NO. CV-04-4001813-S

ELIZABETH KERRIGAN, et. al.	:	SUPERIOR COURT
	:	
	:	JUDICIAL DISTRICT OF NEW HAVEN
v.	:	AT NEW HAVEN
	:	
STATE OF CONNECTICUT, et. al.	:	
	:	NOVEMBER 23, 2005

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS STATE OF CONNECTICUT, DEPARTMENT OF PUBLIC HEALTH, AND J. ROBERT GALVIN AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

DEFENDANTS
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DEPARTMENT OF PUBLIC HEALTH, J. ROBERT GALVIN

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TABLE OF CONTENTS

INTRODUCTION

This is a suit for declaratory and injunctive relief by eight same-sex couples who claim that any Connecticut statute, regulation, or common-law rule that prevents same-sex couples from entering into a same-sex "marriage" violates their rights to equal protection, due process, and intimate association under the Connecticut constitution.[1]

The plaintiffs make this claim notwithstanding the fact that Connecticut has been in the forefront nationally in its longstanding commitment to provide equal rights to same-sex couples.[2] Most significantly, in April, 2005, Connecticut became the second State in the country to pass legislation permitting same-sex couples to enter into civil unions, and the first State to take such action voluntarily, without a court order first holding the State's marriage laws unconstitutional. The legislation, entitled "An Act Concerning Civil Unions," 2005 Conn. Pub. Acts No. 05-10 ("Public Act 05-10" or the "Act"), grants all same-sex couples in the State, effective October 1, 2005, the right to enter into civil unions with "***all the same benefits, protections and***

[1] Such laws, according to the plaintiffs, include, but are not limited to, Conn. Gen. Stat. §§ 46b-21, 46b-25, 46b-36, 46b-37, 46b-81, and 2005 Conn. Pub. Acts No. 05-10, see Amended Verified Complaint ¶ 110 and Plaintiffs' Brief p. 2 n. 2, and are referred to collectively herein as "Connecticut's marriage laws."

[2] For almost fifteen years, Connecticut has prohibited sexual orientation discrimination in employment, public accommodation, housing, credit practices, state benefits and other services, Conn. Gen. Stat. §§ 46a-81a through 46a-81r, has required all state contractors to warrant that they will not discriminate based on sexual orientation or permit their subcontractors to do so, Conn. Gen. Stat. § 4a-60a, and has criminalized intimidation or bias based on sexual orientation. Conn. Gen. Stat. §§ 53a-181j through 53a-181*l*; 1990 Conn. Pub. Acts No. 90-137. In addition, for the past five years, the State has permitted same-sex couples to adopt children, Conn. Gen. Stat. § 45a-724(a)(3), and has provided health and pension benefits to same-sex domestic partners of state employees. See Comptroller's Memorandum No. 2000-13 (March 10, 2000)(available at www.osc.state.ct.us/memoarchives3/2000memos/200013.htm).

responsibilities under [state] 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 a marriage***." 2005 Conn. Pub. Acts No. 05-10, § 14 (emphasis added).[3]

Given the passage of Public Act 05-10, the plaintiffs do not allege that Connecticut law deprives them of the benefits, protections, and responsibilities of marriage, but rather that it deprives them of the right to a union that is called a "marriage."[4] In other words, the issue before this Court is whether the Connecticut constitution requires the State to use the term "marriage" to refer to both same-sex unions and opposite-sex unions, or whether it may limit the term "marriage" to the union of one man and one woman.

Marriage, as an institution, has always been subject to the control of the legislature. Maynard v. Hill, 125 U.S. 190, 205 (1888). Currently, at least 43 states and the federal government have constitutional and/or statutory provisions similar to Connecticut's marriage laws that explicitly define marriage as the union of two individuals of opposite sex.[5] In most of

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[3] 2005 Conn. Pub. Acts No. 05-10 is attached hereto in the State Defendants' Appendix (hereinafter "Defs' App.") at A-3.

[4] By "marriage," the plaintiffs mean a civil marriage sanctioned by the State, not a religious marriage. See Plfs' Brief p. 2 n. 3.

[5] See, e.g., 1 U.S.C. § 7; Ala. Code § 30-1-19; Alaska Stat. § 25.05.011; Alaska Const. Art. I, § 25; Ariz. Rev. Stat. § 25-101C; Ark. Code Ann. § 9-11-109; Ark. Const. Amend. 83, § 1; Cal. Fam. Code § 308.5; Colo. Rev. Stat. §14-2-104(1)(b); Del. Code Ann. tit. 13 § 101; Fla. Stat. § 741.212(3); Ga. Code Ann. § 19-3-3.1; Ga. Const. Art. I, § IV, ¶ I; Haw. Rev. Stat. § 572-1; Haw. Const., art. I, § 26; Idaho Code §§ 32-201, 32-209; 750 ICS 5/201 and 5/212; Ind. Code Ann. § 31-11-1-1; Iowa Code § 595.2; Kan. Stat. Ann. § 23-101; Ky Const. § 233a; Ky. Rev. Stat. § 402.005; La. Const. Art. XII, § 15; Me. Rev. Stat. Ann. tit. 19-A, § 701; Md. Code Ann., Fam. Law, § 2-201; Mich. Const. Art. I, § 25; Mich. Comp. Laws Ann. § 551.1; Minn. Stat. §

the remaining states, the marriage statutes use gender-specific terms such as "husband" and "wife," and thereby imply that marriage is limited to couples of opposite-sex.[6] As discussed below, such laws reflect this nation's long history and tradition of recognizing the institution of marriage as a union between one man and one woman. Although numerous legal challenges to the constitutionality of such laws have been filed in other jurisdictions,[7] the ***only*** State in the

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517.01; Miss. Const. Ann. Art. 14, § 263A; Mo. Rev. Stat. § 451.022; Mont. Code Ann. §§ 40-1-103 and 40-1-401(d); Neb. Const. Art. I, § 29; Nev. Const., art. 1 § 21; N.H. Rev. Stat. Ann. §§ 457:1 and 457:2; N.C. Gen. Stat. §§ 51-1 and 51-1.2; N.D. Const. Art. XI, § 28; N.D. Cent. Code § 14-03-01; Ohio Const. Art. XV, § 11; Ohio Rev. Code Ann. § 3101.01; Okla. Const. Art. II, § 35; Oregon Const. ballot measure 36; 23 Pa. Cons. Stat. Ann. § 1704; S.C. Code Ann. §§ 20-1-10 and 20-1-15; S.D. Cod. Laws § 25-1-1; Tenn. Code Ann. § 36-3-113; Tex. Fam. Code § 2.001; Utah Const. Art. I, § 29; Utah Code Ann. § 30-1-4.1; Vt. Stat. Ann. tit. 15, § 8; Va. Code Ann. § 20-45.2; Wash. Rev. Code § 26.04.020; W. Va. Code 48-2-603; Wyo. Stat. § 20-1-101; see also Joshua K. Baker, Status, Benefits, and Recognition: Current Controversies in the Marriage Debate, 18 B.Y.U. J. Pub. L. 569, 575 and n. 24 (2004).

[6] See, e.g., N.J. Rev. Stat. § 37:1-3; N.M. Stat. Ann. 40-2-1; N.Y. Dom. Rel. Law 170; R.I. Gen. Laws 15-1-1, 15-1-2; Wis. Stat. 765.001.

[7] See, e.g., Smelt v. County of Orange, 374 F. Supp. 2d 861 (C.D. Cal. 2005), appeal pending, 05-5604 (9th Cir.); Marriage Cases, Judicial Council Coordination Proceeding No. 4365, 2005 WL 583129 (Cal. Superior Ct. Mar. 14, 2005)(see Plaintiffs' Appendix in Support of Plaintiffs' Motion for Summary Judgment, hereinafter "Plfs' App." at A-23), appeal pending, (1st Dist. Ct. App.); Lewis v. Harris, 875 A.2d 259 (N.J. App. Div. 2005); Morrison v. Sadler, 821 N.E. 2d 15 (Ind. App. Ct. 2005); Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); Citizens for Equal Protection, Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005), appeal pending, No. 05-2604 (8th Cir.); Hernandez v. Robles, 794 N.Y.S.2d 579 (N.Y. Supreme Ct. 2005), appeal pending, (N.Y. App. Div. 1st Dept.); Shields v. Madigan, 783 N.Y.S. 2d 270 (N.Y. Supreme Ct. 2004); In re Kandu, 315 B.R. 123 (W.D. Wash. 2004); Li v. State of Oregon, No. 040303057, 2004 WL 1258167 (Or. Cir. Ct. April 20, 2004)(Defs' App. at A-49), rev'd 110 P.3d 91 (Or. 2005); Anderson v. King County, No. 04-2-04964-4SEA, 2004 WL 1738447 (Wash. Super. Aug. 4, 2004)(Plfs' App. at A-54), appeal pending, Nos. 75934-1 and 75956-1 (Wash. Sup.); Castle v. King County, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Sept. 7, 2004)(Plfs' App. at A-36), appeal pending, Nos. 75934-1 and 75956-1 (Wash. Sup.); Standhardt v. Superior Court of Arizona, 77 P.3d 451 (Ariz. 2003), review denied, 2004 Ariz. Lexis 62 (May 25, 2004); Baker v.

country that permits same-sex "marriage" is Massachusetts. See Opinions of the Justices to the Senate, 802 N.E. 2d 565 (Mass. 2004).

Because, as discussed below, there are no material facts in dispute and, as a matter of law, the Connecticut constitution does not require that a union granting same-sex couples all the benefits, rights and privileges of marriage be called a "marriage," the motion for summary judgment of defendants State of Connecticut Department of Public Health and J. Robert Galvin (the "state defendants")[8] should be granted and the plaintiffs' motion for summary judgment should be denied.

STATEMENT OF FACTS[9]

The plaintiffs are eight same-sex couples who want to be married in the State of Connecticut.[10] Each couple went to the Registrar of Vital Statistics for the Town of Madison,

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Vermont, 744 A.2d 864 (Vt. 1999); Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Super. Ct. 1998)(Plfs' App. at A-84); Dean v. District of Columbia, 653 A.2d 307 (D.C. App. 1995); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Singer v. Harris, 522 P.2d 1187 (Wash. App. 1974); Jones v. Hallahan, 501 S.W.2d 588 (Ky. App. Ct. 1973); Baker v. Nelson, 191 N.W. 2d 185 (Minn. 1971), appeal dismissed for want of a substantial federal question, 409 U.S. 810 (1972).

[8] The third defendant, Dorothy C. Bean, Deputy Town Clerk, Acting Town Clerk, Deputy Registrar of Vital Statistics and Acting Registrar of Vital Statistics for the Town of Madison, Connecticut, is represented by separate counsel.

[9] As noted in the State Defendants' Statement in Response to Plaintiffs' Statement of Undisputed Facts, the State Defendants accept the facts set forth in the plaintiffs' Statement of Undisputed Facts as true *solely* for the purpose of deciding the pending motions for summary judgment.

[10] The plaintiffs are Elizabeth Kerrigan, Joanne Mock, Janet Peck, Carol Conklin, Geraldine Artis, Suzanne Artis, Jeffrey Busch, Stephen Davis, J.E. Martin, Denise Howard, John Anderson,

Connecticut, on August 23, 2004, or January 28, 2005,[11] in order to obtain a marriage license. (Amended Verified Complaint ¶ 103). Apart from the fact that they were of the same sex, each couple, and each plaintiff individually, satisfied the requirements for marriage under Connecticut law. (Amended Verified Complaint ¶¶ 103, 105). In each case, defendant Dorothy Bean, Deputy Registrar of Vital Statistics and Acting Registrar of Vital Statistics for the Town of Madison, denied the requested marriage license. (Amended Verified Complaint ¶ 104).

On August 25, 2004, the plaintiffs filed the present suit against (1) the State of Connecticut, Department of Public Health, which is charged with supervising the State's system of registering marriages pursuant to Conn. Gen. Stat. § 19a-40; (2) J. Robert Galvin, Commissioner of the Department of Public Health for the State of Connecticut; and (3) Dorothy Bean, Deputy Town Clerk, Acting Town Clerk, Deputy Registrar of Vital Statistics and Acting Registrar of Vital Statistics for the Town of Madison, Connecticut. (Amended Verified Complaint ¶¶ 11-13).[12]

In their Amended Verified Complaint, the plaintiffs allege various financial, legal, and emotional hardships that have resulted from their inability to marry. Many of the cited hardships

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Garrett Stack, Barbara Levine-Ritterman, Robin Levine-Ritterman, Damaris Navarro and Gloria Searson. (Amended Verified Complaint ¶¶ 3-10).

[11] All of the plaintiffs went to the Registrar on August 23, 2004, except for Damaris Navarro and Gloria Searson, who went to the Registrar on January 28, 2005. (Amended Verified Complaint ¶ 103).

[12] Seven couples filed the original Complaint, but subsequently amended it on March 29, 2005, to add an eighth plaintiff couple.

are due to federal or Canadian law that are beyond the ability of the State Defendants to remedy[13] and are not relied on by the plaintiffs in their motion for summary judgment. (See Plaintiffs' Statement of Undisputed Facts). Other alleged hardships are due to alleged inequities in state law that have been eliminated with the passage of 2005 Conn. Pub. Acts No. 05-10, discussed below, and therefore are similarly no longer relied upon. (Id.). The remaining alleged harms, which form the basis for the plaintiffs' motion for summary judgment, are largely personal, subjective and psychological in nature, and include allegations that the inability to marry is detrimental to the plaintiffs' sense of well-being, hinders their relationships with family, and impedes their ability to seek legal recognition for same-sex marriage in other jurisdictions. (Plaintiff's Statement of Undisputed Facts ¶¶ 5, 11, 14, 19, 27, 38).

The plaintiffs claim that by denying them the right to marry, the defendants have violated their rights to equal protection, due process, and intimate association under the state constitution. (Amended Verified Complaint ¶ 107). Specifically, the plaintiffs allege that "[t]o the extent that any statute, regulation, or common law rule, including but not limited to Conn. Gen. Stat. §§ 46b-21, 46b-25, 46b-36, 46b-37, and 46b-81, is applied to deny otherwise qualified individuals from marrying because they wish to marry someone of the same sex or are gay or lesbian couples, such statutes, regulations, and common-law rules violate [1] the equal protection provisions set forth in Article First, §§ 1 and 20 of the Connecticut constitution . . . .[2] the due

[13] For example, the plaintiffs claim to be unable to share Individual Retirement Account savings or social security benefits (Amended Verified Complaint ¶¶ 22, 60, 74, 89, 101), to have to pay higher taxes than married couples (Amended Verified Complaint ¶¶ 32, 60, 69), and to have been unfairly singled out by Canadian customs authorities when traveling between the U.S. and Canada. (Amended Verified Complaint ¶ 55).

process provisions of Article First, §§ 8 and 10 of the Connecticut Constitution . . . [and] [3] the rights of intimate and expressive association in Article First, §§ 4, 5, 14 of the Connecticut Constitution." (Amended Verified Complaint, First, Second and Third Counts).

On April 22, 2005, approximately eight months after the plaintiffs filed their Complaint, Connecticut became the second State in the country to allow same-sex civil unions when the General Assembly passed "An Act Concerning Civil Unions," 2005 Conn. Pub. Acts No. 05-10 (the "Act" or "Public Act 05-10"), which took effect on October 1, 2005.[14] The Act establishes a statutory scheme pursuant to which same-sex couples may enter into civil unions and obtain "all the same benefits, protections and responsibilities under [state] 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 a marriage." (Public Act 05-10, § 14).

The statutory scheme is modeled on the State's marriage laws and contains similar provisions. In particular, the Act provides that a person is eligible to enter into a civil union if such person is (1) not a party to another civil union or a marriage; (2) of the same sex as the other party to the civil union; (3) at least eighteen years of age; and (4) not related to his or her partner by certain degrees of kinship. (Public Act 05-10, § 2). As in the case of marriage, a person who wants to enter into a civil union must first obtain a license from the registrar of vital statistics for the town in which the ceremony is to be performed or in which one of the parties to the ceremony resides. (Public Act 05-10, § 7). The civil union ceremony may be performed by the same individuals who are authorized to perform a marriage, namely judges and retired

[14] Vermont is the only other State that currently allows civil unions. See 15 V.S.A. § 1201 *et seq*.

judges, family support magistrates, state referees, justices of the peace, and all ordained or licensed members of the clergy as long as they continue to be in the work of the ministry. (Public Act 05-10, § 4; see also Conn. Gen. Stat. § 46b-22). Significantly, once united, the parties to a civil union are accorded "all the same benefits, protections and responsibilities under [state] 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 a marriage." (Public Act 05-10, § 14). The primary difference between the statutory schemes is that a "marriage . . . is defined as the union of one man and one woman," Public Act 05-10, § 14, whereas a civil union is a union of two parties of the same sex. (Public Act 05-10, § 2(2)).[15]

Despite the passage of Public Act 05-10, the plaintiffs still seek the right to be "married." Although they no longer claim to be deprived of the legal benefits of marriage under state law, they nonetheless claim that "civil unions, as a separate and unequal status, do not remedy the harm caused to [them] by the exclusion from marriage." (Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment (hereinafter "Plfs' Brief"), p. 2 n. 2). Accordingly, the plaintiffs have not further amended their Complaint, but rather contend that Public Act 05-10 suffers from the same alleged constitutional infirmities as the other Connecticut laws that deny the right of marriage to same-sex couples.

By way of relief, the plaintiffs want this Court to issue a declaratory judgment that any Connecticut statute, regulation or common-law rule that precludes otherwise qualified same-sex

[15] Marriages and civil unions also differ in that minors may, under certain circumstances, be married, Conn. Pub. Acts No. 46b-30, whereas an individual must be 18 years of age in order to obtain a civil union. Public Act 05-10, § 2(3), as amended by Public Act 05-288, § 227.

couples from marrying is unconstitutional. In addition, they seek an injunction ordering Ms. Bean to issue them marriage licenses and an injunction ordering the Department of Public Health to register their marriages once performed. (Amended Verified Complaint, Prayer for Relief). Because there are no material facts in dispute, this case is appropriate for summary judgment.

SUMMARY JUDGMENT STANDARD

"[S]ummary judgment allows the court to dispose of meritless claims before becoming entrenched in a frivolous and costly trial." Donahue v. Windsor Locks Board of Fire Commissioners, 834 F.2d 54, 58 (2d Cir. 1987). Practice Book § 17-49 provides that summary judgment "shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

"The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law." Gould v. Mellick & Sexton, 263 Conn. 140, 146 (2003). "[A] party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." Id. at 151. "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." Gould v. Mellick & Sexton, 263 Conn. 140, 146 (2003). Summary judgment is appropriate "when the complaint fails to set forth a cause of action and the defendant can establish that the defect could not be cured by repleading." Larobina v. McDonald, 274 Conn. 394, 401 (2005).

ARGUMENT

I. CONNECTICUT'S MARRIAGE LAWS CARRY A STRONG PRESUMPTION OF CONSTITUTIONALITY

The plaintiffs face a "difficult task" in seeking to prove that Connecticut's marriage laws are unconstitutional. State v. Angel C., 245 Conn. 93, 102 (1998). It is well-established that "a validly enacted statute carries with it a strong presumption of constitutionality and . . . those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt." State v. Long, 268 Conn. 508, 521 (2004)(brackets omitted); State v. Rizzo, 266 Conn. 171, 291 (2003). "The court will indulge every presumption in favor of the statute's constitutionality." Long, 268 Conn. at 521. "Therefore, 'when a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear.'" Id. at 521, quoting State v. McCahill, 261 Conn. 492, 504 (2002).

In the present case, the alleged invalidity of Public Act 05-10, Conn. Gen. Stat. §§ 46b-21, 46b-25, 46b-36, 46b-37, 46b-81, and any other Connecticut statute that limits marriage to one man and one woman (hereinafter "Connecticut's marriage laws") is by no means clear. Indeed, far from being clearly invalid, Connecticut's marriage laws recognizing marriage as the union of one man and one woman are consistent with the laws of the federal government and every state in the nation except Massachusetts.[16] Although legal challenges to such laws have been brought in other jurisdictions, courts have repeatedly rejected them, holding that laws

[16] Massachusetts is the only state that recognizes same-sex marriage. See Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004); see also footnotes 5 and 6, supra.

limiting marriage to opposite-sex couples satisfy both federal and state constitutional requirements. See, e.g. Smelt v. Orange County, 375 F. Supp.2d 861 (C.D. Cal. 2005)(federal Defense of Marriage Act limiting marriage to one man and one woman does not violate the federal due process or equal protection clause); Wilson v. Ake, 354 F. Supp.2d 1298 (M.D. Fla. 2005)(state and federal Defense of Marriage Acts do not violate the due process, equal protection, full faith and credit, privileges and immunity, or commerce clauses); In re Kandu, 315 B.R. 123 (W.D. Wash. 2004)(federal Defense of Marriage Act is constitutional); Lewis v. Harris, 875 A.2d 259 (N.J. 2005)(New Jersey marriage laws prohibiting same-sex marriage do not violate state constitution); Morrison v. Sadler, 821 N.E. 2d 15 (Ind. App. Ct. 2005)(Indiana's ban on same-sex marriage does not violate the state constitution); Shields v. Madigan, 783 N.Y.S. 2d 270 (2004)(denying marriage licenses to same-sex couples does not violate equal protection or due process clauses of the New York constitution); Standhardt v. Superior Court of Arizona, 77 P.3d 451 (Ariz. Ct. App. 2003), review denied, 2004 Ariz. Lexis 62 (Ariz. May 25, 2004)(Arizona's prohibition on same-sex marriages does not violate the state or federal constitutions); Dean v. District of Columbia, 653 A.2d 307 (D.C. App. 1995)(denial of marriage licenses to same-sex couples does not violate the federal due process or equal protection clauses); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App.), review denied, 84 Wn.2d 1008 (Wash. 1974)(Washington statutes prohibiting same-sex marriage do not violate the state or federal constitutions); Jones v. Hallahan, 501 S. W. 2d 588 (Ky. Ct. App. 1973)(denial of marriage license to same-sex couple did not violate couple's constitutional rights); Baker v. Nelson, 191

N.W. 2d 185 (Minn. 1971), appeal dismissed for want of a substantial federal question, 409 U.S. 810 (1972)(restricting marriage to opposite sex couples does not violate the 14th Amendment).[17]

Because, as discussed below, the plaintiffs cannot sustain "the heavy burden" of proving Connecticut's marriage laws unconstitutional "beyond a reasonable doubt," State v. Long, 268 Conn. 508, 521 (2004), the statutes' constitutionality must be upheld and summary judgment granted for the defendants.

II. CONNECTICUT'S MARRIAGE LAWS DO NOT VIOLATE THE EQUAL PROTECTION PROVISIONS OF ARTICLE FIRST, §§ 1 AND 20, OF THE STATE CONSTITUTION.

The Equal Protection provisions of the Connecticut constitution are set forth in article first, §§ 1 and 20. Section 1, entitled "Equality of rights," states that:

[17] A few courts have struck down state laws limiting marriage to opposite-sex couples, but none, other than Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004), has exhausted the appellate process and resulted in a State being required to allow same-sex "marriage." See Marriage Cases, Judicial Council Coordination Proceeding No. 4365, 2005 WL 583129 (Cal. Superior Ct. Mar. 14, 2005)(Plfs' App at A-23), appeal pending; Baehr v. Lewin, 852 P.2d 44 (Haw. 1993)(led to amendment to Hawaii constitution banning same-sex marriage); Citizens for Equal Protection, Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005), appeal pending, No. 05-2604 (8th Cir.); Hernandez v. Robles, 794 N.Y.S.2d 579 (N.Y. Supreme Ct. 2005), appeal pending, (N.Y. App. Div. 1st Dept.); Li v. State of Oregon, No. 040303057, 2004 WL 1258167 (Or. Cir. Ct. April 20, 2004)(Defs' App. at A-49), rev'd 110 P.3d 91 (Or. 2005)(led to amendment of Oregon constitution banning same-sex marriage); Anderson v. King County, No. 04-2-04964-4SEA, 2004 WL 1738447 (Wash. Super. Aug. 4, 2004)(Plfs' App. at A-54), appeal pending, Nos. 75934-1 and 75956-1 (Wash. Sup.); Castle v. King County, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Sept. 7, 2004)(Plfs' App. at A-36), appeal pending, Nos. 75934-1 and 75956-1 (Wash. Sup.); Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Super. Ct. 1998)(Plfs' App. at A-84)(led to amendment to Alaska constitution prohibiting same-sex marriage); Baker v. Vermont, 744 A.2d 864 (Vt. 1999)(led to law permitting civil unions, but did not require legislature to permit same-sex marriage).

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

Section 20, entitled "Equal protection. No segregation or discrimination," states that:

> 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 or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.

Conn. Const. art. first, § 20. Relying on both of these provisions, the plaintiffs claim that Connecticut's marriage laws violate their state constitutional right to equal protection.

The Connecticut Supreme Court has held that when a plaintiff challenges a state statute on the grounds that it violates the equal protection provisions of the state or federal constitution, the Court should first consider whether the statute at issue, either on its face or as applied, treats similarly situated individuals differently. Ramos v. Town of Vernon, 254 Conn. 799, 826 (2000); State v. Angel C., 245 Conn. 93, 125-126 (1998). If it does not, there is no equal protection violation and no further analysis is required. Angel C., 245 Conn. at 126.

If the challenged statute treats similarly situated individuals differently, the Court must determine the standard by which the statute's constitutional validity will be reviewed. Ramos v. Town of Vernon, 254 Conn. 799, 829 (2000); Barton v. Ducci Electrical Contractors, Inc., 248 Conn. 793, 813 (1999). "If, 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." Ramos, 254 Conn. at 829. "If the statute does not

touch upon either a fundamental right or a suspect class, its classification need only be rationally related to some legitimate government purpose in order to withstand an equal protection challenge." Id. at 829; Barton, 248 Conn. at 814.

In undertaking this analysis, the Court will ordinarily determine first, "as a necessary predicate," whether the challenged statute could withstand scrutiny under "traditional federal and state equal protection principles" derived from the 14th Amendment. City Recycling, Inc. v. State, 257 Conn. 429, 444 (2001). Only if the statute can withstand constitutional scrutiny under traditional equal protection principles is it necessary for the Court to consider whether the state constitution provides greater protection than the federal constitution. Id.; Ramos, 254 Conn. at 828. In making this latter determination, the Court considers the six factors set forth in State v. Geisler, 222 Conn. 672, 684-686 (1992). See State v. Colon, 272 Conn. 106, 319 (2004). These factors are: "(1) the textual approach; (2) holdings and dicta of [the State Supreme Court] and the Appellate Court; (3) federal precedent; (4) sister state decisions or sibling approach; (5) the historical approach, including the historical constitutional setting and the debates of the framers; and (6) economic/sociological considerations." Geisler, 222 Conn. at 685 (citations and italics omitted); State v. Colon, 272 Conn. 106, 319 (2004).

In the present case, the plaintiffs implicitly concede that Connecticut's marriage laws do not violate the federal equal protection clause because they have not made such a claim in their Complaint and they have not, "as a necessary predicate," analyzed whether Connecticut's marriage statutes could withstand scrutiny under traditional equal protection principles. City Recycling, Inc. v. State, 257 Conn. 429, 444 (2001). Having implicitly conceded the statutes'

constitutionality under federal law, the plaintiffs apply the Geisler factors, but their analysis fails to demonstrate that Connecticut's marriage laws violate the state constitution. Because, as discussed below, Connecticut's marriage statutes (1) do not treat similarly situated individuals differently; (2) do not infringe upon a fundamental right; (3) do not discriminate against a suspect class; and (4) satisfy both rational basis review and strict scrutiny, the plaintiffs' equal protection claim fails as a matter of law.

A. Connecticut's Marriage Laws Do Not Violate Equal Protection Because They Do Not Treat Similarly Situated Individuals Differently.

The Connecticut Supreme Court has held that "[t]o implicate the equal protection clauses under the state and federal constitutions . . . it is necessary that the state statute in question, either on its face or in practice, treat persons standing in the same relation to it differently." Ramos v. Town of Vernon, 254 Conn. 799, 826 (2000); State v. Angel C., 245 Conn. 93, 125 (1998); see also Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). "Consequently, the [plaintiffs] must show, as a threshold matter, that [the statutes at issue], either on [their] face or as applied, ***treat[ ] similarly situated individuals differently***." Ramos, 254 Conn. at 826 (emphasis added); Angel C., 245 Conn. at 126. "In determining whether two groups are similarly situated for equal protection purposes, [the court] must look for persons ***situated similarly in all relevant aspects***." State v. Perez, 82 Conn. App. 100, 106, cert. denied, 269 Conn. 904 (2004)(emphasis added). The plaintiffs' failure to meet this threshold requirement is fatal to their equal protection claim. See State v. Angel C., 245 Conn. 93, 126 (1998).

Connecticut's marriage laws create a statutory scheme whereby anyone who wants to marry an individual ***of the opposite sex*** may do so provided he or she is over a certain age, is not related by certain degrees of kinship to his or her intended spouse, and has obtained a marriage license. See Conn. Gen. Stat., chapter 815e, §§ 46b-21 *et seq.*; 2005 Conn. Pub. Acts No. 05-10, § 14 (defining "marriage" as "the union of one man and one woman"). Under this scheme, all applicants who seek such an opposite-sex legal union are treated the same. The statutes do not, "either on [their] face or in practice, treat persons standing in the same relation to [them] differently." State v. Angel C., 245 Conn. at 125. If the plaintiffs want to take advantage of the statutes to obtain a marriage, which by statutory definition is a union to a person of the opposite sex, they are free to do so.

In seeking to obtain a marriage to someone of the *same* sex, the plaintiffs are seeking to obtain something that Connecticut's statutory scheme does not provide. Because they are seeking to marry a spouse of the same sex, the plaintiffs are not "similarly situated" to other applicants for marriage and do not "stand[ ] in the same relation to [the statutes]" as other applicants. Instead, they are seeking something that lies wholly beyond the scope of Connecticut's marriage laws. Angel C., 245 Conn. at 125

The New Jersey Superior Court clearly articulated this point in Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114 at *22-23 (N.J. Super. L., Nov. 5, 2003)(Defs' App. at A-29), aff'd 875 A.2d 259 (N.J. 2005), in which it rejected an equal protection challenge to New Jersey's marriage laws:

> The universally accepted understanding reflected in the laws of this country is that marriage is between a man and a woman . . . . Plaintiffs' desire to enter into a same-sex marriage sets them apart from the historic understanding of the institution of marriage. This distinction puts plaintiffs sufficiently dissimilar to individuals who wish to enter into mixed-gender marriage to invalidate their equal protection arguments. Those individuals who wish to enter into mixed-gender marriage seek access to the historically defined concept of marriage. Plaintiffs, on the other hand, are in a class of individuals who wish to alter the fundamental nature of marriage itself.

The same analysis applies to the present case and compels the same conclusion – denying plaintiffs the right to same-sex marriage does not violate the equal protection clause because individuals seeking same-sex marriage are not seeking the same right as, and thus are not similarly situated to, individuals who seek to marry someone of the opposite sex.

B. Connecticut's Marriages Laws Do Not Infringe Upon A Fundamental Right.

Even if the plaintiffs were similarly situated to individuals seeking to enter into opposite-sex marriages, which they are not, their equal protection claim would nonetheless fail because strict scrutiny does not apply and the challenged statutes satisfy rational basis review. Plaintiffs argue, among other claims, that strict scrutiny should apply because the Connecticut constitution protects a "fundamental right" to marry that is "broad" enough to encompass same-sex marriage. Stripped to its core, plaintiffs' theory is, in essence, that, under our State constitution, every Connecticut citizen has a "broad fundamental right" to marry that includes the right to marry <u>any</u> person of his or her choosing.

This position is untenable and, not surprisingly, finds virtually no support in any of the relevant federal or state appellate authorities on the issue. To the contrary, marriage, as an

institution, has always been subject to the control of the legislature. See, e.g., Maynard v. Hill, 125 U.S. 190, 205 (1888) ("Marriage, as the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature."); Carabetta v. Carabetta, 182 Conn. 344, 346 (1980) ("at least since Maynard, . . . it has been clear that the legislature has plenary power to determine the circumstances under which a marital relationship is created and terminated"); Rosengarten v. Downes, 71 Conn. App. 372, 388-89 & n.8, cert. granted, 261 Conn. 936 (2002) (appeal dismissed as moot Dec. 31, 2002) ("It does not constitute invidious discrimination simply because a state places some restraints on who may marry."). Indeed, as the United States Supreme Court recognized in Maynard, 125 U.S. at 205, it is the legislature that "prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution."

Moreover, the United States Supreme Court has made clear that there are two primary features to the established method of determining whether a plaintiff has asserted a "fundamental" liberty interest under the United States Constitution. See Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997). First, the U.S. Constitution protects "those fundamental rights and liberties that are, objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed'. . . ." Id. (citations omitted). Second, and equally important for purposes of the plaintiffs' novel claim that the fundamental right to marry under the

Connecticut constitution is a "broad" right that includes the right to marry someone of the same gender, the Supreme Court has required "a 'careful description' of the asserted fundamental liberty interest." Id. at 721. In other words, the Court has specifically rejected an approach that seeks to expand fundamental rights beyond those that find support in our "Nation's history, legal traditions and practices" by reformulating those rights in broad, generic terms. See id. at 722-23 (rejecting the claim that prior case law supports the view that there exists under the U.S. Constitution a broad "right to die" and, instead, formulating the precise issue in that case as "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.")

The plaintiffs' position is contrary to these well recognized jurisprudential principles and would require this Court to usurp the power of the legislature to define and regulate marriage, and invent a "broad," fundamental right to marry that is unsupported by the Constitution, laws, history, traditions, or judicial decisions of this State. The plaintiffs' proposed formulation of this "broad" fundamental right to marry any person of one's choosing would upset clearly established constitutional principles, which have always allowed the legislatures of this and other States to define and regulate the institution of marriage.

If the plaintiffs are correct, and every individual has a "broad" fundamental right to marry anyone else, then every Connecticut citizen would not only have a "fundamental right" to marry a person of the same sex, but also would have a "fundamental right" to marry a minor, a close relative, another married person, and, presumably, more than one person. To justify the present "restrictions" against such proposed "marital" unions, the State would be required to show, in

each instance, that there is a compelling interest in continuing to exclude such unions from its longstanding definition of "marriage" and that the present restrictions against such unions are narrowly tailored to serve those interests. To state such a proposition openly and clearly is to refute it. As is discussed below, nothing in the text, historical context or judicial decisions interpreting our State and Federal Constitutions requires such a result or supports any claim that this is the proper Constitutional framework for analyzing such claims. To the contrary, each of the Geisler factors compel precisely the opposite conclusion – that the "fundamental right" to marry does not include any right to marry a person of the same sex.

1. Federal Precedent Does Not Recognize A Fundamental Right To Same-Sex Marriage.

Under federal law, it is well-established that there is no fundamental right to marry a person of the same sex. Indeed, defendants are aware of no federal case that has recognized such a right.

The U.S. Supreme Court has defined "fundamental rights" as those liberties that are "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Washington v. Glucksberg, 521 U.S. at 721, quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937). Although the Court has long recognized the right to marry as "fundamental," it has done so "substantially because of its relationship to procreation," Dean v. District of Columbia, 653 A.2d 307, 333 (D.C. App. 1995), and thus has recognized the right in contexts in which it was clear that it was referring to marriage between individuals ***of the opposite sex***.

For example, in Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942), the Supreme Court considered the constitutionality of an Oklahoma statute that allowed the state to sterilize habitual criminals without their consent. In striking down the statute, the Court emphasized that "[m]arriage and procreation are fundamental to the very existence and survival of the race." Id. at 541. By linking both marriage and procreation to the existence and survival of the human race, the Court clearly implied that it was referring to the marriage of opposite sex individuals.

In Zablocki v. Redhail, 434 U.S. 374 (1978), the Court again discussed the fundamental right to marry, this time noting that "[i]t is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships . . . [because] it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." Id. at 386. As the Supreme Court of Hawaii has observed, "[i]mplicit in the Zablocki court's link between the right to marry, on the one hand, and the fundamental rights of procreation, childbirth, abortion, and child rearing, on the other, is the assumption that the one is simply the logical predicate of the others." Baehr v. Lewin, 852 P.2d 44, 56 (Haw.1993).

Similarly, in Loving v. Virginia, 388 U.S. 1 (1967), when the Court struck down a Virginia law prohibiting interracial marriage it was clearly envisioning marriage as the union of one man and one woman, as evidenced by its description of marriage as "one of the basic civil rights of man, fundamental to our very existence and survival." Id. at 12 (internal quotation

marks omitted). In holding as it did, the Court in no way implied that the right to marry is so "broad" that it includes the right to marry anyone else, including someone of the same sex. Rather, as courts in other jurisdictions have recognized, Loving "was anchored to the concept of marriage as a union involving persons of the opposite sex." Standhardt v. Superior Court of Arizona, 77 P.3d 451, 458 (Ariz. App. Ct. 2003); Seymour v. Holcomb, 790 N.Y.S. 2d 858, 865 (Sup. Ct. of N.Y., Tompkins County, 2005).

The Supreme Court has not only equated the fundamental right of marriage with opposite-sex couples, but also indicated that same-sex marriage is not a fundamental right. In Baker v. Nelson, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810 (1972), two men challenged the constitutionality of a Minnesota state law that did not authorize same-sex marriage. The Minnesota Supreme Court rejected the plaintiff's argument that "the right to marry without regard to the sex of the parties is a fundamental right of all persons," and upheld the constitutionality of the law. Baker, 191 N.W.2d at 186-187. The plaintiffs appealed to the U.S. Supreme Court pursuant to a statute that, at the time, permitted an appeal as of right in all cases involving the constitutionality of a state statute. The Supreme Court, however, dismissed the appeal "for want of a substantial federal question." Baker, 409 U.S. at 810. Because a dismissal for want of a substantial federal question constitutes an adjudication on the merits, Hicks v. Miranda, 422 U.S. 332, 344 (1975); Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247 (1959), and is dispositive of the "specific challenges presented in the statement of jurisdiction," [18] see Mandel

[18] In the appeal to the United States Supreme Court, "[t]he jurisdictional statement in Baker v. Nelson presented the questions of whether the county clerk's refusal to authorize a same-sex

v. Bradley, 432 U.S. 173, 176 (1977) (per curiam), the ruling compels the conclusion that the Court does not consider same-sex marriage to be a fundamental right. See Wilson v. Ake, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005).

Nothing in Lawrence v. Texas, 539 U.S. 558 (2003), alters this analysis. Although the Court in Lawrence utilized rational basis review to strike down a Texas statute that criminalized private sexual conduct between consenting adults of the same sex, the Court emphasized that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Lawrence, 539 U.S. at 578 (emphasis added).[19] Thus, the Court made clear that it did not intend its ruling to support an argument that there is a fundamental right to same-sex marriage.[20] See Wilson, 354 F. Supp. 2d at 1305 (noting that

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marriage deprived plaintiffs of their liberty to marry and of their property without due process of law under the Fourteenth Amendment, their rights under the Equal Protection Clause of the Fourteenth Amendment, or their right to privacy under the Ninth and Fourteenth Amendments." Smelt v. County of Orange, 374 F. Supp. 2d 861, 872 (C.D. Cal. 2005) (citing Baker v. Nelson, Jurisdictional Statement, No. 71-1027 (Oct. Term 1972)).

[19] In Lawrence, the Court struck down the statute at issue using rational basis review and, thus, did not recognize any "fundamental right" at all, much less to same-sex marriage. Id. at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.")(Emphasis added).

[20] Indeed, Justice O'Connor, in her concurrence, explicitly dispelled any notion that Lawrence supported a constitutional right to same-sex marriage when she stated:

> [That Texas' sodomy law] as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations – the asserted state interest in

Lawrence did not alter the binding precedent established in Baker v. Nelson, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810 (1972)); Standhardt v. Superior Court of Arizona, 77 P.3d 451, 457 (Ariz. App. Ct. 2003)("we reject petitioners' contention that Lawrence establishes entry in same-sex marriages as a fundamental right").

Emphasizing the Supreme Court's failure to recognize a fundamental right to same-sex marriage and noting that "[a] definition of marriage only recognized in Massachusetts and for less than two years cannot be said to be 'deeply rooted in this Nation's history and tradition' of the last half century," the District Court for the Central District of California recently rejected arguments similar to those advanced by the plaintiffs in the present case and concluded that, under federal law, the fundamental right to marry does not include a fundamental right to same-sex marriage. Smelt, 374 F. Supp. 2d at 877-79, quoting Glucksberg, 521 U.S. at 720-721.

Other federal and state courts that have considered whether there is a "fundamental right" to marry someone of the same gender have virtually uniformly reached the same conclusion. See, e.g. Wilson, 354 F. Supp. 2d at 1307 ("the Court finds that the right to marry a person of the same sex is not a fundamental right under the [federal] Constitution"); Seymour v. Holcomb, 790 N.Y.S. 2d 858, 865 (Sup. Ct. of N.Y., Tompkins County, 2005)("the Court finds that the alleged right of same-sex couples to marry is not 'deeply rooted in this Nation's history and tradition' and therefore is not a fundamental right" under the state or federal constitutions); In re Kandu,

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> this case – other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

Lawrence, 539 U.S. at 585 (O'Connor, J., concurring).

315 B.R. 123, 141 (Bankr. W.D. Wash. 2004)("this Court concludes that same-sex marriage is not a fundamental right" under the federal constitution); Standhardt v. Superior Court of Arizona, 77 P.3d 451, 465 (Ariz. App. Ct. 2003)("we hold that the fundamental right to marry protected by our federal and state constitutions does not encompass the right to marry a same-sex partner"); Dean v. District of Columbia, 653 A.2d 307, 333 (App. D.C. 1995)("same-sex marriage cannot be called a fundamental right"); Jones v. Hallahan, 501 S.W. 2d 588, 590 (Ky. Ct. App. 1973)("[w]e find no constitutional sanction or protection of the right of marriage between persons of the same sex"); Baker v. Nelson, 191 N.W. 2d 185, 186 (1971).

In sum, under federal law, the fundamental right to marry that is "deeply rooted in this Nation's history and tradition," and has been deemed "fundamental" by the United States Supreme Court, pertains solely to the union of one man and one woman.

2. Sister State Precedent Does Not Recognize A Fundamental Right To Same-Sex Marriage.

State and federal courts across the country have similarly largely rejected the argument that there is a fundamental right to same-sex marriage under the state constitutions of their respective jurisdictions. Indeed, to date, not a single state appellate court, including Massachusetts, has: (a) held that there is a "fundamental right" to marry someone of the same gender; or (b) otherwise formulated the "right" to marriage as "broadly" as the plaintiffs propose in this case.

For example, in Lewis v. Harris, 875 A.2d 259 (N.J. 2005), a New Jersey appellate court held that the New Jersey constitution does not require the recognition of same-sex marriage

because the fundamental right to marry "only extends to marriages between members of the opposite sex." In Standhardt v. Superior Court of Arizona, 77 P.3d 451, 459 (Ariz. App. Ct. 2003), an Arizona appellate court concluded that there is no fundamental right to same-sex marriage under the Arizona constitution because such marriages are "neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty." In Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993), the Hawaii Supreme Court held that there is no fundamental right to same-sex marriage because "we do not believe that a right to same-sex marriage is so rooted in the collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice . . . . Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed." And in Shields v. Madigan, 783 N.Y.S. 2d 270 (N.Y. 2004), a New York trial court concluded that same-sex marriage is not a fundamental right protected by the New York constitution and that strict scrutiny would therefore not apply to a state statutory scheme that precluded same-sex marriage.

Even the Supreme Judicial Court of Massachusetts, the only state appellate court to have held that its state constitution prohibits the state from defining a "marriage" as the union of one man and one woman, did not hold that there is a "fundamental right" to same-sex marriage. Instead, the majority opinion in Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 325 (2003), merely concluded that Massachusetts failed to demonstrate that its definition of marriage, to the extent it did not include a union between two people of the same sex, satisfied the rational basis test because it did not serve any legitimate state purpose. See Goodridge, 440 Mass. at 331 (". . .

we conclude that the marriage ban does not meet the rational basis test for either due process or equal protection.").[21]

Although a handful of state trial courts have held that the fundamental right to "marriage," under their respective state constitutions, includes a right to marry someone of the same gender, appeals remain pending in all of those cases.[22] Perhaps more importantly, the trial courts in each of those cases failed to recognize that "marriage," itself, has always been defined as the union of one man and one woman. Instead, the courts in those cases started with the rather unremarkable premise that "marriage" has been recognized as a "fundamental right" in this nation's federal and state jurisprudence,[23] but then erroneously held that the respective states

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[21] For the reasons set forth infra, that conclusion was also erroneous and should be rejected by this Court.

[22] See, e.g., Anderson v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004)(Plfs' App. at A-54)(appeal pending); Hernandez v. Robles, 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005)(appeal pending); Marriage Cases, Judicial Council Coordination Proceeding No. 4365 (Cal. Superior Ct. County of San Francisco Mar. 14, 2005)(Plfs' App. at A-23)(appeal pending).

[23] Plaintiffs cite numerous sister state court cases that they inaccurately claim all recognized a fundamental right to marry under state constitutional provisions containing language similar to Article First, § 1 of the Connecticut Constitution. A close analysis of those cases reveals that while, in some of those cases, the courts recognized a fundamental right to marry under their respective state constitutions, in others, the courts merely observed that there is a fundamental right to marry under the U.S. Constitution. More importantly, none of the cases stated, or in any way suggested, that the right extends to same-sex couples. See Plfs' Brief pp. 19-20, citing Bailey v. City of Austin, 972 S.W.2d 180 (Tex. App. Ct. 1998); Reinhardt v. Reinhardt, 720 So.2d 78, 79 (La. App. 1st Cir. 1998)(recognizing that the U.S. Constitution and Louisiana Constitution recognize the fundamental liberty interest or right of personal privacy in decisions relating to marriage, child rearing, and family relationships); Beeson v. Kiowa County School Dist., 567 P.2d 801 (Colo. App. Ct. 1977) (finding that statutory language declaring it to be the public policy of the state "to promote and foster the marriage relationship" compelled the

could not continue to define "marriage" as a union between one man and one woman because, to do so, would be to exclude certain people from access to the institution – which, as set forth above, is and always has been (including during the period it has been recognized as a fundamental right) defined as a union between two people of the opposite sex. Thus, those courts accepted the flawed logic advanced to this Court – that the right to marry is a "broad" right that cannot be defined by the State in a way that leads to the exclusion of certain arrangements of people – ignoring the indisputable fact that all prior decisions recognizing a "fundamental right" to marriage did so in the context of the traditional and universal definition of that institution.

But, as set forth above, and as virtually every federal court and state appellate court to have addressed the issue has recognized, the conclusion reached by these courts has no logical basis under accepted, well-established principles of constitutional jurisprudence. As the vast majority of courts have recognized, the "fundamental right" to marriage that is "deeply rooted" in this nation's (and state's) history and tradition and is "implicit in the concept of ordered liberty" is and always has been defined as, along with several other nearly universal criteria, the right to marry a person of the opposite sex. Thus, the State is simply not, as the plaintiffs ask

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conclusion that the creation of a marriage relationship is a fundamental right in Colorado); Fabio v. Civil Service Commission of Pennsylvania, 414 A.2d 82 (Pa. 1980)(recognizing a right to privacy under the federal constitution that includes activities relating to marriage); In re Appeal of Alfie Coats, 849 A.2d 254, 257 (Pa. Super. 2004)(recognizing that, under the federal constitution, prisoners have a fundamental right to marry); In re Baby M., 109 N.J. 396, 447-49 (1988) (observing that "the rights of personal intimacy, of marriage, of sex, of family, of procreation" are fundamental rights protected by the state and federal state constitutions); and Boyton v. Kusper, 494 N.E.2d 135, 140 (Ill. 1986)(noting that the U.S. Supreme Court has recognized a fundamental right to marry under the U.S. Constitution).

this Court to conclude, "excluding" anyone from the institution of marriage. To the contrary, the State is merely: (a) continuing to recognize and define "marriage" as it always has been defined; and (b) even-handedly permitting all persons willing to enter into such a union to do so.

The plaintiffs fail to cite any sister court decision suggesting that there is a "right deeply rooted in this nation's history and tradition" to marry a person of the same sex, which is the precise issue here. Indeed, as is set forth infra, there is simply no basis for any such claim. The few trial court decisions of sister states that have held that the fundamental right to marriage includes the right to marry a person of the same gender ignore this vital component of constitutional analysis.

Under the logic necessarily adopted by these courts, every citizen of those states must have a fundamental right to marry anyone of his or her choosing. That would necessarily include not only a member of the same gender, but also a minor, any family member, a person already married to someone else, and, for that matter, multiple spouses of all of these categories. The plaintiffs can offer no explanation, much less historical or constitutional basis, for "broadly" defining the right to marriage beyond its traditional definition to include members of the same gender, while continuing to exclude from that definition any of these other presently excluded forms of unions. While, as with same-sex unions, the State believes that there are, in fact, compelling state interests for defining marriage as it does, it simply cannot be the case that the State constitution requires such a showing in any or all of these instances in light of the total absence of any historical or legal basis for re-defining the institution of marriage in the manner suggested by the plaintiffs here.

3. The Text Of The Connecticut Constitution Does Not Support Recognition Of A Fundamental Right To Same-Sex Marriage.

Notwithstanding the virtually unanimous view that there is no fundamental right to same-sex marriage under the federal constitution, and the multitude of state courts that have reached the same conclusion with regard to their own state constitutions, the plaintiffs claim that the language of the Connecticut constitution, specifically the "social compact clause" contained in Article First, § 1,[24] is broad and flexible enough to incorporate the right to marry a partner of one's choosing, including a same-sex partner. The plaintiffs, themselves, concede, however, as they must, that there is no explicit reference to such a right in the text of the Constitution. (See Plfs' Brief p. 10). Nevertheless, they contend that such an "unenumerated" right exists. In support of this assertion, they cite several cases that they claim stand for the general proposition that the Connecticut Supreme Court "has always viewed the text of § 1 as articulating broad principles of liberty." (See Plfs' Brief, p. 12).

Such a generalization of our Supreme Court's precedents – whether accurate or not – does nothing to advance the plaintiffs' textual argument under Geisler. More importantly, there is simply no reasonable way of reading the text of Article First, § 1 as a textual source for a "fundamental right" to marry when that "fundamental right" has been defined throughout the ages to concern marrying a person of the opposite sex. Thus, even if Article First, § 1 were deemed a textual source for the "fundamental right" to marry, there is quite clearly no reasonable

[24] Article first, § 1, states that: "All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community."

way of reading Article First, § 1 as being the textual source for a State constitutional right to marry someone of the same gender.

Plaintiffs, themselves, do not even press this issue in their brief. Instead (and without any analysis or legal citation), they simply conclude that "it is anomalous to think that . . . denial of [the right to marriage] 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." (See Plfs' Brief, p. 13). In addition to being a highly suspect and unsupportable historical claim (see infra), such a statement is ultimately beside the point for the purposes of this particular prong of the Geisler analysis. That is to say, whether the framers of the State Constitution would have found the State's longstanding definition of marriage as a union between one man and one woman "offensive" is, while a highly dubious proposition, ultimately irrelevant to the question of whether the actual text of Article First, § 1 is a source of any fundamental right to "marriage," or as the plaintiffs ask this Court to stretch, marriage between two people of the same gender.

Moreover, the claim that the "broad principles of liberty" contained within Article First, § 1 are, by themselves, an appropriate source of the "fundamental right" that the plaintiffs ask this Court to recognize is directly at odds with the Connecticut Supreme Court's decision in State v. Webb, 238 Conn. at 409. In Webb, the Supreme Court expressly held that the "social compact clause" contained within Article First, § 1, the very provision relied upon by the plaintiffs in support of their claim that there is an "unenumerated" fundamental right to same-sex marriage, does not constitute "a source of unenumerated rights under our constitutional scheme." Id.

Rather, "[u]nenumerated rights exist, if at all . . ., only if they are grounded in or derived from the constitutional text or Connecticut's unique historical record." Id. at 410.

As set forth above, and as the plaintiffs, themselves, essentially concede in their brief, nothing in the actual text of Article First, § 1 supports any claim that it is a source of any fundamental right to marriage generally, much less same-sex marriage. In addition, and as is set forth below, Connecticut's "unique historical record" in no way supports the conclusion that there is a State constitutional "fundamental right" to marry someone of the same gender.

4. Nothing In Connecticut's "Unique Historical Record" Supports The Claim That There Is A Fundamental Right To Marry Someone Of The Same Sex.

Since ancient times, the institution of "marriage" has referred to the union of a man and a woman. See Adams v. Howerton, 486 F. Supp. 119, 1123 (C.D. Cal. 1980), aff'd, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982); Hyacinthe Ringrose, MARRIAGE AND DIVORCE LAWS OF THE WORLD 149 (1911); James Schouler, A TREATISE ON THE LAW OF HUSBAND AND WIFE § 14, at 23 (1882)(hereinafter "Schouler"); John Witte, Jr., The Goods and Goals of Marriage, 76 Notre Dame L. Rev. 1019, 1022-71 (2001) (discussing views of marriage from Greek and Roman times through this nation's early years). In addition to being limited to opposite sex couples, marriage at common law was subject to many of the same limitations that exist today. Schouler, supra §§ 14-15, at 23-26 (noting that at common law marriage was precluded based on, among other things, consanguinity, age, and being married to another person). Moreover, as is true today, at common law race was not a limitation on

marriage. Schouler, supra § 16, at 26-27 (explaining that racial limitations on marriage were largely regional and the product of the United States' system of slavery).[25]

The institution of marriage in Connecticut has been no different. As the Connecticut Appellate Court recently noted, "Connecticut has exercised the power to limit by law who may marry since the beginning of the colony." Rosengarten v. Downes, 71 Conn. App. at 388. Indeed, marriages in Connecticut developed out of the common law and have always been limited to opposite-sex unions. See id. at 384. At common law, the issue of who might marry was generally left to the ecclesiastical courts. Id. (citing 1 W. Blackstone, Commentaries on the Laws of England (5th ed. 1773), p. 453). "It is plain from a reading of Blackstone, which speaks of husband and wife, that by using terms like husband and wife or, its Norman French equivalent, baron and feme, the understanding of English common law was that marriage was a contract entered into by a man and a woman." Id. (citing Blackstone, pp. 453, 457).

The Connecticut Appellate Court has further noted that "Judge Swift, in his discussion of the common law of Connecticut regarding rights arising out of marital status, makes clear that this legal relation contemplated a contract made between a man and a woman." Id. (citing 1 Z. Swift, A Digest of the Laws of the State of Connecticut (1822), p.18). "This is also clear when one reads Judge Swift's discussion of limitations on marriage within certain degrees of kindred,

[25] For this reason, the claim that, prior to the U.S. Supreme Court's decision in Loving, there was no "historical" basis for a right to marry someone of a different race is arguably inaccurate. Moreover, plaintiffs' claim that, in Loving, itself, the U.S. Supreme Court did not determine whether there was a fundamental right to mixed-race marriages (see Plfs' Brief at 18) is contradicted by the very holding of that case. In Loving, the Court expressly held that "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." Loving, 388 U.S. at 12. (Emphasis added).

which are prohibited on the ground 'that such incestuous connection is repugnant to the law of nature.'" Id. (quoting Swift, p. 19). The examples Swift gives "are all of men then unable to marry women of various degrees of kindred." Id. (citing Swift, p. 19).[26]

These common law principles were codified into statutes early in the State's history and remain today. "In the Revision of 1702, the General Assembly of this State prohibited marriages between those within certain degrees of kinship, and also the celebration of marriages without publication of banns, and in case of minors, without the consent of the parent or guardian, or before one not having due authority." Gould v. Gould, 78 Conn. 242, 246, 61 A. 604 (1905). "In 1717 bigamous marriages were declared to be null and void, and those between parties under the age of consent." Id.

The 1808 Public Statute Laws of the State of Connecticut continued to reflect these and other provisions that punished and declared "null and void" numerous prohibited forms of marital relations, including: marriages between a "man" and "woman" within certain degrees of kindred; marriages to minors or marriages performed without the consent of parents or legal guardians; and bigamous marriages. See Connecticut Statutes of 1808, Title CV, Chap. 1, §§ 3-12. Moreover, and as noted by the Appellate Court in Rosengarten, many of the statutory provisions governing marriages early in Connecticut's history, particularly the provisions

[26] Swift's earlier treatise, cited by the plaintiffs in their brief (see Plfs' Brief at 25), also contains numerous references to "husband and wife" and the "connexion between the sexes," further illustrating the common understanding of marriage as the union of a man and a woman during this period. See 1 Zephaniah Swift, A System of the Law of the State of Connecticut, 183-190 (1795); see also Tapping Reeve, The Law of Baron and Femme (1816) Chapter XVI (discussing, in detail, who could marry under Connecticut law).

prohibiting incestuous marriages, contained numerous references to "man" and "woman" and "husband" and "wife," making it crystal clear that marriages during the early history of this State were not only regulated by the State in numerous ways, but defined as unions between a "man" and a "woman." See Connecticut Statutes of 1808, Title CV, Chap. 1, §§ 3-12; see also Acts and Laws of the State of Connecticut, 1784, pages 135-38.

Today, many of these same restrictions continue to apply, in varying degrees, and the marriage statutes, generally, continue to speak of marriage in gender specific terms. See, e.g., Conn. Gen. Stat. § 46b-21 (prohibiting and declaring void incestuous marriages); Conn. Gen. Stat. §§ 46b-29 & 46b-30 (prohibiting marriages to wards and minors without legal consent of conservator, parent or legal guardian); Conn. Gen. Stat. §§ 53a-190 & 53a-191 (making it a class D felony to marry more than one person or a person within the degrees of kindred specified in Conn. Gen. Stat. § 46b-21); Conn. Gen. Stat. § 46b-25 (referring to "bride" and "groom"); Conn. Gen. Stat. § 46b-36 & 37(referring to "husband" and "wife"); Conn. Gen. Stat. § 46a-81r (1991) (explicitly providing that nothing in various statutes involving human rights and opportunities "shall be deemed to authorize the recognition of or the right of marriage between persons of the same sex"); Conn. Gen. Stat. § 45a-727a(4)(2000)("It is further found that the current public policy of the state of Connecticut is now limited to a marriage between a man and a woman."); see also Public Act 05-10, § 14 (explicitly defining marriage "as the union of one man and one woman").

Thus, nothing in Connecticut's "unique historical record" supports the claim that there is a "broad fundamental right" under the State constitution that includes the right to marry someone

of the same gender. Plaintiffs fail to cite any authorities in their brief that suggest or support a contrary view. Instead, the entire section of the plaintiffs' brief devoted to the "historical context" of marriage in Connecticut aims at establishing the importance of marriage, generally, since the adoption of the State constitution in 1818 through the present. Not surprisingly, in light of the indisputable historical record in Connecticut and elsewhere, the plaintiffs do not even attempt to demonstrate that there is any historical support for recognizing a "fundamental right" to marry a person of the same gender. Indeed, they explicitly concede that the opposite is true. (See Plfs' Brief at p. 22) ("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.")

Nevertheless, the plaintiffs point to the fact that the marriage laws in Connecticut have changed and evolved throughout history in ways that the framers of the Connecticut constitution could not have anticipated. Even if one were to accept that premise as true, however, it is hardly support for what is required under this particular prong of the Geisler analysis – demonstrating that the State's "unique historical record" supports recognition of the particular fundamental right asserted. See Webb, 238 Conn. at n.20. To the contrary, in light of the clear and unambiguous historical record surrounding the institution of marriage in Connecticut, it simply cannot be said that the framers would have viewed the right to marry someone of the same gender to be so "fundamental" as to not require "explicit enumeration." 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").[27] In short, nothing in the State's "unique historical record" supports the claim that the "fundamental right" to marry under the Connecticut constitution includes the right to marry someone of the same gender.

5. Connecticut Supreme And Appellate Court Precedent Counsels Against The Existence Of A Fundamental Right To Same-Sex Marriage.

None of the decisions from the Connecticut Supreme and Appellate Court support the claim that there is a "fundamental right" to marriage under the Connecticut constitution that includes the right to marry someone of the same gender. If anything, the sparse case law that exists on the general topic of same-sex relations suggests that is does not.

In Rosengarten v. Downes, 71 Conn. App. 372 (2002), the only appellate level decision in Connecticut to have even indirectly addressed the issue of whether same-sex relationships in Connecticut warrant any recognized legal status, the Connecticut Appellate Court held that Connecticut courts lacked subject matter jurisdiction to dissolve a Vermont civil union.[28] In so holding, the Appellate Court rejected the plaintiff's claim that Conn. Gen. Stat. § 46b-1(17) could be interpreted to have granted Connecticut courts the power to recognize and, thus,

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[27] It also is worth noting that virtually all of the examples the plaintiffs offer to illustrate that the institution of marriage has "evolved" over time in Connecticut came about through legislative enactments and/or Constitutional amendments (presumably reflecting changes in the population's values and attitudes about broader underlying societal issues) – not judicial decisions recognizing new fundamental rights that would, by definition, fundamentally change the most basic cornerstones of the institution, in direct contravention of the will of the populace, as expressed through the legislature.

[28] Rosengarten was decided prior to the passage of Public Act 05-10.

dissolve same-sex civil unions entered in another state.[29] Among other things, the Appellate Court held that "the provisions of § 46b-1(17) in relationship with existing legislation and common law principles" did not support any claim that recognition of, and the corresponding power to dissolve, same-sex civil unions "was contemplated as a family relations matter by our legislature." Rosengarten, 71 Conn. App. at 383.

In reaching that conclusion, the Appellate Court noted that: (a) the General Assembly had, by virtue of the passage of Conn. Gen. Stat. §§ 45a-727b and 46a-81r, expressly stated "that Connecticut does not endorse or authorize, respectively, civil unions or any other relationship between unmarried persons;" and (b) as is discussed in greater detail in the preceding section, the history and customs of Connecticut, as reflected in the common law principles from which the present-day institution of marriage arose, defined marriage as a union between a man and a woman. See id. at 383-84.

The Appellate Court also rejected the plaintiffs' claim that Connecticut's public policy favored "recognizing the right of homosexuals to enter into a marriage-like relationship and the corresponding right to dissolve such relationships in Connecticut courts." Id. at 387. In so doing, the court noted that nothing in Connecticut's customs and traditions evinced a public policy favoring formal recognition of such relationships. In addition to the statutory sections the Appellate Court found to be contrary to any evidence of a public policy favoring recognition of

[29] Conn. Gen. Stat. § 46b-1(17) provides that "[m]atters within the jurisdiction of the Superior Court deemed to be family relations matters shall be matters affecting or involving: . . . (17) all such other matters within the jurisdiction of the Superior Court concerning children or family relations as may be determined by the judges of said court."

such relationships, see Conn. Gen. Stat. § 46a-81r, the Appellate Court also held that "[i]t does not constitute invidious discrimination simply because a state places some restraints on who may marry." Id. at 388. "For example, some societies allow polygamous marriage but Connecticut does not allow such marriages. . . . Connecticut has exercised the power to limit by law who may marry since the beginning of the colony." Id. (Emphasis added).

Thus, although the Connecticut Supreme and Appellate Court have not directly addressed the issue of whether the "fundamental right" to marry under the Connecticut constitution includes the right to marry someone of the same gender, the Appellate Court has clearly recognized that: (a) the State, and in particular the legislature, can and has exercised its power to define and regulate the institution of marriage since the inception of the Connecticut colony; (b) even at common law, marriage has always been defined as the union of a man and a woman; and (c) the State may place some restraints on who may marry without engaging in "invidious discrimination." Id. at 388.

Plaintiffs have failed to cite any cases in their brief that support, much less compel, a contrary view. Instead, the plaintiffs cite the Connecticut Supreme Court's decision in Gould v. Gould, 78 Conn. 242 (1905), for the general proposition that "marriage" is a protected right under the equal protection provisions of the Connecticut constitution. Neither Gould nor any of the other Connecticut decisions cited throughout plaintiffs' brief, however, even remotely supports any claim that the equal protection provisions of the Connecticut constitution vest Connecticut citizens with the "fundamental right" to marry someone of the same gender. Nor do those cases support the more general premise that underlies that claim – that there is a "broad"

fundamental right to marry under the Connecticut constitution that entitles each Connecticut citizens to marry anyone of his or her choosing.

To the contrary, and notwithstanding plaintiffs' selective quotations of passages from the Supreme Court's decision in Gould, that decision did not (expressly or impliedly) recognize any "fundamental right" at all to marriage under the Connecticut constitution, much less the "broad" right to marriage proposed by plaintiffs here. Although plaintiffs correctly note that, in Gould, the Supreme Court stated that the Preamble and Art. First, § 1 of the Connecticut constitution guarantees to its people equality under the law in the rights to "life, liberty and the pursuit of happiness," citing State v. Conlon, 65 Conn. 478, 489-91, they inaccurately claim that "[t]he Court then stated simply that '[o]ne of these is the right to contract marriage.'" (See Plfs' Brief at 13) (quoting Gould, 78 Conn. at 244).

The plaintiffs' quotation of this passage from Gould does not include the rest of that sentence or the sentences that follow, which state (in the same breath) that marriage "is a right that can only be exercised under such reasonable conditions as the legislature may see fit to impose. It is not possessed by those below a certain age. It is denied to those who stand within certain degrees of kinship. The mode of celebrating it is prescribed in strict and exclusive terms." See Gould, 78 Conn. at 244 (emphasis added). Moreover, in upholding the challenged restriction on marriage in that case, the Supreme Court did not apply "strict scrutiny" or any other equivalent standard to determine whether the legislature had any "compelling" interest in preventing the kinds of marriages prohibited by the legislation at issue in that case or that the restriction, itself, was narrowly tailored to serve that interest. See id.

Thus, far from recognizing a "broad fundamental right" to marriage like that proposed by plaintiffs here, the Supreme Court's decision in Gould, while recognizing a "right" to "contract" marriage under the State constitution, did not even declare such a right to be "fundamental" for purposes of constitutional analysis, much less suggest that the State is required, in all instances, to demonstrate a "compelling state interest" for each and every law that might arguably be perceived by one or more citizens as an impediment to the ability to marry someone of that person's choosing. To the contrary, the Supreme Court expressly recognized that "it is a right that can only be exercised under such reasonable conditions as the legislature may see fit to impose." Id. at 604. In short, nothing in Gould, which ultimately upheld the constitutionality of a state statute prohibiting epileptic men from marrying women under the age of 45 without applying anything even approaching the equivalent of strict scrutiny, suggests that the Connecticut Supreme Court has recognized the "broad" fundamental right to marry, and the plaintiffs' reliance on Gould is therefore misplaced in building their state constitutional argument.

6. Economic And Sociological Considerations Do Not Support Plaintiffs' Claim That There Is A Fundamental Right To Same-Sex Marriage.

The final Geisler factor requires the Court to assess whether "contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies," see City Recycling, Inc. v. State, 257 Conn. 429, n.12 (2001) (citing State v. Diaz, 226 Conn. 514, 530-31 (1993)), support the conclusion that the Connecticut constitution affords broader protections than its federal counterpart. Although Connecticut is

and has been progressive in protecting and promoting equal rights for all of its citizens, regardless of sexual orientation, those legislative policies do not compel the conclusion that the Connecticut constitution must be interpreted to permit marriages between two people of the same gender.

As set forth above, Connecticut has been a leading pioneer in forging new laws designed to ensure fair and equal treatment for its gay and lesbian citizens and to protect them against discrimination in all of its invidious forms. Most recently, of course, Connecticut became the first state in the nation to voluntarily pass a civil union law, providing virtually all of the benefits of marriage to same-sex couples. In light of the passage of that legislation, plaintiffs cannot possibly claim that the State's failure to recognize same-sex marriages is the cause of any economic disadvantages that would support, much less compel, the conclusion that there should be a "fundamental right" to same-sex marriage. Indeed, as explained above, with the passage of the new civil union legislation, same-sex couples are now entitled to virtually all of the advantages state law affords to married couples. See 2005 Conn. Pub. Acts No. 05-10, § 14.[30]

Moreover, no "contemporary sociological norms," see State v. Ross, 269 Conn. 213, 257-58 (2004), support the claim that there is a "fundamental right" to same-sex marriage under the

[30] While same-sex couples that elect to enter civil unions in Connecticut may not be entitled to all of the economic benefits afforded under federal law, that simply is not a consequence of Connecticut's longstanding definition of marriage, under state law, as a union between one man and one woman. Rather, to the extent any same-sex couples living in Connecticut experience economic disadvantages under federal law, such disadvantages are the result of the Defense of Marriage Act (DOMA), which, by its very terms, prevents same-sex couples from receiving the federal benefits of marriage afforded only to same-sex married couples, regardless of whether such same-sex couples are deemed "married" under the laws of any particular state. See 1 U.S.C. § 7.

Connecticut constitution. Notwithstanding the passage of Public Act No. 05-10, it continues to be the clear public policy of this State to continue to define "marriage" as the union of one man and one woman. See Section II.B.4, supra; see also Public Act No. 05-10, § 14. Indeed, plaintiffs do not even argue in their brief, let alone proffer reliable evidence, suggesting that current sociological norms compel the conclusion that there is now a "fundamental" right to same-sex marriage under any provision of the Connecticut constitution.

Lastly, none of the personal and subjective "intangible" harms the plaintiffs claim they will suffer as a result of the passage of the civil union law support the claim that the "fundamental" right to marriage under our State constitution is "broad" enough to include the right to marry someone of the same gender. Although plaintiffs have submitted affidavits detailing their own personal experiences and subjective feelings toward the civil union law, those personal narratives, while undoubtedly true and sympathetic accounts of their own particular experiences as homosexuals in today's society, are not the kinds of scientific, sociological expert evidence courts have typically relied upon as informing the scope and application of an asserted constitutional right, under Geisler or under the federal constitution. Cf. Brown v. Board of Education, 347 U.S. 483, 495 & n.11 (1954) (noting that "[w]hatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, [the finding of harm to public school students based solely on physical segregation] is amply supported by modern authority"

and citing an extensive compilation of psychological literature supporting that very specific point).[31]

Nor does the civil union law, itself, which actually creates and extends benefits where none previously existed, resemble in any way the kind of impermissible classification or physical barrier that courts have struck down as unconstitutional. Id. at 494 (finding that physically segregating children "from others of similar age and qualifications because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"); cf. Lawrence, 539 U.S. at 575 (finding that laws criminalizing private, consensual intimacy between adults of the same gender impose a "stigma" on those individuals).

In sum, far from supporting the plaintiffs' claims, economic and sociological considerations, like all of the other Geisler factors, compel the conclusion that the Connecticut constitution does not protect a "fundamental right" to marry a person of the same sex.

C. Connecticut's Marriage Laws Do Not Discriminate Based On Gender.

Connecticut's marriage statutes not only do not intrude on a fundamental right, but also do not discriminate against a "suspect class."

The U.S. Supreme Court has defined a "suspect class" as a class of persons "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to

[31] Indeed, in light of the fact that Public Act 05-10 only became effective on October 1, 2005, it is doubtful whether any reliable, sociological evidence could be proffered to this Court, by these plaintiffs or anyone else, concerning the alleged stigmas the plaintiffs speculate they will experience as a result of entering civil unions, as opposed to "marriages."

such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976). Few classifications meet this standard. Although the Supreme Court has held that classifications based on race or national origin are "suspect" and subject to strict scrutiny, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1986), it has concluded that gender classifications are merely "quasi-suspect," entitled only to intermediate scrutiny, Craig v. Boren, 429 U.S. 190 (1976), and has not recognized sexual orientation classifications as suspect at all. See Romer v. Evans, 517 U.S. 620 (1996)(applying rational basis review to a law classifying on the basis of sexual orientation). As discussed below, the marriage laws at issue in the present case do not create "suspect," or even "quasi-suspect," classifications of any kind.

1. Federal And Sister State Courts Have Overwhelmingly Held That Laws Barring Same-Sex Marriage Do Not Discriminate Based On Gender.

Although the plaintiffs contend that Connecticut's marriage laws classify based on gender because the sole reason that an individual may not marry a same-sex partner is because of his or her gender, the federal and sister state courts that have considered the issue have overwhelmingly concluded that laws barring same-sex marriage do not involve gender based classifications.

As the Vermont Supreme Court has pointed out, "[a]ll of the [U.S. Supreme Court's] seminal sex-discrimination decisions . . . have invalidated statutes that single out men or women ***as a discrete class*** for unequal treatment." Baker v. Vermont, 744 A.2d 864, 880 n. 13 (Vt. 1999)(emphasis added); see also Smelt v. Orange, 374 F. Supp.2d 861, 877 (C.D. Cal.

2005)("Supreme Court precedent has only found sex-based classifications in laws that have a disparate impact on one sex or the other"). Thus, for example, U.S. v. Virginia, 518 U.S. 515, 555-556 (1996), repudiated a statute that precluded women from attending Virginia Military Institute, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982), invalidated an admission policy that excluded males from attending a state-supported nursing school, Craig v. Boren, 429 U.S. 190, 204 (1976), invalidated a statute that allowed women to purchase intoxicating beer at a younger age than men, and Frontiero v. Richardson, 411 U.S. 677, 690 (1973), struck down a statute that imposed more onerous requirements upon female members of the armed services who sought to claim spouses as dependants than on male servicemen. In each case, the invalidated statute favored one sex, as a class, over the other.

In contrast, Connecticut's laws limiting marriage to one man and one woman "do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex." Baker, 744 A.2d at 880 n. 13. In this regard, Connecticut's marriage laws are similar to the federal Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), and laws in every other state that bar same-sex marriage. As the overwhelming majority of federal and state courts that have considered the issue have concluded, because such laws apply equally to men and women, they do not classify based on gender. See Smelt, 374 F. Supp. 2d at 877 (federal DOMA is not a sex-based classification because "it does not treat men and women differently"); Wilson, 354 F. Supp. 2d at 1307 ("DOMA does not discriminate on the basis of sex because it treats women and men equally"); Seymour v. Holcomb, 790 N.Y.S. 2d 858, 863 (2005)(New York's Domestic Relations Law is not based on gender because "[e]ach

sex is equally prohibited from precisely the same conduct, i.e., marriage to a person of the same sex"); Shields v. Madigan, 783 N.Y.S. 2d 270, 276 (N.Y. Supreme Ct., Rockland County, Oct. 18, 2004)("the classification at issue here is not one based upon gender because both males and females are similarly situated under the challenged statute in that they are authorized to marry only persons of the opposite sex); Samuels v. New York State Dept. of Health, No, 1967-04, slip op. at 3 (N.Y. Supreme Ct., Albany County, Dec. 7, 2004)(Plfs' App. at A-75)(New York Domestic Relations Law not a gender-based classification); In re Kandu, 315 B.R. 123, 143 (W.D. Wash. 2004)(federal DOMA is not a gender-based classification because it treats men and women equally and there is no evidence that its purpose was to discriminate against men or women as a class); Baker, 744 A.2d at 880; Dean v. District of Columbia, 653 A.2d 307, 363 n. 2 (D.C. App. 1995)(Steadman, J., concurring for majority). Even the majority in Goodridge, 798 N.E.2d at 961, on which plaintiffs rely, did not conclude that Massachusetts' prohibition on same-sex marriage was gender-based.

Despite the fact that Connecticut's marriage laws apply equally to both sexes, the plaintiffs argue that they nonetheless constitute gender-based classification based on the reasoning of two miscegenation cases, Loving v. Virginia, 388 U.S. 1 (1967), and Perez v. Lippold, 198 P.2d 17 (1948). In Loving, the Supreme Court struck down a Virginia statutory scheme barring interracial marriage between "any white person and colored person" on the grounds that it violated constitutional prohibitions against racial discrimination even though it affected both races equally. In so doing, however, the Court looked behind the superficial neutrality of the statutory scheme and found that it was enacted with invidious discriminatory

intent to maintain the pernicious doctrine of "White Supremacy." Loving, 388 U.S. at 11 and n.11.[32] Thus, although the laws were facially neutral, they had a discriminatory purpose to favor whites. Id.

In equal protection cases subsequent to Loving involving facially neutral laws, the Court has made clear that the test for determining whether a facially neutral statute discriminates on the basis of race, sex or other suspect or quasi-suspect classification is whether the law "**can be traced to a discriminatory purpose**." Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979)(emphasis added)(law granting hiring preference to veterans did not violate equal protection because it was not enacted for the purpose of discriminating against women). In the absence of a discriminatory purpose, even if the law has a disparate impact on a suspect class, there is no violation of equal protection. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265(1977)("[p]roof of racially discriminatory intent or purpose is *required* to show a violation of the Equal Protection Clause")(emphasis added).

In the present case, the plaintiffs have not argued, or presented any evidence, that Connecticut's facially neutral marriage laws were enacted for the purpose of discriminating against men or women as a class. In the absence of any such evidence, it must be concluded that such laws do not classify on the basis of gender. See Baker v. Vermont, 744 A.2d 864, 800 (Vt. 1999)("[t]he test to evaluate whether a facially gender-neutral statute discriminates on the basis

[32] In support of this conclusion, the Court noted that the statutory scheme prohibited all interracial marriage between whites and non-whites of any race, thereby preserving the purity of the white race, but did not prohibit interracial marriages among non-whites. Loving, 388 U.S. at 11 and n. 11.

of sex is whether the law 'can be traced to a discriminatory purpose.' The evidence does not demonstrate such a purpose" behind Vermont's marriage laws); In re Kandu, 315 B.R. 123, 143 (W.D. Wash. 2004)(federal DOMA does not classify based on gender because "[t]here is no evidence, from the voluminous legislative history or otherwise, that DOMA's purpose is to discriminate against men or women as a class").

2. Nothing In The Text Of The Connecticut Constitution Or Connecticut's Caselaw Supports The Plaintiffs' Argument That Connecticut's Marriage Laws Classify Based On Gender.

Notwithstanding the lack of federal or sister state support for the contention that Connecticut's marriage laws constitute gender-based classification, the plaintiffs argue that such classification must be found, and strict scrutiny applied, based on the text of Connecticut's constitution, article first, § 20, and Connecticut caselaw interpreting that provision. Contrary to the plaintiffs' claims, nothing in the text of the constitution or its judicial interpretation supports such a result.

Article first, § 20, of the Connecticut constitution states that: "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 or her civil or political rights because of religion, race, color, ancestry, national origin, *sex* or physical or mental disability." Conn. Const. art. first, § 1 (emphasis added). According to the plaintiffs, the fact that this language explicitly prohibits discrimination based on sex means that the framers intended to "make both sexes equal in the law" and eliminate all discrimination and segregation based on sex as a class. Plf's Brief pp. 29-30. The Connecticut marriage laws, however, as discussed above, do not treat the sexes unequally.

Connecticut law, like federal law, holds that a statute or policy that applies equally to men and women does not create a sex-based classification. For example, in State v. Kelley, 229 Conn. 557 (1994), the court considered whether an exception to the hearsay rule applicable to sexual assault cases created a gender-based classification that violated article 1, § 20. In concluding that it did not, the court reasoned that "[b]ecause the doctrine would apply equally to male and female victims, . . . it is not gender biased and, therefore, does not violate article 1, § 20, of the Connecticut constitution." Id. at 565.

Furthermore, under Connecticut law, as under federal law, a facially neutral law that has a disparate impact upon one gender or the other does not violate the equal protection clause in the absence of "intentional or purposeful discrimination." Wendt v. Wendt, 59 Conn. App. 656, 685, cert. denied, 255 Conn. 918 (2000); see also Golab v. New Britain, 205 Conn. 17, 26 (1987). In Wendt, the court held that a statute governing the distribution of marital property that was gender neutral on its face did not violate article first, § 20, in the absence of any evidence of de facto discrimination or, assuming there was a disparate impact, any evidence of intentional or purposeful discrimination.

Applying these principles to the present case compels the conclusion that Connecticut's marriage laws do not classify based on gender in violation of article first, § 20, of the Connecticut constitution. Not only are such laws facially neutral, but the plaintiffs have presented no evidence that they have a disparate impact on one gender or the other and that they

are intentionally discriminatory. Accordingly, the plaintiffs' claim that strict scrutiny should apply because the marriage laws classify based on gender fails as a matter of law.[33]

D. Connecticut's Marriage Laws Are Not Subject To Strict Scrutiny Based On Alleged Sexual Orientation Classification.

Connecticut's marriage laws not only do not classify based on gender, but also do not classify based on sexual orientation. Furthermore, even if this Court were to conclude that the marriages laws did classify based on sexual orientation, the appropriate standard of review would be rational basis, not strict scrutiny, because sexual orientation is not a suspect class.

1. Connecticut's Marriage Laws Do Not Classify Based On Sexual Orientation.

Nothing in the Connecticut marriage laws defining marriage as the union of one man and one woman explicitly prohibits homosexuals from marrying. Instead, such laws permit all individuals to marry someone of the opposite sex, with only limited exceptions not relevant here. As Massachusetts Supreme Court Justice Francis Spina observed in his dissenting opinion in Goodridge v. Dept. of Public Health, 798 N.E.2d 941, 975 (Mass. 2003)(Spina, J., dissenting), "[w]hether an individual chooses not to marry because of sexual orientation or any other reason should be of no concern to the court" and does not render such laws discriminatory.

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[33] Even if the marriage laws did classify based on gender, which they clearly do not, the plaintiffs have failed to establish that Connecticut law would require the application of strict scrutiny. Although Daly v. DelPonte, 225 Conn. 499, 514 (1993), on which plaintiffs rely, applied strict scrutiny to discrimination based on physical disability, it did not address the issue of sex discrimination or purport to establish the standard that would govern such a claim. The only other case that plaintiffs cite, Frazier v. Manson, 176 Conn. 638, 646 (1976), noted in dictum, citing federal law, that sex-based classifications have been identified as inherently suspect. The claim before the court, however, did not involve a sex-based classification or apply strict scrutiny. Accordingly, the precise level of scrutiny that Connecticut courts will apply to claims alleging sex discrimination in violation of article first, § 20, remains an open question.

Not only are the marriage laws neutral on their face, but the plaintiffs have not presented any evidence that the legislative intent of the marriage laws was to discriminate against gay and lesbian couples, rather than to codify the common law tradition of marriage as the union of one man and one woman. In the absence of any evidence of purposeful discrimination, there is no basis for concluding that the marriage laws involve sexual orientation classification. See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979).

2. Federal, Sister State, And Connecticut Caselaw Does Not Recognize Sexual Orientation As A Suspect Classification

Even if this Court were to conclude that Connecticut's marriage statutes classify individuals on the basis of sexual orientation, such classification would not involve a "suspect class" subject to heightened scrutiny.

To date, no federal appellate court has found sexual orientation to be a suspect class. On the contrary, the U.S. Supreme Court in Romer v. Evans, 517 U.S. 620, 632 (1996), applied rational basis review in considering an equal protection challenge to class-based legislation explicitly targeting "homosexual, lesbian or bisexual *orientation*, conduct, practices or relationships," id. at 624 (italics added), and Justice O'Connor, in her concurring opinion in Lawrence v. Texas, 539 U.S. 558, 579-584 (2003)(O'Connor, J., concurring), applied rational basis review in concluding that a Texas statute banning homosexual sodomy, which was "directed toward gay persons as a class," violated equal protection.[34]

[34] The majority in Lawrence applied a due process analysis, rather than an equal protection analysis, and did not consider whether homosexuality is a suspect classification. The majority

Similarly, every Circuit court to consider the issue has refused to treat homosexuals as a suspect class. See Lofton v. Secretary of Department of Children and Family, 358 F.3d 804, 818 (11th Cir. 2004), cert. denied, __ U.S. ___, 125 S. Ct. 869 (2005)(holding that law prohibiting homosexuals from adopting children did not involve a suspect class); Equal Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997), cert. denied, 525 U.S. 943 (1998); Holmes v. Cal. Army National Guard, 124 F.3d 1126 (9th Cir. 1997), cert. denied, 525 U.S. 1067 (1999); Richenberg v. Perry, 97 F.3d 256 (7th Cir. 1996), cert. denied, 522 U.S. 807 (1997); Thomasson v. Perry, 80 F.3d 915 (4th Cir.), cert. denied, 519 U.S. 948 (1996); Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); High Tech. Gays v. Defense Industry Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U. S 1004 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Town of Ball v. Rapides Parish Police Jury, 746 F.2d 1049 (5th Cir. 1984); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).[35]

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did, however, like Justice O'Connor, apply rational basis review rather than strict scrutiny in striking down the law.

[35] District Courts, including the Connecticut District Court, have likewise concluded that sexual orientation is not a suspect classification requiring strict scrutiny. See, e.g., Zavatsky v. Anderson, 130 F. Supp. 2d 349, 356 (D. Conn. 2001)("[h]omosexuals are not a suspect class, and, accordingly, they are entitled only to rational basis scrutiny"); Smelt v. County of Orange, 374 F. Supp. 2d 861, 874-875 (C.D. Cal. 2005); Wilson v. Ake, 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005); In re Kandu, 315 B.R. 123, 143-144 (W.D. Wash. 2004). The few district courts that have held otherwise have been overruled on appeal. See Equal Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994), rev'd, 128 F.3d 289 (6th Cir. 1997), cert. denied, 525 U.S. 943 (1998); Ben-Shalom v. Marsh, 703 F. Supp. 1372 (E.D. Wis.), rev'd, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U. S 1004 (1990); High Tech.

Sister state courts that have considered the issue have also concluded that sexual orientation is not a suspect classification and is not subject to strict scrutiny. See Seymour v. Holcomb, 790 N.Y.S. 2d 858, 863 (N.Y. Supreme Ct., Tompkins County, Feb. 23, 2005)(classification based on sexual orientation is subject to rational basis review); Samuels v. New York State Dept. of Health, No, 1967-04, slip op. at 3-4 (N.Y. Supreme Ct., Albany County, Dec. 7, 2004)(Plfs' App. at A-75); Anderson v. King County, No. 04-2-049644SEA, 2004 WL 1738447, *5 (Wash. Super. Ct. Aug. 4, 2004)(Plfs' App. at A-54)(given the "substantial weight of appellate authority" running contrary to recognizing homosexuality as a suspect classification, "this Court is not in a position to announce a potentially far-reaching new rule that homosexuality defines a suspect class for purposes of constitutional analysis"); Shields v. Madigan, 783 N.Y.S. 2d 270, 276 (N.Y. Supreme Ct., Rockland County, Oct. 18, 2004)("this court will not entertain the position advocated by petitioners that . . . homosexuals constitute a suspect class and that strict scrutiny analysis is applicable"). Significantly, the plaintiffs cite **no** Connecticut case that has held otherwise and the defendants are aware of none.

In sum, the overwhelming weight of existing authority on the issue holds that sexual orientation is not a suspect classification and is not subject to strict scrutiny.

Gays v. Defense Industry Sec. Clearance Office, 668 F. Supp. 1361 (N. D. Cal. 1987), rev'd, 895 F.2d 563 (9th Cir. 1990).

3. Nothing In Article First, §§ 1 And 20, Of The Connecticut Constitution Or The Decisions Of Connecticut's Courts Warrants Recognition Of Sexual Orientation As A Suspect Classification.

Notwithstanding the total lack of any Connecticut precedent treating sexual orientation as a suspect classification, the plaintiffs argue that such classifications "should" be suspect based on article first, §§ 1 and 20, of the Connecticut constitution. Plfs' Br. p. 33. In other words, the plaintiffs want this Court to do what the trial court in Anderson v. King County, No. 04-2-049644SEA, 2004 WL 1738447, *5 (Wash. Super. Ct. Aug. 4, 2004)(Plfs' App. at A-54), expressly refused to do – "announce a potentially far-reaching new rule that homosexuality defines a suspect class for purposes of constitutional analysis." Nothing in the text or intent of the Connecticut constitution warrants such a drastic departure from existing law.

The Connecticut Supreme Court has warned that "[i]n construing the contours of our state constitution, [the court] must 'exercise [its] authority ***with great restraint***' in reaching reasoned and principled results." Moore v. Ganim, 233 Conn. 557, 581 (1995)(emphasis added), quoting State v. Ross, 230 Conn. 183, 294 (1994). It has further cautioned that "[u]nenumerated rights exist, if at all, . . . only if they are grounded in or derived from the constitutional text or Connecticut's unique historical record." State v. Webb, 238 Conn. 389, 410 (1996). The court "must take care not to extend such rights beyond the contours that the historical record supports." Moore, 233 Conn. at 626-627 (Peters, C.J., concurring).

Looking first at the text of constitution, the language of article first, § 20, counsels against recognizing homosexuality as a new suspect class. As noted above, article first, § 20, explicitly prohibits discrimination based on eight specific characteristics -- "religion, race, color,

ancestry, national origin, sex or physical or mental disability." Conn. Const., art. first, § 20. Although the plaintiffs argue that this list is not necessarily exhaustive, the well-established principle of statutory construction "expressio unius est exclusio alterus," meaning "the expression of one thing is the exclusion of the other," Hatt v. Burlington Coat Factory, 263 Conn. 279, 295 (2003), supports the conclusion that the framers would have mentioned sexual orientation had they intended to include it in the list. The fact that they did not, and Connecticut's citizens have not amended the provision as was done to add sex and, later, physical and mental disability, is significant. See Conn. Const., amend. art. V (Nov. 27, 1974); Conn. Const., amend, art. XXI (Nov. 28, 1984).

Equally significant is the fact that the plaintiffs cite no case in which a Connecticut court has interpreted article first, § 20, to encompass additional classifications not mentioned therein. Indeed, to the contrary, in Moore v. Ganim, 233 Conn. 557 (1995), on which plaintiffs rely, the Connecticut Supreme Court *refused* to construe article first, § 20, to prohibit discrimination against a discrete group – the indigent – that was not explicitly mentioned. According to the court, it was "instructive that the framers created no special constitutional obligation to the indigent, nor did they provide any special constitutional protection for the indigent as a discrete group." Id. at 597; see also Romer v. Evans, 517 U.S. 620, 628 (1996)(noting that "[e]numeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply").

Furthermore, nothing in Connecticut's "unique historical record" supports the conclusion that article first, § 20, or any other provision of the state constitution, was intended to protect

sexual orientation as a suspect classification. Although Connecticut has made great strides in protecting the rights of gay and lesbian individuals, and the legislature made discrimination based on sexual orientation illegal in 1991, see 1991 Conn. Pub. Acts No. 91-58, these protections are of recent vintage and are found in legislative pronouncements, not in the text of the constitution or in precedents construing that text. In fact, even in adopting such progressive legislation, the General Assembly made clear that nothing in the anti-discrimination laws was to be construed "to establish sexual orientation as a specific and separate cultural classification in society." Conn. Gen. Stat. § 46a-81r(5).

Given this historical record, it is not possible to conclude that the framers intended article first, § 1, or article first, § 20, to protect sexual orientation as a suspect classification entitled to strict scrutiny. Furthermore, like the Connecticut Supreme Court in Moore v. Ganim, 233 Conn. 557, 614 (1995), this Court should be "extremely hesitant to choose sides in this policy debate and to enshrine one policy choice as a matter of constitutional law." Instead, any such significant change in the law is most appropriately left to the General Assembly. Id. at 615. Accordingly, if this Court concludes that the marriage laws classify based on sexual orientation, the appropriate standard of review is rational basis.

E. Connecticut's Marriage Laws Satisfy Rational Basis Review

Because Connecticut's marriage laws do not intrude on the exercise of a fundamental right or discriminate against a suspect class, the classifications they create between opposite-sex couples and same-sex couples "need only be rationally related to some legitimate government purpose in order to withstand an equal protection challenge." Ramos v. Town of Vernon, 254

Conn. 799, 829 (2000). Contrary to the plaintiffs' claims, Connecticut's marriage laws easily meet this standard.

1. The Rational Basis Standard Is "A Paradigm Of Judicial Restraint."

Under rational basis review, "[t]he test . . . is whether [the] court can ***conceive*** of a rational basis for sustaining the legislation; [it] need not have evidence that the legislature actually acted upon that basis." Donahue v. Town of Southington, 259 Conn. 783, 796 (2002)(italics in original, bold added). In other words:

> Equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge **if there is any reasonably conceivable state of facts that could provide a rational basis for the classification**.

Florestal v. Government Employees Insurance Co., 236 Conn. 299, 316 (1996)(emphasis added); Federal Communications Commission v. Beach Communications, Inc., 508 U.S. 307 (1993).

Because the legislature is not required to articulate its reasons for enacting a statute, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." D.A. Pincus & Co. v. Meehan, 235 Conn. 865, 877 (1996), quoting FCC v. Beach, 508 U.S. at 315. "In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation **unsupported by evidence or empirical data**." D. A. Pincus, 235 Conn. at 877; FCC, 508 U.S. at 315 (emphasis added). "Where there are plausible reasons for [the legislature's] action, [the Court's] inquiry is

at an end." FCC, 508 U.S. at 313. As the U.S. Supreme Court has emphasized, "[t]his standard of review is a paradigm of judicial restraint." Id.

Furthermore, "[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because, in practice, it results in some inequality." State v. Wright, 246 Conn. 132, 148 (1998), quoting Heller v. Doe, 509 U.S. 312, 321 (1993). "The problems of government are practical ones and may justify, if they do not require, rough accommodations." Id.

Applying these principles in the present case, there are multiple conceivable rational reasons why the legislature could have chosen to call the legal union of same-sex couples by a different name than the legal union of opposite-sex couples. Each is discussed below.

2. It Is Entirely Rational For Connecticut To Distinguish Between Civil Unions And Marriages For Administrative Purposes.

The first conceivable rational basis for calling same-sex unions by a different name than opposite-sex unions is to further the State's legitimate interest in facilitating the administration of state programs, and the implementation of state laws, that are interconnected with federal law. See Forbush v. Wallace, 341 F. Supp. 217, 222 (M.D. Ala. 1971)("[a]dministrative factors have often been considered rational bases for challenged statutes"), aff'd, 405 U.S. 970 (1972); Matthews v. Lucas, 427 U.S. 495, 509 (1976)(finding "administrative convenience" to be a rational basis for a statute).

Although Public Act 05-10 creates an entire statutory scheme pursuant to which same-sex couples may be united and obtain all the benefits of marriage under ***Connecticut*** law, the fact

remains that same-sex unions are not recognized by the ***federal*** government and most other states. See 1 U.S.C. § 7; 28 U.S.C. § 1738C. This means that same-sex couples are not recognized as married for purposes of a wide range of federal programs, including social security, medicare, federal housing and food stamp programs, federal income taxes, veterans' benefits, federal civilian and military benefits, the federal Family and Medical Leave Act, and other federal employment benefits. The result, as Justice Sosman of the Massachusetts Supreme Court has pointed out, is that States need to distinguish between same-sex couples and opposite-sex couples in administering federally-funded state programs for which federal laws establish the criteria for eligibility:

> [S]ame-sex "married" couples will not be treated as "married" for such purposes as Federal income taxation (both income taxes and, even more significantly, estate taxes), Social Security benefits (of any kind), immigration, or Federal programs providing health care or nursing home care benefits, to name but a few. And, where those Federal programs set the eligibility requirements for many of our federally funded State programs, those corresponding State programs will not be allowed to treat same-sex couples as married either. . . . **State officials -- not just Federal officials – will, of necessity, have to differentiate between same-sex and opposite-sex couples for all of these State programs**.

Opinion of the Justices to the Senate, 802 N.E. 2d 565, 574-575 (Mass. 2004)(Sosman, J., dissenting)(emphasis added). To differentiate between same-sex and opposite-sex couples in carrying out its administrative responsibilities, the legislature rationally chose to use two different names for the two separate statutory schemes by which such couples are united.

Not only do state officials have to distinguish between same-sex and opposite-sex couples in administering federally-funded state programs, but, as Justice Sosman observes, it is

also entirely possible that the state legislature will want or need to make specific modifications to state law, applicable only to same-sex couples, to address confusion or inequities in areas in which state and federal law overlap. For example, certain state tax laws are based on an individual's filing status under federal law. In order to provide a same-sex couple, which must file as single individuals under federal law, with the same rights and obligations as a married couple under state law, the State may want to make statutory or regulatory changes to its current tax laws that are addressed specifically to same-sex couples. It would be entirely rational for the legislature to adopt a different name for same-sex unions than for opposite-sex union in order to facilitate such changes.

Furthermore, the fact that most other states will not recognize same-sex unions of any kind, and thus will not enforce the rights and obligations of a same-sex union entered into in Connecticut, means that a same-sex couple that enters into a civil union in Connecticut does not acquire all of the same rights and obligations as a married couple. If the same-sex couple moves out of Connecticut to a State that does not recognize their union, all of the rights and obligations that attend their union can effectively be voided. See Opinion of the Justices to the Senate, 802 N.E. 2d 565, 575 (Mass. 2004)(Sosman, J., dissenting). Thus, as a practical matter, notwithstanding Connecticut law, the rights and obligations associated with a same-sex union are not truly the same as those associated with a marriage of opposite-sex individuals.

Given this situation, in which (1) the rights and obligations of same-sex couples are not the same as those of opposite-sex couples under federal law or the laws of other states; (2) state officials will have to differentiate between same-sex and opposite-sex couples in administering

federally-funded State programs; and (3) legislative changes addressed specifically to same-sex couples may need to be made to state laws that are based on federal law, it is eminently rational for the legislature to have chosen a different name for the newly statutorily-created legal union of same-sex couples than for the long-established legal union of opposite-sex couples.

3. It Is Rational For The State To Promote Consistency In The Law Of This State And Uniformity With The Law Of Other Jurisdictions By Defining "Marriage" As The Union Of One Man And One Woman.

Second, Connecticut has a legitimate state interest in promoting uniformity and consistency in the law by choosing a name other than "marriage" for same-sex unions because "marriage" historically has been, and still is, defined in the law of this and virtually every other State as the union of a man and a woman. See footnote 5, supra.

State and federal courts have long recognized that States have a legitimate interest in promoting uniformity and consistency in the law and have upheld the rationality of policies that seek to further that interest. For example, in Forbush v. Wallace, 341 F. Supp. 217, 222 (M.D. Ala. 1971), aff'd, 405 U.S. 970 (1972), the court applied rational basis review and upheld the constitutionality of an Alabama common law rule requiring a wife to take her husband's surname upon marriage because it is "a tradition extending back to the heritage of most western civilizations" and "[u]niformity among the several states in this area is important." See also Lee v. China Airlines, 669 F. Supp. 979 (C.D. Cal. 1987)(policy intended to achieve uniformity in the law is rational).

In passing the new civil union legislation, the Connecticut legislature, on its own volition, elected to extend the tangible benefits of marriage to a relationship that had not heretofore been

formally recognized in the State or otherwise afforded any privileged status – a relationship between two people of the same gender. It simply cannot be deemed "irrational" for the legislature, while electing to extend new rights to same-sex relationships, to describe such relationships as "civil unions" instead of "marriages." As set forth at length in section II. B. 4 above, "marriage" is and always has been defined by this and nearly every other State as a union between two members of the opposite sex. Given this uniform, nationwide practice, and its ancient roots, it is by no means "irrational" for the State to continue to refer to opposite sex relationships, and only opposite sex relationships, as "marriages." Nor should it be deemed constitutionally impermissible for the legislature to extend the tangible benefits of marriage to relationships that have never before been called "marriages" merely because, in so doing, the legislature elected to use some other term to describe the relationships to which the newly created statutory rights attach.

Justice O'Connor made this point in her concurring opinion in Lawrence, 539 U.S. at 585, in which she observed that "[u]nlike the moral disapproval of same-sex relations – the asserted state interest in [Lawrence] – other reasons exist to promote the institution of marriage beyond mere disapproval of an excluded group." According to Justice O'Connor, "preserving the traditional institution of marriage," is, itself, a "legitimate state interest." Id. There is no reason to conclude otherwise in the present case.

4. It Is Rational For Connecticut To Define Marriage As The Union Of Opposite-Sex Couples Because That Is The Manner In Which The Federal Government Defines Marriage.

A third conceivable rational basis for Connecticut's decision to define marriage as the union of one man and one woman is that the federal government defines marriage that way and the federal definition has been upheld in the face of multiple constitutional challenges.

As noted earlier, the federal Defense of Marriage Act, 1 U.S.C. § 7, states that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." Although there have been multiple challenges to this Act, the federal courts have consistently upheld its constitutionality. See, e.g., Smelt v. Orange County, 375 F. Supp.2d 861 (C.D. Cal. 2005)(federal Defense of Marriage Act does not violate the federal due process or equal protection guarantees of the Fifth Amendment); Wilson v. Ake, 354 F. Supp.2d 1298 (M.D. Fla. 2005)(federal Defense of Marriage Act does not violate the federal due process, equal protection, full faith and credit, privileges and immunity, or commerce clauses); In re Kandu, 315 B.R. 123 (W.D. Wash. 2004)(federal Defense of Marriage Act does not violate the principles of comity or the Fourth, Fifth, or Tenth Amendments)**.** Given the existence of the federal law, and the lack of any successful constitutional challenge, it was not irrational for Connecticut, in adopting Public Act 05-10, to include language modeled on the federal law limiting marriage to the union of one man and one woman.

5. It Is Rational For The Legislature To Act Incrementally In Seeking To Provide Equal Rights For Same-Sex Couples.

A fourth conceivable rational basis for using different names for same-sex unions and opposite-sex unions is that the legislature chose to act incrementally in furthering the State's legitimate interest in granting equal rights to same-sex couples.

It is well-established that "[t]he Equal Protection Clause allows the State to regulate 'one step at a time, addressing itself to the phase of the problem which seems most acute.'" Clements v. Fashing, 457 U.S. 957, 969 (1982), quoting Williamson v. Lee Optical Co., 348 U.S. at 489; see also F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 316 (1993). This means that the State is not required to "choose between attacking every aspect of a problem or not attacking the problem at all." Dandridge v. Williams, 397 U.S. 471, 487 (1970). Instead, it "must be allowed leeway to approach a perceived problem incrementally." Beach Communications, 508 U.S. at 316.

The Superior Court of New Jersey in Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114 at * 27 (N.J. Super. L., Nov. 5, 2003)(Defs' App. at A- 29), aff'd, 875 A.2d 259 (N.J. App. Div. 2005), applied this principle in dismissing an equal protection challenge to New Jersey's marriage laws. As explained by the court, "[i]t is entirely reasonable for the Legislature to enact legislative changes to protect same-sex couples without disturbing the marriage statute. Impatience with the scope or pace of change is an insufficient basis upon which to justify the judicial creation of a new constitutional right." Id. at *27.

The same is true in the present case. Because the General Assembly's decision to grant same-sex couples all the rights and benefits of marriage was an entirely reasonable -- and enormous -- step towards ensuring equal rights for same-sex couples, the fact that the General Assembly chose not to take the additional step of calling the union that it created a "marriage" does not constitute an equal protection violation.

Indeed, had the legislature chosen to extend marriage to same-sex couples, Public Act 05-10 probably would not have passed. As is abundantly clear from the legislative history of Public Act 05-10, many legislators held strong personal beliefs, or had constituents who held strong personal beliefs, about the fundamental nature of marriage and simply would not have voted for Public Act 05-10 if it had called the union between same-sex couples a "marriage." Senator Cappiello explained this sentiment as follows when he introduced an amendment to define marriage as the union of one man and one woman:

> 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 think there are differences between marriage and civil unions, even if they are just cultural and social differences, in what the word marriage entails. . . . And I think that there are people in this Chamber on both sides of the aisle, and people throughout this state have struggled with this issue, but also believe, even though the rights should be granted to same sex couples, that marriage should be between one man and one woman. And again, I know some people will be surprised by this comment, but I want to vote for this bill. I want to vote for civil unions.

48 Conn. S. Proc., pt. 4, 2005 Sess. 1044-1045 (April 6, 2005)(remarks of Senator Cappiello)(Defs' App. at A-57).

Senator Nickerson felt the same way, indicating that he would only vote for Public Act 05-10 if it were amended to make clear that it was not changing the state policy defining marriage as the union of one man and one woman. 48 Conn. S. Proc.. pt. 4, 2005 Sess. 1055 (April 6, 2005)(remarks of Senator Nickerson)(Defs' App. at A-59). Representative Ward stated that he was inclined to support a civil union bill and disinclined to support a gay marriage bill. 48 Conn. H. R. Proc., pt. 7, 2005 Sess. 1998 (April 13, 2005)(remarks of Rep. Ward)(Defs' App. at A-62). And Representative Lawlor noted that it was the "swing voters" who were "open to civil unions, [but] not supporting same-sex marriage," who were "driving the decision on this issue." 48 Conn. H. R. Proc., pt. 7, 2005 Sess. 1901 (April 13, 2005)(remarks of Rep. Lawlor)(Defs' App. at A-60). See also id. at 1922 (remarks of Rep. Cafero)(Defs' App. at A-61)(explaining that he believed that a marriage was a union between one man and one woman, but that he was willing to support civil unions because he believed that same-sex couples in a long-term committed relationship deserved rights). Faced with the stark reality that Public Act 05-10 would likely not pass if it sanctioned same-sex marriage, it was entirely rational for the General Assembly to distinguish between civil unions and marriage, and to create separate statutory schemes for each.

In sum, given the State's multiple rational, and indeed compelling,[36] reasons for limiting "marriage" to opposite sex couples, the plaintiffs have failed to meet their heavy burden of

[36] Although the State's marriage laws need only satisfy rational basis review, the interests discussed herein that justify the State's use of the term "civil union" rather than "marriage" for same-sex relationships would also satisfy strict scrutiny because they are not merely legitimate, but compelling, and the State's laws are narrowly tailored to serve those interests.

establishing that Connecticut's marriage laws violate article first, §§ 1 and 20, of the Connecticut constitution "beyond a reasonable doubt." See State v. Long, 268 Conn. 508, 521 (2004). Accordingly, the plaintiffs' equal protection claim fails as a matter of law.

III. CONNECTICUT'S MARRIAGE LAWS DO NOT VIOLATE SUBSTANTIVE DUE PROCESS

Plaintiffs also claim that the due process provisions of the Connecticut constitution, Article First, §§ 8 and 10, guarantee the citizens of this State a "broad" fundamental right to marry, that includes the right to marry someone of the same gender. For substantially the same reasons that there is no such right under the "social compact clause" contained in Article First, § 1, see Section II. B. 3, supra, this claim has no merit.

"The analytical framework for reviewing substantive due process claims is well-established." Hammond v. Commissioner of Correction, 259 Conn. 855, 888 (2002):

> If the petitioner can demonstrate that [his claim] implicates a fundamental right, [the court] must apply strict scrutiny to that statutory provision and require the state to show that the denial of [that claim] furthers a compelling state interest. . . . If, however, the petitioner's claim does not implicate a fundamental right, [the court] review[s] it under the rational basis test . . . The state must show only that the law is not arbitrary or capricious, that is, that it bears a reasonable relation to some legitimate state purpose.

Id. at 888.

While the plaintiffs correctly observe that "[o]ur substantive due process case law under the state constitution . . . establishes that certain fundamental rights are protected," see Ramos, 254 Conn. at 835 n.31, nothing in the text of the due process provisions of the State

constitution[37] or the State's "unique historical record," see Webb, 238 Conn. at 410, supports the claim that they are a source of any "fundamental right" to marry someone of the same gender. See Section II. B, supra; see also 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").

The Connecticut Supreme Court has held that, while not dispositive, the existence of a right recognized at common law is the "starting point" for determining whether a right is protected under Article First, § 10. Ramos, 254 Conn. at 838-39. As set forth supra, marriages at common law were: (a) clearly regulated and defined by the State in numerous ways; and (b) generally spoken of as the "connexion" between "man" and "woman" and "husband" and "wife" and "the sexes." See Section II. B. 4, supra. Indeed, and as the plaintiffs, themselves, concede ". . . the framers would not have contemplated marriage by two people of the same sex." (Plfs' Brief at 22).

Moreover, in Ramos, the Connecticut Supreme 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-Oldsmobile Isuzu Partnership v. Bailey, 229 Conn. 312, 317

[37] Article First, § 10 provides: "All courts shall be open, and every person, for an injury done to him in his person, property and reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Article First, § 8 provides, in relevant part, that: "No person shall . . . be deprived of life, liberty or property without due process of law. . . ." Plaintiffs do not even brief the issue of whether these two provisions are textual sources of their proposed "broad" fundamental right to marry someone of the same gender. In any event, it is clear even from a cursory examination of the language of these two provisions that they are not.

(1994)). Although the plaintiffs correctly observe that the Connecticut Supreme Court has interpreted the right to marry as a "fundamental right[ ] implicitly guaranteed by" the federal constitution, see Zapata v. Burns, 207 Conn. 496, 506 (1988), no appellate court in this State has ever interpreted the due process provisions of the U.S. Constitution as guaranteeing a "fundamental right" to marriage that is "broad" enough to include the right to marry someone of the same gender. Indeed, and as set forth above, any such decision would be contrary to the virtually unanimous view of the federal courts, including the United States Supreme Court, that there is no such right under the U.S. Constitution. See Section II. B. 1, supra.

Because there is no fundamental right to same-sex marriage under the due process provision of the Connecticut constitution, the proper standard to apply to the State's marriage scheme, as it pertains to same-sex couples, is rational basis review. Ramos, 254 Conn. at 840-841 ("rational basis review applies to substantive due process claims that do not infringe upon a fundamental right"). The Connecticut Supreme Court has stated that the rational basis test applicable to due process claims under the Connecticut constitution is for all material purposes "indistinguishable" from the rational basis test that is applicable to equal protection claims. See Ramos, 254 Conn. at 841. Thus, for the same reasons that the State's marriage laws satisfy the rational basis test under the equal protection provisions of the Connecticut constitution, they also satisfy that test under Article First, §§ 8 and 10.

IV. CONNECTICUT'S MARRIAGE LAWS DO NOT VIOLATE THE PLAINTIFFS' RIGHTS TO EXPRESSION AND ASSOCIATION UNDER ARTICLE FIRST, §§ 4, 5, AND 14.

The plaintiffs' final argument – that calling their union a "civil union" rather than a "marriage" violates their rights to expression and association under article first, §§ 4, 5, and 14 of the Connecticut constitution – also lacks merit. The plaintiffs contend that a marriage is a unique expression of love and commitment, akin to speech, and that, under the state constitution, any regulation of that expression is a content-based restriction that can only be justified if it is narrowly-tailored to further a compelling state interest. See Plfs' Brief, pp. 57-58. Contrary to the plaintiffs' claims, none of the relevant Geisler factors support this interpretation of article first, §§ 4, 5, and 14.

First, as the plaintiffs concede, the text of Article first, §§ 4, 5, and 14, "protect[s] speech per se" and "does not aid in this analysis." Plfs' Brief, p. 56 n. 62.[38] Nowhere in the language of the cited provisions is there any explicit mention of a constitutional right to expressive association or any suggestion that such a right, assuming it exists, protects same-sex relationships from state regulation.

Nor does state or federal caselaw support the plaintiffs' argument. Indeed, notably missing from the plaintiffs' brief is any mention of *any* case in which *any* court has held that

[38] Article first, § 4, states that: "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, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance."

excluding same-sex couples from the institution of marriage implicates a constitutional right of expressive association. This is presumably because those courts that have considered such claims have almost uniformly rejected them.

For example, in Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973), and Baker v. Nelson, 191 N.W. 2d 185, 186 n. 2 (Minn. 1971), appeal dismissed for lack of a federal question, 409 U.S. 810 (1972), the courts dismissed the plaintiff same-sex couples' right of association claims without even addressing them. In Seymour v. Holcomb, 790 N.Y.S. 2d 858, 866 (N.Y. Supreme Ct, Tompkins County, Feb. 23, 2005), the court dismissed the plaintiffs' free expression claim under the state constitution because it found that the State's laws limiting marriage to opposite sex couples "in no way prohibit[ed], directly or incidentally, the plaintiff [same-sex] couples from expressing their commitment to each other, ceremonially or otherwise." And in Samuels v. New York State Department of Health, No. 1967-04, slip op. (N.Y. Supreme Ct, Dec. 7, 2004)(Plfs' App. at A-75), the court found:

> no merit to the plaintiff's claim that issuing marriage licenses only to opposite sex couples offends the State Constitution's Free Speech Clause. Assuming, while not finding, that marriage is somehow expressive conduct, the government interest in this case is unrelated to the suppression of free expression and any incidental restriction on plaintiffs' free speech rights is no greater than is essential to the furtherance of that interest.

Samuels, No. 1967-04, slip op. at 8; see also Goodridge v. Dept. of Public Health, 2002 Mass. Super. Lexis 153, *42-45 (Mass. Super. Ct. May 7, 2002)(Defs' App. at A-14)(rejecting claim that right of association under the Massachusetts constitution requires same-sex couples be permitted to marry), vacated on other grounds, 798 N.E.2d 941 (Mass. 2003); Shahar v. Bowers,

114 F.3d 1097, 1099 (11th Cir. 1997)(expressing "considerable doubt" that a woman has an associational right to marry another woman, "[g]iven the culture and traditions of the Nation"), cert. denied, 522 U.S. 1049 (1998).[39]

In the present case, as in Seymour, the State has in no way prohibited same-sex couples from expressing their love and commitment to each other. Indeed, far from prohibiting same-sex couples from associating, Connecticut's statutory scheme explicitly *promotes* association between same-sex couples by providing legal sanction and recognition to same-sex civil unions that confer all the rights, benefits and obligations of marriage.

Given the lack of any express mention of a right of association or same-sex association in the text of article first, §§ 4, 5, or 14, the lack of historical recognition or protection of same-sex relationships of any kind, including same-sex marriage, and the absence of any supportive sister state, federal or Connecticut caselaw on the issue, the plaintiffs' claim that article first, §§ 4,5, and 14, embody a state constitutional right of expressive association that requires the State to call same-sex unions "marriages," rather than "civil unions," has no merit whatsoever.

In sum, the plaintiffs have not met their "heavy burden" of establishing that Connecticut's marriage laws violate the Connecticut constitution "beyond a reasonable doubt.

[39] The only case of which defendants are aware in which a court has given any credence at all to a right of association claim by same-sex individuals is Citizens for Equal Protection, Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005). That case, which is on appeal, is inapposite, however, because the state constitutional provision at issue, in stark contrast to Connecticut's marriage laws, had been broadly interpreted as banning "[t]he uniting of two persons of the same sex in civil union, domestic partnership, or other similar same-sex relationship," thereby effectively barring the legal recognition of, and the extension of benefits to, any same-sex relationships within the state.

State v. Long, 268 Conn. 508, 521 (2004). Accordingly, the determination whether the same-sex union provided for by state statute should be called a "civil union" or a "marriage" is appropriately left to the state legislature.

CONCLUSION

For all of the foregoing reasons, the state defendants respectfully request that the defendants' motion for summary judgment be granted and the plaintiffs' motion for summary judgment be denied.

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