SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 17716

ELIZABETH KERRIGAN, ET AL.

V.

COMMISSIONER OF PUBLIC HEALTH, ET AL.

BRIEF OF CONNECTICUT CATHOLIC CONFERENCE, INC.
AS *AMICUS CURIAE*
IN SUPPORT OF DEFENDANT-APPELLEES

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III. Do Connecticut's state laws, which define "marriage" as the union of one man and one woman, but permit same-sex couples to enter into "civil unions" with all the rights and benefits of marriage, violate the due process provisions of the Connecticut Constitution set forth in Article First, §§ 8 and 10? [Pages 1 through 15.]

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INTEREST OF AMICUS CURIAE

The Connecticut Catholic Conference, Inc. is the public policy voice for the Roman Catholic Church in Connecticut, representing the views of the Catholic Church and of the Connecticut Bishops in matters of marriage, family, health, education and social Justice. The Catholic Church has long advocated for the civil rights of all individuals, while also articulating the importance of marriage as the union of a husband and a wife for the wellbeing of family and society. *See, e.g.,* Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (July 2003) (available at www.vatican.va); U.S. Conference of Catholic Bishops, *Between Man and Woman: Questions and Answers about Marriage and Same-Sex Unions* (November 2003) (available at www.usccb.org). The Connecticut Catholic Conference, Inc. believes that the outcome of this litigation will have broad and significant implications for the wellbeing of society.

STATEMENT OF FACTS AND PROCEEDINGS

Amicus adopts the Counter-Statement of Facts and Proceedings in the Brief of Defendant-Appellees.

ARGUMENT

I. Plaintiffs err in their framing of the legal question presented under rational basis review.

Plaintiffs describe the legal question as, "Does excluding otherwise qualified same-sex couples from marriage violate the guarantees of equal protection . . . because . . . [t]he exclusion fails rationally to further a legitimate government purpose?" (Plaintiffs Br. at iv.) Under the rational basis test (which as plaintiffs note is the same under the due process and equal protection provisions in Connecticut, Plaintiffs Br. at 45, citing *Ramos v. Town of Vernon,* 254 Conn. 799, 841 (2000)), the question is not whether the *exclusion* is rational, in the sense of being either logically or practically necessary to achieve the state's purpose(s), but whether the classification, i.e., the *included class*, is reasonably related to a legitimate state purpose. *Id.,* 254 Conn. at 829 ("If the statute does not touch upon either a fundamental right or a suspect class, its classification need only be rationally related to some legitimate government purpose in order to withstand an equal protection challenge.").

Plaintiffs' formulation of the issue inappropriately imports into the rational basis tests several unacknowledged elements of strict scrutiny. Cf. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 980 (Mass. 2003) (Sosman, J., dissenting) ("Although ostensibly applying the rational basis test to the civil marriage statutes, it is abundantly apparent that the court is in fact applying some undefined stricter standard to assess the constitutionality of the marriage statutes' exclusion of same-sex couples."). The rational

basis test permits some degree of both overinclusiveness and underinclusiveness. *State v. Wright*, 246 Conn. 132, 148 (1998); *Heller v. Doe,* 509 U.S. 312, 320-21 (1993) ("A statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." (internal citations and quotation marks omitted).)

Laws which survive the rational basis test thus routinely use classifications which include some members who do not fulfill the purpose of the legislation and may simultaneously exclude others who might be able to do so. This is what the phrase "overinclusiveness and underinclusiveness" *means.* By isolating a set of excluded individuals and asking whether they are in some ways similar to any included member, plaintiffs inappropriately import a "narrow tailoring" requirement into the rational basis test.

The properly formulated question under the rational basis test asks: Is the classification used in marriage—a sexual union of male and female—rationally related to any conceivable legitimate state purpose? We join other amici in noting that a key state purpose in marriage, long acknowledged in U.S. law and culture, is procreation: bringing together men and women to make and raise their children together. (See Section II, *infra*; *see also* Brief of Amici Curiae of James Q. Wilson, et al.). In that context, the legal question properly formulated is: Is the state classification in marriage—sexual unions of male and female—based on "natural and substantial differences, germane to the subject

and purpose" (*Tough v. Ives*, 162 Conn. 274, 293 (1972)) of procreation? And the answer is, yes: male-female sexual unions as a category have "natural and substantial differences" from same-sex ones that are germane to the purpose of procreation.

II. The law of marriage serves a compelling state interest.

Under the rational basis test, the state need not prove that its classification is narrowly tailored, or that the state interest is compelling. Nevertheless, procreation is not only a legitimate state purpose but a compelling one.[1] One need not accept one proposition, that homosexual or "lesbigay" parenting harms child welfare to acknowledge another, that the state has a unique and compelling interest in advancing procreation within marriage: first, because children so created demonstrably do better when born to a married mother and father;[2] second, because taxpayers and communities suffer when children are produced by less committed sexual unions,[3] and third, because making the

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[1] *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (observing that a "state has a compelling interest in encouraging and fostering procreation of the race"), aff'd, 673 F.2d 1036 (9th Cir. 1982); *Andersen v. King County*, 138 P.3d 963, 1010 (Wash. 2006) (Johnson, J., concurring) ("We conclude that the legislature was justified in enacting DOMA to clarify and reaffirm Washington marriage law by a compelling governmental interest in preserving the institution of marriage, as well as the healthy families and children it promotes.") More generally, the U.S. Supreme Court has recognized procreation – the bearing and rearing of children – as essential to the existence of a democratic society. *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' 'A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.'" (internal citations omitted)).

[2] *See* Maggie Gallagher & Joshua K. Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 MARGINS L.J. 161 (2004).

[3] *See The Marriage Movement: A Statement of Principles* 11 (New York: Institute for American Values) (2000) ("Divorce and unwed childbearing create substantial public costs, paid by taxpayers. Higher rates of crime, drug abuse, education failure, chronic

next generation is necessary to the perpetuation of the human race and neither adoption nor artificial reproduction are likely to substitute for sexual unions. *See generally,* Brief of Amici Curiae of James Q. Wilson, et al. In short, plaintiffs err: one need not assert that homosexual or "lesbigay" parenting harms children to assert that stripping marriage of its connection to procreation and paternity harms both child welfare and social welfare, both of which compelling state interests.

III. Plaintiffs err in suggesting that this Court, under the rational basis test, need not consider any arguments except those made by the State.

Here again plaintiffs inappropriately import elements of strict scrutiny into the rational basis test. Under strict scrutiny, the burden of proof shifts to the state to demonstrate that the law is narrowly tailored to advance a compelling state interest. Furthermore, the state must show the interest asserted is not only a possible but *actual* purpose of the law. By contrast, while this court is not required to hypothesize indefinitely under the rational basis test, it is at a minimum required to consider in good faith all reasons offered to it. *Ramos v. Town of Vernon*, 254 Conn. at 831-32 (quoting *Barton* v. *Ducci Electrical Contractors, Inc.*, 248 Conn. 793, 817-18 (1999)) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational

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illness, child abuse, domestic violence, and poverty among both adults and children bring with them higher taxpayer costs in diverse forms: more welfare expenditure; increased remedial and special education expenses; higher day-care subsidies; additional child-support collection costs; a range of increased direct court administration cost incurred in regulating post-divorce or unwed families; higher foster care and child protection services; increased Medicaid and Medicare costs; increasingly expensive and harsh crime-control measures to compensate for formerly private regulation of adolescent and young-adult behaviors; and many other similar costs. . . . [C]urrent research suggests that these costs are likely to be quite extensive.")

basis for the classification. . . . The test . . . is whether this court can conceive of a rational basis for sustaining the legislation; we need not have evidence that the legislature actually acted upon that basis.") "Any reasonably conceivable" rationale clearly includes those presented to the court by amici.

IV. Plaintiffs err in stating that "procreation has never been the purpose of marriage."

Subverting the rationale of *Loving v. Virginia,*[4] plaintiffs urge this court to accept and advance the astonishing proposition that "procreation has *never* been the purpose of marriage" (Pl. Br. at 59; emphasis supplied.) Their argument: (a) there is no statutory requirement that married couples procreate; (b) capacity and intent to procreate are not preconditions for marriage; and (c) heterosexual couples will continue to procreate regardless. Plaintiffs conclude then by arguing that "the State must demonstrate how a classification serves its goals." Pl. Br. at 60. Preliminarily, we note that the State carries no burden to demonstrate that procreation is the only established state interest in marriage; rather, the burden rests upon plaintiffs to negate any possibility that well-meaning legislators could rationally believe that responsible procreation is a public purpose of marriage. This the plaintiffs cannot do.[5]

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[4] The U. S. Supreme Court in *Loving v. Virginia* had no trouble making the connection between marriage and procreation when it declared, "Marriage is one of the `basic civil rights of man,' fundamental to our very existence and survival." 388 U. S. 1, 12 (1967).

[5] *See, e.g., Poe v. Gerstein*, 517 F.2d 787, 796 (5th Cir. 1975) ("[P]rocreation of offspring could be considered one of the major purposes of marriage. . . ."); *Singer v. Hara,* 522 P.2d 1187, 1195 (Wash. App. 1974) ("[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race."); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."); *Heup v. Heup*, 172 N.W.2d 334, 336 (Wis. 1969) ("Having children is a primary purpose of marriage."); *Zoglio v. Zoglio*, 157 A.2d

Plaintiffs cite *Gould* as support: "Courts have voided marriages, on the other hand, when a person marries knowing he or she is incapable of sexual intimacy. *Gould v. Gould*, 78 Conn. 242, 249-50 (1905). In other words, the State acknowledges the expectation of intimacy, but not of procreation." Pl. Br. at 60, n.68. *Gould* is an odd case to cite in support of the proposition that the law of marriage has never been about procreation, since (a) the actual standard for marriage endorsed by the majority is not sexual intimacy generally but "sexual intercourse" (*Gould*, 78 Conn. at 250) that is, the only kind of sexual act that leads to procreation; (b) the court's upholding of the eugenic rationale at issue in *Gould*, noted by the Plaintiffs as one that "demonstrates a legislative concern, based on beliefs of that time period, about regulating access to marriage in the interest of public health, an issue not presented by this case,"[6] (Pl. Br. at 43, n. 53) clearly assumes procreation as a purpose of marriage (otherwise, affirming the state's right to regulate marriage in the interest of eugenics, *i.e.* of preventing genetically transmitted diseases in offspring, makes no sense) and (c) the concurring opinion in *Gould* explicitly

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627, 628 (D.C. App. 1960) ("One of the primary purposes of matrimony is procreation."); *Frost v. Frost,* 181 N.Y.S.2d 562, 563 (Supr. Ct. New York Co. 1958) (discussing "one of the primary purposes of marriage, to wit, the procreation of the human species."); *Pretlow v. Pretlow*, 14 S.E.2d 381, 385 (Va. 1941) ("The State is interested in maintaining the sanctity of marriage relations, and it is interested in the ordered preservation of the race. It has a double interest."); *Stegienko v. Stegienko*, 295 N.W. 252, 254 (Mich. 1940) (stating that "procreation of children is one of the important ends of matrimony"); *Gard v. Gard*, 169 N.W. 908, 912 (Mich. 1918) ("It has been said in many of the cases cited that one of the great purposes of marriage is procreation."); *Lyon v. Barney*, 132 Ill. App. 45, 50 (1907) ("[T]he procreating of the human species is regarded, at least theoretically, as the primary purpose of marriage . . ."); *Grover v. Zook*, 87 P.638, 639 (Wash. 1906) ("One of the most important functions of wedlock is the procreation of children.").

[6] Under the rational-basis test and pursuant to the police power, the legislature is free to leave the law of marriage to unions of one man and one woman on grounds of public health. *See* Mark W. Dost, *Civil Marriage: "The Voluntary Union for Life of One Man and One Woman, to the Exclusion of all Others,"* Connecticut Lawyer June/July 2004, 21, 28, available at http://www.ctbar.org/filemanager/download/296.

notes “where there exists a physical condition of one affecting the possibility of sexual intercourse, *or the possibility of begetting children,* a similar result [i.e. a fraudulent marriage contract] may follow.” *Gould,* 78 Conn. at 262, Hamersley, J., concurring (emphasis added).

It is simply not credible to state that “marriage has never been about procreation.” The plain, obvious truth the plaintiffs are strangely unwilling to acknowledge is that marriage has widely and repeatedly been held to be connected to procreation and paternity, bringing together men and women to both make and raise the next generation together—not only in Connecticut and other American states, but in virtually every known society. *See* Br. Amici Curiae of James Q. Wilson, et al.

Evidence of this public purpose is built into the very legal structure of marriage. The legal elements of marriage in Connecticut that point to procreation and paternity as a key purpose include its definition: not just any intimate cohabiting, caretaking relationship of adults, but a sexually exclusive union of male and female, in which the law presumptively holds mother and father jointly responsible for any children born to the wife. *Holland v. Holland,* 188 Conn. 354, 357 (1982). Moreover, this presumption of paternity is rebuttable by a finding that the father is not the biological parent of the child, clearly connecting the sexual relationship of the adults to the biological capacity to create new life, and the joint parenting responsibilities of the married couple. *Weidenbacher v. Duclos*, 234 Conn. 51, 69-70 (1995). Similarly, prohibitions on consanguinity and adultery as divorce grounds also point to the State’s conception of marriage as a sexual union that can and often does give rise to children. Conn. Gen. Stat. §§ 46b-40(c) and 46b-81.

If, as plaintiffs suggest, the purpose of marriage in Connecticut is sexual intimacy, then marriage clearly fails their own rational basis analysis for both same-sex and opposite-sex couples, since there are many single people having sexual intimacy, some married people may prefer not to do so, and many kinds of sexually intimate relationships that involve more that two people are not recognized as marriages.

We are not asking this Court to "hypothesize indefinitely" when we point to procreation as a key public purpose of marriage. Our legislature did not dream up marriage in isolation; instead Connecticut's marriage laws reflect the broad, deep, repeatedly articulated sense of our legal and cultural tradition: marriage has something important to do with getting men and women to make and raise the next generation together.

V. Plaintiffs err in describing procreation and paternity as repudiated by the legislature's findings with respect to adoption.

Plaintiffs err in asking this Court to read legislative findings regarding the best interests of children placed for adoption as rejecting the importance of encouraging natural parents to commit to raising their children, or of connecting mothers and fathers in stable family unions. Pl. Br. at 58. In the adoption findings, the legislature notes that it is in the best interests of children to have "persons in the child's life who manifest a deep concern for the child's growth and development," to have "as many persons loving and caring for the child as possible," before noting that these families may include "nuclear, extended, split, blended, single-parent, adoptive, or foster famil[ies]." Conn. Gen. Stat. § 45a-727a. It strains credulity to say that these findings mean that the legislature has determined it has no preference regarding whether children are successfully raised by their natural parents or are taken away by the state and placed in, say, foster families, or

that the state does not care whether men produce children across multiple households. This legislative finding is addressed to the specific purposes of adoption law: serving the best interests of a child who may lack even one natural parent able or willing to care for him or her. Adoption findings should not be misread as a general repudiation of the idea the state has an interest in encouraging men and women to raise their children together.

VI. Plaintiffs err in asserting that the civil union statute repudiates the idea that an important purpose of marriage is procreation and paternity.

The purpose of a civil union statute is to maximize benefits to same-sex couples while minimizing changes in the state's marriage tradition. Plaintiffs err in asserting: "By its plain language and logical force, this statute can only be understood as a legislative determination that there is nothing about lesbian and gay couples that makes them less qualified than heterosexuals to participate in marriage." Pl. Br. at 11. Plaintiffs here misunderstand the source of the legislature's—and their neighbors'—concerns. The decision to retain the traditional understanding of marriage is not primarily a judgment about individuals but rather an institution. At law, in our history, and in the current public understanding, "a union of husband and wife" is not the entry requirement into something separate called marriage, but a substantive part of what marriage *is*. Plaintiffs admit that they seek the "cultural and social" associations of marriage—that is, not the benefits conferred by law, but the shared social understanding in the minds of fellow citizens. The way to achieve that end is to persuade their fellow citizens, and not this Court. [7]

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[7] *See* Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of* Perez *and* Loving*,* 2005 B.Y.U. L. Rev. 555, 560-61 ("[B]ecause social institutions are constituted by shared public meanings, they are necessarily changed when those meanings are changed and/or no longer sufficiently shared. Indeed, that is the only way a social institution can be changed.")

VII. Establishing "civil unions," rather than same-sex "marriage," demonstrates a legislative intention to preserve the longstanding ethical consensus in the broader culture

Marriage is a normative institution. It is "the parent, and not the child of society."[8] In contrast, same-sex marriages and civil unions are a "fragile artifact of the state."[9]

In adopting the name "civil union," rather than "marriage," for the institution that it created for same-sex couples, the legislature may have intended to preserve from diminishment or erosion the longstanding ethical or moral cultural consensus concerning marriage, a consensus that helps to sustain marriages and families. In addition, in introducing to our culture this new institution, the legislature may rationally have sought to communicate, or teach, that the new institution should be *like marriage* in terms of its ethical content, while recognizing that it is *not marriage* because of the absence of procreative potential inherent in same-sex relationships. Although it could have communicated this public policy by including same-sex relationships within the legal definition of "marriage," it could also have determined that by removing the biological pillar supporting the institution, it might facilitate the collapse of the ethical pillars also.

The law of marriage is not a self-contained system standing in isolation from the broader cultural understanding of marriage, but rather a system of regulation, however imperfect, developed against the background of that understanding. Transcending time

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[8] Joseph Story, COMMENTARIES ON THE CONFLICTS OF LAWS 100 (1834), quoted in Charles J. Reid, Jr., *The Unavoidable Influence of Religion upon the Law of Marriage*, 23 Quinnipiac Law Review 493, 503 (2004). In a carefully undertaken survey of 19th- and 20th-century legal treatise writers and case law, Reid refutes the proposition of the *Goodridge* majority that in Massachusetts (or elsewhere, for that matter), "civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution."

[9] Jean Bethke Elshtain, *in* Robert P. George & Jean Bethke Elshtain, eds., THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS xvi (Dallas: Spence Publishing Co., 2006).

and culture, marriage has meant the union of a man and a woman.[10] But marriage has also meant more. In our culture, there has been a consensus on not only the biological foundation of marriage, but also its unique ethical foundations: that the union should be for life (permanency), that the union should be exclusive (fidelity), and that the love that sustains and nurtures the union should be characterized by mutual support and self-sacrifice (selflessness). Although many fail to live up to these ideals, few would challenge them as ideals. These ideals also influence our culture's consensus on the proposition that a man and woman intending to have children *should* marry,[11] a proposition strongly supported, though not required, by our law.

No similar ethical consensus concerning same-sex relationships has emerged, or could reasonably have been expected to have emerged, in the six-year history of same-sex marriage.[12] Although the plaintiffs themselves may draw from the ethical foundations of marriage to guide their own relationships, they can point to no similar ethical consensus governing relationships of same-sex couples.

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[10] Polygamous cultures are no exception, since each marriage is between a man and a woman.

[11] "When we say that [they *should* marry], we mean that they should [commit to these] ethical foundations of marriage. We also mean that a child should be raised in a home where this commitment has been made, where the child will have the benefit of being raised by the child's mother and father, and where the parents will benefit from the companionship of the child and one another. The law supports these ideals of marriage and cannot be understood apart from them." Mark W. Dost, *Civil Marriage: "The Voluntary Union for Life of One Man and One Woman, to the Exclusion of all Others,"* Connecticut Lawyer June/July 2004, 21, 27, available at http://www.ctbar.org/filemanager/download/296, critiquing the *Goodridge* majority's deconstruction of the word "marriage."

[12] The institution of same-sex marriage first appeared in April 2001 in the Netherlands. See Mark W. Dost, *Same-Sex Marriage: A Debate. Part I: the Legal Background,"* Connecticut Lawyer March 2004, 20, 21, available at http://www.ctbar.org/filemanager/download/226.

That the legislature should be cautious in taking steps that erode – or could erode – the ethical consensus of marriage is obvious. The rise in divorce rates that attended the enactment of no-fault divorce laws is a recent and important case in point.[13] By undermining the culture's commitment to permanency in marriage, legislatures that enacted no-fault divorce laws, if not intending to promote the fracture and disintegration of families, in fact facilitated and accelerated the process.[14]

By requiring that the law apply the word "marriage" to a union of same-sex couples, the majority in *Goodridge* dismissed procreation – and even sex – as a principal purpose of marriage. In doing so, the majority dismissed the biological foundation of marriage, its identification with the responsible bearing and rearing of children in a stable and supportive environment. If the law divorces marriage from its biological foundation, which has existed throughout time and across cultures, the undermining of the ethical foundations of marriage will inevitably follow. If the legislature, or this court, teaches the broader culture that marriage is something other than what it has always been, the union

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[13] "[The argument in the 1960s] that the revolution in divorce laws would be without significant effect on marriage . . . seems naive in retrospect when it has been demonstrated that 'the switch from fault divorce law to no-fault divorce law led to a measurable increase in the divorce rate' and that 'parental divorce is associated with negative outcomes in the areas of academic achievement, conduct, psychological adjustment, self-esteem and social relations' and that 'adults who experience parental divorce as children, compared with those from continuously intact families of original, have poorer psychological adjustment, lower socioeconomic attainment and greater marital instability.'" William C. Duncan, *Against Redefining Marriage: A Review and Critique of Recent Legal Developments,* 23 Quinnipiac Law Review 427, 445 (2004), quoting Paul A. Nakonezny, Robert D. Shull & Joseph Lee Rodgers, *The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education and Religiosity,* 57 JOURNAL OF MARRIAGE AND THE FAMILY 477, 485 (May 1995), and Paul R. Amato, *Children's Adjustment to Divorce: Theories, Hypotheses, and Empirical Support,* 55 JOURNAL OF MARRIAGE AND THE FAMILY 23 (February 1993).

[14] The shift to unilateral divorce laws accounted for about 17% of the increase in divorce rates between 1968 and 1988. Linda J. Waite and Maggie Gallagher, THE CASE FOR MARRIAGE 179 (2000).

of a man and a woman, why should the broader culture continue to accept its ethical foundations as *foundational*?

VIII. Plaintiffs err in asserting an individual constitutional right to the cultural and social meanings attached to the word "marriage."

Plaintiffs ask this court to give them the "popular vocabulary" and "self-definition" associated with marriage. Pl. Br. at 4, 12. The plaintiffs do not, however, have an individual constitutional right to rewrite the common meaning of words, on the grounds they find the way the public uses them underinclusive and experience "psychic harm" therefrom. Under the rational basis test, the legislature is entitled to use words in the way the people of Connecticut generally use them. The legislative history, as cited by both the plaintiffs and the State, betrays no evidence of a desire to stigmatize, but a powerful desire to respect the common meaning of the word "marriage."

Plaintiffs are free under the law to call their relationships "marriages." If they seek to change their fellow citizens' understanding of what marriage means, the democratic process, which necessarily involves speaking to their fellow citizens, is the proper forum. It is not at all clear that the subjective psychic harm the plaintiffs complain of is greater than that of Connecticut citizens who would wake up to find their high court has labeled them irrational for caring about the nation's marriage tradition. An individual cannot have a unilateral constitutional right to transform the shared public meaning of a word.

IX. Contrary to assertions of amici, requiring religious group to recognize same-sex unions as marriages creates inevitable church/state conflicts.

Many religious liberty scholars recognize troubling church-state conflict emerging from same-sex marriage. *See* Brief of Amicus Curiae of Becket Fund for Religious Liberty. Prof. Cass Sunstein told the New York Times such conflicts were "real and

serious." Peter Steinfels, *Will Same-Sex Marriage Collide with Religious Liberty*, N.Y. Times, June 10, 2006. Marc Stern, chief counsel of the American Jewish Congress, described the conflicts as "a train wreck." *Id.* While the state cannot accommodate all possible religious views (since a public status requires a public definition), it is rational for the legislature to consider ways to minimize church/state conflicts, even while maximizing benefits to same-sex couples.

"The demand for a culture to nurture same-sex marriage has profound effects not just for traditional marriage, and the rights of parents to raise their children as they see fit. It affects *all* intermediary institutions of civil society standing between the individual and the state, but particularly those which threaten same-sex marriage. Foremost among these are religious organizations that do not support same-sex marriage. . . . State efforts to institutionalize same-sex marriage . . . [force] upon religious institutions the need to come to terms with a political institution regarded by them as contrary to reason and at odds with their faith. In so doing, it also indicts as intolerant religious institutions that stand in opposition to same-sex marriage."[15] Given that "[m]arriage and religion have a long and mutually supportive history" and that "in democratic societies, religion, more often than not, serves civic purposes,"[16] it was reasonable for the legislature to diminish, rather than exacerbate, conflict between political and religious institutions by leaving "marriage" as the union of one man and one woman.

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[15] Seana Sugrue, "Soft Depotism and Same-Sex Marriage," in THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS*, supra* note 9, 191-192.

[16] *Id.*, at 192.

X. Marriage does not discriminate based on sex.

Unlike bans on interracial marriage (which served to keep the races separate so that one race could oppress the other), marriage plays an integrative function with regard to gender. Marriage is a mixed-sex institution. The state is no more obligated, on the grounds of gender equality, to create same-sex marriages than it is required, in the name of gender equality, to provide single-sex universities, in addition to mixed-sex ones, in order to satisfy the desires of men or women who prefer a single-sex education.

Moreover, the very purpose of marriage, as we have described it here, is to create substantially greater equality of parenting between men and women (getting fathers as well as mothers for children), thus reducing the likelihood that women as a class will unfairly bear the high costs of childbearing disproportionately and alone. In this way, the state's definition of marriage not only formally but substantively furthers gender equality rather than diminishing it.

CONCLUSION

For the foregoing reasons, we respectfully request that the judgment of the trial court be affirmed.

Respectfully Submitted,

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CERTIFICATION

This is to certify that the foregoing brief of amicus curiae in support of defendant-appellees complies with the formatting requirements set forth in Practice Book § 67-2, and that a copy of the foregoing was mailed via first class mail, postage prepaid, this 25th day of April, 2007, to:

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