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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# REPLY BRIEF OF THE PLAINTIFFS-APPELLANTS

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TO BE ARGUED BY: BENNETT H. KLEIN


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:** **Page**

**Cases (cont.)** **Page**



**Constitutional Provisions:**



**Legislative Materials:**



**Other Authorities:**

## REPLY ARGUMENT

The Plaintiffs stand on their opening brief, as well as the amici curiae briefs submitted in support of their claims, in response to the State's Brief. The Plaintiffs submit this short reply to make six points: (1) The State incorrectly asserts that there are no meaningful differences between marriage and civil union. (2) The State's assertion for the first time that the limitation of marriage to a man and woman is justified by an interest in preserving tradition is illogical in light of the civil union law and lacks a legitimate public purpose. (3) The cases cited by the State do not support reliance on administrative convenience as a justification for the civil union law. (4) In the end, the State's justifications for the exclusion from marriage and the separation of same-sex couples into civil union are simply catch-phrases -- "administrative convenience," "tradition," or "uniformity of laws" -- devoid of any reason or analysis logically linking them to a legitimate state purpose. (5) The State's references to ad hoc public comments during the ERA debates are irrelevant. (6) The marriage exclusion and the relegation of gay and lesbian couples to a separate legal status created just for them must fall because, as the U.S. Supreme Court in Romer v. Evans, 517 U.S. 620 (1996), stated in embracing Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), the equal protection clause of the constitution does not permit a caste society in which social rank is dictated by unchosen characteristics.

1. The Connecticut Constitution requires equality among citizens -- not near equality or approximate equality. Tellingly, the State acknowledges that the civil union law is not equality; it is a "step towards ensuring equal rights for same-sex couples." State's Br. at 59. The State seeks to mask this constitutional infirmity by shrinking marriage into nothing more than an array of legal rights, thereby creating a fiction that marriage and civil union are the same, the sole difference being "in name alone." State's Br. at 14, 13-17.

But if the difference between marriage and civil union is meaningless, Connecticut has no reason to ban gay and lesbian people from marriage. If the name the state gives to a relationship is inconsequential, the legislature would not have engaged in a heated

debate about whether to include gay and lesbian couples within the existing legal and social framework -- marriage -- or to create only for them an entirely new category.

The civil union classification was not an incidental byproduct of a neutral decision-making process. To the contrary, the legislature deliberately excluded same-sex couples from marriage because marriage is not just a matter of statutory rights, but is a social and cultural institution of unparalleled status that is profoundly significant to individuals who choose to marry. As Representative Cafero stated twice for emphasis during the civil union law debates: "Marriage means something to us. It means something to us." 48 H.R. Proc., pt. 7, 2005 Sess. 1935 (April 13, 2005) (Appendix to Plt's Br. at A73). See also 48 S. Proc., pt. 4, 2005 Sess. 1044 (April 6, 2005) (remarks of Senator Cappiello that there are "social," "psychological," and "cultural" differences between marriage and civil union) (Appendix to Plt's Br. at A33a). The legislature certainly did not believe that the differences between marriage and civil union were "speculative" or "simply non-existent." State's Br. at 15.[1] The debates on the civil union law can only be understood as reflecting a decision to withhold from lesbian and gay citizens the social legitimacy and status of marriage and reserve it as the exclusive domain of heterosexuals. See Plt's Br. at 53-54.[2]

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[1] The State's casual dismissal of the differences between marriage and civil union as "speculative" reveals the lack of any substantive rebuttal of those differences. Moreover, the State simply misses the point when it claims that same-sex couples with civil unions are not harmed by the lack of marriage with respect to challenging the federal Defense of Marriage Act (DOMA) because they can lobby Congress to change DOMA. State's Br. at 17. The point is that the deprivation of marriage denies plaintiffs the opportunity to sue in court to overturn DOMA, or at the very least places a significant hurdle to pursuing such a suit. See Plt's Br. at 19-20; Amicus Curiae Brief of The American Academy of Matrimonial Lawyers, Connecticut Chapter.

[2] The State cites Paul v. Davis, 424 U.S. 693, reh'g denied, 425 U.S. 985 (1976), for the proposition that injury to reputation is insufficient to invoke the protections of the Fourteenth Amendment. State Br. at 13. Paul is irrelevant to the issues in this case. That case held only that a defamation action against state officials for posting a photograph of the defendant identifying him as a shoplifter could not be brought under 42 U.S.C. § 1983 as an infringement of liberty under the Fourteenth Amendment because the Fourteenth Amendment and § 1983 do not "make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims." Id. at 699. The Plaintiffs, of course, are not bringing a tort claim for injury to their reputation.

Even if the difference between marriage and civil union were only about a name, names do, in fact, have a civil rights dimension. What something is named is neither neutral nor innocuous when it occurs in the context of a history of discrimination and inequality. If judges who are women were called "legal analysts" and lawyers who are women were called "legal advocates," nobody could credibly argue, as the State seeks to here, that the difference in nomenclature was inconsequential as long as female judges and lawyers had the same duties and powers under the law as male judges and lawyers.

The decision to separate same-sex couples and call their relationships "civil union" rather than marriage must be viewed through the lens of historical condemnation and discrimination. Lesbian and gay people have been labeled as mentally ill, deviants, and sexual perverts, and have been fired from jobs, barred from employment by the federal government, excluded from entry into the country under our immigration laws, banned from service in our nation's armed forces, and subjected to violence and harassment.[3] Most importantly for this case, their intimacy has been criminalized and, until very recently, their relationships completely unrecognized. It is precisely because of this history that denying same-sex couples access to the social institution that defines family and placing them in a separate class created just for them is stigmatizing and injurious. It is both a remnant and reaffirmation of the unequal, outsider status that lesbian and gay people have experienced as a historically disfavored minority.

The assertion that separate systems for classes of citizens can satisfy constitutional equality guarantees as long as identical legal rights are conferred invokes the long-repudiated reasoning of Plessy v. Ferguson. In that case, the Court upheld separate railway cars for African-Americans because "[w]hen the government ... has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized." 163 U.S. at 551.

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[3] See Plt's Br. at 7-8 and Brief of Amicus Curiae Human Rights Campaign et. al.

This is the very heart of the State's rationale for the constitutionality of the civil union law. This Court should not resurrect that discredited principle and place it in Connecticut constitutional law.[4]

2. The State asserts for the first time on appeal that a separate legal status for same-sex couples is justified by the State's interest in preserving the tradition of marriage as between a man and woman. State's Br. at 54-56.[5] Tradition cannot logically be a rationale for the civil union classification. The tradition that the State purports to maintain is the denial of recognition and legal rights to any couples other than opposite-sex couples. The State, however, disavowed any such tradition when it granted all of the rights and protections of marriage to same-sex couples through the civil union law. Where the legislature has determined that same-sex couples need and deserve the very same legal

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[4] The State references the general proposition that "every minor difference" in the laws does not amount to an equal protection violation. State's Br. at 12. The cases relied upon by the State arise in contexts far afield from this case and thus offer no guidance to the Court here. For example, in Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (State's Br. at 12), in finding an unconstitutional infringement on the right to vote, the Court stated the general proposition that "every minor difference" is not an Equal Protection violation, while noting that courts must consider "the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." See also Ingraham v. Wright, 430 U.S. 651, 674 (1977) (State's Br. at 13) (holding that deliberate decision by school authorities to punish child by "inflicting appreciable physical pain" violates Fourteenth Amendment, while noting that there is "a de minimis level of imposition with which the Constitution is not concerned"); State v. Angel C., 245 Conn. 93, 127 (1998) (State's Brief at 13) (prosecutorial discretion does not violate equal protection); State v. Jason B., 248 Conn. 543, 560 (1999) (State's Br. at 12) (in case where defendant was charged with sex crime based on age difference between him and the victim, Court found his argument "ill-suited" to an equal protection analysis because "[w]e are not aware of any authority that has invalidated a statute simply because it makes no allowance for persons who exceed the statutory age limit by only a few months"); Dower v. Boslow, 539 F.2d 969, 972-73 (4th Cir. 1976) (State's Br. at 12) (fact that preponderance of evidence standard was used in defective delinquent proceedings while administrative civil commitment proceedings had a clear and convincing standard did not offend equal protection because judge found that right to jury trial in delinquent proceedings actually made that process more protective than commitment proceedings); Tanley v. Grasso, 315 F. Supp. 513 (D. Conn. 1970) (rational basis found for differing standards for the qualification to run in primary elections).

[5] The Plaintiffs refer the Court to and do not repeat here the arguments set forth at pages 54-56 of their Brief.

architecture of marriage as opposite-sex couples, there can be no public or governmental purpose left in any asserted tradition of exclusion. Indeed, the State does not identify any public purpose served by the tradition rationale other than the maintenance of historical exclusion for its own sake. State's Br. at 56.

This Court should be suspicious of the State's assertion of tradition. It has been invoked time after time in our history simply as a justification for discrimination. See, e.g., Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (traditional assumptions about the "law of the Creator" and "nature herself" used to justify different spheres for men and women and exclusion of women from law practice); Plessy, 163 U.S. at 550 (legislature "is at liberty to act with reference to the established usages, customs, and traditions of the people"); Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) ("It is ... revolting if ... the rule simply persists from blind imitation of the past.").

Deference to tradition, if accepted as a rationale, would have justified upholding anti-miscegenation laws. The California Supreme Court in 1948 became the first state in the nation to strike down an anti-miscegenation law, in spite of the "unbroken line of judicial support, both state and federal," for their validity and the reality that "such laws [had] been in effect in this country since before our national independence." Perez v. Sharp, 32 Cal. 2d 711, 742, 752 (Cal. 1948) (Shenk, J., dissenting). See also In Re Marriage Cases, 49 Cal. Rptr. 3d 675, 751 (Cal. Ct. App. 2006), rev. granted, 149 P.3d 737 (Cal. 2006) (Kline, J., concurring and dissenting) (noting that the dissent in Perez "emphasized the depth of then-existing antipathy toward interracial marriage, arguing that in light of scientific, judicial and religious support for the traditional prohibition of such marriages, it was not within the Court's province to upset legislative determination."). Nine years before Loving v. Virginia, 388 U.S. 1 (1967), was decided, 96 percent of white Americans opposed interracial marriage between blacks and whites, and 75 percent of white people still opposed such marriages 5 years after Loving. See Andersen v. King County, 138 P.3d 963, 1025 (Wash. 2006) (Fairhurst, J., dissenting). As Chief Judge Kaye of the New York Court of Appeals

concluded, "[t]he long duration of a constitutional wrong cannot justify its perpetuation, no matter how strongly tradition or public sentiment might support it." Hernandez v. Robles, 855 N.E.2d 1, 26 (N.Y. 2006) (Kaye, C.J., dissenting).

The premise that traditional understandings of marriage justify resisting any adjustments to marriage is belied by the very history of changes to features of marriage that were once believed as essential and unalterable.[6] As Justice Scalia noted, "tradition" is simply morality by a kinder name, and the state cannot uphold a law prohibiting a practice because the governing majority has long viewed the practice as immoral. Lawrence v. Texas, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting); id. at 577-78.

The State's invocation of tradition is not tied to any public purpose, but is a thinly disguised attempt to suggest deference to the legislature on an issue it deems controversial. As political theorist Ronald Dworkin has explained, culture changes organically, as well as both by the individual decisions people make and changes in the social landscape -- the very bases for changes in marriage over the centuries. Ronald Dworkin, Three Questions for America, 53 (14) N.Y. Rev. of Books *7-10 (Sept. 21, 2006) (http://www.nybooks.com/articles/19271). While our culture is also shaped by law, principles of human dignity preclude culture from being the exclusive domain of majoritarian rule. Id. at *7. Dworkin draws an apt parallel to freedom of religion. He explains that like marriage, religion is an "irreplaceable cultural resource in which billions of people find immense and incomparable value." Id. at *8-10. Like marriage, the meaning of religion has evolved over the centuries. New religious sects constantly arise generated by social developments (for example, the demand for women clergy). Id. at *8-9. Nobody in our culture "imagines that the cultural meaning of religion should be frozen by laws prohibiting

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[6] See Brief of Amici Curiae The Professors of History and Family Law at 1, 1-7 (the "history [of changes to marriage] renders implausible the suggestion that marriage has a fixed structure that mandates the current exclusion of same-sex couples.").

people with new visions" from access to the legal status or benefits of organized religion. Id. at *9. Dworkin concludes that the

> cultural argument against gay marriage is therefore inconsistent with the instincts and insights in the shared idea of human dignity ... . The argument supposes that the culture that shapes our values is the property of only some of us – those who happen to enjoy political power for the moment – to sculpt and protect in the shape they admire. That is a deep mistake: in a genuinely free society the world of ideas and values belong to everyone.

Id.

Moreover, to the extent the State views this matter as so important to our culture that it should be left only to the majoritarian legislative process, the State seeks to diminish this Court's historical role in fostering social change where necessary to protect fundamental principles of human dignity and equality, regardless of legislative views or the "tradition" in other parts of the nation. See, e.g., Crandall v. State, 10 Conn. 339 (1834) (reversing conviction under law prohibiting schooling for African-Americans where preamble to statute stated that "establish[ment of] literary institutions in this state, for the instruction of coloured persons belonging to other states and countries, [ ] would tend to the great increase of the coloured population of the state, and thereby to the injury of the people"); Jackson v. Bulloch, 12 Conn. 38 (1837) (person considered slave in home state is free in Connecticut); In re Mary Hall, 50 Conn. 131 (1882) (admission of women to the bar); Horton v. Meskill, 172 Conn. 615 (1977) (affirmative constitutional obligation to provide all schoolchildren with substantially equal public education); Sheff v. O'Neill, 238 Conn. 1, 3 (1996) (observing at the outset of decision that "[t]he issue is as controversial as the stakes are high").

3. The cases cited by the State in its section on administrative convenience (State's Br. at 51) do not support any logical reason why the nomenclature "civil union" makes easier the state's tracking of same-sex couples for purposes of eligibility for federal benefits.[7] Indeed, "administrative convenience" is so vague that there is a danger that it

[7] See Plt's Br. at 49-50 (explaining that the label attached to same-sex couples is utterly inconsequential to the administrative ease of such record keeping).

can be used to buttress almost any kind of discrimination, as demonstrated by the State's surprising reliance upon Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971) (State's Br. at 51). In Forbush, the Court denied a constitutional challenge to an Alabama regulation requiring that a married woman use her husband's name on a driver's license -- a regulation of dubious constitutionality under either strict scrutiny or rational basis review. The one-sentence nod to administrative convenience in this case hardly recommends it as a state interest in justifying discrimination under Connecticut constitutional law.[8] Matthew v. Lucas, 427 U.S. 495, 508-509 (1976) (State's Br. at 51) is not about administrative record-keeping or tracking per se, but about presumptions of paternity for non-marital children's eligibility for social security benefits. Finally, United Illuminating Co. v. City of New Haven, 179 Conn. 627 (1980), involved a challenge to a complex taxation statute involving various methods for reassessing and valuing property. After finding several legitimate grounds for the reassessment structure, id. at 644-648, the Court also found it rational not simply because it was convenient, but more importantly because it was "cost effective." Id. at 648. The Court noted that "[r]ather than applying a complex formula to all realty, it is more convenient and economical to apply that formula to all realty with an increased assessment." Id. (emphasis added). In contrast, the State makes no claim of complexity or added expense in this case. There is no logical connection between the need to keep track of same-sex couples in some state programs and the administrative ease of using the nomenclature "civil union couple" versus "same-sex married couple."

4. In the end, the State's asserted justifications for the civil union nomenclature -- "administrative convenience," "tradition," or "uniformity of laws" -- are labels without any

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[8] Forbush also illustrates the significance of names in the civil rights context. See Section 2, supra. Indeed, women have waged battles in both courts and legislatures against long-standing measures that required them to use their husband's name on driver's licenses, passports, voter registration rolls, and other state documents. See Omi Morgenstern Leissner, The Name of the Maiden, 12 Wis. Women's L.J. 253, 254-67 (Fall 1997).

logical reasoning linking them to a legitimate governmental objective. "Tradition" is asserted as an end in itself. Similarly, the State asserts that the federal government does not today recognize marriages of same-sex couples and then concludes that "[g]iven the existence of federal law, and the lack of any successful constitutional challenge, it was not irrational for Connecticut to include language in the larger Civil Union Law modeled on the federal law defining marriage as the union of one man and one woman." State's Br. at 58. The State's mere assertion of an interest in uniformity of laws is utterly lacking in any identification of a legitimate public purpose served by it. Nor is there any reasoning or logical nexus linking the marriage ban to any public purpose. Judge Rosemary Barkett of the Eleventh Circuit has criticized her own court for framing constitutional questions in a result-oriented manner and "substituting labels for reasoned discussion about the law." Rosemary Barkett, The Tyranny of Labels, 38 Suffolk U. L. Rev. 749, 758, 755-58 (2005). Labels, she asserts, bar any real analysis and as such undermine the public trust in judicial independence. Id. at 758-59.

5. The State references public comments prior to the public vote on the ERA as grounds to conclude that the denial of marriage to same-sex couples cannot violate the sex discrimination prohibitions in Article First, § 20. State's Br. at 41-42. Nothing about the intent of the voters can be gleaned from such comments. Some commentators apparently claimed that the amendment would legalize marriages for same-sex couples; others claimed it would not. Even if the ad hoc impressions of individuals who spoke publicly at the time were relevant, these comments reflect differing views and can hardly impute one position to the voters who approved the amendment. Rather than relying on extraneous public comments, this Court must apply its well established principles of constitutional interpretation, including that "[e]ffect must be given to every part and each word in our constitution." Sheff, 238 Conn. at 28 (quoting Cahill v. Leopold, 141 Conn. 1, 21 (1954)).

6. This case raises the core question whether the principles of liberty and equality in the Connecticut Constitution can tolerate a separate classification for a group of citizens

based on a personal characteristic, sexual orientation, that is no more chosen or changeable than left-handedness.[9] Justice Harlan answered this question by declaring that the constitution "neither knows nor tolerates classes among citizens," Plessy, 163 U.S. at 559 (Harlan, J., dissenting), a pronouncement that is a bedrock principle of our constitutional jurisprudence. The scientific experts say there is no real difference between gay and non-gay people, see Brief of American Psychological Association et. al. as Amici Curiae, and the State has determined that there is nothing about sexual orientation that disqualifies a couple from fitting neatly within the framework of our marriage laws. Given this legislative determination and its obvious embrace of the scientific consensus on the normality of a same-sex sexual orientation, discriminating in marriage based on sexual orientation can be no more rational than discriminating against left-handed people in marriage. Although the State and the legislature purport to aspire to equality, equality cannot be achieved when an irrelevant and unchangeable characteristic -- sexual orientation -- is used as the centerpiece of the law.

## CONCLUSION

For the foregoing reasons and the reasons stated in the Plaintiffs' opening brief, 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.

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[9] See Pl's Br. at 35 (setting out conclusion of Surgeon General and major psychological organizations in this country that sexual orientation is determined at a young age and cannot be changed).

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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 February 27, 2007, to the **Hon. Patty Jenkins Pittman, J.**, and the following counsel of record:

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