No. NNH-CV 04-4001813

ELIZABETH KERRIGAN, et al.	:	SUPERIOR COURT
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	:	
vs.	:	JUDICIAL DISTRICT OF NEW
	:	HAVEN AT NEW HAVEN
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STATE OF CONNECTICUT, DEPARTMENT OF PUBLIC HEALTH, et al.	:	
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	:	
	:	January 20, 2005

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT[1]

I. THIS CASE IS ABOUT THE EQUALITY AND LIBERTY OF CONNECTICUT'S GAY AND LESBIAN CITIZENS.

The soul of this case is the equality and liberty of gay and lesbian people in Connecticut to exercise the same rights and make the same kinds of personal choices as their non-gay neighbors and family members. It is a case about the Constitution and the bedrock principles and promises of liberty and equality for all. The State's denial of marriage, first through silence in the common law and licensing statutes, and then explicitly in the civil union law, strikes at the heart of that equality and liberty. It denies to only gay and lesbian citizens that critical, life-defining choice to marry a particular person, and all that marriage means as a legal and social matter for the married couple. In abridging the right to equal treatment under law, the State's exclusion of same-sex couples from marriage endorses the view that the plaintiffs' relationships, commitments and loving bonds are inferior, and that they cannot be part of the community of equals that the Constitution promises to create for all.

[1] Plaintiffs incorporate into this memorandum the arguments made in the memorandum submitted in support of their motion for summary judgment on July 28, 2005 (hereinafter, "Plt. Br.").

Judge Albie Sachs, writing for a unanimous Constitutional Court of South Africa in striking down that country's marriage restriction, wrote that the marriage exclusion is

> a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone.

Minister of Home Affairs v. Fourie & Bonthuys, No. CCT 60/04 (CC S.A. Dec. 1, 2005). App. 45.

A. The Civil Union Law Failed To Embrace The Equality And Liberty of Gay And Lesbian People.

The State seeks to avoid the constitutional questions at issue by pointing to the civil union law, both to distort plaintiffs' claim about the denial of marriage into a wholesale attack on that law,[2] and to assert that passage of the civil union law blunts the constitutional inequality it actually enshrines. Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 8 (hereinafter "State Br."). These are straw man arguments. As much as many in the General Assembly acted laudably and within the police powers in ameliorating the harsh legal void in which same-sex couples live, the painful reality is that the price of tangible benefits was an explicit denial of marriage, a status that has unique social, cultural and legal advantages. For all the progress represented by the enactment of that law, the marriage ban and other provisions stain it with a discriminatory intent against gay people that is central to this case.[3] Importantly, full equality was taken off the table immediately when what had been a mar-

[2] The State characterizes plaintiffs' claims as centering on the "alleged invalidity of PA 05-10." State Br. at 10. To the contrary, the plaintiffs' claims in this case center on the denial of marriage. The plaintiffs do not attack the constitutionality of the civil union law itself, but argue that civil unions are not a legal substitute for marriage. See Plt. Br. at Argument § 5.

[3] Among other things, the civil union law caters to the prejudices of others by allowing a public official to refuse to officiate at a civil union. 2005 Conn. Acts 10 § 6. The law permits no similar exemption for marriage. It provides that a person must be 18 years old to enter a civil union, but a per-

riage bill for same-sex couples was replaced in toto with a civil union bill and then further amended to define "marriage" so as to exclude plaintiffs. See § III(B)(1), infra. Thus, the General Assembly's granting the state-based rights of marriage to same-sex couples does not answer or foreclose the constitutional question here. Indeed, the legislature itself understood that its actions were a political compromise, while the role of the courts is to apply constitutional guarantees.[4]

The State also seeks to mask the constitutional infirmity in the marriage exclusion by asserting that the difference between marriage and civil unions is inconsequential. Indeed, in support of its claim that the marriage exclusion is constitutionally harmless, the State trivializes marriage itself. It asserts that marriage is nothing more than a "term," and that the exclusion of same-sex couples from this vital and respected social institution has no impact other than what something is "called." State Br. at 2. This false reduction of marriage to a name ignores the profound social and cultural importance of marriage that, in fact, motivated the legislature to exclude same-sex couples from that very institution. As Representative Cafero, a member of the legislative leadership, stated twice for emphasis during the civil union law debates: "Marriage means something to us. It means something to us."[5] The State does not contest, and the amici emphasize, that marriage is more than the sum of

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son under 18 can marry with a parent or guardian's consent or the written consent of a judge, and a person under 16 can marry with judicial authorization. Id., § 2. These concessions to private prejudices have no place in legitimate lawmaking. See Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

[4] See, e.g., 48 S. Proc., pt. 4, 2005 Sess. 1097-1098 (April 6, 2005) (remarks of Sen. Finch) ("[T]his is a compromise between those of us who wanted to extend full equality and those of us who are looking for something in between."); 48 Conn. H.R. Proc., pt. 7, 2005 Sess. 1943 (April 13, 2005) (remarks of Rep. Lawlor) ("This will not in any way affect the pending litigation because the pending litigation has to do with whether or not our Constitution prohibits this Legislature from restricting marriage."). The excerpts cited in this brief and plaintiffs' opening brief from the official House and Senate legislative proceedings of the debates on the civil union law are being filed with the Court separately.

[5] See 48 H.R. Proc., pt. 7, 2005 Sess. 1935 (April 13, 2005), (remarks of Rep. Cafero). See also 48

its legal parts. The plaintiffs have described the powerful ways in which the marriage exclusion endorses the view that their relationships and loving bonds are inferior. Notwithstanding the State's attempt to downplay the stigmatization and harm caused by the marriage ban (State Br. at 43), government-sanctioned discrimination and separation is an injury in itself.

In passing the civil union law, the General Assembly, to its credit, recognized the seriousness of the plight of Connecticut's gay and lesbian families. But in remedying that plight, it faltered by enshrining marriage discrimination rather than taking the simple step of ending it. This case seeks to rectify that constitutional injury.

II. THE DENIAL OF MARRIAGE TO SAME-SEX COUPLES VIOLATES THEIR EQUAL PROTECTION RIGHTS.

A. The State Cannot Foreclose The Constitutional Questions At Issue By Relying On A Priori Definitions Or The Legislature's Regulatory Authority.

The State incorrectly asserts that plaintiffs are not similarly situated for equal protection purposes to other marriage applicants because marriage in Connecticut has always been between a man and woman. State Br. at 15-16. This is simply circular reasoning and it begs the question in this case: whether the long-standing statutory understanding of marriage as limited to a man and woman is constitutional. The assertion that a common law or statutory provision cannot inflict a constitutional violation simply because of its long existence defies the most basic principles of constitutional analysis. As Justice Kennedy explained, for all laws, "we insist on knowing the relation between the classification adopted and the object to be obtained. The search for the link between classification and objective gives substance to the Equal Protection Clause." Romer v. Evans, 517 U.S. 620, 632

S. Proc., pt. 4, 2005 Sess. 1044 (April 6, 2005) (remarks of Sen. Capiello) (noting the social and cultural meaning of marriage); 48 S. Proc., pt. 4, 2005 Sess. 1007 (April 6, 2005) (remarks of Sen. McDonald) (referring to the "profound cultural and social meaning" of marriage as a status); Plt. Br. at 26-28 (Connecticut and federal cases describing the unique importance of marriage).

(1996). The State's argument would mean that any statutory classification of long duration is exempt from constitutional scrutiny.

The State ignores the undisputed reality that the plaintiff couples meet all of the established requirements for marriage under Connecticut law (e.g., two people, relatedness, age, and exclusivity), except that the person each wants to marry is of the same sex. The assertion that the plaintiffs are not similarly situated to different-sex couples who seek to marry is even more specious in light of the civil union law. It is patently irrational to assert that the legislature has granted same-sex couples and different-sex couples the identical state-based rights, benefits and protections of marriage, but that plaintiffs are foreclosed from challenging a legislative classification that fences them out from marriage itself. "To justify the restriction in [ ] marriage laws by accusing the plaintiffs of attempting to change the institution of marriage itself terminates the debate at the outset without any accompanying reasoned analysis." Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 973 (Mass. 2003) (Greaney, J., concurring).

Nor can the state thwart plaintiffs' constitutional arguments by asserting that "marriage, as an institution, has always been subject to the control of the legislature." State Br. at 17-18. The legislature's general authority to pass laws does not divest the Court of its power, which predates the Constitution, to inquire into their justification to ensure that laws comport with constitutional requirements. See Symsbury Case, 1 Kirby 444 (1785) (holding that General Assembly could not act to grant land to Hartford and Windsor that had previously been granted to Symsbury). Contrary to the State's position in this case, the Attorney General has previously conceded that laws excluding same-sex couples from marriage are subject to judicial review.[6]

[6] In a May 17, 2004 letter opining that Connecticut's marriage statutes did not permit the marriage of same-sex couples, the Attorney General wrote that "[a]s in all cases that impact the civil rights of citizens, our courts must ultimately determine whether the State's law violates constitutional principles by declining to authorize or recognize marriages between same sex couples…[a] summary of

B. Like All Connecticut Citizens, Plaintiffs May Exercise Their Fundamental Right To Marry The One Person of Their Choice.

Unable to contest the profound liberty interest in making the choice to marry, the State and its amici insist that the right the plaintiffs seek to vindicate is not the fundamental right to marry the person of their choice, but a new right to marry the person of their choice of the same sex. The State's mischaracterization of the right to marry fails for the following reasons: First, the State misconstrues the nature of the liberty interest at stake here. A liberty interest (here, the right to marry the person of one's choice) is held in common by all citizens. The issue then becomes whether the State can deny access to that right to a particular group of citizens. See § II(B), infra. Second, the State misinterprets the proper role of history in determining the liberty interest. See § (II)(B), infra. Third, the State distorts U.S. Supreme Court precedent about the right to marry, including incorrectly stating that federal precedent ties the right to marry to procreation. See § II(B), infra. Fourth, the State erroneously claims that any change in the heterosexual definition of marriage will end all state-imposed limitations on marriage eligibility. See § II(B), infra.

1. The Constitutional Right To Marry Is Shared By Every Citizen.

The liberty interest underlying the right to marry is enjoyed by all citizens. Under federal law, a fundamental right is not restricted to those who have historically had the ability to exercise it, or the fundamental right to marry would have been limited to those of the same race. In Loving v. Virginia, 388 U.S. 1, 9 (1967), the Court acknowledged that members of the Thirty-ninth Congress passing the 14th Amendment intended for anti-miscegenation laws to survive despite the pledge of equal protection of the laws. As the U.S. Supreme Court later observed, "[m]arriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state in-

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representative constitutional challenges shows that they raise serious legal issues." See Letter from Richard Blumenthal, Att. Gen. of Conn., May 17, 2004. App. 114.

terference by the substantive component of the Due Process Clause[.]" Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 847–848 (1992) (emphasis added). Similarly, the U.S. Supreme Court has made clear that personal rights cannot be restricted to some individuals (i.e., married couples) as opposed to applied to all individuals. See Eisenstadt v. Baird, 405 U.S. 438 (1972) (right of individuals, married or unmarried, to make procreative decisions). Because it is an aspect of liberty for all individuals, the State simply misses the point when it argues that courts "in no way implied the right to marry is so 'broad' that it includes the right to marry anyone else, including someone of the same sex." (emphasis in original) State Br. at 22.

By denying same-sex couples the right to marry, the State mocks the promises that "[n]o person shall … be deprived of … liberty," Conn. Const., Art. First, § 8, and that all persons are "equal in rights." Conn. Const., Art. First, § 1.[7] Basic to the guarantee of liberty is that minority rights are not subject to majority approval. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). Nor is liberty served by coercing conformity or suppressing human difference. "[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18 (1984).

Moreover, characterizing plaintiffs' claim as a claim for "a right to same-sex marriage," i.e., narrowing the liberty interest at issue to the facts of this case and the identities of these parties, repeats the error made in Bowers v. Hardwick, 478 U.S. 186 (1986), and repudiated in Lawrence v. Texas, 539 U.S. 558 (2003). The Bowers Court had recast the right at stake in a challenge by a gay man to Georgia's sodomy statute as a claimed "fundamental right" of "homosexual sodomy," 478

[7] Of course, as the Supreme Court has clarified, Art. First, §§ 1 and 10 also provide a basis for substantive due process rights. See Ramos v. Town of Vernon, 254 Conn. 799, 835 (2000); State v. Conlon, 65 Conn. 478, 33 A. 519 (1895).

U.S. at 191, and then rejected as "facetious" the idea that such a right is "'deeply rooted in this Nation's history and tradition.'" Id. at 194. In Lawrence, the Supreme Court held that its prior constricted framing of the issue in Bowers "disclose[d] the Court's own failure to appreciate the extent of liberty at stake." Lawrence, 539 U.S. at 567. The Court underscored that:

> To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it said that marriage is just about the right to have sexual intercourse.

Id. See also Plt. Br. at 17-18 (no reduction of individual liberty interests in choosing marital partner into alleged fundamental right of "interracial marriage," "child support debtor marriage" or "inmate marriage" in U.S. Supreme Court marriage cases).

The right to marry is based on constitutional rights of individual liberty and autonomy.[8] It is based on the principle that some decisions involve matters so intimate, personal and central to dignity that the government may not unduly interfere with them.[9] As the U.S. Supreme Court ex-

[8] As Professor Laurence H. Tribe has explained, the Court's task is not simply to "name the specific activities textually or historically treated as protected." See Laurence H. Tribe, Lawrence v. Texas: The 'Fundamental Right' that Dare Not Speak Its Name, 117 Harv. L. Rev. 1893, 1899 (2004), id. at 1934 (noting that Lawrence and many other cases resisted any such reductionist procedure; "the Court developed its substantive due process jurisprudence … with the long line of decisions that described the protected liberties at higher levels of generality than any 'protected activities' catalog could plausibly accommodate…"). According to Professor Tribe, the "more germane question of who, as between the state and the individuals who are subject to its law, should be entrusted to make choices about the shape of an individual's life and of the relationships that may fulfill it" is at the heart of substantive due process. Id. at 1924. See also id. at 1927 ("the principles governing the constitutional assignment of fundamental rights and liberties are, at bottom, principles concerning the allocation of decisionmaking roles among individuals, associations, and other public and private entities…").

[9] Connecticut's long common law tradition of respect for family autonomy, which has now ripened into a protected constitutional right, is illustrates the zealous protection given to individual decisions about certain core matters of home and family life. See, e.g., Castagno v. Wholean, 239 Conn. 336, 342-343 (1996) (tracing the "common-law right in Connecticut of parents to raise their children without excessive government interference" as reflecting a broad tradition that "the family unit should be respected" and its autonomy invaded "only in the most pressing circumstances"); Roth v. Weston, 259 Conn. 202, 223 (2002) (fundamental constitutional protection allows parents "to make child rearing decisions" and "the due process clause leaves little room for states to override a par-

plained, "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." Lawrence, 539 U.S. at 574. See also Goodridge, 798 N.E.2d at 959 ("[w]hether and whom to marry, how to express sexual intimacy, and whether and how to establish a family … are among the most basic of every individual's liberty and due process rights …").[10]

2. The State Misinterprets The Proper Role Of History In Constitutional Interpretation.

As explained below, in addition to the importance of marriage in Connecticut's history (see Plt. Br. at 21-26), the relevant history for equality and due process purposes is the historical respect for the individual's liberty interest in making a choice of marital partner, and not the identity of the two partners. The State's improper elision of the right at issue in this case (the right to marry the person of one's choice) with those who seek access to it (same-sex couples) results in confusion about the proper role of history in constitutional analysis. The threshold issue addressed in plaintiffs' brief is that there is a protected right to marry the person of one's choice that arises from the liberty and equality provisions of the constitution. See Plt. Br. at 8-9. History has a role in the analysis of that question. See, e.g., Moore v. Ganim, 233 Conn. 557, 601 (1995); State v. Geisler, 222 Conn. 672, 685 (1992). Once a right is found, however, the scope of that right is defined by the

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ent's decision even when [it does not serve] the best interests of the child"). Just as the state cannot intrude on family autonomy absent harm to the public welfare, so, too, the state is barred from interfering with the highly sensitive individual choice of marital partner absent a similar compelling interest in public welfare. See also n.20, infra.

[10] Other courts have repeated the error the State makes here. See, e.g., State Br. at 11-12, 24-26 (citing cases). Chief Justice John Roberts critiqued the same tautology as the State makes here in the federal context during his nomination hearings. In response to a question about the role of history in the assessment of a liberty interest, he testified that "you do not look at it at the narrowest level of generality, which is the statute that's being challenged because, obviously, that's completely circular." Nomination of J. John Roberts to the U.S. S.C.: Hearing before the S. Judiciary Comm., 2005 WL 2237049, 109th Cong. at 51 (2005) (statements of J. John Roberts and Sen. Joseph Biden). (App. 118).

attributes of the right itself, not the people who have been historically excluded from exercising it. See § II(B), supra.[11] The plaintiffs thus do not need to prove that there has been a long-standing practice of marriage for same-sex couples, or that "the framers would have viewed the right to marry someone of the same gender" as fundamental. State Br. at 36.

Turning first to the existence of a right to marry based in the liberty and equality provisions of the Connecticut Constitution,[12] there is rich historical precedent for the protection of individual rights and liberties in Connecticut. Even at a time in the 17th century when biblical injunctions were regarded as a basis for civil law, political leaders understood "the necessity of allowing wide liberty to individuals in order to maintain social stability and equity."[13] Individual rights and liberties rapidly developed throughout the 18th century in what Professor Collier characterized as "an extraordinary shift from the customary emphasis on social control and cohesion that had prevailed in the Congregational commonwealth for nearly a century and a half." Id. at 35. By 1773, "a juridical consensus had developed … that statutes 'derogatory to the Liberty of the Subject must be taken strictly'

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[11] Defendants rely on Glucksberg v. Washington, 521 U.S. 702 (1997), to say that the right at issue must be historically rooted. That case, however, involved consideration of a new and previously unestablished right (assisted suicide). It did not involve the issue of the application of an existing constitutional right. In contrast, it is axiomatic that under the federal constitution an individual's liberty interest in choosing to marry another is a right protected against undue state interference.

[12] See Plt. Br. at 10-28 for a discussion of the Geisler factors supporting the existence of a right to marry under the Connecticut constitution.

[13] Christopher Collier, The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights, 76 Conn. Bar J. 1, 3 (2002) (hereinafter, Collier). As state historian Christopher Collier describes it, the Code of 1650 identified as among the objectives of society assuring the "'Liberties, Immunities, [and] Privileges'" of every man in accord with his place and with "'Humanity, Civillity, and Christianity.'" Id. at 7-8. These individual liberties were specifically expanded in the Code of 1672, id. at 11-12, and over the next century, as the population grew and dispersed and land speculation and commercialization began enduring as part of people's experience, "the communal ethos" waned and "[t]he spirit of the times elevated individual needs and desires to at least a parity with community cohesion." Id. at 29.

-- that is, interpreted narrowly.'"[14] Id. At the end of the Revolutionary War, the reigning consensus was that government existed both to promote godly behavior and protect certain individual rights. Id. at 36. Zephaniah Swift captured this latter objective by explaining that Connecticut citizens "had both natural and civil rights" meriting judicial protection even when they were not articulated by statute.[15] From 1776 to 1818, the so-called pre-constitutional period, courts routinely protected due process and property rights even without statutory or constitutional authority.[16]

Among the freedoms always enjoyed by Connecticut citizens of proper age has been the right to choose a marital partner. As Tapping Reeve wrote in 1816, the matrimonial contract should be as unrestrained as possible, because restraining marriage was "against sound policy, and detrimental to the interest of the commonwealth." Tapping Reeve, The Law of Baron and Femme, 220 (1816) (William S. Hein & Co. 1981). Even during its more repressive periods, among an individual's rights was the right to pursue any vocation and "marry whomever they chose, including Indians and free blacks." Collier, supra at 38. Loathsome as it may have been to some, even many, to choose a marital partner of a different race, Connecticut public policy allowed this choice.[17] Beyond race, as

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[14] By 1791 the state Supreme Court had ruled that the authority given to town selectmen to act in certain instances "'against the general rights and liberties of the citizens'" ought to only be "'cautiously and strictly pursued.'" Id. at 35; Johnson v. Stanley, 1 Root 245, 246 (1791), cited in Collier, supra at n.93.

[15] Id. at 36 (citing Zephaniah Swift, A System of the Laws of the State of Connecticut 62, 177 (1795)).

[16] In addition to due process and property rights, those rights included, freedom from unreasonable searches, freedom from double jeopardy, the right to counsel, free speech, freedom of religion, and the right not to incriminate oneself, among others, were routinely safeguarded by courts without constitutional or statutory sanction. Id. at 30-31.

[17] As Collier explains, "[i]nterracial marriage, illegal most places in the United States, was legal in Connecticut…" Id. at 47. As Collier goes on to say, those marriages were permitted, but may have been rare. Id. Some regarded these marriages as odious. For example, Crandall v. State, 10 Conn. 339, 1834 WL 102 at *5 (1834), a case concerning a statute regulating the education of "coloured persons" from out-of-state, included in the recitation of the arguments prior to the court's opinion the

New England historian Gloria Main explains, as long as the couple in question were free, single and of legal marrying age, parents had no legal grounds on which to stop the marriage. Indeed, "no laws prevented a poor young girl from marrying a rich old man, or a rich widow from taking a handsome young suitor."[18]

Consistent with Connecticut's historical respect for liberty, the Supreme Court has recognized the importance of the individual rights and liberties that flow from the Constitution's embodiment of the "essential principles of liberty" articulated in the opening language of Art. First as well as the provisions of Art. First, § 1 ("[a]ll men … are equal in rights") and Art. First, §§ 8 and 10. The Supreme Court has repeatedly recognized this liberty interest as protecting "rights to 'life, liberty and the pursuit of happiness,'" and constituting the "fundamental condition on which all powers of

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following quote from Chancellor Kent's commentaries:

> "In most of the United States there is a distinction, in respect to political privileges, between free white persons and free coloured persons of African blood; and in no part of the country do the latter, in point of fact, participate equally with the whites, in the exercise of civil and political rights. The African race are essentially a degraded caste, of inferior rank and condition in society. Marriages are forbidden between them and whites, in some of the states, and when not absolutely contrary to law, they are revolting, and regarded as an offence against public decorum… Such connexions in France and Germany, constitute the degraded state of concubinage, which is known in the civil law. But they are not legal marriages, because the parties want that equality of state or condition, which is essential to the contract." 2 Kent's Comm. 258. (emphasis in original).

[18] Gloria L. Main, Peoples of a Spacious Land: Families and Cultures in Colonial New England 70 (2001). The government's lack of interference with marital choice is extremely significant, given that the government, seeking to promote godliness, exerted itself in realms we would now find intolerable. For example, as late as 1772, laws provided for capital punishment in cases of idolatry, blasphemy, witchcraft, bestiality, sodomy, incest, rape, rebellious children and false witnessing. Collier, supra at 19. The punishments were not uniformly applied. Id. at 30, 33. Prior to the American Revolution, an English jurist expressed dismay over the draconian limits on individuals meeting in public places, jumping near a meeting house, and banning Quakers and heretics. Id. at 25-29. Atheism, Deism and challenging Christianity or its principles were unlawful well into the 19th century. Id. at 19.

government can be exercised." See Conlon, 33 A. at 522; Plt. Br. at 12-13.

Importantly, the Supreme Court has also placed marriage as among the protected liberty interests in personal decisions that should be protected from undue government interference. Long before the idea of fundamental rights or strict scrutiny took hold in American law, a Supreme Court decision acknowledged that "the right to contract marriage" is one of "the rights to 'life, liberty and the pursuit of happiness'" protected by the Connecticut constitution, Preamble and Art. First, § 1. Gould v. Gould, 78 Conn. 242, 61 A. 604, 604 (1905).[19] Although the statute, which barred "epileptics" from marriage, was not directly at issue, Justice Hamersley dissented as to its validity. Anticipating future legal developments, he questioned the statute's validity in light of the importance of making the choice to marry, opining that "the constitutional guaranties of personal freedom," in "what in former days was regarded as the proper domain of individual right, namely, the natural right of marriage, the freedom of contract in the exercise of the right, the freedom of conscience in the performance of the personal duties it may involve" made the Court's dicta upholding the statute "doubtful." Id. at 613. In language that speaks to the present case, Justice Hamersley wrote that, "[t]his individual right has been and is regarded as protected by the Constitution from arbitrary invasion." Id.[20]

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[19] Because the modern concept of a "fundamental right" had not yet been developed in the law in 1905, the State's assertion that Gould did not find a "fundamental right" to marry is irrelevant. See State Br. at 39. The important point is the Supreme Court found the right to marriage squarely protected by the Constitution.

[20] The eugenics provision at issue in Gould demonstrates a consistent legislative concern about regulating access to marriage in the interest of public health, an issue not presented by this case. In fact, statutory provisions -- other than gender -- restricting access to marriage itself have not been extensive during Connecticut's history, generally consisting of age and consanguinity provisions and prohibitions on bigamy. See Conn. Gen. Stat. §§ 46b-30 (age) and 30 (consanguinity); § 53a-190 (bigamy prohibition); Connecticut General Statutes of 1808, Title CV, ch. 1, § 3 (age), § 4 (consanguinity), and § 11 (bigamy prohibition).

Contemporary Supreme Court precedent continues to demonstrate the importance of liberty interests in the freedom to make personal choices about important matters.[21] The personal choice of marital partner -- the decision to enter what this state recognizes is a "vital" and "fundamental" relationship (see Plt. Br. at 26-27) -- is an enormous step for any individual. Preserving autonomy for that decision is deeply rooted in history.

Having established the historical respect for liberty that gives rise to the right to choose one's marital partner, a past history of denial of that right to same-sex couples cannot be the basis to abridge it now. Rather, the question becomes whether the State has a justification to interfere with the right. See Plt. Br. at 50-52.[22]

3. The State Distorts Supreme Court Precedent About The Right To Marry.

The State incorrectly asserts that U.S. Supreme Court decisions have recognized a fundamental right to marry only because of a necessary link between marriage and procreation, and thus only in the context of different-sex marriages. State Br. at 20-21. Marriage is a fundamental right without regard to procreation. For example, Turner v. Safley, 482 U.S. 78 (1987), struck a ban on marriages that had no possibility of procreation. The Court recognized that "[m]any important attributes of marriage remain … after taking into account the limitations imposed by prison life." Id. at 95. Significant purposes of marriage other than procreation (and sexual relations) that could be enjoyed by

[21] See, e.g., Ramos, 254 Conn. at 835 (due process contains a substantive sphere that was "'intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice'"). Apart from constitutional considerations, the individual right to self-determination has long been recognized at common law. McConnell v. Beverly Enters.-Conn., 209 Conn. 692, 701 (1989) (common law right to control one's own body).

[22] See also Soc'y for Sav. v. Chestnut Estates, Inc., 176 Conn. 563, 576-77 (1979) ("Part of the idea that due process is not a fixed rule is that its content changes according to history, reason, the past course of decisions …") (internal quotation omitted).

prisoners include the "expression[] of emotional support and public commitment," "exercise of religious faith," "expression of personal dedication," and "the receipt of government benefits." Id. at 95-96. Similarly, the Supreme Court in Zablocki v. Redhail, 434 U.S. 374 (1978), noted that "the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships." Id. at 386.[23]

The State attempts to make its point by quoting: 1) Skinner v. Oklahoma's language that "[m]arriage and procreation are fundamental to the very existence and survival of the race," 316 U.S. 535, 541 (1942); and 2) Loving's description of marriage as "one of the 'basic civil rights of man,' fundamental to our very existence and survival." 388 U.S. at 12 (quoting Skinner, 316 U.S. at 541). State Br. at 21. In light of the Supreme Court's decision in Turner and its language in Zablocki, the State's reliance on any blurring of procreative and marriage rights in Loving and Skinner is unavailing. In those cases, the Court had no need to define precisely the independent contours of the two rights. Indeed, even the State seems to acknowledge the tenuousness of its argument, seeing the link between procreation and marriage it seeks to create in Skinner as only "implied." State Br. at 21.

Finally, U.S. Supreme Court precedent recognizes the right to procreative privacy regardless of marital status. Any purported link between marriage and procreation was severed by the U.S. Supreme Court's ruling that married couples enjoy a constitutionally protected right to avoid procreation. Griswold v. Connecticut, 381 U.S. 479, 485 (1965). In Griswold, the Court defended marriage as a meaningful private relationship against Connecticut's attempt to influence procreation by banning the use of contraception. 381 U.S. at 486. Eisenstadt, similarly clarified that procreation is le-

[23] Similarly, in Casey, 505 U.S. at 851, the U.S. Supreme Court summarized that certain core liberty interests warrant constitutional protection for "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," because they "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." These choices are not bundled into a single decision to marry.

gally unconnected to marriage by striking a Massachusetts statute banning contraceptives to unmarried persons: "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453.[24]

4. The State Incorrectly Claims That Any Change In The Heterosexual Definition Of Marriage Will End All Restrictions On Marriage Eligibility.

Unable to justify the exclusion of the plaintiffs from marriage on its own terms, the State engages in slippery slope arguments. The State distorts plaintiffs' claims here, mischaracterizing them as asserting that "every individual has a 'broad' right to marry anyone else" that would lead to the end of age restrictions, polygamy bans, and consanguinity provisions. State Br. at 19 (emphasis in original), 29, 39-40.

Slippery slope arguments have been raised time and again to distract courts from claims by minorities to equal access to fundamental rights. Ending discrimination against same-sex couples will hardly end all marriage restrictions, including restrictions on multiple partner marriages, any more than ending race discrimination in marriage did. This same specter was raised by the dissent in

[24] The State also incorrectly asserts that Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972), indicates that the U.S. Supreme Court has "indicated that same-sex marriage is not a fundamental right." State Br. at 22. Baker was based on the federal Constitution, and has nothing to do with the plaintiffs' claims here under the Connecticut Constitution. The Supreme Court's summary dismissal of Baker is not binding authority even under the federal Constitution. Summary dismissals "have considerably less precedential value than a decision on the merits." Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180-181 (1979). Moreover, they are not followed when subsequent "doctrinal developments indicate otherwise." Hicks v. Miranda, 422 U.S. 332, 344 (1975) (internal quotation omitted). Baker has been stripped of any binding effect by subsequent doctrinal developments since 1972, including Romer, Lawrence, and marriage decisions such as Zablocki and Turner. See also In re Kandu, 315 B.R. 123, 138 (noting that Baker is not binding in part because "[t]he Supreme Court's approach to the constitutional analysis of same-sex conduct ... at least arguably appears to have shifted ... particularly in light of the Supreme Court's decision in Lawrence").

Perez, and at oral argument in Loving, but legal claims to end polygamy or to abolish age or consanguinity provisions have not advanced in the last fifty-seven years.[25]

Moreover, the legal question at issue in this case is one of justification. A ruling in plaintiffs' favor in this case would not effectively lift other prohibitions because each rises or falls on its own merits. The State may maintain exclusions that are supported by adequate justifications. Allowing more than two people to marry, for example, would require a complete restructuring of the laws of civil marriage. The State would not be able to determine under existing laws which spouse would make decisions in the event of incapacity, who would inherit in the event of intestacy, and how custody, visitation, child support, and tax matters would be handled. In contrast, permitting two people of the same sex to marry requires nothing more than construing existing marriage eligibility requirements to be gender neutral. In short, justifications regarding other bans are simply not before the Court. Alarms about other marriage restrictions should not prevent this court from addressing the important issues raised by this case and assessing the justifications actually put forward in this case by the state to fence same-sex couples out of marriage.

III. LIKE OTHER CONNECTICUT CITIZENS, THE PLAINTIFFS MAY EXERCISE THEIR FREEDOM TO MARRY ON EQUAL TERMS WITH OTHERS.

Whether the nature of plaintiffs' profound interest in choosing to marry the person each loves is labeled "fundamental" or not, and regardless of the contours of federal equal protection law, Art. First, §§ 1 and 20 still protect the plaintiffs' claim to equal treatment under law. That Connecticut tells gay and lesbian people that they cannot marry their loved one is deplorable under equal protec-

[25] Perez v. Lippold, 198 P.2d 17, 46 (Cal. 1948) (Shenk, J., dissenting) (multiple marriages); Peter Irons & Stephanie Guitton eds., May It Please The Court 227, 282-83 (1993) (oral arguments in Loving) in which Virginia Assistant Attorney General R.D. McIlwaine argued: "[T]he state's prohibition of interracial marriage … stands on the same footing as the prohibition of polygamous marriage, or incestuous marriage, or the proscription of minimum ages at which people may marry, and the prevention of the marriage of people who are mentally incompetent."

tion principles.

A. The State Discriminates On The Basis Of Sex.

1. The Marriage Restriction Facially Discriminates Based On Sex.

The plaintiffs have already explained how excluding same-sex couples from marriage facially discriminates on the basis of sex.[26] Notably, the State fails to explain how a man who wants to marry another man is differently situated (other than his sex) from a woman who wishes to marry another man.

The State makes the further argument that marriage is only an institution for different-sex couples and the law applies equally to all persons who wish to join in such a marriage. State Br. at 16, 51. This argument resurrects the discredited reasoning of the U.S. Supreme Court in Pace v. Alabama, 106 U.S. 583 (1883), in which that court upheld a statute prohibiting adultery or fornication between a black person and a white person, and with higher penalties than for same-race violations, because the "law[] applied equally to those to whom it was applicable." McLaughlin v. Florida, 379 U.S. 184, 189-90 (1964) (discussing and overruling Pace). Addressing a similar statute about interracial cohabitation, McLaughlin looked further than had the Pace court, and further than the State urges this court to do, and ruled that the differential treatment accorded to interracial couples and intraracial couples created a classification that had to be justified. Id. at 191. See also Bob Jones Univ. v. United States, 461 U.S. 574, 605 (1983) (rejecting equal application defense in context of university policy barring interracial dating; "decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination," citing

[26] After Daly v. DelPonte, 225 Conn. 499, 513-514 (1993) (finding claims of physical disability entitled to strict scrutiny because of their explicit enumeration in Art. First, § 20), it is surprising that the Attorney General would suggest that some standard less than strict scrutiny might apply to claims of sex discrimination. State Br. at 51 n.33.

Loving and McLaughlin). Here, the State pretends no classification exists and barely defends it.

2. Constitutional Rights Are Personal, Not Group Based.

The State contends that its sex-based classifications are not discriminatory because the State restricts the marital choices of men and women even-handedly. State Br. 46, 51. Constitutional rights, however, belong to individuals, not groups. See, e.g. Adarand Contractors v. Pena, 515 U.S. 200, 227, 230 (1995) ("Constitution protect[s] persons, not groups"; referring to long line of cases understanding equal protection as a personal right) (emphasis in original). The injury imposed in being deprived of a liberty or opportunity because one is a man or because one is a woman is not vitiated because of formal symmetry between men and women as groups, and nothing in Connecticut law so limits the right to be free from sex discrimination.[27]

3. Imposing a Sex Requirement For Eligibility To Marry And Defending It As "Definitional" Supports The Plaintiffs' Sex Discrimination Claim.

Assuming, arguendo, that this Court finds there is no facial classification in the marriage definition and further, that it is neutral as to sex, the State still falls prey to Art. First, § 20 because "codify[ing] the common law tradition of marriage as one man and one woman" constitutes purposeful or intentional discrimination. State Br. at 52; see also State Br. at 16, 27-28 (definitional arguments) and 32-35, 38 ("ancient" practices and 18th and 19th century iterations of the marriage law).[28]

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[27] State v. Kelly, 229 Conn. 557 (1994) does not go so far as defendants suggest. Contrary to the State's argument (State Br. at 50), the Supreme Court did no more than affirm that gender played no role in the admission of evidence in that case; it did not announce a rule limiting sex discrimination to comparisons of men and women as groups. In Kelly, the defendant claimed on appeal that constancy of the accusation evidence admitted against him on sexual assault charges was "'outmoded, anachronistic and gender-biased.'" Id. at 564. With this bare assertion, the Supreme Court flatly rejected his claim, noting the same type of evidence could be and had been used against female defendants. Id. at 565.

[28] The plaintiffs make this argument solely to respond to the State argument that discriminatory intent must be shown in a §20 case when the challenged statute is facially neutral. To the extent Wendt v. Wendt, 59 Conn. App. 656, 681 cert. denied, 255 Conn. 918 (2000), imposes such a requirement, the plaintiffs question whether the Appellate Court in Wendt properly applied Golab v.

Mandating that a woman must have a man to make a marriage complete represents the last remaining outpost of a long history of discrimination against women in the marriage laws that the courts and the legislature, and, most recently, the people, in ratifying the Equal Rights Amendment ("ERA") in Art. First, § 20, have been rooting out of the law for over 150 years.

In justifying the marriage definition as "codify[ing] the common law tradition," the State assumes ideologies and stereotypes that no longer have a place in law. In the common law system, marriage required a man and a woman to be complete as each person had different, legally prescribed roles, rights and responsibilities. It provided that "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything…." William Blackstone, Commentaries on the Laws of England 442 (1765).[29] The husband had the legal duty to support his wife and children; the wife was obligated to give all her service and labor to her husband. He supported and protected her; she served and obeyed him.[30] Her realm lay in the domestic sphere of maintaining the home, caring for children, and serving her husband.[31] Zephaniah Swift reiterated Blackstone's points[32] and Connecti-

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City of New Britain, 205 Conn. 17, 26 (1987)(case under Art. First, § 1) to the § 20 context.

[29] In practice, this meant that a man could not grant anything to his wife; the wife was unable to contract with her husband or anyone else; the husband retained full legal ownership of all her property and real estate for the duration of the marriage; a wife could not bring an action against anyone for injury to person or property without the husband's concurrence; and a husband had the right to "correct his wife" using "'domestic chastisement.'" Hendrik Hartog, Man and Wife in America: A History 115-116 (2000).

[30] Nancy Cott, Public Vows: A History of Marriage and the Nation 12 (2000).

[31] The notion of separate spheres was firmly settled by the mid-19th century. Steven Mintz & Susan Kellogg, Domestic Revolutions: A Social History of American Family Life (1988). Women's work was in the home and not income earning. Id. at 50-51. A woman was expected to "derive her deepest satisfactions from homemaking and childbearing and rearing." Id. at 63.

cut courts enforced the system. See, e.g., Dibble v. Hay, 1 Day 221 (1804) (reiterating that spouses could not contract and that husband could make no gift to her or create an estate for her even though result was to leave woman impoverished after his death).

Although coverture was gradually dismantled as a legal matter in Connecticut,[33] "marital unity was rewritten economically in the provider/dependent model, a pairing in which the husband carried more weight."[34] The notion that women's proper role was in the home lingered in the "cult of domesticity," a notion that was affirmed by law and resulted in lost opportunities and disadvantages to women until fairly recent times.[35]

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[32] Mary Moers Wenig, The Marital Property Law of Connecticut, 1990 Wis. L. Rev. 807, 837 (1990) (quoting from Z. Swift's 1795 treatise on Connecticut law).

[33] Wendt, 59 Conn. App. at 666 (noting that "common-law disabilities of coverture have long since been abolished"), cert. denied, 255 Conn. 918 (2000). See also Wenig, 1990 Wis. L. Rev. at 838, 841, 850.

[34] Cott, Public Vows, at 157. The Supreme Court endorsed this concept as recently as 1973. See, e.g., Stern v. Stern, 165 Conn. 190, 197 (1973) (rejecting challenge to alimony statute that imposed duty to pay exclusively upon the husband because the statute is based not only on sex, "but, more importantly, on the legislature's conception of family relationships and its policy that a husband should be, as at common law, primarily responsible for the support of his wife and family"). This case was overturned by Page v. Welfare Comm'r, 170 Conn. 258 (1976) in which the Court, on rational basis review, described assumptions that "male workers' earnings are vital to the support of their families" but not those of female wage-earners as an "archaic and overbroad generalization." Id. at 268 (internal citations and quotations omitted).

[35] See, e.g., Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (justifying exclusion of women from law practice; "Man is, or should be, woman's protector and defender. … The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."); Muller v. Oregon, 208 U.S. 412, 421 (1908) (upholding statute limiting work hours for women: "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious."); Radice v. New York, 264 U.S. 292, 294 (1924) (limiting night time employment of women in restaurants because of their claimed social and biological needs); Goesaert v. Cleary, 335 U.S. 464, 465-66 (1948) (upholding statute prohibiting licensing of women as bartenders except in narrow circumstances, in part to prevent the "moral and social problems" that could arise with female bartenders; disapproved in Craig v. Boren, 429 U.S. 190, 210 n.23 (1976)); Hoyt v. Florida, 368 U.S. 57, 61-62 (1961) (upholding statute that exempted women but not men from jury service in light of the fact that "woman is still regarded as the center of home and family life;" overturned by Taylor v. Louisiana, 419 U.S.

By characterizing the State's marriage limitations as part and parcel of the common law tradition, the State retreats to the realm of generalizations about presumed inherent differences between men and women. Insisting that marriage is only truly a marriage when it consists of a man and a woman, or that a woman "needs a man" or that a man "needs a woman" revives the legacy of coverture by suggesting there is something unique or essential about men as men and women as women and that it takes both playing their assigned roles to make a marriage complete.[36] With the abolition of coverture as well as passage of the ERA, marriage is now an institution of legal equality between the two parties whose respective rights and responsibilities are equal, mutual and reciprocal. This astonishing throwback argument seeks to do what is forbidden by rudimentary sex discrimination law: resurrect legal restrictions pigeonholing individuals based on broad generalizations about gender roles.[37]

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522 (1975).

[36] In this way, the plaintiffs' claims of sex discrimination are on the same continuum as the successful equal protection argument in Loving. Some scholars also argue that laws limiting marriage to different-sex couples both constrain men and women to limited gender roles and also perpetuate the subordination of women. See, e.g., Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men is Sex Discrimination, 69 N.Y.U. Law Rev. 197 (1994); Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187 (1988).

The Amicus Curiae Briefs filed in support of the Defendants are also rife with sex-based stereotypes. See, e.g., Brief of The Family Institute of Connecticut (FIC Br.) at 22 (arguing that there are "innate differences between men and women and … unique contributions each sex makes in childrearing"); Brief of Connecticut Catholic Conference, Inc. (Catholic Conf. Br.) at 28 (the sex classification in marriage laws "integrate[s] the sexes in a manner that serves the interests of men and women, and the children borne of their unions").

[37] See, e.g., United States v. Virginia, 518 U.S. 515, 541-543 (1996) (rejecting claim that women could be denied opportunity to attend Virginia Military Institute based, in part, on District Court findings of gender-based differences); id. at 541 ("State actors controlling gates to opportunity … may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females"); Roberts, 468 U.S. at 628 (castigating organization seeking to maintain all male membership for relying "solely on unsupported generalizations about the relative interests and perspectives of men and women," even where "such generalizations may or may not have statistical basis in fact" because the courts have "repeatedly condemned legal decisionmaking that relies uncriti-

Finally, the plaintiffs wish to be clear about their position: while individuals should be free to marry without regard to sex, they are equally free to organize their family lives in sex stereotypical ways, and many do. At the same time, the State cannot take the side of reinforcing traditional sex-based roles in marriage and relationships, and that is among the ways the State goes awry in this case.

B. The State Discriminates On The Basis Of Sexual Orientation.

With Alice in Wonderland reasoning, the State claims the General Assembly did not intend to discriminate against gay people when it approved a marriage definition denying them the right to marry. State Br. at 52. The legislative record tells another story. The definitional statute -- ostensibly neutral as to sexual orientation[38] -- has an intended and disparate impact on gay people, thereby imposing a burden on the State to show that the civil union law would have passed without the marriage limitation. Second, the Supreme Court has long recognized that the state constitution is capacious enough to embrace suspect or quasi-suspect classes and this is exactly the kind of case calling for heightened review.

1. The Definitional Statute Intentionally Discriminates Against Lesbians, Gay Men And Same-Sex Couples.

As the State acknowledges, an equal protection violation arises when a law is passed because of its intended impact on an identifiable group. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). See

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cally on such assumptions"); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 139 n. 11 (1994) (in sex discrimination analysis, state actors may not make "overbroad" generalizations to make "judgments about people that are likely to … perpetuate historical patterns of discrimination"); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) (condemning use of stereotypes to justify female only nursing school).

[38] Although the statute defines marriage in terms of a man and a woman and not sexual orientation, it may still be a facial classification because it is utterly obvious that such a definition forecloses gay men and lesbians from marrying the person of their choice.

State Br. at 48, 52. When a discriminatory purpose underlies an otherwise facially neutral statute, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." Hunter v. Underwood, 471 U.S. 222, 227-28 (1985) (applying Arlington Heights and Washington v. Davis, 426 U.S. 229, 239 (1976), to an Alabama law disenfranchising both blacks and poor whites because of its intended disparate impact on African-Americans).

This case is ripe for consideration under these principles. First, assuming arguendo that the marriage definition statute is facially neutral as to sexual orientation, it operates systematically to deny marriage those who wish to share their most intimate relationship with a partner of the same gender, i.e., gay men and lesbians. The effect of the marriage definition on gay people could not be more dramatic.

Second, the General Assembly enacted the marriage definition for the precise purpose of ensuring that, as before, only non-gay people could marry the person of their choice and not gay people. The right to marry would be hollow indeed if it did not include "freedom to join in marriage with the person of one's choice" Perez, 198 P.2d at 21. Under Arlington Heights, a discriminatory purpose may be inferred from the totality of the relevant facts the historical background and legislative history. 429 U.S. at 266-68.[39]

The historical background shows that issues related to relationship recognition have abounded in Connecticut in recent years. See, e.g., 2000 Conn. Acts 228 (Reg. Sess.) (overruling In

[39] The factors cited include, without limitation: (1) the discriminatory effect of the official action; (2) the historical background of the decision; (3) the specific sequence of events leading up to the challenged decision, (4) departures from the normal procedural sequence; (5) departures from the normal substantive standards, and (6) the legislative or administrative history, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports. Plaintiffs assume the first factor is obvious and the fourth and fifth do not apply here.

re Baby Z., 247 Conn. 474 (1999), and creating legal mechanism for second parent adoption)[40]; 2002 Conn. Acts 105 (Reg. Sess.) (allowing another person to designate another to act for him or her in certain circumstances). Significantly, this latter provision also mandated a Judiciary Committee study of the "public policy reasons to permit or prohibit the marriage or civil union of two persons of the same sex." 2002 Conn. Acts 105 § 16.[41]

In 2005, the Judiciary Committee considered Raised Bill No. 963, An Act Concerning Marriage Equality. The Committee voted to replace the marriage bill in toto with a civil union measure. See Judiciary Favorable Rep. No. 963 (Feb. 7, 2005).[42] After Committee approval, the bill passed in the Senate without the marriage limitation, Senate Roll Call Vote 85 (April 6, 2005) (rejecting marriage limitation 13-23), although some members argued strenuously for it.[43]

Between the time of the Senate's passage of the bill and the House's consideration of it,

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[40] This law provides that the "current" public policy of Connecticut is to limit marriage to a man and a woman. 2000 Conn. Acts 228 § 1(4). Section 5 of that law also states: "Nothing in this act shall be construed to establish or constitute an endorsement of any public policy with respect to marriage, civil union or any other form of relation between unmarried persons or with respect to any rights of or between such persons other than their rights and responsibilities to a child who is subject of an adoption as provided for in sections 2 and 3 of this act." Id. at § 5.

[41] The Committee made no recommendations or findings. http://www.cga.ct.gov/jud/PA02-105.htm (last visited on Jan. 19, 2006). In the 2003 session, the General Assembly considered a marriage bill (Raised Bill No. 6389), a marriage limitation (Judiciary Comm. Bill No. 5356), and a civil union bill (Raised Bill No. 6388) (later amended to a domestic partnership measure, Substitute Sen. Bill No. 853).

[42] Cites to legislative history can be found at http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=sb963&which_year=2005&SUBMIT.x=15&SUBMIT.y=10&SUBMIT=Search (last visited Jan. 19, 2006).

[43] See 48 S. Proc., pt. 4, 2005 Sess. 1045 (Apr. 6, 2005) (remarks of Senator Cappiello) ("I want to vote for civil unions … But I do think it is incredibly important to me, to people in my district, to people throughout he state, that if we are going to define civil unions and refer to all of the rights and responsibilities of marriage, we should at least have a definition of marriage.") See also 48 S. Proc., pt. 4, 2005 Sess. 1047 (Apr. 6, 2005) (remarks of Senator Cappiello) (same).

Governor Rell requested an opinion from the Attorney General as to whether the civil union bill would permit same sex couples to marry and received his opinion that it would not. See Br. of Amici Curiae in Support of Pltfs at 16. Nonetheless, the Governor conditioned her support of the bill on a marriage limitation. Mark Pazniokas, Rell Sets Civil Union Conditions She'll Sign Only if Blumenthal Says Bill Doesn't Allow Gay Marriage, Hartford Courant, April 13, 2005 at A1 (quoting Governor: "'Such an amendment will be required in order for me to sign this bill'").

The House started debate the next day, and some members sought to tie together the civil unions bill and a marriage limitation.[44] To ensure that same sex couples could not marry, the House amended the civil union bill to include the present marriage limitation, an amendment the Senate later approved. See Amici Brief, supra, at 17, 20-22 (discussing House and Senate debates on the marriage amendment); House Roll Call Vote 72 LCO #5446 (adopting marriage limitation 80-67); House Roll Call Vote 76 (adopting bill as amended 85-63), Senate Roll Call Vote 119 (adopting bill in concurrence with the House 26-8). Governor Rell then signed the civil union law.

This background shows the discriminatory intent and impact addressed in Arlington Heights, 429 U.S. 252. While a discriminatory purpose and effect does not establish a per se equal protection violation in every case, it is sufficient where, as here, the impact is "stark" or where the impact "could not plausibly be explained on a neutral ground." Feeney, 442 U.S. at 275. Moreover, the State cannot show that the law would have passed without the discriminatory provision, making conclusive the equal protection violation.

[44] See 48 H.R. Proc., pt. 7, 2005 Sess. 1922 and 1984 (Apr. 13, 2005) (remarks of Reps. Cafero and Farr); 48 H.R. Proc., pt. 7, 2005 Sess. 2012 (Apr. 13, 2005) (remarks of Rep. Stone) ("Polls have been cited about how the majority … of people of the State of Connecticut support the civil union bill, but also a clear majority accept the concept of marriage as a union between a man and a woman. We can reflect these two options today by accepting this Amendment, adopting this Amendment, and then adopting the underlying Bill.").

2. The Connecticut Constitution Is Capacious Enough To Incorporate Sexual Orientation As A Suspect Class Or Quasi-Suspect Class.

Beyond denying that any sexual orientation classification exists (State Br. at 51-52), the defendants argue for a crabbed view of the Connecticut constitution's equality provisions based on the absence of explicit textual references and general principles of judicial restraint. State Br. at 55-56.

Numerous Connecticut cases recognize the possibility of suspect class claims under the State Constitution. See, e.g. Leech v. Veterans Bonus Div. App. Bd., 179 Conn. 311, 314 (1979). Art. First, § 1 has long been the standard bearer for equality claims in Connecticut. While § 20 enumerates specific characteristics and sexual orientation is not among them, at most, this means it is an open question as to whether sexual orientation claims are cognizable under that section. Tellingly, defendants do not contest that the plaintiffs satisfy the criteria for a suspect class as established under state and federal law.[45]

As an alternative to determining sexual orientation is a "suspect" class, ample authority suggests that intermediate review is warranted when a law involves "sensitive classifications relating to stereotypes or disadvantaged minorities". Carofano v. City of Bridgeport, 196 Conn. 623, 642 (1985). Carafano relied on Eielson v. Parker, 179 Conn. 552 (1980), involving the constitutionality of a state statute establishing a graduated salary system for judges of the superior court. The high court noted, "We recognize that this two-tier analysis of the law of equal protection …is not sufficiently precise to resolve all cases. Legislation that involves rights that may be significant, though not fundamental, or classifications that are sensitive, though not suspect, may demand some form of

[45] The federal and sibling state precedent cited by defendants have little to no persuasive value. State Br. at 53-54. Some of those cases never raised the issue of suspect class status but simply assumed rational basis review applied. Others rely on the now-overruled Bowers, or cases which previously relied on Bowers. Finally, some cases involve the special situation of the U.S. military. In any event, as the Supreme Court continues to reiterate, in some instances the protections afforded by the state Constitution go further than those provided in the federal Constitution. Barton v. Ducci Elec. Contractors, Inc., 248 Conn. 793, 812 n.15 (1999).

intermediate review." Id. at 564. The State also acknowledges the possibility of quasi-suspect classifications under the state Constitution. State Br. at 45, 48.

IV. THE STATE HAS NOT PROVIDED A CONSTITUTIONALLY ADEQUATE JUSTIFICATION FOR ITS DISCRIMINATION EXCLUDING SAME-SEX COUPLES FROM MARRIAGE.

The State's proffered justifications for barring same-sex couples from marriage fail under even the most basic requirements of the rational basis test and, as such, cannot survive strict scrutiny either.[46] The State asserts three purported rational bases for excluding same-sex couples from marriage itself and placing them in a separate status called "civil union": (1) "administrative purposes;" (2) the promotion of uniformity of laws among the states; and (3) consistency with the federal government's definition of marriage. This Court should not credit these justifications. Not only are they nowhere to be found in the extensive legislative debate on the civil union law, but the record shows that the legislature's actual reasons were "for the purpose of disadvantaging" same-sex couples. See Romer, 517 U.S. at 633.[47]

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[46] Rational basis review under Connecticut law is not toothless and the Supreme Court has demonstrated that it will carefully examine whether there is a logical nexus between a state purpose (assuming it is legitimate) and the means used to achieve it. See Plt. Br. at 41-44. Moreover, judicial review -- even rational basis -- is certainly more searching when legislation is clearly aimed at a particular class, such as the marriage limitation in the civil union law. Concurring in Lawrence, Justice O'Connor noted that "when a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." Lawrence, 539 U.S. at 580 (O'Connor, J., concurring) (citing Moreno, 413 U.S. at 534; Eisenstadt, 405 U.S. at 447-55; Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446-47 (1985); and Romer, 517 U.S. at 632, as examples of this principle).

[47] In this case, the legislative debates on the civil union law demonstrate two impermissible purposes for granting same-sex couples every state-based legal right of marriage, but nonetheless excluding them from marriage itself: (1) The legislature created a separate category for same-sex couples solely for the purpose of separation and exclusion; (2) The legislature wanted to maintain marriage exclusively for heterosexuals because that is the way marriage has always been. See Plt. Br. at 44-52. Critically, the State does not contest that these were the legislature's motives as demonstrated by the legislative debate nor, unsurprisingly, does it claim that such motives are constitutionally permissible. The actual legislative justifications for the denial of marriage in the civil union law are indisputably impermissible and the Court can rule that the denial of marriage to same-sex cou-

The Supreme Court has made clear that where the legislature has indicated its actual purpose in passing a law, that rationale is the critical aspect of constitutional review. See Barton, 248 Conn. at 815 ("[w]e begin our analysis by reviewing the legislative history relevant to the passage of [the statute] … to determine whether the legislative decision … was rational."); City Recycling, Inc. v. State, 257 Conn. 429, 449-450 (2001) ("the legislative history clearly demonstrates that the sole purpose" of the relevant statute was impermissible); Fair Cadillac-Oldsmobile Isuzu Partnership v. Bailey, 229 Conn. 312, 319 (1994) ("As the first step in our constitutional analysis, we must ascertain the legislative purpose" behind the statute and decline to "speculate concerning other conceivable purposes for the statute"). See also Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n. 16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.") (citing U.S. Dep't of Agriculture v. Moreno, 413 U.S. 528, 536-537 (1973)).

Although the State makes a plea for "judicial restraint" in deference to the legislature (State Br. at 58), it is important to keep in mind that the legislature passed the civil union law and that is the context in which this case must be decided. The question before this Court is not whether the Connecticut Constitution requires that the legal rights and obligations of marriage be accorded to same-sex couples. The question is whether the legislature -- having decided to grant all the legal rights and obligations of marriage to same-sex couples -- has any rational reason to exclude them from marriage itself, or whether going that far and then drawing the line at the status of marriage is simply arbitrary.[48]

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ples is unconstitutional on that basis.

[48] Citing City Recycling, the State asserts that the plaintiffs waived a rational basis analysis by not claiming a violation of the federal constitution. State Br. at 14. The State misreads City Recycling,

A. The State's Assertion That The "Civil Union" Nomenclature Is Based On Administrative Needs Is Not Rational.

There is no basis for the State's claim that "calling same-sex unions by a different name than opposite-sex unions" is necessary for the administration of state programs, specifically state programs that are interconnected with federal law. State Br. at 59. The federal government no more respects civil unions than marriages of same-sex couples, so no matter what they are called, the State will have to accommodate this fact in determining eligibility for some joint state-federal benefits programs. The label attached to same-sex couples is utterly inconsequential as to the administrative ease of such record keeping. For example, there is no difference between a state benefits form that has one box to be checked if you are a married couple and one box to check if you are a civil union couple, and a form that has one box for an opposite-sex married couple and one box for a same-sex married couple. The State offers nothing but conclusory statements to explain how the label "civil union" affects the administrative ease of its task because there is simply no logical connection between the need to keep track of same-sex couples in some state programs and the need to use the "civil union" nomenclature.[49]

Moreover, even apart from the complete absence of any demonstrated administrative need to

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as the plaintiffs there, like here, made their claim only under the state constitution. 257 Conn. at 444. The Court merely decided that engaging in a Geisler analysis was not necessary and never imposed a requirement that a party must claim a violation of the federal Constitution to receive a traditional equal protection analysis of its claims. Id.

[49] For these same reasons, the statement that "it is entirely possible that the state legislature will want or need to make specific modifications to state law, applicable only to same-sex couples, to address confusion or inequities in areas in which state and federal law overlap" is equally unavailing. State Br. at 61. Indeed, the tax law the State refers to shows that it is not easier to use the term "civil union couple" than it would be to use the term "married same-sex couple." See 2005 Conn. Acts 3 (Spec. Sess.), An Act Concerning the Implementation of Various Budgeting Provisions ("The provisions of chapters 217, 228c and 229 of the general statutes shall apply to parties to a civil union recognized under the laws of this state as if federal income tax law and federal estate and gift tax law recognized such a civil union in the same manner as Connecticut law").

place same-sex couples in a separate legal status, mere record-keeping can hardly serve as a legitimate justification for discrimination and the segregation of one class of citizens. See Stern, 165 Conn. at 198 ("Obviously administrative convenience or ease of determination cannot serve as a basis to support the discriminatory statutory scheme."); Stanley v. Illinois, 405 U.S. 645, 656 (1972) (noting that constitutional values are designed to protect against "the overbearing concern for efficiency and efficacy.").[50]

B. The State's Assertion That Discrimination Under The Connecticut Constitution Can Be Justified Because Of Discrimination By The Federal Government And Other States Lacks A Rational Basis.

The State also maintains that it is rational to exclude same-sex couples from marriage in Connecticut because "virtually every other State" and the federal government do so. State Br. at 62, 64. Acceding to the standards in other jurisdictions purportedly serves an interest in ensuring "uniformity and consistency in the law" of Connecticut and these other jurisdictions. State Br. at 62.[51]

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[50] Indeed, "administrative convenience" is so vague that there is a danger that it can be used to buttress almost any kind of discrimination, as demonstrated by the State's surprising reliance upon Forbush v. Wallace, 341 F. Supp. 217, 222 (M.D. Ala. 1971) (State Br. at 59). In Forbush, the Court denied a constitutional challenge to an Alabama regulation requiring that a married woman use her husband's name on a driver's license -- a regulation of dubious constitutionality under either strict scrutiny or rational basis review. The one-sentence nod to administrative convenience in this case hardly recommends it as a state interest justifying discrimination under Connecticut constitutional law. The two other cases cited by the State are equally unavailing. Matthew v. Lucas, 427 U.S. 495, 508-509 (1976) (State Br. at 59), is not about administrative record-keeping or tracking per se, but about presumptions of paternity for non-marital children's eligibility for social security benefits. Finally, the State cites the dissent in Opinions of the Justices to the Senate, 802 N.E.2d 565, 574 (Mass. 2004). The dissent's view that administrative reasons justified a separate status was not the ruling of the Court.

[51] At pages 62-63 of its brief, the State does not appear to be arguing that a tradition of defining marriage as between a man and woman is a reason itself to exclude same-sex couples from marriage. Rather, the State asserts that it has an interest in ensuring that Connecticut law is consistent with that of other states and "virtually" all other states define marriage as between a man and woman. See State Br. at 62. For plaintiffs' argument that maintaining "tradition" is not by itself a constitutionally permissible state purpose, see Plt. Br. at 50-52.

The State does not identify any objective or purpose at all that will be served by uniformity with the law of other jurisdictions. The State explains neither the benefits of uniformity nor the harm that would come from lack of uniformity. Rather, it simply observes the existence of the laws of other states and asserts "uniformity" as an abstract interest without more. The State must do more under rational basis review than simply make an observation; it must explain how the law advances a legitimate state purpose. See Fair Cadillac, 229 Conn. at 319 n.11 (dismissing State's purported rational basis that is "more like an observation" where state "does not explain how the closing law advances the purpose of comprehensively regulating [automobile] dealers").

Moreover, the uniformity justification cannot be rational because the State cannot explain why uniformity is important for one aspect of its marriage eligibility laws (i.e., limiting marriage to a man and woman), but not important in all other aspects of its marriage laws, such as permitting marriages of first cousins. See Conn. Gen. Stat. §§ 46b-21, 22. Indeed, there are numerous differences in the laws of all states. In the area of marriage in particular, states have always had somewhat different eligibility rules, including with respect to characteristics such as age, consanguinity, mental competence, and physical condition. While Connecticut permits marriages of first cousins, most other states prohibit them or treat them as null and void.[52] Historically, states have also had dramatically different laws based on race and ethnicity, remarriage after divorce, and competency.[53] Insisting on uniformity for only one aspect of the State's marriage eligibility laws is not only irrational, but also reveals the discrimination that is at the heart of this case.[54]

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[52] See Mark Strasser, Unity, Sovereignty, and the Interstate Recognition of Marriage, 102 W.Va. L. Rev. 393, 402 n.50-53 (1999) (describing varying state laws regarding marriage of first cousins).

[53] See Paul H. Jacobson, Ph.D., American Marriage and Divorce 45 (1959).

[54] Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), again relied upon by the State for its "uniformity" rationale, (State Br. at 62), does not reflect the long-standing respect for equality in Connecticut's constitutional history. See, e.g., Jackson v. Bulloch, 12 Conn. 38 (1837) (despite laws

The existence of the civil union law also demonstrates the irrationality of the State's position. As the State acknowledges, Connecticut is only the second state to pass a law permitting same-sex couples to enter into civil unions. State Br. at 1. The State can hardly claim a rational interest in the uniformity of its laws with those of other states when it clearly, and properly, was not concerned about the paucity of states that have implemented civil union laws. In fact, other states will have to address whether and how their laws will regard civil unions in the very same way that other states will have to address how their laws will regard marriages of same-sex couples.[55] In fact, by creating a new status that exists in "virtually" no other states, rather than giving same-sex couples access to marriage, which exists in every state, the State may well make it harder for Connecticut citizens to have their relationships protected elsewhere. See, e.g., Rosengarten v. Downes, 71 Conn.App. 372, 380-381 (jurisdictional statute covers marriages, but there is no provision for a "civil union"), cert. granted, 261 Conn. 936 (2002) (dismissed as moot).

Any concerns about uniformity with other states, whether in the area of first cousins or otherwise, is addressed by the application of choice of law principles. For over 200 hundred years, this body of law has addressed the accepted inconsistency in state laws as part of our federal system. These principles are routinely applied in every state to address non-uniformity, including in the area of marriage.[56]

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of other jurisdictions, applying principles of equality under Connecticut law to determine that a person considered a slave under law where he came from was free in Connecticut). Lee v. China Airlines, 669 F. Supp. 979, 983 (C.D. Cal. 1987), State Br. at 62, is simply irrelevant because it deals with the validity of the Warsaw Convention to ensure uniformity in international aviation law.

[55] Some states have recognized a civil union for certain purposes. Other states have not. See Plt. Br. at 62.

[56] See Collier v. City of Milford, 206 Conn. 242, 249 (1988) (stating general rule that marriage valid in state where it is contracted is valid everywhere unless it violates public policy and noting that Supreme Court will be required to address validity of common law marriages from other states). Indeed, the legislature itself is well aware that coping with different state laws is an accepted and man-

The State's mere incantation of uniformity or conformity with other jurisdictions cannot stand as a legitimate interest. As the Massachusetts Supreme Judicial Court recently held in ruling unconstitutional legislation prohibiting marriages among same-sex couples but mandating civil unions: "[W]e would do a grave disservice to every Massachusetts resident, and to our constitutional duty to interpret the law, to conclude that the strong protection of individual rights guaranteed by the Massachusetts Constitution should not be available to their fullest extent in the Commonwealth because those rights are not acknowledged elsewhere." Opinions of the Justices, 802 N.E. 2d at 571. Similarly, crediting the State's asserted interest in uniformity here would eviscerate the independent guarantees of the Connecticut constitution. See Horton v. Meskill, 172 Conn. 615, 641-42 (1977).

C. The State Cannot Overcome The Absence of Any Legitimate Justification For Excluding Same-Sex Couples From Marriage By Claiming That The Legislature Is Permitted To Act Incrementally.

The State cannot overcome the lack of a rational justification for the exclusion of same-sex couples from marriage by pointing to the principle of equal protection law that the state may sometimes "take one step at a time" addressing a problem. See City Recycling, 257 Conn. at 453 (internal quotation and citation omitted). The principle that the state is not always required to solve every problem in toto is not a rational basis that provides an independent justification for the exclusion of same-sex couples from marriage and is not applicable to this case.

First, the "one-step at a time" principle does not obviate the requirement that all legislation must nonetheless be rationally related to a legitimate state purpose. As the Supreme Court explained, "[t]he liberty that the state enjoys, however, to address a problem in piecemeal fashion does not encompass the liberty to target one entity and, without rational basis, enact legislation to prevent that

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ageable part of the legal landscape of our federal system. See e.g., Conn. Gen. Stat. § 46b-40(b) ("An annulment shall be granted if the marriage is void or voidable under the laws of this state or of the state in which the marriage was performed") (emphasis added).

entity from doing what it otherwise could lawfully do." City Recycling, 257 Conn. at 453-54 (emphasis added). As such, this principle cannot save the State from the lack of any other rational basis for the marriage exclusion.

Moreover, the one-step at a time principle is inapplicable here because the legislature did not take "one step at a time" by passing the civil union law, but rather granted every state-based tangible protection of marriage to same-sex couples. The Supreme Court has recognized that the legislature can eliminate so many distinctions in a law that any remaining distinctions are simply arbitrary. In Fair Cadillac, for example, the Supreme Court analyzed the Sunday closing law, which the legislature had continually narrowed until the sole group covered by the law was automobile dealers. Fair Cadillac, 229 Conn. at 324. Applying rational basis review, the Court did not rule that the legislature was permitted to act incrementally. Instead, it struck down the closing law because the scale of legislative changes made the sole remaining distinction in the law arbitrary. See Id. (noting that the Court could not "discern any legitimate reason for providing a common day of rest for one narrow class of employees"). Similarly, in this case, it is arbitrary to eradicate every distinction in the tangible legal protections of marriage between same-sex and different-sex couples, but deny the status of marriage to same-sex couples only.

D. The Marriage Ban Cannot Be Justified By The Amici's Assertions That Marriage Is Linked To Procreation, Or By Their Claim That Marriages Of Same-Sex Couples Will Harm Child Welfare.

This Court should reject the claims of various amici that marriage is linked to procreation and that marriages of same-sex couples will harm child welfare. Amici's positions do not reflect Connecticut law, but rather reflect their own ideological and moral preferences.[57] The Court should

[57] See, e.g., Catholic Conf. Br. at 1 (citing Congregation for the Doctrine of the Faith); FIC Br. at 2 (stating its desire that "Judeo-Christian principles" be "re-employed in our society and its public policy"). See Palmore, supra (private biases have no place in the law).

not credit arguments that have not been made by the State, were clearly not one of the legislature's motives for excluding same-sex couples from marriage, and are illogical and contrary to Connecticut law.

As to the idea that procreation is the public purpose of marriage,[58] there is no statutory requirement that married couples procreate, nor could there be. The state is barred from linking the two. See Griswold, 381 U.S. 479 (conclusively severing any link between marriage and procreation by striking down state law forbidding use of contraceptives by married couples, i.e., establishing right not to procreate within marriage). See also Lawrence, 539 U.S. at 605 (Scalia, J. dissenting) (noting that procreation cannot be the purpose of marriage). Procreation is not and has not been the purpose of marriage laws, nor do the amici point to anything to suggest such a purpose. Capacity and intent to procreate are not and have not been a condition of marriage eligibility, and failure to procreate biologically has never been grounds for an annulment or fault-based divorce.[59] Marriage is open to heterosexual couples who wish to adopt, who cannot have biological children, or who choose not to have children. Further, there is no logic to amici's position because heterosexual couples will not stop having children if same-sex couples marry.

Nor is there any basis for amici's claim that the State prefers children to have married parents. To the contrary, the State has equal regard for all children. Lawmakers are well aware of the variety of ways children come into the world and the range of families that raise them. See, e.g., Conn. Gen Stat. § 45a-727a(3) ("best interests of a child are promoted when the child is part of a

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[58] See FIC Br. at 5-10; Catholic Conf. Br. at 4-17; Brief of Family Research Council (FRC Br.) at 23-28; Brief of United Families Connecticut (UFC Br.) at 13.

[59] Courts have voided marriages, on the other hand, when a person marries knowing he or she is incapable of sexual intimacy. Gould, 61 A. at 607. In other words, the State acknowledges the expectation of intimacy, but not of procreation.

loving, supportive and stable family, whether that family is a nuclear, extended, split, blended, single parent, adoptive or foster family."). See also Roth, 259 Conn. at 219-220 (General Assembly has acknowledged that many persons with no biological relationship to children undertake parental duties); Doe v. Doe, 244 Conn. 403, 418 (1998) (nothing novel about donor insemination or surrogacy as a means to having a child); Castagno, 239 Conn. at n.15 (noting "fluid[ity]" of "current sociocultural definitions of 'family'"); Michaud v. Wawruck, 209 Conn. 407, 415 (1988) ("Traditional models of the nuclear family have come, in recent years, to be replaced by various configurations of parents, stepparents, adoptive parents and grandparents"). Indeed, the State is foreclosed from coercing individuals to marry. Moreover, in any equal protection analysis, the State must demonstrate how a classification serves its goals. There is simply no link between encouraging marriage for heterosexuals, some of whom may have biological children, and denying marriage to same-sex couples.

The amici also make the irrational and unfounded claim that denying marriage to same-sex couples advances the state's interests in child welfare.[60] Amici assert that children do best when raised by their biological mother and father and claim that children have poorer outcomes when raised by single parents or adults unrelated to them. The amici imply that same-sex couples should be excluded from marriage because their households generally do not include a biologically-related mother and father. Amici's arguments are, as an initial matter, completely undermined by the civil union law, that provides the same state-based legal protections and obligations with respect to children for same-sex couples as for married heterosexual couples.

Contrary to amici's unfounded fears about child welfare, there is a consensus among every authoritative child welfare association to have addressed the issue – including the American Academy of Pediatrics, the Child Welfare League of America and numerous others – that: (1) same-sex

[60] See FIC Br. at 17-29; Catholic Conf. Br. at 17-23; FRC Br. at 29-32; UFC Br. at 12-14.

parents have parenting abilities at least equal to those of heterosexual parents; and that (2) children of same-sex parents are as healthy, happy and well-adjusted, and fare as well on all measures of development, as their peers."[61]

Nor does an overriding concern with biological parenting drive the state's marriage or adoption policies. Connecticut law contains no preference for different-sex parents. See 2000 Conn. Acts 228 (Reg. Sess.); Hurtado v. Hurtado, 14 Conn.App. 296, 301-302 (1988) (sex of parents not a factor in determining best interests of child); Conn. Gen Stat. § 45a-727a(3), supra. See also McGaffin v. Roberts, 193 Conn. 393, 401 (1984) ("'biological relationships are not [the] exclusive determina[nts] of the existence of family'") (quoting Smith v. Org. of Foster Families, 431 U.S. 816, 843 (1977)).

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[61] See American Academy of Pediatrics, Committee on the Psychosocial Aspects of Child and Family Health, Technical Report and Policy Statement: Coparent or Second-Parent Adoption by Same-Sex Parents, 109 Pediatrics 339 (February 2002), available at http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339 and http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/341; the American Academy of Family Physicians, Jane Stover, FP Report: Delegates Vote for Adoption Policy (October 17, 2002), available at http://www.aafp.org/fpr/assembly2002/1017/7.html; the Child Welfare League of America, CWLA Standards of Excellence for Adoption Services 56 (2000); National Association of Social Workers, Policy Statement: Lesbian, Gay, and Bi-sexual Issues, Social Work Speaks: NASW Policy Statements 198-209 (4th ed. 1997); North American Council on Adoptable Children, North American Council on Adoptable Children Position Statements: Gay and Lesbian Adoptions and Foster Care, (amended April 19, 2005), available at http://www.nacac.org/pub-statements.html#gay; American Psychological Association, Resolution on Sexual Orientation, Parents and Children, available at http://www.apa.org/pi/lgbc/policy/parentschildren.pdf and American Psychological Association and Charlotte Patterson, Lesbian and Gay Parenting: A Resource for Psychologists, (1995), available at http://www.apa.org/pi/parent.html; American Psychiatric Association, American Psychiatric Association, Policy Statement: Adoption and Co-Parenting of Children of Same-sex Couples, APA Reference No. 200214 (Approved, November 2002), available at http://www.psych.org/edu/other_res/lib_archives/archives/200214.pdf; the American Medical Association, American Medical Association, H-60.940: Partner Co-Adoption (Res. 204, A-04) (June 2005), available at http://www.ama-assn.org/apps/pf_new/pf_online?f_n=resultLink&doc=policyfiles/HnE/H60.940.HTM&s_t=H60.940&catg=AMA/HnE&catg=AMA/BnGnC&catg=AMA/DIR&&nth=1&&st_p=0&nth=1&; American Academy of Child and Adolescent Psychiatry, AACAP Policy Statement: "Gay, lesbian and bisexual parents," (June, 1999), available at http://www.aacap.org/publications/policy/ps46.htm; and the American Academy of Family Physicians, Statement of American Academy of Family Physicians available at http://www.aafp.org/fpr/assembly2002/1017/7.html.

Finally, amici's claims are premised on faulty comparisons because they do not compare similarly situated people. The amici do not compare families made up of two married biological parents (mother and father) raising children with families made up of two committed same-sex parents raising children. Instead, the amici point to studies comparing heterosexual two-parent and single-parent families, especially after divorce. These studies do not address parental gender or sexual orientation, but rather consider variables such as the lesser economic and education resources that one adult can offer the child.[62] Moreover, even if, arguendo, children might do better when raised by a biological mother and father, there is nothing to suggest that more heterosexual couples will marry and raise children in that setting if same-sex couples cannot marry.

CONCLUSION

For the foregoing reasons, the plaintiffs request that this Court enter summary judgment in their favor on all counts of the Amended Verified Complaint and: 1) enter a declaratory judgment that any statute, regulation or common law rule applied to deny otherwise qualified individuals from marrying because they wish to marry someone of the same sex or are gay or lesbian violates the Connecticut Constitution; 2) enjoin Defendant Bean, or her successor, to issue marriage licenses to the plaintiffs upon proper completion of applications and to record the marriages according to law; and 3) issue an injunction ordering the Department of Public Health to take all steps necessary to effectuate the Court's declaration.

[62] Sociologist Judith Stacey has pointed out that the "claims that research establishes the superiority of the married heterosexual-couple family and that children need a mother and a father conflate and confuse research findings on four distinct variables – the sexual orientation, gender, number, and marital status of parents." Judith Stacey, Legal Recognition of Same-Sex Couples: The Impact on Children and Families, 23 Quinnipiac L. Rev. 529 (2004).

RESPECTFULLY SUBMITTED,

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