

SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. 17716

ELIZABETH KERRIGAN, ET AL.

PLAINTIFF-APPELLANTS

v.

COMMISSIONER OF PUBLIC HEALTH, ET AL.

DEFENDANT-APPELLEES

**BRIEF AMICI CURIAE OF
JOHN COVERDALE, GEORGE W. DENT, JR., RICHARD F. DUNCAN,
SCOTT FITZGIBBON, MARTIN R. GARDNER, EARL M. MALTZ,
LAURENCE C. NOLAN, RICHARD STITH,
JOHN RANDALL TRAHAN AND LYNN D. WARDLE,
PROFESSORS OF LAW
IN SUPPORT OF DEFENDANT-APPELLEES**

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STATEMENT OF THE ISSUES

- I. Did the trial court correctly conclude that the plaintiffs have not suffered a legally cognizable harm because they have been granted all the rights and benefits of marriage?

- II. 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 equal protection provisions of the Connecticut Constitution set forth in Article First, §§ 1 and 20?

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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?

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INTEREST OF AMICI CURIAE

Amici are professors at major law schools with expertise in U.S. family law, constitutional law, and/or conflicts of law. We offer information on the reasonableness of using civil unions as a vehicle for providing legal structures for same-sex couples, given conflicts with laws in other states in the United States.

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STATEMENT OF FACTS AND PROCEEDINGS

Amici adopt the Counter-Statement of Facts and Proceedings in the Brief of Defendant-Appellees.

SUMMARY OF ARGUMENT

What rational reason could the state legislature have for creating a distinct legal structure called “civil unions” that conveys the identical legal incidents as marriage within the state of Connecticut?¹

One important answer: Labeling same-sex unions “marriages” (rather than civil unions) would mislead—to their detriment—same-sex couples about the degree of legal protection the state of Connecticut can provide through union recognition, as well as create unnecessary and potentially confusing conflicts with sister states and federal law.

Forty-eight of our forty-nine sister states, as well as the federal government, recognize marriage only as the union of a husband and wife, 26 by state constitutional amendment. Forty-one states have passed so-called “defense of marriage” acts, which preclude courts from recognizing same-sex marriages performed in Connecticut. Connecticut has no power to convey the legal incidents of marriage to same-sex couples once these couples step outside of its borders, as most Connecticut citizens do on occasion. These conflicts of laws create real and serious potential dangers for same-gender couples who might rely on a Connecticut marriage, especially with regard to establishing their legal status as parents. Calling these unions “civil unions” provides more accurate notice to same-sex couples of the underlying legal reality: legal recognition

¹ Amici adopt without argument here the position of the State that the Connecticut marriage laws should be reviewed under rational basis analysis.

of same-sex unions is a recent innovation in the law, and the way these unions will be treated in other states is not yet well-established, creating real, unique legal risks for same-gender couples that they may wish to consider in financial, parenting and related legal planning.

Moreover, while the legal situation is uncertain, civil unions are more likely to provide stronger legal protection than same-sex marriages would when couples step outside of Connecticut's borders, especially in the nine states in which marriage is constitutionally defined as the union of husband and wife, but civil unions are not constitutionally precluded. In these states Connecticut civil unions are more likely to provide legal protection for same-sex couples than same-sex marriages, which are clearly contrary to state public policy in sister states with DOMAs and state marriage amendments.

Civil unions thus offer broader legal protection than same-sex marriages would, and also offer better notice to same-sex couples of the need to consider additional legal mechanisms (such as second-parent adoption) to protect their legal interests in the likely event they, or their children, travel outside of Connecticut's borders.

The state of Connecticut should not be faulted by this court for its generous effort to extend important new legal protections to same-gender couples while minimizing confusion and legal conflicts created by laws outside of its jurisdiction and control. Nor should Connecticut be faulted for recognizing the legal reality that same-sex unions are a legal innovation, and not part of our established marriage tradition.

For this court to find that civil unions represent unconstitutional "animus" would have a chilling effect on legislative efforts to bring broader relationship protections to gay

couples across the country. Doing so would give opponents of civil unions an important new argument: passing broad civil union laws would endanger states' marriage laws in court.

ARGUMENT

I. Recognizing same-sex unions as “marriages” would mislead gay and lesbian couples as to the scope of legal protections which can be offered by the state of Connecticut.

Forty-eight of our sister states recognize marriages only between a man and a woman. In recent years, forty-five states have adopted specific statutory or constitutional provisions recognizing marriage as only the union of a husband and wife.² Two more states have reached the same conclusion by judicial interpretation of existing statutes. See *Hernandez v. Robles*, 7 N.Y.3d 338 (2006); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006). 26 states have passed constitutional amendments defining marriage as the union

² Ala. Code § 30-1-19; Alaska Stat. § 25.05.013; Ariz. Rev. Stat. Ann. § 25-101; Ark. Code Ann. §§ 9-11-107, 9-11-109, 9-11-208; Cal. Fam. Code § 308.5; Colo. Rev. Stat. § 14-2-104; Conn. Gen. Stat. Ann. § 46b-38nn; Del. Code Ann. tit. 13, § 101; Fla. Stat. § 741.212; Ga. Code Ann. § 19-3-3.1; Haw. Rev. Stat. § 572-3; Idaho Code Ann. § 32-209; 750 Ill. Comp. Stat. 5/212; Ind. Code § 31-11-1-1; Iowa Code § 595.2; Kan. Stat. Ann. § 23-101; Ky. Rev. Stat. Ann. § 402.00; La. Civ. Code Ann. art. 89; Me. Rev. Stat. Ann. tit. 19-A, § 701; Md. Code § 2-201; Mich. Comp. Laws §§ 551.1, 551.271; Minn. Stat. § 517.01; Miss. Code Ann. § 93-1-1; Mo. Rev. Stat. § 415.022; Mont. Code Ann. § 40-1-401; Neb. Const., art. I, sec. 29; Nev. Const., art. I, sec. 21; N.H. Rev. Stat. Ann. § 457:1 to 3; N.C. Gen. Stat. § 51-1.2; N.D. Cent. Code § 14-03-01; Ohio Rev. Code Ann. § 3101(c)(1); Okla. Stat. tit. 43, § 3.1; Ore. Const., art. XV, sec. 5a; Pa. Cons. Stat. § 1704; S.C. Code Ann. § 20-1-15; S.D. Codified Laws § 25-1-1; Tenn. Code Ann. § 36-3-113; Tex. Fam. Code Ann. § 6.204; Utah Code Ann. § 30-1-4; 15 Vt. Stat. Ann. § 8; Va. Code Ann. § 20-45.2; Wash. Rev. Code § 26.04.020; W. Va. Code § 48-2-603; Wis. Const., art. XIII, sec. 13; Wyo. Stat. Ann. § 20-1-101.

of husband and wife.³ Forty-one states have passed “defense of marriage” acts (by statute, constitutional amendment, or both) explicitly prohibiting courts from recognizing same-sex marriages performed in other jurisdictions.⁴ Conflicts scholars agree: Few, if any, of these states will recognize marriage licenses granted to same-sex couples.⁵

Because most Connecticut couples travel outside Connecticut borders at least occasionally, reliance on a same-sex marriage performed in Connecticut may prove detrimental to the interests of same-sex couples and their children. Legal rights which arise automatically in Connecticut will not survive in other states if that state chooses not to recognize the Connecticut union as a marriage. Thus, for same-sex couples, estate planning, medical decisionmaking, name changes, and even parental rights may all hinge on the existence of a will, health care proxy, court order or adoption, rather than simply a marriage or civil union certificate.

³ Ala. Const., amdt. 774; Alaska Const., art. I, sec. 25; Ark. Const., amdt. 83; Colo. Const., art. II, sec. 31; Ga. Const., art. I, sec. 4 par. 1; Idaho Const., art. III, sec. 28; Kan. Const. art. 15, sec. 16; Ky. Const., sec. 233A; La. Const., art. XII, sec. 15; Mich. Const., art. I, sec. 25; Miss. Const., sec. 263-A; Mo. Const., art. I, sec. 33; Mont. Const., art. 13, sec. 7; Neb. Const., art. I, sec. 29; Nev. Const., art. I, sec. 21; N.D. Const., art. XI, sec. 28; Ohio Const., art. XV, sec. 11; Okla. Const., art. 2, sec. 35; Ore. Const., art. XV, sec. 5a; S.C. Const., art. XVII, sec. 15; S.D. Const., XXI, sec. 9; Tenn. Const., art. XI, sec. 18; Tex. Const., art. I, sec. 32; Utah Const., art. I, sec. 29; Va. Const., art. I, sec. 15-A; Wis. Const., art. XIII, sec. 13.

⁴ See note 2, *supra*. Four of these states have adopted definitional provisions which do not address marriage recognition. Conn. Gen. Stat. Ann. § 46b-38nn; Md. Code § 2-201; 15 Vt. Stat. Ann. § 8; Wyo. Stat. Ann. § 20-1-101.

⁵ See, e.g., “Full Faith and Credit, Family Law, and the Constitutional Amendment Process,” testimony of Professor Lea Brilmayer, Yale Law School, *Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws: Hearing Before the Constitution, Civil Rights, and Prop. Rights Subcomm. of the S. Judiciary Comm.*, 108th Cong., 2004 WL 406849 (March 3, 2004); Linda Silberman, *Same-Sex Marriage: Refining the Conflicts of Laws Analysis*, 153 U. Pa. L. Rev. 2195 (2005); L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex “Marriage”: How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 37 (1998).

For example, while a same-sex marriage in Connecticut may, by operation of law or legal presumption, make a woman the legal parent of her partner's biological child for this state's purposes,⁶ such parental status resting only on the marital status may not be recognized in a state whose public policy or state constitution forbids recognitions of same-sex marriage. In such cases, the strongest legal act protecting parental status for the nonbiological parent in a same-sex couple is likely not marriage but a second-parent adoption; adoption, as a judicial act, is entitled to higher protection under the U.S. Constitution's full faith and credit clause than marriage records. U.S. Const. art. IV, § 1; see also *Finstuen v. Edmondson*, 2006 U.S. Dist. LEXIS 32122; *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002) (both cases requiring recognition of a foreign adoption which would not have been permitted in the forum state). Moreover federal statutes and international treaties require interstate recognition of adoption in some circumstances. See Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=69 (seen February 21, 2007); The Intercountry Adoption Act of 2000, 42 U.S.C. § 14901 et seq.; and 22 C.F.R. §§ 96-98 (2006).

Similarly, while a same-sex marriage would make the partners next of kin for purposes of medical decisionmaking in case one partner is incapacitated within Connecticut, only a validly executed living will, appointment of a health care agent, and durable power of attorney will protect those rights for same-sex couples traveling outside

⁶ See, by analogy, Ct. Gen. Stat. § 45a-771, expressing a presumption of legitimacy regarding children born during marriage, and extending that presumption to children conceived through artificial insemination.

Connecticut. As a prominent Boston probate litigation and elder law attorney counseled in the November/December 2004 issue of the *Boston Bar Journal*, even where the law permits same-sex marriages, numerous other estate planning devices remain necessary for same-sex couples:

What will happen when same-sex couples who marry in Massachusetts vacation out of state, travel between different states, visit out-of-state relatives, and relocate to a new state? . . . [T]he predictability and portability of marriage can only be approximated for same-sex spouses by executing a well-considered estate plan. Given the uncertainty in the law, and in light of the critical need and expense of executing estate planning documents to proximate marital rights and protections available to opposite-sex couples, many lesbians and gay men question whether there is any truly appreciable benefit to marriage.

Lisa M. Cukier, "Marriage and Estate Planning: Under *Goodridge v. DPH*," *Boston Bar Journal*, 48 B.B.J. 14 (Nov./Dec. 2004).

As participants recently noted in a symposium on New Jersey civil unions,⁷ legal practitioners have become skilled in putting together a package of legal protections for unmarried couples. The adoption of marriage legislation may signal, falsely, to many couples that these independent legal devices are now unnecessary. Couples who rely solely upon their legal status in Connecticut may later find, to their detriment, that their protections evaporate upon leaving the state. Repeatedly, proponents of same-sex marriage have argued to the Legislature: "[E]veryone knows what marriage is." Daniela Altimari, *A Marriage Proposal*, *Hartford Courant*, Feb. 1, 2007 (quoting a speaker at a press conference supporting same-sex marriage legislation). And that is a problem when it comes to same-sex unions, because same-sex marriages are not the same when it comes to portability and interstate recognition.

⁷ Symposium, "Same Sex Couples & "The Exclusive Commitment" Untangling the Issues & Consequences," Rutgers Law School – Newark, November 10, 2006 (presentation of Debra E. Guston) (available at <http://law-library.rutgers.edu/feeds/06ssm.php>).

Similarly, other voices suggest that same-sex marriage provides same-sex couples with federal recognition not available to civil union partners.⁸ This is simply false under current federal law. 1 U.S.C. § 7 (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”) (In their amicus curiae brief, the Connecticut chapter of the American Association of Matrimonial Lawyers (“AAML”) argues that same-sex marriage may provide greater federal protection in an alternate legal universe in which federal DOMA statutes are repealed. But it is at least as likely that Congress may in the future prove more willing to pass substantive legal protections for civil unions than to accept same-sex unions as marriages for the purposes of federal law.)

For same-sex couples to rely on the ordinary understanding that the rights attached to the word “marriage” now apply to them could prove dangerous to their children and their interests. Creating a new separate status of “civil unions” more accurately conveys to these couples the underlying legal reality: same-sex unions are a legal novelty, whose consequences outside the state of Connecticut cannot be known with legal certainty when Connecticut citizens travel (or when they move) outside of Connecticut’s borders.

⁸ See, e.g., E.J. Graff, “The Connecticut Half-Step,” Boston Globe, April 24, 2005 (“Civil unions offer less than half of marriage’s full protections and obligations; they don’t trigger any of marriage’s federal rights and responsibilities, and it’s not clear whether they travel beyond the state’s borders. Since Massachusetts, right next door, stands as a proud example of how full legal recognition helps many families and hurts no one, Connecticut’s half-measure was opposed by the advocacy group Love Makes a Family.”).

The risk noted here is not insubstantial. Even experienced practitioners skilled in estate planning devices for gay and lesbian couples find it difficult to stay abreast of the complex and evolving world of interstate conflicts of law as applied to same-sex relationships.⁹ Much more are same-sex couples likely to be unaware of their need for extrinsic and independent estate planning devices, precisely because “Everyone knows what a marriage is.” Most couples who marry do not obtain legal counsel beforehand.

Civil unions, perhaps despite other flaws, at least have the merit of honesty, in that while being identical to marriage within the state, they do not mislead with respect to their effect elsewhere.

II. “Civil unions” are more widely recognized, and less widely precluded by the laws of sister states, and thus may offer Connecticut same-sex couples broader protections in other jurisdictions than would same-sex marriages.

Regardless of what the Connecticut legislature calls same-sex unions, interstate legal distinctions between same-sex unions and opposite-sex marriages will endure. Even if Connecticut were to label these unions “marriages,” the Legislature could do little to resolve the conflicts between its own laws and those of other jurisdictions.

In adopting civil unions, on the other hand, Connecticut maximizes the likelihood that its same-sex couples will have their relationships recognized in neighboring states.

⁹ As one author notes:

A final concern when drafting elder plans - the most difficult to grasp and solidify - is the varied treatment that gay, lesbian, and non-traditional elders will receive in the varying jurisdictions of our legal system. The extent to which a gay, lesbian, or non-traditional elder will be given the same rights, privileges, and protections as a traditional elder varies depending upon the jurisdiction. [This] may negatively impact gays [or the attorney] who know nothing about conflicts of laws.

Matthew R. Dubois, *Note: Legal Planning for Gay, Lesbian, and Non-Traditional Elders*, 63 Alb. L. Rev. 263, 285-86 (1999).

Nearby states of New Jersey and Vermont have already adopted civil union legislation, while the nation's most populous state, California, has a similar system of domestic partnerships. Although recognition provisions are not explicit in the existing legislation, Connecticut civil unions will likely be recognized at least in New Jersey and Vermont, and perhaps California and Massachusetts as well.¹⁰

Equally significant is the fact that while 26 states have adopted constitutional amendments prohibiting the recognition of same-sex marriages (and 45 states have either statute or amendment explicitly defining marriage only as the union of husband and wife) fewer states have constitutionally precluded civil unions, leaving 32 states in which civil unions either exist currently or could be recognized by legislative action or judicial interpretation.

While the interstate recognition of same-sex unions (as either marriages or civil unions) remains an uncertain and often disputed field, in the current legislative and constitutional landscape civil unions are both (a) currently recognized in more states than are same-sex marriages; and (b) have greater potential for widespread recognition in the near future.¹¹

¹⁰ Recognition in California and Massachusetts is less certain because same-sex "civil unions" do not exist in those states, necessitating recognition by analogy of civil unions as "domestic partnerships" (California) or in Massachusetts (same-sex "marriages").

¹¹ We disagree here with argument made by the Connecticut Chapter of the AAML. See AAML brief at 7-9. The AAML brief ignores the significance, independent of the federal DOMA, of state public policy expressions regarding same-sex marriage in at least 45 states. Indeed, even in *Rosengarten*, the primary case relied upon by the AAML, it is far from certain that the Connecticut Court of Appeals would have reached a different conclusion had the Vermont civil union been termed a marriage. *Rosengarten v. Downes*, 71 Conn. App. 372 (2002) (on appeal the plaintiff did not argue that the civil union should be dissolved as a marriage, yet the court noted that Connecticut statutes expressed a public policy recognizing only the union of husband and wife as a marriage).

For example, the Attorney General of New Jersey recently ruled that both civil unions and same-sex marriages from other jurisdictions will be treated in New Jersey only as civil unions. State of New Jersey, Office of the Attorney General, Formal Opinion No. 3-2007 (Feb. 16, 2007), available at <http://www.nj.gov/oag/newsreleases07/ag-formal-opinion-2.16.07.pdf> (advising State Registrar of Vital Statistics). To insist that same-sex unions be labeled “marriages” will not only not give them any greater interstate recognition in 48 states, but will convey a misleading expectation to the parties. To call them “civil unions” reflects the overwhelming interjurisdictional recognition reality.

In recognizing “civil unions,” the Connecticut Legislature has taken steps to minimize these interjurisdictional conflicts and to maximize the likelihood that the rights of same-sex couples will be protected not only in Connecticut but in other states as well.

CONCLUSION

The Connecticut legislature has demonstrated good will, not animus, towards gay and lesbian citizens in creating a new status called “civil unions” which conveys the identical rights and responsibilities as marriage within the state of Connecticut. This new status accurately conveys the underlying legal reality, which no act of the state of Connecticut may change: recognition of same-sex unions is a legal innovation, not part of our established marriage tradition. Because of conflicts with state and federal law, civil unions both provide stronger legal protection for same-sex couples than same-sex marriage would, and also give better notice to same-sex couples of the potential need to seek additional legal mechanisms for protecting their relationships (especially with children) when they travel (or move) outside of Connecticut.

The Plaintiffs object to a psychic harm from having their relations acknowledged as civil unions while they would prefer they be called marriages. Another set of couples, who, under the mistaken apprehension that once their unions are called marriages they will be treated as such in Pennsylvania, travel or move out of Connecticut without additional legal protections, risking custody of children or the right to medical decisionmaking, might feel very differently about the legislature's judgment. The legislature is not required to make law based on individual citizens' subjective feelings of harm. It is certainly rational for the legislature to consider the likely harm from detrimental reliance that will result if it wrongly implies to Connecticut's same-sex couples that their relationships will now be treated as marriages under U.S. law.

The legislature's judgment is clearly not irrational, nor rooted in animus toward gay citizens; it is a reasonable effort to extend important new benefits to same-sex couples. For the court to punish the state for this act would be not only overstepping the court's jurisdiction, it would also put a powerful message to sister states: passing substantive new civil union laws to provide legal benefits to gay couples in itself puts a states' marriage laws in fresh constitutional jeopardy.

Perhaps in time, the case for civil unions vis-à-vis same-sex marriage will grow weaker. The state's legislature has clearly shown it can be trusted to make these sorts of legislative judgments with due consideration for both the rights and the needs of its gay and lesbian citizens.

For the foregoing reasons, amici curiae respectfully request that this Court affirm the judgment below.

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE
CERTIFICATION**

This is to certify that the brief of amici curiae complies with all provisions of Connecticut Rules of Appellate Procedure § 67-2, and that a copy of the foregoing was mailed via first class mail, postage prepaid, this ____ day of April, 2007, to:

Hon. Patty Jenkins Pittman, J.
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