SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 17716

ELIZABETH KERRIGAN *et al*.,

Plaintiffs-Appellants

vs.

COMMISSIONER OF PUBLIC HEALTH *et al*.,

Defendants-Appellees

BRIEF OF *AMICUS CURIAE* ALLIANCE FOR MARRIAGE IN SUPPORT OF DEFENDANTS-APPELLEES

For *Amicus Curiae*
Alliance for Marriage

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INTEREST OF THE *AMICUS*

Alliance for Marriage (AFM), a national non-profit 50l(c)(3) organization incorporated in the state of Virginia, is dedicated to research and education to promote marriage and address the epidemic of family disintegration in the United States. AFM believes that children are best raised in marriages with both a mother and a father who are married to each other. AFM's Board of Directors represent a highly diverse group of worldviews,[1] but all share a common belief in the fundamental truth that marriage is the union of one man and one woman. While AFM is inclusive of all viewpoints (including religious viewpoints), AFM strongly believes that human rationality and common sense are more than sufficient for understanding the importance of marriage, defined as the union of one man and one woman, for both society in general and children in particular. Indeed, AFM's work is supported by a vast body of social science research that confirms that the union of a man and a woman in marriage provides a uniquely beneficial environment for raising children. AFM is thus concerned about, and interested in responding to, legal challenges to the ideal of marriage and family life, such as the present lawsuit.

[1] AFM's Board of Directors includes leaders from the Congress of Racial Equality, African Methodist Episcopal Church, National Black Leadership Roundtable, National Hispanic Christian Leadership Conference, Christian Latin Business Association, Mosque Cares, Queens Board of Rabbis, Korean Presbyterian Church, American Anglican Council, United Methodist Church, and the Institute For Responsible Fatherhood. (The beliefs of AFM's Board are frequently, although not necessarily, the views of their respective organizations.)

AFM has participated as *amicus curiae* in a number of same-sex marriage cases, both state and federal, and in recent years has filed briefs in support of the traditional understanding of marriage with the Maryland Court of Appeals, the New York Court of Appeals, the Oregon Supreme Court, the Washington Supreme Court, the New Jersey Supreme Court, and the United States Court of Appeals for the Eighth Circuit. In this Court, AFM is again seeking to support the traditional definition of marriage as the union of a man and a woman.

STATEMENT OF THE ISSUES AND STATEMENT OF THE CASE

Amicus Curiae Alliance for Marriage adopts the Statement of the Issues and the Statement of the Case and Facts in the brief of the Defendants-Appellees.

SUMMARY OF THE ARGUMENT

Preserving marriage as traditionally and historically understood in law and society as a union between one man and one woman is a constitutionally valid State action. Moreover, children reared by married couples and married couples themselves benefit greatly from marriage - apart from any legal benefits conferred on the family. Benefits to the married couple include greater longevity, greater wealth, more fulfilling sexual relationships, and greater happiness. The state legislature could rationally conclude that extending "marriage" to same-sex couples may not result in an increase of benefits to those couples and that a redefinition of marriage may in fact undermine some of the benefits currently associated with marriage.

Additionally, marriage has historically been seen in light of promoting procreation and child-rearing. Hence, it has been limited to unions between one man and one woman. The State has created civil unions for same-sex couples for different reasons than those which led to the institution of marriage, and these civil unions serve different State interests than those served by the institution of marriage. Since opposite and same-sex couples have relevant biological differences, particularly in relation to potential procreation, differentiating between marriage and civil unions is valid under the Equal Protection Clause of the Connecticut Constitution.

Marriage serves to advance the stability of and provide support to a relationship that may, and often does, result in the birth of children. Unlike same-sex relationships, only the union of a man and a woman can result in natural, unplanned childbirth. The state has a legitimate interest in creating incentives for heterosexual couples to bind themselves to a stable relationship for the sake of potential children. Although same-sex

couples may adopt or bear children through artificial insemination, they may only have children after much planning and preparation, neither of which is always present for natural procreation. The State therefore has a different interest in same-sex couples than opposite-sex couples. Because there is no risk of unplanned parenthood in same-sex couples, the State has a rational interest in providing different recognition to these couples.

The trial court was correct in holding that the Connecticut Constitution does not require a revolutionary redefinition of marriage to encompass same sex couples. Although a fundamental right to marriage was cited by the U.S. Supreme Court in Loving v. Virginia, the Court made clear by dismissal of Baker v. Nelson that marriage as traditionally defined did not apply to same-sex relationships. All individuals have the right to marry without exception. However, to require the State to recognize a homosexual union as a "marriage" would be to redefine the term. Given the different procreative potential for opposite and same-sex couples, the Legislature has a rational and valid reason for creating different institutions to address these differently-situated couples. This is a permissible classification under the Equal Protection Clause of the Connecticut Constitution.

ARGUMENT

I. THE LEGISLATURE CAN RATIONALLY SEEK TO PRESERVE THE HISTORICAL DEFINITION OF MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN.

In Connecticut, marriage has traditionally and legally been defined as the union of one man and one woman. C.G.S.A. § 45a-727a(4); Rosengarten v. Downes, 71 Conn. App. 372, 384 (Conn. App. Ct. 2002) ("the understanding of English common law was that marriage was a contract entered into by a man and a woman."). This has also been the societal understanding of the term throughout the United States. See, e.g. Hernandez v. Robles, 7 N.Y.3d 338, 359 (Ct. App. N.Y. 2006); In re Marriage Cases, 143 Cal. App. 4th 873, 889 (Ct. App. Cal. 2006); Standhardt v. Superior Court, County of Maricopa, 206 Ariz. 276, 285 (Ct. App. Ariz. 2003); Baker v. State, 170 Vt. 194, 199 (Ver. 1999). With the exception of Massachusetts, all states still adhere to this definition. See Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (Mass. 2003).

In very recent years, as same-sex relationships have achieved greater societal acceptance, same-sex couples have sought increased recognition through state institutions. In response, the state of Connecticut has passed Public Acts which allow same-sex couples to enter into civil unions, granting them "all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage." See Public Acts 2005, No. 05-10. Such Acts also allow coparenting partners to adopt children without reference to the partners' respective sex. See Public Acts 2000, No. 00-228. Notwithstanding these benefits, the

definition of marriage continues to be the union of one man and one woman, an intention clearly manifested by the Legislature. C.G.S.A. § 45a-727a(4).

Preserving this historic definition of marriage is a rational legislative goal. "To remove from 'marriage' a definitional component of that institution (i.e., one woman, one man) which long predates the constitutions of this country and state would, to a certain extent, extract some of the 'deep roots' that support its elevation to a fundamental right." Samuels v. New York State Dep't of Health, 29 A.D.3d 9,15 (N.Y. App. Div. 2006). Recognizing the deep roots that support traditional marriage, and that "history and the collective wisdom of our ancestors should not be lightly set aside," the legislature could rationally desire to uphold the historic and traditional definition of marriage. Id.

II. THE LEGISLATURE COULD RATIONALLY BELIEVE THAT CERTAIN FEATURES OF MARRIAGE WOULD NOT EXTEND TO NON-TRADITIONAL FAMILY FORMS, THUS RATIONALLY CONFINING MARRIAGE TO OPPOSITE-SEX COUPLES.

Children and parents both profit from traditional marriage as demonstrated by a variety of significant and diverse measures of success. For instance, children reared in homes with a married mother and father perform better academically, are less likely to abuse alcohol and drugs, have fewer emotional and behavioral problems, are less likely to suffer from depression or commit suicide, are less likely to have children out of wedlock, and are less likely to experience poor health than children reared in other family forms. See John P. Hoffmann & Robert A. Johnson, A National Portrait of Family Structure and Adolescent Drug Use, 60 J. OF MARRIAGE & FAM. (Aug. 1998): 633-45; Elizabeth Thomson et al., Family Structure and Child Well-Being: Economic Resources vs. Parental Behaviors, 73 SOCIAL FORCES (September 1994): 221-42; Nicholas Zill, Nat'l Health Interview Survey, Child Health Supplement (1981); Nadia Garnefski & Rene F. W.

Diekstra, Adolescents from One Parent, Stepparent and Intact Families: Emotional Problems and Suicidal Attempts, 20 J. OF ADOLESCENCE (1997): 201-10; Lawrence Wu & Brian C. Martinson, Family Structure and the Risk of a Premarital Birth, 58 AM. SOC. REV. (April 1993): 210-32; Nat'l Longitudinal Survey of Adolescent Health, Wave I (1995). Moreover, married individuals live longer, are healthier, have greater wealth, have more fulfilling sexual relationships, and have greater happiness than single individuals or cohabitating couples. See Linda Waite & Maggie Gallagher, The Case for Marriage: Why Married People are Happier, Healthier, and Better off Financially (2000) (citing and discussing a panoply of relevant studies).

The legislature could rationally believe that these advantages of traditional marriage may not extend to same-sex unions and that redefining what marriage is by extending it to nontraditional family forms may actually undermine some of these advantages. See, e.g., Maggie Gallagher, (How) Will Gay Marriage Weaken Marriage as a Social Institution, 2 U. ST. THOMAS L.J. 33 (2004); see also In re Marriage, 143 Cal. App. 4th at 889 (traditional marriage is "very important to many Californians, who fear such a fundamental change will destroy or seriously weaken the institution at the heart of family life"). The legislature is uniquely positioned to appropriately weigh the benefits and costs of redefining marriage and legislate accordingly. See Morrison v. Sadler, 821 N.E.2d 15, 26 (Ct. App. Ind., 2005); cf. In re Marriage, 143 Ca. App. 4th at 889. ("Courts simply do not have the authority to create new rights, especially when doing so involves changing the definition of so fundamental an institution as marriage.")

III. MARRIAGE AS TRADITIONALLY DEFINED IN CONNECTICUT ADDRESSES STATE INTERESTS THAT ARE NOT SHARED BY SAME-SEX COUPLES.

As has been recognized in other jurisdictions, a key purpose for marriage has been to encourage stability and long-term commitment within relationships that can result in the procreation of children. See, e.g., Morrison, 821 N.E.2d at 26-27; In re Marriage, 143 Ca. App. 4th 873. Federal decisions declaring marriage to be a fundamental right have linked marriage to procreation and childbirth, elements associated with opposite-sex couples and the traditional definition of marriage. As stated by one court, "Federal decisions have found the fundamental right to marry at issue only where opposite-sex marriage was involved. Loving, Zablocki, and Skinner tie the right to procreation and survival of the race." Andersen v. Washington, 158 Wn.2d 1, 28, 30 (Wash. 2006). Put another way, "the right to marry is not grounded in the State's interest in promoting loving, committed relationships." Id. at 29, n.12.

Because opposite-sex couples may naturally procreate without means of adoption or artificial insemination, the state has an interest in encouraging these couples to create a stable environment for unplanned children.[2] Same-sex couples, on the other hand, cannot bear children through impulse, whim, or accident. Adoption or impregnation by a third party must be planned in advance. It is therefore rational, as other jurisdictions have recently held, for the State to encourage marriage only between opposite-sex couples, where intercourse has a natural tendency to lead to children and where planning and foresight may not precede the birth of a child. Hernandez, 7 N.Y.3d 338 at 359; Andersen,

[2] For instance, a study released in 1998 demonstrated that by their late thirties, sixty percent of American women had had at least one unintended pregnancy. Stanley K. Henshaw, Unintended Pregnancies in the United States, 30 Fam. Plan. Perspectives 24, 28 (Table 3) (1998). Moreover, almost half of the pregnancies that occurred in America in 1994 were unintended. Haishan Fu et al., Contraceptive Failure Rates: New Estimates from the 1995 National Survey of Family Growth, 31 Fam. Plan Perspectives 56, 56 (1999). Among those unintended pregnancies, 53% of the women were using contraceptives. Id.

158 Wn.2d at 37; In re Marriage, 143 Cal. App. 4th at 935 n.33; Morrison, 821 N.E.2d at 24-25; Standhardt, 206 Ariz. at 287-88.

Given the obvious biological reasons for the institution of marriage and the biological differences between opposite and same-sex relationships, State-created institutions rationally reflect those differences. Civil unions were created by the State to provide legal benefits to same-sex couples such as "the ability to visit and care for one another during hospital admissions, to participate in end of life decision making, to provide and receive dependent health insurance coverage, to engage in financial and tax planning advantages conferred by state law and to establish binding family relationships." Kerrigan v. State, 49 Conn. Supp. 644, 647 (Conn. Super. Ct. 2006). On the other hand, marriage was set up largely in the interest of creating a stable environment for children, with corresponding recognition for opposite-sex couples who do so.

The State has an undeniable interest in what happens to children, and subsequently an interest in those relationships where sexual activity is likely to result in childbirth. Because sex matters in issues of procreation, it is rational for the State to make distinguishable institutions to deal with issues involving opposite and same-sex couples.

IV. REQUIRING THE STATE TO RECOGNIZE "SAME-SEX" MARRIAGE WOULD REDEFINE MARRIAGE IN A WAY NEITHER ANTICIPATED NOR INTENDED BY LOVING.

Marriage as understood throughout the history of the United States and in virtually all states, up to the present day, is defined as a union between a man and a woman and is fundamentally linked to procreation and the propagation of the human species. Precedent in the federal and state case law has viewed marriage in that context. As

discussed earlier, the Supreme Court in important federal cases such as Skinner v. Oklahoma and Loving v. Virginia linked marriage with procreation by heterosexual couples, both implicitly and explicitly. See Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race"); Baker v. Nelson, 409 U.S. 810 (1972) (dismissing for "want of a substantial federal question" an appeal for same-sex marriage five years after deciding Loving).

Some advocates of extending the ability to marry to same-sex couples have cited Loving v. Virginia, 388 U.S. 1 (1967) and the "fundamental freedom" to marry as evidence of the State's obligation to grant same-sex couples the opportunity to marry. As has been recognized in other jurisdictions, at the time of that decision the Court "was obviously contemplating unions between men and women when it ruled that the right to marry was fundamental." Morrison, 821 N.E.2d at 33 (quoting Baehr v. Lewin, 852 P.2d 44, 56 (Haw. 1993)). The fundamental right to marriage pinpointed by the court was presumed to involve a man and a woman, and the potential for procreation. Standhardt, 206 Ariz. at 283. The precedential value of Loving in cases involving same-sex marriage is limited by the understanding of marriage at that time. In re Marriage, 143 Cal. App. 4th at 907; Anderson, 158 Wn.2d at 50.

The Loving decision removed state restrictions to marriage for interracial couples, finding that Virginia's laws prohibiting such couples to marry were "measures designed to maintain White Supremacy." Loving, 388 U.S. at 11. This was held to violate the Equal Protection Clause. The State had failed to "treat alike all persons similarly situated." Kerrigan, 49 Conn. Supp. at 661 (2006); see also State v. Campbell, 224 Conn. 168, 185

(1992), cert. denied 508 U.S. 919 (1993). Starkly contrasting in this case, the State has not acted to define marriage with an invidious purpose to discriminate nor has it failed to treat similar couples similarly.

Continuing to define marriage as the union of one man and one woman is not analogous to discrimination against any race, gender, or other protected class. Seymour v. Holcomb, 790 N.Y.S.2d 858, 865 (N.Y. Sup. Ct. 2005); Baker, 170 Vt. at 226-27 (Vt. 1999). This definition and the very institution of marriage stems from the biological fact that a sexual relationship between a man and a woman may, and often does, result in procreation. Marriage was not designed to discriminate against homosexuals, but to promote sexual unions that would propagate the human race. Hernandez, 7 N.Y.3d at 361. Opposite and same-sex couples are different from each other in important biological ways. It is not a violation of the Equal Protection Clause for the State to recognize and respond to these differences.

Loving and the case before the Court differ in another important way. A ruling in Loving expanding Virginia's marriage laws to include interracial couples did not fundamentally change the definition of marriage for that state. Although interracial marriages were prohibited as a means of maintaining White Supremacy, such unions were not unprecedented in that state and were accepted in most other states in the Union. The lower court in this case was correct in upholding the State's definition of marriage, because expanding marriage to same-sex couples would "work a fundamental change in the definition of marriage itself." In re Marriage, 143 Cal. App. 4th at 905. Loving does not mandate nor authorize such a change in the definition of this "fundamental freedom." Standhardt, 206 Ariz. 276 at 283; In re Marriage, 143 Cal. App. 4th at 889.

CONCLUSION

For the foregoing reasons, this Court should uphold the decision of the Superior Court.

Respectfully Submitted,

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