

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 MENEGHIN;
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.

INTERVENORS' BRIEF IN OPPOSITION TO
PLAINTIFFS-APPELLANTS' MOTION IN AID OF LITIGANTS' RIGHTS

Brian W. Raum, Esq.*
James A. Campbell, Esq.*
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, Arizona 85260
(480) 444-0020

Austin R. Nimocks, Esq.*
ALLIANCE DEFENSE FUND
801 G Street, NW, Suite 509
Washington, DC 20001
(202) 393-8690

Michael P. Laffey, Esq.
MESSINA LAW FIRM
961 Holmdel Road
Holmdel, New Jersey 07733
(732) 332-9300

*Attorneys for Proposed Defendants-
Intervenors-Respondents*

* *pro hac vice* motion pending

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... II

PRELIMINARY STATEMENT..... 1

STATEMENT OF FACTS AND PROCEDURAL HISTORY..... 2

ARGUMENT..... 3

I. *RULE* 1:10-3 DOES NOT AUTHORIZE PLAINTIFFS TO OBTAIN THE RELIEF THEY SEEK..... 3

 A. The Legislature Has Fully Complied with the Order in *Lewis*.....4

 B. Judicially Redefining Marriage as Requested by Plaintiffs Would Require the Court to Contradict its *Lewis* Decision.....6

 C. The *Robinson* and *Abbott* Lines of Cases Are Readily Distinguishable from this Case.....8

II. EVEN IF THE COURT’S AUTHORITY UNDER *RULE* 1:10-3 APPLIES HERE, THE COURT SHOULD NOT GRANT PLAINTIFFS’ REQUESTED RELIEF..... 16

 A. Plaintiffs’ Alleged Harms Will Not Be Remedied by their Requested Relief.....16

 B. Plaintiffs’ Factual Arguments Are More Appropriately Address in a New Judicial Proceeding.....19

 C. Plaintiffs’ Motion Is Premature.....20

III. APPOINTING A SPECIAL MASTER WOULD UNNECESSARILY INTERJECT THE JUDICIARY IN PUBLIC-POLICY QUESTIONS ENTRUSTED TO THE LEGISLATURE..... 22

CONCLUSION..... 24

TABLE OF AUTHORITIES

Cases:

Abbott v. Burke,
136 N.J. 444 (1994).....10, 12

Abbott v. Burke,
149 N.J. 145 (1997).....10, 11, 12, 13, 15

Abbott v. Burke,
153 N.J. 480 (1998).....9, 11, 13, 22

Abbott v. Burke,
170 N.J. 537 (2002).....23

Abbott v. Burke,
182 N.J. 153 (2004).....12

Abbott v. Burke,
185 N.J. 612 (2005).....14

Abbott v. Burke,
193 N.J. 34 (2007).....20

Abbott v. Burke,
196 N.J. 544 (2008).....12, 20

Abbott v. Burke,
199 N.J. 140 (2009).....9

East Brunswick Bd. of Educ. v. East Brunswick Educ. Ass’n,
235 N.J. Super. 417 (App. Div. 1989).....4

Lewis v. Harris,
188 N.J. 415 (2006)
....1, 2, 6, 7, 8, 9, 10, 11, 14, 16, 17, 18, 19, 21, 22, 23

Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan,
140 N.J. 366 (1995).....4

Pasqua v. Council,
186 N.J. 127 (2006).....4

Ridley v. Dennison,
298 N.J. Super. 373 (App. Div. 1997).....4

Robinson v. Cahill,
62 N.J. 473 (1973).....8, 9

Robinson v. Cahill,
63 N.J. 196 (1973).....11, 12, 15

Robinson v. Cahill,
67 N.J. 35 (1975).....11

Robinson v. Cahill,
69 N.J. 133 (1975).....10, 11, 12, 13, 15

Wilkins v. Zelichowski,
26 N.J. 370 (1958).....17

Statutes:

N.J.S.A. 37:1-31(a).....1, 5, 16

N.J.S.A. 37:1-33.....1, 16

N.J.S.A. 37:1-36.....2

Other State Constitutional Provisions and Statutes:

DC Code § 46-405.01.....18

DC Code § 32-702(i)(1).....18

Ga. Const. art. 1, § 4, ¶ 1.....18

Ky. Const. § 233A.....18

Wash. Rev. Code § 26.60.090.....18

Wis. Const. art. XIII, § 13.....18

Other Authorities:

<http://www.thecurcconspiracy.com/>.....3

New Jersey Court Rule 1:10-3.....3, 5, 6, 9, 16

PRELIMINARY STATEMENT

Plaintiffs-Appellants (hereafter referred to as "Plaintiffs") seek to re-litigate an issue already decided by this Court. To achieve this, they attempt to use *New Jersey Court Rule 1:10-3*—a procedural tool intended to compel noncompliant parties to submit to previously issued court orders. But as will be demonstrated herein, Plaintiffs have not shown a basis for relief under this extraordinary procedure, and thus, their Motion in Aid of Litigants' Rights should be denied.

Above all, Plaintiffs have not shown that the Legislature failed to comply with the Court's decision in *Lewis*. In *Lewis*, this Court instructed the Legislature to either redefine marriage to include same-sex couples or create a "parallel statutory structure by another name" that prescribes to same-sex couples all the benefits afforded to married opposite-sex couples. *Lewis v. Harris*, 188 N.J. 415, 463 (2006). Soon thereafter, the Legislature enacted the Civil Union Act, *L. 2006, c. 103*; which grants to same-sex couples all the benefits afforded to married opposite-sex couples.¹ This settled the matter: the Legislature fully complied with the Court's order.

¹ See *N.J.S.A. 37:1-31(a)* ("Civil union couples shall have all of the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage"); *N.J.S.A. 37:1-33* (declaring that terms such as "spouse" and "family" shall include persons in a civil union).

But having been, as of yet, unable to obtain the redefinition of marriage through the democratic process, Plaintiffs now return to this Court, requesting a remedy that would require the Court to contradict what it said in its *Lewis* decision, engage in an unprecedented use of *Rule* 1:10-3, and issue relief that would not redress Plaintiffs' alleged harms. This is a venture in which the Court should not engage.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In October 2006, this Court issued its decision in this case, laying out two avenues of compliance from which the Legislature could choose: "It [could] 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." *Lewis*, 188 N.J. at 463. In December 2006, the Legislature complied with this order by enacting the Civil Union Act, L. 2006, c. 103, which became effective in February 2007.

The Civil Union Act created a Civil Union Review Commission ("CURC"), see N.J.S.A. 37:1-36,² which was later composed of

² Contrary to Plaintiffs' repeated assertions, see Pl. Br. at 10, CURC was not established to ensure compliance with the *Lewis* decision. After all, the Legislature complied with the *Lewis* order as soon as it enacted the Civil Union Act.

activists who strongly opposed the Act.³ Not surprisingly, then, in December 2008, after only a year and a half of experience with civil unions, CURC issued its final report, cataloguing a list of alleged problems with the civil-unions scheme.

CURC's final report, as well as other evidence, has been presented to the Legislature, and the elected representatives have been urged to forego civil unions and, in their place, redefine marriage to include same-sex couples. After weighing the evidence as part of its public-policy role, the Legislature has decided, at least for now, not to redefine marriage.

Nearly three-and-a-half years after the *Lewis* decision, after failing to achieve their goals in the Legislature, Plaintiffs return once again to this Court, again seeking a judicial solution to a legislative issue.

ARGUMENT

I. *RULE 1:10-3* DOES NOT AUTHORIZE PLAINTIFFS TO OBTAIN THE RELIEF THEY SEEK.

Plaintiffs rely on *Rule 1:10-3* in urging this Court to rewrite New Jersey's marriage laws, which it refused to do just a few years ago. But as will be explained, that rule does not authorize the Court to act under these circumstances.

³ See *New Jersey (True) Equality*, available at <http://www.thecurcconspiracy.com/> (explaining the bias of the Commission and showing that every public member of the Commission was a same-sex "marriage" advocate or directly affiliated with a group advocating for same-sex "marriage").

A. The Legislature Has Fully Complied with the Order in *Lewis*.

"The motion to enforce litigant's rights described in *Rule 1:10-3* is . . . designed to compel a recalcitrant party to comply with a court order." *Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan*, 140 N.J. 366, 392 (1995) (quotation marks omitted); see also *East Brunswick Bd. of Educ. v. East Brunswick Educ. Ass'n*, 235 N.J. Super. 417, 420 (App. Div. 1989) ("The object of a civil proceeding to afford supplemental relief to a litigant . . . is to enforce a court's order"). Stated differently, "a proceeding to enforce litigants' rights under *Rule 1:10-3* is essentially a civil proceeding to coerce the defendant into compliance with the court's order[.]" *Pasqua v. Council*, 186 N.J. 127, 140 (2006) (quotations omitted); see also *Ridley v. Dennison*, 298 N.J. Super. 373, 381 (App. Div. 1997) ("Relief under *R. 1:10-3* . . . is . . . a coercive measure to facilitate the enforcement of the court order").

But here, the Court is not presented with a disobedient party who has refused to comply with a prior order. In fact, quite the contrary is true. The *Lewis* decision instructed a nonparty, the Legislature, that it could "fulfill [its] constitutional requirement in one of two ways": "either amend the marriage statutes to include same-sex couples or enact a parallel statutory structure by another name." *Id.* at 463.

As required by that order, the Legislature enacted the Civil Union Act, L. 2006, c. 103. That Act declares that all “[c]ivil union couples shall have all of the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage.” N.J.S.A. 37:1-31(a). The enactment of this comprehensive Act fully satisfied the Legislature’s obligation under the *Lewis* order. Thus, this Court’s power under *Rule* 1:10-3, which is designed to ensure a party’s compliance with orders or judgments, is not applicable here.

Plaintiffs’ arguments essentially boil down to this: even though, through the Civil Union Act, the Legislature has provided same-sex couples with all the rights and benefits of opposite-sex married couples, they assert that miscellaneous individuals and organizations are failing to carry out the laws as designed by the Legislature. See Pl. Br. at 24-55. As evidence, they primarily point to anecdotal accounts of instances where a private party (or, in a few cases, a government official) failed to act in accord with the law by not affording civil-union couples the same rights and benefits afforded to married couples.

But these isolated incidents, even if true, do not establish that the Legislature or Defendants have failed to comply with this Court’s order. At best, these stories show that some private actors have at times not complied with the

law. Accusations against private actors not subject to a prior court order are not the proper basis of a *Rule 1:10-3* motion. Instead, if they are a basis for any legal relief, they are more appropriately the subject of a new lawsuit.

B. Judicially Redefining Marriage as Requested by Plaintiffs Would Require the Court to Contradict its *Lewis* Decision.

The *Lewis* decision acknowledged, in no uncertain terms, that whether the age-old institution of marriage should be redefined to include same-sex couples is an issue entrusted to the Legislature rather than the judiciary: "The name to be given to the statutory scheme that provides full rights and benefits to same-sex couples, whether marriage or some other term, is a matter left to the democratic process." *Lewis*, 188 *N.J.* at 423. The Court similarly stated:

We cannot escape the reality that the shared societal meaning of marriage—passed down through the common law into our statutory law—has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin. When such change is not compelled by a constitutional imperative, it must come about through civil dialogue and reasoned discourse, and the considered judgment of the people in whom we place ultimate trust in our republican form of government. . . . We will not short-circuit the democratic process from running its course.

Id. at 460-61.

Yet it is inescapable that the "short-circuiting" of the democratic process that the *Lewis* Court decried is the precise

relief that the Plaintiffs seek through this motion. Plaintiffs ask this Court to require the Legislature to use the term "marriage" for legally recognized same-sex unions. But this Court expressly refused to do that just three-and-a-half years ago, declaring that the definition of marriage lies solely within the legislative realm. Simply put, if this Court were to award the relief requested by Plaintiffs, it would directly contradict that appropriate statement of law.

This Court has already considered and rejected the legal premise of Plaintiffs' motion. Plaintiffs have adamantly maintained throughout this litigation that referring to legally recognized same-sex unions as anything other than "marriage" would violate their rights under the State Constitution:

Plaintiffs argue that even equal social and financial benefits would not make them whole unless they are allowed to call their committed relationships by the name of marriage. They maintain that a parallel legal structure, called by a name other than marriage, which provides the social and financial benefits they have sought, would be a separate-but-equal classification that offends Article I, Paragraph 1. From plaintiffs' standpoint, the title of marriage is an intangible right, without which they are consigned to second-class citizenship. Plaintiffs seek not just legal standing, but also social acceptance, which in their view is the last step toward true equality.

Lewis, 188 N.J. at 458. But this Court already considered those arguments and ultimately rejected them, declaring that "[t]he name to be given to the statutory scheme that provides full

rights and benefits to same-sex couples . . . is a matter left to the democratic process." *Id.* at 423.

Plaintiffs' motion also ignores that this Court has found at least one significant difference between the state-constitutional rights afforded to opposite-sex couples and those afforded to same-sex couples. In *Lewis*, this Court held that while opposite-sex couples have a fundamental right to marry under the New Jersey Constitution, same-sex couples do not. See *Id.* at 441 ("[W]e cannot find that a right to same-sex marriage . . . ranks as a fundamental right"). Plaintiffs seek to eliminate that distinction through an exceedingly robust and unprecedented interpretation of equal-protection principles under Article I, Paragraph I. This Court, however, should once again decline Plaintiffs' request to usurp the Legislature's prerogatives and transform the equal-protection guarantee into a bulldozer of social engineering. See *Robinson v. Cahill*, 62 *N.J.* 473, 492 (1973) (*Robinson I*) ("[T]he equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs").

C. The *Robinson* and *Abbott* Lines of Cases Are Readily Distinguishable from this Case.

Plaintiffs' efforts to analogize this situation to the *Robinson v. Cahill* and *Abbott v. Burke* lines of cases are strained and unconvincing. Attempting to make those situations

appear applicable, Plaintiff describes isolated aspects of those cases at a high level of generality and abstraction. But upon closer inspection, it becomes clear that the *Robinson* and *Abbott* lines of cases are entirely unlike this situation, and thus, they do not support Plaintiffs' attempt to use Rule 1:10-3 here.

First, the *Robinson* and *Abbott* cases are unique among New Jersey's constitutional jurisprudence. Those cases are part of a generation's long litigation, which has lasted from the 1970s to this present day, to improve the quality of education in poor and urban school districts. Compare *Robinson I*, 62 N.J. 473 (1973), with *Abbott v. Burke*, 199 N.J. 140 (2009) (*Abbott XX*). In those cases, this Court closely scrutinized and ultimately mandated particular public-school financing and programs, which addressed countless minutiae such as "full-day kindergarten," see *Abbott v. Burke*, 153 N.J. 480, 503 (1998) (*Abbott V*), "a community services coordinator in every middle and secondary school," see *id.* at 512, and "infrastructure deficiencies in . . . school buildings," see *id.* at 527. This Court's ongoing involvement in the details of public-school education is entirely unlike its treatment of marriage, an issue that, as the *Lewis* decision acknowledged, is entrusted solely to the Legislature. See *Lewis*, 188 N.J. at 423. Unlike in the school cases, there is simply no precedent to support throwing the judiciary headlong into the marriage-redefinition battle.

Second, *Robinson* and *Abbott* involved the right to education, which is a fundamental right under the New Jersey Constitution. See *Robinson v. Cahill*, 69 N.J. 133, 147 (1975) (*Robinson* IV) (acknowledging that the right to education is a "fundamental right"). In contrast, this Court has already recognized that no right to same-sex "marriage" exists under the State Constitution. See *Lewis*, 188 N.J. at 441. The fact that the *Robinson* and *Abbott* plaintiffs were seeking to vindicate a fundamental right weighed in favor of this Court's uncharacteristic willingness to supervise and closely scrutinize the public-education system. No equivalent constitutional interest exists here.

Third, the early *Robinson* and *Abbott* decisions invited the parties to file future motions for relief. In *Abbott III*, for example, the Court explicitly invited motions for future relief, stating that if the government's conduct "suggests less than a reasonable likelihood of achieving compliance [within three to four years], we will entertain applications for relief from any party to this action." *Abbott v. Burke*, 136 N.J. 444, 447 (1994) (*Abbott* III); see also *id.* at 447-48 ("Furthermore, if a law assuring such substantial [compliance] . . . is not adopted [within 25 months], we will consider applications for relief"). These express invitations for future motions in *Abbott III* resulted in the *Abbott* IV decision, see *Abbott v. Burke*, 149

N.J. 145 (1997) (*Abbott IV*), which Plaintiffs claim is like the circumstances currently before this Court, see Pl. Br. at 72-73.⁴

Similarly, in *Robinson II*, the Court said that “[a]ny party may move for appropriate relief . . . if new circumstances so warrant.” *Robinson v. Cahill*, 63 *N.J.* 196, 198 (1973) (*Robinson II*). And in *Robinson III*, after a number of parties and *amici curiae* filed those permitted motions, the Court specifically invited the parties to submit additional arguments on “subjects . . . related to relief.” *Robinson v. Cahill*, 67 *N.J.* 35, 37 (1975) (*Robinson III*). These arguments resulted in the *Robinson IV* decision, see *Robinson IV*, 69 *N.J.* 133 (1975), which Plaintiffs tout as analogous to this situation, see Pl. Br. at 74-75. But, as in *Abbott IV*, the motions that resulted in the *Robinson IV* decision were without question the direct result of invitations by the Court, rather than an unsolicited filing similar to that which is at issue in this case.

The *Lewis* decision did not mention, or in any way imply, that the parties could or should file a motion seeking further relief from the Court. While acknowledging that “Plaintiffs’ quest [did] not end” with the *Lewis* decision, the Court was explicit about where that journey must continue. *Lewis*, 188 *N.J.* at 462. Unlike in *Robinson* and *Abbott*, the *Lewis* Court did

⁴ Also, in *Abbott V*, the Court stated that further “judicial intervention undoubtedly will be sought in the administration of the public education that will evolve under these remedial standards.” *Abbott V*, 153 *N.J.* at 490.

not direct Plaintiffs to submit further briefing or file a supplemental motion. Instead, the Court instructed Plaintiffs to direct their appeals "to their fellow citizens whose voices are heard through their popularly elected representatives." *Id.* This is an important distinguishing factor between *Robinson/Abbott* and *Lewis*.

Fourth, the *Robinson* and *Abbott* decisions repeatedly retained jurisdiction over those disputes. See *Robinson II*, 63 *N.J.* at 198 ("We retain jurisdiction"); *Robinson IV*, 69 *N.J.* at 155 ("We retain jurisdiction"); *Abbott III*, 136 *N.J.* at 447 ("We retain jurisdiction"); *Abbott IV*, 149 *N.J.* at 202 ("The Court shall retain jurisdiction"); *Abbott v. Burke*, 182 *N.J.* 153, 154 (2004) (*Abbott XIII*) ("Jurisdiction . . . is otherwise retained"); *Abbott v. Burke*, 196 *N.J.* 544, 567 (2008) (*Abbott XIX*) ("Jurisdiction is otherwise retained"). While Plaintiffs are correct that the Court did not expressly retain jurisdiction in each and every order issued in *Robinson* and *Abbott*, see Pl. Br. at 78-79, the fact that the Court repeatedly retained jurisdiction makes inescapable the conclusion that, unlike here, the Court intended to retain jurisdiction over those ongoing disputes.

Here, however, the Court did not even imply that it was retaining jurisdiction over this matter. Plaintiffs thus should not be permitted to use this motion to rewrite the *Lewis*

decision more than three-and-a-half years after its issuance. If it were otherwise, this Court's jurisdiction over every case would continue indefinitely, and no litigant could ever be confident that a decision from this Court is final and not subject to modification.

Fifth, the *Robinson* and *Abbott* cases envisioned that the Court's initial orders contained only interim remedies, which would require additional refinements to comply fully with the State Constitution. In *Robinson IV*, for instance, the Court mandated only "a provisional remedy for the school year 1976-1977," declining to issue a more permanent or exacting solution because such judicial overreaching would have been "premature and inappropriate for the Court." *Robinson IV*, 69 *N.J.* at 144. And in *Abbott IV*, the Court acknowledged that "[t]he judicial remedy is necessarily incomplete; at best it serves only as a practical and incremental measure" *Abbott IV*, 149 *N.J.* at 189; see also *id.* at 196 (noting that the ordered remedy had "the nature of provisional or interim relief"); *Abbott V*, 153 *N.J.* at 492 (noting that the Court "mandated . . . an interim remedy").

The *Lewis* decision, in contrast, did not indicate that the two prescribed legislative alternatives were provisional or interim forms of relief—a mere step along the road to providing constitutionally required relief. On the contrary, the Court

stated that enacting a civil-union law that legislatively grants to same-sex couples the same benefits as married opposite-sex couples would "fulfill" the State's "constitutional requirement." *Lewis*, 188 N.J. at 463. In short, the provisional and interim nature of the relief awarded in *Robinson* and *Abbott* is absent here, and thus, unlike the litigants in those cases, Plaintiffs are not justified in seeking further relief from this Court.

Sixth, when the Court granted motions in aid of litigants' rights in *Robinson* and *Abbott*, it was manifestly clear under those circumstances that the parties did not comply with the express terms of a court order. In *Abbott XIV*, for example, the Department of Education, a party defendant in that case, "failed to file its annual report" and its "Long Range Facilities Plans," both of which were required under previous court orders. *Abbott v. Burke*, 185 N.J. 612, 614-15 (2005) (*Abbott XIV*). As a result of this obvious violation of prior orders, the Court granted the plaintiffs' motion for relief in aid of litigants' rights and ordered the defendant to submit the overdue documents. *See id.* at 615.

Similarly, in *Abbott IV*, the State had failed to comply with particular components of prior court orders. Among other issues of noncompliance, the Court acknowledged:

We have ordered the State to study the special educational needs of students in the [special-needs districts]. That has not been done. We also have ordered the State to determine the costs associated with implementing the needed programs. Those studies have not occurred.

Abbott IV, 149 *N.J.* at 185. It was thus clear under those circumstances that the State had failed to comply with prior court orders, thus warranting relief in aid of litigants' rights.

Plaintiffs also cite *Robinson IV* as an example of an instance where this Court granted a motion in aid of litigants' rights. See Pl. Br. at 74-75. Assuming it is true that such a motion is the procedural tool that was used in *Robinson IV* (which is not at all clear from the procedural history), that case is very different from the situation before this Court. The *Robinson* Court initially ordered the Legislature to enact constitutionally compliant legislation by the end of 1974. See *Robinson II*, 63 *N.J.* at 198. But by the middle of 1975, the Legislature had not enacted any legislation. See *Robinson IV*, 69 *N.J.* at 173. It was thus unmistakably clear that the Legislature had not complied with the *Robinson* Court's prior order.

Here, in contrast, the Legislature has complied with the *Lewis* decision by selecting and implementing one of the two expressly approved options for compliance—enactment of the

Civil Union Act. See *Lewis*, 188 N.J. at 463. The Legislature fully complied with the *Lewis* order by enacting the Civil Union Act, which explicitly grants same-sex couples the rights and benefits of civil marriage. See N.J.S.A. 37:1-31(a); N.J.S.A. 37:1-33. This case is thus entirely unlike the previous instances in which this Court has granted a motion in aid of litigants' rights. Simply put, unlike the movants in *Robinson* and *Abbott*, Plaintiffs have not shown that the Legislature or any party failed to comply with a court order.

Plaintiffs have therefore failed to demonstrate that *Rule* 1:10-3 permits them to obtain the relief they seek.

II. EVEN IF THE COURT'S AUTHORITY UNDER *RULE* 1:10-3 APPLIES HERE, THE COURT SHOULD NOT GRANT PLAINTIFFS' REQUESTED RELIEF.

A. Plaintiffs' Alleged Harms Will Not Be Remedied by their Requested Relief.

At the core of their claims, Plaintiffs fundamentally seek identical, or nearly identical, treatment in the day-to-day experiences of same-sex and opposite-sex couples. Again, it must be reiterated that the *Lewis* order does not require actual parity in the day-to-day treatment of same-sex and opposite-sex couples, but only a "statutory structure" prescribing to "same-sex couples . . . the rights and benefits . . . of civil marriage." *Lewis*, 188 N.J. at 463. Nevertheless, there are myriad reasons why even if the Court required the Legislature to

label same-sex unions as "marriages," Plaintiffs could not remedy the harms they allege or obtain the treatment they seek.

First, as previously mentioned, most of the incidents that Plaintiffs allege as harms involve only private actors. See, e.g., Pl. Br. at 40-41 (discussing the actions of hospital employees). But even if the Court requires that same-sex unions be referred to as "marriages" instead of civil unions, those individuals might continue to act in the same way.

Second, some of Plaintiffs' alleged harms invoke matters of federal law, see Pl. Br. at 29-31 (discussing ERISA and COBRA), which, as this Court has recognized, "only confers marriage rights and privileges to opposite-sex married couples," and thus will not be altered by what the Court has done or might do in this case. *Lewis*, 188 N.J. at 459 n.25.

Third, Plaintiffs grossly overstate the alleged harms that same-sex couples might face when they travel out of State. See Pl. Br. at 42-43. The law of other jurisdictions dictates whether a same-sex union formed in New Jersey will be recognized elsewhere. See *Wilkins v. Zelichowski*, 26 N.J. 370, 373-75 (1958) (showing that the law and policy of the jurisdiction asked to recognize a legal union dictates whether the union will be recognized). The majority of States will recognize a foreign same-sex "marriage" to the same extent that they will recognize

a foreign same-sex "civil union."⁵ In these jurisdictions, there will be no practical difference whether New Jersey calls its same-sex unions "marriages" or "civil unions." Moreover, at least one State will recognize a same-sex union labeled a "civil union" but not a "marriage."⁶ In short, then, New Jersey's use of the phrase "civil union" rather than "marriage" has a negligible impact on out-of-state recognition, and to the extent it makes any difference, the designation "civil union" might actually increase the likelihood of out-of-state recognition.

Fourth, the type of treatment sought by Plaintiffs requires full social acceptance of same-sex couples, which this Court admittedly cannot compel. *See Lewis*, 188 N.J. at 462 ("Although courts can ensure equal treatment, they cannot guarantee social acceptance"). The law is surely a powerful force in shaping social culture, but it is not omnipotent toward that end. Thus, even if Plaintiffs received their requested relief, there is no reason to believe that all, or even many, of their alleged harms would be rectified.

⁵ An example of a jurisdiction that would recognize both a foreign same-sex "marriage" and a foreign same-sex "civil union" is the District of Columbia. *See* DC Code § 46-405.01; DC Code § 32-702(i)(1). In contrast, Wisconsin, Kentucky, and Georgia, just to name a few, are examples of jurisdictions that would not recognize any foreign same-sex union (regardless of how it was denominated). *See, e.g.*, Wis. Const. art. XIII, § 13; Ky. Const. § 233A; Ga. Const. art. 1, § 4, ¶ 1.

⁶ *See* Wash. Rev. Code § 26.60.090 (A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership under this chapter, shall be recognized as a valid domestic partnership in this state and shall be treated the same as a domestic partnership registered in this state regardless of whether it bears the name domestic partnership").

B. Plaintiffs' Factual Arguments Are More Appropriately Addressed in a New Judicial Proceeding.

While Plaintiffs' legal arguments have already been considered and rejected by this Court in *Lewis*, Plaintiffs have put forth new factual assertions to support their already rejected legal claims. These factual contentions are more appropriately addressed in a new judicial proceeding, rather than a continuation of *Lewis*.

The material circumstances of this case have changed dramatically since the lawsuit was filed nearly eight years ago. Back then, Plaintiffs and their same-sex partners could not enter a New Jersey legal union that afforded them all the rights and benefits of married opposite-sex couples. Now, however, they can and have entered such unions. These circumstances raise a host of new facts, which Plaintiffs discuss at length in their brief. Thus, as this Court has recognized, "[P]laintiffs' claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples." *Lewis*, 188 N.J. at 458.

Moreover, it would be inappropriate to invalidate the civil-union law based on the one-sided, short-term record before this Court. Instead, litigants seeking to defend the current statutory scheme should be given the opportunity to refute Plaintiffs' evidence through discovery in a new case.

Plaintiffs base their arguments primarily on the findings of the Civil Union Review Commission, which issued its final report in December 2008, a little more than one-and-a-half years after the effective date of the Civil Union Act. There are at least three reasons why it would be inappropriate to rely on that report. First, as will be further explained below, this year-and-a-half snapshot of New Jersey's experience with civil unions is insufficient to permit thorough legal analysis. Second, this report ignores the nearly year and a half's worth of evidence and experiences with the Civil Union Act since the report was issued. Same-sex couples' experiences with civil unions might have changed dramatically during that time. Finally, as previously discussed, the Commission was composed of activists who strongly oppose the Civil Union Act. It would thus be impossible for this Court to effectuate its judicial function if it relies on a record built solely by activists supportive of Plaintiffs' claims.

C. Plaintiffs' Motion Is Premature.

In the past, this Court has denied motions in aid of litigants' rights when the requested relief was premature. See *Abbott v. Burke*, 196 N.J. 451, 452 (2008) (*Abbott XVIII*) (denying a motion in aid of litigants' rights because "the relief sought by plaintiffs [was] premature"); *Abbott v. Burke*, 193 N.J. 34, 35 (2007) (*Abbott XVII*) (denying a motion in aid of

litigants' rights because "the relief sought by movants [was] premature in that any arguments by plaintiffs . . . [regarding] the State's compliance with relevant portions of prior decisions . . . ha[d] to be made in the context of the Fiscal Year 2008 budget, which ha[d] not been enacted"). Here, too, Plaintiffs' motion raises issues that should not be addressed at this time.

Insufficient time has passed to fairly evaluate New Jersey's civil-union system. The idea that same-sex couples can enter into a legally recognized union, regardless of its name, is a concept of relatively recent vintage in the United States. Like other radical changes in the legal system, it is going to take citizens time to become familiar with this concept, regardless of what term is used to describe it. Indeed, this Court has acknowledged as much:

New language is developing to describe new social and familial relationships, and in time will find its place in our common vocabulary. Through a better understanding of those new relationships and acceptance forged in the democratic process, rather than by judicial fiat, the proper labels will take hold.

Lewis, 188 N.J. at 461. With the passage of time, there will undoubtedly be a decrease in the anecdotal accounts of same-sex couples being improperly denied the benefits afforded under the Civil Union Act. Thus, the prudent course—keeping in line with, as stated in *Lewis*, this Court's avowed deference to the Legislature—is to allow adequate time for the new law to take

root. But for now, the Court should stay its hand and continue to leave this issue in the hands of the Legislature.

III. APPOINTING A SPECIAL MASTER WOULD UNNECESSARILY INTERJECT THE JUDICIARY IN PUBLIC-POLICY QUESTIONS ENTRUSTED TO THE LEGISLATURE.

As an alternative form of relief, Plaintiffs request that the Court appoint a Special Master to weigh the evidence that they have presented. Granting this relief would deeply (and perhaps irrevocably) interject the judiciary into the marriage-redefinition debate, which would directly contradict this Court's commitment to allowing the "democratic process" to resolve this issue. *See Lewis*, 188 N.J. at 423.

If appointed, a Special Master would be presented with Plaintiffs' evidence and ordered to evaluate those materials to determine the efficacy of the Civil Union Act. This would entail significant judicial scrutiny of a legislative question involving important matters of public policy. *Cf. Abbott V*, 153 N.J. 480 (1998) (demonstrating the significant judicial scrutiny engendered by the appointment of a Special Master). If the Court were to take this unnecessary step, the marriage-redefinition question would no longer be confided to the Legislature because the Special Master would usurp the Legislature's role as ultimate evaluator of a fundamental public-policy question.

The proper holder of authority to decide important matters of public policy—the Legislature—has already conducted the review that Plaintiffs seek. The Legislature has recently been presented with most of Plaintiffs' evidence, and after evaluating that evidence, the Legislature ultimately found insufficient support to justify a "profound change in the public consciousness of a social institution of ancient origin." *Lewis*, 188 N.J. at 461. While Plaintiffs might be free to continue their quest to redefine marriage through "appeal[s] . . . to their fellow citizens whose voices are heard through their popularly elected representatives," see *id.* at 462, they are not entitled to displace the role of the Legislature by transferring this matter to a Special Master.

Notwithstanding Plaintiffs' complaints, it is undisputable that the Civil Union Act has accomplished much toward this Court's goal of affording same-sex couples the same benefits as married opposite-sex couples. In light of this immediate progress in such a short period of time, Plaintiffs have not justified "a new and superseding role for the courts in this matter." See *Abbott v. Burke*, 170 N.J. 537, 544-45 (2002) (*Abbott VIII*) ("Much has been accomplished. In short, because of the progress made and because of the ongoing effort to fulfill the [constitutional] mandates, we cannot justify a new and superseding role for the courts in this matter.").

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion in Aid of Litigants' Rights. To the extent that Plaintiffs want to adjudicate the claims presented therein, the proper vehicle is a new lawsuit rather than an awkward attempt to re-litigate issues resolved by a fully-complied-with order of this Court.

Respectfully submitted,

Michael P. Laffey
MESSINA LAW FIRM
961 Holmdel Road
Holmdel, New Jersey 07733
(732) 332-9300

Brian W. Raum*
James A. Campbell*
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, Arizona 85260
(480) 444-0020

Austin R. Nimocks*
ALLIANCE DEFENSE FUND
801 G Street, NW, Suite 509
Washington, D.C. 20001
(202) 393-8690

*Attorneys for Proposed Defendants-
Intervenors-Respondents*

* *pro hac vice* motion pending

Date: April 9, 2010