SUPREME COURT

OF THE

State of Connecticut

S.C. 17716

ELIZABETH KERRIGAN, JOANNE MOCK, JEFFREY BUSCH, STEPHEN DAVIS, SUAZANNE ARTIS, GERALDINE ARTIS, BARBARA LEVINE-RITTERMAN, ROBIN LEVINE-RITTERMAN, JOHN ANDERSON, GARRETT STACK, JANET PECK, CAROL CONKLIN, J.E. MARTIN, DENISE HOWARD, DAMARIS NAVARRO, GLORIA SEARSON

v.

STATE OF CONNECTICUT, DEPARTMENT OF PUBLIC HEALTH, J. ROBERT GALVIN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF PUBLIC HEALTH, DOROTHY C. BEAN, IN HER OFFICIAL CAPACITY AS DEPUTY TOWN CLERK AND ACTING TOWN CLERK AND DEPUTY REGISTRAR OF VITAL STATISTICS AND ACTING REGISTRAR OF VITAL STATISTICS FOR THE TOWN OF MADISON

BRIEF OF *AMICUS CURIAE*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Lambda Legal Defense and Education Fund, Inc. is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and those with HIV, through impact litigation, education, and public policy work. Founded in 1973, Lambda Legal is the oldest and largest organization of its kind. Lambda Legal has a strong interest in this case because, in addition to having many members who live in Connecticut, Lambda Legal is or has been party counsel in cases in six states where same-sex couples seek the freedom to marry. As a result, Lambda Legal has developed expertise that can assist the Court in addressing two specific issues.

The first issue concerns the trial court's conclusion that there was no constitutional injury. In the course of representing lesbians and gay men who want to marry their partners, and providing responses to the more than 5,000 people who annually call our organization seeking legal assistance, Lambda Legal has become acutely aware of the benefits that only marriage can provide to committed couples and their children, and of the harm that flows from assigning a group of people to a separate and inherently inferior status such as civil unions. This *amicus* brief will assist the Court in appreciating that harm, and explain the magnitude of the trial court's error in holding that no constitutional injury exists.

The second issue addresses the requirements of rational basis review. Lambda Legal does not believe that rational basis review is the standard that should be applied in this case; however, in the event this Court disagrees and applies that standard, this *amicus* brief highlights the errors in several recent out-of-state cases that misapplied the test under similar circumstances.

ARGUMENT

I. CONSTITUTIONAL INJURY IS INFLICTED ON LESBIANS AND GAY MEN BY BEING CONSIGNED BY THEIR GOVERNMENT TO A STATUS THAT IS SEPARATE FROM AND INFERIOR TO THE STATUS AFFORDED THOSE IN THE MAJORITY

The trial court unquestionably erred in finding no constitutional injury in this case. In creating "civil unions," the Connecticut legislature relegated lesbians and gay men to a separate legal institution rather than grant them the access to marriage that heterosexuals are given. The legislature's action classifies people on the basis of their sexual orientation and sex, treating gay people worse than those in the majority. Such status-based discrimination easily meets the test of a cognizable constitutional injury. Indeed, the one high court to have addressed whether it is unconstitutional to provide same-sex couples civil unions rather than equal access to marriage explained that, "[m]aintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage *is* the constitutional infirmity at issue." *Opinions of the Justices*, 440 Mass. 1201, 1209 (2004) (emphasis added).

If the legislature told those with red hair, or those who are short, that they could not marry and instead would have to enter into civil unions, no one would doubt that, by being legally marked as different and unworthy of marriage, these individuals would have suffered a concrete injury deserving of judicial review. When a minority is denied access to an institution available to the majority, and instead shunted into a separate, lesser status, there is harm of a constitutional dimension.

In fact, relegation to a separate status *standing alone* is a cognizable injury. As with other exercises of government power that set one group apart in a different legal status, the unavoidable result is that members of that group are labeled as inferior and unworthy. The

U.S. Supreme Court explained that "the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984). As a result, "discrimination itself" is constitutionally cognizable because it "stigmatiz[es] members of the disfavored group as 'innately inferior' and therefore less worthy participants in the political community." *Id.* The Connecticut Constitution's guarantees of equality would mean very little if the infliction of such a serious harm did not require at least an examination of whether there is a legitimate and sufficient reason for the differential treatment.[1]

While civil unions provide important security to the families of committed same-sex couples, those gains do not alter the truth that the legislature failed to provide the state's gay minority the full measure of liberty and equality required by the Constitution. Instead, the legislature codified that committed relationships of gay individuals are not to be recognized as identical to committed relationships of the heterosexual majority. When the political process results in a legislative compromise of the rights of one group, it becomes the courts' duty to determine whether the constitutional rights of the minority have been violated. The trial court accordingly erred in refusing to examine whether there is an adequate constitutional justification for the injury this status-based law imposes.

Although being relegated to a second-class status is alone a cognizable injury, the many harms that separate legal treatment engenders make the existence of an injury obvious and inescapable. When the government treats one group differently from others, it invites others to do the same, fostering even more bias, discrimination, and harm.

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1 As this Court recognized in *Sheff v. O'Neill*, 238 Conn. 1, 13 (1996), unless the Connecticut Constitution's text reserves a matter to the state's legislative branch, "it is the role and duty of the judiciary to determine whether the legislature has fulfilled its affirmative obligations within constitutional principles."

Lesbians and gay men historically have encountered these effects of discrimination due to laws that criminalized certain forms of adult consensual sexual intimacy. Even if not enforced, the mere existence of such laws constituted "an invitation to subject homosexual persons to discrimination both in the public and the private spheres." *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

The same is true for a civil union law. If "no message is conveyed by eschewing the word 'marriage,' and replacing it with 'civil union,'" then why would the Legislature be so "purposeful" in creating a new and different statutory structure solely for one group's committed relationships? *Opinions*, 440 Mass. at 1207-08. Such a law indeed has "the effect of maintaining and fostering a stigma of exclusion." *Id*. at 1208.[2] This holds true for lesbians and gay men in all areas of their lives, regardless of whether they are in committed relationships, because they have been labeled by their government as people unworthy of ever marrying. As plaintiff Elizabeth Kerrigan explained, "when the legislature passed the civil unions bill, that message echoed loud and clear." Brief of the Plaintiffs-Appellants ("Pl. Br.") at 2. When government marks lesbian and gay individuals as inferior, it sets an example of how to treat them elsewhere, for neighbors, employers, businesses, police, emergency room staff, schoolmates, and others.

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2 Although assigning a separate status to women and African-Americans has entailed discrimination of a different nature, the core constitutional injury is the same, and the same types of harms from the official message of inferiority and invitation to discriminate flow from that injury. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (in a single-sex educational context, the statutory objective to exclude or protect members of one gender presumed to be "innately inferior" is illegitimate); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (excluding black men from juries "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to ... race prejudice").

The harm that flows from a civil union's stigma is, of course, experienced particularly directly by individuals who have committed to a lifetime relationship of love and support, but who are denied the ability to marry. Although the separate status of a civil union provides the state law benefits and responsibilities of marriage, that does not temper the harm suffered by a couple who wish to convey most accurately what their relationship means, using the one term that is universally understood: marriage. "Ultimately, the message is that what same-sex couples have is not as important or as significant as 'real' marriage, that such lesser relationships cannot have the name of marriage." *Lewis v. Harris*, 908 A.2d 196, 226-27 (N.J. 2006) (Poritz, C.J., dissenting) (citing Michael Wald, Same-Sex Couple Marriage: A Family Policy Perspective, 9 Va. J. Soc. Pol'y & Law 291, 338 (2001) ("[I]f a State passed a civil union statute for same-sex couples that paralleled marriage, it would be sending a message that these unions were in some way second class units unworthy of the term 'marriage[,]' ... that these are less important family relationships.")).[3] In the words of the plaintiffs, a civil union "says that our love and commitment to each other is not good enough for marriage and cements that lie into law." (Janet Peck). It marks the plaintiffs and others in or who seek to form same-sex relationships as "less-than, of less value, not full citizens." (John Anderson). Pl. Br. at 3.

3 The *Lewis* Court held that "committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples." 908 A.2d at 221. In considering whether the status created must have the name "marriage," the Court explained that the legislature must first be "given a chance to address the issue," and in so doing will "probably state its purpose and reasons" if it enacts a separate statutory structure, as the Court would not "presume in advance that our legislators cannot give any [adequate] reason." *Id*. at 222. Thus, the Court gave the legislature 180 days to take action. *Id*. at 224. By contrast, here Connecticut's legislature already has acted, so the question of whether its decision to provide access only to a separate institution meets the state constitution's mandates is squarely presented for this Court's adjudication.

Any married couple would feel that they had lost something precious and irreplaceable if the government were to tell them that they no longer were "married" and instead were in a "civil union." The sense of being "married" – what this conveys to a couple and their community, and the security of having others clearly understand the fact of their marriage and all it signifies – would be taken from them. These losses are part of what same-sex couples are denied when government assigns them a "civil union" status. If the tables were turned, very few heterosexuals would countenance being told that they could enter only civil unions and that marriage is reserved for lesbian and gay couples. Surely there is constitutional injury when the majority imposes on the minority that which it would not accept for itself.[4]

Names matter, especially when they are imposed as a badge of inferiority by the government. Even though the harm may not be precisely the same as that caused by physical segregation, "[l]abels set people apart as surely as physical separation on a bus or in school facilities." *Lewis*, 908 A.2d at 226 (Poritz, C.J., dissenting).[5]

Connecticut's legislature unquestionably created civil unions for gay people as a political compromise in order to reserve the esteemed status of marriage to the majority.

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4 In considering the choice between a school with long-standing prestige and one created solely for African-Americans, the Supreme Court observed that "[i]t is difficult to believe that one who had a free choice between these schools would consider the question close." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). The same can be said about anyone afforded a free choice between the prestigious institution of marriage and an institution newly created to forbid some from marrying.

5 The harm caused by such separate treatment particularly affects young lesbian and gay people, who are painfully aware of the inferior status that confronts them in their futures. *See* David S. Buckel, Government Affixes a Label of Inferiority on Same-sex Couples When it Imposes Civil Unions & Denies Access to Marriage, 16 Stan. L. & Pol'y Rev. 73, 79 (2005) ("By denying an entire group of young people the possibility of marriage, a dream shared by so many growing up in America, the government may undermine their capacity to make healthy and responsible choices in their lives.").

Undeniably, the compromise led to important protections for the families of same-sex couples that previously had been withheld. But this political compromise, however much it may bring improvements for the minority and placate adversaries, still preserves a privileged status for the majority and forces the minority into a distinct, lesser status. The injuries lesbian and gay individuals suffer in continuing to be denied access to marriage and in being consigned to the separate and lesser institution of civil unions amply crosses the threshold of constitutional injury. Those who bear the burdens of this unequal treatment are entitled to have the Court determine whether the government can adequately justify the discrimination under the standard of review applicable to infringements of their constitutional rights. This Court therefore should conclude that the trial court erred in finding no constitutional injury to exist in this case.

II. IF THE COURT APPLIES RATIONAL BASIS REVIEW, IT SHOULD NOT FOLLOW RECENT OUT-OF-STATE CASES THAT HAVE DEPARTED FROM THE STANDARDS MANDATED BY CONNECTICUT AND FEDERAL LAW

The rational basis test is not the appropriate standard of review in this case; strict scrutiny is. Pl. Br. at 21-44. Nonetheless, if this Court decides to apply rational basis review, it should do so with particular care given that Connecticut's civil union law was enacted with the express purpose of excluding same-sex couples from access to civil marriage, thereby denying lesbian and gay state residents important personal and family rights readily available to heterosexuals.

As Justice O'Connor recently pointed out, rational basis review is applied with utmost care when a classification impinges on personal relationships and liberty interests that, even if not "fundamental," are still important, and when a classification is drawn to

target an unpopular group, even without finding that such classification is "suspect." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). It is, after all, only "absent some reason to infer antipathy" that the Constitution presumes that the democratic process will correct "improvident decisions." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). When important rights of minorities are at stake, the Supreme Court has been especially vigilant in evaluating the burden imposed on the minority, in rejecting the classification if it is significantly over- or under-inclusive, and in requiring substantiation that the differential treatment serves a valid purpose. *Romer v. Evans*, 517 U.S. 620, 632-33 (1996); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 448-89 (1985); *USDA v. Moreno*, 413 U.S. 528, 533, 536-37 (1973).

Even if rational basis review is applied in this case, Connecticut case law requires at a minimum[6] that any classification of the state's residents advance a legitimate public interest, and that the classification and the disparate treatment it effects bear at least a rational relationship to the furtherance of that interest and be based on logic. *See e.g.*, *Fair Cadillac-Oldsmobile Isuzu P'ship v. Bailey*, 229 Conn. 312, 316-17 (1994) (justifications for law not rational where they are undercut by other statutes and inconsistent with reality); *State v. Reed*, 192 Conn. 520, 532 (1984) (classifications may not "disregard reality"). This Court has itself noted that "[t]here is a limit to the hypothesizing" that should be engaged in, even under rational basis review. *City Recycling, Inc. v. Connecticut*, 257 Conn. 429, 453

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6 It is well-understood that the Connecticut Constitution may offer more protection to its citizens than the U.S. Constitution has been construed to provide. *See Fair Cadillac-Oldsmobile Isuzu P'ship v. Bailey*, 229 Conn. 312, 316-17 (1994) (emphasizing that Connecticut's equal protection jurisprudence stands independent of federal standards and, if anything, may offer even more protection to the state's residents); *see also City Recycling, Inc. v. Connecticut*, 257 Conn. 429, 445 n.12 (2001) (noting that this Court has looked for guidance to "persuasive" U.S. Supreme Court rational review precedents enforcing the federal equal protection guarantee).

(2001). Justifications that legislation is conferring benefits in incremental steps will not suffice when the government lacks a rational basis for targeting one group for less than equal treatment. *See id.* at 453-54.

Rather than meet the requirements of the careful rational review applied by this Court and the U.S. Supreme Court in analogous circumstances, a handful of other courts that have been confronted with similar equal protection challenges to exclusionary marriage laws instead have misapplied the test. *See, e.g., Hernandez v. Robles*, 855 N.E.2d 1 (2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005).

For example, where Connecticut law requires examination of whether a statute's purpose justifies the burdens it imposes, the Indiana law applied in *Morrison* considers only whether "the *disparate treatment* accorded by the legislation" relates to "*inherent* characteristics which distinguish the unequally treated classes." *Morrison*, 821 N.E.2d at 21 (emphasis added). Indiana's standard does not permit consideration of whether the classification reflects an intent to discriminate against a disfavored group or whether it suffers from even "significant under or overinclusiveness." *Id.* at 28. Not surprisingly, this test has "never resulted in a statute or ordinance being declared facially invalid" under the Indiana Constitution. *Id.* at 22.

The decisions in *Hernandez* and *Andersen* adopted a similarly contorted brand of rational review. First, asserting that the standards of review they applied were "highly indulgent," *Hernandez*, 855 N.E.2d at 781, and "highly deferential," *Andersen*, 138 P.3d at 983, the two pluralities paid a degree of deference not normally given to legislative classifications involving far less significant personal interests, and for groups not subject to

historical disadvantage in the political process. The approach taken by the *Hernandez* and *Andersen* decisions, like that utilized in *Morrison*, makes passage of the "test" a virtual *fait accompli* in any case in which it is employed.

Indeed, the plurality opinions in *Hernandez* and *Andersen* declined to ask the crucial equal protection question: whether the classification restricting same-sex couples from marrying *itself advances* legitimate government interests. They instead framed the issue as whether the government has a "rational reason" for conferring the benefits of marriage on *different*-sex couples. *Andersen*, 138 P.3d at 984. Having mis-framed the core equal protection question, the pluralities went on to find that the government had a legitimate interest at stake – benefiting children raised in heterosexual unions. *See Andersen*, 138 P.3d at 982; *Hernandez,* 855 N.E.2d at 777. They did not, however, answer how that legitimate interest was advanced by excluding same-sex couples and their children from the sheltering institution of marriage.[7]

Finally, the *Hernandez* and *Andersen* pluralities speculated about distinctions between the ways different-sex couples and lesbian and gay couples become parents that, in their view, would render rational the decision to exclude the latter from marriage. They reasoned that only heterosexuals "become parents as a result of accident or impulse,"

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7 The dissents in those cases sagely pointed out the flaw in the pluralities' inverted analysis. *See Andersen*, 138 P.3d at 1018 (Fairhurst, J., dissenting) ("Therefore, the question we are called upon to ask and answer here, which the plurality fails to do, is how *excluding* committed same-sex couples from the rights of civil marriage furthers any of the interests that the State has put forth."); *Hernandez,* 855 N.E.2d at 799 (Kaye, C.J., dissenting) ("The relevant question here 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 . . . . [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 from marriage in no way furthers this interest.").

while lesbian and gay adults do so by planned "adoption or . . . technological marvels." *Hernandez*, 855 N.E.2d at 776; *see also Andersen*, 138 P.3d at 963. Theorizing that the children of heterosexuals therefore must be at greater risk of being born into unstable settings, the plurality opinions concluded that it is more important that heterosexual parents be "offered an inducement – in the form of marriage and its attendant benefits – to . . . make a solemn, long-term commitment to each other." *Hernandez*, 855 N.E.2d at 776.

Significantly, these kinds of generalizations have not been asserted by the government in this case and are precluded by the civil union law. *See* Conn. Gen. Stat. §§ 46b-38aa to 46b-38pp. Such purported interests should not be adopted *sua sponte* by the Court. *See Fair Cadillac*, 229 Conn. at 324 & nn.11-12 (declining to "speculate concerning other conceivable purposes for statute"). Nor could such interests, reminiscent of discredited stereotypes about men and women, even pass muster under this Court's rational basis analysis, which has been particularly skeptical of explanations resting on such generalizations. *See, e.g., id.; Page v. Welfare Comm'r,* 170 Conn. 258, 267 (1976) (acknowledging that law's classification had some "empirical" support, but nonetheless rejecting law founded on "gender-based generalization(s)" under rational basis review); *Kellems v. Brown*, 163 Conn. 478, 495 (1972). The Court accordingly should disregard inapposite decisions such as *Hernandez* and *Andersen* and, if it applies rational basis review, instead apply the meaningful form of such review this state's jurisprudence requires.

RESPECTFULLY SUBMITTED

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