No. NNH-CV 04-4001813

ELIZABETH KERRIGAN & JOANNE MOCK, JANET PECK & CAROL CONKLIN, GERALDINE ARTIS & SUZANNE ARTIS, JEFFREY BUSCH & STEPHEN DAVIS, J.E. MARTIN & DENISE HOWARD, JOHN ANDERSON & GARRETT STACK, BARBARA LEVINE-RITTERMAN & ROBIN LEVINE-RITTERMAN, DAMARIS NAVARRO & GLORIA SEARSON	:	SUPERIOR COURT
vs.	:	JUDICIAL DISTRICT OF NEW HAVEN AT NEW HAVEN
STATE OF CONNECTICUT, DEPARTMENT OF PUBLIC HEALTH, J. ROBERT GALVIN, in his/her official capacity as Commissioner of the Department Of Public Health, and Dorothy C. Bean, in her Official Capacity as Deputy Town Clerk and Acting Town Clerk and Deputy Registrar Of Vital Statistics and Acting Registrar Of Vital Statistics for the Town of Madison.	:	JULY 28, 2005

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Practice Book §§ 11-10 & 17-45, the Plaintiffs submit this memorandum of law in support of their Motion for Summary Judgment filed this date.

INTRODUCTION

The plaintiffs are eight same-sex couples who have lived in loving and committed relationships for between 10 and 30 years.[1] Six of the couples are raising children together. By this action, the plaintiff couples seek equal participation in one of the most fundamental of all our human and civil rights: the right to marry the person you love, the person with whom you want to share your

[1] The plaintiffs have each submitted an affidavit, which are attached to their separately filed Statement of Undisputed Facts.

life. Each of the plaintiff couples sought a marriage license, but was refused solely because the members of each couple were of the same sex.[2]

Marriage is a unique legal and cultural status. It has no equivalent. Marriage is, of course, the foundation, under both state and federal law, for a vast architecture of rights, benefits and obligations that protect couples and their children. But marriage is, and has always been, far more than a package of legal and economic benefits, important as they are. Marriage is the only legal relationship that universally and automatically conveys to others that two people are in a loving and committed relationship. Marriage is also a social institution; it acknowledges the existence of families and protects those families precisely because others understand and respect the institution of marriage. Beyond these public components, marriage for many individuals is a critical part of one's self-definition because it is an expression of deep personal commitment and fidelity to another person that has no substitute.[3]

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[2] See Amended Verified Complaint, ¶¶ 103-108. Plaintiffs filed their Verified Complaint on August 25, 2004, and an Amended Verified Complaint, adding one additional plaintiff couple, on March 29, 2005. Subsequently, on April 20, 2005, the Governor signed into law Public Act 05-10, effective October 1, 2005, that mandates that "all the same benefits, protections and responsibilities" of marriage be accorded to same-sex couples, but expressly excludes same-sex couples from marriage itself. PA 05-10, § 14. PA 05-10 is at Appendix (hereinafter "App.") 1. Instead, the law creates a new and separate status for same-sex couples called "civil union." Id. at § 2. Plaintiffs have not further amended their Complaint in light of the civil union law because their claims challenge the constitutionality of "any statute" that "is applied to deny otherwise qualified individuals from marrying because they wish to marry someone of the same sex." See Amended Verified Complaint, ¶¶ 110, 112, 114. Moreover, as fully explained in Argument § V, infra, civil unions, as a separate and unequal status, do not remedy the harm caused to plaintiffs by the exclusion from marriage.

[3] The Plaintiffs seek the right to civil marriage sanctioned by the state, not religious marriage. See Gould v. Gould, 78 Conn. 242, 61 A. 604, 610 (1905) (Hamersley, concurring) (explaining that "[i]mmediately after the establishment of the jurisdiction of Connecticut … marriage was taken under the exclusive jurisdiction of the civil authority"). The freedom of each religious institution to set its own terms for marriage is not challenged by this lawsuit. It goes without saying that any religious group can refuse to marry any couple, either same-sex or different-sex, for any religious or other reason.

To view marriage as nothing more than a word -- interchangeable with any other term -- is to ignore the profound social and cultural meaning of marriage. The privileged status of marriage and the multidimensional significance of the institution have been recognized and affirmed for centuries by both the state Supreme Court and the United States Supreme Court even while the precise structure of marriage has consistently undergone evolution, such as those changes engendered by the recognition of women's equality.[4] Indeed, precisely because the status of being married is central to human relationships and has no parallel, marriage has been called a civil right, part of what it means to be an equal citizen. See Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the basic civil rights of men") (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)); Goodridge v. Dep't of Pub. Health, 440 Mass 309, 325 (2003) ("civil marriage has long been termed a 'civil right,'" including because of "its intimately personal significance").[5]

Barring the plaintiffs from seeking personal fulfillment and legal security through marriage is a denial of equal citizenship that harms their families and brands them with a governmentally-sanctioned badge of inferiority. "A prime part of the history of our Constitution … is the story of the extension of constitutional rights to people once ignored or excluded." United States v. Virginia, 518 U.S. 515, 557 (1996). Defendants' exclusion of gay and lesbian people from marriage is no longer -- if it ever was -- consistent with the Constitution.

The plaintiffs rely upon three broad principles contained in the Connecticut constitution. First, the denial of marriage rights to lesbian and gay citizens violates Article First, § 1 and Article First, § 20, which are the equality provisions in the Connecticut constitution. The Supreme Court has

[4] See Argument § II(A)(6), infra, for a discussion of the social and cultural status of marriage and § II(A)(3 and 4), infra, for a discussion of state and federal cases regarding access to marriage.

[5] See also Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993) (identifying marriage as a "civil right"); Baker v. State, 744 A.2d 864, 898 (Vt. 1999) (Johnson J., concurring in part and dissenting in part) (same).

made clear that there are unenumerated protected rights in the constitution that emanate from Article First, § 1. See, e.g., Moore v. Ganim, 233 Conn. 557, 601 (1995). Utilizing the framework established by the Supreme Court in State v. Geisler, 222 Conn. 672, 685 (1992), marriage is a right of fundamental importance under the Connecticut constitution (Argument § II(A), infra) and as such the denial of equal access to that right triggers strict scrutiny. In addition, the denial of marriage rights to gay and lesbian citizens is subject to strict scrutiny because it creates suspect classifications based on sex (Argument § II(B), infra) and sexual orientation (Argument § II(C), infra). The state cannot justify its marriage ban under even the lowest level of constitutional review, rational basis (Argument § II (E), infra).

In addition, the marriage ban violates the due process provisions of the Connecticut constitution contained in Article First, §§ 8 and 10 (Argument § III). Importantly, the Supreme Court has ruled that unenumerated substantive rights also flow from these provisions. See Ramos v. Town of Vernon, 254 Conn. 799, 835 & n.31 (2003). The same Geisler analysis demonstrating that marriage is a protected right under Article First, § 1 is equally applicable to the existence of such a right under these due process provisions. Finally, withholding marriage from the plaintiffs also infringes their rights of expression and association under Article First, §§ 4, 5 and 14 (Argument § IV). There is no constitutionally adequate justification for the marriage ban under the due process and expressive association provisions of the Connecticut constitution for the very same reasons that the ban fails under Article First, §§ 1 and 20. The plaintiffs ask this Court to apply the promises of equality, liberty, and freedom of expressive association in the Connecticut constitution to ensure that they, too, have an equal right to marry the person they love.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

A. STANDARD FOR DETERMINING SUMMARY JUDGMENT.

The applicable standards for determining a motion for summary judgment are well established. Practice Book § 17-49 provides:

> The judgment sought shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue of fact and that the moving party is entitled to judgment as a matter of law.

The party seeking summary judgment bears the burden of proving that no genuine issue of material fact exists. Cantonbury Heights Condo. Ass'n v. Local Land Dev., LLC, 273 Conn. 724, 733 (2005). A fact is material if it would make a difference in the result of the case. Arnone v. Conn. Light & Power Co., 90 Conn. App. 188, 193 (2005). The court views the evidence in the light most favorable to the non-moving party. Id. Summary judgment is a proper way to test the legal sufficiency of a complaint where the defendant cannot show that the plaintiff could articulate a cause of action by pleading other facts. Larobina v. McDonald, 274 Conn. 394, 401 (2005). The court may enter summary judgment on a declaratory judgment. See 37 Huntington Street, H, LLC v. City of Hartford, 62 Conn. App. 586, cert. denied, 256 Conn. 914 (2001).

B. GENERAL PRINCIPLES FOR INTERPRETING THE CONNECTICUT CONSTITUION.

The role, indeed duty, of the judicial branch to determine whether the actions of the executive or legislative branches have violated the constitution has been clear throughout Connecticut's history. As the Supreme Court has emphasized:

> This court have (sic) also never failed, on all proper occasions, to assert and maintain the equally sound doctrine, that it is within their well established powers, and a part of their duties, to disregard a legislative act, which is clearly repugnant to the constitution of the United States, or this state … To refuse the exercise of this high prerogative, in such cases, would be a gross dereliction of duty, and put the supreme law of

the state or nation, under the control of the legislature.

Szawak v. Warden, Conn. Corr. Inst., 167 Conn. 10, 28 (1974) (quoting Trustees of the Bishop's Fund v. Rider, 13 Conn. 87, 93 (1839)).[6]

Importantly, the Supreme Court has stressed that the principles set forth in the Connecticut constitution are not fixed in time. Rather, courts

> must *interpret* the constitution in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning …[t]he constitution was not intended to be a static document incapable of coping with changing times. It was meant to be, and is, a living document with current effectiveness.

State v. Dukes, 209 Conn. 98, 115 (1988) (quoting Seattle Sch. Dist. v. State, 90 Wash.2d 476, 516 (1978)) (emphasis in original). The Court emphasized that the Connecticut constitution is "an instrument of progress, it is intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens." Id. As such, it must be interpreted within the "context of the times." Id. at 114.[7] In State v. Webb, 238 Conn. 389, 411 (1996), the Court reaffirmed that "as we engage over time in the interpretation of our state constitution, we must consider the changing needs and expectations of the citizens of our state." Indeed, as the U.S. Supreme Court emphasized in Lawrence v. Texas, 539 U.S.

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[6] See also Sheff v. O'Neill, 238 Conn. 1, 13 (1996) ("it is the role and duty of the judiciary to determine whether the legislature has fulfilled its affirmative obligations within constitutional principles"); Horton v. Meskill, 172 Conn. 615, 625 (1977) (noting "the judicial duty under a constitutional government such as ours to decide a justiciable controversy as to the constitutionality of a legislative enactment"); Preveslin v. Derby & Ansonia Developing Co., 112 Conn. 129, 145 (1930) ("The jurisdiction to determine whether a statute is in conflict with the state Constitution is in the judiciary."); Pratt v. Allen, 13 Conn. 119, 132 (1839) ("If the legislature shall attempt to encroach upon constitutional restrictions, it will become the solemn duty of the court to declare such an attempt illegal and the act void.").

[7] See also id. at 115 (quoting M'culloch v. Maryland, 17 U.S. (4 Wheat. 316, 415 (1819)) ("a constitution is, in Chief Justice John Marshall's words, 'intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.'") (emphasis in original).

558, 579 (2003), "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."

In determining the contours of the Connecticut constitution, the Supreme Court has stated that "our first referent is Connecticut law and the full panoply of rights Connecticut residents have come to expect as their due … In the area of fundamental civil liberties – which includes protections under the Connecticut constitution – we sit as a court of last resort." Horton, 172 Conn. at 641-642. The Supreme Court has established "tools of analysis" to "construe the contours of our state constitution and reach reasoned and principled results." Geisler, 222 Conn. at 685. The Supreme Court stated that the following "tools" should be "considered to the extent applicable": (1) the text of constitutional provisions; (2) holdings and dicta of the Supreme Court and the Appellate Court; (3) federal precedent; (4) decisions of sister states; (5) the historical approach, including the historical constitutional setting and the debates of the framers; and (6) economic/sociological considerations. Id.

While Connecticut courts have an obligation "independently to construe the provisions of our state constitution," see State v. Barton, 219 Conn. 529, 545 (1991), the Supreme Court has advised that federal decisions interpreting the U.S. Constitution are highly persuasive in defining the scope of rights under the Connecticut Constitution.[8] The Supreme Court regards the federal Constitution as establishing "a minimum national standard for the exercise of individual rights." Miller, 227 Conn. at 363. The Connecticut constitution, however, may "afford our [Connecticut] citizens

[8] See Fair Cadillac-Oldsmobile Isuzu P'ship v. Bailey, 229 Conn. 312, 317 (1994) ("[I]t is wrong to assume that independent state constitutions share no principles with their federal counterpart. The interstices of open-ended state constitutions remain to be filled, and many of them will best be filled by adopting into state law, on a case-by-case basis, persuasive constitutional doctrines from federal law and from sister states.") (quoting E. Peters, "State Constitutional Law: Federalism in the Common Law Tradition," 84 Mich. L. Rev. 583, 592-93 (1986); State v. Miller, 227 Conn. 363, 380 (1993) ("decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by Connecticut law").

broader protection of certain personal rights" than under analogous sections of the federal constitution. See Dukes, 209 Conn. at 112.[9]

II. THE EQUAL PROTECTION GUARANTEES IN ARTICLE FIRST, §§ 1 AND 20 OF THE CONNECTICTUT CONSTITUTION FORBID THE DENIAL OF MARRIAGE TO GAY AND LESBIAN COUPLES.

The Declaration of Rights contained in Article First, §§ 1 and 20 of the Connecticut Constitution forcefully articulate the foundational principles of equal protection. These equality provisions stand as a safeguard against invidious and arbitrary discrimination among citizens. The Declaration of Rights begins with a broad pronouncement of its purpose:

> That the great and essential principles of liberty and free government may be recognized and established.[10]

That opening clause is followed by a declaration of specific rights. Article First, § 1 and Article First, § 20 constitute the equal protection provisions of the Connecticut Constitution. Article First, § 1 provides:

> All men when they form the social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community.

Conn. Const., Article First, § 1.[11] Article First, § 20 was added to the Constitution in 1965 and now states:

> No person shall be denied the equal protection of the law nor subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental dis-

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[9] See, e.g., Miller, 227 Conn. at 380-81 (greater rights to be free from unreasonable seizure under state constitution).

[10] In addition, the Preamble to the Connecticut Constitution reserves to the people "the liberties, rights and privileges which they have derived from their ancestors." Conn. Const., Preamble.

[11] The Preamble, introductory language to the Declaration of Rights, and Section One, were contained in the original Constitution of 1818 and retained in the 1965 constitution, mostly verbatim. See W. Horton, The Connecticut State Constitution: A Reference Guide 36-38 (1993).

ability.

Conn. Const., Article First, § 20.[12] The debates of the framers of § 20 at the 1965 Constitution indicate the strongest possible intent to eradicate all discrimination and inequality in society. For example, Mr. Kennelly referred to the text of § 20 as "the very strongest human rights principle that this convention can put forth to the people of Connecticut." 2 Proceedings of the Third Constitutional Convention 692 (1965) (hereinafter "Convention") (App. 7). Ms. Grasso referred to the language as "a new opportunity to give proper expression to the right of man," 2 Convention at 694 (App. 11), and Mr. Houston called the language "the most comprehensive we had to consider." 2 Convention at 693 (App. 10).

The denial of marriage rights to the plaintiffs violates the core equality provisions contained in Article First, §§ 1 and 20. The standard for determining a violation of equal protection under the Connecticut Constitution is well established. The Supreme Court has held that "'every statute is presumed to be constitutional and [has] required that invalidity be established beyond a reasonable doubt.'" See Barton v. Ducci, 248 Conn. 793, 813 (1999) (quoting Faraci v. Conn. Light & Power Co., 211 Conn. 166, 168 (1989)). Therefore, those challenging the constitutionality of a statute bear a heavy burden. Id. Nevertheless, "[i]f in distinguishing between classes, the statute either intrudes on the exercise of a fundamental right or burdens a suspect class of persons, the court will apply a strict scrutiny standard wherein the state must demonstrate that the challenged statute is necessary to the achievement of a compelling state interest." Donahue v. Town of Southington, 259 Conn. 783, 794 (2002). Otherwise, a classification must "be rationally related to some legitimate government purpose in order to withstand an equal protection challenge." Id. Even "the standard of rationality

[12] "Sex" was added as a protected category in 1974 and "physical or mental disability" was added in 1984. Conn. Const. Amends. Arts. V, XXI.

must find some footing in the realities of the subject addressed by the legislature." See e.g., City Recycling, Inc. v. State, 257 Conn. 429, 453 (2001) and Argument § II(E)(1), infra.

Denying marriage to same-sex couples violates the Article First, §§ 1 and 20 for four reasons. First, because marriage is a protected fundamental right under the Connecticut constitution, the denial to individual citizens of equal access to that right triggers strict scrutiny under both equal protection and due process. See Argument § II(A), infra. Second, the denial of marriage rights to gays and lesbians is subject to strict scrutiny because it burdens a suspect class by creating impermissible distinctions that are based on sex. See Argument § II(B), infra. Similarly, the exclusion from marriage creates a suspect classification based on sexual orientation. See Argument § II(C), infra. Fourth, the marriage ban cannot even satisfy the rational basis test because there is no legitimate public purpose in denying marriage to gay and lesbian citizens, a fact confirmed by the state's mandate that same-sex couples must now have every tangible, legal, right and benefit of civil marriage. Nor is there any logical nexus between any legitimate state purpose and the exclusion of same-sex couples from marriage. See Argument § II(E), infra. Perforce, the state cannot withstand the heightened scrutiny applicable to a classification that implicates a fundamental right under the Connecticut Constitution.

A. An Analysis Of The Factors Set Forth In State v. Geisler Establishes That The Right To Marry Is Protected Under The Connecticut Constitution.

While there is no explicit reference to the right to marry the person of one's choosing in the Connecticut constitution, the Supreme Court has made clear that the scope of Article First, § 1 is not limited to rights explicitly enumerated in the constitution. For example, in Webb, 238 Conn. at 409-410, the Court declined to find an asserted "right to life" under Article First, § 1 in a case challenging the constitutionality of the death penalty. The Court stated, however, that "[a]lthough we have rejected natural law and the social compact clauses as sources of unenumerated rights, we neverthe-

less have concluded that citizens in our state may possess certain such unwritten constitutional rights." Id. In Moore, 233 Conn. at 601, the Court declined to find an unenumerated "right to subsistence" under Article First, § 1, but acknowledged that "the framers believed that individuals would continue to possess certain natural rights, even if those rights were not enumerated in the written constitution." See also id. at 618 ("the case law in this state has subscribed to a broader proposition – that the framers did not intend our written state constitution to be an all-encompassing exhaustive enumeration of individual rights") (Peters, C.J., concurring).[13]

Importantly, the plaintiffs in this case, unlike those in Moore and Webb, do not assert a right that is unrecognized in American constitutional jurisprudence. To the contrary, it is beyond question that the freedom to choose one's marital partner has long been conclusively established as a fundamental right under both the state and federal constitution. See, e.g., Gould, 61 A. at 604 (identifying right to marry as protected under Article First, § 1); Loving, 388 U.S. at 12 (the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"), and cases cited in Argument § II(A)(3), infra. Plaintiffs thus seek to participate in marriage as it exists, not create a new right.[14] An analysis of the Geisler factors establishes the existence of a fundamental right to marry under the Connecticut Constitution.

[13] Importantly, the Supreme Court has clarified that in addition to Article First, § 1, these unenumerated rights may also be found in the due process provisions contained in Article First, §§ 8 and 10. See Ramos, 254 Conn. at 835 (2000), and Argument § III, infra.

[14] In contrast to the right to marry, the Court in Moore expressed concern about the existence of a right to subsistence because of, inter alia, the lack of clarity in the record regarding who should be considered indigent and the level of services that would amount to minimal subsistence. See Moore, 233 Conn. at 610. Moreover, the Court was concerned that the plaintiffs sought to impose an unenumerated, affirmative obligation on the government. Id. at 595. In contrast, the plaintiff couples in this case seek equal access to a right that already exists and that the state provides to others.

1. The Text Of Article First, § 1 Is Sufficiently Broad to Encompass The Right To Marry.

The language of Article First, § 1 is broad and flexible enough to incorporate the right to marry. The opening language of Article First, refers to "essential principles of liberty." In addition, the plain language of Article First, § 1 ("All men … are equal in rights") acknowledges the existence of certain rights in the Constitution. The Supreme Court has always viewed the text of § 1 as articulating broad principles of liberty. In State v. Conlon, 65 Conn. 478, 33 A. 519, 522 (1895), for example, the Court described the principles established in Article First, §1 as including principles of "equality under the law, in rights to life, liberty, and the pursuit of happiness," and those "protected rights … that inhere in 'the great and essential principles of liberty and free government.'" The Court stated that:

> [T]he protection of the citizen in the equal enjoyment of those essential rights belonging to citizens of a free government is guarantied, not in narrow phrases of detailed statement, but in terms as broad as those which vest the legislative power in the general assembly and the judicial power in the courts … The language used is purposely broad.

Id. Similarly, in Jackson v. Bulloch, 12 Conn. 38, 1837 WL 60 (1837), the Supreme Court ruled that a person considered a slave under the law where he came from was free in Connecticut, noting that slavery was "a custom so utterly repugnant to the great principles of liberty, justice and natural right" in the constitution. Id. at *4. In so ruling, the Court noted that "[t]he language [of § 1] is certainly broad," and emphasized the "solicitude for liberty manifested in the constitution." Id. at *4-5.[15] See also, Welch v. Wadsworth, 30 Conn. 149, 1861 WL 1079 *2, *6 (1861) ("the fundamental principles of the social compact … underlie all legislation, irrespective of constitutional restraints,

[15] Although the Supreme Court has more recently stated that natural law is not a specific source for the enumerated rights in the Constitution, see Webb, 238 Conn. at 409-410, the language of these 19th century cases nonetheless indicates the Supreme Court's views as to the breadth and significance of the liberty guarantees in Article First, § 1.

and if the act in question is a clear violation of them, it is our duty to hold it abortive and void"); Booth v. Woodbury, 32 Conn. 118, 127 (1864) ("The power of the legislature is limited only by the constitutions of the state and the United States and by the principles of natural justice").[16]

Based on the broad principles of liberty in the text of Article First, § 1, it is anomalous to think that a right as central as marriage, vital to the ordering of society since the beginning of the colony of Connecticut, and conclusively established as fundamental under the federal constitution, would not be found under the Connecticut constitution, or that denial of that right to the class of gay and lesbian citizens would not have been offensive to the principles of justice, equality, and nondiscrimination contemplated by the framers.

2. Decisions Of The Supreme Court Unequivocally Support The Existence Of Marriage As A Fundamental Right Under The Connecticut Constitution.

The Supreme Court has held that the right to marriage is a protected right under the equal protection provisions of the Connecticut constitution. See Gould, 61 A. at 613. Gould involved a statute prohibiting a man or woman who is an "epileptic, imbecile, or feeble-minded" from marrying while the woman was under forty-five years of age. After marrying, the wife learned that her husband was an epileptic and brought an action to have the marriage decreed null and void. Id. at 604. In its analysis, the Supreme Court stated that "[t]he Constitution of this state (preamble and article 1, § 1) guaranties to its people equality under the law in the rights to 'life, liberty, and the pursuit of happiness." Id. The Court then stated simply that "[o]ne of these is the right to contract marriage."

[16] Even where constitutional principles are not at issue, the Supreme Court has demonstrated respect for the vital principles of liberty and equality. In In the Matter of Mary Hall, 50 Conn. 131 (1882), the Supreme Court considered the exclusion of women from the bar. Although the statute was drafted at a time when a woman's admission to the bar was inconceivable (and due to coverture, all but impossible for a married woman), the Court declared that "all statutes are to be construed, as far as possible, in favor of equality of rights. All restrictions upon human liberty, all claims for special privileges, are to be regarded as having the presumption of law against them… ." Id. at 137.

Id. In his concurrence with the result, Justice Hamersley strongly criticized the statute at issue, stating that "the act done by the parties - that of marrying - is not only a harmless act, but the exercise of a right belonging to every citizen." See id. at 612 (emphasis added). He reiterates that "marriage is a status fundamental in its nature to organized society." Id. at 607.[17]

3. Federal Precedent Unequivocally Recognizes A Fundamental Right to Marriage.

i. U.S. Supreme Court Cases Are Dispositive On The Fundamental Right to Marry.

A series of U.S. Supreme Court cases between 1967 and 1987 establish beyond question that the right to marry is fundamental under federal constitutional principles of liberty and, as such, may not be abridged by the state without a compelling state interest. In Loving, the U.S. Supreme Court struck down a state ban on interracial marriages. In addition to ruling that the law was an unconstitutional racial classification on equal protection grounds, the Court unequivocally declared that the right to marry is fundamental under the Due Process Clause of the Fourteenth amendment. Loving, 388 U.S. at 12 ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the 14th Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

Eleven years later, the Court removed any doubt that an independent fundamental right to marriage exists under the federal constitution. In Zablocki v. Redhail, 434 U.S. 374, 384 (1978), the Court stated that "[a]lthough Loving arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all in-

[17] Both before and after Gould, Connecticut courts have repeatedly recognized the unique and vital role of the institution of marriage. See cases discussed at Argument § IIA(6), infra.

dividuals" (emphasis added). The Court declared that the right to marry is the right to make the "decision to enter the relationship that is the foundation of the family in our society." Id. at 386. Notably, in striking a law forbidding marriage by parents who were delinquent in child support payments, the Court was not addressing a suspect class (as in Loving), and rejected the important state interests of providing an incentive to meet outstanding support obligations and providing a deterrent against incurring further obligations. Id. at 400-402.

In Turner v. Safley, 482 U.S. 78, 95-96 (1987), the Court ruled that the right to marry applies to prisoners even though inmates' constitutional rights may be compromised by legitimate penological objectives. On the rational basis review applicable in the prison context, the Court invalidated on its face a Missouri regulation banning nearly all inmate marriages (except those where the birth of a child was expected) as "not reasonably related to legitimate penological objectives." Id. at 99. The Supreme Court concluded that each of the state's interests failed to justify the burden on the individual prisoner's decision to marry. Id. at 98-99. In ruling that the right to marry applies to prison inmates, the Court emphasized that marriages are "expressions of emotional support and public commitment" and these attributes are "an important and significant aspect of the marital relationship" for inmates just as for others. Id. at 95-96. In addition, the Court pointed to the "spiritual significance" of marriage for many individuals, the expectation of intimacy upon parole and release that informs many inmate marriages, and that marital status is often a precondition to the receipt of government benefits. Id. at 96.

The view that the right to marry is a fundamental liberty interest has a long history in American law. Nearly twenty years before the Supreme Court's unequivocal declaration of marriage as a fundamental right in Loving, the California Supreme Court became the first in the nation to strike a law prohibiting interracial marriage as violative of the fundamental right to marry under the federal constitution. See Perez v. Lippold, 198 P.2d 17, 18-19 (Cal. 1948) ("Marriage is thus something

more than a civil contract subject to regulation by the state; it is a fundamental right of free men."). Beginning with Meyer v. Nebraska, 262 U.S. 390 (1923), a line of cases placed the "right to marry" as a liberty interest "essential to the orderly pursuit of happiness by free men." Id. at 399. See also Maynard v. Hill, 125 U.S. 190, 211 (1888) (marriage characterized as "the foundation of the family and of society, without which there would be neither civilization nor progress"); Skinner v. State of Oklahoma, ex. rel. Williamson, 316 U.S. 535, 541 (1942) (characterizing marriage as "fundamental to the very existence and survival of the race"); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred… it is an association for as noble a purpose as any involved in our prior decisions.").

It is now a predicate of the relationship between the individual and the state that the Constitution protects against unwarranted state interference with a range of personal decisions, including "decisions relating to marriage." See Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 851 (1992). Direct state intrusion into these core decisions inevitably impose an intolerable indignity on an individual. As both the U.S. Supreme Court and other courts have made clear, the constitutional right to privacy and autonomy, of which the right to marry is a part, is a recognition that some decisions are so intimate and so central to human dignity and individual identity that they must be protected from undue government interference.[18]

Similarly, in Lawrence, the U.S. Supreme Court, in recognizing and affirming the dignity of same-sex sexual relationships, reiterated that decisions about close personal relationships such as marriage:

[18] The Massachusetts Supreme Judicial Court held in Goodridge that "[w]hether and whom to marry, how to express sexual intimacy, and whether and how to establish a family -- these are among the most basic of every individual's liberty and due process rights." 440 Mass. at 329.

> involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

539 U.S. at 574 (quoting Casey, 505 U.S. at 851). Such choices are "central to the liberty protected by the Fourteenth Amendment … [and] persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." Id. at 574.[19]

These cases powerfully demonstrate that the profound mutual love, respect, commitment, and intimacy that define the marital relationship are essential for human dignity and happiness and are valuable to society as a whole. The right to marry is a fundamental liberty interest under the Connecticut constitution for gay and lesbian citizens.

ii. Plaintiffs Seek To Participate In The Fundamental Right to Marry, Not A New Right Of Same-Sex Marriage.

Importantly, the plaintiffs do not seek a right to "same-sex" marriage; they seek to exercise the same fundamental right to marry available to different-sex couples. The issue in this case, thus, is not whether there is a narrow fundamental right to same-sex marriage. Such a level of specificity is at odds with the Supreme Court's view of fundamental rights. See Ramos, 254 Conn. at n.33 (in context of substantive due process analysis, stating that "broader characterizations of a particular right are more easily sustained than more narrow conceptions").

Moreover, characterizing the right at issue here as a right to "same-sex" marriage is contrary to the U.S. Supreme Court's long-established analysis of the fundamental right to marry. In Loving,

[19] This case does not press the issue of a right to marry under federal law. That issue was not before the U.S. Supreme Court in Lawrence, either, thereby prompting the majority's comment that the case does not concern state sanction of any type of a relationship that gay people may seek to enter. 539 U.S. at 578. However, the broad principles articulated in Lawrence are clear: certain life decisions are fundamentally important for gay and lesbian people as for others.

the U.S. Supreme Court did not determine whether there was a fundamental, historic right to "miscegenic" or mixed-race marriages. Neither did the Court in Zablocki ask whether there was a fundamental right for the poor to marry, nor did the Turner Court assess whether there was a fundamental right of "inmate marriage." In these cases, only after acknowledging the well-established and general fundamental right to marry did the Supreme Court consider the application of the right in the context of the state's denial of marriage to a particular class of people. See Turner, 482 U.S. at 95 (construing the right in the case as "the right to marry"); id. at 97 (looking at "whether the regulation impermissibly burdens the right to marry"); Zablocki, 434 U.S. at 383 (broadly proclaiming that "the right to marry is of fundamental importance"); id. at 383-84, 86 (framing the right as the "freedom to marry," the "right to marry," or the "decision to marry"); Loving, 388 U.S. at 12 ("freedom to marry has long been recognized as one of the vital personal rights.").[20]

As Justice Greaney explained in his concurring opinion in Goodridge, "[t]o define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question … this case calls for a higher level of legal analysis." 440 Mass. at 348 (Greaney, J. concurring). See also Casey, 505 U.S. at 847 (it is "tempting … to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against

[20] See also Castle v. Washington, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Sept. 7, 2004) (App. 36, 48-49) ("[t]he question, then, is not whether marriage is a fundamental right -- it is. The question is whether inter-race marriages can be banned, or whether inmate marriages can be banned, or whether same sex marriages can be banned? The answer to the question depends on the rationale for the state action"); Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Aug. 4, 2004) (App. 54, 58) (observing that there was no "deeply rooted tradition of interracial marriage at the time of the U.S. Supreme Court's consideration of anti-miscegenation statutes in Loving," and noting that "the Court analyzed the issue of their constitutionality in terms of the broad right to marry;" applying similar analysis to the lack of any "deeply rooted tradition" of "marriage while delinquent in child support payments" in Zablocki or "inmate marriage" in Turner).

government interference by other rules of law when the Fourteenth Amendment was ratified … But such a view would be inconsistent with our law."). Consistent with these principles, the state cannot simply define the right to marry based on the very restriction that is being challenged.

4. Sister States Have Also Found That Marriage Is A Fundamental Right Under Their State Constitutions.

State courts throughout the country have similarly found that the right to marry is fundamental and protected under state constitutional provisions that contain language similar to the Connecticut constitution. For example, the Texas Appeals Court found a right to marry under a constitutional provision strikingly similar to Article First, § 1. See Bailey v. City of Austin, 972 S.W.2d 180, 189 (Ct. App. Tex. 1998) ("Under both the federal and state constitution, the freedom to marry is recognized as a fundamental right.").[21] Similarly, a Louisiana Appellate Court ruled that "[t]he U.S. Constitution and the Louisiana Constitution recognize the fundamental liberty interest or right of personal privacy in decisions relating to marriage, child rearing, and family relationships." Reinhardt v. Reinhardt, 720 So. 2d 78, 79 (La. App. 1st Cir. 1998).[22] See also Beeson v. Kiowa County Sch. Dist., 567 P.2d 801, 805 (Colo. Ct. App. 1977) (enjoining a school policy prohibiting married persons from participating in extracurricular activities and finding public policy that "the creation of a 'marriage relationship' is a fundamental right in this jurisdiction"); Fabio v. Civil Service Comm'n of Pennsylvania, 489 Pa. 309, 323 (1980) (constitutional right to privacy encompasses activities relating to marriage);[23] In re Appeal of Alfie Coats, 849 A.2d 254, 262 (Pa. Super. 2004) ("It is settled

[21] Texas Const. Art. I, § 3 provides: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

[22] Louisiana Const. Art. I, § 2 states: "No person shall be deprived of life, liberty, or property, except by due process of law."

[23] Pa. Const. Art. 1, § 1 states: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of

that marriage is a fundamental right under both the United States Constitution and the Pennsylvania Constitution"); In the Matter of Baby M., 109 N.J. 396, 447 (1988) (referring to the "rights of personal intimacy, of marriage, of sex, of family, of procreation," and declaring that "[w]hatever their source, it is clear that they are fundamental rights protected by both the federal and state Constitutions");[24] Boynton v. Kusper, 494 N.E.2d 135, 140 (Ill. 1986) ("[f]reedom to marry has been recognized as a fundamental right").[25]

The broad fundamental right to marry has also been recognized in cases challenging the exclusion of same-sex couples from marriage.[26] In addition, many state constitutional decisions describe marriage as a vital and fundamental social institution, even where the court does not find it necessary to decide directly whether there is a fundamental right to marriage under the state constitution. See e.g., Goodridge, 440 Mass. at 327, 326 ("The right to marry means little if it does not in-

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acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

[24] N.J. Const. Art. 1, ¶ 1 of the provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

[25] Ill. Const. Art. 1, § 2, provides "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

[26] See Baehr, 875 P.2d at 56 (finding fundamental right to marry but declining to find right for same-sex couples); Coordination Proceedings, The Marriage Case, No. 4365, 2005 WL 583129, at *10 (Cal. Sup. Mar. 14, 2005) (App. 32) (case brought under California Constitution declaring that "marriage is a fundamental constitutional right"); Hernandez v. Robles, 794 N.Y.S.2d 579, 593 (N.Y. Sup. Ct. 2005) ("Under both the federal and New York State Constitutions, it is beyond question that the right to liberty, and the concomitant right to privacy, extend to marriage"); Castle, 2004 WL 1985215, at *12 (App. 48) (finding that "[t]here seems little, if any, disagreement that the right to marry is a fundamental right … the question is not whether marriage is a fundamental right – it is."); Andersen, 2004 WL 1738447 (App. 58) ("all agree that precedent firmly establishes the broad right to marry as a fundamental right"); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 IC, 1998 WL 88743, at *5 (Alaska Super. 1998) (App. 87) (in case under Alaska Constitution, finding that "[t]here is no dispute that the right to marry is recognized as fundamental").

clude the right to marry the person of one's choice"; "[b]ecause civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion."); Baker, 744 A.2d at 883 ("The Supreme Court's observations in Loving merely acknowledged what many states, including Vermont, had long recognized. One hundred thirty-seven years before Loving, this Court characterized the reciprocal rights and responsibilities flowing from the marriage laws as the 'natural rights of human nature.'").[27]

5. The Historical Context Supports The Existence of Marriage As A Fundamental Right Under The Connecticut Constitution.

An examination of the sources regarding the role of marriage in Connecticut's history demonstrates that the framers of the Constitution of 1818 would have regarded marriage to be a fundamental right. See Moore, 233 Conn. at 601 (requiring examination of historical sources to discern "the framers' understanding of whether the particular right was so fundamental to an ordered society that it did not require explicit enumeration"); Webb, 238 Conn. at n. 20 (unenumerated rights must be derived from historical record).

[27] Several courts have ruled that the denial of marriage to gay and lesbian couples violates their state constitutions. See Goodridge, supra; Baker, supra; Baehr, supra; Coordination Proceedings (appeal pending), supra; Hernandez v. Robles (appeal pending), supra; Castle (appeal pending), supra; Andersen (appeal pending), supra; Brause, supra. Where states have denied such constitutional claims, they have, among other things, improperly construed the right to marry too narrowly in view of the federal precedent described in § II(A)(3)(ii), supra. See Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005) (appeal to Supreme Court withdrawn); Standhardt v. Superior Court of the State of Arizona, 77 P.3d 451 (2003); Dean v. District of Columbia, 653 A.2d 307 (1995); Jones v. Hallahan, 501 S.W.2d 588 (1973); Singer v. Hara, 522 P.2d 1187 (1974); Baker v. Nelson, 191 N.W.2d 185 (1971); Kane v. Marsolais, No. 3473-04, (N.Y. Sup. Ct. January 31, 2005) (App. 65) (appeal pending); Lewis v. Harris, 875 A.2d 259 (N.J. Super. 2005) (appeal pending); Seymour v. Holcomb, 790 N.Y.S.2d 858 (N.Y. Sup. Ct. 2005) (appeal pending); Samuels v. The New York State Department of Health, No. 9379119 (N.Y. Sup. Ct. Sept. 21, 2004) (App. 75) (appeal pending); Shields v. Madigan, 783 N.Y.S.2d 270 (N.Y. Sup. Ct. 2004) (appeal pending); Smelt v. County of Orange, No. SA CV 04-1042-GLT (U.S. District Court Central District of California Southern Division, June 16, 2005) (App. 89).

From the time of Connecticut's colonial beginnings through the time of the adoption of the Constitution in 1818, to the present, the marital relation has endured as a privileged status of central importance to human relationships and a framework for social and economic ordering. Indeed, in 1818, the marital relation was viewed as crucial to such diverse matters as the existence of the family, human happiness, property transfer, inheritance, economic subsistence and the legal roles of men and women. Marriage was so essential to society and human relations that it is difficult to imagine that the framers could have even envisioned society without it.

The critical factor for this Geisler analysis is the broad consensus that marriage was one of the most vital social institutions, so essential to society and human relationships that its absence would have been inconceivable to the framers. It is of no consequence to the Geisler analysis, however, that the framers would not have contemplated marriage by two people of the same sex. Marriage has changed and evolved significantly throughout the history of Connecticut and the nation in ways the framers could not be expected to anticipate. Features once deemed essential to the definition of marriage as it existed between the seventeenth century and 1818, e.g., the system of coverture, have been abolished.[28] The grounds for ending the marital relationship, once strictly limited to neglect of a fundamental duty of marriage, have been significantly liberalized, culminating in the establishment of no-fault divorce. See C.G.S.A. § 46b-40. The Connecticut constitution, of course,

[28] Coverture, for example, which endured for centuries but is unthinkable today, enshrined in law gender-specific roles in marriage and mandated the absorption of a woman's economic and legal rights in those of her husband. See Mathewson v. Mathewson, 79 Conn. 23, 63 A. 285, 289 (1906) (discussing history of coverture laws and noting that the Married Women's Property Act of 1877, Pub. Acts 1877, p. 211, c. 114, removed "[t]he foundation of the legal status [of coverture], namely, the unity in the husband of his own and his wife's legal identity and capacity to own property… and a new foundation, namely equality of husband and wife in legal identity and capacity to own property" was established.). The last vestiges of gender inequality in marriage were not eradicated until mandated by the passage of the Equal Rights Amendment in 1974. In 1977, for example, spousal support obligations, which at one time flowed only from husband to wife, were made mutual. See 1977 Conn. Pub. Acts 288, codified at C.G.S.A. § 46b-37.

is an "instrument of progress," and must be interpreted in the context of "'the demands of modern society'" in order that it have "contemporary effectiveness for all our citizens." Dukes, 209 Conn. at 115, quoting Seattle Sch. Dist. v. State, 90 Wash. 2d 476, 516. The key factor for a Geisler analysis is the centrality of marriage to society rather than its precise structure in 1818.

It is an understatement that marriage has always been one of the most esteemed and valued relations. During Connecticut's colonial beginnings in the seventeenth century, the Puritans believed, as one authoritative historian of colonial America noted, that the marital relationship was the "highest relationship between mortals," a "covenant" between the parties, and "an ordinance of God and its duties commands of God." Edmund S. Morgan, The Puritan Family 162, 30, 39 (Harper & Row 1966).[29] The exalted status of marriage is evidenced by the Puritan belief that marriage was a "theological metaphor for God's and man's relationship." Mary Moers Wenig, The Marital Property Law of Connecticut: Past, Present, and Future, 1990 Wis. L. Rev. 807, 847.

In Puritan society, the family -- and not the individual -- made up the "foundation of social order." Morgan, supra, at 150. The Puritans conceived of both family and the larger societal structure in terms of dual relationships between ruler and subject, parent and child, and, most importantly, husband and wife. Id. at 25-26, 150. A central component of the marital relation was mutual companionship and love. Id. at 47.

As the central relationship of the family, marriage was an integral part of the social order. The Puritans believed that a loving and stable marriage contributed to the "ideal of domestic har-

[29] The marriage ceremony in colonial Connecticut was performed by a civil magistrate and was separated from ecclesiastical ceremonies. Morgan, supra, at 31. The religious metaphors in the Puritans' view of marriage nevertheless reflected the close relationship between civil society and religion during that period. These religious metaphors, known as "godly speech," were part of the societal norm in seventeenth century Connecticut and thus reflected the high worth that the Puritans placed on marriage. Jane Kamensky, Governing the Tongue: The Politics of Speech in Early New England 45 (1997).

mony" and thus was important to social stability. Steven Mintz and Susan Kellogg, The Godly Family of Colonial Massachusetts in The Way We Lived: Essays and Documents in American Social History 1607-1877 (Volume 1: 3d ed.) 31 (1996). Marriage, however, was not only essential to the conception of human intimacy and relationships, but also played an indispensable role in social and economic ordering. Id. at 30-31. The common law doctrine of coverture was central to the marriage relationship. Through coverture, the husband and wife became economically intertwined and the wife's legal identity became completely absorbed into that of her husband. Henrick Hartog, Man and Wife in America: A History 115-116 (2000). A woman thus gave up independent legal status and the right to possess property, and in return, the husband was legally obligated to support the wife. See Dibble v. Hutton, 1 Day 221, 1804 WL 634 (1804). The gendered division of labor and support within the colonial household created an interdependent relationship between husband and wife, but one in which the power unequivocally rested with the husband. Cornelia Hughes Dayton, Women before the Bar: Gender, Law, and Society in Connecticut 1639-1789 77 (1995).

As an integral component of the social order, marriage was very much encouraged by societal pressures and statutory provisions. Mintz & Kellogg, supra, at 27, 30, 33. Unmarried adults were placed under the guardianship of respectable citizens to prevent them "from harming themselves or society." Gloria L. Main, Peoples of a Spacious Land 71 (2001). As a result, single adults of any age living alone were unusual and it was very rare for a man or woman to never marry. Steven Mintz and Susan Kellogg, The Godly Family of Colonial Massachusetts at 33. To encourage marriage and the preservation of a moral society, a single man was forbidden by law to live alone and was subject to a monetary penalty if he did so. Morgan, supra, at 145. As a result, at least ninety-five percent of colonial women married. Dayton, supra, at 19.

Although the theological metaphors characteristic of the Puritans became less common with time and other cultural changes, the belief in the marital relation as unparalleled in worth and critical

to human intimacy and relationships endured into the late eighteenth and early nineteenth centuries. Zephaniah Swift wrote in his authoritative treatise on Connecticut law in 1795:

> The connexion between husband and wife, constitutes the most important, and endearing relation, that subsists between individuals of the human race. This union, when founded on a mutual attachment, and the ardor of youthful passions, is productive of the purest joys and tenderest transports, that gladden the heart.
>
> This connexion between the sexes, has been maintained in all ages, and in all countries; tho the rights and duties of it have been various, as well as the modes and ceremonies, by which it is contracted.

1 Zephaniah Swift, A System of the Law of the State of Connecticut, 183 (1795). It is clear that Swift saw marriage as a central and enduring social institution which was so universal that it existed at all times and in all countries. "[I]n interpreting our state constitution, the statements of [Swift] are entitled to significant weight." Moore, 233 Conn. at 603.

In addition, the writings of Tapping Reeve also support the critical role of marriage. In his treatise, The Law of Baron and Femme, published in 1816, Judge Reeve describes marriage as "a contract, the most important that can be entered into," and describes the separation of husband and wife as "the great evil to be avoided." Tapping Reeve, The Law of Baron and Femme (1816) 325, 334. See Moore, 233 Conn. at 602 (giving weight to the writing of "jurists in temporal proximity to the adoption of the 1818 constitution").

Statutes relating to marriage at and just before the time of the 1818 Constitutional Convention also demonstrate the centrality of the marital relationship. The importance of the marital union is emphasized by the fact that adultery was not merely grounds for divorce, but also a crime against the state.[30] Moreover, since the social order was dependent on the existence of stable and enduring

[30] See Acts and Laws of the State of Connecticut, 1784, page 8 (adultery a crime) and page 41 (adultery as grounds for divorce. See also Connecticut Statutes of 1808, Title VII (adultery a crime) and Title XLIX (adultery a ground for divorce).

marriages, divorce was limited and based only on the neglect of a fundamental duty of marriage. Cornelia Hughes Dayton, Women before the Bar: Gender, Law, and Society in Connecticut 1639-1789 116.[31]

6. Sociological and Economic Considerations Favor Recognizing Marriage As A Fundamental Right.

The unparalleled importance of the right to marry is confirmed by its correlative social and cultural status. Being "married" has profound meaning for oneself and for others. Marriage is, of course, the foundation for hundreds of critical legal rights and obligations that provide stability, order, and protection to couples and their children. These rights exist not only under state law,[32] but also married couples ordinarily receive extensive federal protections as well.[33]

Beyond marriage's edifice of legal rights, courts for centuries have remarked upon its social attributes. Marriage is the only legal status that is universally recognized and understood as the loving and committed union of two persons. It has been characterized as a "unique human relationship," see Billington v.Billington, 220 Conn. 212, 221 (1991) (internal quotation omitted), and "one of the

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[31] See also Acts and Laws of the State of Connecticut, 1784 at page 41 (no divorce except for adultery, fraudulent contract, or willful desertion) and Connecticut Statutes of 1808, Title XLIX (same).

[32] See Susan Price Livingston, Connecticut Laws Involving Marital Status, OLR Research Report 2001-R-0606 (detailing 588 Connecticut States in which marital status is a factor). See also Gurliacci v. Mayer, 218 Conn. 531, 564 (1991) (no loss of consortium claim for unmarried person because "the formal marriage relation forms the necessary … strength of commitment between two individuals which gives rise to the existence of consortium between them" (internal quotation omitted)).

[33] U.S. Gen. Accounting Office, Pub. No. GAO/OGC-97-16, Defense Of Marriage Act 1-3 (1997), at http://www.gao.gov/archive/1997/og97016.pdf; and U.S. Gen. Accounting Office, Pub. No. GAO/04-353R, Defense Of Marriage Act: Update to Prior Report 1 (2004), at http://www.gao.gov/new.items/d04353r.pdf. (1138 federal benefits, such as joint income tax filing, 26 U.S.C. § 6013 or the right to social security benefits as a surviving spouse, 42 U.S.C. § 402 (b-f)).

most fundamental of human relationships," Davis v. Davis, 119 Conn. 194, 175 A. 574, 577 (1934). It transforms a private bond into a public act. See Allen v. Allen, 73 Conn. 54 (1900) ("after a marriage is entered into, the relation becomes a status … . It is the relation fixed by law, in which the married parties stand to each other, towards all other persons, and to the state"). See also Griswold, 381 U.S. at 486 (discussed supra, and describing marriage as a "way of life," a "bilateral loyalty," "intimate to the degree of being sacred").

Marriage is also a social institution that acknowledges the existence of families and protects them because others respect the institution of marriage. It is "the relationship that is the foundation of family in our society," Zablocki, 434 U.S. at 386, and "a main pillar upon which society is founded." Guilford v. Oxford, 9 Conn. 321, 1832 WL 92 at *4 (Conn. 1832). See also Alden v. Alden, 21 Conn. Supp. 301, 307 (1959) (marriage "is the basis of the family and the home and is therefore an institution upon which rests our whole way of life.").

The U.S. Supreme Court has described the values that define and give significance to family in general, and marriage in particular, which "have played a critical role in the culture and traditions of the Nation." Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 (1984).

> [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty...
>
> Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life.

Id. at 619-20 (citations omitted). Marriage is "at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity and family … . Because it fulfills yearnings for security, safe haven, and connection that express

our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." Goodridge, 440 Mass. at 322 .

The right to marry is fundamental under the Connecticut constitution. As such, unequal access to this right triggers strict scrutiny.

B. In Denying Marriage To Couples Of The Same Gender, Defendants Have Applied A Sex-Based Classification To The Marriage Statutes That Is Constitutionally Impermissible Under Article First, § 20.

It is beyond question that the state's exclusion of same-sex couples from marriage is gender-based. Application of the Geisler factors demonstrates that the marriage ban violates the express prohibitions on sex classifications in the Connecticut constitution.

1. The Plain Meaning Of The Text Of Article First, § 20 Compels The Conclusion That Barring Same-Sex Couples From Marriage Is An Impermissible Sex Classification.

The Connecticut constitution states: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability." Conn. Const. Article First, § 20 (emphasis added). As the Supreme Court explained, through this constitutional provision, "[t]he people of this state and their legislators have unambiguously indicated an intent to abolish sex discrimination … The history of [the equal rights amendment] evidences a firm commitment not only to end discrimination against women, but also to do away with sex discrimination altogether." Evening Sentinel v. Nat'l Org. for Women, 168 Conn. 26, 34 (1975).

The Supreme Court has instructed that "effect must be given to every part and each word in the constitution … [u]nless there is some clear reason for not doing so." State v. Lamme, 216 Conn. 172 (1990) (citing Stolberg v. Davidson, 454 U.S. 958 (1981)). Applying the clear language of § 20,

the defendants have denied each plaintiff the ability to marry his or her chosen spouse because of sex. Janet Peck was denied a license to marry Carol Conklin because Janet is a woman. But a man can marry Carol, and if Janet were a man, she could marry Carol. The difference between the ineligible Janet and any eligible man is their sex. Similarly, if Garrett Stack were a woman, John Anderson could undoubtedly marry him. He cannot do so because of his own sex. It is undisputed as a factual matter that the individual's choice of marital partner is constrained because of his or her sex.

The debates of the 1965 Constitutional Convention discussing § 20 demonstrate the strongest intention of the framers to eliminate "discrimination" and "segregation" based on the classes in § 20. The debates indicate that some at the convention thought that the word "segregation" was unnecessary or might be construed to limit rights. 2 Convention at 691-692 (App. 7-9). To resolve that concern, Mrs. Woodhouse stated:

> It would seem that this language as offered in the amendment is sufficiently general so that it would not be interpreted as an exclusion or limit rights. I think we all realize that rights of individuals in this country have developed and changed from time to time and we certainly would not want to have in our Constitution any language that would in the future perhaps limit new rights…It would be regrettable if it should be in any way suggested that this Constitution did not unequivocally oppose the philosophy and the practice of segregation.

Id. at 691 (App. 8). Mr. Kennedy similarly described § 20 as "a broad statement of principle that is all inclusive and would provide a complete umbrella for the total protection against discrimination and the word subjugation against segregation." Id. at 692 (App. 9). In Sheff, the Supreme Court held that the term "segregation" in Article First, § 20 "has independent constitutional significance" and affirmed that de jure segregation and discrimination based on classes protected in § 20 is prohibited. See 238 Conn. at 1, 27-28.[34]

[34] The issue in Sheff was whether the de facto segregation of Hartford's public schools was constitutional. Justice Borden's dissent, joined by Justices Palmer and Callahan, disagreed that unintentional de facto discrimination was within the meaning of § 20's prohibition on segregation because of race. But there is no doubt that both the majority and the dissent agree that § 20 clearly prohibits de jure

The debates of the framers during the 1972 debate on the Equal Rights Amendment, which added "sex" to the classes protected under § 20, also supports the conclusion that barring same-sex couples from marriage is impermissible "discrimination" and "segregation" that is "because of sex" based on the plain language of § 20. Although one of the purposes of the ERA was to improve the legal standing of women, it is clear that the legislature understood that the ERA would make both sexes equal in the law. Senator Lieberman stated that "[t]he resolution before us represents an opportunity to affirm the concept of equal treatment of both sexes before the law." 15 S. Proc., Pt. 4, at 1527 (1972 Sess.) (App. 14). Eliminating inequalities for women is not possible unless the sexes are equal.

The legislature also recognized that the ERA would affect marriage. Representative Neidetz, the sponsor of the resolution in the House, stated: "Equal rights amendment may also have an effect on those state laws affecting domestic relations. In this area, as elsewhere, the amendment will prohibit discrimination based upon sex. This will mean the state domestic relations laws will have to face individual circumstances and needs, not on sexual stereotypes." 15 H.R. Proc., Pt. 2, at 874 (1972 Sess.) (App. 20). Representative Neidetz's comments make clear that the equal rights amendment made marriage a union of legal equals. As such, the sex of the parties should not play a role in determining the rights and responsibilities of marriage under state law because doing so would necessarily require depending on gender stereotypes that the ERA was intended to remove from the law.

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discrimination or segregation, such as that in the newly enacted civil union law. See Pub. Act 05-10, §§ 2 and 14 (creating the new status of civil unions for couples of the same sex, but limiting marriage exclusively to a man and woman) (App. 1-3).

2. Sister State and Federal Precedent Supports The Conclusion That The Exclusion Of The Plaintiffs From Marriage Is Because Of Sex.

Courts in sister states have also found that the exclusion of same-sex couples from marriage is impermissible sex discrimination. For example, in Goodridge, Justice Greaney, concurring, explained that "our marriage statutes … create a statutory classification based on the sex of the two people who wish to marry … an individual's choice of marital partner is constrained because of his or her own sex." 440 Mass. at 345. Similarly in Baker, Justice Johnson (concurring in part and dissenting in part) concluded that "[a] woman is denied the right to marry another woman because her would-be partner is a woman … Similarly, a man is denied the right to marry another man because his would-be partner is a man … Thus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex." 170 Vt. At 254. See also Baehr, 842 P.2d at 60-61 (finding application of marriage laws regulate on the basis of sex). The Alaska Supreme Court explained the sex discrimination inherent in the marriage ban by stating that "if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious." Brause, 1998 WL 88753, at *6 (App. 88). See also Coordination Proceedings, 2005 WL 583129 at *9 (App. 31) ("It is the gender of the intended spouse that is the sole determining factor").

Moreover, federal and sister state precedent in other marriage discrimination contexts clarifies that any contention that men and women are equally disadvantaged by the marriage laws (since neither can marry someone of the same sex), does not vitiate the sex-based nature of the classification. In Perez, the California Supreme Court dismissed the suggestion that anti-miscegenation laws were not discriminatory because they imposed the same restrictions on Caucasians and people of color. The Court noted:

> A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains.

Perez v. Lippold, 198 P.2d at 25. The United States Supreme Court also rejected such an argument in Loving when the Commonwealth of Virginia argued all blacks and whites were treated equally because none were allowed to marry the other. But since race was the determining factor for eligibility to marry, the Court held that the miscegenation law violated the equal protection clause. Loving, 388 U.S. at 11-12. Just as Perez and Loving contained a race-based classification, so, too, does the present marriage system contain a sex-based classification.[35]

3. The Holdings Of The Supreme Court Make Clear That Sex-Based Classifications Trigger Heightened Scrutiny.

Because the marriage laws as interpreted by the defendants foreclose the plaintiff couples from legally marrying their chosen life partners based on sex-based classifications, those laws must be subjected to heightened scrutiny in accord with Article First, §20. The Supreme Court has declared that a constitutional provision to outlaw discrimination, such as those protected classes in Article First, § 20, must pass a strict scrutiny test. Daly v. DelPonte, 225 Conn. 499, 514 (1993). In that case, the Supreme Court addressed the constitutional prohibition on disability discrimination in § 20, parallel to that amendment's prohibition on sex discrimination. The Court reasoned that the "explicit prohibition of discrimination because of physical disability defines a constitutionally protected class of persons whose rights are protected by requiring encroachments on these rights to pass a strict scrutiny test." Id. The Court explained that "[t]his conclusion follows from the language of

[35] Other cases have also rejected the "equal discrimination defense." See, e.g., McLaughlin v. Florida, 379 U.S. 184, 191, 194 (1964) (rejecting equal application defense and striking statute prohibiting an unmarried different-race couple from cohabiting where a same-race couple was not so penalized).

the clause itself: 'No person shall be denied the equal protection of the law … because of … .'" Id. Sex is similarly a constitutionally protected class under § 20 and thus sex-based classifications as well must be subject to strict scrutiny. See Frazier v. Manson, 176 Conn. 638, 646 (1979) (stating that "'[f]undamental rights' are those rights which are established by the constitution," and noting that sex based classifications "have been identified as inherently suspect"). In short, the sex-based classifications in the marriage laws that prevent individuals from marrying based on the sex of their chosen partner are subject to strict scrutiny under the Connecticut constitution and must be found to be unconstitutional.

C. The Sexual Orientation-Based Distinctions In The Marriage Laws Violate Plaintiffs' Rights To Equal Protection Of The Law.

Similar to the sex discrimination built into the marriage statutes, the marriage laws also discriminate on the basis of sexual orientation. Because two people of the same gender cannot marry, the state excludes all lesbian and gay people as a class from marrying the person of their choice. Moreover, the new civil union law explicitly defines marriage as "between one man and one woman." PA 05-10, § 14 (App. 3). The legislature's purpose to exclude intentionally all lesbian and gay couples from marriage could not have been plainer. See also Lawrence, 539 U.S. at 581 (O'Connor, J., concurring) (adverse treatment of those with same-sex partners is discrimination based on sexual orientation)

1. The Broad Principles Of Liberty And Equality In The Text Of §§ 1 And 20, And The Debate Of The Framers of § 20, Support the Inclusion Of Sexual Orientation As A Suspect Class.

Discrimination based on sexual orientation is invidious and should be subject to strict scrutiny. As an initial matter, the characteristics set out in Article First, § 20 are among those that courts consider suspect, but that list is not necessarily exhaustive. See Moore, 233 Conn. at 597 (noting that the enumerated classes in § 20 are "not dispositive" on rights of other classes). There is nothing in

the language of § 20 that precludes additional classes of people from demonstrating a history of purposeful discrimination against them such that statutory classifications that fence out that group should be treated as suspect. Indeed, the framers of § 20 intended that it be "the very strongest human rights principle" and an "opportunity to give proper expression to the right of man." See Argument § II, supra. Further, the Supreme Court has consistently held that the equality and liberty protections in § 1 are "broad." Argument II(A)(1), supra.

2. Federal Precedent, Sister State Precedent, And Sociological And Economic Considerations Support The Inclusion Of Sexual Orientation As A Suspect Class.

One way that Connecticut courts may determine whether a classification is suspect under the state constitution is to look to federal precedent and employ the mode of analysis frequently used by courts in interpreting the Fourteenth Amendment. See Geisler, 222 Conn. at 685 (listing federal precedent as one of the "tools of analysis" to be considered to the extent applicable).

Utilizing the federal test for the determination of a suspect class, some of the factors deemed to have relevance in determining whether a classification warrants heightened scrutiny include: (1) whether the group at issue has been subjected to a "history of purposeful unequal treatment"; (2) whether the disadvantaged class is defined by a trait that "frequently bears no relation to ability to perform or contribute to society"; and (3) whether the group historically has been "relegated to such a position of political powerlessness." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); Frontiero v. Richardson, 411 U.S. 677, 686 (1973).[36] See also Tanner v. Oregon Health Sciences Univ., 157 Or. App. 502, 523 (1998) (defining suspect classes as "distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping and prejudice"). Nota-

[36] A trait need not be "immutable in order for classifications which disadvantage that group to receive heightened scrutiny." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 n. 10 (1985); see also Tanner v. Oregon Health Sciences Univ., 157 Or. App. 502, 522, 523 (1998).

bly, the Connecticut Supreme Court has utilized these same factors in assessing whether there is "traditional indicia of suspectness" under the equal protection clauses of both the state and federal constitutions. See Leech v. Veterans' Bonus Division Appeals Board, 179 Conn. 311, 314 (1979).

Discrimination based on sexual orientation meets the criteria for heightened scrutiny. First, lesbians and gay men have been and continue to be subjects of discrimination. See generally, Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) (noting "pernicious and sustained hostility" and such "immediate and severe opprobrium" associated with gay people); George Chauncey, Why Marriage: The History Shaping Today's Debate, (2004) at 5-58 (condensed history of anti-gay discrimination in United States from 1930s to present); Evan Wolfson, Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different, 14 Harv.J. L. & Pub. Pol'y, 21, 30-33 (1991). It is fair to infer the existence of discrimination from legislative enactments intended to combat discrimination. See, e.g., C.G.S.A. §§ 46a-81a to 81r (prohibiting sexual orientation discrimination in employment, housing, and public accommodations); C.G.S.A. §§ 53a-181i to181l (prohibiting sexual orientation based hate crimes).[37] As the Supreme Court noted, "the Gay Rights Law was enacted in order to protect people from pervasive and invidious discrimination on the basis of sexual orientation." Gay & Lesbian Law Students Ass'n v. Board of Trustees, 236 Conn. 453, 481-82 (1996).[38] Anti-gay violence and hate crimes per-

[37] The fact that Congress had enacted a number of laws condemning sex discrimination was regarded by the Supreme Court as evidence that Congress had already concluded that classifications based on sex were invidious. See Frontiero v. Richardson, 411 U.S. 677, 687 (1973).

[38] One Senator speaking in favor of the Gay Rights Law stated that the bill "addresses discrimination on the basis of status, not specific acts, because such discrimination is widespread, even systematic in our society … Countless gays … fear discrimination in their jobs, in their housing … I know of overt acts of discrimination, whether it's slurs, ugly slurs painted on the sides of houses or on the cars of homosexuals, whether it was the testimony of individuals before the Judiciary Committee earlier this year, whether it was the letters and the write-ins from countless individuals who are gay and who have faced discrimination in their lives …" Gay Law Students Ass'n, 236 Conn. at 481 (quoting remarks of Senator George Jepsen).

sist.[39] Young gay and lesbian people are particularly at risk for severe social isolation, verbal harassment and physical violence, and suicide.[40] Gay and lesbian people continue to be the subject of significant social stigma because of their sexual orientation.[41] And the deliberate exclusion of same-sex couples from marriage, see PA 05-10, § 14 (App. 3), makes clear that lesbian and gay citizens still lack equal access to some of society's most important institutions. Although Connecticut can be proud of the progress it has made in improving the climate for its gay and lesbian citizens, it was perhaps an understatement for Representative Lawlor to remark during the civil union debate in the House of Representatives that "[t]here is, at least to some extent, a climate of hostility towards gays and lesbians in our state."[42]

Moreover, discrimination with roots elsewhere also affects Connecticut citizens. The United

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[39] See Partners Against Hate compilation of data from FBI Hate Crime Statistics: 2000 and FBI Hate Crime Statistics: 2003
(available at: http://www.partnersagainsthate.org//about_hate_crimes/fbi_story_03.html). (In Connecticut, the percentage of total hate crimes constituting antigay hate crimes has doubled from 8.6% in 2000 to 16.4% in 2003).

[40] See Maurice R. Dyson, Safe Rules or Gays' Schools? The Dilemma of Sexual Orientation Segregation in Public Schools, 7 U. Pa. J. Const. L. 183, 188 (2004) (reporting that 80% of lesbian and gay youth report feelings of severe isolation, 45% of gay males and 20% of lesbians report having experienced verbal harassment and/or physical violence as a result of their sexual orientation during high school; and 30% of gay and bisexual adolescent males attempt suicide at least once).

[41] United States Department of Health and Human Services, The Surgeon General's Call to Action to Promote Sexual Health and Responsible Behavior (July 2001) (available at http://www.surgeongeneral.gov/library/sexualhealth/call.htm at p. 7) ("our culture often stigmatizes homosexual behavior, identity and relationships"); Eric K.M. Yatar, Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence, 12 Law & Sexuality 119 (2003), at 141 ("There is still a great amount of social and cultural stigma associated with homosexuality that persists in modern American society, in spite of its increased acceptability as an alternative lifestyle.").

[42] Connecticut House of Representatives Debate on Civil Union Bill (hereinafter, "House Debate"), App. 310.

States military excludes openly gay people from serving in the armed forces. 10 U.S.C. § 654. The federal government has enacted a law intended to ensure that same-sex couples do not enjoy any of the federal benefits and protections of marriage. 1 U.S.C. § 7 (definition of marriage). Despite repeated attempts to amend Title VII, there is no protection against sexual orientation discrimination in federal discrimination laws. See 42 U.S.C. § 2000e. And it is still legal to be fired from a job, denied housing, or denied access to a public accommodation because of sexual orientation in most of this country.[43]

As for the second criterion for suspectness, lesbians and gay men have the ability to perform in society unrelated to their sexual orientation. The lack of a relationship between the trait and ability is likely to reflect "prejudice and antipathy." Cleburne, 473 U.S. at 440. It is well established that sexual orientation – like gender, religion, race and national origin – bears no relation to the ability to perform or contribute to society. The American Psychiatric Association removed homosexuality from its list of mental illnesses in 1973.[44] As the plaintiff couples in this case demonstrate, gay men and lesbian women form committed, long-term and often lifetime relationships. And like many of the plaintiffs, many gay and lesbian couples raise children together successfully.[45]

Third, lesbian and gay people have historically been relegated to a position of relative politi-

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[43] See State Nondiscrimination Laws in the U.S., available at http://www.thetaskforce.org/downloads/nondiscriminationmap.pdf (only 16 states have sexual orientation nondiscrimination laws).

[44] American Psychiatric Association, Position Statement on Homosexuality and Civil Rights, 131 Am. J. Psychiatry 497 (1973) (available at: http://www.apa.org/pi/reslgbc.html) (concluding that "homosexuality *per se* implies no impairment in judgment, stability, or general social or vocational capabilities"); see also Resolution of the Council of Rep's of the Amer. Psychological Ass'n, 30 Am. Psychologist 633 (1975).

[45] Indeed, Connecticut has affirmed that gay and lesbian people can be good parents, by its passage of a statute removing barriers to two people of the same sex adopting children together. C.G.S.A. § 45a-727(a)(3).

cal powerlessness within the majoritarian, legislative political sphere.[46] It should be obvious that the kinds of unequal treatment described above would have ongoing consequences and relegate gay people to a position of relative political powerlessness. While gay men and lesbians have become more visible in Connecticut, many still feel the need to hide their sexual orientation to avoid the widespread discrimination and violence it engenders. Other indicators of lack of political power of gay people include: the passage of the federal anti-marriage law (mentioned above); the continued discriminatory regime imposed on gay and lesbian persons in the United States military, despite evidence that lesbian and gay people serve as well as or better than their heterosexual counterparts; and continuing political initiatives intended to limit or eviscerate the rights of gay people.[47] Under the Geisler factors, sexual orientation should be considered a suspect classification that requires strict scrutiny from this Court under the Connecticut constitution.[48]

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[46] This criterion cannot be taken too literally. Women, and in some places, African-Americans have made significant progress, but still wield significantly less political power in society as a whole.

[47] See, e.g., Paul Carrier Gay-rights Foes Turn in Petitions to Force Vote, Portland Press Herald, June 29, 2005 (In Maine, opponents of a recently passed antidiscrimination law submitted petitions to the state with enough signatures to place a repeal of the law in a Nov. 8 referendum).

[48] Other courts have concluded that classifications based on sexual orientation are suspect and deserving of strict scrutiny. See Tanner, 157 Or. App. at 524 (1998) (state university violated the privileges and immunities clause of the Oregon Constitution by failing to extend insurance benefits to same-sex domestic partners); Castle v. Washington (App. at 36); Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988) (regulations barring gays and lesbians from military discriminate against a suspect class without promoting a compelling government interest, thus violating equal protection), vacated, 875 F.2d 699 (1989) (en banc) (specifically declining to address the constitutional issues), cert. denied, 498 U.S. 957 (1990). The California Supreme Court has also held that invidious discrimination against gays and lesbians violates the Equal Protection guarantee of the California Constitution. Gay Law Students Assoc. v. Pac. Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592 (1979). Although later reversed by appellate courts, several other courts have also concluded that sexual orientation discrimination is subject to heightened scrutiny. See Equal. Found. of Greater Cincinnati v. City of Cincinnati, 860 F. Supp. 417, 434-40 (S.D. Ohio 1994); Ben-Shalom v. Marsh, 703 F. Supp. 1372, 1378-80 (E.D. Wis. 1989); High Tech Gays v. Def. Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1368-70 (N.D. Cal. 1987). The courts that reversed these decisions, as well as other appellate courts that ruled similarly, did so on the basis that classifications based on sexual orientation are actually tied to "homosexual conduct," which could be constitutionally criminalized un-

D. Excluding Same-Sex Couples From Marriage Fails Strict Scrutiny.

It is axiomatic that under strict scrutiny, the state must show that its action is "necessary to the achievement of a compelling state interest." Ramos, 254 Conn. at 829. It is difficult to identify any legitimate interest, let alone compelling interest that justifies the continued exclusion of same-sex couples from marriage, especially in light of the civil unions law. PA 05-10 (App. 1). Procreation cannot be a compelling interest because, aside from the civil unions law, married couples have a fundamental right not to procreate. Griswold, 381 U.S. at 485-486. Accordingly, there is no procreation requirement for marriages to be valid, and indeed, many different-sex couples do not or cannot procreate. Further, excluding same-sex couples is not necessary to further procreation because same-sex couples do procreate through the use of alternative insemination or surrogacy. To the extent that childrearing is a compelling interest, the co-parent adoption law, C.G.S.A. § 45a-727(a)(3), places same-sex couples on the same legal footing as different-sex couples. It is difficult to see how excluding these couples from marriage furthers childrearing. See also, Argument § II(E)(1)(iii). Put simply, there is no compelling state interest that justifies the continued exclusion of same-sex couples from marriage.

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der Bowers v. Hardwick, 478 U.S. 186 (1986). See Equal. Found. of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261, 267 (1995) ("Those persons who fall within the orbit of legislation concerning sexual orientation are so affected not because of their orientation but rather by their conduct which identifies them as homosexual, bisexual, or heterosexual.") (emphasis in original), cert. denied & judgment vacated in light of Romer v. Evans, 518 U.S. 1001 (1996); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573-74 (9th Cir.), reh'g denied, 909 F.2d 375 (9th Cir. 1990). See also Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990). In light of the Supreme Court's having overturned Bowers in Lawrence, 539 U.S. at 578, however, the reasoning in these cases has been completely undermined. Significantly, Connecticut repealed its sodomy laws in 1969, further rendering these federal cases irrelevant to a determination of the scope of the Connecticut constitution. See 1969 Conn. Pub. Acts, §§ 77-81.

E. There Is No Constitutionally Adequate Justification Under The Equal Protection Clause of the Connecticut Constitution For The State's Exclusion Of Same-sex Couples From Marriage, Whether Using A Strict Scrutiny or Rational Basis Level of Review.

Because the exclusion of gays and lesbians from marriage denies a class of citizens equal access to a fundamental right and burdens suspect classifications, see Argument § II(A-C), supra, it is subject to strict scrutiny.[49] Any justification the state may posit for barring same-sex couples from marrying, however, fails even the rational basis test under both equal protection provisions in Article First, §§ 1 and 20 of the Connecticut Constitution. Perforce, for those same reasons, the state cannot demonstrate that any reason for excluding same-sex couples from marriage meets the strict scrutiny test that it be "necessary to the achievement of a compelling state interest." Donahue, 259 Conn. at 794.[50]

1. Rational Basis Review Is Not A Rubber Stamp Of Legislative Action.

The rational basis test requires a two-step inquiry by the Court. First, the Court must determine whether the state's proffered reason for the classification constitutes a legitimate state purpose. See, e.g., Fair Cadillac, 229 Conn. at 319 ("we must ascertain the legislative purpose" as first step in rational basis analysis under state constitution). Second, if the proffered purpose is a legitimate one,

[49] As an initial matter, for purposes of equal protection, it is beyond question that the plaintiff couples meet the requirement that the "statute in question, either *on its face* or in practice, treats persons standing in the same relation to it differently." Ramos, 254 Conn. at 826 (internal citation omitted) (emphasis in original). Plaintiffs meet all the eligibility critera for marriage other than that they wish to marry someone of the same sex. See Amended Verified Complaint, ¶¶ 105-106. In addition, any claim that the plaintiff couples are not similarly situated to different-sex couples is belied by the civil union law which grants all the same marital rights and protections to same-sex couples as are granted to different-sex couples, but excludes same-sex couples from marriage itself.

[50] The state has not yet indicated which governmental interests, if any, are furthered by the exclusion of same-sex couples from marriage. The plaintiffs reserve their right to respond fully, after the state or amici have done so, as to why those articulated interests cannot meet either strict scrutiny or rational basis review.

the court must then "determine whether the classification and disparate treatment inherent in a statute bear a rational relationship to a legitimate state end and are based on reasons related to the accomplishment of that goal." Donahue, 259 Conn. at 795. The state's denial of marriage to same-sex couples neither furthers a legitimate state purpose nor is rationally related to any legitimate state purpose.

Rational basis review is not toothless and does not require judicial capitulation to proffered state interests. As the Supreme Court explained, "there is a limit to the hypothesizing that we will undertake in order to sustain the constitutionality of a statute … even the standard of rationality must find some footing in the realities of the subject addressed by the legislature." City Recycling, Inc. v. State, 257 Conn. 429, 452-453 (2001) (striking statute on rational basis grounds).[51] The reasons for the state's classification may not "disregard[] reality." State v. Reed, 192 Conn. 520, 532 (1984).

Decisions of the Supreme Court demonstrate that even under rational basis review, the Court does not simply defer to the legislature, but will carefully examine whether there is a logical nexus between the state purpose and the means used to achieve it. In two cases where the Court struck down Sunday closing laws under rational basis review, the Court engaged in a detailed analysis of the logical connection between the state's purpose and the statutory scheme at issue. In Caldor's, Inc. v. Bedding Barn, Inc., 177 Conn. 304, 320-322 (1979), the Court traced the legislative history of an increasing number of exemptions to the Sunday closing laws and ruled that the statutory scheme no longer treated "all dealers in any particular item of merchandise" alike. Id. at 332. Rather, the legislation made a distinction "among stores in which products are sold, not among the products dealt in." Id. For example, under the Sunday closing laws, various food items may be sold by small

[51] See also Fair Cadillac, 229 Conn. at 319 (declining to "speculate concerning other conceivable purposes for the statute").

retail food stores, retail drug stores, prepared food service organizations, and dairies, but not by supermarkets. Id. Similarly, artists' supplies and tobacco products may be sold by drugstores and restaurants and those who operate tourist attractions, but not by Pier 1 imports that operates a home furnishings store. Id. And emergency repair parts for cars and boats, and emergency plumbing and electrical parts and equipment, may be provided by those in the repair, maintenance and service business, but not by a hardware store. Id. As a result, the Court struck down the law because of "the apparent absence of a rational connection between the items whose availability the legislature deemed appropriate to a day of rest and recreation, and the business establishments permitted to offer them for sale." Id. at 324.

In Fair Cadillac, the Court analyzed the latest iteration of the Sunday closing laws that were limited to automobile dealerships. 229 Conn. at 319. The Court ruled that a common day of rest is a legitimate state interest, but that the sale of motor vehicles on Sunday does not bear a reasonable relationship to that purpose. The Court reasoned that it cannot "discern any legitimate reason for providing a common day of rest for one narrow class of employees..." Id. at 324. The state asserted, for example, that it is rational to have a Sunday closing law aimed at automobile dealerships because motor vehicle dealers are comprehensively regulated under Connecticut statutes and the Department of Motor Vehicles (DMV) is closed on Sunday. Id. at n.11. The Court did not simply defer to this rationale. To the contrary, it found the rationale illogical because Saturday is the busiest day of the week for motor vehicle dealers, and is also a day when the DMV is open only in the morning. Id. Similarly, the state also argued that the closing laws are rational because the automobile sales industry is a "highly competitive business." Id. at n. 12. The Court, however, found that this rationale was undercut by another statute that prohibited employees in any commercial occupation from working more than six days per week. Id. at n. 13.

Similarly, in State v. Reed, 192 Conn. 520 (1984), the Court struck down a statute requiring a

person charged with a criminal offense who had been found not guilty by reason of insanity to pay for post-conviction confinement in a state institution in the same manner as patients civilly committed by the courts of probate. The defendant claimed that other persons similarly deprived of their liberty, such as prison inmates, are not required to pay for such care. Id. at 521. The Court did not simply defer to the legislature's determination that insanity acquitees should be required to pay for their care. Instead, the Court engaged in a careful examination of the statutes to determine whether the distinctions among various classes of persons who were required to pay for confinement and those who were not were consistent and logical. See id. at 527-528 (noting, for example, that the need for a hearing for insanity acquitees to be released made them more like prison inmates who were not required to pay for confinement, whereas persons civilly committed and required to pay for confinement could be released at any time without further legal proceedings).

Finally, in Page v. Welfare Commissioner, 170 Conn. 258 (1976), the Court considered a statute that required adult children with parents who received welfare benefits to contribute to their parents' support. Id. at 260. The Court struck, on rational basis grounds, a regulation that provided more exemptions under such payments for married men with minor children and working spouses than for married women with minor children and working spouses. Id. at 262-263. Even where "the notion that men are more likely than women to be the primary supporters of their spouses is not entirely without empirical support," the Court ruled that "'such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.'" Id. at 268 (internal citation omitted). Rather, any difference in the amount of an exemption must be based on the families' actual experience. Id. at 269-270. See also Kellems v. Brown, 163 Conn. 478, 494 (1972) (striking on rational basis grounds tax exemption that existed for widows but not widowers where "no valid reason whatsoever for the…discrimination…is disclosed in the body of the act"). These cases demonstrate that even under

rational basis review, the statute will be ruled unconstitutional where it does not further a legitimate state purpose at all, or, among other reasons, where the state's reasons for the classification are illogical, inconsistent, or contrary to other provisions in state law.

2. The State's Exclusion of Same-Sex Couples From Marriage Does Not Further A Legitimate State Purpose, Nor Is It Rationally Related To Any Legitimate State Interest.

The starting point for any analysis of the state's reasons for denying marriage to same-sex couples must be the civil union law, Public Act No. 05-10 (App. 1). By this law, the state has mandated that every legal, tangible right, benefit and responsibility of marriage, but not marriage itself, be provided to same-sex couples.[52] The civil union law is the strongest possible legislative declaration that same-sex couples and their children need and are worthy of the very same rights and protections as married different-sex couples have. The law, however, inexplicably creates "civil union" as a new and separate category in which to place same-sex couples who otherwise meet all of the eligibility criteria for marriage.[53] As the California Superior Court explained in striking down that state's law excluding same-sex couples from marriage, "California's enactment of rights for same-sex couples belies any argument that the state would have a legitimate interest in denying marriage in order to preclude same-sex couples from acquiring some marital right that might somehow be inappropriate for them to have."[54] Coordination Proceedings (App. 27). Indeed, it is beyond cavil that the state

[52] See Public Act No. 05-10, § 14 (App. 3): "Parties to a civil union shall have all the same benefits , protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in marriage, which is defined as the union of one man and one woman." (Emphasis added.)

[53] See Public Act No 05-10, § 2 (App. 1): "A person is eligible to enter into a civil union if such person is: (1) Not a party to another civil union or marriage; (2) of the same sex as the other party to the civil union; (3) Except as provided in Section 10 of this act, at least eighteen years of age; and (4) Not prohibited from entering into a civil union pursuant to section 3 of this act.

[54] Id. (App. 27) (noting that California has granted to same-sex couples "virtually all the rights that marriage entails").

cannot posit as a justification for limiting marriage to different-sex couples any reason related to the ways that the legal rights of marriage protect couples, families, children, and society as a whole.

While the civil union law confers upon same-sex couples every state-based legal right of marriage, the legislative debates reveal two purposes for nonetheless excluding same-sex couples from marriage itself. First, the debate reveals that the legislature created a separate category for same-sex couples solely for the purpose of separation and exclusion. For example, Representative Powers stated during the House debate:

> [I]f you will, picture railroad tracks. One track is marriage. The second track is civil unions. And we are literally tracking the same language with just two different terms.

House Debate (App. 348). Similarly, Senator McKinney declared:

> Civil unions will provide an important legal framework, but more importantly, recognition of same-sex relationships between two people of the same sex, people who deserve the same legal rights and responsibilities that my wife and I have … . At the same time, I think there are a great many people I represent who would rather we call that something other than marriage.

Debate of Connecticut Senate on Civil Union Bill, April 6, 2005 (hereinafter "Senate Debate") (App. 268).[55] The placement one category of citizens (here, same-sex couples) into a separate status -- solely for the sake of separation and exclusion of that group -- cannot constitute a constitutionally

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[55] See also Statement of Representative Lawlor ("And as I said at the outset, the Bill simply embraced the existing rules and regulations governing marriages and then transposed them and made them applicable to civil unions.") (House Debate, App. 407); Statement of Representative Farr ("And so we're trying to find a common ground, and that common ground is to create a separate entity, which is civil union, to give gays the rights under the civil union that married couples have, but to create a separate entity to do that.") (House Debate, App. 369); Statement of Representative Mantilla ("It is a second-class citizenship. I'm willing to accept it today in order to protect the number of families that really deserve to be protected by the civil union bill.") (House Debate, App. 389); Senator Harris ("This bill sets up a two-tiered system. Civil unions increases rights under state law for same sex couples, but there's going to be another level of rights that opposite sex couples have as has been described. It does smack a little bit of a separate but equal system. And it does so, in my mind, without really a rational basis. I can't really understand.") (Senate Debate, App. 257).

permissible state purpose. See Argument § II(E)(1)(i), infra.

Second, the civil union debate indicates that the legislature excluded same-sex couples from marriage solely because of the belief in preserving a historical and traditional definition of marriage as between one man and one woman. Representative Cafero explained:

> I believed in my heart and in my soul that a marriage is a union between one man and one woman. But I also believe that same-sex couples in a long-term, committed relationship deserve rights. Call it civil union then.

House Debate (App. 333-334). Similarly, Senator Nickerson stated:

> I came to this debate believing that the heart of this bill is rooted in two principles. One, that marriage is, and has been for thousands of years, understood as between one man and one woman… . And our Judeo-Christian code long before the United States was founded and long before the State of Connecticut existed, adopted that. And our statutes reflect not simply a momentary view of how human life should be conducted, but embody thousands of years of that understanding that a marriage is between a man and a woman. Secondly, it is absolutely the case that people of the same sex have suffered horribly and certainly we have taken steps up to today, not sufficiently adequate, to address that.[56]

Senate Debate (App. 247). The exclusion of same-sex couples from marriage solely to preserve tradition or history is not a legitimate state purpose. See Argument § II(E)(1)(ii), infra.

i. The Creation Of A Separate Legal Status For Same-Sex Couples Is Not A Constitutionally Permissible State Purpose.

The creation of a separate status for same-sex couples -- simply for purposes of exclusion and separation -- cannot be a legitimate state purpose. As the Massachusetts Supreme Judicial Court observed in rejecting a civil union alternative under that state's constitution, "[t]he history of our nation has demonstrated that separate is seldom, if ever, equal." See Opinions of the Justices to the

[56] In spite of Senator Nickerson's invocation of the Judeo-Christian code, marriage has been a purely civil matter from the inception of Connecticut's colonial beginnings. See 1 Zephaniah Swift, *A System of the Law of the State of Connecticut* 185 (1995).

Senate, 440 Mass. 1201, 1206 (2004).[57] For these reasons, the exclusion of same-sex couples from marriage cannot satisfy the "legitimate state purpose" prong of the rational basis test, let alone the "compelling state interest" test under strict scrutiny.

Indeed, the core issue raised by the separate status for same-sex couples embodied in the civil union law is the same as courts faced in Plessy v. Ferguson, 163 U.S. 537 (1896), and Brown v. Board of Education, 347 U.S. 483 (1954): can the Constitution tolerate segregation mandated by law for it's own sake? Plessy affirmed a statute that segregated train passengers by race. 1890 La. Acts 111. In his famous dissent, Justice Harlan first articulated the principles of equality that are now commonly accepted in American constitutional jurisprudence. Justice Harlan insisted that the Constitution prohibits distinctions "implying inferiority in civil society" because "there is in this country no superior, dominant or ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." Plessy, 163 U.S. at 556, 559. Justice Harlan explained that this is true even of laws that confer equal rights and benefits.[58] As Justice Harlan explained, "The thin disguise of 'equal' accommodations … will not mislead anyone, nor atone for the wrong this day done." Id. at 562.

Subsequently, in Brown v. Board of Education, the Supreme Court rejected the idea that "equality of treatment is accorded when races are provided substantially equal facilities." Id. at 488. The Court reasoned that segregation "generates a feeling of inferiority as to [blacks'] status in the

[57] See also Goodridge, 440 Mass. at 312 (In case striking down marriage ban, stating, "[t]he Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens").

[58] The civil union law does not, in fact, confer equal rights and benefits on same-sex civil union couples and different-sex married couples. See Argument § V, infra.

community that may affect their hearts and minds in a way unlikely ever to be undone." Id. at 494.[59]

Since Brown, the tenet that equality is fundamental and essential for its own sake has been a consistent and bedrock principle of American constitutional jurisprudence. As the U.S. Supreme Court explained in Heckler v. Matthews, 465 U.S. 728, 739 (1984):

> The right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against … "[D]iscrimination itself … stigmatiz[es] members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community."

Similarly, in United States v. Virginia, 518 U.S. 515 (1996), the Supreme Court overturned the exclusion of women from Virginia Military Institute. The Court held that the exclusion of women denied them "full citizenship stature." Id. at 532. The Court ruled that a separate facility could not provide equality. Significantly, the Court noted that a separate institution for women could not provide the "standing in the community, traditions and prestige" that would be provided by full inclusion. See also Watson v. Memphis, 373 U.S. 526, 538 (1963) (adequacy of separate recreational facilities for African Americans is "beside the point; it is the segregation by race that is unconstitutional"); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) (statutory objective to exclude members of one gender presumed to be "innately inferior" is prohibited).

These same principles condemn the segregation effectuated by denial of marriage in the civil union law. The legislature's view that same-sex relationships must be placed in a separate category reflects nothing more than the biases and negative attitudes that the U.S. Supreme Court has repeatedly admonished must have no place in our constitutional system. Courts have increasingly recognized that gay people must have the rights available to others, and the harm that flows from dis-

[59] Although not a constitutional case, it is worth noting that the Supreme Court referenced Brown's proclamation that "there can be no such thing as separate but equal" in Evening Sentinel, 168 Conn. at 29. In that case, the Court ruled that sex-segregated help-wanted advertising constitutes a per se violation of the Connecticut Fair Employment Practices Law.

criminatory laws. In Lawrence, the U.S. Supreme Court explained that laws criminalizing private, consensual intimacy between two adults of the same sex impose a "stigma" on those individuals. 539 U.S. at 575. The laws "demean[] the lives of homosexual persons" and deny them "dignity." Id. The Court noted as well that these laws are an "invitation to subject homosexual persons to discrimination both in the public and in the private spheres." Id.

Relatedly, in Romer v. Evans, 517 U.S. 620, 635 (1996), the U.S. Supreme Court struck down a law aimed at precluding gay and lesbian citizens from seeking state discrimination protections. The Court noted that such a "classification of persons undertaken for its own sake" violates equal protection even when under a rational basis review. " 'Class legislation…[is] obnoxious to the prohibition of the Fourteenth Amendment.'" Id. at 650 (quoting Civil Rights Cases, 109 U.S. 3, 24 (1883)). See also Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("[t]he 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"); Cleburne, 473 U.S. at 448 (noting "negative attitudes" and "fears" about the mentally retarded and stating that the government "may not avoid the strictures of [the equal protection clause] by deferring to the wishes or objections of some fraction of the body politic").

Courts considering constitutional challenges to the exclusion of same-sex couples from marriage have also recognized that a separate status for same-sex couples, even if such status in fact provided all of the tangible benefits of marriage, offends constitutional equality guarantees. Such a system brands same-sex couples as second-class citizens and proclaims an official governmental message that their relationships are inferior to the relationships of different-sex couples. The Massachusetts Supreme Judicial Court explained in Opinions of the Justices that:

> The bill's absolute prohibition of the use of the word 'marriage' by 'spouses' who are of the same sex is more than semantic. The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that

> reflects a demonstrable assigning of same-sex … couples to second-class status … . The bill would have the effect of fostering a stigma of exclusion that the Constitution prohibits.

440 Mass. at 1207. "[N]o amount of tinkering with language," according to the Court, "will eradicate the stain upon those targeted by the exclusion from marriage." Id. at 1208. See also Barbeau v. Attorney General of Canada, 2003 B.C.C.A. 251, ¶ 156 (2003) (App. 176) ("[a]ny other form of recognition of same-sex relationships, including the parallel institution of [registered domestic partnerships], falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples 'almost equal', or to leave it to governments to choose amongst less-than-equal solutions."); Halpern v. Toronto, 172 O.A.C. 276, ¶¶ 102-107 (2003) (App. 204) (separate status for same-sex relationships insufficient; right to equality requires access to "fundamental societal institutions").

The two-tiered "marriage/civil union" format reinforces the notion that some Connecticut residents are second-class citizens. Where the state has granted every state-based right of marriage to same-sex couples, such a system of exclusion for the sake of exclusion, separation for the sake of separation, cannot be a legitimate governmental purpose. It thus can be neither a rational basis for the exclusion from marriage nor can it hardly be a compelling state interest required under strict scrutiny. As the California Superior Court concluded analyzing a similar domestic partnership law, the "State's position that California has granted marriage-like rights to same-sex couples points to the conclusion that there is no rational state interest in denying them the rites of marriage as well." See Coordination Proceedings (App. 27).

ii. An Interest In Maintaining "Tradition" Is By Itself Not A Constitutionally Permissible State Purpose.

The mere fact of a past history of exclusion of same-sex couples from marriage cannot justify the continuation of that exclusion. Nor can any belief that marriage is between one man and one woman -- simply because that is the way it is and has always been -- be a constitutionally adequate

basis for exclusion. Simply put, tradition for the sake of tradition fails to justify discrimination when constitutional values are at stake.

Courts ruling that anti-miscegenation laws were unconstitutional and a denial of the fundamental right to marry would never have done so had they deferred to notions of tradition and past history. To the contrary, the Court in Perez acknowledged that these laws were based on long-standing views that mixed-race marriages were "unnatural," but nonetheless ruled that "the fact alone that the discrimination has been sanctioned by the state for many years does not supply such justification." Perez, 198 P.2d at 27. See also id. at 32 (Carter, J., concurring) ("Even if I concede, which I do not, that the statutes here involved were at any time reasonable, they are no longer reasonable."). Nor did the U.S. Supreme Court in Loving give weight to the fact that 16 states outlawed interracial marriage at the time that the Court struck down bans on marriage by people of different races as violative of equal protection. See Loving, 388 U.S. at n. 5.

As the Massachusetts Supreme Court noted in Goodridge, "it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." 440 Mass. at n. 23. Indeed, "marriage is no more limited by the historical exclusion of same-sex marriage than it was limited by the exclusion of interracial marriage, [or] the legal doctrine of coverture." See Hernandez v. Robles, 794 N.Y.S.2d 579, 597 (N.Y. Sup. Ct. 2005). As such, as the California Superior Court noted, "[a] statute lacking reasonable connection to a legitimate state interest cannot acquire a connection simply by surviving unchallenged over time." Coordination Proceedings (App. 26).

In Lawrence, the U.S. Supreme Court declared that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." 539 US. at 577. Indeed, the Court recognized that adherence to

past tradition for its own sake undercuts the process of constitutionalism itself. The Court noted that the framers of the Constitution knew that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." Lawrence, 539 U.S. at 579. Indeed, with the Connecticut constitution as well, strict adherence to past tradition as a state interest in and of itself would thwart the Supreme Court's mandate that the constitution be an "instrument of progress," not a "static document," and as such "interpret[ed] … in accordance with the demands of modern society." Dukes, 209 Conn. at 115.

iii. The Exclusion of Same-Sex Couples From Marriage Cannot Be Rationally Related To The State's Interest In Procreation Or Parenting.

The defendants or amici supporting their position may argue that barring same-sex couples from marriage is necessary because of the state's interest in furthering procreation or parenting by different-sex married couples. To the extent that procreation and the protection of children are legitimate state interests, the ban on marriage to gay and lesbian individuals does not further those interests in any rational way.

At the outset, the civil union law undercuts any claim that the limiting marriage to different-sex couples furthers the state's interest in procreation or child-rearing, as the same tangible legal rights and obligations -- including with respect to obligations to children -- apply to both civil unions and marriages. The state can thus hardly be said to have used its police powers to prefer different-sex couples over same-sex couples with respect to procreation and child-rearing.

Irrespective of the civil union law, however, the ability to marry is not tied to the ability or intent to procreate. Many individuals in different-sex couples are not capable of procreation, including post-menopausal women and persons who are otherwise infertile. Those individuals, as well as persons who simply choose not to procreate, are permitted to marry. As the Court in Goodridge

stated:

> Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. There is no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus… . People who cannot stir from their deathbed may marry.

440 Mass. at 331-332. Moreover, preventing lesbians and gay men from marrying does not further procreation by different-sex couples. See, e.g., Halpern v. Attorney General of Canada, 172 O.A.C. 276, ¶ 121 (App. 206) ("Heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry.").

Moreover, many same-sex couples bring biological children into the world in the same way as do different-sex couples through access to donor insemination or reproductive technology. Indeed, many of the plaintiff families are raising children conceived during their relationship.

Nor is there any nexus between excluding same-sex couples from marriage and the welfare of children. Many same-sex couples, such as six of the plaintiff couples in this case, are raising children. The state does not advance the welfare of children by making "the task of child rearing for same-sex couples … infinitely harder by their status as outliers to the marriage laws." Goodridge 440 Mass. at 335. As the Goodridge court further explained, "[e]xcluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated and socialized." Id. (internal quotation omitted).

Finally, even before the civil union law, Connecticut recognized that same-sex couples are raising children and that those children deserve protection. See C.G.S.A. § 45a-727(a)(3). There is no basis to deny gay and lesbian individuals the right to marry based on any concern for the welfare of children.

III. THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE VIOLATES THE DUE PROCESS PROTECTIONS OF ARTICLE FIRST, §§ 8 AND 10.

The plaintiffs' right to marriage is also protected under the due process provisions of the Connecticut constitution, Article First, §§ 8 and 10. Article First, § 10 provides:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

Conn. Const., Article First, § 10. In addition, Article First, § 8 provides in relevant part: "No person shall … be deprived of life, liberty or property without due process of law … ." Conn. Const., Article First, § 8; cf. U.S. Const. Amend XIV, § 1 (providing, inter alia, "nor shall any State deprive any person of life, liberty, or property, without due process of law …").

Just as the Supreme Court has held that there are unenumerated rights under Article First, § 1, it has similarly clarified that there are unenumerated protected rights under Article First, § 10. In Ramos, 254 Conn. at 835, the Court explained:

> [T]he following quote describing the guarantees inherent in the due process clause of our federal constitution is also descriptive of the liberties contained in the due process clause in article first, § 10 of our state constitution. "It is axiomatic that the due process clause not only guarantees fair procedures in any governmental deprivation of life, liberty, or property, but also encompasses a substantive sphere…barring certain government actions regardless of the fairness of the procedures used to implement them…This basic protection embodies the democratic principle that the good sense of mankind has at last settled down to this: that [due process was] intended to secure to the individual from the arbitrary exercise of the powers of the government, unrestrained by the established principles of private right and distributive justice.

See also id. at n. 31 ("Our substantive due process case law under the state constitution, however, clearly establishes that certain fundamental rights are protected."). [60]

[60] In Ramos, the Court stated that the existence of a right recognized at common law is the starting point, but is not dispositive of whether a right is protected under § 10. 254 Conn. at 838-39. Regardless, the Court need not dwell long on that point because there is no question that marriage existed at common law long before the time of the 1818 Constitutional Convention. It is beyond question that the statutory provision for marriage, codifying the common law, was carried over in all revisions of the Connecticut statutes up to 1818. See, e.g., Acts and Laws of the State of Connecticut, 1784, page

The right to marry the person of one's choosing is fundamental and protected as a substantive right under §§ 8 and 10 based on the Geisler analysis set forth in Argument § II(A), supra. Moreover, in Ramos, the Court stated that its "case law construing the due process clause of the federal constitution provides a useful 'framework for state constitutional analysis and in interpreting state constitutional provisions.'" Ramos, 254 Conn. at 834-35 (quoting Fair Cadillac, 229 Conn. at 317). The Supreme Court has acknowledged that the right to marry is a "fundamental right[] implicitly guaranteed by" the federal constitution, see Zapata v. Burns, 207 Conn. 496, 506 (1988), thus underscoring the existence of the right to marry under the substantive sphere of the due process clause of the Connecticut constitution.

Because marriage is a protected right under §§ 8 and 10, it may not be abridged absent a narrowly tailored compelling interest. The state's exclusion of same-sex couples from marriage satisfies neither rational basis review nor strict scrutiny under the due process provisions of the Connecticut Constitution for the very same reasons that the exclusion fails under the equal protection provisions. The Supreme Court has stated that the rational basis test under the Connecticut Constitution is essentially the same under equal protection and due process. See Ramos, 254 Conn. at 841 ("Equal protection rational basis review is for all material purposes … indistinguishable from the analysis in which we would engage pursuant to a due process claim."). As such, for the same reasons that state's denial of marriage to gays and lesbians violates the equal protection provisions of the Connecticut Constitution, that denial also violates Article First, §§ 8 and 10 of the Connecticut Constitution.

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135 (an act for the regulating and orderly celebration of marriage); Connecticut Statutes of 1808 Title CV (same).

IV. THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE VIOLATES THEIR RIGHTS OF EXPRESSION AND ASSOCIATION UNDER ARTICLE FIRST, §§ 4, 5, 14

Withholding marriage from the Plaintiffs also infringes their rights of expression and association, protected by Article First, §§ 4, 5, and 14.[61] Jeffrey Busch and Steven Davis want to marry, for example, because marriage "affirms the couple's relationship in their own eyes, is a public expression to others of the couple's values about commitment, and places the status of the relationship in a privileged and honored place in our culture." Affidavit of Stephen Davis, ¶ 4. It is exactly this form of expression -- unique to marriage and uniquely understood by others as a statement of love and commitment -- that is denied to the Plaintiffs. Although the Supreme Court has not addressed whether denying marriage infringes constitutional rights of expression and association, an application of the relevant Geisler factors makes clear that Defendants have violated Plaintiffs' rights under Art. First, §§ 4, 5 and 14.[62]

Federal courts have long recognized the expressive nature of marriage and that this aspect of marriage warrants constitutional protection as an intimate association. See, e.g., Turner v. Safley, 482 U.S. at 95-96 ("[M]arriages … are expressions of emotional support and public commitment. … [T]he commitment of marriage [is] an expression of personal dedication."); See Roberts v. United

[61] Article First, § 4 states: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Article First, § 5 states: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press." Article First, § 14 states: The citizens have a right, in a peaceable manner, to assemble for their common good…"

[62] Reviewing the texts of these provisions does not aid in this analysis, as the provisions protect speech per se. Connecticut courts have held, however, that "[c]onduct can be expressive and communicate an idea. Speech and conduct may coalesce in one act." State v. Linares, 32 Conn. App. 656, 663 (1993), certification granted, 232 Conn. 345 (1995).

States Jaycees, 468 U.S. 609, 619 (1984) ("the creation and sustenance of a family – marriage" is one those personal affiliations deserving of constitutional protection).

Further, the expression inherent in marriage is analogous to the range of expressive conduct Connecticut courts have already found to be protected. See, e.g., Leydon v. Town of Greenwich, 257 Conn. 318, 350 (2001) (wearing shirts with messages, distributing literature, participating in vigil, soliciting signatures); State v. Linares, 32 Conn. App. 656, 663, (1993) (unfurling banner), certification granted, 232 Conn. 345 (1995). State precedents have also made clear that free speech protections include the right to join in intimate associations.[63] Leydon, 257 Conn. at 350 (constitution protects associating with others); Davenport v. Society of the Cincinnati in the State of Conn., 46 Conn. Supp. 411, 430 (1999) ("Impediments to the exercise of one's right to choose one's associates can violate the right of association[.]" (internal quotations omitted)); Rafferty v. Hartford Courant Co., 36 Conn. Supp. 239, 249 (1980) ("right to associate with whom one will" clearly established).[64]

The exclusion of the Plaintiffs from marriage necessarily denies them access to a unique form of expression and association. It is the same-sex inclusive content of the Plaintiffs' proposed speech and association that the Defendants find objectionable. Yet these constitutional provisions prohibit Defendants from specifically targeting Plaintiffs' expressive conduct and association "because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid."

[63] Despite a lack of doctrinal clarity regarding the source of this protection, the right of intimate association is found in free speech protections. See Marrero v. Mega Communications, CV000803888, 2003 WL 21771788 (Conn. Super. 2003) (recognizing roots of association rights in both expression and liberty provisions); see also Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987) (same).

[64] Although sister states have not directly addressed whether the exclusion of same-sex couples from marriage violates expression and association protections, they have highlighted the expressive elements of marriage. See, e.g., Goodridge, 440 Mass. at 322 ("Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.").

State v. Ball, 226 Conn. 265, 273 (1993) (internal quotations omitted); see also Linares, 232 Conn. at 366 (expression protections "forbid[] the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." (internal quotations omitted)). Denying Plaintiffs marriage simply because of the abstract idea that two women or two men joined together conveys to a disapproving portion of the population cannot be justified. See Spence v. Washington, 418 U.S. 405, 412 (1974); Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

V. THE PASSAGE OF THE CIVIL UNION LAW DOES NOT REMEDY THE HARM THAT PLAINTIFFS EXPERIENCE FROM THE DENIAL OF MARRIAGE.

Even if the creation of a separate but partially equal status for same-sex couples were constitutionally permissible, which it is not (see Argument § II(E)(2)(i), supra) civil unions are not, in fact, equal to marriage. Civil unions do not come close to matching the powerful social and cultural benefits of marriage. Legislators acknowledge there is a powerful difference between the two. As Senator Capiello acknowledged during the civil union debate, "I do believe that marriage is between one man and one woman, and I do think there are differences. Maybe they're social. Maybe they're psychological, but I do think there are differences between marriage and civil unions, even if they are just cultural and social differences, in what the word marriage entails." Senate Debate (App. 243). Nor do civil unions provide the same tangible legal and economic benefits of marriage. Civil unions are not an adequate substitute for marriage and do not remedy the enormous harm that the plaintiff couples experience by the denial of marriage.

A. The Denial of Marriage Causes Enormous Harm To Plaintiffs And Denies Them Protections That Cannot Be Obtained Through A Civil Union.

The denial of marriage to gays and lesbians deprives them of the "enormous private and social advantages" of marriage. See Goodridge, 440 Mass. at 322. Marriage is part of our common

cultural vocabulary. It is understood everywhere as conveying that two people are in a committed and loving relationship that is accorded great respect. Geraldine and Suzanne Artis, for example, want to marry because marriage would "communicate really simply that we are in a committed relationship for life."[65] Civil unions, in contrast, as a new and unrecognized status created solely for gay and lesbian citizens, do not have anywhere near the cultural respect and recognition that marriage has.[66] Indeed, the term marriage is important as well when couples are traveling outside Connecticut

[65] See Affidavit of Suzanne Artis, ¶ 3. See also Affidavit of Janet Peck, ¶¶ 8, 15 (recounting that when she was married to a man earlier in her life, she "felt the security and respect from others that marriage brings"; and noting that in her professional work as a marriage counselor, she is struck by "how people of all ages and backgrounds talk about marriage as the ultimate in family and commitment" and "believe it is marriage that cements and makes visible that love and commitment to themselves and others"); Affidvit of John Anderson, ¶ 3 (explaining that his family does not understand that his relationship with Garrett Stack is equivalent to a marriage); Affidavit of Garrett Stack, ¶¶ 3-4 ("the word 'marriage' would help people understand immediately who and what we are to one another in ways that they previously have not. Marriage is a word that needs no explanation … If John and I were able to marry, we would fit within the way our society defines relationships."); Affidavit of J.E. Martin, ¶ 3 (describing how marriage gave other members of her family "a familial and social status that everyone understood from the day they got their marriage licenses and had a wedding ceremony"); Affidavit of Gloria Searson, ¶ 4 (explaining that as an African-American woman who with her partner Damaris Navarro is raising four children, she is "acutely aware of the negative stereotypes in society of African-American children being raised by parents who are not married" and that "because of the prejudices of others…being married would give [her] family more of a solid, respected feeling.").

[66] Affidavit of Geraldine Artis, ¶ 5 (civil unions "demand explanations" and "do not carry with them the immediate understanding that comes with marriage"); Affidavit of Stephen Davis, ¶ 3 (being denied marriage means that he and his partner of 16 years Jeffrey Busch "constantly have to explain to others who we are to each other, using different language to describe [their] relationship, [their] commitment, and [their] family"); Affidavit of Jeffrey Busch, ¶ 7 (describing that his partner is not invited to certain family weddings because he is not seen as "immediate family"); Affidavit of Barbara Levine-Ritterman, ¶ 9 (noting that their children understand the status of the term marriage and stating that she and her partner Robin want their children "to know that their parents' commitment is part of the popular vocabulary, that they are married and not 'CU'd,' an unrecognizable concept.").

and may find themselves in a hospital emergency room where the term "civil union" may not be understood.[67]

Marriage also ties people into the larger fabric of their families and the community. Because of its unique and long-standing cultural status, marriage is, as Janet Peck describes, "the glue that connects and cements entire families together, generation after generation."[68] The denial of marriage and the creation of civil unions separates people from the fabric of their families and the community in general. As Janet Peck explains, "[b]ecause we cannot marry, Carol and I live outside that bonding."[69]

Importantly, the denial of marriage, and the creation of a separate and inferior status, sends a potent message that the relationships of gay and lesbian couples are not as worthy as heterosexuals' relationships and brands them as second-class citizens. Jeffrey Busch explains that civil unions are "humiliating" and a "judgment that our commitment is not as worthy, our love is not as deep, and

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[67] See Affidavit of Barbara Levine-Ritterman, ¶ 10 (explaining that she "struggles to remain a cancer survivor" and asserting her belief that marriage is more likely to be respected by others than a "newly created legal status" if a medical crisis occurs while she and her family are out-of-town); Affidavit of Janet Peck, ¶ 4 (describing how Carol was denied access to her in the intensive care unit after she had surgery for life-threatening liver tumors because the nurse did not understand what the term "partner" meant).

[68] Peck Aff., ¶ 1. See Peck Aff., ¶¶ 5-12 (and Statement of Undisputed Facts, ¶¶ 9-10) for her detailed description of how marriage would connect her in deeply meaningful ways to the generations of her family. See also Mock Aff., ¶¶ 3-5 (explaining that rituals were an important part of her upbringing and marriage is a key "rite of passage" that "mark[s] your spiritual growth, but also your social status in the community.").; Kerrigan Aff., ¶ 9 ("[b]eing able to marry would represent a true connectedness to the people around me.").

[69] See Peck Aff., ¶ 11; Mock Aff., ¶ 5 (being denied marriage and relegated to civil unions makes her feel "different and separate from the rest of [her] friends, family and peers").

our relationship is simply less than the relationships of opposite-sex couples", making him feel like "an outsider and a second-class citizen, in the eyes of the government and society generally." Busch Aff., ¶ 5.[70]

The impact of this governmentally-sanctioned discrimination is particularly harmful for children of same-sex couples. J.E. Martin and Denise Howard want their children to know that their family is "equal in society's eyes and a civil union simply does not have the same meaning as marriage." Martin Aff., ¶ 8. Jody Mock and Beth Kerrigan do not want their children to mistakenly think of their relationship as "wrong because it is illegal for us to marry." Mock Aff., ¶ 9. And Jeffrey Busch and Stephen Davis do not want to have to explain to their young son Eli that what his parents have is "like a marriage" or "almost a marriage." Busch Aff., ¶ 6. They do not want Eli to feel that his family is not as good as his friends' family, or that under Connecticut law their family is less "valid" because his parents are not permitted to marry. Busch Aff., ¶ 6.

B. Civil Unions Do Not Afford The Same Tangible Benefits As Marriage.

Civil unions do not provide the same tangible legal benefits as marriage in two critical respects. First, many Connecticut residents will relocate for work or school, to care for family or

[70] See also Kerrigan Aff., ¶ 8 (civil unions make her feel that the government "view[s] [her] relationship as lesser than heterosexuals"); Peck Aff., ¶ 17 (civil unions convey that "[a]fter almost 30 years of love and commitment … I am not worthy of giving Carol what I and all of society honors as the ultimate sharing of love and commitment"); Conklin Aff., ¶ 10 (civil unions engender "the hurt and pain of being different," and "tell[] us that our love and commitment are second rate"); Searson Aff., ¶ 7 (only marriage will make her feel that she is "an equal citizen"); Affidavit of Robin Levine-Ritterman, ¶ 8 (civil union says "that our family is inferior to others on no basis other than that we have made a life with each other, with another woman rather than with a man); Anderson Aff., ¶ 7 ("Without marriage we are marked as less-than, of less value, not full citizens"); Affidavit of Geraldine Artis, ¶ 4 ("[h]aving to use this cold, unrecognizable language is demeaning and diminishes the meaning of making a lifelong commitment to the one you love").

friends, or simply to take a vacation. Civil unions provide significantly less protection than marriage when couples move or travel out of state.[71]

There are sound arguments why others should respect civil unions from Connecticut or elsewhere, and a few states have for limited purposes.[72] But many appellate courts in, including the Connecticut Appellate Court, have declined to equate the two for purposes of administering particular laws. See Rosengarten v. Downes, 71 Conn. App. 372, 802 A.2d 170 (no jurisdiction to dissolve civil union), cert. granted, 806 A.2d 1066 (2002), appeal dismissed (Dec. 21, 2002). Burns v. Burns, 560 S.E.2d 47 (Ga. App. 2002), cert denied, (Ga. July 15, 2002) (civil union not a basis for modifying restriction on parental visitation). As a general matter, it has been difficult to dissolve a civil union outside of Vermont. See, e.g., Fred A. Bernstein, Gay Unions Were Only Half the Battle, New York Times (April 6, 2003) at section 9, p. 2.

In contrast to civil unions, all fifty states have marriage laws that are substantially similar throughout the United States. Moreover, common law principles establish that a marriage valid where celebrated will be recognized everywhere, unless there is a strong public policy against the marriage. See Restatement (Second) of Conflict of Laws § 283(2). While many states have laws that refuse to recognize marriages between same-sex couples, there can be little doubt that a marriage license would provide Connecticut couples with the strongest arguments for recognition of their relationships in another state. By limiting same-sex couples to civil union status, the state leaves same-sex couples with greater barriers to the recognition of their legal relationship in other states.

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[71] See Remarks of Senator Andrew MacDonald (noting that "[t]he full range of legal and social and economic opportunities [of marriage]…are not fulfilled by this bill," and that civil unions "stop at the borders of the state of Connecticut" and don't "allow couples to open the door to apply for hundreds, and indeed thousands, of rights and opportunities that are afforded by federal law.") Senate Debate (App. 230).

[72] See, e.g., Langan v. St. Vincent's Hosp. of N.Y., 765 N.Y.S.2d 411 (2003), appeal docketed (allowing man joined in civil union standing to sue for wrongful death of partner).

Second, without marriage same-sex couples are forever precluded from access to critical federal laws that protect couples. These laws include the ability to share in a spouse's social security, the ability to be designated as the beneficiary of a spouse's pension plan, and the ability to take time off from work for the illness of a spouse. While the federal Defense of Marriage Act defines marriage for federal purposes as being "only a legal union between one man and one woman as husband and wife," 1 U.S.C. § 7, it is only through being married that the plaintiff couples can attempt to overturn this discriminatory law.[73] By barring same-sex couples from the status of marriage, the plaintiffs and other same-sex couples will not be able to advocate for the respect for their legal relationship in Congress or the federal courts.[74]

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 couples violates

[73] It is worth noting that for over 200 years, the federal government has ceded the determination of who is married to the states for purposes of federal benefits. See e.g., Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) ("[T]he whole subject of the domestic relations of husband and wife…belongs to the laws of the States and not to the laws of the United States"); In Re Burrus, 136 U.S. 586 (1890) (same). Of course, the general rule of states governing eligibility to marry gives way only when states' marriage laws fail to conform with constitutional guarantees. See e.g., Perez, 32 Cal. 2d at 728; Zablocki, 434 U.S. at 402. See also e.g., De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) (scope of federal right concerning a legal status within a family relationship should be determined by reference to state law).

[74] It is also important to note that the civil union law does not consistently mirror the statutes regarding marriage. Under the civil union law, a public official may explicitly refuse to officiate at a civil union. See Public Act No. 05-10, § 6 (App. 2). There is no analogous provision in the marriage statutes. Second, a person must be 18 years old to enter into a civil union. Id. § 2 (3) (App. 1). But a person under 18 can marry with a parent of guardian's consent or the written consent of a judge, and a person under 16 can marry with judicial authorization. C.G.S.A. § 46b-30(b).

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.

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