STATE OF CONNECTICUT
SUPREME COURT

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S.C. 17716

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ELIZABETH KERRIGAN, ET AL.
VS.
COMMISSIONER OF PUBLIC HEALTH, ET AL.

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BRIEF OF THE PLAINTIFFS-APPELLANTS WITH SEPARATE APPENDIX

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TO BE ARGUED BY: BENNETT C. KLEIN

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b. The exclusion discriminates or segregates on the basis of sexual orientation without a compelling state interest or, minimally, a substantial relationship to an important state interest? (Br. at 32-36)

c. The exclusion fails rationally to further a legitimate government purpose? (Br. at 44-60)

II. Does excluding otherwise qualified same-sex couples from marriage deprive same-sex couples of the fundamental right to marry the person of one's choice in violation of the guarantees of due process in the Connecticut Constitution as set forth in Article First, §§ 8 and 10? (Br. at 37-44)

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STATEMENT OF FACTS AND PROCEEDINGS

The Plaintiffs[1] brought this action for declaratory judgment and injunctive relief by way of verified complaint filed August 25, 2004. (R.) The trial court (Pittman, J.) ordered the Plaintiffs to provide notice to all the town clerks in Connecticut of the action and further ordered that notice be provided by publication in newspapers throughout the state. (R.) The Defendants[2] answered the complaint in what amounted to a general denial. (R.) On March 29, 2005, the Plaintiffs amended their complaint to include an additional couple,[3] and the Defendants answered the amended complaint accordingly. (R.) The parties filed cross motions for summary judgment. (R.) After a hearing, the trial court (Pittman, J.) granted the Defendants' motion for summary judgment and denied the Plaintiffs' motion for summary judgment. The Plaintiffs timely appealed, and this Court transferred the appeal to itself pursuant to Practice Book § 65-1 and Conn. Gen. Stat. § 51-199(c).

The Plaintiffs sought marriage licenses from Defendant Bean. (R.) Each couple was over the age of eighteen, not related within the degrees of kinship prohibited by Conn. Gen. Stat. § 46b-21, and not already married. (R.) They appeared in person before Defendant Bean with the proper identification and application fee. (R.) Because the couples were of the same sex, Defendant Bean denied them marriage licenses, referring to an opinion letter by the Attorney General. (R.)

In the three-count verified complaint, the Plaintiffs alleged 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

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[1] Seven couples initiated this action. They are Elizabeth Kerrigan and Joanne Mock, Janet Peck and Carol Conklin, Geraldine and Suzanne Artis, Jeffrey Busch and Stephen Davis, J.E. Martin and Denise Howard, John Anderson and Garrett Stack, and Barbara and Robin Levine-Ritterman. (R.)

[2] The Defendants are J. Robert Galvin in his official capacity as Commissioner of Public Health, the Department of Public Health ("State Defendants"), and Dorothy Bean in her official capacity as Deputy Town Clerk and Acting Town Clerk and Deputy Registrar of Vital Statistics and Acting Registrar of Vital Statistics for the Town of Madison. (R.)

[3] The additional couple is Damaris Navarro and Gloria Searson. (R.)

> 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 violate the Connecticut Constitution].

(R.) Specifically, the Plaintiffs claimed that excluding same-sex couples from marriage violates the guarantees of equal protection as set forth in Article First, §§ 1 and 20 (First Count), due process as set forth in Article First, §§ 8 and 10 (Second Count), and the right of intimate and expressive association as set forth in Article First, §§ 4, 5, and 14 (Third Count). (R.)[4] The Plaintiffs sought a declaration that such statutes violate the Connecticut Constitution. (R.) Additionally, the Plaintiffs requested an injunction ordering Defendant Bean or her successor to issue marriage licenses to the couples and ordering the Department of Public Health to take steps to implement the declaration, including registering such licenses upon proper return. (R.)

On July 28, 2005, the Plaintiffs moved for summary judgment. (R.) By this time, the legislature had enacted the civil union law, P.A. 05-10 (codified at Conn. Gen. Stat. §§ 46b-38aa through 46b-38pp), which was to take effect on October 1, 2005.[5] In the affidavits that accompanied their motion for summary judgment, the Plaintiffs described their reasons for seeking access to the unique status of marriage. They also described the disadvantage associated with civil unions and the pain and humiliation they felt at being forced to decide whether to accept the stigma of a new, separate status as a condition for obtaining some of the important legal protections of marriage.

For example, Elizabeth Kerrigan stated simply: "Being denied access to marriage brings home the message that I am not equal. All the more so, when the legislature passed the civil unions bill, that message echoed loud and clear." (Kerrigan Aff. at 3, para. 8; App. at A80.) Joanne Mock explained that she grew up with the belief that key rites of

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[4] The Plaintiffs do not pursue on appeal their claim under the Third Count of the amended verified complaint with respect to Article First, §§ 4, 5 and 14.

[5] Contrary to the trial court's statement that the Plaintiffs amended their complaint after the passage of the civil union law (MOD at 7), the governor did not sign P.A. 05-10 into law until April 20, 2005, which was after the Plaintiffs filed their amended verified complaint on March 29, 2005.

passage "not only mark your spiritual growth, but also your social status in the community." (Mock Aff. at 1, para. 3; App. at A82.) She always "viewed [her] wedding as the ritual that would convert [her] into an adult." Id. She believes that entering into a civil union would devalue her relationship with Elizabeth Kerrigan because it "would only call to everyone's attention that we can't really get 'married.'" (Mock Aff. at 2, para. 5; App. at A83.) Plaintiff Janet Peck explained that "[n]ot only does marriage provide a special glue that holds two people together, it provides the glue that connects and cements entire families together, generation after generation. Because we cannot marry, Carol and I live outside of that bonding." (Peck Aff. at 5-6, para. 11; App. at A90-A91.) To her, a civil union designation "says that our love and commitment to each other is not good enough for marriage and cements that lie into law." (Peck Aff. at 7, para. 17; App. at A92.) Plaintiff Carol Conklin recognized that civil unions provide legal protections, but stated that "these benefits do not outweigh the disrespect I feel from being put in a separate legal category by the civil union law." (Conklin Aff. at 4, para. 11; App. at A96.) As John Anderson put it:

> It is demeaning and hurtful to create a separate class of relationships. Garry and I have the exact same needs -- emotional, financial, and social -- as heterosexual couples. We provide society with the same taxes and the benefits accruing from a stable, caring relationship. We own our home; we mingle and mix with our neighbors. We belong in every way, but one. Without marriage we are marked as less-than, of less value, not full citizens.

(Anderson Aff. at 2, para. 7; App. at A120.)

Some couples stated their intent, albeit with great reluctance, to enter into a civil union. For example, Jeffrey Busch indicated that he and Stephen Davis would join in a civil union because they have a responsibility to their son, Eli, to take advantage of important legal protections. But Jeffrey states that "[b]eing placed in a separate and inferior status is humiliating." (Busch Aff. at 2, para. 5; App. at A105.) He does not "want Eli to have to explain to anyone who asks that what his parents have is something 'like a marriage'… [or] 'almost a marriage.'" Busch Aff. at 3, para. 6; App. at A105.) Similarly, the Levine-Rittermans planned to access the benefits of a civil union because Barbara is a cancer

survivor. Even so, they "feel like there is psychic harm to us and our children from the state officially labeling us as something other and less than our colleagues, friends and neighbors." (B. Levine-Ritterman Aff. at 3, paras. 8 & 10; App. at A127.) They want their two children "to know that their parents' commitment is part of the popular vocabulary, that they are married and not 'CU'd,' an unrecognizable concept." (B. Levine-Ritterman Aff. at 3, para. 9; App. at A127.) Damaris Navarro and Gloria Searson had a civil union in Vermont because at the time it was the "best available way to formally have [their] relationship and [their] family recognized and affirmed." (Searson Aff. at 2, para. 6; App. at A137.) But it "hurts" that the state does not deem them "worthy of marriage." (Navaro Aff. at 2, para. 5; App. at A134.) This couple is raising four children, including their goddaughter and Gloria's nephew. Gloria is "acutely aware of the negative stereotypes in society of African-American children being raised by parents who are not married … [and] believe[s] that being married would give [her] family more of a solid, respected feeling." (Searson Aff. at 2, para. 4; App. at A137.)

The Plaintiffs also expressed concern that civil unions would not afford the recognition of their relationships that comes with the term marriage. Geraldine Artis stated that "[m]uch of the discrimination we face as a couple could be detoured or addressed by being able to say that we are married. People understand what that means. In contrast, civil unions demand explanations." (G. Artis Aff. at 2; para. 5; App. at A101.) Denise Howard expressed similar concerns, stating, "I don't want to have to spend the next 10 years trying to explain what exactly a civil union means to every person I meet who asks my marital status, asks about my family, or to whom I am introducing J.E." (Howard Aff. at 3, para. 6; App. at A117.) Stephen Davis worried "about the lack of familiarity with the term civil union in other states" and described a particularly distressing encounter with a customs official who demanded to know the whereabouts of Eli's mother. (Davis Aff. at 2, para. 6; App. at A110.)

The Defendants opposed the Plaintiffs' motion for summary judgment and filed their

own motion for summary judgment. The Defendants asserted that excluding same-sex couples from marriage was not sex discrimination or the deprivation of a fundamental right. (R.) The Defendants further claimed that rational basis review applied to discrimination on the basis of sexual orientation. (R.) The Defendants argued that administrative convenience, consistency with the laws of other jurisdictions, and an incremental approach to solving problems justified the creation of a new and separate status for same-sex couples. (R.)

In its Memorandum of Decision on Cross-Motions for Summary Judgment ("MOD"), the trial court noted that prior to the passage of the civil union law, it would have engaged in a traditional constitutional analysis of the Plaintiffs' claims. (MOD at 10.) In view of the passage of the civil union law, however, the trial court determined that the Plaintiffs could not show "legal harm" because they are treated equally to different-sex couples. (MOD at 11.) Accordingly, the trial court did not analyze the Plaintiffs' claims that excluding them from marriage violated their rights to equal protection, due process, or intimate and expressive association.[6]

The court began by noting that civil unions "create an identical set of legal rights in Connecticut for same-sex couples and opposite-sex couples." (MOD at 11.) The court acknowledged that marriage is a fundamental right, but concluded that "[b]eing married no longer carries the cultural or social weight, for good or ill, that it did in decades past." (MOD at 13.) The court determined that the legal rights rather than nomenclature were what mattered under the Constitution. Because civil unions provide the same substantive rights under Connecticut law, the court held that the difference in the names provided "no basis on which to find that the ameliorative statutory scheme in the recent legislation is

[6] At the hearing on the motions for summary judgment, the trial court asked the State Defendants, "So I do need to perform a constitutional analysis if I find that two similarly-situated groups are called different things?" Counsel for the State Defendants responded, "Right, correct." (Tr. 3/21 at 54.)

unconstitutional."[7] (MOD at 14.)

The court next rejected the Plaintiffs' claim that civil unions afford a lesser, inferior status to same-sex couples. The court concluded that nomenclature is inconsequential for purposes of constitutional rights. (MOD at 17.) The court described "civil union" as a "neutral" term and, noting that "offensiveness is largely in the eye of the beholder," dismissed assertions that civil unions create an inferior status. (MOD at 16.) The court similarly disposed of the Plaintiffs' discussion of case law addressing government-created segregation and classifications as applying to instances of physical segregation only. (MOD at 19-20.) The court concluded that problems with the lack of public understanding of the term "civil union" could be addressed by "education of or sanction against persons who may attempt to deny the couple the rights and benefits of the law." (MOD at 21.)

Finally, the court acknowledged that the lack of portability of civil unions and recognition by the federal government was a real injury. (MOD at 22.) Even though the Plaintiffs argued that separating them into civil unions created an additional hurdle to surmount in having their relationships recognized elsewhere (Tr. 3/21 at 32), and prevented them from challenging federal discrimination, the court held that this harm resulted from the discriminatory laws of other jurisdictions rather than the terminology of the civil union law. (MOD at 22.) The court concluded that this harm was beyond the control of the legislature or the court. (MOD at 22.)

Accordingly, the court granted the Defendants' motion for summary judgment and denied the Plaintiffs' motion for summary judgment. This appeal followed.

[7] Although the Plaintiffs challenge the constitutionality of the language in the civil union law that expressly limits marriage to opposite-sex couples, see Conn. Gen. Stat. § 46b-38nn, the Plaintiffs do not seek to have the civil union law as a whole declared unconstitutional. Rather, the Plaintiffs seek access to marriage rather than the separate status created by civil unions.

ARGUMENT

I. INTRODUCTION.

The Plaintiffs are sixteen individuals -- Connecticut residents, citizens and taxpayers. They are in their 30's, 40's, 50's and 60's. Most of them are parents, and several have cared or are caring for aging relatives. Each also participates in the larger community where they reside -- in West Hartford, Colchester, Middletown, Wilton, Derby, Woodbridge, New Haven and West Haven. Three have dedicated their professional lives to public school students: two as teachers (in Hartford and Woodbridge) and one as a school principal. Three work in the insurance field. One has spent her career at General Electric while another operates her own database company. Five work in medical care: as an assistant to disabled adults; as a therapist and marriage counselor; as an AIDS educator; as an acupuncturist; and as an HIV and AIDS case manager for a non-profit agency. One is a librarian at a private university while another is an administrative law judge. (R.)

Beyond that, the Plaintiffs are eight same-sex couples in committed relationships for between 11 and 31 years who were each denied a marriage license by the State of Connecticut. This case raises two central questions: 1) Is it permissible under the Connecticut Constitution to deny the right to marry to these Plaintiffs? 2) Given the legislature's enactment of the civil union law after this case was filed, and its acknowledgement of both the common humanity of gay people and their rights to equal treatment in their family lives, is it constitutional for the legislature to deny marriage where it also creates only for gay people a separate legal system, with a different name, and deems them eligible for all state-based rights available to married spouses?

Both questions benefit from understanding these issues in the larger context of harsh oppression and systematic discrimination against gay people in our law and culture over the last century.[8] Until 1961, it was a crime in every state for lesbians and gay men to

[8] For general histories of the treatment of lesbian and gay people in this country, see George Chauncey, Why Marriage? The History Shaping Today's Debate Over Gay Equality

engage in intimacy with loved ones. See Lawrence v. Texas, 539 U.S. 558, 569 (2003) (Scalia, J., dissenting) (citing Bowers v. Hardwick, 478 U.S. 186, 192-194 (1986)). Indeed, it was not uncommon for police to raid gay establishments and arrest people on such charges as disorderly conduct merely for congregating and socializing.[9] Until the 1970s, lesbians and gay men were widely regarded as mentally ill and sexual and moral perverts.[10] Lesbians and gay men have been subject to widespread employment discrimination (including by the federal government)[11] and are among the most frequent victims of hate crimes.[12] In spite of progress, significant stigma associated with lesbian and

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5-22 (2004), and John D'Emilio, Sexual Politics, Sexual Communities, The Making of the Homosexual Minority in the United States, 1940-1970 (1983) (hereinafter "Sexual Politics, Sexual Communities").

[9] William N. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet 63-64 (1999).

[10] In the 1960s and 1970s there was virtual unanimity in the psychiatric profession that homosexuality was pathological. See Ronald Bayer, Homosexuality and American Psychiatry 38 (1981). Gay men and lesbians were vulnerable to civil commitment where they were sometimes subjected to a range of therapies, including in severe cases, castration, hysterectomies, lobotomies, and electroshock treatment. D'Emilio, supra at 17-18. It was not until 1973 that the American Psychiatric Association removed homosexuality from its list of mental disorders; all other organizations soon did the same. See Bayer, supra. See also D'Emilio, supra at 42-43 (recounting 1950 U.S. Senate hearings into "alleged employment of homosexuals 'and other moral perverts' in government." The Committee Report noted, "'[i]ndulgence in acts of sex perversion weakens the moral fiber of the individual'"; "'[o]ne homosexual can pollute a government office.'" Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 122 (1967) (noting that Congress intended phrase "psychopathic personality … to effectuate its purpose to exclude from entry all homosexuals and other sex perverts").

[11] In 1953, the Eisenhower administration issued Executive Order 10, 450, which required the dismissal of all government employees who were "sex perverts," including homosexuals, from both the civilian and military branches of the federal government and federal contractors. See Patricia A. Cain, Litigating for Lesbian and Gay Rights: A Legal History, 79 Va. L. Rev. 1551, 1565-66 (1993). This ban remained in effect until 1975. In addition, the law often denied openly gay people occupational licenses, e.g., in the health care, legal, and teaching fields, based on homosexuality as evidence of moral turpitude. See Boggan et al., The Rights of Gay People, ACLU Handbook, Ch. III "Occupational Licenses" 24-31 (rev. ed. 1983).

[12] Partners Against Hate, FBI Hate Crime Statistics: 2000 and FBI Hate Crime Statistics: 2003 (http://www.partnersagainsthate.org//about_hate_crimes/fbi_story_03.html) (In Connecticut, the percentage of total anti-gay hate crimes doubled from 8.6% of all hate crimes in 2000 to 16.4% in 2003).

gay people remains today.[13]

The journey of Connecticut lawmakers in confronting and eliminating aspects of discrimination against lesbian and gay people has been remarkable, but the legislature also has failed with respect to ending marriage discrimination. In 1969, the legislature decriminalized sodomy, thereby ending the criminalization of a gay person's self-expression and affection. P.A. 69-828 § 214 ("An Act Concerning Revision and Codification of the Substantive Criminal Law"). It addressed "'widespread, even systematic'"[14] discrimination against individuals with respect to basic civil transactions and passed "An Act Concerning Discrimination on the Basis of Sexual Orientation," to provide fair treatment in housing, public accommodations, and employment in a like manner as to race, sex and other personal characteristics. P.A. 91-58. It recognized that prejudice may have violent manifestations and enhanced penalties for crimes based on actual or perceived race, religion, ethnicity or sexual orientation. P.A. 00-72 ("An Act Concerning Intimidation Based on Bigotry or Bias"). Over time, the General Assembly began to see that fairness to individuals was not enough and created an explicit process to allow co-parent adoption to assist gay and lesbian (and other non-marital) families with children in formalizing their legal, parent-child relationships. P.A. 00-228 ("An Act Concerning the Best Interest of Children in Adoption Matters"). Two years later, the legislature authorized the extension of limited legal protections through "An Act Authorizing The Designation of A Person To Assume Ownership of a Motor Vehicle Upon the Death of the Owner and Authorizing The Designation of a Person For Certain Other Purposes". P.A. 02-105.

While the Legislature has addressed different manifestations of discrimination against gay people, it has consistently set aside any issue of marriage discrimination.

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[13] See U. S. Dep't of Health and Human Servs., The Surgeon General's Call to Action to Promote Sexual Health and Responsible Behavior 5 ("Surgeon General's Report") (July 2001) (http://www.surgeongeneral.gov/library/sexualhealth/call.htm).

[14] Senator George Jespen, speaking in favor of the "Gay Rights Law," quoted in Gay & Lesbian Law Students Ass'n v. Bd. of Trs., 236 Conn. 453, 481 (1996).

During the civil union debates, Judiciary Co-Chair Representative Michael Lawlor eloquently described the five years of legislative engagement on relationship recognition that pushed aside marriage but led to the civil union law. 48 Conn. H.R. Proc., pt. 7, 2005 Sess. at 1883-84 (April 13, 2005) (remarks of Rep. Lawlor) (App. at A43-A44) (five year process); 48 H.R. Proc. at 1889-1912 (reviewing legislative debate on adoption law, consideration of marriage and civil union bills dating from 2002-2003, and Judiciary Committee study mandated by Designation law) (App. at A45-A68). See also Conn. Gen. Stat. § 46a-81r(4) (non-discrimination law not be construed as creating "the right of marriage between persons of the same-sex"); Conn. Gen. Stat. § 45a-727a(4) (current public policy of Connecticut is to limit marriage to a man and a woman).

The same reluctance to end marriage discrimination in past years extends to the civil union law as well. In 2005, the Judiciary Committee considered Raised Bill No. 963, "An Act Concerning Marriage Equality." The Committee replaced that bill with a civil union measure and ultimately both houses of the legislature and the Governor approved it. P.A. 05-10 ("An Act Concerning Civil Unions"). This case is in this Court at this time because for all of the legislature's progress in addressing discrimination, that intolerable exclusion remains.

The civil union law provides that "[p]arties to a civil union[15] shall have the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in marriage … ." Conn. Gen. Stat. § 46b-38nn. By acknowledging that committed lesbian and gay couples are identically situated to and deserving of the same legal rights as married couples, the legislature has already made the policy judgment that corresponds with the legal principle dictating the outcome of this case.

[15] A civil union can only be entered into by two people of the same sex while marriage can only be entered into by a man and a woman. Conn. Gen. Stat. §§ 46b-38bb(2) & 46b-38nn.

By its plain language and logical force, this statute can only be understood as a legislative determination that there is nothing about lesbian and gay couples that makes them less qualified than heterosexuals to participate in marriage. By including civil union spouses within the state-based framework for marital rights and responsibilities, the statute is an explicit legislative policy judgment that same-sex couples deserve and squarely fit within the existing structure of marriage. Although it purported to separate marriage from civil unions by name and by location in the General Statutes, its folding of same-sex pairs into the marital framework concedes that neither sexual orientation nor sex makes any material difference with respect to marriage itself.

The debates concerning the civil union law also confirm that the legislature understood the full humanity of lesbian and gay couples and their right to equal treatment under law. It realized that -- like Plaintiffs John Anderson and Garrett Stack, who have been together for over 26 years, and Plaintiffs Robin and Barbara Levine-Ritterman who are raising two children and coping with Barbara's recovery from breast cancer -- lesbian and gay couples share the same concerns and commitment and need and deserve the same protections as their married heterosexual counterparts. Representative Cafero, for example, recalled past times when legislators referred to lesbians and gay men as "those people." 48 H.R. Proc. at 1914 (App. at A69). But over time he began to realize that:

> People you live with and work with, maybe a son, a daughter, a brother, a sister that you know and love and respect, and all of a sudden you find out they're gay. Now those people have a name and a face and a history. They're real people. And that's why our views have changed, because so many of us now could put a name and a face to that person we worked with or played with or roomed with in college. We find out they're gay… .
>
> I was introduced to neighbors who I never knew were gay, good, decent, hardworking people with families and troubles, as Chairman Lawlor indicated, like everybody else, productive members of society who deserve rights. They deserve my respect, and I want to give them that respect.

48 H.R. Proc. at 1914-15, 1934 (App. at A69-A70, A72). Representative Cafero said that he came to see lesbians and gay men as people who were just like everybody else. 48 H.R. Proc. at 1914-15 (App. at A69-A70). He concluded: "I cannot answer the question any

longer why I would deny same-sex couples in a long-term relationship recognition of their union. I couldn't answer the question." 48 H.R. Proc. at 1922 (App. at A71).[16]

In spite of its important conclusions about lesbian and gay couples vis-à-vis married couples and vis-à-vis the state, the legislature blinked when it implemented its policy determination. Rather than expressly including lesbian and gay couples within the existing legal and social institution of marriage, it adopted a separate and different approach for same-sex couples alone. By denying access to the institution of marriage, the legislature denied access to a profound relationship that forms a critical part of self-definition and expresses deep commitment and fidelity to another person. It denied those families participation in an institution that our culture understands and respects as synonymous with family. It denied them access to something our culture understands as both a fundamental right and a civil right. Rather than completely embrace that lesbian and gay citizens are part of a community of equals, it marked those families as different from all others. And it politically compromised on the principles it came so close to embracing fully for reasons that are not even valid: personal beliefs, fear of constituent reactions, and the bare desire to separate. See Arg. § V (C), infra.

For this Court, the question is not one of political courage, but constitutional principle to be vindicated both for the Plaintiffs and for the integrity of the Constitution itself. With equality and liberty guarantees as the touchstone, the Constitution must abhor a result in which people who are found to be identically situated to others are nonetheless treated

[16] Other legislators expressed similar conclusions. Senator McKinney remarked that same-sex couples are "people who deserve the same legal rights and responsibilities that my wife and I have." 48 S. Proc., pt. 4, 2005 Sess. at 1113 (April 6, 2005) (remarks of Sen. McKinney) (App. at A39). See also 48 S. Proc., at 1031-32 (remarks of Sen. Meyer) ("indeed, as I have seen that love and commitment, I have felt it would be sheer discrimination not to grant them the same legal and constitutional rights that my wife of 26 years and I share, and our six children share.") (App. at A31-A32); 48 S. Proc. at 1076 (remarks of Sen. Harris) (describing experience of learning that his college roommate, a "respected member on campus," was gay and how his "eyes have been opened" to experiences of gay and lesbian families in his community) (App. at A37).

differently and separated into distinct classes. See Romer v. Evans, 517 U.S. 620, 623 (1996) ("One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.' Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake.") (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

Even more injurious is when the legally mandated separation is imposed on a minority group, in the context of remedying acknowledged discrimination against that minority group, and when the issue concerns both a societally esteemed institution and a deeply personal choice implicating both liberty and equality rights. Separate (and unequal) laws and institutions are virtually unheard of today because our experience teaches that such mechanisms maintain bias by denying full participation in society to a disfavored group. See Opinion of the Justices, 802 N.E.2d 565, 569 (Mass. 2004) ("[t]he history of our nation has demonstrated that separate is seldom, if ever equal."). To permit this political compromise to trump the mandates of equality and liberty in the constitution would "'put the supreme law of the state or nation, under the control of the legislature.'" Szarwak v. Warden, Conn. Corr. Inst., 167 Conn. 10, 28 (1974) (quoting Trs. of the Bishop's Fund v. Rider, 13 Conn. 87, 93 (1839)). This is one of those occasions when the Court must emphasize that equality under the Constitution cannot be realized through separation. See Sheff v. O'Neill, 238 Conn. 1, 30 (1996); Evening Sentinel v. Nat'l Org. for Women, 168 Conn. 26, 34 (1975) (discussed infra.).

II. THE TRIAL COURT ERRED BY REFUSING TO REACH THE MERITS OF PLAINTIFFS' CONSTITUTIONAL CLAIMS.

In spite of the deliberate exclusion of the Plaintiffs from a government-created institution -- one of our most esteemed civil institutions -- the trial court ruled that gay and lesbian citizens had been treated identically to others and therefore did not even analyze the constitutional claims at issue here. The trial court improperly concluded that the

Plaintiffs had sustained no "legal harm" because the difference between "marriage" and "civil union" is "inconsequential" and equality is not "affected by [] names." (MOD at 11, 13 17.) As a threshold matter, the trial court misapplied the basic tenets of equal protection law, which do not require such harm. More importantly, the trial court viewed marriage as merely a word and ignored its multidimensional significance as an institution with profound social and cultural importance and deep personal meaning, and to which access is considered a civil right. See Loving v. Virginia, 388 U.S. 1, 12 (1967).

A. The Denial Of Marriage Subjects Plaintiffs To "Differential Treatment."

The trial court began its analysis with a faulty premise by repeatedly using the language "legal harm" to describe the equal protection standard.[17] Such language departs from this Court's description of the standard for assessing whether a statute conforms to the equal protection clause. This Court has alternatively stated either an affirmative test that equal protection requires "the uniform treatment of persons standing in the same relation to the governmental action questioned," see, e.g., Franklin v. Berger, 211 Conn. 591, 594 (1989), or conversely stated that equal protection prohibits differential treatment of similarly situated people. See, e.g, City Recycling, Inc. v. State, 257 Conn. 429, 452-53 (2001) (whether statute "treat[s] persons standing in the same relation to it differently").[18]

Even assuming, arguendo, that this dispute was about nothing more than nomenclature, the trial court was plainly wrong that what something is named cannot create a legislative classification, requiring a justification when challenged. No court would immunize from constitutional review a law mandating that state-recognized unions of mixed-race or mixed-religion couples be called "civil unions," as long as those couples were

[17] See, e.g., MOD at 2 ("plaintiffs have failed to prove that they have suffered any legal harm that rises to constitutional magnitude"); id. at 11 (asking whether plaintiffs suffered "actionable harm"); id. at 13 (referring to the "legal harm required to declare judgment in [plaintiffs'] favor").

[18] See also City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (equal protection is "a direction that all persons similarly situated should be treated alike").

granted the same protections as "married" couples. Such a classification turns on its head the core principle that citizens are equal unless there is a justification to treat them differently.

The deliberate exclusion of a group of citizens from a government institution can hardly be plainer evidence of treating that group differently. A classification would hardly be necessary but for the legislature's literally treating similarly situated persons differently. As the U.S. Supreme Court explained, even under the lowest level of constitutional scrutiny, "[w]e insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause." Romer, 517 U.S. at 632.

B. Marriage Is Not Simply A Descriptive Term But Is A Unique Legal, Social And Cultural Status That Provides Advantages That Cannot Be Matched By A "Civil Union."

The trial court was also mistaken by trivializing marriage as nothing more than a descriptive term or a bundle of legal rights. While individuals may disagree, marriage is a unique legal and social status that has immense and powerful social attributes that provide enormous and irreplaceable advantages to married couples. As Representative Cafero stated twice for emphasis during the civil union law debates: "Marriage means something to us. It means something to us."[19] 48 H.R. Proc. at 1935 (App. at A73).

Marriage is indisputably a civil institution of unparalleled prestige, respect, and longevity. No other relationship has been described by this Court as a "unique human relationship," Billington v. Billington, 220 Conn. 212, 221 (1991) (internal quotation omitted), and "one of the most fundamental of human relationships." Davis v. Davis, 119 Conn. 194, 203 (1934). No other relationship has been characterized by the U.S. Supreme Court as a "way of life," a "bilateral loyalty," and a relationship "intimate to the degree of being sacred."

[19] See also 48 S. Proc. at 1044 (remarks of Sen. Cappiello) (noting the social and cultural meaning of marriage) (App. at A33a); 48 S. Proc. at 1007 (remarks of Sen. McDonald) (referring to the "profound cultural and social meaning" of marriage as a status) (App. at A30a).

Griswold v. Connecticut, 381 U.S. 479, 486 (1965). No other state-recognized relationship can have the same "spiritual significance" for many couples. See Turner v. Safley, 482 U.S. 78, 95-96 (1987). Indeed, no other interpersonal relationship, other than parenting, has the status of a fundamental right. See Arg. § IV, infra. Because of marriage's unparalleled prestige and respect, few heterosexual couples would willingly substitute the nomenclature "marriage" with "civil union."

Importantly, the government itself has created marriage as a "status" that is something greater than the private bond of love and intimacy shared by two individuals. As this Court has recognized, "after a marriage is entered into, the relation becomes a status … . It is the relation fixed by law, in which the married parties stand to each other, towards all other persons, and to the State." Allen v. Allen, 73 Conn. 54, 55 (1900). Thus, marriage is the "status" conferred by the government to signify that two people are in a relationship that is worthy of special recognition and protection. Id.

Our Courts have fully recognized the manifest advantage that comes from an institution's longevity, tradition and prestige as compared to a new institution created solely for a minority group. For example, Sweatt v. Painter, 339 U.S. 629 (1950), involved whether Texas's attempt to create a separate law school for black students was "substantially equal" to its law school for whites under the "separate but equal" doctrine in effect prior to Brown v. Bd. of Educ., 347 U.S. 483 (1954). Although the Court in that context was properly concerned with tangible comparisons such as the number of faculty or the size of the library, the Court went beyond such factors to emphasize some of the very factors that distinguish marriage and civil union. The Court stated:

> What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these schools would consider the question close.

339 U.S. at 634 (emphasis added). See also Brown, 347 U.S. at 493-94 (affirming the

relevance of this principle from Sweatt because separation itself "generates a feeling of inferiority as to … status in the community that may affect … hearts and minds."); United States v. Virginia, 518 U.S. 515, 557 (1996) (rejecting Virginia's alternative of a separate military institution for women and citing Sweatt for the principle that the "'prestige' -- associated with [Virginia Military Institute's] success in developing citizen soldiers -- is unequaled").[20]

These decisions stand for the proposition that if an individual is denied the opportunity to participate in a fundamental institution conferring a status with enormous societal prestige, that person is disadvantaged. To believe that being denied the most prestigious status is innocuous or inconsequential also necessarily suggests there are no advantages to participating in marriage. But there are at least five ways in which being "married" helps individuals and couples. First, the unique social meaning of marriage over the centuries carries profound personal meaning and value for couples that civil unions can never provide. Political theorist Ronald Dworkin has eloquently explained:

> The institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social, and personal meaning. It means something slightly different to each couple, no doubt. For some it is primarily a union that sanctifies sex, for others a social status, for still others a confirmation of the most profound possible commitment. But each of these meanings depends on associations that have been attached to the institution by centuries of experience. We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love.

Ronald Dworkin, Three Questions for America 53 (14) New York Review of Books (September 21, 2006) (http://www.nybooks.com/articles/19271).

Second, the prestige and longevity of marriage as a social institution have created a common ritual that ties people together into the larger fabric of families, generations and

[20] The trial court misunderstood this key principle in Sweatt and other segregation cases by stating that such decisions were "controlled by" the context of "separate facilities or actual *physical* separation." (MOD at 19, 20.) As such, there is no support for the trial court's assertion that our jurisprudence repudiating segregation applies only to spatial separation and not legal separation.

communities. Couples who cannot marry "live outside" of that cultural fabric and cannot be part of the continuity of tradition. (See Br. at 3 (discussing Peck and Mock Affs.)) Without "the right to choose to marry -- one is excluded from the full range of human experience." Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 956-57 (Mass. 2003).

Third, marriage ties into a common vocabulary that all people share. The status of marriage is protective as a universal concept that immediately conveys to the community that two people love each other and are a family. Civil unions do not come close to this broad protection of marriage. There are no civil union analogues to the verb "to marry" or the adjective "married." Indeed, the Plaintiffs do not want their children to have to explain that their parents are "CU'd" or "almost" married. (See Br. at 3-4 (discussing Busch and B. Levine-Ritterman Affs.))

Fourth, the creation of a marriage substitute not only deprives lesbian and gay couples of the "enormous private and social advantages" of marriage, see Goodridge, 798 N.E.2d at 954, but also marks them as inferior and less worthy. The trial court's characterization of civil union as a "neutral term" (MOD at 16) belies the entire force of the legislative debate. See Arg. § V(C), infra. Rather than being merely "semantic" or "innocuous," the term "is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status." Opinion of the Justices, 802 N.E.2d at 570. Language has "power" because "[l]abels set people apart as surely as physical separation on a bus or in school facilities." Lewis v. Harris, 908 A.2d 196, 226 (N.J. 2006) (Poritz, C.J., dissenting). As Chief Justice Poritz explained:

> Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law. By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as "real" marriage, that such lesser relationships cannot have the name of marriage.

Lewis v. Harris, 908 A.2d at 226-27 (Poritz, C.J., dissenting).[21]

[21] See also Egale Canada Inc. v. Canada (Att'y Gen.), 2003 B.C.C.A. 251, ¶ 156

This mark of government inferiority emanates from the state's action and not, as the trial court concluded, from Plaintiffs' subjective feelings. (See MOD at 15 ("plaintiffs may feel themselves to be relegated to a second class status, [but] there is nothing in the text of the Connecticut statutes that can be read to place the plaintiffs there.")) The trial court's reasoning conjures up a long-repudiated notion from Plessy v. Ferguson. Upholding separate facilities for Black citizens, that Court reasoned:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

Fifth, without marriage, same-sex couples are forever precluded from access to the federal rights and protections granted to married couples (e.g., ability to share in a spouse's Social Security). While the law currently defines marriage for federal purposes as "only a legal union between one man and one woman as husband and wife," 1 U.S.C. § 7, it is only through being married that the Plaintiff couples can attempt to overturn this discriminatory law in the courts or in the Congress.[22] In addition, while many states have laws that refuse to recognize marriages between same-sex couples, there can be little doubt that a marriage license would provide Connecticut couples with the strongest arguments for legal respect of their relationships in another state or country. See, e.g., Rosengarten v. Downes, 71 Conn. App. 372, 802 A.2d 170 (no jurisdiction to dissolve civil union), cert. granted, 806

("[a]ny other form of recognition of same-sex relationships, including the parallel institution of [registered domestic partnerships], falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples 'almost equal', or to leave it to governments to choose amongst less-than-equal solutions."); Halpern v. Toronto, 172 O.A.C. 276, ¶¶ 102-107 (2003) (separate status for same-sex relationships insufficient; right to equality requires access to "fundamental societal institutions").

[22] The lack of access to federal benefits today does not negate this deprivation for purposes of the Court's constitutional analysis. The plaintiffs can hardly be expected to institute a new legal challenge to the state's denial of marriage when federal discrimination ends.

A.2d 1066 (2002), appeal dismissed as moot (Dec. 21, 2002). The weaker legal position of Connecticut citizens who have a civil union emanates from the State's refusal to grant marriage licenses, not simply from the discrimination of other jurisdictions.

III. THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE VIOLATES THE EQUAL PROTECTION GUARANTEES OF ARTICLE FIRST, §§ 1 AND 20 OF THE CONNECTICUT CONSTITUTION.

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

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

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

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

Conn. Const., Article First, § 1.[23] Article First, § 20 was added to the Constitution in 1965 and now states:

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

Conn. Const., Article First, § 20.[24]

The denial of marriage to same-sex couples is subject to strict scrutiny because it

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

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

burdens a suspect class by creating impermissible distinctions based on sex. See Arg. § III(C), infra. Similarly, the exclusion from marriage is subject to strict scrutiny -- or at the very least, intermediate scrutiny -- because it classifies based on sexual orientation. See Arg. § III(D), infra.

A. Standard Of Review.

The construction of the Connecticut Constitution presents a question of law subject to plenary review. See Ramos v. Town of Vernon, 254 Conn. 799, 829-830 (2000).

B. General Principles For Interpreting The Connecticut Constitution.

This Court has stressed that the principles set forth in the Connecticut Constitution are not fixed in time. Rather, courts

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

State v. Dukes, 209 Conn. 98, 115 (1988) (quoting Seattle Sch. Dist. v. State, 90 Wash. 2d 476, 517 (1978)) (emphasis in original). The Court emphasized that the Connecticut Constitution is "an instrument of progress, it is intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens." Id. As such, it must be interpreted within the "context of the times." Id. at 114.[25] In State v. Webb, 238 Conn. 389, 411 (1996), the Court reaffirmed that "as we engage over time in the interpretation of our state constitution, we must consider the changing needs and expectations of the citizens of our state." Id. at 411.

In determining the contours of the Connecticut Constitution, this Court has stated that "our first referent is Connecticut law and the full panoply of rights Connecticut residents

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

have come to expect as their due … . In the area of fundamental civil liberties which includes all protections of the declaration of rights and contained in article first of the Connecticut constitution we sit as a court of last resort." Horton v. Meskill, 172 Conn. 615, 641-42 (1977). The Court has established "tools of analysis" to "construe the contours of our state constitution and reach reasoned and principled results." State v. Geisler, 222 Conn. 672, 684-85 (1992). The Court stated that the following tools should be "considered to the extent applicable": (1) the text of constitutional provisions; (2) holdings and dicta of the Supreme Court and the Appellate Court; (3) federal precedent; (4) decisions of sibling states; (5) the historical approach, including the historical constitutional setting and the debates of the framers; and (6) economic/sociological considerations. Id.

While Connecticut courts have an obligation "independently to construe the provisions of our state constitution," see State v. Barton, 219 Conn. 529, 545 (1991), this Court has advised that federal decisions interpreting the U.S. Constitution are highly persuasive in defining the scope of rights under the Connecticut Constitution.[26] The Court regards the federal Constitution as establishing "a minimum national standard for the exercise of individual rights." State v. Miller, 227 Conn. 363, 379 (1993). The Connecticut Constitution, however, may "afford [Connecticut] citizens broader protection of certain personal rights" than under analogous sections of the federal constitution. See Dukes, 209 Conn. at 112.[27]

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

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

Although "every statute is presumed to be constitutional," "[i]f, in distinguishing between classes, the statute either intrudes on the exercise of a fundamental right or burdens a suspect class of persons, the court will apply a strict scrutiny standard wherein the state must demonstrate that the challenged statute is necessary to the achievement of a compelling state interest." Donahue v. Town of Southington, 259 Conn. 783, 794 (2002). Otherwise, a classification must be rationally related to some legitimate government purpose in order to withstand an equal protection challenge. Id.

C. The Denial Of Marriage To Same-Sex Couples Is Subject To Strict Scrutiny Because It Is A Sex-Based Classification Prohibited By Article First, § 20.

The state's exclusion of same-sex couples from marriage is a facial classification based on sex. Application of the Geisler factors demonstrates that the marriage exclusion violates the express ban on sex classifications in the Connecticut Constitution.

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

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

In interpreting this language, "[f]undamental principles of constitutional interpretation require that '[e]ffect must be given to every part of and each word in our constitution.'" Sheff, 238 Conn. at 28 (quoting Cahill v. Leopold, 141 Conn. 1, 21 (1954)); State v. Lamme, 216 Conn. 172, 177 (1990). As this Court has observed, the language of Section

20 is "highly unusual" because it "prohibits segregation not only indirectly, by forbidding discrimination, but directly, by the use of the term 'segregation'." Sheff, 238 Conn. at 26-27.[28] Indeed, Connecticut is the only state in the country whose constitutional prohibition of sex-based classifications uses the term "segregation."[29] The term "segregation" denotes "separation." Id. at 28.

The classification at issue in this case operates in two ways. First, applying the language of Section 20, the state subjects the Plaintiffs to "segregation or discrimination" by denying each one the ability to marry his or her chosen spouse because of sex. Janet Peck was denied a license to marry Carol Conklin because Janet is a woman. But a man can marry Carol, and if Janet were a man, she could marry Carol. The difference between the ineligible Janet and any eligible man is their sex. Similarly, if Garrett Stack were a woman, John Anderson could marry him. Garrett cannot do so because of his own sex. It is thus undisputed that a man cannot do what a woman can (marry a man) and a woman cannot do what a man can (marry a woman). It is "because of" sex that each individual is outside the definition of marriage. Individuals are plainly "separated" from equal access to a civil institution because of sex. Second, the civil union law independently subjects the Plaintiffs to "segregation or discrimination" because of sex by creating different legal statuses for same-sex and different-sex couples.

As the plain language of Section 20 makes clear, "segregation or discrimination" because of sex stands on the same footing as "segregation or discrimination" because of race. Section 20 no more permits the denial of marriage based on sex or the separate designation of same-sex relationships as civil unions than it permits the denial of marriage

[28] The issue in Sheff was whether the de facto segregation of Hartford's public schools was constitutional. There was no doubt, however, that § 20 clearly prohibits de jure discrimination such as that in the civil union law.

[29] As Sheff observes, New Jersey and Hawaii use the word "segregation" in their constitutions, 238 Conn. at 26 n.29, but not with respect to provisions related to sex discrimination. N.J. Const. Art. 1, para. 5; Haw. Const. Art. 1, § 9.

based on race or the separate designation of mixed-race relationships as civil unions. Moreover, the plain language of Section 20 demonstrates that "segregation or discrimination" itself is the social evil to be eradicated by that provision. Section 20 protects a "person" from being "subjected to" segregation or discrimination because of sex. Nothing further need be found because the plain text of Section 20 makes sex-based classifications per se prohibited and thus constitutionally injurious. Nothing in the text limits Section 20's application to "physical segregation" only. (MOD at 20.) The language clearly covers "segregation or discrimination" in a government-created civil institution.[30]

2. The Debates Of The Framers At The 1965 Constitutional Convention Confirm The Plain Meaning Of Section 20.

This Court has observed that the debates of the framers of the 1965 constitutional convention underscore their "strong commitment to ending discrimination and segregation." Sheff, 238 Conn. at 30. The framers explained the breadth of the language "segregation or discrimination." Delegate James Kennelly described what is now Section 20 as "a broad statement of principle that is all inclusive and would provide a complete umbrella for the total protection against discrimination and … segregation." 2 Proceedings of the Third Constitutional Convention 692 (1965) (hereinafter, "Convention") (App. at A22.)

In fact, the delegates were concerned that the term "segregation" "might invite too narrow a construction of the prohibition against discrimination." Sheff, 238 Conn. at 31; 2 Convention at 691-692 (App. at A21-A22). To resolve that concern, Delegate Woodhouse stated:

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

[30] The trial court, at oral argument, seemed to suggest that the denial of marriage is a sex-based classification, but ignored the plain text of Section 20 by subsequently ruling that the classification is "inconsequential." (Tr. at 15; MOD at 11.)

2 Convention at 691 (App. at A21). Delegate Kennelly referred to this langauge as the "very strongest human rights principle that this convention can put forth to the people of Connecticut." 2 Convention at 692 (App. at A22). Delegate Grasso refered to the language as a "new opportunity to give proper expression to the right of man," 2 Convention at 694 (App. at A24), and Delegate Houston called the language "the most comprehensive we had to consider." 2 Convention at 693 (App. at A23). These repeated emphases on the all encompassing nature of the prohibition on segregation and discrimination and its applicability to future rights undercuts the trial court's view that Section 20 is limited only to segregation or discrimination of a spatial nature.

3. The Debates Of The 1972 Convention -- As Well As Sociological And Economic Considerations -- Confirm The Plain Meaning Of Section 20 By Demonstrating That Connecticut Has Eliminated Sex As A Factor In The Enjoyment Of Legal Rights.

The 1972 debates of the framers of the Equal Rights Amendment, which added "sex" to the classes protected under Section 20, also support the conclusion that barring same-sex couples from marriage is impermissible "segregation or discrimination" that is "because of sex." Although one of the purposes of the ERA was to improve the legal standing of women, its fundamental principle was to make the sexes equal in the law. Senator Lieberman stated that "[t]he resolution before us presents an opportunity to affirm the concept of equal treatment of both sexes before the law." 15 S. Proc., Pt. 4, 1972 Sess. at 1527 (April 12, 1972) (App. at A27).

The legislature recognized that the ERA would affect marriage. Representative Neidetz, the sponsor of the resolution in the House, stated: "Equal rights amendment may also have an effect on those state laws affecting domestic relations. In this area, as elsewhere, the amendment will prohibit discrimination based upon sex. This will mean the state domestic relations laws will have to face individual circumstances and needs, not on sexual stereotypes." 15 H.R. Proc., Pt. 2, 1972 Sess. at 874 (March 29, 1972) (App. at A33).

The remarks of the framers indicate that Section 20's prohibition on sex-based classifications was the culmination of steady legal, sociological and economic developments since the late nineteenth century eradicating sex as a factor in the enjoyment of legal rights, including, notably, in marriage. Historically, the common law doctrine of coverture enshrined different legally proscribed rights, roles and responsibilities for men and women within marriage, mandating the absorption of a woman's legal and economic rights in those of her husband. See Mathewson v. Mathewson, 79 Conn. 23, 32-35 (1906) (describing history of coverture laws).[31] The husband had the legal duty to support his wife and children; the wife was obligated to give all her service and labor to her husband, focusing on the domestic sphere of maintaining the home, caring for children, and serving her husband. Nancy Cott, Public Vows: A History of Marriage and the Nation 12 (2000).

Although coverture was gradually dismantled as a legal matter in Connecticut, Wendt v. Wendt, 59 Conn. App. 656, 666 (2000) (noting that "common-law disabilities of coverture have long since been abolished"), cert. denied, 255 Conn. 918 (2000),[32] "marital unity was rewritten economically in the provider/dependent model, a pairing in which the husband carried more weight."[33] Cott, supra, at 157. The notion that women's proper role

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[31] Coverture provided that "[b]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything … ." William Blackstone, Commentaries on the Laws of England 442 (1765). In practice, this meant that a man could not grant anything to his wife; the wife was unable to contract with her husband or anyone else; the husband retained full legal ownership of all her property and real estate for the duration of the marriage; a wife could not bring an action against anyone for injury to person or property without the husband's concurrence; and a husband had the right to "correct his wife" using "'domestic chastisement.'" Hendrik Hartog, Man and Wife in America: A History 115-116 (2000). These notions permeated Connecticut law. See Dibble v. Hutton, 1 Day 221 (Conn. 1804) (spouses could not contract; husband could make no gift to wife or create an estate for her even though result was to leave woman impoverished after his death); Mary Moers Wenig, The Marital Property Law of Connecticut, 1990 Wis. L. Rev. 807, 837 (1990) (quoting from Zephaniah Swift's 1795 treatise on Connecticut law).

[32] See also Wenig, supra, note 31, at 841, 850.

[33] The Supreme Court endorsed this concept as recently as 1973. See, e.g., Stern v. Stern, 165 Conn. 190, 197 (1973) (rejecting challenge to alimony statute imposing

was in the home lingered in the "cult of domesticity," a notion the law affirmed, resulting in lost opportunities and disadvantages to women until fairly recent times.

The passage of the ERA proclaimed this state's elimination of sex as a basis for distinctions in the roles of parties to a marriage.[34] Yet, the State in the trial court proceedings justified its assertion that marriage can consist only of a man and a woman on the common law tradition. The state's reliance on common law tradition for the restriction of marriage to a man and woman represents the last remaining outpost of a long history of sex-specific roles in the marriage laws that the courts, the legislature, and, the people, in ratifying the ERA, have jettisoned. Marriage is now an institution of legal equality between the two parties whose respective rights and responsibilities are equal, mutual and reciprocal. The state's astonishing insistence on resurrecting legal restrictions that pigeonhole individuals based on broad generalizations about sex roles flies in the face of rudimentary sex discrimination law.[35]

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exclusive duty to pay on husband because statute turned not only on sex, "but, more importantly, on the legislature's conception of family relationships and its policy that a husband should be, as at common law, primarily responsible for the support of his wife and family"). The Court overturned this case in Page v. Welfare Comm'r, 170 Conn. 258 (1976), describing assumptions that "male workers' earnings are vital to the support of their families" but not those of female wage-earners as an "archaic and overbroad generalization." Id. at 268 (internal citations and quotations omitted).

[34] For example, in 1977, spousal support obligations, which at one time flowed only from husband to wife, were made mutual. See P.A. 77-288, codified at Conn. Gen. Stat. § 46b-37.

[35] See, e.g., United States v. Virginia, 518 U.S. 515, 541-543 (1996) (rejecting claim that gender-based differences could justify denying women opportunity to attend Virginia Military Institute); id. at 541 ("State actors controlling gates to opportunity … may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females'") (internal quotation omitted); Roberts v. Jaycees, 468 U.S. 609, 628 (1984) (castigating organization seeking to maintain all male membership for relying "solely on unsupported generalizations about the relative interests and perspectives of men and women," even where "such generalizations may or may not have statistical basis in fact" because the courts have "repeatedly condemned legal decisionmaking that relies uncritically on such assumptions"); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) (condemning use of stereotypes to justify female-only nursing school).

4. Federal And Sibling State Precedent Demonstrate That The Exclusion Of Lesbian And Gay Couples From Marriage Is Because Of Sex.

Precedent from sibling states also demonstrates that the exclusion of same-sex couples from marriage is an impermissible, sex-based classification. The Hawaii Supreme Court concluded that the marriage laws regulate on the basis of sex. See Baehr v. Lewin, 852 P.2d 44, 60-61 (Haw. 1993). Similarly, in Goodridge, 798 N.E.2d at 971, Justice Greaney, concurring, explained that the sex-based classification is "self-evident" because "an individual's choice of marital partner is constrained because of his or her own sex." See also Baker v. State, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (concluding that "[a] woman is denied the right to marry another woman because her would-be partner is a woman … . Similarly, a man is denied the right to marry another man because his would-be partner is a man … . Thus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex."); Andersen v. King County, 138 P.3d 963, 1037-39 (Wash. 2006) (Bridge, J., concurring in the dissent); Hernandez v. Robles, 855 N.E.2d 1, 29-30 (N.Y. 2006) (Kaye, C.J., dissenting).

Courts that have not found sex-based discrimination in the marriage laws have all done so based on the simplistic view, which the state urged below, that a legal restriction is not "because of" sex if it applies equally to all persons who wish to marry. See, e.g., Andersen, 138 P.3d at 988 (stating that "[m]en and women are treated identically [because] … neither may marry a person of the same sex.").[36] These decisions are plainly wrong because they disregard U.S. Supreme Court precedent that has forcefully rebuffed this "equal application" defense as a justification under the Fourteenth Amendment.

In McLaughlin v. Florida, 379 U.S. 184 (1964), the Court explicitly rejected its ruling

[36] See also Hernandez, 855 N.E. 2d at 10-11 ("[w]omen and men are treated alike-they are permitted to marry people of the opposite sex, but not people of their own sex"); Baker, 744 A. 2d at 880 n.13 ("marriage laws are facially neutral; they 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."); In re Marriage Cases, 143 Cal. App. 4th 873, 914 (2006) ("laws treat men and women exactly the same, in that neither group is permitted to marry a person of the same gender").

in Pace v. Alabama, 106 U.S. 583 (1883), which upheld a statute prohibiting adultery or fornication between a black person and a white person, with higher penalties than for same-race violations, because the "law[] applied equally to those to whom it was applicable." McLaughlin, 379 U.S. at 189. Addressing a statute that made it a crime for unmarried black and white couples to cohabitate, the Court rejected the reasoning relied on by Florida and in Andersen and other recent cases and ruled that:

> Pace represents a limited view of the Equal Protection Clause which has not withstood analysis in subsequent decisions of this Court … . This narrow view of the Equal Protection Clause was soon swept away … . Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation.

McLaughlin, 379 U.S. at 188-191. The Court struck down a statute that "treats the interracial couple made up of a white person and a Negro differently than it does any other couple." Id. at 188.

Similarly, in Loving, the U.S. Supreme Court, following McLaughlin, "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of invidious racial discriminations." 388 U.S. at 8. See also Evening Sentinel, 168 Conn. at 34 (noting that ERA was intended "to do away with sex discrimination altogether").

The assertion that McLaughlin and Loving are inapplicable because the Fourteenth Amendment was concerned with race discrimination, see, e.g., Andersen, 138 P.3d at 990, is illogical and misses the point. State equal protection provisions that prohibit sex-based classifications, such as Section 20, equally abhor race-based and sex-based classifications. The exclusion of same-sex couples from marriage involves a sex-based classification for the same reason that Loving involved a racial classification -- the exclusion "violates the central meaning of the Equal Protection clause" because it "proscribes generally accepted conduct if engaged in by members of different [sexes]." 388 U.S. at 11. See also Roberts v. Jaycees, 468 U.S. 609, 625 (1984) (noting that "stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by

persons suffering discrimination on the basis of their sex as by those treated differently because of their race").

Moreover, the equal application defense must fail because constitutional rights are individual rights, not group rights. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("Constitution[s] protect persons, not groups"; referring to long line of cases understanding equal protection as a personal right) (emphasis in original); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring) ("The Equal Protection Clause and our constitutional tradition are based on the theory that an individual possesses rights … . At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual … class").

Finally, even if, arguendo, the equal application defense could save a law that classifies on a suspect basis under the Fourteenth Amendment, the same result would not follow under Section 20. This Court has held that the "express inclusion of the term 'segregation' in [§ 20] has independent constitutional significance" that makes it broader than the Fourteenth Amendment. See Sheff, 238 Conn. at 28.[37] The marriage exclusion turns on an individual's sex. To rule that the sex-based classification in the marriage laws is negated by an "equal application" defense would undermine this plain meaning and eviscerate the framers' intention that Section 20 be "all inclusive," a "complete umbrella," and "total protection" that "unequivocally opposes the philosophy and practice" of "segregation or discrimination."

[37] It is worth noting that no other equal protection provisions considered by other courts in marriage cases contain Connecticut's unique language proving that "no person" shall be subject to "segregation or discrimination" because of sex. Though containing explicit sex protections, in contrast to Section 20's application to each individual, the Washington Constitution more generally states that "equality of rights shall not be denied." Wash. Const. Art. XXXI, § 1. New York does not include sex in its equal protection provision, see N.Y. Const. Art. I, § 11, and the Vermont Court was considering the scope of its Common Benefits Clause, which "differs markedly" from equal protection provisions. Baker, 744 A.2d at 870 (discussing Vt. Const. c. 1, art. 7).

5. The Holdings Of This Court Make Clear That Sex-Based Classifications Require Strict Scrutiny.

This Court has ruled that laws that restrict or classify based on the classifications specified in Section 20, such as sex, must be subjected to strict scrutiny. See Daly v. Delponte, 225 Conn. 499, 514 (1993). In that case, this Court addressed the constitutional prohibition on disability discrimination in Section 20, parallel to that amendment's prohibition on sex discrimination. The Court reasoned that the "explicit prohibition of discrimination because of physical disability defines a constitutionally protected class of persons whose rights are protected by requiring encroachments on these rights to pass a strict scrutiny test." Id. at 513-14. The Court explained that "[t]his conclusion follows from the language of the clause itself: 'No person shall be denied the equal protection of the law … because of … physical or mental disability.'" Id. Sex is a similarly constitutionally protected category under Section 20 and thus sex-based classifications must be subject to strict scrutiny.

D. The Exclusion Of Same-Sex Couples From Marriage Impermissibly Classifies On The Basis of Sexual Orientation And Must Be Subjected to Strict Scrutiny Or, Minimally, Intermediate Scrutiny.

Similar to the sex discrimination built into the marriage statutes, the marriage laws also discriminate on the basis of sexual orientation. Because two people of the same sex cannot marry, the state excludes all lesbian and gay people as a class from marrying the person of their choice. See Lawrence, 539 U.S. at 581 (O'Connor, J., concurring) (adverse treatment of those with same-sex partners is discrimination based on sexual orientation). Moreover, the civil union law explicitly defines marriage as "the union of one man and one woman." Conn. Gen. Stat. § 46b-38nn. The legislature's purpose to exclude intentionally all lesbian and gay couples from marriage could not have been plainer.

1. The Text Of The Constitution And This Court's Precedent Establish That Sexual Orientation Discrimination Must Be Subjected to Heightened Scrutiny.

Sexual orientation discrimination must be subjected to heightened scrutiny because

lesbian and gay people have been subjected to a history of systemic and harsh unequal treatment based on myths and stereotypes wholly unrelated to their ability to perform in society. Lesbian and gay people meet all the criteria for suspect class status under the Fourteenth Amendment of the federal Constitution: (1) lesbian and gay people have been subjected to a "history of purposeful unequal treatment," San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); (2) sexual orientation "bears no relation to the ability to perform or contribute to society," Frontiero v. Richardson, 411 U.S. 677, 687 (1973); and (3) lesbian and gay people have historically been "relegated to such a position of political powerlessness." Rodriguez, 411 U.S. at 28. This Court has utilized these factors to identify suspect classes, see Leech v. Veterans' Bonus Div. App. Bd., 179 Conn. 311, 314 (1979), but has also recognized that intermediate review is warranted when a law involves "sensitive classifications relating to stereotypes or disadvantaged minorities[.]" Carofano v. City of Bridgeport, 196 Conn. 623, 642 (1985). Carofano relied on Eielson v. Parker, 179 Conn. 552, 564 (1980), in which this Court recognized that a "two-tier analysis of the law of equal protection … is not sufficiently precise to resolve all cases. Legislation that involves … classifications that are sensitive, though not suspect, may demand some form of intermediate review." Where a group has been subject to a history of pervasive discrimination, Article First, § 1's promise that all citizens are "equal in rights" is capacious enough to incorporate sexual orientation as a suspect or quasi-suspect class. See State v. Conlon, 65 Conn. 478, 489-90 (1895) (Article First, § 1 guarantees "equality under the law, in rights to 'life, liberty and the pursuit of happiness'" in language that is "purposely broad.").[38]

2. Federal Precedent, Sibling State Precedent, And Sociological And Economic Considerations Support The Application Of Heightened Scrutiny To Sexual Orientation Classifications.

Discrimination based on sexual orientation meets the criteria for strict scrutiny and,

[38] In addition to Article First, § 1, this Court has also noted that the enumerated classes in Section 20 are "not dispositive" on rights of other classes. See Moore v. Ganim, 233 Conn. 557, 597 (1995).

accordingly, should at a minimum be subjected to intermediate scrutiny. First, as described in Argument § I, supra, and as courts have consistently found, lesbians and gay men have been and continue to be subjects of discrimination. See generally, Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) (noting "pernicious and sustained hostility" and "immediate and severe opprobrium" associated with gay people).[39] Although Connecticut can be proud of the progress it has made in improving the climate for its gay and lesbian citizens, it was perhaps an understatement for Representative Lawlor to remark during the civil union debate in the House of Representatives that "there is, at least to some extent, a climate of hostility towards gays and lesbians in our State."[40] 48 H.R. Proc. at 1879-80 (remarks of Rep. Lawlor) (App. at A41-A42).

As for the second criterion for suspectness, lesbians and gay men have the ability to perform in society unrelated to their sexual orientation. The lack of a relationship between the trait and ability is likely to reflect "prejudice and antipathy." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). Sexual orientation, like sex, religion, race and national origin, bears no relation to the ability to perform or contribute to society. The American Psychiatric Association and all other major mental health organizations have removed homosexuality from their lists of mental disorders.[41] The civil union law and

[39] See also, e.g., Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1181 n. 23 (9th Cir. 2006) (history of discrimination against gay men and lesbians is "self-evident fact"); Ben-Shalom v. Marsh, 881 F.2d 454, 465 (7th Cir. 1989) ("Homosexuals have suffered a history of discrimination and still do, though possibly now in less degree."); Tanner v. Oregon Health Services Univ., 971 P.2d 435, 447 (Or. App. 1998) ("[C]ertainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.").

[40] See also 48 S. Proc. at 1054 (remarks of Senator Nickerson) (noting that "it is absolutely the case that people of the same sex have suffered horribly") (App. at A36).

[41] See Arg. § I, supra, and American Psychiatric Association, Fact Sheet, Gay, Lesbian and Bisexual Issues (2002) (http://www.aglp.org/pages/cfactsheets.html#Anchor-Gay-14210) ("[a]ll major professional mental health organizations have gone on record to affirm that homosexuality is not a mental disorder.").

second parent adoption law implicitly acknowledge that gay and lesbian people form committed and long-term relationships and can be good parents.

Moreover, while the immutability of a characteristic is not central to suspect class status, see infra, sexual orientation, like other characteristics, is a core aspect of personal identity and selfhood that all major mental health organizations and the Surgeon General agree cannot be changed.[42] Courts have recognized that "sexual orientation and sexual identity are immutable." Hernandez-Montiel v. Immigration & Naturalization Serv., 225 F.3d 1084, 1093 (9th Cir. 2000) (further explaining that as a characteristic that is "inherent to one's very identity as a person," homosexuality cannot be viewed as limited solely to sexual conduct). See also Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 34-35 (D.C. 1987) (describing medical literature that being lesbian or gay is as deeply ingrained as being heterosexual). As the Court in Hernandez-Montiel and professional mental health organizations have emphasized, "the attempted 'conversion' of gays and lesbians" is "unethical" and should be "condemned." 225 F.3d at 1093; accord Karouni v. Gonzales, 399 F.3d 1163, 1173 (9th Cir. 2005) (lesbian and gay people should not be required to "change a fundamental aspect of [their] human identity."). Notably, neither the U.S. Supreme Court nor this Court has deemed immutability to be central in the standard for suspect class status. See Rodriguez, supra, Frontiero, supra, and Leech, supra. Illegitimacy, for example, is a status that can be changed, but such classifications receive strict scrutiny "[b]ecause illegitimacy is beyond the individual's control and bears 'no relation to the individual's ability to participate in and contribute to society.'" Cleburne, 473 U.S. at 441 (quoting Matthews v. Lucas, 427 U.S. 495, 505 (1976)). Indeed, religion can be changed, but is a protected status under Section 20. Even if immutability were a factor,

[42] American Psychological Ass'n, Briefing Sheet on Same-Sex Families & Relationships at 2 (June 2006) ("Human beings cannot choose to be either gay or straight.") (http://www.apa.org/ppo/issues/lgbfamilybrf604a.html); Surgeon General's Report, supra ("sexual orientation is usually determined at adolescence if not earlier … and there is no valid scientific evidence that sexual orientation can be changed.").

it is clear that lesbian and gay people would satisfy that criterion.

Third, lesbian and gay people have historically been relegated to a position of relative political powerlessness within the majoritarian, legislative political sphere.[43] While gay men and lesbians have become more visible in Connecticut, many still feel the need to hide their sexual orientation to avoid the widespread discrimination and violence it engenders. Inequality, such as the marriage discrimination at issue here, has hardly disappeared. Despite repeated attempts to amend Title VII, there is no protection against sexual orientation discrimination in federal antidiscrimination laws. See 42 U.S.C. § 2000e. Other indicators of lack of political power of gay people include: the passage of the federal anti-marriage law, see 1 U.S.C. § 7, and the continued discriminatory regime imposed on gay and lesbian persons in the United States military, see 10 U.S.C. § 654, despite evidence that lesbian and gay people serve as well as their heterosexual counterparts, and continuing political initiatives intended to limit or eviscerate the rights of gay people. [44]

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

[44] Other courts have concluded that classifications based on sexual orientation are suspect and deserving of strict scrutiny. See Hernandez , 855 N.E.2d at 27 (Kaye, C.J., dissenting) ("Homosexuals meet the constitutional definition of a suspect class, that is, a group whose defining characteristic is 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy-a view that those in the burdened class are not as worthy or deserving as others'") (citations omitted); Tanner, 157 Or. App. at 524 (1998) (state university violated the privileges and immunities clause of the Oregon Constitution by failing to extend insurance benefits to same-sex domestic partners); Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988) (regulations barring gays and lesbians from military discriminate against a suspect class without promoting a compelling government interest, thus violating equal protection), vacated, 875 F.2d 699 (1989) (en banc) (specifically declining to address the constitutional issues), cert. denied, 498 U.S. 957 (1990). The California Supreme Court has also held that invidious discrimination against gays and lesbians violates the Equal Protection guarantee of the California Constitution. Gay Law Students Assoc. v. Pac. Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592 (Cal. 1979). Although later reversed by appellate courts, several other courts have concluded that sexual orientation discrimination is subject to heightened scrutiny. See, e.g., Equal. Found. of Greater Cincinnati v. City of Cincinnati, 860 F. Supp. 417, 434-40 (S.D. Ohio 1994). The courts that reversed such decisions, as well as other appellate courts that ruled similarly, did so on the basis that classifications based on sexual orientation are actually tied to "homosexual conduct," which could be constitutionally criminalized under Bowers v.

IV. THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE IS SUBJECT TO STRICT SCRUTINY BECAUSE IT INFRINGES ON THE FUNDAMENTAL RIGHT TO MARRY IN VIOLATION OF ARTICLE FIRST, §§ 8 AND 10.

The right to marry is based on core constitutional rights of respect for individual liberty and personal autonomy. It recognizes that some personal decisions are so intimate and central to human dignity and individual identity that they must be protected from undue government interference regardless of majoritarian beliefs. See Lawrence v. Texas, 539 U.S. 558, 573-74 (2003). Cf. Moore, 233 Conn. at 595 (Constitution protects against direct infringement of personal liberties by state action). In this case, the State does not -- indeed cannot -- contest the profound liberty interest in making the choice to marry, but instead seeks to recast the existing right to marry sought by the Plaintiffs as some new and unrecognized right to same-sex marriage. The State's insistence that the constitutional right to marry must forever be restricted to a male-female institution misconstrues both the nature of the liberty interest at stake and the role of history in constitutional interpretation. Liberty does not belong only to some citizens; it belongs to every citizen. The "solicitude for personal liberty manifested in the [Connecticut] Constitution," Jackson v. Bulloch, 12 Conn. 38, 44 (1837), is not so cramped and static that constitutional rights are restricted solely to those who have historically had the ability to exercise them. Because the Connecticut Constitution is a "'living document with current effectiveness'" and "'[]capable of coping with changing times,'" Dukes, 209 Conn. at 115 (citing Seattle Sch. Dist. v. State 585 P.2d 71 (Wash. 1978)), gay and lesbian citizens -- whom the State has acknowledged form intimate relationships much as their heterosexual counterparts do -- must be able to exercise the same rights and make the same kind of choices as their non-gay neighbors

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Hardwick, 478 U.S. 186 (1986). See Equal. Found. Of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261, 269 (6th Cir. 1995) ("Bowers … and its progeny command that … gays, lesbians, and bisexuals cannot constitute either a 'suspect class' or a 'quasi-suspect class.'") In light of the Supreme Court's having overturned Bowers in Lawrence, however, the reasoning in these cases has been completely undermined. Significantly, Connecticut repealed its sodomy laws in 1969, further rendering these federal cases irrelevant to a determination of the scope of the Connecticut constitution. See P.A. 69-828, §§ 77-81.

and family members.[45]

A. Standard Of Review.

The construction of the Connecticut Constitution presents a question of law subject to plenary review. See Ramos, 254 Conn. at 829-30.

B. The Constitutional Text And Precedents Of This Court And The U.S. Supreme Court Demonstrate That The Right To Marry Is Shared By Every Citizen.

The liberty right to choose whom to marry is protected by the due process provisions in Article First, §§ 8 and 10. Article First, § 10 provides:

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

Conn. Const., Article First, § 10. In addition, Article First, § 8 provides in relevant part: "No person shall … be deprived of life, liberty or property without due process of law … ." Conn. Const., Article First, § 8; cf. U.S. Const. Amend XIV, § 1 (providing, inter alia, "nor shall any State deprive any person of life, liberty, or property, without due process of law …"). This Court has recognized that the due process clause under the Connecticut Constitution "encompasses a substantive sphere" and "establishes that certain fundamental rights are protected." Ramos, 254 Conn. at 835 & n.31. These substantive rights also emanate from Article First, § 1. See, e.g., Gould v. Gould, 78 Conn. 242 (1905), discussed infra.

Neither party disputes that there is a fundamental right to marry under both the Connecticut and federal constitutions. See Loving, 388 U.S. at 12 ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as

[45] In addition to directly infringing the Plaintiffs' liberty interests in marriage, the State's exclusion violates their right to equal protection. See Plyler v. Doe, 457 U.S. 202, 216-17 (1982) ("[W]e have treated as presumptively invidious those classifications … that impinge upon the exercise of a 'fundamental right.'")

one of the vital personal rights essential to the orderly pursuit of happiness by free men.")[46]; Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("[a]lthough Loving arose in the context of racial discrimination, prior and subsequent decisions of this Court affirm that the right to marry is of fundamental importance for all individuals") (emphasis added)); Turner v. Safley, 482 U.S. 78, 95-96 (1987) (right to marry applies to prisoners and noting that marriages are "expressions of emotional support and public commitment.")[47] Long before the idea of fundamental rights or strict scrutiny took hold in American law, this Court acknowledged that the "right to contract marriage" is among Article First, § 1's guarantees of "'life, liberty, and the pursuit of happiness.'" Gould, 78 Conn. at 243-44.[48]

The liberty interest underlying the right to marry is enjoyed by all citizens; this case challenges the deprivation to gay people of a fundamental right enjoyed by all Americans. Under federal law, a fundamental right is not restricted to those who have historically had

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[46] This Court has looked to "case law construing the due process clause of the federal constitution" for state constitutional analysis, Ramos, 254 Conn. at 834-35, and has acknowledged that the right to marry is a "fundamental right [ ] implicitly guaranteed by" the federal constitution. Zapata v. Burns, 207 Conn. 496, 506 (1988).

[47] The State below incorrectly asserted that U.S. Supreme Court decisions have recognized a fundamental right to marry only because of a necessary link between marriage and procreation. See Turner, 482 U.S. at 95-96 (extending right to marry to prisoners who had no expectation of possibility of procreating and noting critical expressive aspects of marriage). Any purported link between marriage and procreation was severed by the U.S. Supreme Court's ruling that married couples enjoy a constitutionally protected right to avoid procreation. Griswold, 381 U.S. at 485.

[48] Connecticut's long common law tradition of respect for family autonomy, which has now ripened into a protected constitutional right, illustrates the zealous protection given to individual decisions about certain core matters of home and family life. See, e.g., Castagno v. Wholean, 239 Conn. 336, 341-343 (1996) (tracing the "common-law right in Connecticut of parents to raise their children without excessive government interference" as reflecting a broad tradition that "the family unit should be respected" and its autonomy invaded "only in the most pressing circumstances"); Roth v. Weston, 259 Conn. 202, 223 (2002) (fundamental constitutional protection allows parents "to make child rearing decisions" and "the due process clause leaves little room for states to override a parent's decision even when [it does not serve] the best interests of the child"). Just as the State cannot intrude on family autonomy absent harm to the public welfare, so, too, the State is barred from interfering with the highly sensitive individual choice of marital partner absent a similar compelling interest in public welfare.

the ability to exercise it, or the fundamental right to marry would have been limited to those of the same race. In Loving, the Court acknowledged that members of the Thirty-ninth Congress passing the 14th Amendment intended for anti-miscegenation laws to survive despite the pledge of equal protection of the laws. 388 U.S. at 9. As the Court later observed, "[m]arriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause[.]" Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 847–848 (1992) (emphasis added).

Indeed, in Loving, the U.S. Supreme Court did not determine whether there was a fundamental, historic right to "miscegenic," or mixed-race marriages. The Court in Zablocki did not ask whether there was a fundamental right for the poor to marry, nor did the Turner Court assess whether there was a fundamental right to "inmate marriage." In these cases, only after acknowledging the well-established and general fundamental right to marry did the Supreme Court consider the application of the right in the context of the state's denial of marriage to a particular class of people. As Justice Greaney explained in his concurring opinion in Goodridge, "[t]o define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question … this case calls for a higher level of legal analysis." 798 N.E.2d at 972-73 (Greaney, J., concurring). See also Casey, 505 U.S. at 847 (it is "tempting … to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified … . But such a view would be inconsistent with our law.").[49]

[49] The U.S. Supreme Court has repeatedly demonstrated that fundamental rights are not limited to those persons who historically were able to exercise them. See, e.g., Stanley v. Illinois, 405 U.S. 645 (1972) (recognizing parental rights of unwed father in spite of longstanding common rule that child born out of wedlock had no legal parents); Eisenstadt

History can have a role in determining constitutional rights, Geisler, 222 Conn. at 685, but there is no need to examine history and tradition when, as here, Plaintiffs seek to exercise a pre-existing fundamental right rather than to seek a new right.[50] The Supreme Court's decision in Lawrence demonstrates why gay and lesbian citizens may not be a priori excluded from liberty by a past history of exclusion.[51] In Lawrence, the U.S. Supreme Court held that all adults, including lesbian and gay citizens, enjoy a "right to liberty under the Due Process Clause" that "gives them the full right to engage" in "private sexual conduction … without intervention of the government." 539 U.S. at 578. The Court reassured that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education." Id. at 574. Reaffirming its decision in Casey, the Lawrence Court emphasized:

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

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v. Baird, 405 U.S. 438 (1972) (right of individuals, married or unmarried, to make procreative choices).

[50] The right to marry is well established and meets the criteria in Washington v. Glucksburg, 521 U.S. 702 (1997), that a fundamental right is one "which [is] 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'" without it. Id. at 720-21. Glucksburg involved consideration of a new and previously unestablished right (assisted suicide). It did not involve the issue of the application of an existing constitutional right. Even if this Court re-examined the Glucksberg factors with respect to so-called "same-sex marriage," Connecticut's ban on marriage for same-sex couples is recent, dating only to the Coparent Adoption Law in 2000, P.A. 00-228. Moreover, the liberty interest at stake may be carefully described as the right to marry the person of one's choice.

[51] As Professor Laurence H. Tribe has explained, the Court's task is not simply to "name the specific activities textually or historically treated as protected." See Laurence H. Tribe, Lawrence v. Texas: The 'Fundamental Right' that Dare Not Speak Its Name, 117 Harv. L. Rev. 1893, 1899 (2004); id. at 1934 (noting that Lawrence and many other cases resisted any such reductionist procedure; "the Court developed its substantive due process jurisprudence … with the long line of decisions that described the protected liberties at higher levels of generality than any 'protected activities' catalog could plausibly accommodate…").

Id. (quoting Casey, 505 U.S. at 851 (1992)).

The Court concluded: "Persons in a homosexual relationship may seek autonomy for those purposes, just as heterosexuals do." Id. at 574. While the issue of marriage was not before the Court, the import of Lawrence is that it is impermissible to simply exclude gay and lesbian citizens from exercising the same liberties as others absent an adequate justification.[52]

Moreover, characterizing Plaintiffs' claim as a claim for "a right to same-sex marriage," i.e., narrowing the liberty interest at issue to the facts of this case and the identities of these parties, repeats the error made in Bowers v. Hardwick, 478 U.S. 186 (1986), and repudiated in Lawrence. The Bowers Court had recast the right at stake in a challenge by a gay man to Georgia's sodomy statute as a claimed "fundamental right" of "homosexual sodomy," 478 U.S. at 191, and then rejected as "facetious" the idea that such a right is "'deeply rooted in this Nation's history and tradition.'" Id. at 194. In Lawrence, the Supreme Court held that its prior constricted framing of the issue in Bowers "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake." Lawrence, 539 U.S. at 567 ("To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse.")

[52] In Goodridge, the Massachusetts Supreme Judicial Court, although not determining the existence of a fundamental right because the marriage ban lacked rationality, 798 N.E.2d at 961, did recognize the fundamental importance of marriage for same-sex couples. See 798 N.E.2d at 966-67 (describing marriage as "a public institution and a right of fundamental importance"). Sibling state precedents have failed to appreciate that liberty interests must be available to all citizens. Early cases dismissed claims under the Due Process Clause of the Fourteenth Amendment without a shred of analysis. See Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). More recent cases have been wrongly decided because courts have misconstrued the nature of the liberty interest and, in particular, the application of Glucksburg, supra, to an already existing fundamental right. See Lewis, 908 A.2d at 207-11; Andersen, 138 P.3d at 976-79; Hernandez, 855 N.E.2d at 10; Marriage Cases, 49 Cal. Rptr. 4th at 905-914; and Standhardt v. Superior Court ex rel. Cty. Of Maricopa, 77 P.3d 451, 454-55 (Ariz. Ct. App. 2003).

The respect for the individual's liberty interest in choice of marital partner has also been expressed by this Court. In his concurrence in Gould 78 Conn. at 251, Justice Hamersly questioned the validity of a statute barring epileptics from marrying in light of the personal importance of choosing a marital partner, opining that "the constitutional guaranties of personal freedom," in "what in former days was regarded as the proper domain of individual right; namely, the natural right of marriage, the freedom of contract in the exercise of the right, the freedom of conscience in the performance of the personal duties it may involve" made the Court's dicta upholding the statute "doubtful." Id. at 266-67. Whether an "epileptic" or a same-sex couple, in language that speaks to the present case, Justice Hamersley wrote that, "[t]his individual right has been and is regarded as protected by the Constitution from arbitrary invasion." Id.[53]

As the U.S. Supreme Court observed in Lawrence, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects." 539 U.S. at 575. The Connecticut Constitution also links liberty and equality. In addition to the due process rights embodied in Article First, §§ 8 and 10, Article First, § 1 intertwines both liberty and equality in its language that all are "equal in rights." See Conlon, 65 Conn. at 522 (stating that Article First, § 1 "protect[s] … the citizen in the equal enjoyment of those essential rights belonging to citizens of a free government" in language that is "purposely broad."). The intersection of liberty and equality is particularly relevant to this case. The State itself has recognized that lesbian and gay relationships and heterosexual relationships are identically situated vis-à-vis the law. Lesbian and gay people, too, therefore have an equal liberty right to participate in marriage.

[53] The eugenics provision at issue in Gould demonstrates a legislative concern, based on beliefs of that time period, about regulating access to marriage in the interest of public health, an issue not presented by this case. In fact, statutory provisions -- other than gender -- restricting access to marriage itself have not been extensive during Connecticut's history, generally consisting of age and consanguinity provisions and prohibitions on bigamy. See Conn. Gen. Stat. §§ 46b-30 (age) and 46b-21 (consanguinity); § 53a-190 (bigamy prohibition); Conn. Gen. Stat. 1808, Title CV, ch. 1, § 3 (age), § 4 (consanguinity), and § 11 (bigamy prohibition).

C. A Change In The Sex-Based Marital Restriction Will Not End All Restrictions On Marriage Eligibility.

Slippery slope arguments have been raised time and again to distract courts from claims by minorities to equal access to fundamental rights. Ending discrimination against same-sex couples will not end all marriage restrictions, including restrictions on multiple partner marriages, any more than ending race discrimination in marriage did. This same specter was raised at oral argument in Loving, but legal claims to end restrictions on polygamy or to abolish age or consanguinity provisions have not advanced.[54]

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

V. THERE IS NO CONSTITUTIONALLY ADEQUATE JUSTIFICATION FOR THE DENIAL OF MARRIAGE TO SAME-SEX COUPLES, UNDER EITHER A STRICT SCRUTINY OR RATIONAL BASIS LEVEL OF REVIEW.

Because the exclusion of lesbian and gay people from marriage burdens suspect

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[54] Peter Irons & Stephanie Guitton eds., May It Please The Court 227, 282-83 (1993) (oral arguments in Loving) in which Virginia Assistant Attorney General R.D. McIlwaine argued: "[T]he state's prohibition of interracial marriage … stands on the same footing as the prohibition of polygamous marriage, or incestuous marriage, or the proscription of minimum ages at which people may marry, and the prevention of the marriage of people who are mentally incompetent.").

classifications and infringes on a fundamental right, see Argument §§ III & IV, supra, it is subject to strict scrutiny. None of the state's justifications proffered below -- administrative ease, consistency with other jurisdictions, or incremental approach -- are compelling interests that can justify discrimination against suspect classes or deprivation of fundamental rights. Further, creating an entirely new status is hardly a narrowly tailored solution to a perceived problem. For example, to the extent that tracking the sex of couples is necessary to comply with federal law, doing so by tracking different-sex married couples and same-sex married couples is a far narrower solution than creating a new legal category for same-sex couples.

In any event, any justification for barring same-sex couples from marrying fails even the rational basis test under both equal protection provisions in Article First, §§ 1 and 20 of the Connecticut Constitution and the substantive due process provisions of Article First, §§ 8 and 10. Perforce, for those same reasons, the State cannot demonstrate any reason for excluding same-sex couples from marriage that meets the strict scrutiny test that it be "necessary to the achievement of a compelling state interest." Donahue, 259 Conn. at 794.

Rational basis review requires a two-step inquiry. First, the classification must advance a "legitimate public interest." See City Recycling, Inc., 257 Conn. at 445; Fair Cadillac-Oldsmobile Isuzu P'ship v. Bailey, 229 Conn. 312, 319 (classification must "relate[] to a legitimate state purpose"; "[a]s the first step in our state constitutional analysis, we must ascertain the legislative purpose"). Second, if the proffered purpose is a legitimate one, the court must "decide whether the classification and disparate treatment in a statute bear a rational relationship to a legitimate state end and are based on reasons related to the accomplishment of that goal." Donahue, 259 Conn. at 795; City Recycling, 257 Conn. at 445 (requiring rational relationship between classification and state interest).[55] See also Cleburne, 473 U.S. at 440 (the inquiry is whether the "classification drawn by the statute is

[55] The Court applies the same rational basis test to equal protection and due process claims. See Ramos, 254 Conn. at 841.

rationally related to a legitimate state interest").

The State's assertion in the trial court that the exclusion of gay and lesbian couples from marriage is justified by administrative convenience, as well as by the existence of similar discrimination in other jurisdictions, does not come close to meeting the rational basis test. See § B, infra. In addition, the legislative history of the civil union law demonstrates that there is no legitimate public purpose at all for creating a separate classification just for gay and lesbian citizens rather than including Plaintiffs within marriage. See § C, infra. Finally, this Court should not credit claims made by amici in the trial court that marriage is linked to procreation and that marriages of same-sex couples will harm children. These claims were disavowed by the State, were indisputably not one of the legislature's motives for excluding same-sex couples from marriage, and are repudiated by other provisions of Connecticut law, including the civil union law. See §, D, infra.

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

Rational basis review is not toothless and does not require judicial capitulation to proffered state interests. As the Court explained, "there is a limit to the hypothesizing that we will undertake in order to sustain the constitutionality of a statute … even the standard of rationality must find some footing in the realities of the subject addressed by the legislation." City Recycling, 257 Conn. at 452 (striking statute on rational basis grounds).[56] The reasons for the state's classification may not "disregard[] reality." State v. Reed, 192 Conn. 520, 532 (1984).

Under rational basis review, the Court does not simply defer to the legislature, but will examine whether there is a logical nexus between the state purpose and the means used to achieve it in light of all relevant state laws. In two cases where the Court struck down Sunday closing laws under rational basis review, the Court engaged in a detailed analysis of the logical connection between the state's purpose and the statutory scheme at

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

issue. In Caldor's, Inc. v. Bedding Barn, Inc., 177 Conn. 304, 320-322 (1979), the Court noted the increased number of legislative exemptions to the businesses affected by Sunday closing laws, found that the statutory scheme no longer treated "all dealers in any particular item of merchandise" alike. Id. at 323. The Court could not rationalize a system in which, for example, various food items may be sold by small retail food stores, retail drug stores, prepared food service organizations, and dairies, but not by supermarkets. Id. Similarly, artists' supplies and tobacco products may be sold by drugstores and restaurants and those who operate tourist attractions, but not by Pier 1 Imports that operates a home furnishings store. Id. The Court struck down the law because of "the apparent absence of a rational connection" between the items designated as appropriate for sale on a day of rest and the businesses permitted to sell them. Id. at 324.

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

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

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

In Page v. Welfare Comm'r, 170 Conn. 258 (1976), the Court considered a statute that required adult children with parents who received welfare benefits to contribute to their parents' support. Id. at 260. The Court struck, on rational basis grounds, a regulation that provided more exemptions from such payments required for married men with minor children and working spouses than for married women with minor children and working spouses. Id. at 267-68. Even where "the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support," the Court ruled that "'such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.'" Id. at 268 (internal citation omitted). Rather, any difference in the amount of an exemption must be based on the families' actual experience. Id. at 269-270. See also Kellems v. Brown, 163 Conn. 478, 494 (1972) (striking on rational basis grounds tax exemption that existed for widows but not widowers where "no valid reason whatsoever for the … discrimination … is disclosed in the body of the act").

These cases demonstrate that applying the logic required by rational basis review

condemns statutes that further no legitimate state purpose at all, or, among other reasons, where the state's reasons for the classification are illogical, inconsistent, or contrary to other provisions in state law. Indeed, rational basis review should be especially searching where personal relationships and liberty interests are implicated, even if they are not fundamental. See Lawrence, 539 U.S. at 580 ("We have been most likely to apply rational basis review to hold a law unconstitutional … where … the challenged legislation inhibits personal relationships.") (O'Connor, J., concurring).

B. The State's Proffered Reasons For Excluding Same-Sex Couples From Marriage Are Not Rationally Related To Any Legitimate State Interest.

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

There is no basis for the State's proffered justification in the trial court that the civil union classification is necessary for the administration of state programs, specifically because some state benefits programs are interconnected with federal law. The federal government does not currently respect either civil unions or marriages of same-sex couples. The State will therefore have to differentiate between same-sex and different-sex couples in determining eligibility for some joint state-federal benefits programs. The label attached to same-sex couples is utterly inconsequential to the administrative ease of such record keeping. For example, there is no difference between a state benefits form that has one box to be checked for married couples and one box to check if for civil union couples, and a form that has one box for different-sex married couples and one box for same-sex married couples. There is simply no rational or logical connection between the need to keep track of same-sex couples in some state programs and the need to use the "civil union" nomenclature.[57]

[57] Indeed, the legislature itself has modified state law to address inequities to same-sex couples resulting from the intersection of state and federal law. See P.A. 05-3 (Sp. Sess.), An Act Concerning the Implementation of Various Budgeting Provisions ("The provisions of chapters 217, 228c and 229 of the general statutes shall apply to parties to a civil union recognized under the laws of this state as if federal income tax law and federal estate and gift tax law recognized such a civil union in the same manner as Connecticut

Moreover, even apart from the complete absence of any demonstrated administrative need to place same-sex couples in a separate legal status, mere record-keeping can hardly serve as a legitimate justification for discrimination and the segregation of one class of citizens. See Stern, 165 Conn. at 198 ("Obviously administrative convenience or ease of determination cannot serve as a basis to support the discriminatory statutory scheme."); Stanley v. Illinois, 405 U.S. 645, 656 (1972) (noting that constitutional values are designed to protect against "the overbearing concern for efficiency and efficacy"). A stated concern with "administrative convenience" is so vague that there is danger that it can be used to buttress almost any kind of discrimination.

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

The State also maintained in the trial court that it is rational to exclude same-sex couples from marriage in Connecticut because all states but one and the federal government do so. The State asserted an interest in making the law of Connecticut uniform and consistent with these other jurisdictions.

The State asserted uniformity merely as an abstract interest without identifying either an objective or benefit from uniformity nor any harm from lack of uniformity. The State must do more under rational basis review than simply make an observation; it must explain how the law rationally advances a legitimate state purpose. See Fair Cadillac, 229 Conn. at 319 n.11 (dismissing State's purported rational basis that is "more like an observation" where state "do[es] not explain how the closing law advances the purpose of comprehensively regulating [automobile] dealers").

Moreover, the uniformity justification cannot be rational because the State cannot explain why uniformity is important for one aspect of its marriage eligibility laws (i.e., limiting

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law"). The language of this statute itself demonstrates that it is no easier to use the term "civil union couple" than it would be to use the term "married same-sex couple" where such distinctions were necessary due to federal law.

marriage to a man and woman), but not important in all other aspects of its marriage laws, such as permitting marriages of first cousins, see Conn. Gen. Stat. § 46b-21, even though most other states prohibit them or treat them as null and void.[58] In the area of marriage in particular, states have always had somewhat different eligibility rules, including with respect to characteristics such as age, consanguinity and physical condition. Homer H. Clark, Jr., The Law of Domestic Relations in the United States 83-84, 89, 98-99 (2nd ed. 1988). Historically, states have also had dramatically different laws based on race and ethnicity, remarriage after divorce, and competency. See Paul H. Jacobson, Ph.D., American Marriage and Divorce 45 (1959). Insisting on uniformity for only one aspect of the State's marriage eligibility laws is irrational.

The existence of the civil union law also demonstrates the irrationality of the State's position. The State can hardly claim a rational interest in the uniformity of its laws with those of other states when it clearly, and properly, was not concerned about the paucity of states that have implemented civil union laws. Other states will have to address whether and how their laws will regard civil unions in the very same way that other states will have to address how their laws will regard marriages of same-sex couples. In fact, by creating a new status that exists in "virtually" no other states, rather than giving same-sex couples access to marriage, which exists in every state, the State may well make it harder for Connecticut citizens to have their relationships protected elsewhere. See, e.g., Rosengarten, 71 Conn. App. 372.

Any concerns about uniformity with other states, whether in the area of first cousins or otherwise, is addressed by the application of choice of law principles. For over 200 hundred years, this body of law has addressed the accepted inconsistency in state laws as

[58] See Mark Strasser, Unity, Sovereignty, and the Interstate Recognition of Marriage, 102 W. Va. L. Rev. 393, 402 nn.50-53 (1999) (describing varying state laws regarding marriage of first cousins). See, e.g., Idaho Code § 32-206 (1996) (marriages between first cousins prohibited); Ark. Code Ann. § 9-11-106(a) (1987) (marriages between first cousins are incestuous and absolutely void).

part of our federal system. These principles are routinely applied in every state to address non-uniformity, including in the area of marriage.[59]

The State's mere incantation of uniformity or conformity with other jurisdictions cannot stand as a legitimate interest. It eviscerates any meaning in the independent guarantees of the Connecticut Constitution. See Jackson v. Bulloch, 12 Conn. 38 (1837) (despite laws of other jurisdictions, applying principles of constitutional equality to determine that a person considered a slave where he came from was free in Connecticut); Horton, 172 Conn. at 641-42.

C. The Legislative History Of The Civil Union Law Demonstrates The Lack Of Any Legitimate State Purpose For Excluding Same-Sex Couples From Marriage.

As this Court has stated, Article First, § 1 requires that a law have a public purpose, see cases discussed supra, and that "classifications must be based on natural and substantial differences, germane to the subject and purpose of the legislation." Tough v. Ives, 162 Conn. 274, 293 (1972). The legislature's determination that lesbian and gay couples must be accorded the identical legal rights as heterosexual couples refutes any premise that there could be a "natural and substantial" difference between the two groups justifying the exclusion from marriage of only one. The legislative history of the civil union law reveals the lack of any legitimate state purpose for denying marriage to gay and lesbian couples. As such, the civil union nomenclature begs the question: When there is an existing system by which the government grants the very rights that the legislature decided to accord to same-sex couples, what possible state purpose could there be in the unusual step of creating a different and new status just for one group of citizens?

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[59] See Collier v. City of Milford, 206 Conn. 242, 249 (1988) (stating general rule that marriage valid in state where it is contracted is valid everywhere unless it violates public policy and noting that Supreme Court will be required to address validity of common law marriages from other states). Indeed, the legislature itself is well aware that coping with different state laws is an accepted and manageable part of the legal landscape of our federal system. See e.g., Conn. Gen. Stat. § 46b-40(b) ("An annulment shall be granted if the marriage is void or voidable under the laws of this state or of the state in which the marriage was performed") (emphasis added).

No legislator offered any reason related to a specific state purpose why the public welfare required that same-sex couples have the same rights and protections of marriage but must be excluded from marriage itself. Some legislators offered no particular reason for the classification other than the simple desire to create a separate classification. See 48 H.R. Proc. at 1984 (remarks of Rep. Farr) ("[W]e're trying to find a common ground, and that common ground is to create a separate entity, which is civil union, to give gays the rights under the civil union that married couples have, but to create a separate entity to do that") (App. at A75); 48 H.R. Proc. at 1948 (remarks of Rep. Powers) ("[I]f you will, picture railroad tracks. One track is marriage. The second track is civil unions. And we are literally tracking the same language with two different terms.") (App. at A74) [60] The creation of a separate status for same-sex couples solely because of a bare desire to classify cannot be a legitimate state purpose. "The State must do more than justify its classification with a concise expression of an intention to discriminate." Plyler v. Doe, 457 U.S. 202, 227 (1982). As the U.S. Supreme Court explained, "the Equal Protection Clause does not permit … a classification of persons undertaken for its own sake." Romer, 517 U.S. at 635. See also Shelley v. Kraemer, 334 U.S. 1, 22 (1948) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."). Since the U.S. Supreme Court's decision in Brown, this Court and the U.S. Supreme Court have underscored the deprivation caused by such classification, including because of the stigma and dignitary harm. See Evening Sentinel, 168 Conn. at 29, 35 ("there can be no such thing as separate but equal"; and noting that "symbolic discrimination" is "every bit as restrictive as naked exclusions"). [61]

[60] See also 48 H.R. Proc. at 2022-23 (remarks of Rep. Mantilla) (App. at A76-A77); 48 S. Proc., at 1081 (remarks of Sen. Harris) (App. at A38).

[61] See also Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (noting the "deprivation of personal dignity that surely accompanies denials of equal access to public establishments"); Heckler v. Matthews, 465 U.S. 728, 739 (1984) ("[D]iscrimination itself … stigmatiz[es] members of the disfavored group as 'innately inferior'"); United States v. Virginia, supra; Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) (statutory

Nor can concerns about constituents' negative attitudes constitute a legitimate state purpose. See 48 S. Proc. at 1113-14 (remarks of Sen. McKinney) (noting that same-sex couples were just like he and his wife, but stating that "[a]t the same time, I think there are a great many people I represent who would rather we call that something other than marriage.") (App. at 39-A40.) Although legislators understandably pay attention to the voters, the presumed negative attitudes of voters cannot be the basis for denying access to a governmental institution in the absence of some other legitimate government interest. In Cleburne, for example, the U.S. Supreme Court held that it was irrational for the state to require a home for the mentally disabled to obtain a special use permit when other residences did not have to obtain such a permit. 473 U.S. at 448. The Court ruled that the "negative attitudes" or "fears" of neighborhood residents could not be the basis for the City Council's action, but rather classification must be based on "factors which are properly cognizable in a zoning proceeding." Id. The government may not "avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic." Id.

Other legislators justified a civil union system for gay people because of deep personal beliefs that marriage is for heterosexuals only. As Representative Cafero explained: "I believed in my heart and in my soul that marriage is a union between one man and one woman. But I also believe that same-sex couples in a long-term committed relationship deserve rights. Call it civil union then." 48 H.R. Proc. at 1922 (App. at A71). The desire to maintain the status quo of a historical exclusion cannot be, in and of itself, a legitimate state purpose under equal protection. It justifies discrimination solely by reference to the existence of discrimination rather than by any factor germane to the subject and purposes of the law, and is therefore arbitrary. See Romer, 517 U.S. at 635 (the reason for the classification must be independent of the classification itself). In

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objective to exclude members of one gender presumed to be "innately inferior" is prohibited).

Palmore v. Sidoti, 466 U.S. 429 (1984), the Supreme Court noted the "reality of private biases and the possible injury they might inflict," but ruled that the State was forbidden from "bowing to the hypothetical effects of private … prejudice," stating, "[t]he Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." 466 U.S. at 433 (internal quotation omitted).[62] Indeed, where the legislature has concluded that gay and lesbian couples are just the same as heterosexuals with respect to the civil institution of marriage, maintaining a historical exclusion based on personal beliefs can hardly be linked to valid governmental interests.

The tautology -- that marriage must remain a heterosexual only institution because marriage has been a heterosexual institution – vitiates the equality and liberty guarantees and thwarts the process of constitutionalism itself. The Connecticut Constitution would be an "atrophied" and "static" document, frozen in time, if citizens could be treated unequally solely based on legislators' personal beliefs about a past history of exclusion. See Dukes, 209 Conn. at 115 (constitution is a "living document" and must be interpreted "in accordance with the demands of modern society."); Goodridge, 798 N.E.2d at 961 n.23 ("[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been."). As the U.S. Supreme Court explained in Lawrence, "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." 539 U.S. at 577-78.

A classification that cannot be "explained by reference to legitimate public policies"

[62] Our constitutional history teaches the danger of permitting personal beliefs, untethered to a public purpose, to justify a denial of equality. See, e.g., Loving, 388 U.S. at 3 (quoting opinion of Virginia trial court) ("Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents … . The fact that he separated the races shows that he did not intend the races to mix."); Virginia, 518 U.S. at 544 (discussing the historical exclusion of women from professions like law and medicine based on stereotypical beliefs, including more recently that "women seeking careers in policing encountered resistance based on fears that their presence would 'undermine male solidarity'"; and noting that such beliefs, without more, are impermissible grounds to deny equal opportunity to women.).

raises "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Romer, 517 U.S. at 634. Lack of a legitimate public purpose makes a classification per se arbitrary and irrational and results in "[c]lass legislation" that is "obnoxious to the prohibitions of the Fourteenth Amendment." Romer, 517 U.S. at 635 (quoting Civil Rights Cases, 109 U.S. at 24).

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

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

First, the "one step at a time" principle does not obviate the requirement that all legislation must nonetheless be rationally related to a legitimate state purpose. As the Supreme Court explained, "[t]he liberty that the state enjoys, however, to address a problem in a piecemeal fashion does not encompass the liberty to target one entity and, without rational basis, enact legislation to prevent that entity from doing what it otherwise could lawfully do." City Recycling, 257 Conn. at 453-54 (emphasis added). As such, this principle cannot save the State from the lack of any other rational basis for the marriage exclusion.

Moreover, the one-step at a time principle is inapplicable here because the legislature did not take "one step at a time" by passing the civil union law, but rather found gay and non-gay people similarly situated with respect to every state-based tangible protection of marriage and granted these protections to same-sex couples. This Court has recognized that the legislature can eliminate so many distinctions in a law that any

remaining distinctions are simply arbitrary. In Fair Cadillac, for example, this Court analyzed the Sunday closing law, which the legislature had continually narrowed until the sole group covered by the law was automobile dealers. Fair Cadillac, 229 Conn. at 323-24. Applying rational basis review, the Court did not rule that the legislature was permitted to act incrementally. Instead, it struck down the closing law because the scale of legislative changes made the sole remaining distinction in the law arbitrary. See id. (noting that the Court could not "discern any legitimate reason for providing a common day of rest for one narrow class of employees"). Similarly, in this case, it is arbitrary to eradicate every distinction in the tangible legal protections of marriage between same-sex and different-sex couples, but deny the status of marriage to same-sex couples only.

E. The Marriage Ban Cannot Be Justified By Assertions Of Various Amici In The Trial Court That Marriages Of Same-Sex Couples Will Harm Child Welfare Or That Marriage Is Linked To Heterosexual Procreation.

This Court should reject the assertions, posited by various amici in the trial court, that marriage by same-sex couples will harm children or that the purpose of marriage is linked to heterosexual procreation. The Court should not credit arguments that have not been made by the State,[63] were clearly not one of the legislature's motives for excluding same-sex couples from marriage, and are themselves vitiated by other aspects of Connecticut law.

1. There Is No Basis For The Claim That The Marriage Ban Advances The Welfare of Children.

Amici in the trial court asserted that denying marriage to same-sex couples advances the state's interests in child welfare. They claimed that the State has an interest in ensuring that children are raised by their biological mother and father and that children have poorer outcomes when raised by single parents or adults unrelated to them. As such, they implied that same-sex couples should be excluded from marriage because their households generally do not include a biologically-related mother and father.

[63] See Lewis 908 A.2d at 206 n.7; Marriage Cases, 143 Cal. App. 4th at 934 n.33 (both declining to consider similar justifications not raised by the state).

As a threshold matter, these assertions are precluded by both the second parent adoption law, P.A. 00-228, and the civil union law, P.A. 05-10. In passing the second parent adoption law, the legislature made express findings that the "best interests of a child are promoted when the child is part of a loving, supportive and stable family, whether that family is a nuclear, extended, split, blended, single-parent, adoptive or foster family." Conn. Gen. Stat. § 45a-727a(3). This is a legislative policy that family configuration is not a relevant factor in determining the best interests of children. Similarly, the civil union law provides the same state-based legal protections and obligations with respect to children for same-sex couples as for married couples. Accordingly, any proffered issue related to the welfare of children must be legally irrelevant as a reason that the state denies marriage to same-sex couples.[64]

These state policies are well founded. There is a consensus among every authoritative child welfare association to have addressed the issue – including the American Academy of Pediatrics, American Psychological Association, American Psychiatric Association, the Child Welfare League of America, and numerous others – that: (1) same-sex parents have parenting abilities at least equal to those of heterosexual parents; and that (2) children of same-sex parents are as healthy, happy and well-adjusted, and fare as well on all measures of development, as their peers.[65]

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[64] Nor does an overriding concern with biological parenting drive the state's marriage or adoption policies. Connecticut law contains no preference for different-sex parents. See P.A. 00-228; Hurtado v. Hurtado, 14 Conn. App. 296, 301-302 (1988) (sex of parents not a factor in determining best interests of child); Conn. Gen. Stat. § 45a-727a(3). See also McGaffin v. Roberts, 193 Conn. 393, 401 (1984) ("'biological relationships are not [the] exclusive determina[nts] of the existence of a family'") (quoting Smith v. Org. of Foster Families, 431 U.S. 816, 843 (1977)).

[65] See American Academy of Pediatrics, Technical Report and Policy Statement: Coparent or Second-Parent Adoption by Same-Sex Parents, 109 (2) Pediatrics 339 (February 2002), http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339; the American Academy of Family Physicians, Jane Stover, FP Report: Delegates Vote for Adoption Policy (October 17, 2002) (http://www.aafp.org/fpr/assembly2002/1017/7.html); the Child Welfare League of America, CWLA Standards of Excellence for Adoption Services 56 (2000); National Ass'n of Social Workers, Policy Statement: Lesbian, Gay, and Bi-sexual Issues, Social Work Speaks: NASW Policy Statements 198-209 (4th ed. 1997);

Finally, the claims of various amici below were premised on faulty comparisons because they do not compare similarly situated people. Rather, all of the studies cited in the trial court proceedings compare heterosexual two-parent and single-parent families, especially after divorce. These studies do not address parental sex or sexual orientation, but rather consider variables such as the lesser economic and education resources that one adult can offer the child.[66]

2. Procreation Has Never Been The Purpose of Marriage.

As an initial matter, because the civil union law provides the same, state-based rights and obligations to same-sex couples and married heterosexual couples, there is no logic to the notion that the marriage laws exist to uniquely encourage heterosexual procreation in the context of marriage.[67] There is no statutory requirement that married

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North American Council on Adoptable Children, North American Council on Adoptable Children Position Statements: Gay and Lesbian Adoptions and Foster Care, (amended April 19, 2005) (http://www.nacac.org/pub-statements.html#gay); American Psychological Ass'n, Resolution on Sexual Orientation, Parents and Children, (http://www.apa.org/pi/lgbc/policy/parentschildren.pdf); American Psychological Ass'n and Charlotte Patterson, Lesbian and Gay Parenting: A Resource for Psychologists, (1995), (http://www.apa.org/pi/parent.html); American Psychiatric Association, Policy Statement: Adoption and Co-Parenting of Children of Same-sex Couples, APA Reference No. 200214 (November 2002) (http://www.psych.org/edu/other_res/lib_archives/archives/200214.pdf); American Medical Association, H-60.940: Partner Co-Adoption (Res. 204, A-04) (June 2005), http://www.ama-assn.org/apps/pf_new/pf_online?f_n=resultLink&doc=policyfiles/HnE/H60.940.HTM&s_t=H60.940&catg=AMA/HnE&catg=AMA/BnGnC&catg=AMA/DIR&&nth=1&&st_p=0&nth=1&; and American Academy of Child and Adolescent Psychiatry, AACAP Policy Statement: "Gay, lesbian and bisexual parents," (June, 1999), http://www.aacap.org/publications/policy/ps46.htm).

[66] Sociologist Judith Stacey has pointed out that the "claims that research establishes the superiority of the married heterosexual-couple family and that children need a mother and a father conflate and confuse research findings on four distinct variables – the sexual orientation, gender, number, and marital status of parents." Judith Stacey, Legal Recognition of Same-Sex Couples: The Impact on Children and Families, 23 Quinnipiac L. Rev. 529, 530 (2004).

[67] Courts in New York, Washington and Indiana have ruled that the exclusion from marriage is rational because the state can limit the benefits of marriage to heterosexuals as an inducement to create more stability and permanence in heterosexual relationships. These courts have concluded that heterosexual individuals are more likely to procreate accidentally and irresponsibly than lesbian and gay people and therefore have greater need for the protections of marriage. See Hernandez, 855 N.E.2d at 7; Andersen, 138 P.3d at 982; Morrison v. Sadler, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005). Aside from the strained reasoning, such an assertion is precluded in this case by the civil union law. Moreover,

couples procreate, nor could there be since the state is barred from linking the two. See Griswold, 381 U.S. 479 (conclusively severing any link between marriage and procreation by striking down state law forbidding use of contraceptives by married couples, i.e., establishing right not to procreate within marriage). See also Lawrence, 539 U.S. at 605 (Scalia, J., dissenting) (noting that procreation cannot be the purpose of marriage). Procreation is not and has not been the purpose of marriage laws, nor did the amici below point to anything to suggest such a purpose. Capacity and intent to procreate are not conditions of marriage eligibility, see Conn. Gen. Stat. §§ 46b-20 to 46b-30 (evidencing absence of ability and/or intent to procreate as a condition of marriage eligibility), and failure to procreate biologically is not grounds for an annulment or fault-based divorce. See Conn. Gen. Stat. § 46b-40(b) (evidencing absence of failure to procreate biologically as cause for annulment or divorce); § 46b-40(c) (same for divorce).[68] Marriage is open to heterosexual couples who wish to adopt, who cannot have biological children, or who choose not to have children. Further, there is no logic to amici's position because heterosexual couples will not stop having children if same-sex couples marry. Finally, in any equal protection analysis, the State must demonstrate how a classification serves its goals. There is simply no link between encouraging marriage for heterosexuals, some of whom may have biological children, and denying marriage to same-sex couples.

CONCLUSION

This Court has demonstrated that it will not allow mere resistance to change or the pervasiveness or longevity of a legal exclusion to impede its role as the branch of

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these cases have misapplied the rational basis test by asking whether the state has a rational reason to include certain groups in the benefits of marriage, rather than engaging in the appropriate inquiry: whether excluding same-sex couples from marriage "bear[s] a rational relationship to a legitimate state end and [is] based on reasons related to the accomplishment of that goal." See, e.g., Zapata, 207 Conn. at 507.

[68] Courts have voided marriages, on the other hand, when a person marries knowing he or she is incapable of sexual intimacy. Gould, 78 Conn. at 249-50. In other words, the State acknowledges the expectation of intimacy, but not of procreation.

government charged with vigilantly protecting the dignity and equality of every person. This Court's ruling in In re Mary Hall, 50 Conn. 131 (1882), for example, made Connecticut the first state in the country to end the exclusion of women from the bar. The Court declared that "all statutes are to be construed, as far as possible, in favor of equality of rights. All restrictions upon human liberty, all claims for special privileges, are to be regarded as having the presumption of law against them." Id. at 137. The Court realized the exclusion was wrong even though all prior decisions, including from the U.S. Supreme Court, had held against the admission of women and in the face of the deeply entrenched traditional social structure mandating "separate spheres" for men and women.[69] Today, this Court should rule that the Connecticut Constitution cannot tolerate the arbitrary separation of lesbian and gay citizens from all other citizens.

For the foregoing reasons, the judgment should be reversed and directed as follows: that a declaratory judgment enter that any statute, regulation, or common-law rule applied to deny otherwise qualified individuals from marrying because they wish to marry someone of the same sex violates the Connecticut Constitution; that the Defendant Bean, or her successor, issue marriage licenses to the Plaintiffs upon proper completion of applications and to record the marriages according to law; and the Department of Public Health to take all steps necessary to effectuate the Court's declaration.

[69] See Matthew Berger, Mary Hall: The Decision And The Lawyer, 79 Conn. B.J. 29 (2005). Berger explains that "[a]t the beginning of the nineteenth century, middle and upper-class women were expected to live their lives in the women's 'sphere.'" Id. at 31. Women's roles were tied to the domestic sphere. Their activities outside the home, including in the business and professional spheres, were severely restricted. Id. Fewer than ten years before this Court's landmark decision in Mary Hall, the U.S. Supreme Court had issued its decision in Bradwell v. State of Illinois, 83 U.S. 130 (1872), ruling that the Fourteenth Amendment did not prohibit that state from excluding women from the bar. In a concurrence, Justice Bradley articulated the prevailing view of society that "[t]he natural and improper timidity and delicacy which belongs to the female sex evidently unfits it for many occupations of civil life … . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." 83 U.S. at 141-142.

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CERTIFICATION

I hereby certify that the foregoing brief complies with the formatting requirements set forth in Practice Book § 67-4 and that the font is Arial 12. I further certify that a copy of the foregoing was mailed, postage prepaid, on November 22, 2006, to the **Hon. Patty Jenkins Pittman, J.**, and the following counsel of record:

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