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STATE OF CONNECTICUT
JUDICIARY COMMITTEE

TESTIMONY OF MARY L. BONAUTO, ESQ.
GAY & LESBIAN ADVOCATES & DEFENDERS

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Dear Committee Co-Chairs Sen. Eric Coleman, Rep. Michael Lawlor,
and Honorable Committee Members:

My name is Mary Bonauto. I am a lawyer at New England's Gay & Lesbian Advocates & Defenders (GLAD) and I thank you for the opportunity to speak with you today.

My work at GLAD involves litigation in state and federal courts in the six New England states as well as public education. Our goal is to ensure there is only one standard of justice under law with no exceptions based on sexual orientation, HIV status or gender identity or expression. Along with two Vermont lawyers, I represented the plaintiff couples in the Vermont marriage case, *Baker v. State (1999),* which led to the Vermont legislature's enactment of the nation's first ever civil union law in 2000. I am also presently counsel to seven Massachusetts couples seeking to end their exclusion from civil marriage. That case, *Goodridge v. Dept. of Public Health,* is tentatively scheduled for oral argument before the Massachusetts Supreme Judicial Court in February 2003.

My testimony today will address some of the alternatives available to you as you contemplate how to respect and strengthen the gay, lesbian, bisexual and transgender families of Connecticut. I will first address marriage since it is the fairest and simplest alternative, as well as one to which the Connecticut Constitution plainly speaks. I will also briefly address the scope

and limitations of Vermont's civil unions, California's domestic partner law, and Hawaii's reciprocal beneficiary law.

A. Civil Marriage

Civil marriage is a unique legal institution. As a legal matter, the right to join in marriage with the person of one's choice is among the most fundamental of all our civil and human rights. It is grounded in the intangibles of love, an enduring commitment, and shared aspirations to journey together through life. As reflected in state statutes and common law, marriage is a legal commitment of two people who agree to undertake mutual responsibilities and upon whom the law imposes a distinct status.

Connecticut allows any two people to marry if they are competent, of the requisite age, pass a blood test, are not too closely related, and pay a small fee. *See C.G.S. §§* 46b- 21, 24-27, 29-30. Although Connecticut law does not proscribe the marriages of same-sex couples, the only people who meet all of these requirements but cannot marry are those who have fallen in love with someone of the same gender.

Before continuing, I want to recognize and distinguish the religious rite of marriage from civil marriage. The religious rite is usually important, even sacramental, in some faiths. However, the religious rite is entirely distinct from the civil institution that this body regulates. The religious rite may have enormous personal and spiritual significance, but a religious marriage has no *legal* significance in and of itself. The only marriages of which the state takes cognizance are civil marriages. Marriage has been a civil matter in Connecticut since at least 1638. *Gould v. Gould,* 78 Conn. 242, 61 A. 604, 610 (1905) (Hamersley, J., concurring) (as of 1638, marriage was taken under the exclusive jurisdiction of the civil authorities).

Once joined in civil marriage, the law confers an array of rights and duties on the couple that dramatically alters their legal status vis-a-vis each other, the state and third parties. As the OLR has already reported that marriage is a gateway to hundreds of rights and responsibilities at the state level. OLR Research Report 2001-R-0606 (Feb. 5, 2002). The law honors and reinforces both the presumed emotional commitment and also the economic interdependence of married couples. While this legislature has taken certain steps toward alleviating some of the absurd consequences of treating committed same-gender couples like legal strangers, *see, e.g.,* Public Act No. 02-105, Public Act No. 11-228, the overwhelming majority of marital protections and responsibilities remain off limits for committed same-gender couples. These include access to inheritance and death protections, the ability to be treated as an economic unit for tax and insurance purposes, the legal obligation to remain married and if divorcing, to resolve property claims equitably and custody issues based on the child's best interests, the ability to file claims for injury to a spouse, and protections afforded through workers compensation as well as particular benefits for public employees.

The extensive network of legal protections accorded married families came primarily from the legislature. The only reasonable inference is that the legislature believes that these protections somehow strengthen and work to the good of married families. If the legislature believes this enormous range of protections is good for the families of married couples, then those same legal protections would be good for the families of same-gender married couples for the exact same reasons. While most people will never need to exercise all of the rights available to them because they are married, the law provides a safety net when you do need it. If your spouse is a State Trooper and is killed on the job, the line of duty benefits available to families

are available only to married families. The safety net fails the families of gay and lesbian employees. Of course, there are myriad examples of this sort.

Finally, as the Office of Legislative Research pointed out in its materials, people cannot contract for the overwhelming majority of these legal rights and responsibilities. *See* OLR Research Report 2002-R-0144 (Feb. 7, 2002). No two people can contract their way into divorce and the full range of domestic relations laws, or the tax code, or the workers compensation and unemployment systems, or the right to sue based on a spousal relationship. It is simply not enough to tell someone to find a good lawyer to secure their legal rights.

As important as it is to include same-gender families within the legal protections and responsibilities of state law, even this step would not fully redress the harm caused by the exclusion of same-gender couples from civil marriage. Marriage is more than the sum of its legal parts. Legally, it is a status. It is also a cultural status that represents and reinforces our sense of what constitutes family, love and commitment. As Beth Robinson, one of my co-counsel in Vermont is fond of saying, "People don't sing songs about domestic partnership or civil unions." The inability of gay and lesbian families to use the language of marriage to describe our lives and our loves makes us permanent outsiders. It also says that we are not full, equal and valued members of the community. It hurts the child whose parents are lesbian or gay by saying that child's family is less valued than other families. It hurts the parents who want the best for their children and ache for their lesbian daughter who has been with her partner for fifteen years and cannot marry while their other children can marry. It sends a terrible message to

young people, i.e., that their aspirations to participate as full and whole members of our society are foreclosed from the outset.[1]

B. The Constitutional Perspective

Since the Constitution is both a source of public policy, and guidepost for this body in establishing public policies, I also wish to touch briefly on how the Connecticut and United States Constitutions speak to this matter.

1. Introduction

What the legislature or courts thought of the rights of women, or racial minorities in 1638, or 1818, or 1965 is undoubtedly different from what you think today. Justice Ginsburg of the United States Supreme Court captured just this sentiment when she wrote in 1996: "A prime part of the history of our Constitution ... is the story of the extension of constitutional rights and protections to people once ignored or excluded."[2] The extension of constitutional rights can happen in court, but it can and often does happen in legislatures as well. For example, starting in 1895, Connecticut forbade the marriages so-called imbeciles, epileptics and feeble-minded persons if the woman was under 45 (and capable of reproducing). Pub. Acts 1895, P. 667, c.325. Over time, this body realized that exclusion was wrong, and it changed it. A similar moment has arrived for the legislature with respect to the exclusion of same-gender couples from civil marriage. This body knows more about gay and lesbian families than anyone did when the

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[1] In this way, marriage has been likened to a badge of citizenship. The historian Nancy Cott explains that slaves were not permitted to marry because they were not free. Despite obvious differences between slaves and any other person, she maintains that the inability to marry speaks to the unequal citizenship of gay people. Nancy Cott, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (Harvard U. Press 2000) at 56-76, 216. Professor Cott goes further, and argues that the exclusion of same-sex couples from marriage "reinforces a caste supremacy of heterosexuality over homosexuality just as laws banning marriages across the color line exhibited and reinforced white supremacy." *Id.* at 216.

marriage laws were first administered to exclude same-sex couples. This body now knows that gay and lesbian individuals and families are part of the very fabric of the community. With this knowledge comes an opportunity to act to bring those families within the rights and protections from which they have been excluded.

The United States Supreme Court has started down this road with respect to gay people. In striking down an anti-gay state constitutional amendment from Colorado in *1996,* the Court stated in the very first paragraph of its opinion:

> One century ago, the first Justice Harlan admonished [the Supreme] Court that the Constitution `neither knows nor tolerates classes among citizens.' *Plessy v. Ferguson, 163 U.S. 537, 559 (1896)* (dissenting opinion). Unheeded then, those words are now understood to state a commitment to the law's neutrality where the rights of persons are at stake.

Romer v. Evans, 517 U.S. 620, 623 (1996). The *6-3* majority opinion in that case, invoking the ringing dissent of a justice who recognized the wrong in "separate but equal," marks the first time that Court acknowledged the equality rights of gay people and the promise of the "law's commitment to neutrality when the rights of persons are at stake." The Connecticut legislature and courts started down that road well before the U.S. Supreme Court. And this body's ending the exclusion of same-sex couples from civil marriage would epitomize the "commitment to the law's neutrality when the rights of persons are at stake."

2. <u>Marriage is A Fundamental Right For All Qualified Residents.</u>

As a general matter, the State and Federal Constitution prevent the government from interfering with core personal decisions. It is a basic predicate of the relationship between the individual and the state that the Constitutions protect against unwarranted state interference with "personal decisions relating to marriage, procreation, contraception, family relationships, child

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[2] *United States v. Virginia, 518 U.S. 515, 557 (1996).*

rearing, and education." *Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).* Family relationships[3] are afforded constitutional shelter under the due process clause of the *14*th Amendment because the "deep attachments and commitments" marking those relationships enable individuals "independently to define one's identity that is central to any concept of liberty." *Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984).* The profound mutual love, respect, commitment and intimacy that define family relationships, particularly the marital relationship, are essential for human dignity and happiness and are valuable to society as a whole.

In considering how to proceed, this body may wish to be aware of a line of cases providing that marriage is a core protected choice so that the right to marry may not be abridged by the state without a compelling state interest. *Loving v. Virginia, 388 U.S. 1, 12 (1967)* (marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men" under due process clause of *14*th Amendment); *Zablocki v. Redhail, 434 U. S. 374, 384 (1978)* ("Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."); *Turner v. Safley, 482 U.S. 78, 95-96 (1987)* (invalidating restrictions on prisoners' marriages).

Those rights within the Declaration of Rights of the Connecticut Constitution are deemed fundamental. *Horton v. Meskill, 172* Conn. *615, 640-42 (1977).* A number of cases have already acknowledged that marriage is a fundamental right. *See, e.g., Zapata v. Burns, 207* Conn. *496,*

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[3] The concept of family is broad. *See, e.g., Troxel v. Granville, 530 U.S. 57, 63 (2000) ("[t]he* demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household").

506 (1988); *Gould v. Gould,* 78 Conn. 242, 61 A. 604 (1905) (under state constitution) . [4] *See generally* Conn. Const., Art. I, § 10 (due process protections). Marital choice is but one aspect of a far broader constitutional guarantee of privacy. *See, e.g., Doe v. Maher,* 40 Conn. Supp. 394, 440 (1986) (Medicaid restrictions on abortion violated rights of privacy of poor women and state due process clause). *See also Foody v. Manchester Mem. Hosp.,* 40 Conn. Supp. 127, 132 (1984) (right to bodily integrity in rejecting unwanted medical treatments).

3. <u>Excluding Same-Sex Couples From Marriage Undercuts Connecticut's Commitment to Equality.</u>

Connecticut has long been highly sensitive to equality concerns of individuals. When the country was divided over slavery, Connecticut determined that a slave brought into this state was free. *Jackson v. Bulloch,* 12 Conn. 38 (1837). At a time when other states refused to allow women to practice law, and the U.S. Supreme Court upheld a state's restriction on a woman practicing medicine, Connecticut admitted Mary Hall to the bar. *In re Hall,* 50 Conn. 131, 137 (1882) (statutes "to be construed, as far as possible, in favor of equality of rights"). Equality of all citizens lies at the heart of this issue, too.

First, the administration of the marriage laws creates sex-based distinctions that were proscribed specifically with the 1974 ERA. Conn. Const., Art. 1, § 20 (as amended). [5] While

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[4] This same result is required under the federal constitution, but the Connecticut Constitution provides even greater protections than the federal Constitution in the area of fundamental civil liberties. *State v. Mikolinksi,* 256 Conn. 543, 547 (2001); *Barton v. Ducci Electrical Contractors,* 248 Conn. 793, 812 n.15 (1999).

[5] This provision now states: "No person shall be denied the equal protection of the laws nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability. Article 1 § i also provides: "All men when they form a social compact, are equal in rights, and no man or set of men are entitled to exclusive public emoluments or privileges from the community."

nothing in the statutes regulating access to marriage provides that a man may only marry a woman, or that a woman may not marry a woman, the law is interpreted to accomplish that result. Jane will be denied a license to marry Juliet because she is a woman. But a man can marry Juliet, and if Jane were a man, she could marry Juliet. She cannot do so because of her own sex. An Alaska trial court explained the discrimination as follows:

> If twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex classification can hardly be more obvious.[6]

Some people object to the sex discrimination analysis because men and women are equally disadvantaged in that neither can marry someone of the same sex. But this same reasoning was rejected in justifying racial restrictions on marital partners. Anti-miscegenation laws were defended on the grounds that both whites and persons of color were equally disabled from marrying each other. In evaluating this defense, courts did not compare the experience of whites and persons of color as groups, but instead found that limiting an individual's choice of whom he or she could marry based on the individual's race was racial discrimination forbidden by the 14th Amendment. *Perez v. Sharp,* 198 P.2d 17, 25 (Cal. 1948); *Loving v. Virginia,* 388 U.S. 1, 11-12 (1967). Distinctions in law based on sex must be strictly scrutinized by lawmakers.

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[6] *Brause v. Bur. of Vital Statistics,* 1998 WL 88753, *6 (Alaska Super. No. 3AN-95-6562 CI, Feb. 27, 1998). *See also Baehr v. Lewin,* 842 P.2d 44, 60-61 (Haw. 1993) (finding application of marriage laws regulate on the basis of sex).

[7] In *Daly v. DelPonte, 225* Conn. 499, 514 (1993), the Supreme Court announced strict scrutiny for disability classifications, *citing* Robert I. Berndon, Connecticut Equal Protection Clause: Requirement of Strict Scrutiny When Classifications Are Based Upon Sex, Physical Disability or Mental Disability, 64 Conn. B. J. 386 (1990) (criticizing Appellate Court's decision in *Dydyn v. Dept. of Liquor Control,* 12 Conn. App. 455, *cert denied,* 205 Conn. 812 (1987) for

Separate and distinct from the State's use of sex-based rules in applying the marriage statutes is its use of sexual orientation-based classifications. If the concept of being gay or lesbian means anything, it includes those who wish to share their most intimate relationship with a partner of the same gender. Unlike rules preventing consanguineous or under-age marriages which operate evenly across the population and apply to everyone, rules preventing individuals from marrying others of the same sex operate systematically to exclude the class of gay men and lesbians. By prohibiting a man from marrying a man, and a woman from marrying a woman, the State is essentially barring all gay and lesbian individuals from marrying the person of their choice.[8]

In the end, even if this body were convinced that marriage is not a fundamental right under the Connecticut Constitution, and that equality rights based on sex and sexual orientation were not offended by the present system, it is still the case that the present exclusion of same-sex

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applying "intermediate scrutiny" to sex-based classifications). Since physical and mental disability and sex were both amendments to section 20, it is likely that sex-based classifications would receive strict scrutiny as well. *Compare Doe v. Maher, 40* Conn. Supp. *394, 448 (1986)* (noting "impressive" argument for "absolute" scrutiny of sex-based classifications).

[8] While the level of scrutiny accorded to sexual orientation based classifications under Connecticut law is an open question, it would be consistent with Connecticut's strong protection of individual rights to accord some form of heightened scrutiny. Former Justices Brennan and Marshall have opined:

> [H]omosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is likely ... to reflect deep-seated prejudice rather than ... rationality.

Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009 (1985) (Brennan, J., and Marshall, J., dissenting, from denial of writ of certiorari).

couples from civil marriage in arbitrary and lacks any rational basis.[9] Stated differently, no legitimate public policy is advanced by the continued exclusion of same-gender couples from marriage.

C. Comparison of Marriage, Civil Unions and Domestic Partnership

Along with other legislatures around the country, this body has taken measured steps to begin protecting the gay, lesbian, bisexual and transgender families of Connecticut. Three states have adopted broader proposals: Vermont with enactment of its civil union law in 2000 (Act 91); California with enactment (and subsequent amendment) of its domestic partnership law in 2001 (Acts 2001, AB 25, Chapter 893), and Hawaii with enactment of its reciprocal beneficiary law in 1997 (Act 383). *See also* OLR Research Report 2002-R-0004 (January 18, 2002).

Civil unions create a status parallel to marriage for purposes of state laws. A person joining in civil union must meet the same requirements, except that civil unions are only available at age 18. When joined in civil union, persons have "all the same benefits, protections and responsibilities under law ... as are granted to spouses in a marriage." 15 V.S.A. § 1204(a). Similarly, a person joined in civil union is considered to be a "spouse," "family," dependent," and "next-of-kin" with the other. 15 V.S.A. § 1204 (b). A dissolution (divorce) proceeding is required to terminate a civil union. From the state law perspective, it transforms the family relationships of gay people from that of "legal strangers" to legal next of kin.'[0]

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[9] Rational basis review in Connecticut is satisfied when "the classification and the disparate treatment inherent in a statute bear a rational relationship to a legitimate state end and are based on reasons related to the accomplishment of that goal." *Zapata v. Burns, 207* Conn. 496, 507 (1988).

[10] With the elections in 2002, the consensus is that civil unions are secure in Vermont. Ross Sneyd, "Future of civil unions guaranteed," Burlington Free Press, Nov. 24, 2002, at 1B.

The California Domestic Partnership Law'[1] creates a registration system for same sex couples and different sex couples in which one is at least age 62 and provides a set of rights. To join in domestic partnership, the same requirements apply as for marriage except that the parties must be age 18, they must live together, and they must agree to be responsible for each other's basic living expenses. Among the rights now extended are the rights to:

- Visit in a hospital and make medical decisions for an incapacitated partner;
- Health coverage for partners of state employees;
- Sue for wrongful death and seek damages for negligent infliction of emotional distress;
- Bequeath property to a domestic partner under the statutory form of will, thereby easing death planning;
- Relocate with a partner without losing access to unemployment benefits'
- Share in the state income tax exemption for health benefits;
- File disability claims on behalf of an incapacitated partner;
- Adopt a partner's child using the stepparent adoption process;
- Continue with health benefits when a government employee or retiree dies;
- Use sick leave to care for a partner or partner's child
- Priority to administer a partner's estate.

The domestic partner status can be terminated at any time. In the next legislative session, a civil union bill will again be introduced, as well as a bill to provide parity between domestic partner couples and married couples through the domestic partner law.

Finally, Hawaii's Reciprocal Beneficiary law allows any two people who cannot marry -e.g. same -gender couples and close relatives, to register as reciprocal beneficiaries and obtain certain rights. Eligible persons may not be married, and they must file a notarized declaration of the relationship with the Department of Health. Among other things, it includes access to:

" Domestic partnership is also a term used in some cities and towns which maintain a registration system for relationships but with no or few protections or responsibilities attached, or in workplaces which then enables qualified employees to obtain some spousal benefits for their domestic partners. Even where benefits are provided, however, the benefits are taxed as income whereas it is not income to spouses. Nor can the benefits be transferred with the employee if he or she takes a different job.

- Worker's compensation benefits
- Inherit without a will;
- Claims for wrongful death;
- Hospital visitation and health care decisions;
- Consent to postmortem exams;
- Certain property rights;
- Protection under domestic violence laws.

Equality concerning insurances (life, health) and retirement plans were included in the law, but those provisions have either sunsetted and not been reenacted or have been struck by courts.

While each of these enactments provide critical protections to same-gender couples and their families, each is limited.

First, each system is a separate institution from marriage with a separate name. To some, that is simply semantics, but in fact it is about equal citizenship. A separate system, however well-intentioned, cannot truly parallel the unique legal status of marriage. Moreover, the basic message of a separate system is that same-gender couples are not fully valued members of society.

Second, as a practical matter, none of the systems provides access to the myriad federal benefits of marriage.[12] According to a report issued by the U.S. General Accounting Office in 1997, there are *at least* 1,049 federal laws and programs which distinguish among people based on their marital status. U.S. GAO Report, 97-16 (Jan. 31, 1997). A few examples include social security survivor benefits, fifty-seven provisions of the income tax code, protections for the families of veterans, and immigration laws which are aimed at keeping families together. Even if this body amends its marriage laws to allow same-gender couples to marry, those benefits will not become available immediately. The reason for this is that the federal government passed a

[12] Some federal programs and laws that do not use the term "spouse" as a qualification may still be available to qualified same-gender couples.

law defining marriage as the union of a man and a woman for purposes of all federal laws and programs.[13] But many people believe that law is unconstitutional and vastly exceeded the powers of Congress. At a minimum, it contravenes the long-standing custom whereby the federal government defers to the states' definitions of marriage in determining eligibility for programs.[14] Providing access to civil marriage will provide an important impetus for the federal government to re-examine its past discriminatory actions in the so-called Defense of Marriage Act, and hopefully lead to corrective amendments and ultimately repeal.

Third, aside from concrete federal benefits and programs, there are times when federal law addressing a particular topic operates to displace contrary state laws on the same topic. As just one example, there are questions ahead about whether or not the Employee Retirement Income and Security Act, known as ERISA, will exempt some private employers from their obligation to provide spousal employee benefits to spouses joined in civil union. A federal judge in Hawaii struck the private employer insurance provisions in the Hawaii reciprocal beneficiary law on this basis.[15]

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[13] These laws are now codified at 1 U.S.C. sec. 7 (definition of "marriage" and "spouse") and 29 U.S.C. sec. 1738C (purporting to exempt states from obligations under full faith and credit clause of U.S. Constitution).

[14] *See generally,* Andrew Koppelman, "Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional," 83 Iowa L. Rev. 1 (1997). Compare divorce which is recognized from state to state. *Williams v. North Carolina,* 317 U.S. 287 (1942).

[15] This decision was not officially reported. *See* Linda Hosek, "Draft Bill Will Try to Extend Health Benefits," Honolulu Star Bulletin, Sept 27, 1997, at A-1 (reporting that U.S. District Judge David Ezra concluded that ERISA preempted application of state law to private sector health plans covered by ERISA). The California law and a distinct Maine statute have sought the same end of providing insurance but by requiring insurers to make coverage available to domestic partners.

Lastly, none of these statuses is readily portable from state to state. Marriages that are valid where licensed and certified are overwhelmingly recognized from state to state. *See* Att'y Gen. Op., March 8, 1948 (opining that a marriage of a "native white American and a native Chinese" would be valid in Connecticut because marriages are generally valid everywhere if they are valid where performed). The same body of law that supports recognition of marriages *should* apply to civil unions, but has not to date. *See, e.g., Burns v. Burns,* 253 Ga. App. 600 (2002); *Rosengarten v. Downes, 71* Conn. App. 372 (2002), rev. granted (S.C. 16836). Even with civil unions, when people joined in that status cross state lines for work, or to visit family at the holidays, they run the distinct risk of being transformed back to legal strangers to one another. While there are several layers of discrimination against same-gender couples in existing law, at least with "marriage," there is stronger case for interstate recognition. People deserve that security and peace of mind.

Thank you for this opportunity, and please let me know if there is any further information I can provide to the Committee.