SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 17716

ELIZABETH KERRIGAN, ET AL

VS.

COMMISSIONER OF PUBLIC HEALTH, ET AL

AMICI CURIAE BRIEF OF THE FAMILY LAW PRACTITIONERS AND THE PROFESSORS OF FAMILY LAW

LESLIE I. JENNINGS-LAX
JURIS NO. 423803
RUBIN, ELDRICH & SCHAFFER, P.C.
59 ELM STREET
NEW HAVEN, CT 06510
TELEPHONE: (203) 821-3023
FACSIMILE: (203) 821-3026

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STATEMENT OF THE INTERESTS OF AMICI CURIAE

Amici are experienced legal practitioners with an emphasis in Connecticut family and matrimonial law and professors of law who specialize in family law. They are concerned that the legal and definitional concepts of marriage, as they have evolved through state statutory and decisional law, be represented accurately to the Court.

The following are the individual amici and their statements of interest:

- **Barbara Aaron** is a partner in the law firm of Berman Bourns, Aaron & Dembo and has been practicing law for over twenty years. She practiced exclusively in the areas of family/matrimonial law and serves as a special master in several judicial districts around the state. She is currently the co-President of the Connecticut Council for Divorce Mediation (CCDM) and also serves on the executive committee of the Connecticut Bar Association Family Law Section and the board of directors of the Children's Law Center.

- **Daniel W. Adelman** has been a family law practitioner for twenty years. He serves as special master in both the New Haven and Middletown courts as well as at the Regional Family Trial Docket. He is a member of the American Bar Association, Connecticut Bar Association, Association of Trial Lawyers of America and Connecticut Trial Lawyers Association. He has been given numerous citations for pro bono work devoted to underprivileged people.

- **Gerard I. Adelman** has been practicing law, primarily family law, since 1982. He is a named partner in the firm of Weigand, Mahon & Adelman, Attorneys at Law, P.C. in Meriden. In his practice he has developed an interest in mediation and collaborative divorce. He acts as a special master in the Meriden, Middletown and New Haven JDs as well as being one of the original special masters at the Regional Family Trial Docket. He has written and lectured on family law issues.

- **Elaine S. Amendola** was graduated from the Yale Law School in 1962 and has practiced law in Connecticut since then. She and her daughter Bonnie specialize in matrimonial law at Amendola & Amendola, LLC in Fairfield Connecticut. Attorney Amendola is the past president of the Connecticut Chapter of The American Academy of Matrimonial Lawyers and has served on the Academy's national committee on same sex marriage.

- **Barry F. Armata** is a well-known and highly regarded Guardian ad Litem in the Hartford/New Britain judicial districts who has been practicing family law for twenty years. In his practice, he has had occasion to represent children of gay unions who have raised questions regarding why their parents are not permitted to marry. He

serves as a special masters in the state's trial courts and is on the Board of Editors of the Connecticut Family Lawyer. His practice of family includes his work with Collaborative Divorce, and he is past President of the Connecticut Council for Divorce Mediation.

- **Campbell D. Barrett** is a partner in the Hartford law firm of Budlong & Barrett, LLC. He is the former chair of the Connecticut Bar Association Young Law Section's Family Law Committee and is the present co-chair of Hartford County Bar Association's Family Law Committee. He is a co-author of Same Sex Marriage: The Legal and Psychological Evolution in America (Wesleyan Univ. Press, 2006).

- **Renee C. Berman** has been practicing law for three years. For the past two years she has been associated with the Law Offices of Frank J. Riccio LLC in which her practice has focused on family law. She is a member of the Connecticut Bar Association (Family Law Section), New Haven County Bar Association, and Greater Bridgeport Bar Association.

- **Brian H. Bix** is the Frederick W. Thomas Professor of Law and Philosophy at the University of Minnesota. He holds a J.D. from Harvard University and a doctorate from Oxford University. From 1995 to 2001, Prof. Bix was a professor at the Quinnipiac Law School, where his family law course included both Connecticut family law and general family law principles. He is a member of the Executive Committee of the American Association of Law Schools Family and Juvenile Law Section. Professor Bix writes frequently on family law issues, and is the co-author of Family Law: Cases, Text, Problems (4th ed., LexisNexis, 2004)

- **Eric J. Broder**, a licensed attorney in both Connecticut and New York, has practiced law for over ten years. He currently is a partner with Carole T. Orland at Broder & Orland LLC, a family law firm in Westport, whose work includes Pre-nuptial and Pre-union agreements, divorces and civil union dissolutions, custody, relocation and post-judgment matters. He serves on the Board of Editors of the Connecticut Family Lawyer and is co-Chair of the Family Law Section of the Fairfield County Bar Association.

- **C. Michael Budlong** is a partner in the Hartford law firm of Budlong & Barrett, LLC. He is a former assistant attorney general and has had an active family law practice for 35 years. He is the former multi-term chair of the Hartford County Bar Association's Family Law Committee.

- **Christopher C. Burdett** has practiced family law for thirty years. In 1968, he obtained his juris doctorate from Rutgers University, where he was Editor of the Rutgers Law Review. He was a recipient of the J. Skelley Wright Award for Civil Rights & Liberties. In addition to being licensed in Connecticut, Attorney Burdett is admitted to the bar in the State of New York, the Southern District of New York, the

Second Circuit and United States Supreme Court. He has been a special master in Connecticut superior courts since 1979. He is a member of the Stamford Regional and Connecticut Bar Associations, the Connecticut Trial Lawyers Association and the Association of Trial Lawyers of America.

- **Robert A. Burt** is Alexander M. Bickel Professor of Law at Yale University. He has been a member of the Yale faculty since 1976 and previously served on the law and medical school faculties at the University of Michigan and the law faculty at the University of Chicago. Professor Burt has written extensively on biomedical ethics, constitutional law and family law. His most recent book is Death is That Man Taking Names: Intersections of American Medicine, Law and Culture (Univ. of California Press and the Milbank Memorial Fund, 2002); for preparation of this book, he was awarded a John Simon Guggenheim Fellowship in 1997. He is also author of The Constitution in Conflict (Harvard Univ. Press, 1992), Two Jewish Justices: Outcasts in the Promised Land (Univ. of California Press, 1988), and Taking Care of Strangers: The Rule of Law in Doctor-Patient Relations (Free Press, 1979). He received a J.D. degree from Yale University in 1964, an M.A. in Jurisprudence from Oxford University in 1962 and a B.A. from Princeton University in 1960.

- **Naomi Cahn** is John Theodore Fey Research Professor of Law, and Associate Dean for Faculty Development at George Washington University Law School. She teaches courses on family law, professional responsibility, and trusts and estates. She is a former chair of the Association of American Law Schools Family Law Section and has written many law review articles in the area of family law. She is co-author of the book Families by Law: An Adoption Reader (2004). Professor Cahn received her L.L.M from Columbia University, and her B.A. from Princeton University.

- **Rebecca L. Ciota, Esq.,** an associate in the law firm of Wayne D. Effron, P.C., is a graduate of Fordham Law School (2005) and Cornell University (2001). She is the author of A.6286: An In-Depth Analysis of Domestic Partnership in New York State, published by the State of New York (2000) and was actively involved in the drafting of the New York State Bar Association Report and Recommendations of the Special Committee to Study Issues Affecting Same-Sex Couples (October 2004), as well as the preparation of Who Needs Marriage?: Equality and the Role of the State, Journal of Law and Family Studies (2006). Virtually all of her practice involves matrimonial litigation.

- **Ann P. Coonley** has been practicing family law since 1982. She is a graduate and former faculty of the Quinnipiac University School of Law. Her practice, which has offices in both New Haven and Fairfield counties, consists of both litigation and mediation.

- **Doris B. D'Ambrosio** has been in Family Law Practice for twenty-two years. Previously a partner with Wetstone & D'Ambrisio, she has been in solo practice for

the past five years. She serves as a Special Master in Hartford and New Britain Superior Courts and has done so for thirteen years.

- **Judith Dixon** is a graduate of Brown University (1970) and the University of Connecticut School of Law (1978). She has been a general practitioner in the State of Connecticut, with an emphasis on family law, for over twenty-five years. She is a member and former Chair of the Family Law Section of the Connecticut Bar Association and former President of the Litchfield County Bar Association.

- **Sarah D. Eldrich** has been practicing law for twenty-three years. She is a fellow in the American Academy of Matrimonial Lawyers and serves on its Board of Governors. She also is Vice President of its Connecticut Chapter. She is past chair of the Family Law Section of the Connecticut Bar Association and serves on the Board of Editors of the Connecticut Family Lawyer.

- **Thomas A. Esposito** has been a member of the Connecticut Bar since 1990. He is a partner in the New Haven Law Firm of Welty Esposito & Wieler where he concentrates in the areas of child protection and family law. Attorney Esposito serves on the Quinnipiac University School of Law Center for Children and the Family Advisory Board and is an adjunct Professor of Law at the Quinnipiac University School of Law where he teaches Advanced Juvenile Law: Child Protection Practice in Connecticut and Negotiations.

- **Lisa A. Faccadio** is a solo practitioner in Middletown who has been practicing family law exclusively for the past twenty-nine years. She is on the Board of Directors of the Middlesex County Bar and a past member of the Executive Committee of the Family Law Section of the Connecticut Bar Association. She is a current member of the American and Connecticut Bar Associations and Family Law Sections. She serves as a Special Master in various judicial districts in the state.

- **Douglas I. Fishman** practices family law, including divorce, custody and adoption at Louden Legal Group in Hartford, Connecticut. He is a graduate of Brown University (1982) and the University of Connecticut School of Law (1998), and a founding member of the board of an international adoption agency in Connecticut.

- **Jean Ferlazzo** has been practicing family law since 1977. She serves as a special masters in the Danbury and Stamford judicial districts, and has done so since the program began. She is a member of the Family Law Section of the Connecticut Bar Association.

- **James R. Greenfield** is a Past president of the Connecticut Bar Association, who has limited his practice to family law, exclusively, for the last twenty-five years. He is a member of the Family Law Sections of the New Haven, Connecticut, and American Bar Associations. He is a fellow of both the American Academy of

Matrimonial Lawyers (Past President of its Connecticut Chapter) and the International Academy of Matrimonial Lawyers.

- **Jane K. Grossman**, who has been practicing family law for eight years, is a staff attorney at New Haven Legal Assistance in the Family Law Unit. She is the board vice president of Connecticut Women's Education And Legal Fund and a member of the Connecticut Bar Association Family Law School and the New Haven County Bar Association Family Law Section. She also is an adjunct faulty professor at Quinnipiac University School of Law.

- **Kate W. Haakonsen** has practiced law since 1978, with a concentration in family law and mediation. She is a member of the Connecticut Bar Association where she serves on the Family Section Executive and Legislative Committees; the Hartford County Bar Association Family Law Committee (Past Chair); the Association for Conflict Resolution, which is a nationwide organization of mediators and arbitrators; and the Connecticut Trial Lawyers Association. She serves as a Special Master in the Hartford, Middlesex and Tolland Judicial District Family Divisions and the Regional Custody Docket and frequently speaks at law and mediation conferences around New England.

- **Monica Lafferty Harper** has practiced family law for over twenty-five years. She serves as a special master in superior court in Hartford, Tolland, and Middlesex judicial districts and at the Regional Family Trial Docket. She is a member of the Family Law Section and the House of Delegates of the Connecticut Bar Association. She is a frequent lecturer on family law issues to both lawyers and nonlawyers.

- **Sheila Hayre** has a bachelor's degree in psychology and a master's degree in cultural anthropology from Stanford University. She graduated from Yale Law School in 2002, after which she clerked at the United States Circuit Court of Appeals for the Second Circuit and then at the United States District Court for the District of Connecticut. She spent two years as an Equal Justice America fellow at New Haven Legal Assistance Association (NHLAA) until she was hired there permanently. As a staff attorney at NHLAA, she practice both family law--including divorce, child custody and visitation, alimony, and child support--and immigration law.

- **Mark Henderson** has been practicing law for over twenty years, with an emphasis in family law. He is a member of the Family Law Sections of both the American and Connecticut Bar Associations and is a member of Lawyers for Children America. He often acts as Guardian ad Litem or Attorney for the Minor Child is contentious custody cases. He serves as special mater both at the trial courts and at the Regional Family Trial Docket.

- **Pamela Hershinson** is a solo practitioner in West Hartford, with an emphasis in family law, including divorce mediation. She has been in private practice since 1982, prior to which time she worked at Neighborhood Legal Services in Hartford.

She serves as a Special Master in the family courts in Hartford, New Britain and Middletown. She is a former member of the Board of Directors of the Connecticut Civil Liberties Union, Hartford Interval House and Hartford Community Mental Health Center. She also has served as a hearing officer at Connecticut Department of Mental Retardation and Connecticut Department of Children and Families.

- **Joan Heifetz Hollinger** teaches family and child welfare law at the University of California, Berkeley, Boalt Hall School of Law. She is the Reporter for the proposed Uniform Adoption Act (1994), and an expert on adoption policy and the implications of assisted reproduction for parentage laws. She has appeared as amicus curiae on behalf of children in a number of precedent-setting cases, including Troxel v. Granville 530 U.S. 57(2000), In re Bridget R, 41 Cal.App.4th 1483 (1996), In re Nicholas H. 28 Cal.4th 56(2002), Sharon S. v. Superior Court 31 Cal.4th 417(2003), and Elisa B. v. Sup. Ct El Dorado Co., 37 Cal 4th 108 (2005).

- **Sheila S. Horvitz, Esq**. has been a matrimonial lawyer for over 28 years in Connecticut. She is the principal in her law firm, Sheila S. Horvitz, Matrimonial Law, Mediation and Arbitration Center in Norwich, Connecticut. She is a Fellow of the American Academy of Matrimonial Lawyers and past president of the Connecticut Chapter. She has written and lectured widely at seminars, and on radio and television programs on issues of family law.

- **Jocelyn B. Hurwitz** has been practicing matrimonial law in the State of Connecticut since 1992 at the law firm of Cohen and Wolf, P.C. She is a shareholder in the firm and Chair of the firm's Matrimonial Group. She represents clients in all types of matrimonial matters and is routinely appointed to represent the interests of children as their attorney or guardian ad litem.

- **Otto Iglesias** has practiced in Connecticut for five and half years. He is a staff attorney with the Children's Law Center, where he primarily represents children who are indigent in high conflict divorce cases.

- **Carolyn Wilkes Kaas** has been on the faculty at Quinnipiac University School of Law since 1989. She is an Associate Professor of Law, Director of the Legal Clinic, and the Director of the Family and Juvenile Law Concentration. She teaches family law courses, and handles family law cases, on behalf of children and parents in the legal clinic. She has authored several articles relating to children and custody, and the role of counsel for children in custody matters.

- **Charles Kindregan** is Distinguished Professor of Law at Suffolk University, where he teaches courses in family law, financial issues in divorce and assisted reproductive technology. He is the co-author of the four volume book titled Family Law and Practice-3rd Edition (West 2003), Assisted Reproductive Technology (A.B.A. 2006) and other books. He has authored over 100 articles which have been published in various law reviews. He is the chair of the American Bar Association

Family Law Section Committee on Assisted Reproduction and Genetics. He is a graduate of Chicago-Kent College of Law of the Illinois Institute of Technology (J.D.) and Northwestern University School of Law (LL.M.)

- **Sandra Lax** has practiced Family Law since 1988; she has been a member of the American Academy of Matrimonial Attorneys since 1998 and serves as the Liason between the Academy and the America Bar Association Committee on Pro Bono Issues Regarding Children. She is an Adjunct Professor at Quinnipiac University School of Law, teaching Advanced Family Law and Custody. She has an AV rating from Martindale Hubbell and serves as Custody Special Masters for the Regional Court. She also co-founded the Custody Special Masters Program for the Stamford Superior Court with Judge Tierney.

- **Rachel A. Lieberfarb** is a third year associate attorney at the firm of Cohen and Wolf, P.C. in Bridgeport, Connecticut. She received her B.A. from Washington University in St. Louis and her J.D. from the University of Connecticut School of Law. She is a member of the American, Connecticut and Greater Bridgeport Bar Associations.

- **Verna B. Lilburn** has been practicing law for fifteen years, with an emphasis in family for the past ten years. Her practice includes all aspects of family law, including mediation. She serves as Chair of the Legal Studies Advisory Board at University of New Haven, where she also has taught family law and legal research as an adjunct professor.

- **Wm. Bruce Louden** has been practicing family law since 1963. He is a fellow of the American Academy of Matrimonial Lawyers and past President of its Connecticut Chapter. He has been pioneer nationally in a constructive approach to divorce, mediating divorces for twenty-two years and, in recent years, serving as a private special master and a member of the Collaborative Divorce Lawyers Association. He has written and spoken on matrimonial law nationally and in Connecticut, and been an adjunct faculty member at the University of Connecticut Law School, teaching the Family Law Seminar and Legal Ethics.

- **Debra B. Marino**, a graduate of Boston University and Quinnipiac University School of Law, has practiced law for over ten years. Her practice is limited to family law, divorce and custody cases, and some of her cases have included work on behalf of third-party applicants for custody and/or visitation with children. In particular, she is known for her work in the case of Roth v Weston, in which she represented the petitioner Aunt and grandmother.

- **Edith F. McClure** has practiced exclusively in the area of Family law for over twenty-six years. She is a long-time member of the Executive Committee of the Family Law Section of the Connecticut Bar Association and a fellow in the American Academy of Matrimonial Lawyers. She serves as a Special Master in Hartford and

New Britain courts as well as on the Regional Family Trial Docket (Custody Court) in Middletown.

- **Keenan Marie McMahon**, an associate with Cacace, Tusch & Santagata, has been practicing family law for two years. In addition, she received a concentration in family and juvenile law studies from Quinnipiac University School of Law. Prior to entering the legal field, Attorney McMahon taught special and regular education classes at the elementary school level. She is a member of the Fairfield County, Connecticut and American Bar Associations, and she is a member of the Family Law Section of the Connecticut Bar Association. She also is member of the National Association of Counsel for Children.

- **Reuben S. Midler** has been practicing family law for over fifteen years. His practice includes representation at both the trial and appellate levels, and he often serves as Guardian ad Litem in contentious custody disputes. He is a member of the American Bar Association, Connecticut Bar Association, Connecticut Trial Lawyers Association and the Association of Trial Lawyers of America.

- **Eliot Nerenberg** has been in practice for thirty-three years. He is past Chair of the Family Law Section of the Connecticut Bar Association and has been a member of various other Connecticut Bar Association committees. He also was on the Publications Development Board of the Family Law Section of the American Bar Association for eight years.

- **Edward Nusbaum** has been practicing law for over twenty years. He is a fellow of the American Academy of Matrimonial Lawyers and current President of its Connecticut Chapter. He also is a fellow of the International Academy of Matrimonial Lawyers an serves as a special master for the Stamford, Bridgeport, Ansonia/Milford, Danbury and Middletown judicial districts.

- **Sarah S. Oldham**, of Rutkin & Oldham, LLC, has been practicing family law for over fifteen years. She is a member of the American Academy of Matrimonial Lawyers and serves on the Board of Managers for its Connecticut Chapter. She was the chair of the Family law Section of the Connecticut Bar Association for 2003-04 and served as an officer for that section for the four years preceding.

- **Carole T. Orland** has practiced law for over twenty-five years and is a licensed attorney in Connecticut, New York, Massachusetts and the District of Columbia. She is currently a partner with Eric J. Broder at Broder & Orland LLC, a family law firm in Westport, whose work includes Pre-nuptial and Pre-union agreements, divorces and civil union dissolutions, custody, relocation and post-judgment matters. She is a member of the Family Law Sections of the Fairfield County and American Bar Associations and serves on the Executive Committee of the Family Law Section of the Connecticut Bar Association.

- **Thomas Parrino** has been practicing law for over fifteen years. He is a fellow of the American Association of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers. He is a member of the Executive Committee of the Family Law Section of the Connecticut Bar Association and past co-Chair of the Family Law Committee of the Regional Bar Association for Stamford, Norwalk, Darien and Wilton. He serves as a special master in Stamford, Danbury, Bridgeport and Middlesex judicial districts and is a frequent lecturer on family law issues.

- **Shirley Pripstein** has been practicing family law for twenty-six years for the legal aid society of Hartford. She has served as a special master in Hartford since the program commenced in 1986. She has been a member of the legislative subcommittee for the Family Law Section of the Connecticut Bar Association for ten years, and she currently serves as the Continuing Legal Education coordinator for that section.

- **Gerald A. Roisman** was admitted to the Connecticut Bar in 1962. He is a member of the Hartford County, Connecticut and American Bar Associations and Family Law Sections. He is a fellow of the American Academy of Matrimonial Lawyers, founding member of the American Academy of Family Trial Lawyers (Director), founding member of the International Academy of Matrimonial Lawyers, Diplomat and Director of the American College of Family Trial Lawyers, and member of the Sports Lawyer Association. He also serves as a Special Master in Hartford and Middletown.

- **David S. Rosettenstein** is a Professor of Law at Quinnipiac University School of Law. He received a B.Sc. and an LL.B from the University of the Witwatersrand in South Africa, a B.Sc. (Hons.) from the University of Cape Town, and a D.Phil. from Oxford University. He has taught family law in Connecticut for almost 25 years and is the author of numerous articles and book chapters in the area of family law including "Adoption" in International Encyclopedia of Marriage and Family, Second Edition (Macmillan Reference, 2003) and Legitimating Difference Without Sacrificing Social and Family Fabric in The Journal of Law and Family Studies (Spring 1999).

- **Kenneth B. Rubin** has practiced law for twenty-nine years. He is a fellow in the American Academy of Matrimonial Lawyers and President-Elect of the Connecticut Chapter. He is a frequent lecturer both to those in family law practice, including new lawyers, and to those in related fields on family law issues.

- **Arnold H. Rutkin** has practiced law for over thirty years, focusing a substantial portion of his practice on family law and trial work including complex financial and custody issues. He is a fellow of both the American Academy of Matrimonial Lawyers, serving on its Board of Governors, and the International Academy of Matrimonial Lawyers. He is co-author of Connecticut Family Law and Practice, and the general editor of the four-volume treatise, Family Law and Practice, used as a basic reference source by family lawyers all over the country. He is also in the founder and executive editor of the Connecticut Family Lawyer, and past Editor-in-

Chief of the Family Advocate, the nationally acclaimed publication of the Family Law Section of the American Bar Association.

- **Andrew I. Schaffer** has been practicing family law for over ten years. He often acts as Guardian ad Litem or as Attorney for the Minor Child in contentious custody cases. He serves as a special master in various trial courts in the state as well at the Regional Family Docket. He currently is the chair of the Family Law Committee of the New Haven County Bar Association.

- **Joan E. Schaffner** is an Associate Professor of Law at the George Washington University Law School. She has served as convener of the Advisory Group on Federal Benefits to the Gender Bias Task Force of the Ninth Circuit and co-authored a working paper, Gender in Social Security Disability Determinations, for that group. She received her B.S. in mechanical engineering (magna cum laude) and J.D. (Order of the coif) from the University of Southern California and her M.S. in mechanical engineering from the Massachusetts Institute of Technology.

- **Nancy Segore-Freshman** has practiced family law in Connecticut for twenty-five years, with a specific interest in children and children's issues. Early on in her career, she worked as a special public defender in Juvenile Court and with abused and neglected children. She co-authored the letter that resulted in the Connecticut Ethics Opinion #35 regarding divorce mediation and has pioneered the establishment of the Collaborative Divorce Model in Fairfield County.

- **Sheryl A. Shaughnessey** is a sole practitioner in Fairfield, with a concentration in Family Law and Real Estate. She is certified in Divorce Mediation and is a member of the Connecticut Council for Divorce Mediation. She co-chairs the Ethics section of the American Bar Association and is a member of the Standing Committee on Professionalism, the Executive Committee of the Family Law Section, and the Lawyers Concerned for Lawyers Committee of the Connecticut Bar Association. She serves as a Special Master for the Greater Bridgeport Bar Association, the Milford Bar Association, Hew Haven Bar Association and the Regional Family Trial Docket in Middletown, Connecticut.

- **Katharine Silbaugh** is Visiting Professor of Law, Harvard Law School, 2006-2007, and Professor of Law, Boston University School of Law, where she has served as Associate Dean for Academic Affairs. She is a graduate of Amherst College, magna cum laude, and the University of Chicago Law School, with high honors and Order of the Coif. She clerked for Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit. She is the author, with Posner, of a survey of sexual regulation, A Guide to America's Sex Laws. She also authored The Practice of Marriage (2006), Is the Work-Family Conflict Pathological or Normal under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts, (2004), and Marriage Contracts and the Family Economy (1998).

- **Louise T. Truax** has been practicing family law since 1993. She serves as a special master in Bridgeport and Stamford. She is a fellow in the American Academy of Matrimonial Lawyers and is Chair Elect of the Connecticut Bar Association Family Law Section. She is a frequent lecturer and author in the area of matrimonial law and is the Editor-in-Chief of the Connecticut Family Lawyer.

- **Lori Welch-Rubin**, a Yale law graduate and former law clerk to then Chief Justice Ellen Ash Peters, has practiced law in this state for fifteen years. She received the Connecticut Bar Association's Pro Bono statewide Award in 1992 and was recognized by the Connecticut Law Tribune in 1998 for her appellate accomplishments. Emphasizing family law at both the trial and appellate levels, she has a particular interest in custodial issues involving both opposite sex and same sex parents and has advocated that children have an independent right to enjoy the benefits that flow from involved and caring parents when the adults involved are no longer together.

- **Christine M. Whitehead** is a graduate of Smith College and the University of Connecticut Law School. She has been in private practice for thirty years, devoting her practice solely to matrimonial work. She is a fellow of the American Academy of Matrimonial Lawyers and a member of the Family Law Section of the Connecticut Bar Association. She serves as a special master in the Hartford judicial district.

- **Martha Anne Wieler**, a partner in the firm Welty, Esposito and Wieler, has been practicing family law in Connecticut for over ten years. Her practice consists both of litigation and mediation, and she serves as a special master in the state’s superior courts.

STATEMENT OF FACTS AND PROCEEDINGS

Amici adopt the Statement of Facts and Proceedings in the Brief of the Appellants.

ARGUMENT

In the trial court, various amici offered procreation-related justifications for the denial of marriage to the Plaintiffs neither advanced by the state nor addressed by that court.[1] The Family Institute of Connecticut (hereinafter "FIC") argued that "[t]he state's interest in promoting marriage is to encourage individuals whose sexual activity results in children to be married to each other." FIC Br. at 16**.** The Family Research Council (hereinafter "FRC") argued that the state's interest in promoting "responsible procreation" is reasonably related to the marriage exclusion because only opposite sex couples can procreate both accidentally and intentionally, and because children are best served when raised by a biologically related mother and a biologically related father. FRC Br. at 23. Some appellate courts of other states that recently have addressed the marriage exclusion have adopted some of this reasoning.[2]

As practitioners and professors of Connecticut family law, amici dispute these assertions. First, the civil union and co-parent adoption laws demonstrate that the FIC/FRC amici's hypotheses are entirely illogical. Second, matrimonial law in Connecticut, even stemming back to fault-based annulment and divorce, shows these hypotheses to be in error, as the law has never considered procreation a requirement for marriage, nor the refusal of one spouse to procreate, in and of itself, as grounds for an annulment or a fault-

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[1] Although amici here address a rational basis argument advanced by the Family Institute of Connecticut/Family Research Council amici, they believe that this case is subject to strict scrutiny under both constitutional equal protection and due process principles.

[2] See, e.g., Hernandez v. Robles, 855 N.E.2d 1 (NY 2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006); Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005).

based divorce. Rather, Connecticut law confers the protections of marriage on the couples, and likewise on any children they may have (whether biologically related to both, one, or neither), without regard to the procreative capacity or intent of the couples entering into the marital bond. Third, marriage and procreation are independent, fundamental rights. The state may not adopt justifications for the denial of marriage that are premised on the ways in which couples exercise their fundamental right to procreate without showing that the differential treatment furthers a compelling interest in a narrowly tailored manner. Finally, the legislature and the courts in Connecticut repeatedly have recognized the protections that marriage offers to children, especially in the past, when the stigma attached to illegitimacy was much weightier than it is today. This same reasoning condemns the denial of marriage to Plaintiffs because the exclusion functions only to harm the children in those families while benefiting no one else and, particularly, no other children. In sum, there is no logical nexus between "procreation" or "responsible procreation" and marriage that justifies excluding same sex couples from the institution of marriage.

I. The Civil Union and Co-Parent Adoption Laws Eviscerate Any Foundation for the FIC/FRC Amici's Arguments.

The procreation-related hypotheses advanced by the FIC/FRC amici, and the rationales of other courts adopting those hypotheses, cannot provide a rational basis for excluding same-sex couples in Connecticut from marriage because the General Assembly already has foreclosed those arguments. In 2000, the General Assembly provided a legal mechanism for both individuals in unmarried couples, including same-sex couples, to become parents of their children, whether born to or adopted by one of them. *Inter alia*, the legislature expressly found 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-727 (a) (3). Not only does the state permit both individuals in same-sex couples both to be legal parents of their children, but, through the civil union law, allows their families to have the same state-based legal protections as married couples. Taken together, these laws evince a public policy eschewing any legal preference that parents be different-sex rather than same-sex, or that state-protected couples parent only children who are biologically related to them. These efforts also are consistent with centuries of effort to equalize the rights of marital and non-marital children. See, e.g., Moore v. McNamara, 201 Conn. 16, 23 (1986) (describing 1821 law rejecting common law rule that an illegitimate child was nullius filius).

II. The Marriage Law of Connecticut Does Not Include Procreation As One Of Its Primary Purposes.[3]

If procreation-related concerns were so foundational to marriage law, one would expect to see those concerns expressed by statute; they are not. Although the marriage laws of Connecticut, codified at General Statutes §§ 46b-20 through 46b-30 inclusive, set forth certain requirements that individuals must meet before they may marry (e.g.

[3] Amici address this argument on the terms presented by its advocates solely to dispatch it, but with full knowledge that it turns rational-basis review on its head. The classic rational basis review inquiry is whether "the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). The constitutional question presented here is one of exclusion of same-sex couples, and thus procreation-related hypotheses about why the state laws allow heterosexuals to marry do not speak to the justifications for denying marriage to the Plaintiffs. See, e.g., Hernandez v. Robles, supra, 855 N.E.2d 27 (Kaye CJ., dissenting) (emphasis in original) ("Properly analyzed, equal protection requires that it be the legislated distinction that furthers a legitimate state interest, not the discriminatory law itself. Were it otherwise, an irrational or invidious exclusion of a particular group would be permitted so long as there was an identifiable group that benefited from the challenged legislation. . . . The relevant question is whether there exists a rational basis for excluding same-sex couples from marriage, and, in fact, whether the State's interests in recognizing or supporting opposite-sex marriages are rationally furthered by the exclusion").

prohibitions based on degrees of kinship; General Statutes § 46b-21; requirement for the written consent of the conservator where one is under a conservator's supervision or control; General Statutes § 46b-29; and a prohibition based on minority; General Statutes § 46b-30), no Connecticut statute requires that those who enter into the marital relationship have the ability or the desire to procreate, as evidenced, in part, by omission of any provision setting a maximum age limitation at which individuals may marry. Not only does the law permit women who are beyond their child-bearing years to marry, but no one—male or female—is subjected to a physical or mental exam prior to marrying to determine his or her capacity to bear or beget children prior to marrying.[4]

Further, procreation-related issues are no more of a basis for dissolving or voiding a marriage in Connecticut than a bar to entering one, for the refusal or inability to procreate standing alone has never been grounds for a divorce or annulment in this state. For example, no annulment is permitted even where a court finds that a wife fraudulently represented prior to the marriage that she would be willing to bear children, but after the marriage insisted that her husband use contraception; see Hannibal v. Hannibal, 23 Conn. Sup. 201, 202, 204 (1962); [5] nor is the refusal to engage in sexual relations sufficient

[4] Specifically, General Statutes § 46b-26 (e) (Rev. 2002), a public health statute which required women of child-bearing age to be tested for rubella immunity, did not permit a marriage license to be withheld on the basis of the results of such a test but rather required a woman who tested negative for the immunity to be informed of the risks inherent in her lack of immunity. Those statutes have been repealed effective as of Oct. 1, 2003. Public Act 03-188.

[5] One commentator has read this court's decision in Fattibene v. Fattibene, 183 Conn. 433, 438-39 (1981) to stand for the proposition that Connecticut will grant an annulment if there is a fraudulent misrepresentation regarding sexual relations or the ability to bear children. Lynn D. Wardle, "*Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J. L. & Pub. Policy 771, 794 n.77 (2001).

grounds for a fault-based divorce or annulment. See, e.g., McCurry v. McCurry, 7 Conn. Sup. 197, 198-201, aff'd, 126 Conn. 175 (1939). In such cases, courts have considered and disposed of the idea that refusal to engage in sexual relations and, by extension, refusal to engage in procreative activity, constituted a total neglect of the duty one spouse owed to the other. Rather, as one court phrased it, the duty on which the ground of desertion rested, which was the basis for many such cases, was the duty to cohabit, not the duty to engage in sexual relations or procreative activity. See McDonnell v. McDonnell, 14 Conn. Sup. 123, 125-29 (1946) (wife's refusal to have sexual relations with husband not sufficient factual grounds for desertion where parties still live together); Murphy v. Murphy, 112 Conn. 417, 418-20 (1930) (wife's inability to have sexual relations not basis for annulment or divorce). On the other hand, when a woman had no intent to share physical intimacy or live with her new husband, but married only to please her parents, a court annulled the marriage for lack of consent between the parties. Bernstein v. Bernstein, 25 Conn. Sup. 239, 240-41 (1964). Simply put, procreation-related concerns have not and are not a basis for entering, dissolving or voiding a marriage under Connecticut law.

III. An Individual's Fundamental Right To Procreate Is Separate And Distinct From Any Marital Relationship In Which That Right Might Be Exercised.

An individual's rights both to choose whether to procreate and to choose whether to marry are fundamental rights. As to procreation, it is settled law that to choose whether to bear or beget a child is within the fundamental privacy rights of an individual, whether married or not. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). Any link that may have

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That portion of Fattibene, however, discussed the requirements for an annulment under District of Columbia law, not Connecticut law. Therefore, as the court in Hannibal v. Hannibal, supra, 23 Conn. Sup. 202, correctly noted: "[T]here is no case in Connecticut which holds that a fraudulent misrepresentation by a wife that she is willing to bear children is a sufficient cause to declare a marriage void."

existed between marriage and procreation was severed by the U.S. Supreme Court's ruling that married couples enjoy a constitutionally guaranteed right to avoid procreation. Griswold v. Connecticut, 381 U.S. 479, 485 (1965). The Supreme Court in Griswold defended marriage as a meaningful private relationship against the State of Connecticut's attempt to promote procreation by banning the use of contraception. 381 U.S. at 486. While Griswold clarified that marriage is a fundamental right without regard to procreation, Eisenstadt clarified that procreation is legally unconnected to marriage. Striking a Massachusetts statute barring contraceptive use by unmarried persons, the Supreme Court declared that "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt, 405 U.S. at 453. See Zapata v. Burns, 207 Conn. 496, 506 (1998) (acknowledging distinct fundamental rights).

The Plaintiffs already have argued, and amici agree, that marriage is a fundamental right; that discussion need not be repeated here. There is not support, however, for the contention that the right to marry is linked inextricably to, or founded on, real or assumed procreative capacity. Rather, the courts regularly have recognized the two rights as separate and distinct. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (noting "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education") (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

Turner v. Safely, 482 U.S. 78 (1987) likewise demonstrates the independent contours of the two rights. In Turner, the U.S. Supreme Court confronted a Missouri prison regulation that forbade inmate marriages except for compelling reasons, which in practice meant pregnancy or birth of an illegitimate child. Id. at 82, 96-97. In striking the regulation, the Court held that all inmates possessed a right to marry even apart from considerations about procreation. Id. at 95. In doing so, it recognized that there are significant and

constitutionally worthy interests in marriage apart from procreation, including that, for some, marriage is an "expression of emotional support and public commitment," an "exercise of religious faith," and an "expression of personal dedication," and may trigger "the receipt of government benefits." Id. at 95-96.

Among the necessary inferences from these principles is another fatal blow to the FIC/FRC amici's argument that the state denies marriage to same-sex couples in order to favor the procreation (intentional or accidental) of different-sex couples. By focusing on the manner in which same-sex couples and/or different-sex couples exercise their fundamental right to procreate, the FIC/FRC amici trigger an additional reason to subject the exclusion to strict scrutiny. Quite simply, the state cannot penalize people who seek to exercise one right for the decisions they make regarding their wholly independent right to procreate.

For example, in Shapiro v. Thompson, 394 U.S. 618 (1969), the U.S. Supreme Court struck down Connecticut's one year residency requirement for eligibility for certain government benefits, holding that this policy unconstitutionally disadvantaged people based on their exercise of the right to interstate travel. "[A]ny classification which serves to penalize the exercise [of a fundamental right], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." Shapiro, 394 U.S. at 634. As in Shapiro, where a law, such as that denying marriage to Plaintiffs here, penalizes the exercise of a fundamental right (procreative decisions), the government needs a compelling and narrowly tailored justification for the classification in the law.

The FIC/FRC amici assert that the state may deny marriage to same-sex couples but not to opposite-sex couples because the latter can exercise the right to procreate by engaging in sexual intercourse whereas same-sex couples can procreate only by use of reproductive technologies. Given its gross over-inclusiveness (many opposite-sex couples cannot produce children biologically without access to the same technology employed by same-sex couples) and under-inclusiveness (many same-sex couples do have biologically-

related children), the exclusion of same-sex couples from marriage cannot survive the strict scrutiny such an argument would trigger.

IV. Excluding Same-Sex Couples From Marriage Does Not Rationally Further the Government Interest in Encouraging Individuals To Bring Children Into Their Families Through "Traditional" Procreation Nor Does It Advance the Welfare of Any Children, Including Those Who Are the Result of "Accidental Procreation."

Assuming, *arguendo*, that rational basis review applies to the Plaintiffs' exclusion from marriage, under "well settled" analysis, this court still "must decide whether the classification and disparate treatment inherent in [the] statute bear a rational relationship to a legitimate state end and are based on reasons related to the accomplishment of that goal." Donahue v. Town of Southington, 259 Conn. 783, 795 (2002)

To the extent that the FIC/FRC amici argue that denying Plaintiffs marriage advances a governmental interest in encouraging children to be brought into their families through sexual intercourse, the exclusion fails rationally to further that interest and simply harms children of same-sex couples. Opposite-sex couples will continue to bring children into their families through "traditional" procreation and other means regardless of whether same-sex couples are permitted to marry. See Hooper v. Bernalillo County Assessor, 472 U.S. 612, 622 (1985) (striking down a statute under rational basis review because it was "not written to require any connection between [the classification] and [the proffered interest."]. Rational basis review is reality-based, City Recycling, Inc. v. State, 257 Conn. 429, 452-53 (2001), and the reality is that marriage is available without regard to procreative capacity and intent (see Section II, supra). The further reality is that the state law treats children brought into families through traditional procreation or by other means equally, as evidenced by the co-parent adoption and civil union laws.[6]

[6] Amici recognize that the Plaintiffs and their children are still harmed by being denied access to the full legal, cultural and social protections afforded through marriage.

Significant as well is that Connecticut has long sought to equalize its treatment of all children, whether born through traditional means or through the aid of reproductive technology, whether born to their legal parents or adopted by them, and whether marital or nonmarital. While both the courts and the state legislature have worked to equalize the status of marital and nonmarital children, in 1974, the state legislature amended the general statutes to permit the children of unmarried parents the same access to the panoply of benefits available under custody and support laws as was available to the children of married parents. Grynkewich v. McGinley, 3 Conn. App. 541, 543 n.2 (1985). Specifically, the General Assembly revised General Statutes § 46b-61 so that the courts of this state would have jurisdiction over matters involving the custody and support of all children, not just of children whose parents once were married. Id. See also Stevens v. Leone, 35 Conn. Sup. 237, 239 (1979). The legislature sought to extend these rights not only to legitimized children of unmarried couples but, apprently, to the illegitimate children of unmarried couples as well. Id. at 240. Where statutes otherwise were unclear, the courts equalized treatment of marital and nonmarital children. See, e.g., Moll v. Gianetti, 8 Conn. App. 50, 52-53 (1986) (permitting a non-spouse parent to obtain award of attorney's fees for pursuing support action against other parent under General Statute § 46b-62 (Rev. 1986), which permitted only spouses to obtain awards of attorney's fees). This statutory and decisional case law exemplifies that Connecticut historically has recognized that marriage, by its very nature, provides the package of social and legal benefits, but more importantly, that this state has sought to provide those same social and legal benefits to all children. In this instance, the result should be no different – marriage provides a unique set of social and legal benefits to children, and currently, the children of same-sex couples who otherwise would choose to marry, are being denied those benefits by the state's marriage exclusion.

As discussed, because the state treats children born via traditional procreation and the children born with the aid of reproductive technology in the same manner, there is no rational connection between denying marriage to same-sex couples and advancing "traditional" procreation. Similarly, there is no connection between denying marriage to same-sex couples and furthering the welfare of children born as a result of accidental procreation. It is true that opposite sex couples can "accidentally" procreate, and it may well be true that children benefit from the stabilizing force of marriage. Neither of these truisms, however, rationally supports the notion that children of accidental procreation need the stabilizing force of marriage more than intentionally-conceived children of same-sex couples. Nor does the welfare of children born as a result of accidental procreation benefit from denying marriage to same-sex parents with children. Children of same-sex couples enjoying the protections that come with marriage would not take anything away from children of opposite-sex couples doing the same. No child's welfare is improved by denying marriage to same-sex couples, but denying marriage to those couples denies to their children the benefits that flow uniquely from marriage. Accord Hernandez, 855 N.E.2d 1, 30 (N.Y. 2006) (Kaye, CJ., dissenting) ("[W]hile encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the state, the exclusion of gay men and lesbians in no way furthers this interest.") (Emphasis in original); Andersen, 138 P.3d at 1018 (Fairhurst, J., dissenting) (same).

CONCLUSION

As family lawyers and law professors, we are well aware of the difficulties faced by families and their children. It is not every day that a court has a clear answer to a problem, but this Court does. Public policy and the constitution allow this Court to take a step that favors families and their children by ending the exclusion of same-sex couples from marriage.

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Respectfully Submitted,

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Leslie I. Jennings-Lax,
Juris No. 423803
Rubin, Eldrich & Schaffer, P.C.
59 Elm Street
New Haven, CT 06510
Telephone: (203) 821-3023
Facsimile: (203) 821-3026

CERTIFICATION OF COMPLIANCE WITH PRACTICE BOOK § 67-2

I hereby certify that this brief complies with the requirements of Practice Book § 67-2. It was prepared in 12-point Arial typeface.

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Leslie I. Jennings- Lax

CERTIFICATION OF SERVICE

This is to certify that on this 11th day of December, 2006, a copy of the foregoing brief of the amicus curiae was served by mailing the same by United States mail, first-class postage prepaid, to the following counsel of record and the trial court, as follows:

Attorney Mary L. Bonauto
Attorney Bennett Klein
Attorney Karen Loewy
Attorney Jennifer Levi
GAY & LESBIAN ADVOCATES & DEFENDERS
30 Winter Street, Suite 800
Boston MA 02108
Phone: 617/426-1350; Fax: 617/426-3594

Kenneth J. Bartschi
Karen L. Dowd
HORTON, SHIELDS & KNOX, P.C.
90 Gillett Street
Hartford CT 06105
Phone: 860/522-8338
Fax: 860/728-0401

Attorney Maureen M. Murphy
MURPHY, MURPHY & NUGENT, LLC
234 Church Street, 12th Floor
New Haven CT 06510
Phone: 203/787-6711
Fax: 203/777-6442

Attorney Judith A. Ravel
LAW OFFICES
246 Goose Lane, Suite 201
Guildford CT 06437
Phone: 203/458-2300
Fax: 203/458-8822

Attorney Jane Rosenberg
Attorney Susan Cobb
Attorney Robert Deichert
Attorney Robert Clark
OFFICE OF THE ATTORNEY GENERAL
55 Elm Street
Hartford CT 06106
Phone: 860/808-5318; Fax: 860/808-5387

Attorney Renee Redman
AMERICAN CIVIL LIBERTIES UNION OF CONNECTICUT
32 Grand Street
Hartford CT 06106
Phone: 860/247-9823
Fax: 860/728-0287

The Honorable Patty J. Pittman
Superior Court
Judicial District of New Haven
235 Church Street
New Haven, Ct 06510

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Leslie I. Jennings- Lax