In other words, the disparate treatment of same-sex couples in New Jersey cannot be regarded simply as private discriminatory conduct by individuals who act in contempt or ignorance of the law. Rather, the State bears responsibility for the inequality that has resulted from the discrimination it has written into the law and for its refusal to redress that discrimination, once confronted with unmistakable evidence of its existence. As the Commission reported, "[D]enying . . .

access to the widely recognized civil institution of marriage while conferring legal benefits under a parallel system . . . imposes a second-class status on same-sex couples and sends the message that it is permissible to discriminate against them." *Final Report* at 8. The inequality found by the Commission and described in detail below will persist so long as the State limits the official recognition of same-sex unions to civil unions, barring these couples from civil marriage. *Final Report* at 2.

A. Same-sex Couples Continue to Lack Workplace Benefits and Protections Equal to Their Married Counterparts.

In *Lewis*, this Court found that "the inferior legal standing" of committed same-sex couples amounted to a violation of equal protection. 188 N.J. at 426. Among the many daily "social indignities and economic difficulties" faced by Plaintiffs and others, *id.*, the Court noted that "[w]ithout the benefits of marriage," same-sex couples were forced to pay "excessive health insurance premiums because employers did not have to provide coverage to domestic partners," were denied the right to "family leave" time." *Id.* at 426. Additionally, the Court found, same-sex couples "receive fewer workplace protections than married couples." *Id.* at 449.

Today, despite the Civil Union Act, inequality in employment benefits and workplace protections persists. *Final*

Report at 11-13. Lesbian and gay employees are routinely denied benefits – including health insurance – that are extended to heterosexual married employees. For example, Plaintiff Suyin Lael tried to add her partner Sarah Lael to her health insurance plan, but her employer refused, stating that it does “not recognize civil unions because they have offices in New Jersey and Pennsylvania and follow Pennsylvania law only.” *Aff. of Suyin Lael* ¶11, Ex. 10.

As one New Jersey resident put it, after being denied coverage for his civil union partner – who, as a result, had to buy more costly, less comprehensive insurance – the “civil union” designation can serve as an invitation to employers to treat same-sex couples differently. See Sept. 26, 2007 CURC Hr’g at 79 (Test. of Robert Corcoran), Ex. 15. At the very least, as the CURC found, the unfamiliarity of the designation causes confusion on the part of employers, who are accustomed to administering benefits in terms of marriage and simply are unsure of whether a civil union partner qualifies as a spouse. For example, one witness employed by the *New Jersey Star-Ledger* testified before the Commission that “the policies concerning the continuation of the medical benefits for my partner when I retire are really not . . . laid out clearly.” Nov. 5, 2008 CURC Hr’g at 43 (Test. of John Corbitt), Ex. 24. The employee manual refers to “domestic partners” and “spouses” but not civil

unions; the witness was told preliminarily by human resources that his civil union partner would not be covered upon his retirement, but the matter was being reviewed by lawyers for the employer. *Id.* at 43-44.

Whatever the motivation of employers and insurance companies, it is clear that employers are not extending equal benefits to civil union members. *See, e.g.*, Sept. 26, 2007 CURC Hr'g at 64-65 (Test. of Donald Rogers), Ex. 15 (Vietnam veteran denied health coverage for civil union partner by employer whose plan gave benefits "only available to legally married spouses," and the plan did not recognize civil unions as such); *id.* at 68-69 (Test. of Bruce Moskovitz) (denied ability to list civil union partner as surviving "spouse" for purposes of pension benefits by major pharmaceutical company); N.J. S. Jud. Comm. Hr'g (Dec. 7, 2009) (Test. of Lucy O'Brien), Ex. 27 at 97 (presenting letter from insurance company clarifying that "for purposes of dependent eligibility . . . 'spouse' includes same-sex partners who are married in jurisdictions that recognize same-sex marriages" but not civil union partners) *and* Ex. 33 (letter). The denial of equivalent benefits to civil union partners also applies in some cases to flex-spending accounts, Sept. 26, 2007 CURC Hr'g at 98 (Test. of Jesse Thompson Adams), Ex. 15, and family leave policies, Oct. 24, 2007 CURC Hr'g at

97-98 (Test. of Henry Simonetti), Ex. 17 (explaining practices of employer, major commercial airline).

The distinction between "civil union" and "marriage" is, as the CURC found, the source of this disparate treatment: employers treat same-sex relationships differently than marriage "because of the term used by statutes establishing government-sanctioned, same-sex relationships." *Final Report* at 13. As one employment law attorney told the Commission, "employers are still questioning whether they have to provide benefits" to couples in civil union because their benefits "plan says 'spouse' or 'marriage.'" Oct. 24, 2007 CURC Hr'g at 81 (Test. of Luanne Peterpaul), Ex. 17; see also May 21, 2008 CURC Hr'g at 40 (Test. of Mauro Camporeale, Ex. Dir., Bergen Ct'y Central Trades and Labor Council, AFL-CIO), Ex. 20 ("Without the legal term 'marriage,' . . . employers try to find ways to exempt same-sex couples from getting the full and equal benefits that they deserve"); *Id.* at 43 (Test. of Carol Gay, Ex. V. Pres., N. J. Indust. Union Council) ("[T]hat word 'marriage' somehow or other carries more weight. It's just more legally binding in the minds of a lot of employers and in the minds of insurance companies too.").

Furthermore, the relegation of committed same-sex couples to civil union status often causes disparate treatment of lesbian and gay employees subject to collective bargaining

agreements. Thus, if a previously negotiated labor contract refers only to "spousal" benefits and does not contain the novel term "civil union," those contracts frequently have been read by those administering them to exclude civil union partners from coverage. Sept. 26, 2007 CURC Hr'g at 42-44 (Test. of Jodi Weiner, Int'l Bhd of Elec. Workers Local 456), Ex. 15 (explaining that she was able to obtain benefits from her employer for her same-sex partner only because they were married in Massachusetts, whereas the union contract did not afford coverage for New Jersey Civil Union partners); see also May 21, 2008 CURC Hr'g at 41 (Test. of Mauro Camporeale, Ex. Dir., Bergen Ct'y Central Trades and Labor Council, AFL-CIO), Ex. 20 (reporting that some employers use contract language to avoid providing benefits to same-sex partners). By contrast, as a labor lawyer representing the Communications Workers of America told the Senate Judiciary Committee, "in collective bargaining agreements in Massachusetts . . . we are not seeing the denial of benefits to the extent that we are in New Jersey," because same-sex partners [in Massachusetts] are termed "spouses." N.J. S. Jud. Comm. Hr'g (Dec. 7, 2009) (Test. of Rosemarie Cipparulo), Ex. 27 at 68-73.

Thus, based upon the civil union designation, lesbian and gay workers are, in practice, "treated differently from straight employees" despite the "strong labor belief that all workers

should be treated equally." May 21, 2008 CURC Hr'g at 38 (Test. of Carla Katz, Pres., Commc'ns Workers of Am. Local 1034), Ex. 20; *accord id.* at 43-44 (Test. of Carol Gay) (labor union members "endors[e] and truly support marriage equality" because "workers want everybody to be treated fairly"); *id.* at 49 (Test. of Rosemarie Cipparulo) ("[I]t's demoralizing and divisive for workers in the same job title, doing the same work, to be subject to different benefits"). Moreover, in order to protect workers with same-sex partners, labor unions are "now put in the position of having to negotiate the extension [of benefits] to an additional class of people in this most difficult of times." *Id.* at 47. As one labor leader explained, for this reason, "We absolutely cannot say that civil unions in New Jersey are just as good as marriage or even good enough." *Id.* at 37 (Test. of Carla Katz, Pres., Commc'ns Workers of Am. Local 1034).

Civil union status has also proven to create additional adverse consequences for same-sex couples in the employment context. Most importantly, companies that fund their own insurance plans – nearly fifty percent of employers in New Jersey, *Final Report* at 11 – are governed by the federal Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"), which preempts state laws and allows self-

insured employers to choose how to define "spouse."⁹ This means that employers subject to ERISA may choose to extend benefits to same-sex partners, though they are not legally obligated to do so. However, as the CURC found, ERISA-governed New Jersey employers who provide marriage-based benefits frequently declined to expand their spousal definitions to include partners in civil unions, thus denying healthcare, pension, and other benefits to the civil union partners of their employees. *Id.* at 11-12; *see also* Oct. 10, 2007 CURC Hr'g at 15 (Test. of Barbara Bennet) Ex. 16 (registered nurse unable to cover civil union partner on health insurance because employer cited exemption "under federal guidelines"). One witness testified he would be unable to continue the health care coverage of his civil union partner after his retirement, stating that his employer (Johnson & Johnson, for whom he had worked for 29 years) cited ERISA in refusing coverage. Oct. 15, 2008 CURC Hr'g at 54-55 (Test. of Roger Asperling), Ex. 23. The witness explained that he is "in a very difficult position," because upon his retirement, he will no longer be able to afford his partner's health insurance, such

⁹ ERISA contains a preemption clause, 29 U.S.C. § 1144(a) stating that the Act "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" addressed by ERISA. That would arguably apply to state laws such as the Law Against Discrimination, *N.J.S.A. 10:5-1 et seq.* One individual whose civil union partner was denied benefits by his Fortune 500 employer, under the shield of ERISA, filed a complaint with the New Jersey Division on Civil Rights, but was told there was nothing it could do to compel the employer to provide benefits. Oct. 24, 2007 CURC Hr'g at 74-75 (Test. of Richard Cash), Ex. 17.

that if his partner faces a serious illness, he “could be forced into bankruptcy.” *Id.* at 55.

Similarly, employers have invoked other provisions of federal law that reference marriage and not civil unions to deny same-sex couples benefits, including continuation of benefits after termination of employment under 29 U.S.C. §§ 1161-1169 (“COBRA”), see Sept. 26, 2007 CURC Hr’g at 91 (Test. of Thomas Mannix), Ex. 15; benefits enrollment outside of annual enrollment periods, see Sept. 26, 2007 CURC Hr’g at 30-32 (Test. of Richard Cash), Ex. 15 (noting entrance into civil union is not a qualifying “event” under federal law for purposes of benefits enrollment); and health insurance coverage pursuant to ERISA and collective bargaining agreements, see Jennifer Moroz, *N.J. Civil Unions, Six Months On*, Philadelphia Inquirer (Aug. 5, 2007) (describing resistance of United Parcel Service to providing coverage afforded to married spouses to civil union partners); accord Sept. 26, 2007 CURC Hr’g at 50 (Test. of Heather Aurand) (employee of UPS, stating that Act gives employers “an excuse to treat us differently”), Ex. 15.

In stark contrast, the record indicates that in states such as Vermont and Massachusetts, where marriage equality is the law, ERISA-governed employers have routinely extended benefits to same-sex partners. *Final Report* at 6, 11, 20; March 19, 2008 CURC Hr’g at 132-33 (Test. of Mark Solomon, Dir., Mass

Equality), Ex. 18; Sept. 26, 2007 CURC Hr'g at 38 (Test. of Tom Barbera, V. Pres., AFL-CIO), Ex. 15. Where same-sex couples are not excluded from civil marriage, the existing language of benefit plans automatically encompasses same-sex spouses, and an employer who wished to discriminate would thus have to "affirmatively amen[d]" its plan in order to do so. *Id.* at 35 (Test. of Beth Robinson). But companies have proven unwilling to "depart from [their] general rule covering married employees" and thus have not "draw[n] a new line of discrimination in order to deny benefits to some married employees but not others." Letter of Lee Swislow and Gary Buseck to CURC (Sept. 26, 2007) (attached as Ex. 26). By contrast, because same-sex partners are not identified as spouses when they are united by a civil union, many employers refuse to apply this "general rule" and, because of the distinction created by the State, are able to easily distinguish between different-sex couples who are married and same-sex partners who have been united in a civil union only. *Id.*

Moreover, in states with marriage equality, the inclusiveness and neutrality of the letter of the law "sends a message and is very persuasive" to employers, even those governed by ERISA. N.J. Sen. Jud. Comm. Hr'g (Dec. 7, 2009), Ex. 27 at 73 (Testimony of Rosemarie Cipparulo). This is not the case in New Jersey, because the Legislature's selection of

an alternate legal status for same-sex couples has discouraged employers from extending equal benefits to lesbian and gay employees, simply because civil unions are not marriage. *Final Report* at 13. Indeed, the Commission concluded that the State's role in creating these types of discriminatory conditions is therefore a significant one. *Final Report* at 11-12, 20.

Relatedly, civil unions have undermined workplace equality for same-sex couples because, in order to attain benefits regularly provided to others, those couples often must seek clarification from their employers regarding coverage for people with civil unions. That inquiry requires them to divulge details of their private lives in the employment context and makes them more vulnerable to discrimination. As one witness told the Senate Judiciary Committee:

[A]t each job interview, I was forced to ask the question: Do you offer civil union benefits? That forced me to come out at every single job interview to every single prospective employer. Did I get turned down because of my sexual orientation? I don't know. But I do know that having a separate term to identify same-sex relationships makes such job discrimination a possibility in New Jersey.

[N.J. Sen. Jud. Comm. Hr'g (Dec. 7, 2009), Ex. 27 at 60 (Test. of Louise Walpin)].

This type of exposure would disappear if same-sex couples could marry. *Accord id.* at 185 (Test. of Harriet Bernstein) (observing that "because civil unions only apply to gay and

lesbian couples, you are allowing institutions to ask my sexual orientation every time I have to fill out an application, an insurance form, or any other paperwork").

In sum, the record and findings of the Civil Union Review Commission reveal that, in the employment context, the Civil Union Act has, in fact, perpetuated rather than remedied the "inferior legal standing" of same-sex couples' relationships "compared to that of married couples." *Lewis*, 188 N.J. at 426. Experience teaches that the legislatively created civil union designation results in unequal treatment under employee and insurance benefits plans, because those plans recognize "marriage." The result is a regime that fails to comply with the constitutional mandate of *Lewis*.

B. Same-sex Couples Continue to Face Unequal Treatment and a Lack of Recognition in Public Accommodations and Civic Life.

The Court in *Lewis* recognized that the "the inequality gap" between heterosexual married couples and same-sex couples included being denied benefits and privileges "customarily extended to family members." 188 N.J. at 426, 448-49. This has not changed as a result of the Civil Union Act. Rather, the record before the CURC reveals that the discriminatory and stigmatizing lack of equality imposed by civil unions extends to nearly all aspects of same-sex couples' financial, commercial

and civic dealings, perpetuating what *Lewis* called a “system of disparate treatment,” *id.* at 453.

Thus, the record shows, rather than serving as a conduit for the legal recognition of same-sex couples, the new civil union designation has been a symbol of difference and inferiority for same-sex couples, and a hindrance to their participation in myriad aspects of civic life. As the Commission observed, many civil union couples encounter “obstacles and frustrations” because government, employer, and health care forms “do not address or appropriately deal with the status of being in a civil union.” *Final Report* at 9. This “lack of recognition,” *id.*, causes “unequal treatment” for same-sex couples, *id.* at 14, which “persist[s] despite directives from the New Jersey Department of Health and Senior Services regarding the implementation of the Civil Union Act,” *id.* at 15.

The advent of civil unions has not prompted local branches of nationwide financial services, real estate, and other companies to reengineer their business policies, forms, or computer programs in order to accommodate this novel and anomalous legal category. This contributes to the lack of recognition experienced by same-sex couples. For example, one New Jersey resident testified before the Commission that for numerous financial transactions that he and his civil union partner undertake, they are forced to supply documentation of

their relationship and to explain what a civil union is. Oct. 24, 2007 CURC Hr'g at 61-63 (Test. of Kevin Slavin), Ex. 17. Similarly, another witness found that when she and her partner were buying a house, she had to explain to mortgage brokers, bankers and real estate agents, as well as lawyers "what we were [and] what civil union meant[.]" *Id.* at 47 (Test. of Rose Levant-Hardy). Civil union couples have reported significant difficulty in filing their state taxes, because of confusion regarding civil unions and how to treat them for purposes of New Jersey law. Oct. 24, 2007 CURC Hr'g at 107 (Test. of Leslie Farber, Chair, N.J. State Bar Assoc. Gay, Lesbian, Bisexual, Transgender and Intersex Section), Ex. 16; see also *Quarto v. Adams*, 395 N.J. Super. 502 (App. Div. 2007) (resolving dispute of same-sex couple married in Canada with Division of Taxation regarding ability to file joint tax return).

Likewise, government has also failed to accord proper, "equal" recognition to civil unions, as this Court required. Thus, for example, one witness encountered difficulty at the Department of Motor Vehicles when attempting to change his surname to match that of his civil union partner. Sept. 26, 2007 CURC Hr'g at 98-99 (Test. of Jesse Thompson Adams); *cf.* *Lewis*, 188 N.J. at 448 (identifying right to surname change without petitioning court as a right denied same-sex couples). Another testified that, upon appearing for jury duty, the

presiding judge told her and other jurors to state their marital status as either "single" or "married." Oct. 10, 2007 CURC Hr'g at 67-68 (Test. of Veronica Kairos), Ex. 16. Thus, the juror was forced to reveal her sexual orientation during *voir dire* and had to explain to the judge and the jury her legal status as a partner in a civil union. *Id.* This individual later expressed to the Legislature that "the failing was not in the judge but in the law that attempted to establish a legal classification with no common understanding in our society." N.J. Sen. Jud. Comm. Hr'g (Dec. 7, 2009), Ex. 27 at 183. Significantly, when this incident took place, judges and judicial staff had already been trained regarding civil unions, see March 19, 2008 CURC Hr'g at 7-10 (Test. of David Anderson, Dir., Admin've Office of the Courts), Ex. 18. This episode vividly illustrates that – even with training – civil unions are inherently and irremediably different from and inferior to marriage.

For same-sex couples, the lack of recognition of civil unions also casts not only their benefits but also their legal obligations into doubt. *Cf. Lewis*, 188 N.J. at 423 (specifying that a parallel structure must create identical rights and obligations as marriage). For example, testimony before the Commission revealed that civil union partners are often unable to readily include each other on financial disclosure or ethics forms. See Oct. 10, 2007 CURC Hr'g at 30 (Test. of Jeff

Ziegler), Ex. 16 (testimony of local school board member describing how the definitions attached to his school board's financial disclosure form did not include civil unions); March 19, 2008 CURC Hr'g at 164-65 (Statement of Commission Member Frank Vespa-Papaleo), Ex. 18 (describing same problem on the financial disclosure forms provided by the State Ethics Commission); Sept. 26, 2007 CURC Hr'g at 18 (Test. of Thomas Prol, Trustee, N.J. State Bar Ass'n), Ex. 15 (describing similar problems with respect to solid waste licensing application).

Still worse, the lack of recognition persists for same-sex couples in hospitals and other critical-care settings, *Final Report* at 14, a particular concern of this Court in *Lewis*, see 188 N.J. at 426 (recognizing that plaintiffs had been denied privileges by healthcare facilities). Although the law requires hospitals to recognize the rights of civil union partners to access their partners during medical treatment, and indeed, healthcare facilities are required to have policies implementing these rights as a condition of licensing, see May 21, 2008 CURC Hr'g at 20-21 (Test. of John Calabria, Dep't of Health and Senior Servs.), Ex. 20, same-sex partners are routinely denied the options afforded married couples in medical settings. As the testimony of many witnesses before the CURC and Legislature established, many healthcare institutions do not elicit information about civil union partners when treating patients.

Moreover, many health care providers inform civil union partners that they are not entitled to receive health information about their partners or to be in the same room with them while they receive treatment. See Oct. 10, 2007 CURC Hr'g at 12-13 (Test. of Paul Walker), Ex. 16; Oct. 24, 2007 CURC Hr'g at 51-52 (Test. of Lori Davenport), Ex. 17; N.J. Sen. Jud. Comm. Hr'g (Dec. 7, 2009) (Test. of William Paul Beckwith), Ex. 27 at 59 (recounting that, in March 2008, New Jersey hospital emergency worker refused to recognize him as next-of-kin for his civil union partner and "wanted a name of a sister, his wife, or his mother or father for medical decisions if he wasn't able to make them"). One individual, prior to having surgery, noticed that a hospital worker changed the status of her emergency contact from "civil union partner" to "friend," a status that has no legal meaning, but epitomizes the denigration of committed relationships experienced routinely by same-sex couples in civil unions. *Id.* at 180 (Test. of Margaret Maloney).¹⁰

These incidents are not isolated, see *id.* at 117 (Test. of Rev. Elizabeth Stolfi) ("As a [hospital] chaplain, I have heard countless horror stories of loved ones being kept from their partners, because not all emergency rooms and ICUs recognize or

¹⁰ This testimony is discouragingly similar to the original observation of Plaintiff Cindy Meneghin that she and her same-sex partner are "very vulnerable" in emergency medical situations "because we can be viewed as just 'friends' or 'roommates,'" and thus denied access to and decisionmaking power

honor civil unions.”), nor, as this Court made clear in *Lewis*, are they inconsequential. See 188 N.J. at 426 (describing denial of such rights as component of inferior legal status). Lack of recognition of civil union status has continued to lead to delays in the provision of critical care in life-threatening situations. See Oct. 24, 2007 CURC Hr’g at 27-29, Ex. 17, and Oct. 15, 2008 CURC Hr’g at 40-47, Ex. 23 (Test. of Gina Pastino) (explaining delay in son’s emergency treatment due to time spent with hospital staff explaining relationship of partner to her son).

And as the experience of Plaintiff Cindy Meneghin, referenced earlier, demonstrates, there should be no mistake that the Civil Union Act has failed to remedy the vulnerability experienced by same-sex couples when confronted with health care crises. Ms. Meneghin has had the unfortunate experience of having “had two serious medical situations involving trips to the emergency room, one before and one after [her] civil union.” Ex. 8 at ¶7. She strikingly reports the same recognition problems before and after her civil union. *Id.* In both instances, Ms. Meneghin had to repeatedly explain to hospital staff who her civil union partner, Maureen Kilian, was and that Ms. Kilian had a right to make decisions on her behalf if she

for each other. See Aff. of Cindy Meneghin ¶ 2 (Sept. 21, 2003) (attached as Ex. 29).

could not do so herself. Being unable to say that she was married, for Ms. Meneghin, marked both medical crises with the unnecessary fear and frustration of not being able to convince hospital staff that her partner “was the key person above all others to help [her] emotionally and otherwise, the person whose presence and access should never be questioned.” *Id.* ¶7.

Thus, experience teaches that this lack of recognition flows from the designation of same-sex couples as something other than married. In the words of one individual whose civil union partner was denied access to her in a life-threatening situation, had her partner been able

to walk in and say, “This is my spouse, and we are married,” people would instantly know the significance of that relationship. They may not like it, but at least everybody has a frame of reference in this society regarding the term marriage and spouse and husband and wife. Everybody knows what that means.

[Oct. 15, 2008 CURC Hr’g at 43-44 (Test. of Gina Pastino), Ex. 23.]

In contrast, same-sex couples who have been allowed to marry have had their relationships recognized and given full effect in these most vulnerable moments. One Massachusetts woman described the “huge relief” that marriage brought her and other same-sex couples, because “[i]f you have a car crash and end up in the hospital that you don’t know, or an ER, you know that you’re going to be treated like anybody else.” April 16, 2008

CURC Hr'g at 52 (Test. of Marsha Hams), Ex. 19; *accord* Oct. 24, 2007 CURC Hr'g at 23-24 (Test. of Plaintiff Cindy Meneghin), Ex. 17 (stating that with marriage, there would be "no need to be afraid to go into an emergency room and wonder at a time of crisis where minutes could count if the person behind the desk will understand and recognize [the] relationship").

Finally, the lack of recognition encountered by same-sex couples in New Jersey is magnified when they travel outside of New Jersey. As Plaintiff Karen Nicholson-McFadden states, she and her partner "frequently travel out-of-state, and . . . always feel at risk." Aff. of Karen Nicholson-McFadden ¶6. Unlike when *Lewis* was decided, at which time "only Connecticut and Vermont, through civil union, and Massachusetts, through marriage, extend[ed] to committed same-sex couples the full rights and benefits offered to married heterosexual couples," 188 N.J. at 454, Connecticut and Vermont have now jettisoned their separate-but-unequal civil union systems,¹¹ joining Massachusetts, New Hampshire,¹² Iowa,¹³ and the District of

¹¹ See *Conn. Pub. Act 09-13* (amending marriage laws, *Conn. Gen. Stat.* §§ 46b-21 to 30, to contain gender-neutral terms) and *Vt. Stat. Ann. Tit. 15, § 8* (2010) (defining marriage as between "two people").

¹² See *N.H. Rev. Stat. Ann. § 457:1-a* (2010) (same).

¹³ See *Varnum v. Brien*, 763 N.W.2d 862, 896-907 (Iowa 2009) (striking language limiting marriage to heterosexual couples from state marriage statutes as violative of equal protection).

Columbia¹⁴ in recognizing same-sex marriage.¹⁵ Furthermore, Maryland,¹⁶ New York¹⁷ and Rhode Island,¹⁸ which do not themselves solemnize same-sex marriages, do (unlike New Jersey) recognize such marriages validly formed in foreign jurisdictions. Indeed, there is now no other state which licenses a “civil union.” As a result, when civil union partners and their families travel outside of New Jersey, they have found that, while other states recognize marriage, their anomalous designation “is misunderstood or not understood at all,” leading to hardship, uncertainty, and a lack of recognition that would not occur were they allowed to marry. *Final Report* at 9-11.

These practices of neighboring jurisdictions are relevant, because in *Lewis*, the State justified its disparate treatment of same-sex couples in part by reference to its “interest in uniformity with other states' laws.” 188 N.J. at 453. Notably,

¹⁴ See D.C. Code § 46-401(a) (2010) (clarifying that same-sex individuals are eligible for marriage).

¹⁵ Additionally, as the Legislature is aware, several foreign nations allow same-sex couples to marry, including, but not limited to, Belgium, Canada, the Netherlands, Norway, South Africa, and Spain. *Final Report* at 37.

¹⁶ See Marriage - Whether Out-of-state Same-sex Marriage that Is Valid in the State of Celebration May Be Recognized in Maryland, 95 Op. Att’y Gen. 3 (2010) (attached as Ex. 31).

¹⁷ See *Golden v. Paterson*, 877 N.Y.S.2d 822 (Sup. Ct., Bx. Cty. 2008) (upholding authority of executive directive ordering state agencies to recognize foreign same-sex marriages); see also *Godfrey v. Spano*, 920 N.E.2d 328 (N.Y. 2009) (upholding validity of Executive Order recognizing out-of-state same-sex marriages for purposes of public employee health insurance coverage and other benefits); *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008) (recognizing the plaintiff’s out-of-state same-sex marriage).

the Legislature also recognized the relevance of the law in other jurisdictions, by specifically charging the CURC with monitoring such developments. See *N.J.S.A.* 37:1-36(c)(4) (directing CURC to “collect information about the recognition and treatment of civil unions by other states”); *Final Report* at 35-37 (reporting on practice in other jurisdictions). Nonetheless, despite these developments, the Legislature has failed to provide marriage equality, and currently is the only state to license civil unions.

In sum, as a unique and anomalous legal status, civil unions routinely are not recognized, either inside or outside New Jersey. The treatment afforded same-sex couples by government workers, medical staff and facilities, and others merely illustrates that same-sex couples in New Jersey have, as the record now reveals, been relegated to an inferior legal status that has not and really cannot provide equality. Same-sex couples are significantly disadvantaged in their daily interactions because of this separate designation. And the routine failure of governmental and corporate entities to recognize the rights of same-sex couples is a direct result of their civil union status, which amounts to an unconstitutionally

¹⁸ Letter of R.I. Atty’ Gen. (Feb. 21, 2007) (recognizing validity of same-sex marriage formed in Massachusetts) (attached as Ex. 32).

“unequal dispensation of benefits and privileges to one of two similarly situated classes of people.” 188 *N.J.* at 451.

C. Same-sex Couples Continue to Experience a Lack of Family Law Protection.

The Civil Union Act has also failed to remedy what the Court in *Lewis* described as constitutionally deficient family law protections for same-sex couples, due in part to the law’s failure to address certain “critical issues relating to custody, visitation, and partner and child support[.]” 188 *N.J.* at 450. Today, the lives of same-sex couples and their families in New Jersey are marked by uncertainty and vulnerability, as significant confusion still exists regarding, for example, the legal process for dissolution of a civil union and the status of valid same-sex marriages created in other jurisdictions. Unlike married couples, those in civil unions must rely on a patchwork of judicial decisions, administrative and regulatory pronouncements, and sub-legislative opinions from state authorities such as the Attorney General and the Registrar of Vital Statistics – all of which are subject to change or revision – in order to understand and to secure recognition of their rights and privileges.

For instance, the Legislature has not provided a means to dissolve civil unions that is equal to that provided different-sex couples who are married. *Cf. Lewis*, 188 *N.J.* at 450 (noting

deficiencies of the Domestic Partnership Act with respect to family law protections). Although the Act states that “[t]he laws of domestic relations, including . . . divorce . . . shall apply to civil union couples,” N.J.S.A. 37:1-31(c), that promise has not been realized. Specifically, shortly after the Act was signed into law, the Legislature passed a statute relating to divorce, which provided for the recognition of “irreconcilable differences” as a ground for terminating a marriage. L. 2007, c. 6, s. 1467. That law did not, however, mention civil unions. Despite the fact that the Administrative Office of the Courts (“AOC”) subsequently issued a directive instructing Family Part judges to interpret the new termination ground as applying to civil unions, March 19, 2008 CURC Hr’g at 13 (Test. of David Anderson), Ex. 18, that non-binding directive has failed to settle the ambiguity. Well after the issuance of the AOC directive, family law practitioners and even Family Part judges remain confused about the application of “irreconcilable differences” to civil unions. See *Hammond v. Hammond*, FM-11-905-08-B (Ch. Div. Feb. 6, 2009) (slip opinion) (noting that “there isn’t an explicit recognition of irreconcilable differences” as a ground for dissolving a civil union) (Tr. of Decision attached as Ex. 34 at 23); July 16, 2008 CURC Hr’g at 26-28 (Test. of Peggy Sheahan-Knee, Pres., N.J. State Bar Ass’n), Ex. 22 (describing confusion of association’s members).

Same-sex New Jersey couples who are legally married in other jurisdictions also experience problems should they seek to dissolve their marriages. The Act did not specify whether New Jersey law would recognize marriages of same-sex couples legally formed in other jurisdictions. Although then-Attorney General Stuart J. Rabner issued a formal opinion purporting to clarify that such marriages should be treated as civil unions, Op. Att'y Gen. 3-2007 7 (Feb. 16, 2007) (attached as Ex. 30), this opinion, like the AOC directive, does not carry the legal force of statutory or decisional law, resulting in remaining uncertainty for same-sex couples. Moreover, this opinion created an additional problem for married, same-sex couples in New Jersey who want to divorce, as they face the prospect of being able to only dissolve a civil union, not their out-of-state marriage, with all of the resulting consequences for their ability to remarry.¹⁹ See Oct. 24, 2007 CURC Hr'g at 12-13 (Test. of Edward Barocas), Ex. 17. Although in one unreported New Jersey case, an individual sued and won from a lower court the right to seek a divorce from her same-sex spouse, see *Hammond, supra*, No. FM-11-905-08-B (Transcript of Decision, Feb.

¹⁹ As many jurisdictions impose residency requirements to divorce, same-sex couples who marry and later come to reside in New Jersey need the ability to dissolve marriages where they live, in New Jersey, as do different-sex couples.

6, 2009), Ex. 34, the uncertain state of the law places the fates of other married same-sex couples seriously in doubt.

A similar confusion surrounds the process of "reaffirmation" that is open to civil union couples. Although the Attorney General has opined that foreign marriages should be automatically treated as civil unions, the State also created the process of "reaffirmation," whereby same-sex couples may formally convert out-of-state marriages to civil unions for purposes of New Jersey law. July 16, 2008 CURC Hr'g at 15-16 (Test. of Joseph Komosinski, Registrar of Vital Statistics), Ex. 22 (explaining that although "reaffirmation" is not required, the process is offered to same-sex couples who desire a record of their legal relationship in New Jersey). The process has left many married same-sex couples confused as to whether it is necessary to enter into a civil union to guarantee recognition of their rights in New Jersey. By contrast, different-sex couples who marry in other jurisdictions and then relocate to New Jersey do not face any doubt or confusion as to whether their legal relationships will presumptively be recognized by the State without additional steps or proceedings.

The confused state of the law means that, in practice, local government clerks are apt to treat out-of-state marriages of same-sex couples improperly. Thus, for example, one witness before the Commission testified that when she sought to have her

Massachusetts marriage recognized as a civil union in New Jersey, the town clerk would not accept her marriage certificate. Instead, she was told that she would “have to have a civil union, because the marriage wouldn’t be recognized.” Oct. 15, 2008 CURC Hr’g at 21-22 (Test. of Jamie Boccia), Ex. 23; *cf. Lewis*, 188 N.J. at 463 (noting that the State “cannot make entry into a same-sex civil union any more difficult than it is for heterosexual couples to enter the state of marriage”).

The lack of clarity regarding these fundamental parameters of civil unions – including the basic elements of their creation and dissolution – is yet another example of the manner in which the legal status of civil unions has not delivered the full rights and benefits of marriage to same-sex couples in New Jersey, as was mandated by *Lewis*. As they did before *Lewis*, same-sex couples still live under a cloud of uncertainty regarding their legal status, a condition that amounts to a denial of the benefits to which they are entitled under New Jersey’s Constitution.

D. Same-sex Couples and Their Children Continue to Suffer Disparate and Unfair Financial Burdens.

The Civil Union Act has also not erased the economic disadvantages heaped upon same-sex couples and their children, which *Lewis* attributed to their exclusion from the rights and

benefits of marriage. 188 N.J. at 450-53. In particular, *Lewis* recognized that the “economic and financial inequities that are borne by same-sex domestic partners” are unfairly “borne by their children too.” *Id.* 450. In spite of this core concern of the *Lewis* Court, the Commission concluded that, even after passage of the Civil Union Act, same-sex couples continue to face economic and financial inequities, and that these disadvantages have a predictably negative impact on their children. *Final Report* at 24 (noting that under a “dual system,” same-sex couples and their families suffer economic harm).

Specifically, the Commission concluded that the legal uncertainty and lack of recognition created by the alternate civil union scheme requires same-sex couples and their children to vindicate their rights through costly litigation “when things go wrong.” *Final Report* at 14. Indeed, many individuals testified that the Civil Union Act did little to alter the preexisting norm, where, faced with uncertain legal standing, same-sex couples were forced to hire lawyers to formalize their legal relationship in a piecemeal fashion. Sept. 26, 2007 CURC Hr’g at 85 (Test. of Steven Carter), Ex. 15 (describing how civil unions invite “[t]he prospect of litigating from now into eternity to get the benefits and protections” that married couples receive as a matter of course). As a consequence, civil

union couples and their families are financially vulnerable, as they bear the expensive burden of taking legal steps to effect the recognition of their relationships in New Jersey, even as different-sex married couples enjoy clear, statutorily prescribed rights. See N.J. Sen. Jud. Comm. Hr'g (Dec. 7, 2009) (Test. of Allen A. Etish, Pres., N.J. State Bar Ass'n), Ex. 26 at 65 ("Same-sex couples and the lawyers who represent them must navigate an unnecessarily complex legal construct"); *id.* at 67-68 (Test. of Thomas J. Snyder, Chair-Elect, Family Law Section, N.J. State Bar Ass'n) (civil union couples must engage in "costly litigation as we look to achieve more creative ways to mitigate" shortcomings of civil union construct). By contrast, in states like Massachusetts that recognize marriages of same-sex couples, no such expense and effort is required. See April 16, 2008 CURC Hr'g at 53 (Test. of Sue Shepherd), Ex. 18 (relating that after she was allowed to marry in Massachusetts she no longer needed to use "a special gay rights lawyer" to effect financial and real estate transactions).

The financial burdens of seeking legal advice and enforcing their rights in the face of uncertainty and non-recognition compounds the economic disadvantage experienced by same-sex couples and their families as a result of the unequal workplace benefits and protections discussed above. This compounded burden is, of course, experienced most acutely by lower-income

residents of New Jersey. See May 21, 2008 CURC Hr'g at 32-33 (Test. of Nicole Sharpe, Office of the Pub. Advocate), Ex. 19. These citizens, who are disproportionately people of color, often cannot afford attorneys and thus are left without recourse to address the resulting problems and ambiguity that would not plague their lives were they permitted to marry. *Final Report* at 14; see also Sept. 26, 2007 CURC Hr'g at 55 (Test. of Dr. Sylvia Rhue, Dir. of Religious Affairs, Nat'l Black Justice Coal.), Ex. 14.

Same-sex couples and their children also face greater financial burdens than do married couples with respect to education, a fundamental right in New Jersey. See *N.J. Const.* art. VIII, § 4, ¶ 1; *Cf. Lewis*, 188 *N.J.* at 449 (noting inability of same-sex couples to attain tuition benefits on equal terms to married families). Thus, for example, despite the Act's requirement that "laws related to tuition assistance or higher education for surviving spouses or children" shall apply "in like manner" to civil union couples, *N.J.S.A.* 37:1-32(v), in administering its own financial aid system, New Jersey has chosen to utilize a federally created formula that does not recognize the legal relationship of same-sex parents. Specifically, because all students in New Jersey seeking financial aid are required to submit a Free Application for Federal Student Aid ("FAFSA") in order to determine their

eligibility for assistance, and because this federal form does not permit children of civil union partners to indicate the nature of their family structure, children of same-sex couples are often denied the financial aid to which they may be entitled. April 16, 2008 CURC Hr'g at 13-14 (Test. of Jane Oates, Exec. Dir., Comm'n on Higher Educ.), Ex. 17. FAFSA denies certain children the critical benefit of listing one of their parents as a second dependent in the household, disqualifying them from certain grants or unsubsidized loans. *Id.* at 14. Although New Jersey is not required to do so, *id.* at 17, by choosing to use the federal form to determine student eligibility when allocating over \$230 million per year in state financial aid, the State has, in denying same-sex couples access to marriage, effectively rendered it impossible for some needy children of same-sex couples to obtain state educational assistance. *Id.* at 17.

This inequality persists, as the Director of New Jersey's financial aid program acknowledged to the Commission, as a matter of administrative convenience: "[T]he problem," he stated, "is in order to have a new separate database, we have to create a new form, new process, duplicate the application process, duplicate . . . the information process, and that's just something that's extremely expensive and almost impossible" given current fiscal constraints. April 16, 2008 CURC Hr'g at

19 (Test. of Michael Angulo, Exec. Dir., N.J. Higher Educ. Student Assistance Auth.), Ex. 17.²⁰ Nor, apparently, does the State have plans to implement an alternative application system to ensure that the children of same-sex couples are guaranteed equal access to financial aid in New Jersey. See *Final Report* at 30 (noting that the costs of changing the system have not been budgeted by the government).

In these respects, the Civil Union Act has not remedied the economic inequities borne by same-sex couples and their children in New Jersey, an express concern of the Court in *Lewis*. See 188 N.J. at 450-451 (observing that “the economic and financial inequities that are borne by same-sex [couples] are borne by their children too,” who are thus “disadvantaged in a way that children in married households are not”). Relegation to a novel

²⁰ Fiscal considerations and administrative convenience are, of course, not sufficient governmental interests to justify invidious classifications. See, e.g. *Saenz v. Roe*, 526 U.S. 489, 507 (1999) (observing that a state’s “legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens”); *Plyler v. Doe*, 457 U.S. 202, 227-28 (1982) (“A concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources”); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (noting that administrative convenience is “no shibboleth” with which states may justify classifications that violate equal protection); accord *WHS Realty Co. v. Town of Morristown*, 323 N.J. Super. 553, 562 (App. Div. 1999) (concluding that an ordinance providing free trash collection to all residential dwellings of three or less units, but not multifamily dwellings of four or more units, violated the equal protection clause of the New Jersey Constitution because “[a]lthough preservation of fiscal integrity is a valid state interest,” that goal may not be “‘accomplish[ed] . . . by establishing ‘invidious’ distinctions between citizens’”) (quoting *Sanchez v. Department of Human Servs.*, 314 N.J. Super. 11, 27 (App. Div. 1998)), certif. denied 162 N.J. 489 (1999).

and anomalous legal status has, in sum, failed to alleviate the economic burdens borne by same-sex couples and their families.

E. The Maintenance of a Separate “Civil Union” Status Harms Certain Children and Deprives Them of Equality.

In addition to the disparate financial burdens faced by same-sex couples and their families, children of same-sex parents, as well as lesbian and gay youth in New Jersey are harmed by virtue of the State’s relegation of same-sex relationships to an alternate and inferior status. Although the Court in *Lewis* would not “presume” that an alternate designation would automatically result in unequal status and rights for same-sex couples, this prudential stance was based on the assumption that an alternate statutory scheme would in fact deliver equal rights, see 188 N.J. at 458 (“[P]laintiffs’ claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred[.]”), which it has not. That said, the Court also explicitly recognized that “this State has no experience with a civil union construct.” *Id.* at 459. Now, after three years of experience, it is clear that the maintenance by the State of the separate construct of civil union sends a message to the public that “same-sex couples are not equal to different-sex married couples in the eyes of the law, that they are ‘not good enough’ to warrant true equality.” *Final Report* at 2; see also *id.* at 35 (“[I]t is

apparent that affording access to [marriage] exclusively to opposite-sex couples, while providing same-sex couples access only to a novel alternative designation, realistically must be viewed as constituting significant unequal treatment") (quoting *In re Marriage Cases*, 183 P.3d 385).

This result has been wrought by the Legislature, in spite of the fact that New Jersey has, for decades, recognized that sexual orientation is irrelevant to parental rights and fitness, see *Lewis*, 188 N.J. at 444-45 (surveying case law), and that the "'qualities of family life on which society places a premium . . . are unrelated to the particular form a family takes.'" *Id.* at 445 (quoting *V.C. v. M.J.B.*, 163 N.J. 200, 232 (2000) (Long, J., concurring)). As the Court stated, it is "distinctly unfair" for the State to "recogniz[e] the right of same-sex couples to raise natural and adopted children and plac[e] foster children with those couples, and yet den[y] those children the financial and social benefits and privileges available to children in heterosexual households." *Lewis*, 188 N.J. at 453. The record now makes clear that civil unions deny the children of same-sex couples certain "financial and social benefits" that flow to the children of marriages.

Moreover, as *Lewis* also recognized, "[c]hildren have the same universal needs and wants, whether they are raised in a same-sex or opposite-sex family." 188 N.J. at 451. Thus, one

of the core purposes of assigning legal significance to committed relationships, regardless of sexual orientation, is that "families are strengthened by encouraging monogamous relationships." 188 N.J. at 453. But civil unions, we now know, have a destabilizing effect on the children of same-sex parents, in light of the legal uncertainty and economic disadvantages visited upon same-sex couples, as described above. See *Final Report* at 36 (concluding that excluding same-sex couples from civil marriage "prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which the children will be reared, educated, and socialized"); see also N.J. S. Jud. Comm. Hr'g (Dec. 7, 2009), Ex. 26 at 28 (Test. of Thomas J. Snyder, Chair-Elect, Family Law Section, N.J. State Bar Ass'n) (noting the impact on children when parents are forced to engage in "contentious litigation" in order to vindicate their rights).

Indeed, the record before the Legislature establishes that civil unions place children in a well-founded state of fear and vulnerability, which is the natural result not only of the palpably different treatment these families receive in a host of settings, but of the inevitable perception that their families are different from and inferior to other families. Several of the Plaintiffs describe this as a constant and weighty concern with respect to their children. See Aff. of Karen Nicholson-

McFadden ¶12; Aff. of Suyin Lael ¶6 (noting that in 2002, she and her partner Sarah Lael changed their last names and that of their daughter to the same name to signal to “teachers and administrators that they should deal with both . . . as parents and treat our daughter’s family as family” but, eight years later, and even after entering a civil union, the couple still worries about “all of the different ways to signal or declare that [the] family should be treated as if the [parents are] married”). Similarly, Plaintiff Maureen Kilian explains, “[I]n our family we’ve had lots of cousins’ weddings lately. . . . where Josh has been an usher and Sarah has been a maid of honor or bridesmaid, [and] they’ve talked with us yet again about why their cousins can get married and we’re not allowed to. It’s very fresh in our children’s minds.” Aff. of Maureen Kilian, ¶10.

Dr. Judith Glassgold, a licensed practicing psychologist, testified that the Civil Union Act contributes to an already existing stigma associated with homosexuality, which affects the children of same-sex relationships just as much as their parents. April 16, 2008 CURC Hrg at 44-45, Ex. 19 (noting that “[c]ivil unions can be perceived as society’s judgment that committed intimate relationships with people of the same sex are inherently different and potentially inferior to heterosexual relationships, and . . . less deserving . . . of society’s full

recognition"). Mary Jean Weston, a licensed clinical social worker and Assistant Executive Director of the National Association of Social Workers-New Jersey, testified that children of same-sex couples are "forced to understand and, worse yet, explain the stigmatizing and cumbersome label of civil union." *Id.* at 65.

The children of same-sex parents experience this stigma and vulnerability in a powerful and poignant way. For example, Kasey Nicholson-McFadden, the son of two Plaintiffs in this lawsuit, stated, "[I]t doesn't bother me to tell kids that my parents are gay, but it does bother me to say they can't get married, because it makes me feel that our family is less than their family." N.J. S. Jud. Comm. Hr'g (Dec. 7, 2009), Ex. 16 at 113. Another witness, whose parents are of the same sex, described the shame that she felt when she realized that her parents' civil union was not valued in the same way as are the marriages of her friends' parents. April 16, 2008 CURC Hr'g at 72-73 (Test. of Miriam Sharp-Fried), Ex. 19. A religious leader who officiates at many weddings testified that in his experience, children of same-sex couples are confused by the label of "civil union" which implies that their parents' union "is something less" and not "as meaningful" as marriage. Nov. 5, 2008 CURC Hr'g at 29-31 (Test. of Charles Stevens), Ex. 23. Kathryn Dixon, Vice President of the National Association of

Social Workers, affirmed that civil unions have done little to alleviate the stigma felt by same-sex families, as her colleagues "have to spend session hours hearing the grief of children and families related to these issues." N.J. S. Jud. Comm. Hr'g (Dec. 7, 2009), Ex. 26 at 102.

A further troubling consequence of the economic disadvantage, vulnerability to familial destabilization, and stigmatization faced by children of civil unions in New Jersey is the negative effect that this unequal treatment will have on their sense of citizenship and their place in society. Specifically, the accumulated record reveals that the effect of civil unions is to alienate, rather than include, children of same-sex parents. One of the profound effects that the institution of marriage has is that it "helps protect the individual from anomie," or social disconnectedness. Herek, *Legal Recognition of Same-Sex Relationships in the United States*, 61 *American Psychologist* 607, 615 (2006) (attached as Ex. 35). In contrast, stigmatized status is "negatively valued by society and is consequently a basis for disadvantaging and disempowering those who have it." *Id.* at 617.

A primary concern of the Plaintiffs in bringing this case, which has remained unabated notwithstanding the creation of civil unions, has been their ability to instill in their children a feeling of participation in, and respect for,

society. As Plaintiff Karen Nicholson-McFadden states: “[l]iving with dignity and respect are all the more important now that we have children. We have the responsibility to instill self-respect in our son and daughter, and pass on our core values to them, values like the importance of lifetime commitments.” Aff. of Karen Nicholson-McFadden ¶12, Ex. 11. Government-sanctioned disparate treatment is an obstacle to this goal. Thus, Plaintiffs worry that by treating their relationships as separate and distinct from marriage, the government of New Jersey is sending a message to their children that their families are not as valued by society. See *id.*; Aff. Maureen Kilian ¶10, Ex. 7 (describing her concern that her children “do not understand why” their parents cannot get married when to them their parents’ relationship “shouldn’t be treated differently from the relationships between their friends’ parents who are married”); Aff. of Marcye Nicholson-McFadden ¶12, (same), Ex. 12.

In contrast to the experience of Plaintiffs, the Commission heard testimony from same-sex couples who are legally married in other jurisdictions, regarding the positive impact attainment of this legal status had on their children. See *Final Report* at 22; April 16, 2008 CURC Hr’g at 58-61 (Test. of Laura Patey), Ex. 18 (stating that her marriage was “always in the forefront of [her son’s] thinking” because it gave him “a sense of

validation of being part of a real family"); *Id.* at 60-61 (Test. of Leah Powers) ("I cannot tell you the impact that 15 minutes and the marriage license had on our two young guys.") One adult child of a same-sex couple from Massachusetts testified that, growing up, he had been constantly "afraid to ask my teammates or friends to stay at the house because I was afraid that they would see that my parents have one . . . bedroom, but I was also afraid that my coach would either cut me from the team or bench me, and that was something that happened all the way up until my parents got married," at which point he "felt like finally I was protected." *Final Report* at 22-23; April 16, 2008 CURC Hr'g at 47 (Test. of Peter Hams), Ex. 18. He described the subsequent marriage of his parents as "the biggest thing in my life." *Id.*

Gay and lesbian youth are also deeply affected by the inferior label of civil unions, which is a powerful symbol of their unequal status in New Jersey. As one young person stated, "In New Jersey I am a second-class citizen, someone who does not have equal rights, someone who it is perfectly okay to treat differently according to the State government." N.J. S. Jud. Comm. Hr'g (Dec. 7, 2009) (Test. of John Otto), Ex. 26 at 105. Civil unions send the clear message to him and to other gay youth that full participation and equality is not possible for them simply because of their sexual orientation. *Id.* at 106. See also *id.* at 97-98 (Test. of Lucy O'Brien) (testifying that

her gay teenage son is "acutely aware" "he is a second-class citizen in his own state" and "that his state enacted a civil union law specifically in order to prevent gay people like him from getting married").

By contrast, children in states with marriage equality are encouraged to participate not only in society but also in the kind of stable relationships that are, after all, what marriage is all about. See April 16, 2008 CURC Hr'g at 54 (Test. of Peter Hams), Ex. 18 (describing reaction of gay teenagers to the marriage of his same-sex parents: "[Y]ou can see in their eyes that finally there's hope that their relationship is just as good as anybody else's. There's a future in their relationship."). Dr. Marshall Forstein, Associate Professor of Psychiatry at Harvard Medical School, testified that for lesbian and gay teenagers who already face a heightened risks of suicide, depression and marginalization, the full extension of equal rights through marriage equality "has significant meaning both internally and socially" with great potential for mitigating their sense of isolation and stigma. *Id.* at 33. He testified that the same is true for the children of same-sex parents, noting that since the advent of marriage equality in Massachusetts, "there's a sense that the children themselves have new status in the culture because their parents are legal." *Id.* at 37.

F. The Unequal Treatment Resulting from Civil Union Status Causes Psychological and Dignitary Harm to Same-sex Couples.

Because civil unions have proven to be unequal to marriage and are thus widely understood as a separate and inferior category, same-sex couples suffer psychological and dignitary harm as a result of being relegated to this inferior status. As demonstrated above, in an array of settings, people in civil unions are treated differently from those in civil marriages, in ways that stigmatize same-sex couples, with all of the psychological harm that flows therefrom, on the basis of their state-created unequal status.

The record before the CURC, the experiences of the Plaintiffs, and the testimony before the Legislature show that civil union status conveys that the institution is inferior to marriage, and, inexorably, that the individuals and relationships subject to that second class institution are inferior as well.

While it may not have been clear at the time *Lewis* was decided, the Plaintiffs' experience of civil unions and the experience of others who have entered civil unions, as shown by the CURC materials and legislative testimony, prove that civil unions do not accomplish a central purpose of *Lewis*: to allow same-sex couples to hold themselves out to their government and their fellow citizens, just as married couples do, as a mutually

bound unit entitled to equal recognition and treatment. See *Lewis*, 188 N.J. at 423 (stating that Legislature must “provide for, on equal terms, the rights and benefits enjoyed and burdens and obligations borne by married couples”). The social recognition of marriage serves to reinforce and solidify both the institution itself and the relationships that fall within its scope, but this recognition has been denied civil union couples, like Plaintiffs. See, e.g., Aff. of Sarah Lael ¶13, Ex. 9 (describing need to repeatedly explain relationship to each other and children to clerks, doctors, and school personnel). And significantly, because the State has chosen to consign same-sex couples to a legal status that conveys inferiority, the burden has fallen on these couples to attempt to justify their status – to try to convince the world that in spite of their designation, their relationships should be considered, as *Lewis* required, equal to different-sex relationships. See Aff. of Cindy Meneghin ¶17 (“Even after getting a civil union, we still spend a lot of time explaining the status of our relationship when we should be more focused on the important things that all families worry about[.]”), Ex.8; Aff. of Chris Lodewyks ¶7 (“We constantly have to explain to people what [a civil union] is and that our relationship is as important to us as it would be to a married couple.”), Ex. 6; Aff. of Alicia Toby ¶6 (describing civil union as “marriage with

a caveat"), Ex. 4. The CURC likewise concluded that whereas "marriage" carries "persuasive weight," those in civil unions "described situations in which they were forced to explain their civil union status, what a civil union is, and how it is designed to be equivalent to marriage." *Final Report* at 9; see also Sept. 26, 2007 CURC Hr'g at 52 (Test. of Thomas Walton), Ex. 15 ("We feel like this is going to be our lives now, explaining to people what a civil union is.").

Plaintiffs' relationships are, like the relationships of different-sex couples who may marry in New Jersey, a central element of their lives and for whom their commitment is as solemn and meaningful as marriage, see, e.g., Aff. of Sandra Heath ¶9 ("Alicia and I continue to live our life together as a marriage"), Ex. 3; Aff. of Craig Hutchison ¶3 (attributing success of 38-year relationship to "shar[ing] each other's core values of integrity, community, honor, respect, and love"), Ex. 5; Aff. of Marcye Nicholson-McFadden ¶4 ("[O]ur family is the center of our lives"), Ex. 12; accord *Lewis*, 188 N.J. at 424 (stating that "[i]n terms of the value they place on family, career, and community service, plaintiffs lead lives that are remarkably similar to those of opposite-sex couples"). Yet Plaintiffs and other same-sex couples in civil unions have seen that their state-created status sends the public a contrary message about the status and value of their relationships. See

Aff. of Cindy Meneghin ¶17 (“[W]e are getting this constant message that our family doesn’t count, or isn’t legitimate”), Ex.8; see also Oct. 10, 2007 CURC Hr’g at 33-34 (Test. of Carol Hague), Ex. 16 (“To call [the commitment of same-sex couples] something different but with the same benefits trivializes the deepest bonds of which humans are capable.”); *id.* at 56 (Test. of Melina Waldo) (“As long as we have a separate category such as civil unions, the love that gay couples have for each other will always be thought of as less than.”). In the words of Plaintiff Dennis Winslow, “Being in a civil union has not clarified to the world in the way that I hoped that our relationship should be treated as seriously as those defined by marriage vows.” Ex. 2 at ¶7.

Those in civil unions have experienced the difference between their own understanding of their relationships and the degrading and humiliating meaning their separate civil union status has conveyed. See, e.g., Aff. of Karen Nicholson-McFadden ¶9 (stating that alternate legal status and attendant labels “cheapens my relationship”), Ex.11; Aff. of Mark Lewis ¶10 (describing his experience of explaining civil union status to others as humiliating), Ex. 1. Furthermore, the legal designation of “civil union” has proven to isolate same-sex couples from the married world around them. As Sarah Lael said, “it feels like standing on the outside of something important

and looking in.” Aff. of Sarah Lael ¶11, Ex. 9. This has imposed emotional and significant psychological distress. See April 16, 2008 CURC Hr’g at 33 (Test. of Marshall Forstein, M.D.), Ex. 17 (equating civil union status with sexual orientation discrimination, which “contributes to increased rates of anxiety, depression and substance-use disorders”). Because only same-sex couples are limited to civil unions, *N.J.S.A.* 37:1-29 (defining civil union as “legally recognized union of two eligible individuals of the same sex”), the existence of this separate institution has – against the grain of New Jersey law and policy, see *Lewis*, 188 *N.J.* at 444-45 (recounting “step by step” prevention of discrimination on the basis of sexual orientation) – proven to perpetuate rather than address social bias. The civil union limitation reinforces the notion that sexual orientation is a legitimate basis upon which to disfavor certain classes of people. See Oct. 24, 2007 CURC Hr’g at 42 (Test. of Anthony Giarmo), Ex. 17 (explaining that as parent of gay son, he understands civil unions to communicate that “homosexuals justifiably [can] be placed in a separate relationship category”).

A legal institution that is designed to deliver the “full benefits and privileges” of marriage, *Lewis*, 188 *N.J.* 448, but that, in practice, has isolated and stigmatized its participants, as civil unions have proven to do, cannot be said

to be truly equal. *Id.* (recognizing that same-sex couples have a “strong interest in equality of treatment relative to comparable heterosexual couples”). As the United States Supreme Court has observed, when considering the purported “substantial equality” of a well-established law school, with its reputation, experience, traditions, and prestige, in comparison to that of a newly created law school created especially for minorities, who were prevented from attending the established law school, “[i]t is difficult to believe that one who had a free choice between these law schools would consider the question close.” *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). The same is true here. The Legislature has, notwithstanding this compelling fact and a record which demonstrates it beyond peradventure, denied them this choice. Particularly given the resulting stigma and harm, the Legislature’s decision in this regard undermines rather than fulfills the mandate of *Lewis*.

* * * *

All of these disparities – from the denial of healthcare and family law protections to the lack of recognition and increased economic burdens – demonstrate that, despite its language regarding rights and protections, in reality, the Civil Union Act results in ongoing discrimination, persistent ambiguity, and the rampant denial of legal rights and benefits to which same-sex couples and their children are entitled. We

now know, and the record before the Commission and the Legislature makes clear, that this inequality flows directly from a legal structure that is less than marriage, is both a legal anomaly and a designation of inferiority, and has devastating effects on same-sex couples and their children.

In seeking relief in aid of litigants' rights, Plaintiffs do not simply seek the "social acceptance" that the Court in *Lewis* suggested could only come about through the democratic process. 188 N.J. at 458. Rather, they seek genuine "equal treatment," which, as this Court made absolutely clear, is required by the New Jersey Constitution. *Id.* at 462. Because now, more than three years after *Lewis*, the State has failed to afford such equal treatment, this Court should grant Plaintiffs' motion in aid of litigants' rights and conclude that the equality mandated by *Lewis* can only be achieved by allowing same-sex couples to marry.

II. THIS COURT SHOULD EXERCISE ITS ENFORCEMENT POWERS AND ORDER RELIEF IN AID OF LITIGANTS' RIGHTS.

Plaintiffs seek enforcement of this Court's judgment in *Lewis*, with which the State has not complied. Because as set forth above, the State has failed to provide to same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples, relief pursuant to *Rule* 1:10-3 of

the New Jersey Court Rules is the appropriate means by which to address this constitutional deprivation.

Rule 1:10-3 provides that “a litigant in any action may seek relief by application in the action” and that a “judge shall not be disqualified because he or she signed the order sought to be enforced.” See also *Manalapan Realty, L.P. v. Township Comm. of Twp. of Manalapan*, 140 N.J. 366, 392 (1995) (“The motion to enforce litigant's rights described in Rule 1:10-3 is addressed to a court's ‘inherent right to invoke coercive measures designed to compel a recalcitrant party to comply with a court order.’”) (quoting *S.S. v. E.S.*, 243 N.J. Super. 1, 8 (App. Div. 1990)). This rule provides litigants in New Jersey with a remedy when a party acts in violation of a court's order or fails to follow its directives. See *Haynoski v. Haynoski*, 264 N.J. Super. 408, 414 (App. Div. 1993) (“The *sine qua non* for an action in aid of litigant's rights, pursuant to R. 1:10-5 [now R. 1:10-3], is an order or judgment[.]”); *Asbury Park Bd. of Educ. v. New Jersey Dept. of Educ.*, 369 N.J. Super. 481, 487 (App. Div. 2004) (noting that a motion in aid of litigant's rights must be filed “before the court that issued that order, here the Supreme Court”), *remanded*, 180 N.J. 108 (2004).

Significantly, this Court understood that the deprivations described above might arise were the Legislature to provide for a system other than marriage. The Legislature likewise

understood this risk, and required the Civil Union Review Commission to evaluate the system it created. *N.J.S.A.* 37:1-36(c)(1) & (3). That inequality having materialized, and the Legislature, despite receipt of reports from the Commission and the testimony at its own sessions, having refused to respond, the Court must now act and provide a remedy.

A. Relief in Aid of Litigant Rights Is an Appropriate Remedy to Ensure Compliance with Lewis's Mandate.

This Court has recognized "the judiciary's power (and need) to enforce its own orders" in a variety of contexts. *State ex rel. S.S.*, 183 *N.J.* 20, 22 (2005) (recognizing that courts have authority under *R. 1:10-3* to secure compliance with their orders in the context of juvenile family-in-crisis petitions); see also *Silverman v. Berkson*, 141 *N.J.* 412, 428 (1995) (suggesting that "the usual procedures for relief to litigants under *R. 1:10-3* would be available" to a court to enforce subpoenas issued by the Bureau of Securities). And in several cases, this Court has granted motions in aid of litigants' rights in order to secure compliance with the requirements of the New Jersey Constitution.

For example, in *Abbott v. Burke*, 149 *N.J.* 145, 185, 202 (1997), ("*Abbott IV*"), the Court granted a motion in aid of litigants' rights to secure compliance with the constitutional mandate of a "thorough and efficient" public education under Article 8, section 4, paragraph 1 of the New Jersey Constitution.

Specifically, the Court concluded that provisions of a statute enacted by the Legislature in response to the Court's decision in *Abbott III*, (*Abbott v. Burke*, 136 N.J. 444 (1994)) were unconstitutional as applied to educational special needs districts (SNDs) because the State's failure to address "dilapidated, unsafe, and overcrowded facilities" in SNDs rendered the statute violative of the New Jersey Constitution's education clause. 149 N.J. at 185.

In 2005, the Court again granted a motion in aid of litigants' rights in the context of *Abbott*, after concluding that the Legislature's enactment of the New Jersey Educational Facilities Construction and Financing Act of 2000 (EFCFA), N.J.S.A. 18A:7G-1 to -44, in response to the Court's decisions in *Abbott V* and *Abbott VII*, had failed to fulfill the mandate of those decisions. *Abbott v. Burke*, 185 N.J. 612, 613-14 (2005) ("*Abbott XIV*") (concluding that freezes on funding and the indefinite postponement of construction meant that "significant deficiencies" in school facilities conditions "persist and are likely to worsen"). Irrespective of the State's "substantial effort to improve school facilities conditions in the Abbott districts," the Court found that the constitutional violations identified in *Abbott V* and *Abbott VII* had not been remedied. *Id.* at 614.

In granting relief in aid of litigants' rights in these cases, the Court recognized that, when constitutional rights are at issue, the State's passage of legislation purportedly responsive to directives of this Court does not necessarily obviate the need for further judicial intervention. If, in practice, the enactment fails to remedy the unconstitutional conditions originally of concern to the Court, relief to enforce this Court's orders may be constitutionally required. Because as set forth above, such a situation is now presented here, Plaintiffs' Motion should be granted.

Indeed, this Court has previously intervened to enforce constitutional rights when it has "come face to face with a constitutional exigency involving, on a level of plain, stark and unmistakable reality, the constitutional obligation of the Court to act." See, e.g., *Robinson v. Cahill*, 69 N.J. 133, 139 (1975) ("*Robinson IV*"), cert. denied by *Klein v. Robertson*, 423 U.S. 912 (1975). The situation presently facing the Court is thus very similar to the one it confronted in *Robinson IV*. In *Robinson II* and *Robinson III*, the Court had declared the system of education financing in New Jersey unconstitutional, but it did not enter any specific orders to remedy the deprivation of constitutional rights. See *Robinson v. Cahill*, 62 N.J. 473, 513-521 (1973) ("*Robinson II*"); *Robinson v. Cahill*, 67 N.J. 35 (1975) ("*Robinson III*"). The Court instead allowed the

Legislature an opportunity to devise a remedy, and simply established a deadline by which time remedial legislation had to be enacted. See *Robinson*, 67 N.J. at 35 (discussing deadline set in previous order, *Robinson v. Cahill*, 63 N.J. 196 (1973)). When legislation meeting the constitutional requirements articulated by the Court was not adopted, however, the Court in *Robinson IV* was required to act. The Court noted that:

Having previously identified a profound violation of constitutional right, based upon default in a legislative obligation imposed by the organic law in the plainest of terms, we have more than once stayed our hand, with appropriate respect for the province of other Branches of government. In [the] final alternative, we must now proceed to enforce the constitutional right involved.

[69 N.J. at 139-40.]

Here, the Court is similarly compelled to act. While the Court in *Lewis*, as in *Robinson*, asserted a need for judicial forbearance in the first instance on the question of whether same-sex couples should be permitted to marry, or whether some other means could be devised to provide the equal treatment required by the Court, see *Lewis*, 188 N.J. at 460, the question of whether civil unions comply with “the constitutional mandate” of *Lewis* and whether Plaintiffs have been afforded the relief ordered by the Court, has been tested by three years of evidence, and is now squarely presented.

Given that the "State ha[d] no experience with a civil union construct that provides equal rights and benefits to same-sex couples," this Court provided the Legislature with an opportunity to experiment with a statutory remedy. *Lewis*, 188 N.J. at 459-60. Although the Court would not "presume that a separate statutory scheme, which uses a title other than marriage, contravenes equal protection principles," by leaving that question open, *id.* at 423, the Court necessarily recognized the well-settled principle that separate, purportedly equal legal classifications may not withstand constitutional scrutiny if, in practice, they fail to deliver equal treatment. See, e.g., *United States v. Virginia*, 518 U.S. 515, 547 (1996) (state's remedial creation of separate, women-only military training program failed to cure equal protection violation caused by exclusion of women from Virginia Military Academy because the separate program was "unequal in tangible and intangible" ways); *Jenkins v. Morris Twp. School Dist.*, 58 N.J. 483, 500 (1971)(stating that the "law now acknowledges" that the "fallacious" separate but equal doctrine "serves only as a sleeping sickness" that "moves only toward further intolerances and misunderstandings"). Thus, this Court in *Lewis* recognized that it might be the case "that identical schemes called by different names would create a distinction that would offend Article I, Paragraph 1" of the New Jersey Constitution. 188

N.J. at 459; accord *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999) (recognizing that in the future it could be “establish[ed] that – notwithstanding equal benefits and protections under Vermont law – the denial of a marriage license operates *per se* to deny constitutionally-protected rights”).²¹

In light of (1) the detailed record compiled by – and unanimous decision reached by – the very Commission created by the Legislature to test whether such an unconstitutional “distinction” had in fact been created by the Civil Union Act; (2) the record of legislative testimony, consideration, and subsequent legislative refusal to take ameliorative action; and (3) the experiences of the *Lewis* Plaintiffs themselves, this Court should grant relief in aid of litigants’ rights to address the unmistakable reality that the rights and benefits of civil marriage are not, in fact, being “made equally available to same-sex couples” in New Jersey, as the Court ordered. See *Lewis*, 188 *N.J.* at 423.

²¹ Similar to New Jersey’s CURC, Vermont’s Legislature established a commission, to review and evaluate the state’s laws (including Vermont’s civil union law) relating to recognition and protection of same-sex couples and their families. The final report of the Vermont Commission on Family Recognition and Protection, which was considered by the CURC, see Transcript of CURC Hr’g, Sept. 26, 2007, Ex. 14, noted myriad problems with the civil union construct, including lack of recognition, problems of portability, and lack of social and cultural status. Vermont Comm. on Family Recognition & Protection, *Final Report* (April 21, 2008), available at http://www.leg.state.vt.us/WorkGroups/FamilyCommission/VCFRP_Report.pdf. The Commission was not charged with making specific recommendations, but the Vermont legislature, unlike New Jersey’s, acted on the basis of the report to remedy the patent inequality perpetuated by civil unions. See *Vt. Stat. Ann. Tit. 15, § 8* (2010).

The judiciary has "inherent and rule-authorized power to enforce litigants' rights." *State v. Simpson*, 365 N.J. Super. 444, 451 (App. Div. 2003); *Knight v. Margate*, 86 N.J. 374, 387 (1981)("The power of the Supreme Court . . . is necessarily paramount and exclusive as to matters that are central to the judiciary."). This is true regardless of whether or not jurisdiction is expressly retained by the Court: the applicable rule, by its terms, certainly does not impose such an explicit statement. See R. 1:10-3 (providing that "a litigant in any action may seek relief by application in the action" and that "[a] judge shall not be disqualified because he or she signed the order sought to be enforced").

Thus, in several of this Court's *Abbott* decisions, the Court considered motions in aid of litigants' rights on their merits, and in some instances ordered relief, even where the Court had not expressly retained jurisdiction when issuing the previous orders or judgments with which the litigants sought compliance. See *Abbott v. Burke*, 163 N.J. 95, 101 (2000) ("*Abbott VI*") (granting motion in part after concluding that Court's intervention was warranted to assure implementation "faithful to the programs proposed by the Commissioner and accepted by" the Court less than two years prior, in *Abbott v. Burke*, 153 N.J. 480 (1998) ("*Abbott V*"), where jurisdiction was not expressly retained); see also *Abbott v. Burke*, 153 N.J. 480

(1998) (*“Abbott V”*) (granting in part Plaintiffs’ second motion for relief in aid of litigants’ rights seeking compliance with Court’s orders in *Abbott V* and *Abbot VI*, even though Court did not expressly retain jurisdiction in either of those decisions). These decisions reflect his Court’s fundamental approach to equal protection challenges, that “[m]echanical approaches to the delicate problem of judicial intervention under either the equal protection or the due process clauses may only divert a court from the meritorious issue or delay consideration of it.” *Robinson*, 62 N.J. at 491-92.

In sum, Plaintiffs’ application for relief in aid of litigants’ rights is the proper vehicle to remedy the State’s failure to comply with *Lewis*’s mandate. Accordingly, Plaintiffs’ motion should be granted and the State ordered to allow same-sex couples to marry.

B. The Constitution Does Not Permit Further Delay in Implementing *Lewis*’s Mandate.

The New Jersey Constitution protects same-sex couples against having to wait indefinitely for equality. In *Lewis*, this Court set a 180-day deadline for the Legislature to fulfill the constitutional mandate to provide “the full rights and benefits” of marriage, recognizing that the Constitution does not permit equal treatment to be indeterminately delayed. 188 N.J. at 463; *Watkins v. Nelson*, 163 N.J. 235, 258 (2000)

(recognizing axiom that “justice delayed is justice denied” and adding that “slow justice is not good justice, [n]either can be tolerated”).

Other courts examining alternate schemes of rights and benefits have recognized the inequalities produced by separate schemes in practice and found a constitutional violation that was not susceptible to cure by the passage of time. In 2008, the California Supreme Court concluded that a domestic partnership scheme, which provided same-sex couples “virtually all of the same legal benefits and privileges” of marriage, nevertheless violated the California constitution’s equal protection guarantee in light of the “significant difficulties and complications” that still existed for same-sex couples in that State. *In re Marriage Cases*, 183 P.3d at 445-46.²² Notably, that Court cited the New Jersey Civil Union Review Commission’s interim report to support its reasoning that, while the public’s understanding and acceptance of domestic partnerships “may change over time,” the unfamiliarity of the

²² The remedy of allowing same-sex couples to marry ordered by the California Supreme Court in *In re Marriage Cases* was superseded by constitutional amendment. See *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009) (recognizing that voter initiative measure, Proposition 8, added a new section to article I of the California Constitution, providing: “Only marriage between a man and a woman is valid or recognized in California”). However, the equal protection analysis of *In re Marriage Cases*, recognizing that constitutional rights cannot be subservient to society’s acceptance of equality, was undisturbed by that subsequent history. The constitutionality of Proposition 8 is currently being challenged in *Perry v. Schwarzenegger*, Case No. 3:09-cv-02292 (N.D. Cal. 2009).

separate classification is “likely, for a considerable period of time, to pose significant difficulties and complications for same-sex couples” and their children and that in the interim the constitution would not countenance that “real and appreciable harm.” *Id.* at 445-46, 452; see also *Final Report* at 2 (citing Vermont legislative report concluding that same inequality and problems existed there under civil union law after nearly a decade). Similarly, because the CURC record demonstrates that three years after *Lewis*, same-sex couples’ equal protection rights are still being violated, the New Jersey Constitution protects those individuals from having to wait any longer for the “new language” of the Legislature’s alternate scheme to “find its place in our common vocabulary” or for “a better understanding” of those same-sex relationships to “take hold.” *Lewis*, 188 N.J. at 461.

Moreover, the circumstances in which this Court has declined to entertain motions in aid of litigants’ rights stand in stark contrast to the instant case. For example, in *Abbott v. Burke*, 170 N.J. 537, 544 (2002) (“*Abbott VIII*”), although the Court granted certain relief in aid of litigants’ rights, it declined to appoint a special master to address deficiencies in the implementation of the State’s pre-school program for special need districts, reasoning that Courts “do not run school systems,” and should not exercise “day-to-day control over the

Abbott reform system.” *Id.* at 562-63. In particular, Justice LaVecchia reasoned, in her concurring and dissenting opinion, that the remedial relief sought was not grounded in constitutional rights. *Abbott v. Burke*, 170 N.J. 537, 563 (2002) (LaVecchia, J. concurring in part and dissenting in part). She noted that the Court, in its previous *Abbott* decisions, “avoided suggesting that the provision of preschool to children in *Abbott* districts was a requirement rooted in our constitutional mandate for a thorough and efficient education;” instead, those decisions simply discussed the “executive and legislative choice to implement preschool programs even more expansively than the Court had required.” *Id.* at 566. And, in another *Abbott* decision, the Court declined to order relief in aid of litigants’ rights where it found such a remedy to be “premature.” *Abbott v. Burke*, 196 N.J. 451, 452 (2008) (“*Abbott XVIII*”). The Court noted that the State had represented to the Court that anticipated legislation would provide funding for school construction, thereby addressing the relief sought through the plaintiffs’ motion. *Id.*

Here, in contrast, there is no question that the claimed violations are of a constitutional magnitude, and a remedy is by no means premature. The Court gave the Legislature the first opportunity to devise its own remedy for the equal protection violations identified in *Lewis*. Because the Legislature has

refused to adequately respond in the face of a clear record of inequality – even ignoring the findings and recommendations of the very Commission it created as a part of the constitutional remedy, as well as hours of testimony from scores of witnesses to legislative committee members – the Court must now intervene to ensure that the constitutional rights of same-sex couples are finally vindicated in this state.

Plaintiffs do not seek the Court's intervention in the management of administrative programs or resources of other branches of government. Rather, they simply seek enforcement of the Court's order finding that their equal protection rights are violated by anything less than the provision to same-sex couples, on equal terms, of the full rights and benefits enjoyed by heterosexual married couples in New Jersey. As several of New Jersey's sister courts have similarly recognized, this Court is therefore empowered, and indeed compelled, to remedy the constitutional violation at issue. *See In re Marriage Cases*, 183 P.3d at 450 (noting that access to marriage was not simply a question for the political process because "the provisions of the California Constitution itself constitute the ultimate expression of the people's will," and the Court must enforce "the fundamental rights embodied within that Constitution for the protection of all persons"); *Goodridge*, 798 N.E.2d at 966 ("We owe great deference to the Legislature to decide social and

policy issues, but it is the traditional and settled role of courts to decide constitutional issues."); *Kerrigan*, 957 A.2d at 480-81 ("Contrary to the suggestion of the defendants . . . we do not exceed our authority by mandating equal treatment for gay persons; in fact, any other action would be an abdication of our responsibility.").

In sum, while the Legislature could have remedied the constitutional violation presented, having chosen not to – and, in particular, having chosen to ignore the body that it created to determine whether civil unions provide the equality demanded by this Court in *Lewis* – previous deference to the Legislature must now give way to the Court's paramount duty "as the designated last-resort guarantor of the Constitution's command." *Robinson IV*, 69 N.J. at 154-55. More than three years after *Lewis*, and with full equal rights for same-sex couples and their children still lacking – as acknowledged not only by proponents of marriage equality but also by legislators who oppose it – the Court must now proceed to give meaning to its conclusion that there is no "legitimate public need for an unequal legal scheme of benefits and privileges that disadvantages committed same-sex couples." *Lewis*, 188 N.J. at 453.

C. The CURC Findings Warrant Relief in Aid of Litigants' Rights, Including, at the Very Least, Appointment of a Special Master to Evaluate Compliance with *Lewis's* Mandate.

The Court is now confronted with a record which demonstrates that equality for same-sex couples has not been achieved in New Jersey. While the Court in 2006 did not "presume that a difference in name alone is of constitutional magnitude," 188 *N.J.* at 459, here, the CURC's findings and conclusions make undeniably clear that the distinction between civil unions and marriages in New Jersey is, in fact, more than just one of nomenclature.

The findings and conclusions of the CURC are, of course, entitled to significant weight, given that the Legislature created this entity with the express understanding that it was necessary to evaluate whether civil unions would provide rights equal to marriage. Specifically, the Legislature created the CURC in the same stroke as the Civil Union Act and charged that entity with evaluating the "effectiveness of the act" and, most importantly, with "determin[ing] whether additional protections are needed" in order to comply with the constitutional mandate of *Lewis*. *N.J.S.A.* 37:1-36(c)(1) & (3). Indeed, the Legislature directed the Commission to evaluate "the effect" of providing same-sex couples "civil unions rather than marriage," *N.J.S.A.* 37:1-36(c)(5) & (6)), and to report its findings to the

Legislature and Governor, *N.J.S.A.* 37:1-36(g). Despite having created the Commission as part of its attempt to comply with *Lewis*, the Legislature has ignored the Commission's findings that civil unions do not provide rights that are equivalent to marriage, but rather, actually invite the public to conclude that same-sex couples are not equal to different-sex married couples in the eyes of the law, and thus do not warrant full equality. *Final Report* at 2. This is significant given that, in particular, several members of the Legislature have candidly acknowledged that the Civil Union Act is not working.

The findings and conclusions of the CURC in particular (as well as legislative testimony and Plaintiffs' affidavits showing that the Civil Union Act has failed to meet *Lewis's* mandate) therefore warrant remedial relief from this Court, specifically allowing same-sex couples to marry. However, even if this Court were to conclude that the CURC findings are an insufficient basis upon which to conclude that the Civil Union Act has failed, in light of the serious questions raised by the Commission, a remedy in aid of litigants' rights is still warranted, in the form of further Court-supervised fact-finding.

Significantly, when the State's compliance with previous judicial orders or directives was "not conducive to resolution on a summary record" this Court has "remanded the matter to a special master for development of an evidential record." *Abbott*

ex rel. Abbott v. Burke, 199 N.J. 140, 145 (2009) (describing remand order in *Abbott v. Burke*, 196 N.J. 544, 565 (2008) (“Abbott XIX”)); see also *Abbott v. Burke*, 149 N.J. 145, 200-01 (1997) (remanding matter to trial court with authorization for appointment of Special Master to assist the court in determining appropriate remedial relief).

Plaintiffs submit that because the Legislature created the CURC specifically in order to assure compliance with *Lewis*, its findings and conclusions should obviate the need for further fact-finding. Should this Court, however, conclude that the State’s compliance with *Lewis* requires further inquiry, the appointment of a Special Master would be an appropriate and judicially feasible means of further developing the factual record in this regard. See *Southern Burlington County N.A.A.C.P. v. Mount Laurel Twp.*, 92 N.J. 158, 281-83 (1983) (authorizing trial courts to appoint special master “to assist municipal officials in developing constitutional zoning and land use regulations” and noting that “use of such special masters . . . is not uncommon in litigation resulting in some form of institutional change”) (citing, *inter alia*, T. Eisenberg & S. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 Harv. L. Rev. 465 (1980); Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 Colum. L. Rev. 707 (1978); *The Wyatt Case: Implementation of*

a Judicial Decree Ordering Institutional Change, 84 Yale L. J. 1338, 1344 (1975)). Indeed, this Court has relied upon special masters to address constitutional questions in a variety of contexts. See, e.g., *State v. Loftin*, 157 N.J. 253, 265 (1999) (remanding death penalty case to special master to examine proportionality review methodology used by the Court in capital cases and to develop a record for the Court to assess claims that "New Jersey's system of capital punishment operates in an invidiously discriminatory manner").

In sum, the findings and conclusions of the CURC that civil unions have failed to provide full equality to same-sex couples and their children in New Jersey is entitled to significant weight and warrants a remedy from this Court allowing same-sex couples to marry. At the very least, however, given the CURC findings, this Court should consider the appointment of a special master to further develop the facts regarding whether the Civil Union Act complies with this Court's mandate in *Lewis*.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion in aid of litigants' rights and declare that the Civil Union Act denies them the "rights and benefits that are statutorily given to their heterosexual counterparts [in] violat[ion of] the equal protection guarantee of Article I, Paragraph 1" of the New Jersey Constitution of

1947. *Lewis*, 188 N.J. at 423. Plaintiffs ask simply that the Court require the State to provide what the Court already has ruled the New Jersey Constitution requires, and direct the State to afford Plaintiffs and other same-sex couples equal treatment by allowing them to marry.

Respectfully submitted,

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