No. 12-144

IN THE
Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,
Petitioners,

v.

KRISTIN M. PERRY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF GARDEN STATE EQUALITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Garden State Equality ("GSE") is New Jersey's largest organization advocating for the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") individuals and the greater LGBT community.[1] Since its founding in 2004, GSE has grown to more than 125,000 members and has successfully advocated for the passage of no less than 213 LGBT hate-crime, antidiscrimination, and anti-bullying laws in New Jersey. GSE has also led the campaign for New Jersey to ratify a marriage equality bill, which was successfully passed by the New Jersey Legislature last year, but was ultimately vetoed by the Governor. GSE is currently campaigning for an override of that veto before the end of the legislative session in January 2014.

In addition to its organizing, education and advocacy related to LGBT issues in New Jersey, GSE has participated as a plaintiff in *Garden State Equality v. Dow*, MER-L-1729-11 (N.J. Super. Ct.-L. Div.), currently pending in the Superior Court of New Jersey, Law Division. That lawsuit, described in more detail herein, challenges under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the equal protection guarantee of Article I, Paragraph I of the New Jersey Constitution, New Jersey excluding same-sex couples from the institution of civil marriage.

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[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court in accordance with Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the above-mentioned *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

GSE has a strong interest in the Court's decision of this case, which addresses issues identical or similar to those present in GSE's ongoing New Jersey litigation -- *i.e.*, the constitutionality of a State's denial of the designation of "marriage" to same-sex couples. In campaigning for marriage equality, GSE has documented the experiences of same-sex couples in New Jersey under the State's civil union regime and the various ways that New Jersey's denial of marriage has harmed same-sex couples in the State. GSE has brought and will continue to bring that knowledge and understanding to bear in the *GSE v. Dow* litigation and does so as *amicus curiae* in this case. Accordingly, GSE appears as *amicus curiae* in support of Respondents and urges this Court to affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT

This case requires the Court to decide, *inter alia*, whether California's amendment to its Constitution withdrawing the right of marriage from gay and lesbian couples violates the Equal Protection Clause of the Fourteenth Amendment. The central underlying substantive issue in this case is the meaning and significance of marriage, as well as the harm of denying that institution to same-sex couples, and the constitutional ramifications of that denial, an issue that is not unique to California. To the contrary, as *amicus* shows in describing the experience of civil unions in New Jersey, same-sex couples are injured whenever a state denies them the right to marry, even when they are ostensibly afforded the same rights as married couples under a separate legal status.

The United States Court of Appeals for the Ninth Circuit acknowledged that Proposition 8 "stripped same-sex

couples of the right to have their committed relationships recognized by the State with the designation of 'marriage,'" *Perry v. Brown*, 671 F.3d 1052, 1076 (9th Cir. 2012), but left "'intact all of the other very significant [state] constitutional protections afforded same-sex couples,'" *id.* (quoting *Strauss v. Horton*, 207 P.3d 48, 102 (Cal. 2009)). Among these protections was the right to enter into an officially recognized family relationship, there a "domestic partnership" that conveyed the same legal rights as a marriage. But the Court of Appeals observed that designating a relationship as "marriage" carries "extraordinary significance" because "'marriage' is the name that society gives to the relationship that matters most between adults" and the term "is singular in connoting 'a harmony in living,' 'a bilateral loyalty,' and 'a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.'" *Id.* at 1077 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)). Ultimately, the Court of Appeals held that denying marriage to same-sex couples "works a meaningful harm to gays and lesbians, by denying to their committed lifelong relationships the societal status conveyed by the designation of 'marriage,' and this harm must be[, but is not,] justified by some legitimate state interest," *id.* at 1081, 1088 (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

As *amicus curiae* GSE argues herein, the significance accorded the word "marriage," the injury caused by denying same-sex couples the right to marry, and the lack of any state interest sustaining that denial are not unique to California. Rather, these unjustified harms are visited upon same-sex couples in New Jersey as well, in a state that, like California, purports to provide same-sex couples with the full range of

substantive legal rights extended to married couples, but denies them the official designation of "marriage."

The separation of same-sex couples from married, different-sex couples creates a distinction with a significant difference. Marriage is the term that society uses to recognize the most important relationship that two adults can form. But, as GSE has documented, government officials, private businesses and organizations, as well as individual New Jersey citizens, all recognize "marriage" as a unique relationship endowed with certain rights and privileges because the term connotes the deepest, most significant, loving relationship into which two adults can enter; no other designation can ever capture that same meaning or convey that same value.

Nor is relegating same-sex couples to a parallel status of "civil union" or "domestic partnership" a mere semantic difference. Instead, as *amicus* sets forth below, New Jersey's differentiation between marriage and civil union profoundly and concretely alters the lives of same-sex couples, resulting in civil union partners being denied access to their loved ones in hospitals; being deprived of health insurance by their partners' employers; incurring additional financial burdens in obtaining goods and services; suffering additional costs to acquire additional legal protections for each other and their children; and, ultimately, experiencing psychological and dignitary injuries. Such treatment of same-sex couples can only be justified by a state interest, which New Jersey (like California) has failed to demonstrate under the appropriate standards.

Rather, all of the harms that same-sex couples have suffered in New Jersey and that *amicus* documents in this brief stem from the central truth that the District Court and

Court of Appeals recognized: marriage signifies a couple's commitment to each other in the most profound way recognized by our law and society; that, as a result, "marriage" extends to couples not only a menu of legal rights and privileges but also the social and symbolic recognition of that relationship's meaning and value; and that no other word or term can ever serve as an adequate substitute.

Based on its experience with New Jersey's denial of marriage to same-sex couples, *amicus* GSE urges this Court to affirm the decision below.

ARGUMENT

I. The History of Civil Unions in New Jersey

On June 26, 2002, six same-sex couples filed a complaint seeking a declaration that New Jersey'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 and an injunction compelling the State to grant them marriage licenses. *Lewis v. Harris*, 188 N.J. 415, 427 (2006). After the parties filed cross-motions for summary judgment, the trial court granted summary judgment to the State, *id.* at 428, a decision which was affirmed by a divided appellate panel, *see Lewis v. Harris*, 378 N.J. Super. 168 (App. Div. 2005).

On October 25, 2006, the New Jersey Supreme Court reversed, concluding that New Jersey's failure to afford same-sex couples the same rights as opposite-sex couples violated the State's equal-protection guarantee. *Lewis*, 188 N.J. at 423, 457. The court found that same-sex couples in New Jersey faced regular "social indignities and economic

difficulties . . . due to the inferior legal standing of their relationships compared to that of married couples," including higher health care premiums, denial of health care coverage, and the refusal of hospitals and medical care providers to recognize same-sex partners as family members during health care crises. *Id.* at 426. Further, the New Jersey Supreme 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 the New Jersey Constitution. *Id.*

To remedy this constitutional violation, the New Jersey Supreme Court directed the State to act within 180 days 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. The court noted, however, that purportedly "identical schemes called by different names" might 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 New Jersey Legislature enacted the Civil Union Act, 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). 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.

The Legislature contemporaneously established the New Jersey Civil Union Review Commission ("CURC" or "the Commission"), an entity charged with evaluating "the effectiveness of the act"; collecting "information about the act's effectiveness from members of the public, State agencies and private and public sector businesses and organizations"; determining "whether additional protections are needed"; and determining "the effect on same-sex couples, their children and other family members of being provided civil unions rather than marriage." N.J.S.A. 37:1-36(c). Additionally, 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).

In February 2008, the CURC issued an interim report setting forth its preliminary finding that the Civil Union Act failed to comply with the constitutional requirements of *Lewis*. The Commission cited evidence that the Civil Union Act was not guaranteeing to same-sex couples the full rights and benefits enjoyed by heterosexual married couples in the State. N.J. CURC, *First Interim Report of the New Jersey*

Civil Union Review Commission (Feb. 19, 2008) ("*Interim Report*), *available at* http://www.state.nj.us/lps/dcr/downloads/1st-InterimReport-CURC.pdf (last visited Feb. 21, 2013). For example, the Commission detailed significant disparities between the legal protections and benefits afforded to couples in civil unions in New Jersey and those permitted to marry, with respect to employment and health care and cited evidence that same-sex couples and their children face the stigma of "second-class legal status." *Id.* at 4, 9-13.

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

Nonetheless, New Jersey's political branches have failed to remedy the problems identified by the CURC and have not yet met their obligations under the State's Constitution. A bill providing for marriage equality cleared

the Senate Judiciary Committee in 2009, *see* Mary Fuchs, *N.J. Senate Judiciary Committee Approves Gay Marriage Bill*, Star-Ledger, Dec. 7, 2009, but the full Senate refused to pass the measure, *see N.J. Senate Rejects Bill Legalizing Gay Marriage*, Star-Ledger, Jan. 7, 2010. More recently, on February 16, 2012, the New Jersey Legislature passed a gay marriage bill, *see* MaryAnn Spoto, *New Jersey Assembly Passes Gay Marriage Bill*, Star-Ledger, Feb. 17, 2012, but it was vetoed by Governor Chris Christie, MaryAnn Spoto, *Gov. Christie Vetoes N.J. Gay Marriage Bill*, Star-Ledger, Feb. 18, 2012.

As a result, same-sex couples in New Jersey have returned to the courts. Specifically, on March 18, 2010, the plaintiffs in *Lewis* filed a motion in aid of litigants' rights with the New Jersey Supreme Court. *See* N.J. Court Rule 1:10-3. In that motion, the *Lewis* plaintiffs contended that the CURC's findings -- as well as evidence adduced by the Legislature during hearings on the marriage equality bill pending in 2009 -- conclusively demonstrated that the State's Civil Union Act violated the equal-protection principle announced in *Lewis*. Thus, the *Lewis* plaintiffs argued, they were entitled to relief from the New Jersey Supreme Court in the form of an order permitting them and all other same-sex couples to marry in the State. On July 26, 2010, the Court denied the motion without prejudice to the matter being raised in a new lawsuit. *Lewis v. Harris*, 202 N.J. 340 (2010).

Accordingly, on June 29, 2011, a group of plaintiffs, including GSE, filed suit in the Superior Court of New Jersey, alleging that New Jersey's exclusion of same-sex couples from the institution of civil marriage violates the Equal Protection and Due Process Clauses of the Fourteenth

Amendment, as well as the equal protection and due process guarantees of Article I, Paragraph 1 of the New Jersey Constitution. Plaintiffs' state and federal equal protection claims survive pretrial motion practice, *see Garden State Equality v. Dow*, No. MER-L-1729-11, N.J. Super. Unpub. LEXIS 360 (N.J. Super. Ct.-L. Div. Feb. 21, 2012), and the case is currently in discovery.[2] The *GSE* litigation builds upon the CURC's findings and reports and focuses on the experiences of six same-sex couples -- two of whom were named plaintiffs in the *Lewis* litigation -- and upon the harms that have been visited upon them by their relegation to the separate civil union status. As the CURC's findings and conclusions establish and the experience of the named plaintiffs in *GSE* further demonstrate, equality can never be fully realized by relegating same-sex couples to a state-created separate status and excluding them from marriage.[3]

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[2] Because *GSE v. Dow* is still in discovery, GSE relies on the factual allegations in its Complaint, which, before summary judgment much less a full trial, are assumed to be true. *See NCP Litig. Trust v. KPMG LLP*, 187 N.J. 353, 365 (2004) (holding that, on motion to dismiss brought under N.J. Court Rule 4:6-2(e), court must assume allegations are true and draw all reasonable inferences in plaintiffs' favor); *see also Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012) (accepting as true all facts on motion to dismiss). *Amicus*, which intends to prove each of these allegations at trial, therefore relies on its Complaint for purposes of introducing those facts specific to the plaintiffs in the *GSE* litigation.

[3] Connecticut and Vermont at one point purported to provide same-sex couples the same rights and obligations as marriages in the form of civil unions, but both states have since eschewed those separate statuses, now allowing same-sex couples to marry. *See Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (2008); VT Human Rights Commission, *Position Statement on Same-Sex Marriage*, *available at* http://hrc.vermont.gov/sites/hrc/files/pdfs/ss%20marriage/HRC_state

II. Separate Status Denies Same-Sex Couples Equal Protection.

LGBT couples' experiences in New Jersey demonstrate that the difference between marriage and civil unions is not one of mere nomenclature. Rather, as the CURC found and as *GSE v. Dow* plaintiffs will attest, same-sex couples routinely encounter significant obstacles in exercising their civic rights, including problems being allowed to make decisions regarding medical treatment for their civil union partners, health benefits and workplace protections, and in receiving 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 created by the New Jersey Legislature. 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. These burdens also unfairly disadvantage the children of same-sex couples.

This 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 resulting from the discrimination it has written

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ment.pdf (last visited February 27, 2013); VT Office of Legislative Counsel, *Report on the Vermont Commission on Family Recognition and Protection* (Apr. 21, 2008), *available at* http://hrc.vermont.gov/sites/hrc/files/pdfs/ss%20marriage/VCFRP%20report%20and%20appendices.pdf (last visited February 27, 2013). N.J. CURC, *First Interim Report of the New Jersey Civil Union Review Commission* (Feb. 19, 2008) ("*Interim Report*)

into the law and for its refusal to redress that discrimination, once confronted with unmistakable evidence of its existence. As the Commission reported, "denying . . . 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 below will persist in New Jersey -- and any other State where this separate status exists -- so long as same-sex couples are prohibited from marrying. *Final Report* at 2.

A. Civil union couples in New Jersey lack workplace benefits and protections equal to their married counterparts.

In *Lewis*, the New Jersey Supreme 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." *Id.* at 426.[4] Additionally, the Court found, same-

[4] *See also Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), *petition for cert. filed*, __ U.S.L.W. ____ (U.S. July 2, 2012) (No. 12-23). (plaintiffs challenged Arizona law preventing state employees from enrolling their same-sex partners in state health insurance due to their inability to marry); *Conaway v. Deane*, 401 Md. 219, 240 n.6 (Md. 2007) (noting Maryland law that provides for health care benefits, conditioned on marital status, to the effective exclusion of same-sex couples prohibited from marriage); *Andersen v. King County*, 158 Wn.2d 1, 41-42 (Wash. 2006) ("many day-to-day decisions that are routine for married couples are more complex, more agonizing, and more costly for same-sex couples. A married person may be entitled to health care and other benefits through a spouse."); *Jones v. County of Missoula*, 2006 MT 2 (Mont. 2006) (plaintiffs challenged county amending its employee benefits plan to

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. Lesbian and gay employees are routinely denied benefits -- including health insurance -- that are extended to heterosexual married employees. *Final Report* at 11-13.

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* CURC Hr'g, Sept. 26, 2007, at 79 (Test. of Robert Corcoran), *available at* http://www.nj.gov/oag/dcr/downloads/public-hearing-transcript-curc-9.26.07.pdf (last visited Feb. 21, 2013). At the very least, the designation causes confusion on the part of employers, who are accustomed to administering benefits based upon marriage and, as one employment law attorney told the Commission, are "questioning whether they have to provide benefits" to couples in civil unions because their benefits "plan says 'spouse' or 'marriage.'" CURC Hr'g,

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extend health insurance coverage to domestic partners); *Ralph v. City of New Orleans*, 928 So. 2d 537 (La. 2006) (plaintiffs challenged a city's new policy to provide health insurance coverage to same-gender domestic partners of city employees); *Alaska Civ. Liberties Union v. State*, 122 P.3d 781 (Alaska 2005) (plaintiffs challenged Alaska and Anchorage programs that denied health insurance benefits to same-sex partners due to their inability to marry); *Arlington County v. White*, 259 Va. 708 (Va. 2000) (holding that a local governing body acted *ultra vires* in extending coverage under its self-funded health insurance benefits plan to unmarried domestic partners of its employees); *Connors v. Boston*, 430 Mass. 31 (Mass. 1999) (refusing to expand health insurance coverage to include domestic partners).

Oct. 24, 2007, at 81 (Test. of Luanne Peterpaul), *available at* http://www.nj.gov/oag/dcr/downloads/public-hearing-transcript-curc-10.24.07.pdf (last visited Feb. 21, 2013). As one *New Jersey Star-Ledger* employee testified, "the policies concerning the continuation of the medical benefits for my partner when I retire are really not . . . laid out clearly" because the manual referred to "spouses" but not civil unions. CURC Hr'g, Nov. 5, 2008, at 43-44 (Test. of John Corbitt), *available at* http://www.nj.gov/oag/dcr/downloads/Transcript-CURC-11052008.pdf (last visited Feb. 21, 2013).

Whatever the motivation of employers and insurance companies, it is clear that employers do not extend equal benefits to civil union members. Thus, the CURC hearings revealed that an employer denied health care coverage to a Vietnam veteran's civil union partner because the employer's benefits were "only available to legally married spouses," CURC Hr'g, Sept. 26, 2007, at 64-65 (Test. of Donald Rogers); a major pharmaceutical company refused to list an employee's civil union partner as a surviving "spouse" under its pension plan, *id.* at 68-69; an employer denied its employees' civil union partners flex-spending accounts, *id.* at 98 (Test. of Jesse Thompson Adams); and a major airline denied an employee the right to take family leave to care for his civil union partner, CURC Hr'g, Oct. 24, 2007, at 97-98 (Test. of Henri Simonetti). Indeed, as the example of a *GSE v. Dow* plaintiff illustrates, even the State of New Jersey fails to provide benefits to its employees' civil union partners -- the plaintiff, an employee of a New Jersey community college, temporarily lost his health insurance coverage for his civil union partner and children because the State's insurance auditor did not recognize civil union as a valid

relationship. Compl. ¶ 14, *GSE v. Dow*, MER-L-1729-11 (N.J. Super. Ct., L. Div. June 29, 2011).

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 ("CBAs"). Thus, if a previously negotiated CBA 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. CURC Hr'g, Sept. 26, 2007, at 42-44 (Test. of Jodi Weiner, Int'l Bhd of Elec. Workers Local 456); *see also* CURC Hr'g, May 21, 2008, at 41 (Test. of Mauro Camporeale, Ex. Dir., Bergen Ct'y Central Trades and Labor Council, AFL-CIO), *available at* http://www.nj.gov/oag/dcr/downloads/Transcript-CURC-and-Public-Hearing-05212008.pdf (last visited Feb. 21, 2013). That is, based upon their civil union designation, lesbian and gay workers are "treated differently from straight employees." CURC Hr'g, May 21, 2008, at 38 (Test. of Carla Katz, Pres., Commc'ns Workers of Am. Local 1034), Ex. 20; *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").

Civil union status has also proven to create additional adverse consequences for employees of companies that fund their own insurance plans -- nearly fifty percent of New Jersey, *Final Report* at 11 -- and are therefore 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." As the CURC found, ERISA-governed New

Jersey employers who provide marriage-based benefits frequently decline 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. One witness testified that he would be unable to continue the health care coverage of his civil union partner after his retirement because Johnson & Johnson, his employer of 29 years, refused coverage under ERISA. CURC Hr'g, Oct. 15, 2008, at 54-55 (Test. of Roger Asperling). Similarly, employers have invoked other provisions of federal law that reference marriage to deny same-sex couples benefits, including so-called "COBRA" benefits after termination of employment under 29 U.S.C. §§ 1161-1169, *see* CURC Hr'g, Sept. 26, 2007, at 91 (Test. of Thomas Mannix), and benefits enrollment upon entrance into a civil union as a qualifying "event," *see id.* at 30-32 (Test. of Richard Cash). In stark contrast to New Jersey, the CURC found 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; CURC Hr'g, March 19, 2008, at 132-33 (Test. of Mark Solomon, Dir., Mass Equality), *available at* http://www.nj.gov/oag/dcr/downloads/Transcript-CURC-03192008.pdf (last visited Feb. 21, 2013); CURC Hr'g, Sept. 26, 2007, at 38 (Test. of Tom Barbera, V. Pres., AFL-CIO).

Finally, civil unions have undermined workplace equality for same-sex couples because, in order to attain benefits regularly provided to others, civil union couples often must advocate with their employers regarding coverage. That inquiry requires them to divulge details of their private lives in the employment context and makes them more vulnerable to discrimination. Louise Walpin, a

GSE v. Dow plaintiff, "felt compelled to inquire whether her prospective employers offered benefits to civil union partners when looking for a nursing job in New Jersey," and often "wonders whether some employers discriminated against her and did not hire her because her inquiries disclosed her sexual orientation." Compl. ¶ 47, *GSE v. Dow*. This type of forced "outing" would not exist if same-sex couples could marry.

B. Same-sex couples continue to face unequal treatment and a lack of recognition in public accommodations and civic life.

Beyond workplace benefits, the record before the CURC reveals that the inequality effected by denying same-sex couples the right to marry, relegating them instead to civil unions, extends to nearly all aspects of these couples' financial, commercial, and civic dealings, perpetuating what the New Jersey Supreme Court called a "system of disparate treatment," *Lewis*, 188 N.J. at 453.[5] Indeed, the civil union

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[5] *See also Perry v. Brown*, 671 F.3d at 1063-64 (noting that preventing same-sex couples from marrying "lessens the status and human dignity of gays and lesbians in California, and [] officially reclassif[ies] their relationships and families as inferior to those of opposite-sex couples" and "single[s]out a disfavored group for unequal treatment"); *In re Marriage Cases*, 183 P.3d 384, 445 (Cal. 2008) (noting that denying marriage only to same-sex couples risks "caus[ing] the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship"); *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 151 (Conn. 2008) ("[m]aintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage *is* the constitutional infirmity at issue." (quoting *Opinions of the Justices to the Senate*, supra, 440 Mass. 1201, 1209 (Mass. 2004)) (emphasis in original)); *Schulman v. AG*, 447 Mass. 189, 198 (Mass. 2006)

designation is a symbol of difference and inferiority for same-sex couples and an obstacle 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.

Indeed, local branches of nationwide financial services, real estate, and other companies have not changed their policies, forms, or computer programs to accommodate the new and anomalous legal category engendered by "civil unions." Thus, individuals in a civil union must supply additional information about, or documentation of, their relationship to explain what a civil union is in order to engage in financial transactions, CURC Hr'g, Oct. 24, 2007, at 61-63 (Test. of Kevin Slavin); buying or refinancing a house, *id.* at 47 (Test. of Rose Levant-Hardy); applying for insurance, Compl. ¶ 33(c), *GSE v. Dow* (allegations concerning plaintiffs Marcye and Karen Nicholson-McFadden); or even in arranging for the funeral of a loved

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(noting that preventing same-sex couples from marrying prohibits them from attaining the multitude of legal rights, and financial and social benefits, that arise therefrom"); *Opinions of the Justices to the Senate*, 440 Mass. at 1207 ("The dissimilitude between the terms "civil marriage" and "civil union" is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.").

one, *id.* ¶ 33(b) (allegations concerning plaintiffs Marsha Shapiro and Louise Walpin). This contributes to the inferior status experienced by civil union couples.

Nor is this confusion about the meaning of civil unions limited to the private sector. Civil union couples have reported significant difficulty in filing their state taxes because of confusion regarding civil unions and how to treat them. CURC Hr'g at 107, Oct. 24, 2007 (Test. of Leslie Farber, Chair, N.J. State Bar Assoc. Gay, Lesbian, Bisexual, Transgender and Intersex Section); Compl. ¶ 44, *GSE v. Dow*; *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 agencies have failed to accord equal recognition to civil unions. Thus, one witness before the CURC 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). Likewise, prospective jurors in civil unions often feel compelled to "out" themselves during *voir dire* by stating their relationship status in response to the question whether they are married or single. *See* CURC Hr'g, Oct. 10, 2007, at 67-68 (Test. of Veronica Kairos); Compl. ¶ 32, *GSE v. Dow*.

The lack of recognition persists for same-sex couples in hospitals and critical-care settings even though New Jersey law requires hospitals to recognize the rights of individuals to access their civil union partners during medical treatment. *Final Report* at 14; May 21, 2008 CURC Hr'g at 20-21 (Test. of John Calabria, Dep't of Health and Senior Servs.). Several *GSE v. Dow* plaintiffs have been

subject to this mistreatment. Daniel Weiss was forced to explain to hospital staff what a civil union is and why he should have been permitted to make all medical decisions for his partner, John T. Grant, after John had been struck by a car and rushed to an emergency room with a shattered skull and an epidural hematoma; still, hospital staff insisted on calling John's sister and having her drive four hours to the hospital in the middle of the night so she could sign medical authorizations for him. Compl. ¶ 31(a), *GSE v. Dow*. When Tevonda Bradshaw went into labor and was admitted to the hospital, her civil union partner, Erica Bradshaw, was not recognized as the child's parent and Erica was forced to go home to retrieve Tevonda's identification while Tevonda was in labor, in the process of giving birth to their child. *Id.* ¶ 31(b). And on two occasions, Cindy Meneghin has had to explain to emergency room staff that her civil union partner, Maureen Kilian, had a right to make decisions on Cindy's behalf if she could not do so herself, just as if they were married. *Id.* ¶ 31(d).

These incidents are not isolated. 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* CURC Hr'g, Oct. 10, 2007, at 12-13 (Test. of Paul Walker); CURC Hr'g, Oct. 24, 2007, at 51-52 (Test. of Lori Davenport); N.J. Sen. Judiciary Comm. Hr'g at 59 (Dec. 7, 2009) (Test. of William Paul Beckwith) (recounting that a New Jersey hospital emergency worker refused to recognize him as next-of-kin for his civil union partner). 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. N.J. Sen. Judiciary Comm. Hr'g at 180 (Test. of Margaret Maloney). Nor are these incidents inconsequential: the lack of recognition of civil union status has led to delays in the provision of critical care in life-threatening situations. *See* CURC Hr'g, Oct. 24, 2007, at 27-29, *and* CURC Hr'g, Oct. 15, 2008, at 40-47 (Test. of Gina Pastino), *available at* http://www.nj.gov/oag/dcr/downloads/Transcript-CURC-101508.pdf (last visited Feb. 21, 2013) (explaining delay in son's emergency treatment due to time spent with hospital staff explaining relationship of partner to her son).

New Jersey's 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 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, married same-sex couples have had their relationships recognized and given full effect in these most vulnerable moments. For example, 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." CURC Hr'g, April 16, 2008, at 52 (Test. of Marsha Hams), *available at* http://www.nj.gov/oag/dcr/downloads/Transcript%20CURC-and-Public-Hearing-04162008.pdf (last visited Feb. 21, 2013).

Finally, the lack of recognition encountered by same-sex couples in New Jersey is magnified when they travel outside of New Jersey. Several *GSE v. Dow* plaintiffs have experienced anxiety about traveling for fear that, in the event of an emergency, their civil union status will not be recognized. Compl. ¶ 34, *GSE v. Dow*. Thus, plaintiff Daniel Weiss carries paper and electronic copies of his healthcare proxies everywhere he goes, in the event that such an emergency occurs. *Id.* ¶ 42.

In sum, as a unique and anomalous legal status, civil unions routinely are not recognized by private organizations and public agencies. The treatment afforded same-sex couples by government workers, medical staff and facilities, and others merely illustrates that New Jersey same-sex couples have been relegated to an inferior legal status that has not and really cannot provide equality.

C. Same-sex couples and their children continue to suffer disparate and unfair financial burdens.

Economic disadvantages are heaped upon same-sex couples because they cannot marry and these disadvantages are unfairly "borne by their children too." *Lewis*, 188 N.J. at 450. Indeed, the Civil Union Review Commission concluded that, even after the passage of the Civil Union

Act, same-sex couples continue to face economic and financial inequities, and these disadvantages have a predictably negative impact on their children. *Final Report* at 24.

Specifically, the Commission concluded that the legal uncertainty and lack of recognition created by the separate 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 face "[t]he prospect of litigating from now into eternity to get the benefits and protections" that married couples receive as a matter of course. Sept. 26, 2007 CURC Hr'g at 85 (Test. of Steven Carter). As a consequence, civil union couples and their families bear the expensive burden of taking legal steps to effect the recognition of their relationships in New Jersey while opposite-sex married couples enjoy clear, statutorily prescribed rights. Unsurprisingly, this burden is experienced most acutely by lower-income New Jersey residents, *see* CURC Hr'g, May 21, 2008, at 32-33 (Test. of Nicole Sharpe, Office of the Pub. Advocate), who are disproportionately people of color, *see Final Report* at 14. By contrast, in marriage equality states, married same-sex couples no longer need, in the words of one CURC witness from Massachusetts, to use "a special gay rights lawyer" to effect financial and real estate transactions. CURC Hr'g, April 16, 2008, at 53 (Test. of Sue Shepherd).

For example, despite the Civil Union 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 the federally created Free Application for Federal Student Aid ("FAFSA"). But FAFSA neither recognizes the legal relationship of same-sex parents nor permits children to list one parent as a second dependent in the household, disqualifying them from certain grants or unsubsidized loans. *Id.* at 14. Thus, children of same-sex couples are often denied financial aid to which they may be entitled. CURC Hr'g, April 16, 2008, at 13-14 (Test. of Jane Oates, Exec. Dir., Comm'n on Higher Educ.).

This inequality persists, as the Director of New Jersey's financial aid program acknowledged to the Commission, purely 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. *Id.* at 19 (Test. of Michael Angulo, Exec. Dir., N.J. Higher Educ. Student Assistance Auth.). 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).

D. 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. Specifically, New Jersey's maintenance of the separate civil union status sends a message 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 to same-sex couples.'") (quoting *In re Marriage Cases*, 183 at 445).

As the New Jersey Supreme Court has acknowledged, "[c]hildren have the same universal needs and wants, whether they are raised in a same-sex or opposite-sex family," *Lewis*, 188 N.J. at 451, and, thus, one of the core purposes of assigning legal significance to committed relationships is to meet those needs and wants by encouraging committed, monogamous relationships among parents, *id.* at 453; *see also Perry v. Brown*, 671 F.3d at 1069 n.4 (9th Cir. 2012) ("the children of same-sex couples benefit when their parents marry") (citing *Perry v. Schwarzenegger (Perry IV)*, 704 F. Supp. 2d at 2010, 973, 980-81)); *Varnum v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009) ("Society benefits . . . from providing same-sex couples a stable framework within which to raise their children . . ., just as it does when that framework is provided for opposite-sex couples."). 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, all of which "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." *Final Report* at 36.

Indeed, same-sex couples' lack of access to marriage places children in a state of fear and vulnerability, which is the natural result not only of the palpably different treatment these families receive in numerous settings, but of the inevitable perception that their families are different from and inferior to other families. 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 Hr'g, at 44-45. 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 couples experience this stigma and vulnerability in a powerful and poignant way. For example, Kasey Nicholson-McFadden, the son of two *GSE v. Dow* plaintiffs, testified before the New Jersey Senate Judiciary Committee that, "it 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 at 113 (Dec. 7, 2009); Compl. ¶ 13, *GSE v. Dow*. 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.

CURC Hr'g, Nov. 5, 2008, at 29-31 (Test. of Charles Stevens). 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), at 102.

In contrast, the CURC heard testimony from same-sex couples who are legally married in other jurisdictions regarding the positive impact that being married had on their children. *See Final Report* at 22; CURC Hr'g, April 16, 2008, at 58-61 (Test. of Laura Patey) (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." CURC Hr'g, April 16, 2008, at 47 (Test. of Peter Hams), Ex. 18. This witness described the 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, "[i]n 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 at 105 (Dec. 7, 2009) (Test. of John Otto). 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* CURC Hr'g, April 16, 2008, at 54 (Test. of Peter Hams) (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."). Dr. Marshall Forstein, Associate Professor of Psychiatry at Harvard Medical School, testified that, for lesbian and gay teenagers who already face a heightened risk 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.

E. The unequal treatment resulting from separate 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. Significantly, the burden has fallen on same-sex couples to attempt to justify their civil union status -- to try

to convince the world that, in spite of their designation, their relationships should be considered equal to different-sex relationships. For example, the plaintiffs in *GSE v. Dow* have had to explain and justify their relationship when attempting to buy family insurance, Compl. ¶ 33(b), *GSE v. Dow*; when filling out medical forms and obtaining medical care, *id.* ¶ 33(c); and even when making funeral arrangements for family members, *id.* ¶ 33(a). The CURC concluded that, while "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* CURC Hr'g, Sept. 26, 2007, at 52 (Test. of Thomas Walton) ("We feel like this is going to be our lives now, explaining to people what a civil union is.").

The *GSE v. Dow* plaintiffs' relationships are, like the relationships of opposite-sex couples who may marry in New Jersey, a central element of their lives; their commitment is as solemn and meaningful as marriage. Yet these plaintiffs and other same-sex couples in civil unions have seen their status express a very different message about the value of their relationships. *See, e.g.*, Compl. ¶ 6, *GSE v. Dow* (describing Daniel Weiss and John T. Grant's "wish to be recognized as a married couple in New Jersey, where they work and make their home"); *id.* ¶ 12 (describing Marcye and Karen Nicholson-McFadden's concern that their children will be taught "that their parents' relationship or their family is of lesser importance than any other family in New Jersey"). Indeed, because of their separate civil union status, same-sex couples in New Jersey, "cannot invoke the status of marriage in order to communicate to their children and others the depth and permanence of the couples'

commitment in terms that society, and even young children, readily understand and respect." *Id.* ¶ 52.

The legal designation of "civil union" has proven to isolate same-sex couples from the married world around them, which has caused emotional and psychological distress. *See* CURC Hr'g, April 16, 2008, at 33 (Test. of Marshall Forstein, M.D.) (equating civil union status with sexual orientation discrimination, which "contributes to increased rates of anxiety, depression and substance-use disorders"). And 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"), civil union status reinforces the notion that sexual orientation is a legitimate basis upon which to disfavor certain classes of people. *See* CURC Hr'g, Oct. 24, 2007, at 42 (Test. of Anthony Giarmo) (explaining that, as parent of gay son, he understands civil unions to communicate that "homosexuals justifiably [can] be placed in a separate relationship category").

III. New Jersey's Experience Shows that Denying Access to Marriage for Same-Sex Couples Denies Equal Protection Under Law.

In sum, New Jersey's experience with civil unions establishes two essential points, each of which underlay the decisions below. First, marriage must be recognized for what it is: the designation our society accords to the deepest, most sacred relationship two adults can form and for which we, therefore, reserve special benefits and protections. New Jersey's experience shows, in other words, that marriage serves as the State's "recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings

about one another and to join in an economic partnership and support one another and any dependents," *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 961, and "is the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered it," *Perry v. Brown*, 671 F.3d at 1079. And, second, denying such recognition "works a meaningful harm to gays and lesbians." *Perry v. Brown*, 671 F.3d at 1081. Specifically, creating a separate status injures same-sex couples because, among other factors, such designation "increases costs and decreases wealth . . . because of increased tax burdens, decreased availability of health insurance and higher transactions costs to secure rights and obligations typically associated with marriage," *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 978; "singles out gays and lesbians and legitimates their unequal treatment," *id.* at 979; and "results in frequent reminders for gays and lesbians in committed long-term relationships that their relationships are not as highly valued as opposite-sex relationships," *id.* *See also Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 417 (Conn. 2008) (holding 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 at 445-46 (concluding that a separate institution of domestic partnership "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").

Indeed, as this Court has observed, when considering the purported "substantial equality" of a well-established law school, with its reputation, traditions, and prestige, in

comparison to that of a new law school created specifically for minorities 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 analogy is obvious. A legal institution designed to deliver the "full benefits and privileges" of marriage, but that in practice has isolated and stigmatized its participants, as civil unions in New Jersey have proven to do, cannot be said to be truly equal. *Lewis*, 188 N.J. at 448. Nor can it be justified by any state interest, whether that state interest is tradition, as New Jersey asserts, *see Williams v. Illinois*, 399 U.S. 235, 239-41 (1970) (holding that "ancient" practice of imprisoning debtors did not itself justify overlong imprisonment of individuals unable to pay their criminal fines); *see also Loving v. Virginia*, 388 U.S. 1 (1967) (declining to consider tradition of anti-miscegenation laws as supporting State's continued prohibition of interracial marriage), or the interests asserted by California, *Perry v. Brown*, 671 F.3d at 1086-93 (holding that "furthering California's interest in childrearing and responsible procreation," "proceeding with caution before making significant changes to marriage," "protecting religious freedom," and "preventing children from being taught about same-sex marriage in schools" were not rational bases).

Amicus curiae urges this Court to affirm the Court of Appeals' judgment that Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, *amicus* urges that the Court affirm the judgment in the Court below.

Respectfully submitted,

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