IN THE COURT OF APPEALS OF MARYLAND

September Term, 2006

No. 44

FRANK M. CONAWAY, et al.,

Appellants,

v.

GITANJALI DEANE, et al.,

Appellees.

On Appeal from the Circuit Court for Baltimore City
(M. Brooke Murdock, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This appeal arises from a decision of the Circuit Court for Baltimore City holding that Maryland's statutory definition of marriage to include only a man and a woman violates the prohibition of sex discrimination found in Article 46 of the Maryland Declaration of Rights.

On July 7, 2004, the plaintiffs, who are eighteen residents of Baltimore City, Prince George's County, St. Mary's County and Washington County, Maryland, and one resident of Costa Rica, sued the clerks of the circuit courts for the respective Maryland jurisdictions (the "State"), seeking declaratory and injunctive relief. The complaint sought a declaration

that the failure of the Maryland statutory code to permit same-sex marriage violates the prohibition against gender discrimination in Article 46 of the Maryland Declaration of Rights and denies due process and equal protection of the laws, in violation of Article 24 of the Declaration of Rights.

After this Court disposed of an interlocutory appeal brought by would-be intervenors, *Duckworth v. Deane*, 385 Md. 509 (March 11, 2005) (per curiam order), *opinion issued*, 593 Md. 524 (July 28, 2006), the parties filed and briefed cross-motions for summary judgment. (E. 89-91, 384-386.) In their arguments, plaintiffs analogized this case to various historical developments in the law of marriage and divorce, and emphasized the need for strict scrutiny of the definition of marriage in Md. Code Ann., Family Law ("FL") § 2-201, based on their assertions that there is a fundamental right to same-sex marriage and that sex and sexual orientation are suspect classifications. (E. 130-157.)

In response, the State argued that (1) the dramatic change in the legal definition of marriage sought by plaintiffs is a legislative matter to be addressed by the General Assembly; (2) strict scrutiny is unwarranted because there is no fundamental right to enter a marriage other than the traditional marriage between a man and a woman, and the marriage statute does not implicate any suspect classification or discriminate on the basis of gender, and (3) it is not only rational, but compelling, for the State to maintain the unique and vital institution of marriage between a man and a woman, given that the fundamental right to marriage arises from the traditional family interests in procreation and child-bearing, and especially in light of federal law mandating that same definition of marriage.

The circuit court heard argument on August 30, 2005. The court then issued a

Memorandum opinion invalidating the definition of marriage in FL § 2-201.[1] (E. 640-659; App. 1-20.) First, the court expressly declined to reach plaintiffs' due process and equal protection challenges to the statute. Mem. op. at 6 n.4. (E. 645; App. 6.) Applying strict scrutiny, the circuit court held that the statutory definition constitutes gender discrimination in violation of Article 46. Mem. op. at 2. (E. 641; App. 2.) Notwithstanding the State's express averments that the marriage statute serves a compelling State interest, is narrowly tailored, and has a rational basis (E. 551-160, 618, 421-434), the court relied on its understanding "that Defendants fail to argue that the state has a compelling interest. . . ." Mem. op. at 14. (E. 664; App. 14.) The court then opined that there is no rational basis for maintaining the definition of marriage, which has always been the law of Maryland, remains the law in all but one other State, and is currently codified in the federal Defense of Marriage Act. Mem. op. at 15-19. (E. 654-58; App. 15-19.) The court also issued an order granting plaintiffs' motion for summary judgment, denying defendants' motion for summary judgment, and staying enforcement of the Order pending the outcome of this appeal. (E. 660-661; App. 21-22.) The court's order did not set forth a declaration of the rights of the parties or state the terms of any injunction. (E. 660-661; App. 21-22.)

The State filed a timely notice of appeal on January 20, 2006. (E. 35.)

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[1] The circuit court also issued an order granting the State's motion to strike from the record plaintiffs' Exhibit 11, the Declaration of Lina Ayers, Esq. (E. 378.) Plaintiffs have not cross appealed from that adverse evidentiary ruling.

QUESTIONS PRESENTED

1. Did the circuit court err in ruling that the statute recognizing as lawful only marriage between a man and a woman denies equality of rights because of sex in violation of Article 46 of the Declaration of Rights where the circuit court acknowledged that under the marriage statute neither gender has greater or lesser rights than the other?

2. Does the statute recognizing as lawful only marriage between a man and a woman deny either equal protection of the law or substantive due process as guaranteed by the "Law of the land" provision of Article 24 of the Declaration of Rights where that definition of marriage has always been the law of Maryland and the same definition of marriage is mandated by federal law and the laws of all but one other State?

STATEMENT OF FACTS

A. Regulation Of Marriage In Maryland

Maryland has a comprehensive system for the regulation of marriage, which determines the validity of a marriage and provides the exclusive means of establishing a lawful marriage through licensing, certification and recordation. Under these provisions, "[o]nly a marriage between a man and a woman is valid in this State." FL § 2-201. "The law of Maryland does not recognize common law marriages or other unions of two or more persons – such as concubinage,[2] syneisaktism,[3] relationships of homosexuals or lesbians –

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[2] "Concubinage" is the cohabitation of unmarried people. A "concubine" is a secondary wife in certain polygamous societies. *Webster's II New Riverside University Dictionary* (1988 ed.) at 294-295.

[3] "Syneisaktism," from the Greek *syneisaktoi* ("people brought into [the house] together"), is a form of celibate cohabitation involving members of the opposite sex, which (continued...)

as legally bestowing upon two people a legally cognizable marital status. Such relationships are simply illegitimate unions unrecognized, or in some instances condemned, by the law." *Tyma v. Montgomery County*, 369 Md. 497, 508 (2002)(citations omitted).

Marriage to more than one person is prohibited and constitutes a felony. Md. Code Ann., Crim. Law § 10-502(b) and (c). Maryland law also prohibits a man from marrying certain enumerated persons who are related by blood or by other affinity, and separately provides that a woman may not marry certain enumerated relatives.[4] A person must be at least 18 years old to be lawfully married, except where the parties to the marriage satisfy statutory provisions pertaining to parental consent and proof of pregnancy or childbirth.[5]

To be lawfully married in Maryland a person first must apply for, FL § 2-402, and receive "a license issued by the clerk for the county in which the marriage is performed," FL

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[3] (...continued)
was practiced by religious ascetics in early Christianity. It is also known as "spiritual marriage," "chaste marriage," or "pseudo-marriage." *See* "Spiritual Marriage," in Blake Leyerle, *Theatrical Shows and Ascetic Lives: John Chrysostom's Attack on Spiritual Marriage* (Berkeley: U. Cal. Press, 2001) 75-99, 77.

[4] "A man may not marry his: (i) grandmother; (ii) mother; (iii) daughter; (iv) sister; or (iv) granddaughter," FL § 2-202(b)(1), or "his: (i) grandfather's wife; (ii) wife's grandmother; (iii) father's sister; (iv) mother's sister; (v) stepmother; (vi) wife's mother; (vii) wife's daughter; (viii) son's wife; (ix) grandson's wife; (x) wife's granddaughter; (xi) brother's daughter; or (xii) sister's daughter," *id.*, § 2-202(c)(1).

"A woman may not marry her: (i) grandfather; (ii) father; (iii) son; (iv) brother; or (v) grandson," *id.*, § 2-202(b)(2), or "her: (i) grandmother's husband; (ii) husband's grandfather; (iii) father's brother; (iv) mother's brother; (v) stepfather; (vi) husband's father; (vii) husband's son; (viii) daughter's husband; (ix) husband's grandson; (x) brother's son; (xi) sister's son; or (xii) granddaughter's husband," *id.*, § 2-202(c)(2).

[5] An individual 16 or 17 years old may marry either with parental consent or with a physician's certificate that the woman to be married is pregnant or has given birth, and an individual under the age of 16 may marry with both parental consent and a physician's certificate confirming pregnancy or childbirth. FL § 2-301.

§ 2-401(a). If "the clerk finds that there is a legal reason why the applicants should not be married, the clerk shall withhold the license unless ordered by the court to issue the license." FL § 2-405(f). By issuing the statutory form of license, the clerk authorizes "any individual authorized by the laws of this State to perform a marriage ceremony" to "join together in matrimony" the identified "intended husband" and "intended wife." FL § 2-403(a)(1). By law, the clerk must make available to each marriage license applicant birth control information and a list of the family planning clinics located in the county where the license is issued, as provided by the Department of Health and Mental Hygiene. FL § 2-405(h). The person who officiates at the wedding ceremony is required to file with the clerk a certificate confirming the date and time at which the identified "husband" and "wife" were "united in marriage." FL § 2-403(b). *See id.*, FL § 2-409(b).

Each clerk is required to keep a "marriage license book," containing "a complete record of each license issued," with specific items enumerated in § 2-501 of the Family Law Article. The clerk also must keep a "foreign marriage record book" for recording marriages of Maryland citizens that are performed outside Maryland. FL § 2-502. At periodic intervals, the clerk must send to the Secretary of Health and Mental Hygiene a copy of the record of each marriage license issued and must submit reports on divorces, annulments, and changes in marriage records. FL § 2-503.

B. The Definition Of Marriage Under Federal Law And The Laws Of Other States

In 1996, Congress enacted the Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (1996), which provides that for purposes of all federal laws marriage means only a legal union between one man and one woman as husband and wife, and a

"spouse" means only a husband or wife of the opposite sex. 1 U.S.C. § 7. The Act also authorizes each State to withhold recognition of same-sex marriages that may be valid under the law of another State. 28 U.S.C. § 1738C. In every case where the issue has been decided, the federal Defense of Marriage Act has been upheld as constitutional against challenges asserting equal protection and due process claims, including claims of gender discrimination. *See Wilson v. Ake*, 354 F. Supp.2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123 (Bank. W.D. Wash. 2004); *Smelt v. County of Orange*, 374 F. Supp.2d 861 (C.D. Cal. 2005), *aff'd in part, vacated in part due to lack of standing*, 447 F.3d 673 (9th Cir. 2006).

In addition to Maryland, forty-three States have also enacted similar statutes recognizing only a marriage between a man and a woman.[6] Twenty states have adopted

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[6] Ala. Code 1975 § 30-1-19 (2006); Alaska Stat. § 25.05.013 (2005); Ariz. Rev. Stat. § 25-101(c) (2006); Ark. Code. Ann. §§ 9-11-107, 9-11-109 (2006); Cal. Fam. Code §§ 300, 308.5 (2006); Col. Rev. Stat. § 14-2-104 (2006); Conn. Gen. Stat §§ 45a-727a(4), 46b-38nn (2006); Del. Code. tit.13, § 101 (2006); Fla. Stat. Ann. §§ 741.04, 741.212 (2006); Ga. Code Ann. § 19-3-3.1 (2006); Haw. Rev. Stat. §§ 572-1, 572-3, 572C-2 (2005); Idaho Code § 32-201 (2006); 750 Ill. Comp. Stat. § 5/212(a)(5) (2006); Ind. Code § 31-11-1-1 (2006); Iowa Code § 595.2(1) (2006); Kan. Stat. Ann. §§ 23-101(a), 23-115 (2005); Ky. Rev. Stat. § 402.020(1)(d) (Baldwin 2005); La. Civ. Code Art. 86, Art. 89 (2006); Me. Rev. Stat. Ann. tit. 19A §§ 650, 701(5) (2006); Mich. Comp. Laws §§ 551.2, 551.3, 551.4, 551.272 (2006); Minn. Stat. Ann. §§ 517.01, 517.03 (2006); Miss. Code § 93-1-1(2) (2006); Mo. Ann. Stat. § 451.022 (2006); Mont. Rev. Code Ann. §§ 40-1-103, 40-1-401(1)(d) (2005); Nev. Rev. Stat. § 122.020(1) (2005); N.H. Rev. Stat. Ann. §§ 457:1, 457:2 (2006); N.C. Gen. Stat. Ann. § 51-1.2 (2006); N.D. Cent. Code § 14-03-01 (2005); Ohio Rev. Code Ann. § 3101.1 (Supp. 2006); Okla. Stat. Ann. tit. 43 §§ 3, 3.1 (2006); Or. Rev. Stat. Ann. § 106.010 (2005); Pa. Consol. Stat. tit. 23 §§ 1102, 1704 (2006); S.C. Code 1976 Ann. Art. 1 §20-1-10 (2005); S.D. Codified Laws § 25-1-1 (2006); Tenn Code Ann. § 36-3-113 (2006); Tex. Fam. Code tit. 1, § 2.001 (2006); Utah Code Ann. §§ 30-1-2(5), 30-1-4.1 (2006); Vt. Stat. Ann. tit. 15, § 8 (2005); Va. Code Ann. § 20-45.2 (2006); Wash. Rev. Code §§ 26.04.010(1), 26.04.020(1)(c) (2006); W. Va. Code § 48-2-104(c) (2006); Wis. Stat. Ann. § 765.01 (2005); Wyo. Stat. 1977 Ann. § 20-1-101 (2005).

constitutional amendments limiting marriage to opposite-sex couples, including Alabama, Alaska, Arkansas, Hawaii, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Texas and Utah. *See* website of the National Conference of State Legislatures, www.ncsl.org/programs/cyf/samesex.htm (website last visited Sept. 1, 2006).

In November 2006, ratification of similar constitutional amendments will go before the voters in six other states: Idaho, South Carolina, South Dakota, Tennessee, Virginia and Wisconsin. *Id.* Proposed constitutional amendments banning same-sex marriage are pending in the legislatures of six more states: Delaware, Indiana, Massachusetts, New Jersey, North Carolina and Pennsylvania. *See* www.stateline.org/live/details/story?contentId=20695 (website last visited Sept. 1, 2006). Citizen-led ballot initiatives to amend state constitutions to ban same-sex marriage are pending in Arizona and Colorado. *Id.*

Marriage between persons of the same sex is recognized as lawful in only one State, Massachusetts, as a result of the decisions in *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003), and *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004). In all other States where the matter has been ultimately decided, constitutional challenges to opposite-sex marriage requirements have been rejected.[7]

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[7] *See Standhardt v. Superior Ct. of Arizona*, 77 P.3d 451, 462-64 (Ariz. App. 2003); *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App.), *cert. granted and dismissed*, 806 A.2d 1066 (Conn. 2002); *Adams v. Howerton*, 673 F.2d 1036 (9th Cir., Cal. 1982); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *see id.*, 653 A.2d at 363-64 (Steadman, J., concurring); *Wilson v. Ake*, 354 F. Supp.2d 1298 (M.D. Fl. 2005); *Morrison v. Sadler*, 821 N.E.2d 15, 24-30 (Ind. App. 2005); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1971); *Citizens for Equal Protection, Inc. v. Bruning*, 455 F.3d 859 (8th Cir. Neb. 2006); *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. A.D. 2005), (continued...)

C. Plaintiffs' Allegations

The complaint alleges that all but one of the plaintiffs tendered completed marriage license applications and fees to the circuit court clerks in their respective jurisdictions. In each case, the defendant clerk refused to issue a marriage license because both applicants for the license were members of the same sex. Complaint ¶¶ 126 - 134. (E. 66-68.)

The plaintiffs seek to have Maryland law recognize same-sex marriage so that lesbian and gay couples and their children can have "the social status that marriage confers on married couples and their children, and the hundreds of rights, responsibilities, benefits, and obligations that marriage affords to married couples and their children." Complaint ¶ 6. (E. 42.) While a number of those same programs and advantages are available even to those who do not have a marriage license (E. 431 at n.26, 433-34), most of the protections and benefits identified by plaintiffs, and especially those most pertinent to the problems described in their Complaint, are created or governed by federal law rather than state law. Plaintiffs note as many as "1,138 protections and benefits to married couples and their children" that "the federal government affords." (E. 114.)

Plaintiffs have conceded that the relief they seek in this action based solely on State law grounds would not entitle them to any of "the protections and benefits afforded to married couples by the federal government," which are unavailable to same-sex couples

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[7] (...continued)
appeal pending; *Hernandez v. Robles*, __N.E.2d__, 2006 WL 1835429, 2006 N.Y. Slip Op. 05239 (N.Y. Jul. 6, 2006); *Seymour v. Holcomb*, 790 N.Y.S.2d 858, 863 (Sup. Ct. 2005); *Shields v. Madigan*, 783 N.Y.S.2d 270, 276 (Sup. Ct. 2004); *In the Matter of Cooper*, 592 N.Y.S.2d 797, 800-01 (N.Y. App.1993); *Li v. State of Oregon*, 110 P.3d 91, 96, 101 (Ore. 2005); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. 1974).

pursuant to the requirements of the federal Defense of Marriage Act, 28 U.S.C. § 1738C. (E. 114 at n.4.) For example, under the Defense of Marriage Act, even if the State of Maryland were to recognize same-sex marriage as valid, it would not alter the status of plaintiffs or others similarly situated, who would still be deemed to be unmarried with respect to their immigration status, *see* Complaint ¶¶ 14, 65 (E. 44, 54), their treatment by United States customs, *see* Complaint ¶ 21 (E. 45-46), their Social Security benefits, *see* Complaint ¶ 119 (E. 65), exemptions from State liens for the costs of long term care under the Medicaid program pursuant to 42 U.S.C. § 1396p(A)(2)(a), *see* Complaint ¶ 6 (E. 42), or their ability to rollover retirement accounts pursuant to 26 U.S.C. § 408(c)(ii)(II), *see* Complaint ¶ 82 (E. 57).

D. The Circuit Court's Decision

In its Memorandum opinion, the circuit court concluded that Maryland's statute recognizing only a marriage between a man and a woman constituted "unjustified discrimination based on gender" in violation of Article 46 of the Declaration of Rights, also known as the Equal Rights Amendment ("ERA"), and was not "narrowly tailored to serve any compelling governmental interests." Mem. op. at 6. (E. 645; App. 6.) The court expressly declined to address any of the plaintiffs' claims under Article 24. Mem. op. at 6 n.4. (E. 645; App. 6.) The court rejected the possibility that recognition of "civil unions" could serve as a "constitutionally adequate alternative to same-sex marriage," and also noted plaintiffs' insistence that they are not seeking, as an alternative form of relief, the recognition of civil unions. Mem. op. 9 n.9. (E. 648; App. 9.)

In defense of the statute, the State argued below that the definition of marriage does

not constitute sex discrimination within the meaning of Article 46, in that it does not create a classification that benefits or burdens one gender more than another. The circuit court rejected that argument "as a matter of law because it is inherently illogical as a matter of fact." Mem. op. at 10. (E. 649; App. 10.) In so doing, the circuit court disparaged the proposition, which it labeled the "equal application theory," that "statutory prohibitions on same-sex marriage do not create gender-based classifications because each prohibition applies equally to both sexes." Mem. op. at 7. (E. 646; App. 7.) Instead, in the circuit court's view, the ERA's command -- that "equality of rights under the law shall not be abridged or denied because of sex" -- can be violated even where "neither gender has greater or lesser rights than the other." Mem. op. at 7. (E. 646; App. 7.) In support of these conclusions, the circuit court relied on its reading of this Court's decisions in *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53 (1985), and *Giffin v. Crane*, 351 Md. 133 (1998).

The circuit court also relied on the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967)(striking down anti-miscegenation laws as invidious racial discrimination), as it was interpreted in a decision of the Hawaii Supreme Court, which is no longer valid after having been abrogated by constitutional amendment, *Baehr v. Lewin*, 852 P.2d 44, 61-64 (1993)(invalidating state marriage law under Hawaii's version of the ERA), *reversed after constitutional amendment, sub nom Baehr v. Miike*, No. 20371, Summary Disposition Order (Haw. Supreme Ct., Dec. 9, 1999)(unpublished), 994 P.2d 556 (1999)(table). Mem. op. at 7, 8 n.7. (E. 646-47; App. 7, 8.) The circuit court did not discuss the impact of post-*Loving* Supreme Court decisions nor did the lower court identify any case where either the Supreme Court or this Court has relied upon *Loving* in resolving a claim of

gender discrimination. The circuit court also made no reference to the legislative history of the ERA and its ratification.

The circuit court expressed its disagreement with various out-of-state appellate decisions, which have uniformly rejected gender discrimination challenges to opposite-sex marriage laws and found sufficient government interests to support such laws, Mem. op. at 8-9 (citations omitted) (E. 647-48; App. 8-9); instead, the circuit court chose to rely on the no longer valid Hawaii decision in *Baehr v. Lewin*, 852 P.2d 44, which, prior to its abrogation in 1999, had been the lone instance where any appellate court had held that a prohibition of same-sex marriage constituted gender discrimination. Mem. op. at 7, 8 n.7. (E. 646-47; App. 7, 8.)

The circuit court did not analyze the State's express assertion that the marriage statute is narrowly tailored to serve a compelling state interest in maintaining its definition of marriage, which is the same definition mandated by federal law (E. 421-434, 552-560); instead, the court's opinion states "that Defendants fail to argue that the state has a compelling interest." Mem. op. at 14. (E. 653; App. 14.) Although it was not necessary for the disposition of the Article 46 gender discrimination claim, the circuit court went on to opine that the legislative determination to recognize only opposite-sex marriages lacks a rational basis, contrary to the conclusion of all pertinent federal courts that have considered the question, and all state high courts except for the lone outlier, Massachusetts. The court characterized Maryland's interest as "encouraging procreation and child-rearing within [the] traditional [family] unit" and declared that Maryland's marriage law was "wholly unconnected" to promoting that interest. Mem. op. at 15. (E. 654; App. 15.) Although the

court acknowledged that a valid legislative classification "may be based on rational speculation unsupported by evidence or empirical data," Mem. op. at 16 n.13 (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)) (E. 655; App. 16), the court concluded that FL § 2-201 "fails rational basis review because the facts necessarily assumed by the Legislature to support it exceed 'rational speculation.'" Mem. op. 16. (E. 655; App. 16.) In the circuit court's view, the longstanding and commonly understood definition of marriage to require both a man and a woman cannot be rationally related to a legitimate government interest because it rests on "broad assumptions" by legislators and because, given the novelty of same-sex marriage as a heretofore unknown phenomenon, "the Legislature has little experience with same-sex marriage" on which to base its determination. Mem. op. 16. (E. 655; App. 16.)

Finally, the circuit judge concluded that the challenged statute was not "rationally related to the preservation of federal and interstate definitional uniformity" and rejected the State's interest in legislatively addressing alleged discrimination in benefits one step at a time. Mem. op. 17-18. (E. 656-57; App. 17-18.)

SUMMARY OF ARGUMENT

If this Court follows its general practice upon an appeal from a grant of summary judgment, the only issue to be considered is whether the circuit court was legally correct in determining that the statutory definition of marriage in § 2-201 of the Family Law Article, which applies equally to men and women, constitutes sex discrimination under Maryland's Equal Rights Amendment, Article 46. The circuit court's decision should be reversed because it departs from the plain language of Article 46 and this Court's decisions construing

the Article, it conflicts with all valid decisions of federal courts and state appellate courts that have considered the issue, and the decision cannot be reconciled with either the history of the ERA's adoption by the same Legislature that enacted FL § 2-201 or the contemporaneous construction of the ERA as consistently applied. The circuit court's basis for abrogating the marriage statute has been uniformly rejected in all pertinent decisions of federal courts and State appellate courts.

If the Court does address the Article 24 equal protection and substantive due process claims asserted by plaintiffs but not addressed by the circuit court, those claims should also be rejected. The historic definition of marriage is itself a vital part of the "Law of the land," which Article 24 promises to apply for the benefit of all Marylanders. Since Maryland's founding, the State has continuously regulated marriage as a civil contract between a man and a woman, which remains the essence of marriage under Maryland law. As courts have concluded in all known decisions where the issue has been addressed, plaintiffs' claims implicate no suspect classification or fundamental right so that strict scrutiny is not warranted. Although under these circumstances, the marriage statute need only have a rational basis to be sustained, the State has a compelling interest in maintaining the only form of marriage that has ever been recognized in Maryland, a narrowly tailored requirement that is also codified in federal law and shared by all other States except one. The marriage definition challenged in this lawsuit unquestionably has a rational basis, as courts have held in an all but unanimous line of federal and state court decisions.

ARGUMENT

I. SCOPE AND STANDARD OF REVIEW UPON APPEAL FROM THE GRANT OF SUMMARY JUDGMENT

"[I]t is a settled principle of Maryland appellate procedure that ordinarily an appellate court will review a grant of summary judgment only upon the grounds relied upon by the trial court" and "'will not speculate that summary judgment might have been granted on other grounds not reached by the trial court.'" *Bishop v. State Farm Mutual Insurance Co.*, 360 Md. 225, 234 (2000)(citation omitted). *But see Eid v. Duke*, 373 Md. 2, 11 (2003)(appellate court may consider question that is "inextricably intertwined" with the ground on which the trial court granted summary judgment). The standard for reviewing a trial court's grant of summary judgment is "whether the trial judge was legally correct in his or her rulings." *Okwa v. Harper*, 360 Md. 161, 178 (2000).

II. MARYLAND'S MARRIAGE LAW DOES NOT ABRIDGE OR DENY EQUALITY OF RIGHTS BECAUSE OF SEX WITHIN THE MEANING OF MARYLAND'S EQUAL RIGHTS AMENDMENT, ARTICLE 46 OF THE DECLARATION OF RIGHTS.

The circuit court held that Maryland's legislative determination to limit lawful marriage to opposite-sex couples constitutes discrimination on the basis of sex in violation of Article 46, Maryland's Equal Rights Amendment (the "ERA"). It reached that conclusion by misreading the plain language of Article 46 and this Court's precedents interpreting the ERA, by disregarding its history and that of other relevant portions of the Maryland Constitution, and by rejecting a growing body of case law from federal courts and state appellate courts that have unanimously rejected sex discrimination challenges to opposite-sex

marriage laws.[8]

Contrary to the circuit court's opinion, recent decisions by the high courts of New York and Washington demonstrate the appropriate resolution of this challenge to Maryland's marriage statute: "By limiting marriage to opposite-sex couples," the State "is not engaging in sex discrimination" because "[t]he limitation does not put men and women in different classes, and give one class a benefit not given to the other;" "[w]omen and men are treated alike -- they are permitted to marry people of the opposite sex, but not people of their own sex;" and "[p]laintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class." *Hernandez v. Robles*, __ N.E.2d __, 2006 WL 1835429 at page 9, 2006 N.Y. Slip Op. 05239 (N.Y. Jul. 6, 2006). *Accord Andersen v. King County*, 138 P.3d 963, 988 ¶ 100 (Wash. 2006)("Has equality been denied or abridged on account of sex? . . . Men and women are treated identically under" the marriage statute; "neither may marry a person of the same sex;" the statute "therefore does not make any 'classification by sex,' and it does not discriminate on account of sex")(citations omitted).

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[8] *See, e.g.*, *Hernandez v. Robles*, __ N.E.2d __, 2006 WL 1835429 at page 9, 2006 N.Y. Slip Op. 05239 (N.Y. Jul. 6, 2006); *Andersen v. King County*, 138 P.3d 963, 988-90, ¶¶ 98-107 (Wash. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307-08 (M.D. Fl. 2005); *In re Kandu*, 315 B.R. 123, 143 (Bank. W.D. Wash. 2004); *Baker v. State of Vermont*, 744 A.2d 864, 880 n.13 (Vt. 1999); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1971); *Lewis v. Harris*, 2003 WL 23191114, *21-*22 (N.J. Super. 2003, *aff'd*, 875 A.2d 259 (N.J. Super. A.D. 2005), *appeal pending*.

A. The Marriage Statute Does Not Discriminate Against Same-Sex Couples "Because Of Sex" Within The Plain Meaning Of Article 46.

Article 46 provides that "[e]quality of rights under the law shall not be abridged or denied because of sex." In construing this language as a constitutional mandate to permit marriage between members of the same sex, the circuit court departed from the plain and ordinary meaning of Article 46 by reading the word "sex" as if it meant "sexual orientation," a phrase that has a much different definition and legal significance. Although each of these terms has been used in various Maryland statutes, *see, e.g.*, Md. Code, Art. 49B, §§ 5, 8, 14, 16, 19, and 22 (enumerating "sex" and "sexual orientation" as separate types of discrimination), the General Assembly selected the word "sex" for Article 46 but chose not to include the phrase "sexual orientation" or any comparable terminology. In its plain and ordinary sense, "[t]he term 'sex' is often used to denote anatomical or biological sex. . . ." *In re Heilig*, 372 Md. 692, 698 n.4 (2003)(noting that the Court would use the terms "sex" and "gender" interchangeably in considering transsexual plaintiff's petition to change the designation of sex on his birth certificate as authorized in Md. Code Ann., Health-General § 4-214(b)(5)). On the other hand, "sexual orientation" as it pertains to discrimination laws is defined by statute to mean "the identification of an individual as to male or female homosexuality, heterosexuality, or bisexuality." Md. Code Ann., Art. 49B, §§ 15(j) (employment discrimination), 20(u) (housing discrimination).

By similarly prohibiting discrimination "because of sex" in Title VII, "Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation." *Spearman v. Ford Motor Co.*, 231 F. 3d 1080, 1084 (7th

Cir. 2000), *cert. denied*, 532 U.S. 995 (2001)(citation omitted). Thus, "'sex,' when read in this context, logically could only refer to membership in a class delineated by gender," and the prohibited discrimination "must be a distinction based on a person's sex, not on his or her sexual affiliations." *Simonton v. Runyon,* 232 F.3d 33, 36 (2nd Cir. 2000). For this reason, "[t]he law is well-settled in [the Second Circuit] and all others to have reached the question" that "Title VII does not prohibit harassment or discrimination because of sexual orientation." *Dawson v. Bumble & Bumble,* 398 F.3d 211, 217 (2nd Cir. 2005)(quoting *Simonton*, 232 F.3d at 35 (citing cases)).

Like Congress, the General Assembly also knows how to express the difference between discrimination based on sex and that based on sexual orientation. *See* Md. Code, Art. 49B, §§ 5, 8, 14, 16, 19, 22 (enumerating "sex" and "sexual orientation" as separate types of discrimination). Plaintiffs themselves have highlighted this distinction, not only by asserting separate claims of "discrimination based on sex" (Count I of the Complaint) (E. 69-70) as distinguished from "discrimination based on sexual orientation" (Count II of the Complaint) (E. 71-72), but also by identifying a list of Maryland statutes and regulations which specifically prohibit discrimination on the basis of "sexual orientation," but only by invoking those precise words. (E. 124-26.)

Thus, it is clear, even to the plaintiffs, that the Legislature has not included the term "sexual orientation" in Article 46 of the Declaration of Rights, and that the term "sex" conveys a different meaning.[9] The notably contentious history of legislative action

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[9] In this respect, Maryland's ERA differs from the ERA in the Hawaii Constitution, which (before being superseded by constitutional amendment) was held by that State's (continued...)

addressing "sexual orientation" counsels strongly against blurring that distinction or minimizing its significance to the members of the General Assembly who approved the ERA and the voters who ratified it. For example, according to a contemporary account of the 2001 legislation that added the term "sexual orientation" to the statutory discrimination prohibitions in Article 49 of the Code, 2001 Md. Laws, Ch. 340, § 1 (effective Nov. 21, 2001), "[n]o other piece of legislation in Maryland's recent history has been more bitterly debated than a bill to add the words 'sexual orientation' to Maryland's civil rights law prohibiting discrimination in employment, housing and public accommodations. . . . [T]he effort to extend that same protection to 'sexual orientation' met much resistance, including a failed referendum effort. . . ." Catherine M. Brennan, "Banning Discrimination Based on Sexual Orientation," 35-Jun Md. B.J. 50, 50 (May/June 2002). As it was ultimately enacted, the legislation directed that the Act "is intended to ensure *specific* rights" and -- even more to the point of this case -- that the Act "may not be construed to authorize or validate a marriage between two individuals of the same sex." 2001 Md. Laws, Ch. 340, § 2, subsections (1) and (4) (emphasis added).

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[9] (...continued)
highest court to invalidate laws restricting same sex marriage. *Baehr v. Lewin*, 852 P.2 P.2d 44 (Haw. 1993), *aff'd after remand sub nom Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997). There, the framers of the 1978 Hawaii Constitution "expressly declared their intention that a proscription against discrimination based on sexual orientation be subsumed within the clause's prohibition against discrimination on the basis of sex," and the State of Hawaii "conceded that very point" during the court proceedings. *Baehr v. Miike*, No. 20371, Summary Disposition Order at 2 n.1, reversing judgment reported at 950 P.2d 1234 in light of constitutional amendment (Haw. Supreme Ct., Dec. 9, 1999)(unpublished), 994 P.2d 556 (1999)(Table), full text available at www.hawaii.gov/jud/20371.htm (website last visited Aug. 31, 2006).

marriage between two individuals of the same sex." 2001 Md. Laws, Ch. 340, § 2, subsections (1) and (4) (emphasis added).

Accordingly, as this Court has observed, sex or gender is a "biological" criterion, a "fact that may be established by medical and other evidence," and one's "true gender," as so determined, "may affect or determine, for example, the validity of a marriage. . . ." *In re Heilig*, 372 Md. at 711, 719~~20~~ n.9. (citation omitted). Because the circuit court's decision improperly conflates "sex" with "sexual orientation," it cannot be reconciled with the meaning of Article 46 and should be reversed.

B. The Marriage Statute Does Not Constitute Sex Discrimination Under This Court's Decisions Or Any Persuasive Authority.

As construed by this Court, Article 46 may invalidate "governmental action which imposes a burden on, or grants a benefit to, one sex but not the other one," if the "different benefits" or "different burdens" are assigned to persons "based solely upon their sex." *Giffin v. Crane*, 351 Md. 133, 149, 151 (1998)(citing *Burning Tree Club v. Bainum*, 305 Md. 53, 64 (1985)(opinion of Murphy, C.J.)) and *Kline v. Ansell*, 287 Md. 585, 593 (1980)). *See Kline*, 287 Md. at 593 (where "Maryland's law provides different benefits for and imposes different burdens upon its citizens based solely upon their sex. . . . [s]uch a result violates the ERA"). Thus, Maryland courts have applied Article 46 to strike down laws or other government action that worked to the disadvantage of one sex but not the other. *See, e.g., Turner v. State*, 299 Md. 565, ~~574~~574-76 (1984)(invalidating criminal statute that prohibited use of female "sitters" to solicit customers in taverns but did not similarly prohibit use of male sitters); *Rand v. Rand*, 280 Md. 508, 516 (1977)(invalidating common law rule that

On the other hand, this Court has held that the prohibition of sex discrimination in Article 46 is not implicated where, as here, challenged laws extend the same burdens and benefits to both sexes, even if application of the law necessitates some reference to sex. *See, e.g., Massage Parlors, Inc. v. Mayor and City Council of Baltimore*, 284 Md. 490, 493-95 (1979)(ordinance prohibiting massage parlors from simultaneously administering massages to customers of the opposite sex in the same room did not constitute sex discrimination under Article 46); *Md. State Bd. of Barber Examiners v. Kuhn*, 270 Md. 496, 506 (1973)(statutory scheme that allowed barbers to cut men's and women's hair but restricted cosmetologists to cutting women's hair was "not a case of discrimination based on sex" under Article 46). Accordingly, this Court recently observed that the common law requirement imposing a confidential relationship and duty of disclosure upon both male and female parties to an antenuptial agreement "is inherently gender neutral" under Article 46, notwithstanding "the historical bias of male dominance" in husband and wife relationships. *Cannon v. Cannon*, 384 Md. 537, 572 n.19 (2005). In addition, the Court has recognized that "[d]isparate treatment on account of physical characteristics unique to one sex is generally regarded as beyond the reach" of the Equal Rights Amendment. *Burning Tree Club, Inc. v. Bainum*, 305 Md. at 65 (Murphy, C.J.)(citing *Brooks v. State*, 24 Md. App. 334, *cert. denied*, 275 Md. 746 (1975)).

Under this precedent, the marriage definition in § 2-201 of the Family Law Article does not involve sex discrimination within the meaning of Article 46 because it does not create a burden or benefit that applies to one sex but not the other. Moreover, given the prominent role of "sexual orientation" in plaintiffs' challenge, they cannot show, as they

must, that the marriage definition creates a discriminatory classification that is "based *solely* upon their sex." *Giffin v. Crane*, 351 Md. at 151, 152 (citations omitted)(emphasis added). Since the marriage law dispenses the same burdens and benefits equally to both men and women, plaintiffs' claim of sex discrimination must be rejected, just as similar claims have been rejected, both by federal courts, *see In re Kandu*, 315 B.R. 123, 143 (Bank. W.D. Wash. 2004); *Wilson v. Ake*, 354 F. Supp.2d 1298, 1307-08 (M.D. Fla. 2005), and by state appellate courts, *see Hernandez v. Robles*, __ N.E.2d __, 2006 WL 1835429 at page 9, 2006 N.Y. Slip Op. 05239; *Andersen v. King County*, 138 P.3d , 988-90, ¶¶ 98-107 (Wash. 2006); *Baker v. State of Vermont*, 744 A.2d 864, 880 n.13 (Vt. 1999); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1971); *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. App. 1974).

Nor is there any merit to plaintiffs' argument that the definition of marriage to include a man and a woman can somehow be treated as sex discrimination "even though it applies equally to men and women" (E. 141), a proposition that directly contradicts both this Court's construction of Article 46, *see Giffin v. Crane*, 351 Md. at 149, 151, and the conclusion reached in all currently valid federal court decisions and state appellate court decisions that have addressed the issue, *see* cases cited above. Faced with this uniformly adverse authority, the circuit court below opined that this Court's decision in *Burning Tree Club* somehow supports its conclusion that sex discrimination in violation of Article 46 can exist even where, as here, "neither gender has greater or lesser rights than the other." Mem. op. at 7. (E. 646; App. 7.) However, this Court's precedent contradicts the circuit court's reading of *Burning Tree Club*. In *Giffin v. Crane*, Chief Judge Bell cited the opinion of his predecessor,

Chief Judge Murphy, in *Burning Tree Club*, as authority for the definitive statement of which laws and government actions can be considered sex discrimination within the meaning of Article 46: those that, unlike the definition of marriage, "impose[] a burden on, or grant[] a benefit to, one sex but not the other one." *Giffin v. Crane*, 351 Md. at 149 (citing *Burning Tree Club v. Bainum*, 305 Md. at 64).

Contrary to the circuit court's analysis, *Burning Tree Club* did not involve a challenge to a law that distributed burdens and benefits equally to men and women. Instead, the statutory provision at issue applied to only one entity in Maryland, the all male Burning Tree Club, and it was "undisputed that the sole purpose of the provision was to allow Burning Tree to continue discriminating against women and still receive the state subsidy," a reduced tax assessment for preserving open spaces, which was otherwise unavailable to any club that practiced such discrimination. *Burning Tree Club*, 305 Md. at 100 (Eldridge, J., concurring in part, dissenting in part). The statute "impose[d] different benefits and different burdens upon persons based solely upon their sex" in violation of Article 46 because "in application, the provision [would] always be applied to a particular sex," *i.e.*, women, "the one excluded by a given, participating country club," which was all male. *Id.*, 305 Md. at 86, 87 (Rodowsky, J., concurring). Thus, in that instance, "only one sex [would] be the object of discrimination." *Id.*

In contrast to the situation in *Burning Tree Club*, as plaintiffs concede, Maryland's definition of marriage applies throughout Maryland and neither sex is excluded by classification from the benefits and burdens of marriage. Therefore, neither *Burning Tree* nor any other precedent or persuasive authority supports the circuit court's decision.

The circuit court was also mistaken in accepting plaintiffs' argument analogizing their theory of sex discrimination to racial discrimination cases, such as *Loving v. Virginia*, 388 U.S. 1 (1967), which involved anti-miscegenation laws that prevented non-white persons from marrying whites. Like plaintiffs' other arguments, that analogy has been rejected by every currently valid federal court decision and state appellate decision where it has been addressed. *See Hernandez v. Robles*, __ N.E.2d __, 2006 WL 1835429 at p. 9 (the fact that "[w]omen and men are treated alike" under the marriage statute "is not the kind of sham equality that the Supreme court confronted in *Loving*; the statute there, prohibiting black and white people from marrying each other, was in substance anti-black legislation. Plaintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class."); *Andersen v. King County*,138 P.3d at 989 ¶ 104 ("*Loving* is not analogous. In *Loving* the Court determined that the purpose of the antimiscegenation statute was racial discrimination, 'and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.'")(quoting *Loving*, 388 U.S. at 9)); *In re Kandu*, 315 B.R. at 142-43 (unlike the anti-miscegenation law in *Loving*, which was held to be "founded on an impermissible racial classification," definition of marriage in the federal Defense of Marriage Act "does not single out men or women as a discrete class for unequal treatment"); *Baker v. Nelson*, 191 N.W.2d at 187 ("in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference of sex"); *Lewis v. Harris*, 875 A.2d at 272 ("nothing in *Loving* suggests that the Fourteenth

Amendment prohibits a State from limiting the institution of marriage to a State-recognized union between a man and a woman"); *Baker v. State of Vermont*, 744 A.2d at 880 n.13 (reliance on *Loving* was misplaced because "[t]here the high court had little difficulty in looking behind the superficial neutrality of Virginia's anti-miscegenation statute to hold that its real purpose was to maintain the pernicious doctrine of white supremacy," whereas the marriage definition did not have such a discriminatory purpose with respect to sex)(citing *Loving*, 388 U.S. at 11); *Singer v. Hara*, 522 P.2d at 1195-96 (*Loving* analogy and sex discrimination claim rejected; plaintiffs "were not denied a marriage license because of their sex; they were denied a marriage license because of the nature of marriage itself").

Therefore, in keeping with the language and legislative history of Article 46, as well as pertinent case law, Maryland's definition of marriage does not deny equality of rights because of sex.

C. The Legislative History Of The Maryland ERA's Approval By The Same Legislators Who Enacted The Marriage Statute And Contemporaneous Construction Of The Maryland ERA Confirm That The Right To Same-Sex Marriage Is Not Encompassed In The ERA.

At the same session in 1972, the Maryland General Assembly adopted two resolutions, one approving a proposed federal ERA and the other proposing a similarly-worded State ERA as an amendment to the Maryland Constitution.[10] While the federal ERA has not yet been approved by a sufficient number of states, the Maryland ERA was overwhelmingly approved by State voters in November, 1972. A tactic often used by ERA opponents to counter these and other state efforts was to predict that such constitutional amendments

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[10] *See* H.J.R. 102 and S.J.R. 80 (1972); 1972 Md. Laws, Ch. 366.

would require states to recognize same-sex marriage.[11] However, in the midst of the Maryland ERA debate and the Congressional debate on the federal counterpart, U.S. Senator and Floor Leader, Birch Bayh, assured the Senate that a Federal ERA would still permit the states to invalidate single-sex marriage as long as such laws were applicable to members of both sexes. 118 Cong. Rec. 9331 (1972). (E. 441.) *See also* the oft-cited Memorandum of Eleanor M. Carey, Office of the Attorney General, to the Maryland Commission on the Status of Women, dated September 19, 1972 at p. 4.[12] (E. 478.) Senator Bayh's comments occurred

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[11] In the Maryland Department of Legislative Services file on HB 687 is a 1973 leaflet patterned after one distributed by the National American Woman Suffrage Association, which states that "[s]ome people say . . . [t]he ERA will legalize homosexual marriages. . . . The facts are . . . [s]ame sex marriage can be permitted or forbidden regardless of the ERA. *It will only mean that if men can't marry men, women can't marry women."* (Emphasis in original.) (E. 502.). To show that some myths die hard, a website promoting ongoing efforts to ratify the federal ERA contains the following Q&A:

> "How does the ERA relate to the issue of homosexual rights?
>
> ERA opponents' claim that the amendment would require states to allow same-sex marriage is false. The state of Washington rejected such a claim under its state ERA in the 1970s. The state of Hawaii, which considered such a claim under its state ERA, recently amended its constitution to declare marriage a contract between a man and a woman. *The legislative history of the ERA shows that its intent is to equalize rights between women and men, not to address issues of discrimination based on sexual orientation.*"

See www/equalrightsamendment.org/faq.htm (last visited Aug. 30, 2006)(emphasis added). (E. 505.)

[12] A news story appearing in the State's largest newspaper three weeks before the vote on the Maryland ERA reported on a conference on the proposed amendment and disclosed the results of Ms. Carey's report on the statutory changes needed because of the passage of the ERA, which did not include the law restricting marriage to opposite-sex couples. *See* Barbara Gold, "When women are 'equal,' what then?" *Baltimore Sun* (Oct. 15, 1972) at C1. (A. 23-24.) Rather, Ms. Carey was quoted as saying that "[s]tatutes which prohibit single sex marriages . . . would not be offensive to the ERA." *Id.*

before General Assembly votes on both the state and federal ERAs.[13] The legislative history of the federal ERA has special pertinence to the interpretation of the Maryland ERA because, as was predicted by Ms. Carey in her 1972 memorandum, this Court has interpreted Article 46 to be *in pari materia* with the federal legislation and has continued to rely on contemporaneous analyses of the federal ERA. *See Giffin v. Crane* 351 Md. 133, 148-49 (1998)(citing with approval *Brown, Emerson, Falk & Freeman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 Yale L.J. 871 (1971)); *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 64, 65, 70 (1985)(same); and *Rand v. Rand*, 280 Md. 508, 512 (1977) (same).[14]

In 1973, the same General Assembly that proposed the State ERA and ratified the federal counterpart enacted legislation -- virtually without dissent -- clarifying that Maryland law did not recognize same-sex marriage. *See* 1973 Md. Laws, Ch. 213 (SB122) (now FL

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[13] The State ERA was approved by the House of Delegates on March 22, 1972, and by the Senate on April 1, 1972. 1972 House Journal at 1281-82; 1972 Senate Journal at 1899. The Senate joint resolution approving the federal ERA passed the Senate on March 31, 1972, and the House on April 7, 1972. Senate Journal at 1857; 1972 House Journal at 2563-64. The House joint resolution approving the federal ERA passed the House on March 24, 1972, and the Senate on April 1, 1972. 1972 House Journal at 1499; 1972 Senate Journal at 1900-01. (E. 511, 509-511.).

[14] *See* Barbara Gold, "When women are 'equal,' what then?" *Baltimore Sun* (Oct. 15, 1972) at C1. (App. 23-24.) The article was prescient in anticipating that the Maryland ERA would be interpreted in accordance with principles articulated in Professor Thomas Emerson's landmark 1971 Yale Law Journal analysis of the federal ERA, Brown, Emerson, Falk & Freeman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 Yale L.J. 871 (1971). The Emerson article also listed the kinds of statutory changes that would result from ratification of the federal ERA. Absent from that list were statutes limiting marriage to opposite sex couples. In fact, Emerson had "expressed his belief that the Equal Rights Amendment was not intended to force the states to grant marriage licenses to homosexual couples and would not be so construed by the courts." Note, *The Legality of Homosexual Marriage*, 82 Yale L.J. 573, 584 n.50 (1973).

§ 2-201).[15] This legislation confirmed the same conclusion reached in a 1972 opinion of the Attorney General. *See* 57 *Opinions of the Attorney General* 71 (1972). (E. 437-439.) As noted in a 1975 House Judiciary Committee report to the Legislative Council, even before the passage of the 1973 statute, "there existed a wealth of statutory and case law from Maryland and other jurisdictions" denying recognition of same-sex marriage and thus, the statute "merely codified the law which has long recognized that the parties to a valid marriage must be of the opposite sex." *See* Legislative Council, *Report to the General Assembly of 1975* at 457-58. (E. 507-508.) Evidently, those legislators who approved ERAs in 1972 did not see anything inconsistent about their decision in 1973 to vote for legislation clarifying that the State recognizes only a marriage between a man and a woman.

Also in 1973, Governor Mandel created the Governor's Commission to Study the Implementation of the Equal Rights Amendment and directed it to recommend statutory changes to bring Maryland's law into compliance with the State ERA. *See Turner v. State,* 299 Md. 565, 577-78 (1984). The Commission's list of recommended changes has guided Maryland courts in determining whether existing legislative or common law rules pass muster under the ERA. *Id. See, e.g., Condore v. Prince George's County,* 289 Md. 516, 531 (1981). In its various reports, the last of which was issued in July 1978, the Commission did not recommend the repeal or revision of the statute now codified as § 2-201 of the Family Law Article, nor did the Commission ever suggest that the statute was constitutionally

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[15] It is instructive to compare the names of those sponsoring and voting for the federal and state ERAs in 1972 with those voting for the 1973 legislation on same-sex marriage. *Compare* 1972 House Journal at 1281-82, 1499, and 2563-64; and 1972 Senate Journal at 1857, 1899, and 1900-01, *with* 1973 Senate Journal at 273 and 1973 House Journal at 2743. (E. 509-519.) All of this legislation went through the same Senate committee.

suspect.[16] (E. 520-526.)

As consistently interpreted by State officials after its adoption, the ERA was understood not to sanction same-sex marriage or pose any bar to the continued application of FL § 2-201. In a March 14, 1979 letter of advice to Delegate Joan B. Pitkin, the Attorney General's Office concluded that the ERA applied only to gender discrimination and that it was not unconstitutional for the State to prohibit homosexual marriages. (E. 527-528.) In a subsequent publication prepared by the Maryland Commission for Women celebrating "The Maryland ERA -- A Ten Year History," the Commission at page 11 noted that:

> In general, the state ERA does not interfere in such areas of privacy, abortion, homosexual relationships, or family matters. . . . The state ERA is also not concerned with the relationship of two persons of the same sex. Indeed, courts in several states have held that state ERAs do not permit homosexual marriage.

(E. 535.) Taken together, this history of the adoption of Article 46, its contemporaneous construction, and its consistent application since, offers further evidence that the "framers" of the amendment did not intend that the prohibition of sex discrimination in Article 46 could somehow be violated by the State's decision not to recognize same-sex marriage.

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[16] In 1974, the Commission compiled a list of "all possible areas of the law . . . which could possibly be affected by the State ERA." *See* Final Report, Governor's Commission to Study Implementation of the Equal Rights Amendment (July 1, 1978) at p. 3. At that time, same sex marriage was listed; however, action was later "deferred," thereby eliminating the item from Commission consideration and recommendation. *Id.*

III. MARYLAND'S MARRIAGE STATUTE DOES NOT DENY EQUAL PROTECTION OR DUE PROCESS UNDER ARTICLE 24 OF THE MARYLAND DECLARATION OF RIGHTS BECAUSE THE STATUTE IMPAIRS NO FUNDAMENTAL RIGHT, AFFECTS NO SUSPECT CLASS, AND PLAINTIFFS CANNOT DEMONSTRATE THAT THE STATUTE LACKS ANY RATIONAL BASIS.

In addition to the claim of gender discrimination under Article 46 which formed the sole basis of the circuit court's decision, the complaint in this matter asserts three challenges to the marriage statute under Article 24 of the Maryland Declaration of Rights: an equal protection claim that the statute unlawfully discriminates based on sexual orientation (Count II), an equal protection claim that the statute prevents the exercise of a fundamental right (Count III), and a claim that the statute violates substantive due process by preventing the exercise of a fundamental right (Count IV). (E. 71-76.) Each of these claims must fail under proper application of Article 24 as it has been interpreted by this Court.

A. Proper Analysis Of Plaintiffs' Article 24 Claims Requires Consideration Of Maryland's History Of Opposite-Sex Marriage And Its Relation To Federal Law.

Contrary to the circuit court's opinion, which seeks to minimize the significance of the State's continuous adherence throughout its history to a marriage definition that is also codified in federal law, *see* Mem. op. at 17-19 (E. 656-58; App. 17-19), both that long tradition of common law as codified in statute and its continuing affinity with federal law are part and parcel of what Article 24 guarantees. That is, Article 24 actually serves to ensure that such longstanding and fundamental features of the law will continue to be applied fairly for the benefit of Maryland citizens, consistent with pertinent federal law.

Derived from Chapter 39 of the original Magna Carta (1215),[17] *see Piselli v. 75th Street Medical*, 371 Md. 188, 205 n.6 (2002)(Eldridge, J.), Article 24 declares

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Its object is to "secure the *pre-existing rights* of the people as those rights had been *established by usage* and the *settled course of law*." *Lanasa v. State*, 109 Md. 602, 610 (1909)(emphasis added). By guaranteeing that each person will be protected "by the Law of the land," Article 24 "acts to vindicate important personal rights protected by the Maryland Constitution or those recognized as *vital to the history and traditions of the people of this State*." *Attorney General of Maryland v. Waldron*, 289 Md. 683, 715 (1981)(emphasis added). Moreover, to determine the proper application of this guarantee, Article 46 must be construed in conjunction with all other relevant provisions of the State Constitution, *see Reed v. McKeldin*, 207 Md. 553, 561 (1955), taking into account the "temper and spirit of the people at the time" of its adoption and "the common usage well known to the people." *Boyer v. Thurston*, 247 Md. 279, 292 (1967)(citation omitted). *See also Reed v. McKeldin*, 207 Md. at 561 ("it is permissible to inquire into the prior state of the law, the previous and contemporary history of the people, the circumstances attending the adoption of the organic law, as well as broad considerations of expediency").

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[17] "XXXIX. No freeman shall be taken or [and] imprisoned or disseised or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land," as quoted in *The King (at the Prosecution of Arthur Zadig) v. Halliday*, A.C. 260, 295 (House of Lords, 1917)(quoting McKechnie, trans., *Magna Carta* (1914 ed.) at 375)(brackets in original).

Nor can "the Law of the land" be applied as required by Article 24 without due regard to federal law, which is "the supreme Law of the Land," under the United States Constitution, art. VI, cl. 2, and "the Supreme Law of the State," under Article 2 of the Maryland Declaration of Rights. "This Court has recognized for a long time that [Article 24] generally is interpreted in the same manner as the Due Process Clause of the Fourteenth Amendment" of the federal Constitution. *Kane v. Board of Appeals of Prince George's County*, 390 Md. 145, 169 (2005). "Although the Maryland Constitution contains no express equal protection clause," it is also "settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights." *Attorney General of Maryland v. Waldron*, 289 Md. at 704 (citations omitted). The equal protection guarantee implicit in Article 24 "has been interpreted to apply 'in like manner and to the same extent as the Fourteenth Amendment of the Federal Constitution,'" so that "'decisions of the Supreme Court on the Fourteenth Amendment are practically direct authorities.'" *Id.*, 289 Md. at 704-05 (citations omitted).

While Maryland has a compelling interest in maintaining its longstanding definition of marriage, consistent with federal law and the laws of all but one other State (E. 551-553, 618), under each of the Article 24 theories posited by plaintiffs, Maryland's marriage statute ultimately must be upheld if there is any rational basis to support it, as there most certainly is. Where, as in this case, an equal protection challenge under Article 24 does not involve a fundamental right or a suspect class, it is "subject to a rational basis analysis." *Kane v. Board of Appeals of Prince George's County*, 390 Md. at 172. Because the "'companion contentions of equal protection and [substantive] due process mesh,'" the "standards are the

same," and "'determination of one will resolve the other.'" *Dept. of Transportation, Motor Vehicle Administration v. Armacost*, 299 Md. 392, 422 (1984)(citation omitted). *See Maryland Aggregates Ass'n v. State*, 337 Md. 658 (1995), *cert. denied*, 514 U.S. 1111 (1995)(applying rational basis analysis to reject both equal protection and substantive due process challenges to statute under Article 24).

Here, as federal courts and other state appellate courts have unanimously concluded,[18] rational basis review applies because the marriage statute does not implicate a suspect class and there is no fundamental right to have the State give its official sanction to same-sex marriage. Since the rational basis for Maryland's marriage statute has been affirmed and reaffirmed repeatedly by reasoning minds in the Maryland General Assembly, the United States Congress, federal courts, and state appellate courts throughout the Nation, this Court should uphold the statute as constitutional.

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[18] *See Standhardt v. Superior Ct. of Arizona*, 77 P.3d 451, 462-64 (Ariz. App. 2003); *Adams v. Howerton*, 673 F.2d 1036 (9th Cir., Cal. 1982); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *see id.*, 653 A.2d at 363-64 (Steadman, J., concurring); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *Morrison v. Sadler*, 821 N.E.2d 15, 24-30 (Ind. App. 2005); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1971); *Citizens for Equal Protection, Inc. v. Bruning*, 455 F.3d 859 (8th Cir. Neb. 2006); *Lewis v. Harris*, 875 A.2d 259 (N.J.Super.A.D. 2005), *appeal pending*; *Hernandez v. Robles*, __ N.E.2d __, 2006 WL 1835429, 2006 N.Y. Slip Op. 05239 (N.Y. Jul. 6, 2006); *Seymour v. Holcomb*, 790 N.Y.S.2d 858, 863 (Sup. Ct. 2005); *In the Matter of Cooper*, 592 N.Y.S.2d 797, 800 (N.Y. App.1993); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. 1974).

B. Marriage Has Been A Civil Contract Between A Man And A Woman Throughout Maryland History As Reflected In The State Constitution And Laws.

No part of the "Law of the land" is more firmly "established by usage and the settled course of law," *Lanasa v. State*, 109 Md. at 610, or more "vital to the history and traditions of the people of this State," *Attorney General of Maryland v. Waldron*, 289 Md. at 715, than the understanding that a lawful marriage unites a man and a woman. Maryland's marriage statute, FL § 2-201, providing that "[o]nly a marriage between a man and a woman is valid in this State," embodies public policy that is deeply rooted in the tradition of the State, not only in its common law and statutes, but in its Constitution. The enactment of the statute in 1973 merely confirmed the definition that had governed marriage law in Maryland since its founding. If the enactment represented any innovation, it was perhaps the idea that there might be a need for the General Assembly to spell out in a statute what had been universally understood throughout history, not only in Maryland but practically everywhere.

In the proceedings below, plaintiffs offered their own version of history, one that emphasized what they portrayed as the ameliorative evolution of marriage laws over time. (E. 116-122.) Though undoubtedly there have been numerous changes in the laws pertaining to marriage through the ages, the one characteristic that is most pertinent to this case has remained constant and unchanged: throughout its history Maryland has regulated marriage as a civil contract between a man and a woman. The very persistence of this regulatory regime underscores the importance of that contract, both to the State and to the people of Maryland. It is said to be "the most important contract into which individuals can enter, as the parent not the child of civil society." *Fornshill v. Murray*, 1 Bland 479, 481 (1828).

Moreover, "it is a contract in which society is a party" and "has a deep interest." *Campbell's Case*, 2 Bland 209, 235 (1830).[19] This history of marriage as public contract, and the State's abiding interest in its regulation, must inform any consideration of plaintiffs' Article 24 challenge.

Marriage was a part of the law of England brought to Maryland by the colonists. *Marburg v. Cole*, 49 Md. 402 (1878); Fader, *Maryland Family Law* § 2.1 (2000). To the extent not superseded by statute, that legacy of English law remains applicable. *Marburg v. Cole*, 49 Md. at 411. However, from its very founding, the legislature of Maryland has continuously exercised its authority to enact laws regulating marriage. *See Harrison v. State*, 22 Md. 468, 493 (1864); Cinlar, Nuran, *Marriage in the Colonial Chesapeake, 1607-1770: A Study in Cultural Adaptation and Reformulation* (August 2000) ("Cinlar").

As early as 1638, a bill was introduced to create the county courts and to give them jurisdiction over

> "all causes matrimonial" including the trial of covenants and contracts and the punishment of faults committed against the same, and the punishment of clandestine marriage, that is, marriage entered into without the required publication of banns.

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[19] That the State's interest in marriage reflects, at least in part, its interest in the propagation and raising of children, has also been long recognized. The introductory clauses of Chapter 5 of 1756, which imposed a tax on bachelors, state that as "the entering into the holy Estate of Matrimony may tend to the more orderly Propagation of Mankind, it ought, not only in a religious, but political View, to be promoted, and the continuing in a State of Celibacy discountenanced."

Assembly Proceedings, February – March 1638/9, Archives Volume I at page 47.[20] In 1640, the General Assembly enacted a law providing that no marriage could be solemnized without publication of banns. Chapter 7 of 1640.[21] Registration of births, marriages and burials was required by Chapter 16 of 1654. Archives Volume I, page 345. Punishment of adultery and fornication was imposed by Chapter 1 of 1650. Archives Volume I, page 286. Other enactments addressed the capacity of the parties to marry (Chapter 1 of 1702; Chapter 12 of 1777), the terms of the relationship (Chapter 16 of 1642; Chapter 335 of 1853; Chapter 9 of 1862), and its dissolution (Chapter 12 of 1777; Chapter 262 of 1841). Each of these statutes has been amended and added to over time.

The period after independence and statehood witnessed the continued control of the General Assembly over the relationship of marriage and the clear assumption on its part that marriage involved a man and a woman. In fact, one of the first acts of the State's new General Assembly was to pass legislation "concerning marriages." Among its other provisions, Chapter 12 of 1777 set out marriages prohibited as incestuous, required that marriages be performed by ministers, required a license and publication, prohibited going out of the State to marry a person from this State, required recordation of marriages and of places

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[20] The Archives Volumes are available online at http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/html/index.html. Where historic documents from this source are quoted in this brief, spelling has been modernized. The earliest available records of the General Assembly begin in 1637.

[21] Another bill introduced in 1638 provided encouragement of marriage, and enforcement for its provisions, by providing for the punishment of adultery and fornication, with adultery punished "with a more painful whipping or grievous fine." Archives Volume I, pages 52-53. These bills were introduced in the 1638 session, read twice and engrossed, but never passed, though the records reflect the publication of banns in late 1638. *See* Judiciary and Testamentary Business of the Provincial Court Archives Volume IV, pages 50 and 51.

where marriages were performed, and set the age to marry at 16 for a female and 21 for a male. The list of relationships for which marriage was prohibited is instructive, as in each case what is barred is a marriage between a man and a list of his female relatives, and between a woman and a list of her male relatives. That same pattern is retained in the current statute pertaining to marriage and prohibited degrees of kinship. *Compare* FL § 2-202(c)(1) *with* FL § 2-202(c)(2).

The one factor that has remained constant, in all legislative enactments, is that throughout its history in Maryland, marriage has always been the union of one man and one woman, in an exclusive sexual union, with certain fiscal responsibilities between the parties themselves and the parties and their offspring. This unaltered factor reflects the underlying purposes of State involvement in the marriage relationship: to encourage men and women who are engaging in sexual relations to do so within a relationship that will provide for the needs of the resulting children, and to create clear lineages for the purpose of succession. Cinlar at 97. Thus, Chapter 25 of 1666, Archives Volume II, page 148, which sets out the form to be used in marriages in the colony, provides that the *man* will take the *woman* by the right hand and say certain words, after which the *woman* is to take the *man* by the right hand and say her portion. *See also* Chapter 6 of 1676, Archives Volume II, page 522. Chapter 14 of 1692 required the use of the liturgy of the Church of England, with the addition of the pronouncement: "I hereunto by Law Authorized do Pronounce you Lawful man & wife." Archives Volume XIII, pages 450-451. As discussed below, statutory enactments up to and including the present day have reflected the understanding that marriage is the union of one man and one woman.

This unvarying continuity from earliest times distinguishes this requirement from the less enduring restrictions plaintiffs emphasized below in an attempt to suggest that all aspects of marriage have been subject to change. It is worth noting, however, that the actual history of some of those former features of marriage law did not necessarily follow the oversimplified course described by plaintiffs, and none of the changes contemplated a union other than between a man and a woman. For example, while miscegenation was subject to a variety of sanctions over the years, throughout much of Maryland's history, miscegenous marriages were not void, and in fact, were not declared void in Maryland until 1884. *See* 1884 Md. Laws, Ch. 264. Contrary to plaintiffs' implication that divorce was formerly all but unavailable, Pollock and Maitland suggest that marriages could be dissolved in pre-Christian times and under the early common law, meaning that they were not always indissoluble. Pollock and Maitland, *The History of English Law*, 393-93 (Cambridge University Press 1968). In Maryland, the General Assembly granted separations as early as 1656, *Judicial and Testamentary Business of the Provincial Court, 1649/50-1657*, Archives Volume X, p. 471, and began to grant divorces, initially termed "annulments," not long after independence, in 1790, *see* Chapter 25 of 1790, *Laws of Maryland 1785-1791,* Archives Volume CCIV p. 480. Nor was religious solemnization consistently required historically, as plaintiffs suggest. The requirement of religious solemnization was not historically a part of the law of England, Pollock and Maitland at 369-70, and has not been consistently required in Maryland. Early colonial statutes permitted couples to be married by a justice of the peace, *see e.g.,* Chapter 7 of 1658, Archives Volume XIX p. 374, and the 1864 Constitution made specific provision for marriage by a judge, a clerk of court, or a mayor. Article III § 49, Constitution of 1864. Although, as

plaintiffs note, the law of marriage has always been significantly related to issues of property rights, those rights have been evolving and changing throughout history, while the nature of marriage as a contract between a man and a woman has remained constant and vital to the State's interest in regulating marriage.

This same understanding of marriage as essentially a civil contract between a man and a woman is also reflected in the proceedings of the State's constitutional conventions and in the sessions surrounding those conventions. The 1851 Constitution barred legislative grants of divorce and required the General Assembly to pass laws protecting the property of a wife from the debts of the husband.[22] The language of this section referring to husband and wife indicates the view of the convention that these were the parties to marriages, a conclusion based on the established practice.[23] Moreover, by calling for legislative action rather than simply making the proposed provision part of the Constitution, the framers signaled their understanding that the legislature continued to be the appropriate forum for the regulation of marriage.

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[22] To this day, Article III, § 43 states that "the property of the wife shall be protected from the debts of her husband." For nearly 120 years the Constitution maintained an express reference to existing marriage laws, under which same sex marriage was not valid. Article IV, § 38 provided that "[t]he Clerk of the Court of Common Pleas [in Baltimore City] shall have authority to issue within said city, all marriage and other licenses required by law, *subject to such provisions as are now and may be prescribed by Law*." *See Constitutional Revision Study Documents*, 1968, at pp. 940-41 (emphasis added).

[23] Until 1851, the legislature had the authority to grant divorces. All 28 divorces granted in the session preceding the 1850 convention were to couples consisting of one man and one woman. *See* 1849 Md. Laws, Chapters 64, 138, 164, 188, 191, 206, 256, 291, 292, 308, 327, 344, 345, 428, 440, 443, 444, 447, 448, 450, 459, 481, 503, 519, 520, 547, 558, 560.

The 1864 Constitution also made clear that the regulation of marriage rested with the legislature,[24] by specifying that:

> The General Assembly shall provide by law for the registration of births, marriages and deaths, and shall pass laws providing for the celebration of marriage between any persons legally competent to contract marriage, and shall provide that any persons prevented by conscientious scruples from being married by any of the existing provisions of law, may be married by any Judge or Clerk of any Court of record, or any Mayor of any incorporated city in this State.

Article III, § 49, Constitution of 1864. Moreover, the debates on this provision reflect the framers' view that marriage was limited to the relationship between a man and a woman. Delegate Peter stated:

> I believe that every man and every woman is entitled to be married in that manner which they may select . . . I conceive that it would constitute a valid marriage if two persons were to rise in this house and declare that they were man and wife, and intended to live as man and wife.

Debates of the Constitutional Convention of 1864, Archives Volume CII (102), page 982. And Delegate Bell stated that:

> there can be no doubt that the law in this State is that the consent of the parties, acknowledgment of children, and the fact of living together as man and wife, are received in the courts of justice as evidence of marriage; nay, as marriage itself.

Archives Volume CII (102), page 988.

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[24] The debates also support this conclusion. Delegate Stirling stated:

> The institution of marriage is a social institution on which rests the whole fundamental structure of society. It is a matter within the absolute discretion of the State. The State has a right to say that nobody shall get married. The State has a right to abolish marriage. It has a right to provide regulations under which it shall be taxed. It is simply a question of State policy.

Debates of the Constitutional Convention of 1864, Archives Volume CII (102), page 984.

Particularly when viewed as part of this historical continuum, it is evident that more recent enactments of the legislature regarding marriage are based on principles firmly grounded in this same collective understanding and that they conform to constitutional requirements. The legislature has continued to treat marriage solely as a relationship between a man and a woman and has taken affirmative steps to protect that foundation of the institution. In 1973, the General Assembly acted promptly following the issuance of an Opinion of the Attorney General advising that, under then existing Maryland law, the clerks of court should refuse to issue marriage licenses to persons of the same sex. 57 *Opinions of the Attorney General* 71 (1972). The General Assembly enacted Chapter 213 of 1973, which states that "Only a marriage between a man and a woman is valid in this State." *See Jennings v. Jennings*, 20 Md. App. 369, 374 n.7 (1974). After adoption of this provision, codified now as FL § 2-201, the House Judiciary Committee considered and rejected a petition that it be repealed. The Committee noted that the provision had passed the General Assembly "overwhelmingly," and further concluded that it reflected the current state of the law, with the result that its repeal would not affect the law or permit same-sex marriage. *House Judiciary Committee Report to the General Assembly of 1975*, p. 457. (E. 507-08.)

In 1978, the General Assembly enacted Chapter 794, which completely revised the law respecting property disposition in divorce and annulment. As introduced, the preamble to the law would have provided that it is "the policy of the State that marriage is a union of two individuals having equal rights under the law." The measure was amended, however, to provide that it is "the policy of this State that marriage is a union between a *man* and a *woman* having equal rights under the law." 1978 Md. Laws, Ch. 794 (emphasis added). This

language has been cited by this Court on numerous occasions. See *Niroo v. Niroo*, 313 Md. 226, 237 (1988); *Lookingbill v. Lookingbill*, 301 Md. 283, 286 (1984); *Bledsoe v. Bledsoe*, 294 Md. 183, 185 (1982); *Harper v. Harper*, 294 Md. 54, 63 (1982); *Deering v. Deering*, 292 Md. 115, 122 (1981); *Pitsenberger v. Pitsenberger*, 287 Md. 20, 24 (1980), *appeal dismissed*, 449 U.S. 807 (1980).

In recent years, even as the Legislature has acted to address discrimination on the basis of sexual orientation, it has insisted upon preserving the historic meaning of marriage. Thus, a provision of the Antidiscrimination Act of 2001, which prohibits discrimination on the basis of sexual orientation in public accommodations, employment and housing, specifies that it "may not be construed to authorize or validate a marriage between two individuals of the same sex." 2001 Md. Laws, Ch. 340, § 2. Similarly, in the 2005 legislative session, Senate Bill 796, which passed the General Assembly but was vetoed by the Governor, would have provided that "this Act may not be construed in any way that conflicts with the public policy of the State that recognizes a valid marriage to be only a marriage between a man and a woman." Section 3 of Senate Bill 796 of 2005. The bill also stated that the "establishment of a life partnership registry in this State may not be construed to recognize, condone or prohibit a domestic partnership, civil union, or marriage between two individuals of the same sex entered into in another state or jurisdiction." Senate Bill 796 of 2005, page 20, line 31 through page 21, line 2. (E. 465-66.)

As recently as 2002, this Court confirmed its own understanding that Maryland law does not recognize unions of homosexuals or lesbians as "bestowing upon two people a legally cognizable marital status." *Tyma v. Montgomery County*, 369 Md. 497, 508

(2002)(quoting *Maryland Comm'n on Human Relations v. Greenbelt Homes, Inc.*, 300 Md. 75, 83-84 (1984)). In neither *Tyma* nor *Greenbelt Homes* did this Court or any of its members suggest even the possibility that this venerable feature of marriage in Maryland might violate any provision of the Constitution. In this case, as well, that well-established understanding of the "Law of the land" counsels rejection of plaintiffs' Article 24 claims.

C. Strict Scrutiny Is Not Warranted Because Sexual Orientation Is Not A Suspect Classification.

There is no valid support for plaintiffs' argument that sexual orientation is a suspect classification warranting strict scrutiny. As plaintiffs acknowledged below, the Supreme Court has never recognized such a suspect classification, *see* Plfs. Memorandum at 58 n.15 (E. 154), lower federal courts have expressly rejected attempts to assert such a suspect classification, *id.* (E. 154), and plaintiffs are unable to cite a single Maryland case recognizing sexual orientation as a suspect classification, *id.* at 50-60 (E. 146-56).

On the contrary, it has been expressly held that a classification based on sexual orientation is subject to rational basis review because those who may have a particular sexual orientation do not constitute a suspect class. *See Veney v. Wyche*, 293 F.3d 726, 732, 732 n.4 (4th Cir. 2002)(citing the Supreme Court's application of rational basis review in *Romer v. Evans*, 517 U.S. 620, 631-32 (1996)); *Thomasson v. Percy*, 80 F.3d 915, 928 (4th Cir. 1996), *cert. denied*, 519 U.S. 948 (1996). *Accord Lofton v. Secretary of the Dept. of Children & Family Services*, 358 F.3d 804, 818, 818 n.6 (11th Cir. 2004)("all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class"); *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998) (federal appellate courts "have not recognized homosexuals as a suspect class and have applied a rational basis test").

Out of all the same-sex marriage challenges brought to date, no currently valid appellate decision of any state court has accepted the argument that a sexual orientation classification requires strict scrutiny. Indeed, plaintiffs' proposal that sexual orientation be treated as a suspect classification is unsupported by any decision issued by the highest court of any other state in any type of case. Moreover, no such suspect class should be established for the first time in this case, since "the Supreme Court has made clear that 'respect for separation of powers' should make courts reluctant to establish new suspect classes." *Thomasson*, 80 F.3d at 928 (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976)). Accordingly, even in the only state where same-sex marriage is currently recognized by virtue of an appellate court ruling, the Massachusetts high court declined to consider plaintiffs' contention that sexual orientation is a suspect classification. *See Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 961 (Mass. 2003).

Faced with this unanimous agreement that sexual orientation is not a suspect classification, plaintiffs attempted below to cast doubt on pertinent federal decisions by suggesting those courts relied on authority that predated the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003)(invalidating sodomy statute). In decisions rendered since *Lawrence*, however, federal courts have reaffirmed that sexual orientation is not a suspect classification, *see Lofton v. Secretary of the Dept. of Children & Family Services*, 358 F.3d 804, 818 (11th Cir. 2004), and have specifically rejected arguments that a classification based on sexual orientation justifies strict scrutiny in same-sex marriage litigation. *See Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *In re Kandu*, 315

B.R. at 143 ("'homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny'" and "[t]he Supreme Court's decision in *Lawrence* does not eviscerate this holding")(citing *High Tech Gays v. Defense Indus. Security Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) and *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003)); *Wilson v. Ake*, 354 F. Supp.2d at 1307-08. The high courts of other States have also rejected arguments similar to those raised by plaintiffs here. *See Andersen v. King County*, 138 P.3d at 990 ¶ 110 (rejecting plaintiffs' arguments based on *Lawrence*); *Hernandez v. Robles*, __ N.E.2d __, 2006 WL 1835429 at pages 8-9, 1006 N.Y. Slip op. 05239 (same).

Thus, there is no precedent or even persuasive authority to support plaintiffs' insistence upon the creation of a new suspect classification for sexual orientation. As demonstrated by *Attorney General of Maryland v. Waldron*, 289 Md. 683, 705-06 (1981), when addressing claims that strict or heightened scrutiny may be required by a purported suspect classification, Maryland appellate courts do not write on a blank slate. Instead, this Court will look primarily to Supreme Court decisions to determine which classifications have been "[p]laced in the suspect category by the Supreme Court thus far. . . ." *Id.*, 289 Md. at 706 (citing Supreme Court decisions recognizing suspect classifications based on race, national origin and ancestry). Where, as in this case, there is no Supreme Court decision recognizing a purported suspect classification and no prior Maryland decision supporting the proposition, this Court need be "only briefly detained" by the inquiry and will conclude, as it did in *Waldron*, that the challenged law is not one that "classifies along lines determined to be 'suspect.'" *Id.*, 289 Md. at 716-17. *See also In the Matter of Trader*, 272 Md. 364, 397 (1974)(rejecting argument that juveniles challenging decision to try them as adults in criminal proceedings could "fall

within such a suspect class") (relying upon Supreme Court decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)). Therefore, as the Court concluded in *Waldron*, this Court should reject the asserted suspect classification and, instead, should apply rational basis review.

D. Strict Scrutiny Is Not Warranted Because There Is No Fundamental Right To Same-sex Marriage.

Similarly, the Court should also reject plaintiffs' demand for strict scrutiny based on a purported fundamental right, because no appellate court of the United States, Maryland or any other state has ever recognized a fundamental right that would require the State to abrogate its long-established definition of marriage and give its official sanction to marriage between members of the same sex. Instead, while case law does recognize a fundamental right to marriage as traditionally defined to involve a man and a woman, *see Samuels v. Tschechtelin*, 135 Md. App. 483, 537 (2000) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)) (listing recognized fundamental rights), "[c]ourts in other jurisdictions recently faced with the issue have concluded that there is no tradition of same-sex marriage and no fundamental right to marriage that includes same-sex marriage," *Andersen v. King County*, 138 P.3d at 978. *Accord Hernandez v. Robles*, __ N.E.2d __, 2006 WL 1835429, at *8-*9; *Standhardt v. Superior Court*, 77 P.3d 451, 459 (Ariz. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307, 331 (D.C. 1995). Even in Massachusetts, the highest court of that State did not find that there is a fundamental right to same-sex marriage, but instead purported to rest its decision upon rational basis analysis. *See Goodridge*, 798 N.E.2d at 961. Therefore, this Court should also conclude that plaintiffs' challenge implicates no fundamental right.

Just as Maryland courts look to Supreme Court precedent in determining whether a classification has been recognized as suspect, *Waldron*, 289 Md. at 706, Maryland courts also rely upon Supreme Court jurisprudence to determine whether an asserted interest has been recognized as a fundamental right, *see, e.g., Samuels v. Tschechtelin*, 135 Md. App. at 537. Supreme Court case law does not address, much less recognize, any right to require the government to "give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). *See id.*, 539 U.S. at 585 (O'Connor, J., concurring) (acknowledging a "legitimate state interest" in "preserving the traditional institution of marriage"). In the absence of such precedent from the Supreme Court, or any supportive decision issued by a Maryland appellate court or the highest court of a fellow state, plaintiffs' claim of a fundamental right must be rejected.

Especially "where social or economic legislation is involved, as here, courts have generally avoided labeling a right as fundamental so as to avoid activating the exacting strict scrutiny standard of review." *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 650 (1983)(holding education is not a fundamental right). Analysis of a new claim of a fundamental right "must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint" requires the Court "to exercise the utmost care" whenever it is asked "to break new ground in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993)(alterations in original)(citation omitted). "[W]hether a claimed right is fundamental does not turn" upon its "relative desirability or importance," even if some may consider the asserted interest to be "vital." *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. at 649. Instead, an asserted interest must not be treated as a fundamental right unless it is "objectively, 'deeply rooted in this Nation's history and tradition,'" and "'implicit in the concept of ordered

liberty,' such that 'neither liberty nor justice would exist if [the right] were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. at 720-21 (citations omitted).

Plaintiffs attempt to escape the dictates of precedent by arguing that they are merely seeking to prevent the State from burdening the fundamental right to marry, which has long been recognized. By characterizing their claim that broadly, however, plaintiffs obscure the nature of the unprecedented right they are actually asserting and thereby fail to satisfy the requirement that fundamental rights analysis "must begin with a careful description of the asserted right. . . ." *Reno v. Flores*, 507 U.S. at 302. *See Suessmann v. Lamone*, 383 Md. 697, 731 (2004) (plaintiffs' claim that challenged law burdened the fundamental right to vote was deemed "not, precisely speaking, an accurate formulation" of plaintiffs' "asserted right," which this Court reformulated and rejected as a purported "right to vote in the primary elections of a party to which they do not belong").

Once the purported right is properly identified, *i.e.* the right to insist that the State issue marriage licenses to same-sex couples, it becomes clear that no such fundamental right exists. As federal courts and state appellate courts have concluded in rejecting a fundamental right to same-sex marriage, the fundamental right to marry that has been recognized protects only the ability "to marry and raise [a] child in a traditional family setting," *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978), and "it would be incorrect to suggest that the Supreme Court, in its long line of cases on the subject, conferred the fundamental right to marry on anything other than a traditional, opposite-sex relationship." *In re Kandu*, 315 B.R. at 140. *Accord Andersen v. King County*, 138 P.3d at 978, ¶¶ 46, 48.

Though plaintiffs cite a litany of decisions that invalidated laws or government action found to have burdened the fundamental right to marry, *see* Plfs. Memorandum at 38-39

(citing *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374; *Loving v. Virginia*, 388 U.S. 1) (E. 134-35), in each of those cases the relief afforded merely granted or enforced the right to participate in marriage as it has been historically understood to include a man and a woman. In those cases, no one sought to abrogate the longstanding legal definition of marriage and replace it with a different meaning, as plaintiffs seek to do here.

The interest asserted by plaintiffs cannot possibly satisfy the criteria for recognizing a fundamental right, not merely because there is no tradition of same-sex marriage upon which to draw, but because plaintiffs' arguments either eschew or obscure the "history, legal traditions, and practices" that "provide the crucial 'guideposts for responsible decisionmaking'" when there is an assertion of a fundamental right. *Washington v. Glucksberg*, 521 U.S. at 721 (citations omitted). In fact, the very essence of plaintiffs' challenge is an attempt to invalidate the undisputed historical understanding of marriage that has been the law of Maryland throughout the State's existence and still represents the Legislature's determination of the policy that best reflects and promotes societal values. Here, as the Supreme Court observed in *Washington v. Glucksberg*, to hold for plaintiffs, the Court "would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State." *Id.*, 521 U.S. at 723 (citations omitted). "The mere novelty of such a claim is reason enough to doubt" its validity. *Id.* (quoting *Reno v. Flores*, 507 U.S. at 303).

Finally, plaintiffs also cited below numerous statutory changes and court decisions related to marriage to advance the argument that marriage is not static, suggesting that removing the requirement of opposite sex is but the next natural step on a continuum. However, merely identifying such "enunciated policies and promulgated laws" does not

"somehow transform a previously non-fundamental 'desire'" to receive a marriage license "into a fundamental right. . . ." *Suessmann v. Lamone*, 383 Md. at 732. As the Washington Supreme Court recently concluded in rejecting any fundamental right to same-sex marriage, "although marriage has evolved, it has not included a history and tradition of same-sex marriage in this nation. . . ." *Andersen v. King County*, 138 P.3d at 979 ¶ 53.

Unlike the court decisions and statutory changes plaintiffs invoke, the relief sought in this case would not be a mere application or incremental extension of the right to marry, but would instead alter the very essence of marriage, as it has always existed in Maryland as a publicly sanctioned union between a man and a woman. Plaintiffs have no right, fundamental or otherwise, to insist upon such a radical departure from the law of Maryland.

Therefore, because there is no suspect classification nor any pertinent fundamental right, the appropriate standard of scrutiny is the rational basis test.

E. The State Has a Compelling Interest That Would Withstand Strict Scrutiny Even If The Court Could Appropriately Apply That Test to Maryland's Marriage Law.

Although in this case the State is under no duty to satisfy the "compelling interest" and "narrowly tailored" showings required by strict scrutiny, the State does have a recognized "compelling interest in fostering the traditional institution of marriage (whether based on self-preservation, procreation, or in nurturing and keeping alive the concept of marriage and family as a basic fabric of our society), as old and as established as our entire civilization, which institution is deeply rooted and long established in firm and rich societal values." *In the Matter of Estate of Cooper*, 564 N.Y.S.2d 684, 688 (Sup. Ct. 1990), *aff'd*, *In the Matter of Cooper*, 592 N.Y.S.2d 797 (Sup. Ct. App. Div. 1993), *appeal dismissed*, 604 N.Y.S.2d 558 (1993)(parentheses in original). In Maryland, marriage is a compelling concern of the State

because "the public has a direct interest" in marriage "as an institution of transcendent importance to social welfare," *Picarella v. Picarella*, 20 Md. App. 499, 504 (1974), and, therefore, "[s]ociety has a deeply-rooted interest" in maintaining the traditional "institution of marriage." *Harris v. State*, 37 Md. App. 180, 183 (1977)(citation omitted). An "injury to the marriage institution" necessarily "interfere[s] with the general welfare." *Miller v. Ratner*, 114 Md. App. 18, 28 n.2 (1997)(citation omitted). The State's law promoting its interest in the historic family unit as a mechanism for protecting the progeny of biological unions could not be more narrowly tailored than it is, as discussed below.

The relief sought by plaintiffs would undoubtedly produce cultural change of significant magnitude. Reasonable minds may debate the wisdom or extent of such change, but none would dispute its "dramatic impact," as the circuit court characterized the effect of its ruling. Mem. op. at 19. (E. 658; App. 19.) Plaintiffs themselves acknowledge the multitude of public policies and programs that would be affected by a decision in their favor. *See* Plfs. Memorandum, Appendix (enumerating 399 statutory provisions and denominating it a "partial list" of rights and responsibilities relating to marriage). (E. 176-201.)

The State has a compelling interest in ensuring that social and economic change of this type is accomplished through a robust public debate, through the legislative process, in which the People's elected representatives may fully consider the complex ramifications and nuances of a dramatic shift in public policy. Contrary to plaintiffs' rhetoric below (E. 166-167), the State neither asserts that the "judicial branch has no role in ensuring equality and liberty for disfavored classes" (E. 167) nor suggests that those goals may be "only achieved through the majoritarian process" (E. 167). Instead, the State merely recognizes the constitutional imperative that "[a]ny societal judgment to level the playing field must appreciate the proper

divide between judicial and legislative activity." *Lewis v. Harris*, 875 A.2d 259, 278 (N.J. Super. App. Div. 2005)(Parrillo, J., concurring). This imperative is embodied in Article 8 of the Declaration of Rights, which does not permit a court to void legislation merely upon the ground that it is deemed to be not "in the best interest of the public." *Sugarloaf Citizens Assoc. v. Gudis*, 319 Md. 558, 572 (1990). As this Court has recognized, "that sort of unguided discretion, involving as it does, questions of policy and expediency, is legislative, not judicial, discretion." *Id.*

F. Plaintiffs Cannot Satisfy Their Burden Of Showing The Marriage Statute Lacks Any Rational Basis.

Under the rational basis standard, Maryland's marriage statute must be upheld as constitutional because plaintiffs cannot show, as they must, that there could be no reasonable basis for the General Assembly's decision to codify the historic and still widely accepted definition of marriage as a union of a man and a woman. Though courts have acknowledged multiple bases for upholding the rationality of opposite-sex marriage laws, the New York Court of Appeals perhaps best expressed the ultimate reason why such laws must be deemed rational:

> The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. *A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted.* We do not so conclude.

Hernandez v. Robles, __N.E.2d __, 2006 WL 1835429 at page 8, 2006 Slip. op. 05239 (emphasis added).

1. Rational Basis Review Requires Deference To Legislative Choices And Respect For The Democratic Process.

Rational basis review "is a paradigm of judicial restraint," which does not permit courts "to judge the wisdom, fairness, or logic of legislative choices." *Maryland Aggregates Ass'n, Inc. v. State,* 337 Md. at 673 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). Under this standard, "a legislative choice is not subject to courtroom fact-finding," *FCC v. Beach*, 508 U.S. at 315, and courts must not "substitute their evaluation of legislative facts for that of the legislature." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981). A statute reviewed for rational basis "enjoys a strong presumption of constitutionality, and a reasonable doubt as to its constitutionality is sufficient to sustain it." *Murphy v. Edwards,* 325 Md. 342, 368 (1992)(citation omitted). This strong presumption requires that "a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632 (1996). The statute "can be invalidated only if the classification is without any reasonable basis and is purely arbitrary," *Whiting-Turner Contract. Co. v. Coupard*, 304 Md. 340, 352 (1985); that is, a statute "fails rational-basis review only when it 'rests on grounds wholly irrelevant to the achievement of the State's objective.'" *Heller v. Doe*, 509 U.S. 312, 324 (1993) (citation omitted).

To uphold the statute, "[i]t is not necessary to identify the reasons that actually prompted the General Assembly to legislate as it did." *Maryland Aggregates Ass'n v. State*, 337 Md. at 675. The State "has no obligation to produce evidence to sustain the rationality of a statutory classification," which "may be based on rational speculation unsupported by evidence or empirical data." *Heller v. Doe*, 509 U.S. at 320 (citation omitted). "If any state of facts reasonably can be conceived that would sustain the classification, the existence of that state of facts at the time the law was enacted must be assumed." *Whiting-Turner Contract. Co. v. Coupard*, 304 Md. at 352.

On the other hand, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. at 320 (citation omitted). Thus, the State is "not required to convince the courts of the correctness" of "legislative judgments"; rather, "'those challenging the legislative judgment must convince the court that the legislative facts'" on which the legislation may be based "could not reasonably be conceived to be true by the governmental decisionmaker.'" *Minnesota v. Clover Leaf Creamery*, 449 U.S. at 464 (citation omitted). If a legislative determination is "'at least debatable,'" then a court errs "in substituting its judgment for that of the legislature." *Id.*, 449 U.S. at 469 (citation omitted).

When, as in this case, "social or economic legislation is at issue," the Constitution allows the State "wide latitude." *Piscatelli v. Board of Liquor License Comm'rs*, 378 Md. 623, 643 (2003) (quoting *Maryland Aggregates Ass'n v. State*, 337 Md. at 672; *Cleburne v.*

Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985)). Accordingly, the State does not violate the equal protection guarantee "merely because the classifications made by its laws are imperfect," and "it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Piscatelli*, 378 Md. at 644-45 (citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989)). Often the Legislature must confront "intractable economic, social and even philosophical problems," and "[c]onflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure," but under rational basis review, resolution of such difficult issues is "not the business of the Court." *Callahan v. Dept. of Health and Human Hygiene*, 69 Md. App. 316, 325 (1986), *cert. denied*, 308 Md. 382 (1987)(rejecting equal protection challenge to State benefits eligibility regulation) (quoting *Dandridge v. Williams*, 397 U.S. 471, 487 (1970)).

"Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *FCC v. Beach*, 508 U.S. at 315 (citations omitted). As this Court has further explained, "judicial review of legislative decision making must be narrowly circumscribed" under rational basis review "'[e]ven where the social undesirability of a law may be convincingly urged,'" because "'invalidation of the law by a court debilitates popular government.'" *Maryland Aggregates Ass'n, Inc. v. State*, 337 Md. at 670 (citations omitted). Especially given that "[m]ost laws dealing with economic and social problems are matters of

trial and error," it is better that a law's "defects should be demonstrated and removed" by the Legislature "than that the law should be aborted by judicial fiat," because "[s]uch an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests – the people.'" *Id.*, 337 Md. at 670-71 (citations omitted).

Thus, under the proper standard of review required by pertinent case law, plaintiffs bear the burden of showing Maryland's statutory definition of marriage, which conforms with both federal law and the laws of all but one State, lacks "any reasonable basis and is purely arbitrary," *Whiting-Turner Contract. Co. v. Coupard*, 304 Md. at 352, in that "it 'rests on grounds wholly irrelevant to the achievement of the State's objective.'" *Heller v. Doe*, 509 U.S. at 324 (citation omitted). Since plaintiffs do not even purport to make this showing, their challenge should be rejected, and the marriage law should be upheld.

2. The Legislative Determination That Only A Marriage Between A Man And A Woman Is Valid, As Codified In Maryland's Marriage Statute, Must Be Upheld As Rational.

Applying these standards to Maryland law, including FL § 2-201, confirms that it has a rational basis and is constitutional. While there is no need to specify which particular facts motivated the General Assembly to codify the definition of marriage in this statute, *Maryland Aggregates Ass'n v. State*, 337 Md. at 675, the rationality of that determination is confirmed by the similar definition of marriage that is not only found in standard legal dictionaries,[25] but

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[25] *See* "Marriage," *Black's Law Dictionary* 972 (6th ed. 1990)("Legal union of one man and woman as husband and wife. . . . Marriage . . . is the legal status, condition or relation of one man and one woman united in law for life, or until divorced, for the discharge to each other and the community of the duties legally incumbent on those whose association

(continued...)

is also codified in the more recently enacted federal Defense of Marriage Act ("DOMA");[26] by the considerable testimony and evidence presented to Congress in support of that legislation;[27] by the decision of at least 43 other States to adopt similar legislation or constitutional provisions in recent years comparable to the federal DOMA;[28] and by the numerous court decisions that have upheld as rational the federal DOMA and similar marriage laws in other states.[29]

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[25] (...continued)
is founded on the distinction of sex.").

[26] Pub. L. No. 104-199, 110 Stat. 2419 (1996); *see* 1 U.S.C. § 7 (1997) (providing that for purposes of all federal laws "'marriage' means only a legal union between one man and one woman as husband and wife").

[27] *See, e.g.*, H.R. Rep. No. 104-664 (1996) at 1-18, *reprinted in* 1996 U.S.C.C.A.N. 2905-23.

[28] *See* statutes of various states cited *supra* in footnote 6. *See also* Gary Buseck, *Can Anyone Show Just Cause Why These Two Should Not Be Lawfully Joined Together*, 38 New Eng. L. Rev. 495, 500 & n.25 (2004)(summarizing adoption of DOMA-like provisions by various States).

[29] *See In re Kandu*, 315 B.R. 123, 145-48 (Bankr. W.D. Wash. 2004)(upholding federal DOMA as rational); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308-09 (M.D. Fla. 2005)(upholding both federal DOMA and Florida's version of DOMA as rationally related to State interests); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982)(upholding federal law limitation of spouse status to opposite sex couples as rational); *Standhardt v. Superior Ct. of Arizona*, 77 P.3d 451, 462-64 (Ariz. App. 2003)(upholding Arizona marriage statute as rational); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *see id.*, 653 A.2d at 363-64 (Steadman, J., concurring) (upholding District of Columbia marriage law as rational); *Morrison v. Sadler*, 821 N.E.2d 15, 24-30 (Ind. App. 2005)(upholding Indiana marriage statute as rational); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1971)(upholding Minnesota marriage law as rational); *Citizens for Equal Protection, Inc. v. Bruning*, 455 F.3d 859, 867-69 (8th Cir. Neb. 2006) (upholding Nebraska marriage statute as rational); *Lewis v. Harris*, 875 A.2d 259, 268-74 (N.J. Sup. Ct. A.D. 2005)(upholding New Jersey marriage law as rational); *Hernandez v. Robles*, __ N.E. 2d __,
(continued...)

The very existence of these authorities demonstrates that the General Assembly's legislative choice to retain Maryland's longstanding definition of marriage, in conformity with the commonly accepted legal definition and in keeping with federal law and the laws of fellow States, is "'at least debatable,'" *Minnesota v. Clover Leaf Creamery*, 449 U.S. at 469. Therefore, it is sufficiently rational to satisfy the equal protection and due process guarantees of Article 24.

Under the rational basis standard, Maryland law preserving the historic definition of marriage to include a man and a woman is eminently reasonable and unquestionably bears a fair and substantial relation to the State's legitimate interest in maintaining and promoting the traditional institution of marriage. *See Harris v. State*, 37 Md. App. at 183; *Picarella v. Picarella*, 20 Md. App. at 504; *In the Matter of Estate of Cooper*, 564 N.Y.S.2d at 688.

It is plaintiffs who are unable to provide any plausible rationale to explain how the other distinguishing characteristics of a lawful marriage could continue to be justified if the basic definition of marriage were altered to remove its essential male and female components. For example, "a core feature of marriage is its binary, opposite-sex nature," and "the binary idea of marriage arose precisely because there are two sexes." *Lewis v. Harris*, 875 A.2d at 277 (Parrillo, J., concurring). In Maryland, as in all other states, the binary aspect of marriage is emphasized and enforced by a bigamy statute making it a crime to "enter into a marriage

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[29] (...continued)
2006 WL 1835429, 2006 N.Y. Slip op. 05239 (N.Y. Jul. 6, 2006)(upholding New York marriage statute as rational); *Seymour v. Holcomb*, 790 N.Y.S.2d 858, 863 (Sup. Ct. 2005)(same); *Samuels v. N.Y. State Dept. Of Health*, 811 N.Y.S.2d 136, 143-45 (Sup. Ct. 2006) (same); *In the Matter of Cooper*, 592 N.Y.S.2d 797, 800 (Sup. Ct. App.1993)(same); *Andersen v. King County*, 138 P.3d 963, 982-83 (Wash. 2006) (upholding Washington state marriage law as rational); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. 1974) (same).

ceremony with another" while "lawfully married to a living person. . . ." Md. Code Ann., Crim. Law, § 10-502(b). *See State v. Green*, 99 P.3d 820, 828 n.13 (Utah 2004) ("bigamy is a crime in every state")(citations omitted).

As in *Lewis v. Harris*, plaintiffs here "have no quarrel with the legal requirement that marriage be limited to a union of two people," but they "simply have not posited an alternative theory of marriage that would include members of the same sex, but still limit the arrangement to couples, or that would otherwise justify the distinction." *Id.*, 875 A.2d at 277 (Parrillo, J., concurring). "If, however, the meaning of marriage and the right to marital status is sufficiently defined without reference to gender, then what principled objection could there be to removing its binary barrier as well?" *Id.* "If, for instance, marriage were only defined with reference to emotional or financial interdependence, couched only in terms of privacy, intimacy, and autonomy, then what non-arbitrary ground is there for denying the benefit to polygamous or endogamous unions whose members claim the arrangement is necessary for their self-fulfillment?" *Id.*

In fact, "there is arguably a stronger foundation for challenging statutes prohibiting polygamy than statutes limiting marriage to members of the opposite sex 'because, unlike gay marriage, [polygamy] has been and still is condoned by many religions and societies.'" *Id.*, 875 A.2d at 270 (Skillman, J., opinion of the court)(citation omitted)(brackets in original). "Nevertheless, courts have uniformly rejected constitutional challenges to statutes prohibiting polygamy on the grounds that polygamous marriage is offensive to our Nation's religious principles and social mores." *Id.* (citing *Reynolds v. United States*, 98 U.S. 145, 161-67 (1878); *Potter v. Murray City*, 760 F.2d 1065, 1068-71 (10th Cir. 1985), *cert. denied*, 474 U.S. 849 (1985); *State v. Green*, 99 P.3d 820 (Utah 2004)).

While plaintiffs cannot identify a non-arbitrary explanation for why marriage can be limited to couples if gender is made irrelevant, the rationality of licensing marriage between two members of the opposite sex is easily understood. The binary aspect of marriage is rational when marriage is viewed in the traditional manner as a union between two members of the opposite sex, who are potentially capable of procreation. Whereas plaintiffs argue that "state law requires neither the ability nor the desire to bring a child into one's life through 'traditional' procreation as a condition of marriage" (E. 169), that argument misses the point. "Marriage's vital purpose is not to mandate procreation but to control or ameliorate its consequences," *Lewis v. Harris*, 875 A.2d at 276 (Parrillo, J., concurring), which include the need to provide for "children who are frequently the natural result of sexual relations between a man and a woman." *Morrison v. Sadler*, 821 N.E.2d 15, 30 (Ind. App. 2005). *Accord Andersen v. King County*, 138 P.3d at 982-83 ¶¶ 66-70; *Hernandez v. Robles*, __ N.E.2d __, 2006 WL 1835429 at pages 6-7.

As state appellate courts in Arizona, Indiana, New Jersey, New York and Washington State have all agreed, the definition of marriage to include a man and a woman is rationally related to a legitimate government interest in providing for the offspring that may result from heterosexual intimacy, since "no other relationship has the potential to create, without third party involvement, a child biologically related to both parents. . . ." *Andersen v. King County*, 138 P.3d at 982 ¶ 66. *Accord Hernandez v. Robles*, __ N.E.2d __, 2006 WL 1835429 at page 17 ("Since marriage was instituted to address the fact that sexual contact between a man and a woman naturally can result in pregnancy and childbirth, the Legislature's decision to focus on opposite-sex couples is understandable. It is not irrational for the Legislature to provide an incentive for opposite-sex couples -- for whom children may be conceived from casual,

even momentary intimate relationships -- to marry, create a family environment, and support their children. Although many same-sex couples share these family objectives and are competently raising children in a stable environment, they are simply not similarly situated to opposite-sex couples in this regard given the intrinsic differences in the assisted reproduction or adoption processes that most homosexual couples rely on to have children.").

Though same-sex couples also may serve as parents and raise children through other means, "[i]ndisputably, the only sexual relationship capable of producing children is one between a man and a woman." *Standhardt v. Superior Court, Maricopa County*, 77 P.3d 451, 462 (Ariz. App. 2003). Thus, at a minimum, the legislative choice to recognize the marriages of opposite-sex couples but not same-sex couples "is reasonably related to a clearly identifiable, inherent characteristic that distinguishes the two classes: the ability or inability to procreate by 'natural' means." *Morrison v. Sadler*, 821 N.E.2d at 25. Though not all opposite-sex couples intend to have children, "'accidents' do happen, or persons often change their minds about wanting to have children," and the legislature could reasonably conclude that the institution of marriage is a necessary safeguard in that it "not only encourages opposite-sex couples to form a relatively stable environment for the 'natural' procreation of children in the first place, but it also encourages them to stay together and raise a child or children together if there is a 'change in plans.'" *Id.* "Because same-sex couples cannot themselves procreate [naturally], the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships." *Standhardt v. Superior Court, Maricopa County*, 77 P.3d at 463. *Accord Morrison v. Sadler*, 821 N.E.2d at 25.

To illustrate the reasonableness of such a legislative choice, one court has observed "the key difference between how most opposite-sex couples become parents, through sexual intercourse, and how all same-sex couples must become parents, through adoption or assisted reproduction." *Morrison v. Sadler*, 821 N.E.2d at 24. Because "becoming a parent by using 'artificial' reproduction methods is frequently costly and time-consuming" and "[a]dopting children is much the same," the legislature may reasonably assume that "[t]hose persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes," which "require a great deal of foresight and planning" that tend to suggest there will be "provision of private welfare at birth and thereafter." *Morrison v. Sadler*, 821 N.E.2d at 24, 24 n.10, 30. The legislature might consider that such "deliberative procreation . . . to a not inconsiderable extent performs to society's benefit the role that marriage was designed to fill for the far greater number engaged in passion-based procreation." *Id.*, 821 N.E.2d at 30 (citation omitted). By contrast, the legislature may deem the institution of marriage an ongoing necessity for opposite-sex couples, because "natural" procreation "may occur between opposite-sex couples and with no foresight or planning," and "[a]ll that is required is one instance of sexual intercourse with a man for a woman to become pregnant." *Id.*, 821 N.E.2d at 24.

Although it is possible that in the future these considerations could "take on different meaning and significance given the displacing potential of cross-cultural forces in our society, such as contraception and assisted reproductive technology," at present there is "no plausible basis for suggesting the link" between marriage and procreation "is now so weak as to require the line be drawn any differently." *Lewis v. Harris*, 875 A.2d at 278 (Parrillo, J., concurring). Similarly, "there is no basis for concluding that our society now accepts the view that there

is no essential difference between a traditional marriage of a man and woman and a marriage between members of the same sex." *Id.* at 274 (Skillman, J.).

What was stated in *Lewis v. Harris* is also true here: "[n]othing before the court compels us to remove the 'deep logic' of gender as a necessary component of marriage, or to recognize, on equal footing, any adult relationship characterized merely by interdependence, mutuality, intimacy, and endurance." *Id.*, 875 A.2d at 278 (Parillo, J., concurring). "Because the reasons for the existence of marriage retain substantial vitality to date, because the 'specialness' of its opposite-sex feature makes it meaningful and achieves important public purposes, and because the meaning and value of alternative theories are speculative and unknown," the State's interest in maintaining the traditional definition of marriage "is rationally based." *Id.* at 277.

CONCLUSION

For the reasons stated above, the decision of the Circuit Court for Baltimore City should be reversed.

Respectfully submitted,

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September 21, 2006

Pursuant to Md. Rule 8-504(a)(8), this brief has been printed with proportionally spaced type: Times New Roman - 13 point.

TEXT OF PERTINENT AUTHORITIES

Maryland Declaration of Rights

Article 24. Due process

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Article 46. Equality of rights not denied on basis of sex

Equality of rights under the law shall not be abridged or denied because of sex.

Md. Code Ann., Family Law

§ 2-201. Marriages which are valid

Only a marriage between a man and a woman is valid in this State.

1 U.S.C. § 7. Definition of "marriage" and "spouse"

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.
(Pub. L. 104-199, § 3(a), 110 State. 2419 (Sept. 21, 1996))

28 U.S.C. § 1738C. Certain acts, records, and proceedings and the effect thereof

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.
(Pub. L. 104-199, § 2(a), 110 Stat. 2419 (Sept. 21, 1996))

APPENDIX

Page

GITANJALI DEANE & LISA POLYAK;	*	
ALVIN WILLIAMS & NIGEL SIMON;	*	
TAKIA FOSKEY & JOANNE RABB;		
JODI KELBER-KAYE &	*	**IN THE**
STACY KARGMAN-KAYE;		
DONNA MYERS & MARIA BARQUERO;	*	**CIRCUIT COURT**
JOHN LESTITIAN;		
CHARLES BLACKBURN & GLEN DEHN;	*	**FOR**
STEVEN PALMER & RYAN KILLOUGH;		
PATRICK WOJAHN & DAVID KOLESAR; and	*	**BALTIMORE CITY, PART 30**
MIKKOLE MOZELLE & PHELICIA KEBREAU,	*	
Plaintiffs	*	
v.	*	**Case No.: 24-C-04-005390**
FRANK CONAWAY, in his official capacity as Baltimore City Circuit Court Clerk;	*	
ROSALYN PUGH, in her official capacity as Prince George's County Circuit Court Clerk;	*	
EVELYN ARNOLD, in her official capacity as St. Mary's County Circuit Court Clerk;	*	
DENNIS WEAVER, in his official capacity as Washington County Circuit Court Clerk; and	*	
MICHAEL BAKER, in his official capacity as Dorchester County Circuit Court Clerk,	*	
Defendants	*	

* * * * * * * * * * * * *

MEMORANDUM

The case at bar is about marriage–an institution that has been the subject of many challenges over the last 50 years and that remains at the center of family life in American society. Plaintiffs argue that Maryland's statutory prohibition of same-sex marriage is inconsistent with Maryland's equal rights and due process constitutional amendments, and they ask this Court to declare the prohibition invalid. After much study and serious

reflection, this Court holds that Maryland's statutory prohibition against same-sex marriage cannot withstand this constitutional challenge. Family Law § 2-201 violates Article 46 of the Maryland Declaration of Rights because it discriminates, based on gender against a suspect class; and is not narrowly tailored to serve any compelling governmental interests.

In June 1972, the Clerk of the Circuit Court for Baltimore City submitted a question to Maryland's Attorney General regarding the legality of the denial of marriage licenses to same sex couples. The Attorney General, in reply, stated that the prohibition of same sex marriages was implicit in Maryland's statutory code and common law decisions. *See* 57 Md. Op. Att'y Gen. 71 (1972).

A few months later, in November 1972, Maryland voters ratified Article 46 of Maryland's Declaration of Rights. Commonly referred to as Maryland's Equal Rights Amendment ("ERA"), this constitutional provision states that the "equality of rights under the law shall not be abridged or denied because of sex." Shortly thereafter, during the 1973 legislative session, the General Assembly passed Senate Bill 122, a same-sex marriage prohibition, which is now codified at § 2-201 of the Family Law Article. The statute reads, "Only a marriage between a man and a woman is valid in this State."

Plaintiffs in the present case are nine couples and one individual. Plaintiffs concede that the "Maryland statutory code does not permit marriages of lesbian and gay couples"; but they argue that the statute is unconstitutional. Their Complaint further suggests that the plaintiffs are "representative" of the "thousands of lesbian and gay families throughout Maryland" who suffer legal, financial, and emotional harm as a result of the same-sex prohibition. The legal benefits from which unmarried couples are excluded include,

inter alia, the right to bring wrongful death actions under the Courts and Judicial Proceedings Article §§ 3-901 through 3-904 (2002), survivorship actions under §4-202 of the Family Law Article (1999); and surviving spouse's intestate succession rights under the Estates and Trusts Article §3-102 (2001).

All nine couples allege that, but for their sexual identities, they would be permitted to marry their partner under Maryland law.[1] They allege that they applied for marriage licenses in Circuit Court clerks' offices across the state including Dorchester County Circuit Court, Washington County Circuit Court, St. Mary's County Circuit Court, Prince George's County Circuit Court and Baltimore City's Circuit Court. [2] According to the Complaint , the applications were denied for the sole reason that Plaintiffs are same-sex couples.

The Clerks contend that the denials were proper because the undisputed historical understanding of marriage in Maryland, the Maryland Constitution and the laws enacted under state constitutional authority dictate that a civil contract of marriage can only be created between a man and a woman.

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[1]The individual plaintiff alleges that he would like to marry at some point in the future.

[2] This Memorandum refers to Defendants from the various named jurisdictions as "the Clerks."

I. PROCEDURAL HISTORY

A Complaint for Declaratory and Injunctive relief was filed by Gitanjali Deane and Lisa Polyak; Alvin Williams and Nigel Simon; Takia Foskey and Joanne Rabb; Jodi Kelber-kaye and Stacy Kargman-kaye; Donna Myers & Maria Barquero; John Lestitian; Charles Blackburn & Glen Dehn; Steven Palmer & Ryan Killough; Patrick Wojahn & David Kolesar; Mikkole Mozelle & Phelicia Kebreau on July 7, 2004. Defendants Frank Conaway, in His Official Capacity as Baltimore City Circuit Court Clerk; Rosalyn Pugh, in Her Official Capacity as Prince George's County Circuit Court Clerk; Evelyn Arnold, in Her Official Capacity as St. Mary's County Circuit Court Clerk; Dennis Weaver, in His Official Capacity as Washington County Circuit Court Clerk; and Michael Baker, in His Official Capacity as Dorchester County Circuit Court Clerk filed an Answer on September 7, 2004.

The Court Clerk for Anne Arundel County, Robert Duckworth filed a Motion to Intervene on July 27, 2005, alleging that his personal interests would be affected by the law suit and requested that he be permitted to participate as an individual with his own attorney. All parties opposed the Motion. [3] All Motions to intervene were denied, the Court having determined that the interventions would unduly delay and prejudice the adjudication of the rights of the original parties. The Hon. Robert P. Duckworth filed an appeal with the Court of Special Appeals on November 21, 2005. The Court of Appeals, on its own motion, issued a writ of certiorari on December I7, 2005. The judgment of the Circuit Court for Baltimore City was affirmed on March 11, 2005.

On June 14, 2005, the Clerks filed a Motion for Summary Judgment, alleging that

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[3] Certain Members of the General Assembly, and a citizen, Toni Marie Davis also filed Motions to Intervene, which were opposed by Plaintiffs and Defendants.

there was no genuine dispute of any material fact and that they were entitled to judgment as a matter of law. Plaintiffs also filed a Motion for Summary Judgment on June 14, 2005, agreeing that there was no genuine dispute of material fact but maintaining that as a matter of law, they were entitled to judgment. Motions for Leave to participate as Amici Curiae were granted to the Public Justice Center, the National Association of Social Workers, Citizens for Traditional Families, the Alliance Defense Fund, First and Franklin Street Presbyterian Church, 25 Religious Organizations and 48 Religious Leaders. Argument was heard on August 30, 2005.

II. FACTUAL HISTORY

All parties agree that Plaintiffs are gay or lesbian couples who wish to marry, including one surviving same-sex partner. Plaintiffs were denied marriage licenses by Circuit Court clerks in the five identified jurisdictions because they are same-sex couples. According to the Complaint, Plaintiffs seek marriage licenses for the societal and governmental protections that are afforded heterosexual married couples. Defendants maintain that Family Law §2-201 prohibits same sex marriages.

III. DISCUSSION

Plaintiffs concede that Family Law §2-201 prohibits same sex marriages, but argue that 1.) the same-sex marriage prohibition constitutes unjustified discrimination based on gender, in violation of Article 46 of Maryland's Declaration of Rights; 2.) the same-sex marriage prohibition constitutes unjustified discrimination based on sexual orientation, in violation of the equal protection component of Article 24 of Maryland's Declaration of Rights; 3.) the same-sex marriage prohibition constitutes an unjustified, disparate

deprivation of plaintiffs' fundamental right to marry, in violation of the equal protection component of Article 24 of Maryland's Declaration of Rights; and 4.) the same-sex marriage prohibition constitutes an unjustified deprivation of Plaintiffs' fundamental right to marry in violation of the due process component of Article 24 of the Maryland's Declaration of Rights.

After carefully considering Plaintiffs' various arguments, this Court finds that Family Law §2-201 constitutes unjustified discrimination based on gender, in violation of Article 46 of Maryland's Declaration of Rights.[4] The mere creation of a sex-based classification triggers application of the Equal Rights Amendment, under which distinctions drawn based on sex are suspect and subject to strict scrutiny. Because this Court does not find that §2-201 is narrowly tailored to serve any compelling governmental interests, this Court must conclude that the statutory ban on same-sex marriage is unconstitutional.

A. Family Law §2-201 facially discriminates on the basis of gender

Family Law §2-201 specifically bars an individual from marrying a member of the same sex. The relative genders of the two individuals are facts that lie at the very center of the matter; those whose genders are the same as their intended spouses may not marry, but those whose genders are different from their intended spouses may. This Court, therefore, concludes that §2-201 discriminates based on gender. The Court finds unpersuasive the arguments of Defendants and others that statutory prohibitions on same-sex marriage do not create gender-based classifications because each prohibition

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[4]This Court's conclusion that Family Law §2-201 imposes a sex-based discrimination renders unnecessary a decision as to Plaintiffs' other three constitutional claims.

applies equally to both sexes.[5] These arguments are illogical and inaccurate. The equal application theory must be rejected because the theory has already been addressed and rejected in Maryland. *Burning Tree Club, Inc. v. Bainum (Burning Tree I)* 305 Md. 53, 501 A.2d 817 (1985); *Giffin v. Crane*, 351 Md. 133, 716 A.2d 1029 (1998). Proponents of the equal application theory argue that prohibiting same-sex marriage does not constitute gender discrimination because all men and all women are equally precluded from marrying someone of their own sex; neither gender has greater or lesser rights than the other. *See Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999); *Singer v. Hara,* 11 Wash. App. 247, 253, 522 P.2d 1187, 1191-92 (1974); Paul Benjamin Linton, *Same-Sex Marriage Under State Equal Rights Amendments,* 46 St. Louis U.L.J. 909, 925-29 (2002). According to this theory, no gender classification exists and a state's Equal Rights Amendment is not implicated. Thus, a state need not show that compelling interests support its discrimination.

Proponents of the equal application theory distinguish statutory bans on same-sex marriage from the now defunct anti-miscegenation statutes prohibiting marriage between interracial couples. In *Loving v. Virginia*, 388 U.S. 1, 8-9, 87 S. Ct. 1817, 1822 (1967), where the Supreme Court struck down Virginia's anti-miscegenation statute, Virginia advanced an equal application theory to defend the statute prohibiting interracial marriage. See, *Baehr v.Lewin*, 74 Haw. 530, 565, 852 P.2d 44, 61-64 (1993); Stephen Clark, *Same-Sex But Unequal: Reformulating the Miscegenation Analogy*, 34 Ruters L. J. 107 (2002). Virginia argued that the statute did not create impermissible racial classifications because

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[5] Often referred to as the "equal application theory."

the statute affected both blacks and whites equally. However, the Supreme Court struck down the statute, finding that the State did not meet its heavy burden of justifying the racial classification. Courts finding same-sex marriage bans constitutional declare their holdings consistent with *Loving's* holding because of key factual and logical differences between the two cases. This Court is unpersuaded that sufficient differences exist to distinguish the cases.

In *Singer v. Hara,* 11 Wash.App. 247, 252, 522 P.2d 1187, 1191-92 (1974), the Washington Court of Appeals denied that a statutory same-sex marriage ban in fact created a gender classification.[6] In *Singer,* the court held that same-sex partners are not prohibited from marrying because of their genders, but due to the definition of marriage–ie, the relationship the couple wishes to enter would not be a marriage.[7] *Id.* In distinguishing *Loving,* the court reasoned that striking down the statutory same-sex prohibition would require a change in "the basic definition of marriage as the legal union of one man and one woman," whereas permitting interracial couples to marry did not. *Id.*

This reasoning is unpersuasive. It makes little sense for the Washington court to deny that the same-sex prohibition created a gender-based classification; and, then to state that the "operative distinction" between *Loving* and the same-sex marriage case is the legal union of a man with a woman. *Id.* at 1191. *Singer* states that same-sex couples

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[6]The equal application theory was not disturbed in Washington's subsequent same-sex marriage case, *Anderson v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *8 (Wash. Super. Aug. 4, 2004).

[7]As the Supreme Court of Hawaii noted in *Baehr*, 74 Haw. at 567, 852 P.2d at 62 n.23, the anti-miscegenation statutes *automatically voided* an interracial marriage without the necessity of any judicial involvement–another similarity between interracial marriages and same-sex marriages.

are barred from marriage not due to their genders, but owing to a definition of marriage that necessitates an opposite-sex couple. Despite the court's insistence that no gender classification exists, the relative genders of a same-sex couple are the very crux of the matter. Certainly, in *Singer*–it was the couples' gender that placed them outside the definition of marriage. It, therefore, seems logically impossible to resolve the issue of whether an individual plaintiff and his/her partner fall within the definition of marriage without examining their relative genders.

The Supreme Court of Vermont similarly found that a statutory ban on same-sex marriage did not create a gender-based classification. *Baker v. State of Vermont*, 170 Vt. 194, 744 A.2d 864 (1999). Using the equal application theory, the court found that the statute treated men and women equally and was, therefore, facially gender-neutral. *Id.* at 880 n.13. The court further reasoned that a facially neutral statute will not be found discriminatory unless there is evidence of a discriminatory purpose behind it.[8] Unlike *Loving*, where the Supreme Court found evidence of a "pernicious doctrine of white supremacy," the Supreme Court of Vermont found there was insufficient evidence of a discriminatory purpose behind the statutory ban on same-sex marriage. The court thus rejected the argument that the statutory prohibition of same-sex marriage constituted sex discrimination, although it did declare the statute unconstitutional on other grounds.[9]

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[8]*Baker* distinguished *Loving* by pointing to the "superficial neutrality" of the anti-miscegenation statutes in *Loving* and the Supreme Court's finding that there was, in fact, evidence of a discriminatory purpose in *Loving* that could not withstand scrutiny. *Baker,* 170 Vt. at 215, 744 A.2d at 880 n.13.

[9]Vermont considered "civil unions" to be a constitutionally adequate alternative to same-sex marriage. See *Baker,* 170 Vt. at 225, 744 A.2d at 886-87. Without disparaging the value of unions created in those jurisdictions, this Court concludes that

This Court finds that the equal application theory fails as a matter of law because it is inherently illogical as a matter of fact. It is inaccurate and overly abstract to describe §2-201 as equally prohibiting men and women from marrying members of their own sex. Section 2-201 bars a man from marrying a male partner when a woman would enjoy the right to marry that same male partner. As compared to the woman, the man is disadvantaged solely because of his sex. In the opinion of the Court, Family Law §2-201 discriminates on its face based on gender.

Rejection of the equal application theory finds support in case law suggesting that Maryland has already rejected this theory in favor of the view that a statute operating on one gender–though the statute may not specify which gender– draws a gender-based distinction. In *Burning Tree Club, Inc., v. Bainum,* 305 Md. 53, 501 A.2d 817 (1985) (*Burning Tree I*), the Court struck down what Judge Rodowsky termed in his concurring opinion a "unique creature–an unconstitutionally discriminatory anti-discrimination law." *Id.* at 88. In that case, Plaintiffs challenged an "open spaces" tax law extending property tax benefits to an all-male country club. The tax law prohibited recipient clubs from discriminating on the basis of gender, but excepted clubs whose primary purpose was "to serve or benefit members of a particular sex." It was this "primary purpose" exception that four of the seven Court of Appeals judges agreed violated Maryland's Equal Rights Amendment.

Particularly relevant here is the characterization of the statute at issue in *Burning Tree I.* Members of the Court of Appeals observed that, under its prior rulings, the

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such "separate but equal" remedy is not a remedy at all. Further, Plaintiffs make clear in their brief that they are not requesting this type of relief.

possibility seemed to remain open that a statute conferring burdens and/or benefits on both sexes could fail under the Equal Rights Amendment. Judge Eldrige, dissenting in part, noted that while many sex discrimination cases before the Court have involved a burden or benefit conferred solely upon one sex, the Court has "never held that the ERA is narrowly limited to such situations." *Id.* at 95.[10] Judge Rodowsky, in his concurring opinion, underlined the unique nature of a statute– an anti-discrimination statute–that assigned burdens or benefits on the basis of sex. Despite the generic application of the word "sex" in the statute to either males or females, he pointed out that in any given instance the statute "will always be applied to a particular sex." *Id.* at 87.

His observation appears to reject the equal application theory by changing the field of entities affected by the statute's operation. Under the equal application theory, the statute would be constitutional because the burden was equally distributed to the sexes; all women could be excluded from men's country clubs and all men would be excluded from women's country clubs. However, as Judge Rodowsky noted, only women or men will be affected under one particular application of the statute because "the universe of consideration for the particular problem created by this antidiscrimination law is any participating country club, in and of itself." *Id.* That is to say, one must examine the constitutionality of the statute through the lens of one particular country club. Under an individual application of the statute, one country club is affected by operation of the statute, and thus one sex bears a burden that the other, in that particular instance, does

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[10]In doing so, Judge Eldrige underlined his disagreement with the view of three other judges that the ERA is implicated only when the government confers a burden or benefit upon one sex. *Id.* at 95.

not. Such a result constitutes sex-based discrimination.

Further evidence that Maryland rejects the equal application theory appears in *Giffin v. Crane*, 351 Md. 133, 716 A.2d 1029 (1998), where the Court of Appeals held that it was erroneous for a trial court to transfer custody of two girls to their mother based on the assumption that the mother would be a better custodian because she was the same sex as the children. A striking factual parallel arises between *Giffin* and the hypothetical proposed by Justice Johnson in her opinion, concurring in part and dissenting in part, in Vermont's same-sex marriage case, *Baker v. State.*[11] Justice Johnson noted that under the equal application theory, a statute requiring courts to give custody of boys to their fathers and girls to their mothers would not discriminate on the basis of gender because it would treat both sexes equally Id. at 254 n.10. Given the holding in *Giffin,* that "the equality between the sexes demanded by the Maryland Equal Rights Amendment focuses on "rights" of the individual "under the law", which encompasses all forms of privileges, immunities, benefits and responsibilities of citizens. . .", this Court is certain the Court of Appeals would reject such a result. *Giffen,* 351 Md. at 149, 716 A.2d at 1037. It is worthy of note that Justice Johnson agreed with the majority's holding that Vermont's same-sex marriage prohibition violated the state's constitution. However, she disagreed with the majority's use of the equal application argument and stated her belief that the prohibition against same-sex marriage is a "straightforward case of sex discrimination." *Baker,* 170 Vt. At 252, 744 A.2d at 905.

B. Strict scrutiny is the applicable standard of review for a statute drawing a gender-based distinction

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[11] 170 Vt. 194, 744 A.2d 864 (1999).

Under the Equal Rights Amendment, gender-based classifications are suspect and subject to strict scrutiny. *Murphy v. Edmonds*, 325 Md. 342, 357, 601 A.2d 102 n.7 (1992). Subject to strict scrutiny, a classification will only be upheld if the State meets the burden of demonstrating that it is "suitably tailored to serve a compelling state interest." *Id.*, quoting *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, (1985). The heavy burden placed on the state where a suspect classification is involved far exceeds the burden placed upon the challenger of a statute when the classification does not affect a suspect class. In such a case, a reviewing court generally will not invalidate a statute unless its classification is "so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [governmental] actions were irrational." *Murphy*, 325 Md. at 355-356, 601 A.2d at 108. Under this standard, the statute "enjoys a strong presumption of constitutionality" and its challenger bears the burden of showing that it is "clearly arbitrary." *Id.*[12]

Because this Court has determined that § 2-201 makes a gender-based classification on its face, it must scrutinize the statute and the governmental interests in applying it to determine whether the Clerks meet their burden of showing that it is narrowly tailored to achieve compelling state interests. See *State v. Burning Tree Club*, 315 Md. 254, 295-96, 554 A.2d 366, 387 (1989); *Condore v. Prince George's Co.*, 289 Md. 516,

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[12] Plaintiffs argue that the minimum standard of review applicable requires § 2-201 to bear a "fair and substantial relation to a legitimate government interest." A review of Maryland rational basis jurisprudence reveals that this standard, that of a "fair and substantial relation," has been applied by the Court of Appeals both as a form of heightened scrutiny and, in a small number of cases, as a form of rational basis review. The greater majority of Maryland rational basis cases employ the "traditional" or "deferential" rational basis test, cited above.

425 A.2d 1011 (1981); *Turner v. State* 299 Md. 565, 574, 474 A.2d 1297, 1301-1302 (1984).

There is no apparent compelling state interest in a statutory prohibition of same-sex marriage discriminating, on the basis of sex, against those individuals whose gender is identical to their intended spouses. Indeed, this Court is unable to even find that the prohibition of same-sex marriage rationally relates to a legitimate state interest. This Court notes that Defendants fail to argue that the state has a compelling interest in prohibiting same-sex marriage, and they would place the burden on Plaintiffs to show that §2-201 lacks a legitimate state interest. Because this Court finds that the statutory prohibition fails both standards of review, this Court will address Defendants' arguments in demonstrating that §2-201 fails rational basis review and, by extension, the high strict scrutiny standard.

Procreation, child-rearing, and traditional families

Defendants argue that promoting the traditional family unit, in which the heterosexual parents are married, and encouraging procreation and child-rearing within this traditional unit, are legitimate government interests served by §2-201. Plaintiffs do not contend that these are not legitimate state interests. Therefore, the analysis will be confined to whether §2-201 is related to these goals. The Court concludes that the prohibition of same-sex marriages is not rationally related to the state interest in the rearing of biological children by married, opposite-sex parents.

Indeed, the prevention of same-sex marriages is wholly unconnected to promoting the rearing of children by married, opposite sex-parents. This Court, like others, can find no rational connection between the prevention of same-sex marriages and an increase or decrease in the number of heterosexual marriages or of children born to those unions. *Massachusetts v. Goodridge*, 440 Mass. 309, 334, 798 N.E.2d 941, 963 (2003). This Court is similarly unable to find that preventing same-sex marriage rationally relates to the Maryland's interest in promoting the best interests of children. Courts finding such a rational relationship exists conclude that it is reasonable for the state to decide that children born and raised by two married, opposite-sex parents "will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children." *Standhardt v. Superior Court of Arizona*, 206 Ariz. 276, 288, 77 P.3d 451, 463 (2003). This Court is unable to agree to such broadly stated principles because the vast number of assumptions necessary to do so, exceeds the scope of reasonable legislative speculation.

Defendants argue that the General Assembly's long history with traditional opposite-sex marriage and inexperience with same-sex marriage justifies the legislative conclusion that opposite-sex marriage is the optimal environment for procreation and child-rearing. The Legislature's experience does not, in fact, justify such a conclusion. The broad assumptions underlying the Legislature's prohibition of same-sex marriage, coupled with the fact that the Legislature has little experience with same-sex marriage, compels the conclusion that its prevention of same-sex marriage is not rationally related to the State's interests in promoting stable families and protecting the best interests of children.

Although the General Assembly does not need evidentiary support for its conclusions under the rational basis test, the conclusions must be based on rational speculation. [13] In reviewing a statute, a court need only assume those facts that "reasonably can be conceived" to sustain the classification. *Whiting-Turner Contract Co. v. Coupard*, 304 Md. 340, 352, 499 A.2d 178, 185 (1985). Section 2-201 fails rational basis review because the facts necessarily assumed by the Legislature to support it exceed "rational speculation." To support § 2-201, the Legislature would have to have concluded that children raised by opposite-sex married couples are better-off than children raised by same-sex married couples. To do so, the General Assembly may have assumed that opposite-sex marriages less frequently end in divorce, that opposite-sex couples are better parents, or that opposite-sex couples focus more on their children's education. But these assumptions are not rational speculation; they are broad

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[13] Classification "may be based on rational speculation unsupported by evidence or empirical data." *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 2643 (1993).

unsupported generalizations that do not establish a rational relation between same-sex marriage and the State's interests in promoting procreation, child-rearing, and the best interests of children.

Uniformity of State and Federal Law

Defendants argue that § 2-201's ban on same-sex marriage is rationally related to the preservation of federal and interstate definitional uniformity. Such uniformity, they argue, is a legitimate state interest due to the potential for conflicts and "anomalous results" should the state and federal definitions of marriage diverge. Uniformity of interstate and federal law is not a legitimate state interest, however, when it effectively forecloses judicial inquiry into whether Section 2-201 is valid under the Maryland Constitution, and increases the likelihood of unconstitutional activity.

Under Defendants' analysis, a denial of right, invalid under the Maryland Constitution, would be validated in Maryland when another state acted identically, engaging in conduct that would have been unconstitutional in Maryland except for the very fact of the other state's action. Defendants urge this Court to abdicate its role as reviewing body and substitute the judgment of other state legislatures for its own. Such a substitution is impermissible, as it is the role of the courts to determine the constitutionality of legislation. *Curran v. Price*, 334 Md. 149, 159, 638 A.2d 93, 98 (1994). The validity of § 2-201 must ultimately be a judicial determination, not a back-to-front inquiry into whether a denial of right, which may or may not be constitutional, has become constitutional by the participation of other States or the federal government.

As Plaintiffs note, federalism permits each state to make its own determinations regarding marital law, and comity law has developed to resolve any conflicts or differences

that may arise. Defendants themselves cite to the differing state decisions to adopt legislation or constitutional provisions concerning same-sex marriage and the differing judicial decisions reached by courts analyzing the constitutionality of such provisions. Maryland has an interest in ensuring constitutional activity within its borders and protecting its citizens from unconstitutional burdens, and that interest outweighs any interest in ensuring uniformity of law.

The Existence of Other Remedies

Defendants argue that the General Assembly's enactment of laws such as those permitting second parent adoption or designation of representatives and executors for health care and inheritance decisions address the effects of Plaintiffs' non-marital status. Defendants conclude that the creation of such statutes supports the rationality of the legislative determination to prevent same-sex marriage. This Court fails to see how this is so. If these ancillary statutes make a married couple and a non-married couple essentially equivalent with respect to the effects of marriage, there simply is no rational reason to prevent the marriage.

Tradition

Defendants argue that promoting and preserving legislatively expressed societal values and the traditional institution of marriage are legitimate state interests served by a statute prohibiting same-sex marriage. Having concluded that preventing same-sex marriage has no rational relationship to any other legitimate state interest, this Court concludes that tradition and social values alone cannot support adequately a discriminatory statutory classification.

Although tradition and societal values are important, they cannot be given so much weight that they alone will justify a discriminatory statutory classification. When tradition is the guise under which prejudice or animosity hides, it is not a legitimate state interest See, e.g., *Romer v. Evans*, 517 U.S. 620, 634-35, 116 S.Ct. 120, 1628 (1996) (animus against homosexuals, a politically unpopular group, is not a legitimate government interest); *Cleburne v. Cleburne,* 473 U.S. 432, 448, 105 S.Ct. 3249, 3259 (1985) (prejudice against the mentally handicapped is not a legitimate state interest). Similarly, expressing moral disapproval of a class is not sufficient to sustain a classification where there is no other legitimate state interest. *Lawrence v. Texas*, 539 U.S. 558, 582-583, 123 S.Ct. 2472, 2486 (2003).

This Court has found that there is no other legitimate state interest rationally served by preventing same-sex marriage. Therefore, we need not engage in speculation as to whether § 2-201 was enacted out of prejudice or animus toward Maryland's homosexual population. Tradition and societal values alone cannot sustain an otherwise unconstitutional classification. The Court is not unaware of the dramatic impact of its ruling, but it must not shy away from deciding significant legal issues when fairly presented to it for judicial determination. As others assessing the constitutionality of preventing same-sex marriage note, justifying the continued application of a classification through its past application is "circular reasoning, not analysis," and that it is not persuasive. *Goodridge v. Department of Public Health*, 440 Mass. 309, 332, 798 N.E.2d 941, 961 n.23 (Mass. 2003); *Anderson v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *8 (Wash. Super. Aug. 4, 2004).

IV. CONCLUSION

For these reasons, Plaintiffs' Motion for Summary Judgment is granted; Defendants' Motion for Summary Judgment is denied; and judgment is entered as a matter of law for Plaintiffs. Because of the nature of this action, and the logistical ramifications that may affect the Clerks' Offices across the State of Maryland as a result of the Court's decision, the operation of this Court's Order is stayed pending any appeal, pursuant to Maryland Rule 2-632.

/s/ M. Brooke Murdock
M. BROOKE MURDOCK
Judge

cc: Andrew Baida, Esq.
Margaret Nolan, Esq.

GITANJALI DEANE & LISA POLYAK; ALVIN WILLIAMS & NIGEL SIMON; TAKIA FOSKEY & JOANNE RABB; JODI KELBER-KAYE & STACY KARGMAN-KAYE; DONNA MYERS & MARIA BARQUERO; JOHN LESTITIAN; CHARLES BLACKBURN & GLEN DEHN; STEVEN PALMER & RYAN KILLOUGH; PATRICK WOJAHN & DAVID KOLESAR; and MIKKOLE MOZELLE & PHELICIA KEBREAU,	*	IN THE CIRCUIT COURT FOR BALTIMORE CITY, PART 30
Plaintiffs	*	
v.	*	Case No.: 24-C-04-005390
FRANK CONAWAY, in his official capacity as Baltimore City Circuit Court Clerk; ROSALYN PUGH, in her official capacity as Prince George's County Circuit Court Clerk; EVELYN ARNOLD, in her official capacity as St. Mary's County Circuit Court Clerk; DENNIS WEAVER, in his official capacity as Washington County Circuit Court Clerk; and MICHAEL BAKER, in his official capacity as Dorchester County Circuit Court Clerk,	*	
Defendants	*	

* * * * * * * * * * * * *

ORDER

Upon consideration of Plaintiffs' Motion for Summary Judgment, Defendants' Motion for Summary Judgment, argument and the relevant pleadings, for the reasons stated in the accompanying Memorandum, it is this 20th day of January, 2006, by the Circuit Court for Baltimore City, Part 30, hereby

ORDERED that:

1. Plaintiffs Motion for Summary Judgment is GRANTED; and

2. Defendants' Motion for Summary Judgment is DENIED; and

3. Judgment is entered in favor of Plaintiffs and against Defendants on all counts, with costs to be paid by Defendants; and

4. Pursuant to Md. Rule 2-632, enforcement of the Order is STAYED pending appeal.

/s/ M. Brooke Murdock
M. BROOKE MURDOCK
Judge

cc: Andrew Baida, Esq.
Margaret Nolan, Esq.

When women are 'equal,' what then?

By BARBARA GOLD

"Equality of rights under the law shall not be abridged or denied because of sex." Do you agree? You'll have your chance to have your say on November 7. That statement is the proposed Equal Rights Amendment to the Maryland Constitution. It will be Question 3 on the ballot in the general election.

Maryland is one of five states in the country which has or is considering its own Equal Rights Amendment. The others are all waiting to see what happens with the Equal Rights Amendment to the United States Constitution. The federal version was passed, after 49 years of trying by women's groups, in the House (354-23) in October 1971 and in the Senate (84-8) last March. The legislatures of 20 of the states, Maryland among them, have already ratified the federal amendment. Eighteen more are needed. Five—Illinois, Louisiana, Vermont, Connecticut and Oklahoma—have defeated it, at least temporarily. All but Louisiana will probably reconsider.

Are the two proposed amendments—the federal and Maryland's—different? Not really. The words of the federal amendment are almost exactly the same: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." The federal amendment will not go into effect until two years after ratification. The Maryland amendment would go into effect immediately after passage. Otherwise the two are essentially alike.

What will the proposed Maryland amendment, the closest to us right now, mean? How will it change our lives? The Maryland Commission on the Status of Women and the Citizens Coalition for the Equal Rights Amendment—a diverse group including women from the League of Women Voters and the Women's Political Caucus—sponsored an all-day meeting at the College of Notre Dame recently to talk about those questions. Endorsements from state legislators, Democrat Mildred Olenasek and Republican Louise Gore, and from the League of Women Voters—which generally refuses to make specific endorsements of anything—were read, and Ann Hoffman and Valerie Olson, local lawyers and charter members of Baltimore's Women's Law Center, spent the morning trying to give specific answers to those big questions.

Sex, they both agreed, will no longer be a permissible factor in determining the legal rights and responsibilities of women or of men.

The Yale Law Journal, in its definitive article on the amendment in April 1971, lauded that as the basic principle of the ERA.

Senator Sam Ervin of North Carolina, leading opponent of the measure, did not agree. "Father, forgive them," he prayed on the Senate floor, "they know not what they do. American womanhood (will be) crucified on a cross of dubious equality and specious uniformity."

What will the ERA really mean? Ann Hoffman has no pat response. "It's hard, of course, to know how the changes will be implemented. We have to wait for the cases to develop. I can't give specific answers now. It will be a blow if the ERA fails, however. It just may be the way of getting many changes women want."

Credit a big concern

The Yale Law Journal adds, "The Amendment embodies the moral judgment that women as a group may no longer be relegated to an inferior position in our society. They are entitled to an equal status with men."

Dr. Ann Scott, legislative vice president of the National Organization for Women, a new resident of Baltimore, and a participant in the all-day meeting, observed recently in Ms. magazine, "My own secret fantasy is that the ERA will mean money—some kind of substantial reallocation of income downward, and if money flows downward far enough to get to the bottom, the people it's going to help most will be women. I have visions of billions of dollars pouring into the empty purses of women in the form of all kinds of equalized state-regulated fringe and insurance benefits and pension plans and pay.

"The ERA means that the policy of this country is now to consider people first—as individual human beings, and second as women and men."

What most concerned women at the Notre Dame meeting?

"Every other question," Ann Hoffman reports, "had to do with will the ERA bring equal rights to women in the area of credit," and the funny thing is that that is barely touched on specifically by the amendment. It will prevent any governmental agency from authorizing or dictating any policy that discriminates, but 99 per cent of credit problems come from credit card companies, banks or stores. The ERA only affects government action.

"There were many questions on criminal law. A number of women were concerned because they are aware women in prison are getting a raw deal, and they wanted to know the specifics.

"Nobody asked about the draft, and that's unusual."

What will the ERA mean in Maryland? Eleanor Carey, a third-year law student at the University of Maryland and a member of the Women's Law Center, spent the summer going through the entire Maryland Code for the Maryland Commission on the Status of Women to find out, she told me recently, "where there is discrimination on the basis of sex and to pick out those statutes which might be offensive to the ERA."

Rape laws' future

She started from the premise that the ERA will permit statutes which distinguish between persons on the basis of sex if and only if the classification created by the statute is reasonable and based on physical characteristics unique to one sex.

"For example, we could have a statute permitting maternity leaves or regulating sperm donations. Rape laws will probably survive because they are intended to protect women in a way in which they are uniquely different from men.

But there would be strict scrutiny of even those statutes to make sure they are relevant to unique physical characteristics."

Prostitution laws, however, would have to be either abandoned entirely or made equally applicable to men and women.

What about the protective laws which regulate things like the hours women may work and the weights they may lift? Senator Ervin was eager to preserve all laws which protect women and to do away only with those which are specifically harmful. Eleanor Carey says, and Ann Hoffman agrees, "Some laws which supposedly protect women actually restrict them from jobs. Some of these protections—weight rules for instance—could be extended to men.

Mine statute

"Maryland eliminated such restrictions in the last session of the legislature, but it does have a statute which restricts women from working in mines. It says, 'No male minor under 18 can work in a mine and no female of any age can work underground.' That would have to be changed."

Usually employment laws keep women out of jobs rather than protect them. "If an employer decided that, in order to prevent absenteeism," Eleanor Carey says, "he wouldn't hire women between certain ages because they might get pregnant, that would also come under scrutiny. He would have to show that there are no other ways to stop absenteeism.

"Only federal, state and local government will be regulated, however. Private discrimination on the basis of sex is still not prohibited. The problem is similar to the racial one. If the business is small enough, if it's not covered by Title Seven (of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, religion or sex), then it could refuse to hire women."

One of the biggest government employers is the military. Would women be

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subject to the draft under the ERA? "I think they will. But they would be assigned according to their particular talents, skills and abilities. The Army would probably not send a person who is 5-foot-2 and weighs 90 pounds into combat duty. It would seem to me that the criteria the army establishes would have to be sex-neutral qualifications—height, weight, etc."

U.S. Representative Martha D. Griffiths, leading supporter of the ERA in the House, adds, "That doesn't mean women would be on the front lines. Individuals would fill jobs for which they are best suited."

Alimony reciprocal

What about schools? Opponents of the ERA often raise the specter of quotas for women students as an objection. "Schools would not have to establish quotas," Eleanor Carey says. "The ERA does not require that you make up the past, only that men and women have equal access now."

What about child support and alimony? "Today," she continues, "the husband is obligated, during marriage, to provide his wife with the necessaries, and she can pledge his credit to get them. This type of obligation would now have to be reciprocal, and a lot of people object.

"Many women fear they would no longer be able to get alimony, and that the husbands will not support them if there is a divorce. Essentially, both parties would be reciprocally responsible for the support of each other.

"I really doubt that too much will change under the ERA in the typical marriage arrangement where the wife is dependent on the husband's income. What will happen is that the law would look at individuals as individuals and at the individual family. It would no longer make presumptions about people because they are men or women."

Alimony would thus be determined by ability to pay rather than by sex.

Equal pensions

Pensions are another big money issue. "Probably the ERA would require that pensions be provided to the surviving spouse rather than just to the widow. They will, of course, have to be equal for men and women in the same job categories. Right now, women frequently receive smaller pensions."

Criminal laws worried many women at Notre Dame. Dr. Scott thinks, "The ERA should nullify anything which applies to one sex only or treats men and women differently—such as different prison terms for the same offense."

Eleanor Carey has a Maryland example of that on the tip of her tongue. "Right now, the Maryland law permits indeterminate sentences, not to exceed the maximum sentence for the crime committed, for certain crimes for men between 16 and 25. There is a similar statute for women but it is not limited by age. It simply says 'any female.' The purpose was probably to be lenient. I think, however, that it would probably have to say 'any person' if we are to retain such a statute at all."

Sometimes, of course, questions about the ERA are less serious. "It astonishes me," Dr. Scott has exclaimed, "how often when women were advocating the most basic human rights, the discussion was brought back to the subject of equal opportunities in public toilets."

States could continue to have separate bathrooms and dormitory rooms in order to preserve the constitutional right to privacy.

Single sex marriages

That may be legal, but everyone may not like it. Last spring, Rita Davidson, Maryland secretary of employment and social services, told another Notre Dame seminar on women's rights that she once answered a question about whether or not there was discrimination in state government by saying, "Yes, indeed. I don't have access to the men's rooms, and that's where 80 per cent of the state's business is conducted. I often hear men say, 'I was talking with so-and-so in the john.' This is a wrong system. Even if I wanted to, I can't go inside because they keep the johns locked."

There are other seemingly frivolous but actually serious questions: What about single sex marriages? "Statutes which prohibit single sex marriages," Eleanor Carey thinks, "would not be offensive to the ERA. As long as all women were prohibited from marrying other women, and all men were prohibited from marrying other men, then the statute is O.K."

And what about the Maryland Seal? It reads, "Fatti Maschi Parole Femine." "Deeds are manly, words are womanly." It's one of the last things on the Carey list of Code items requiring "strict scrutiny."

And finally, what about the woman who wants to stay home? Will she be able to? Or will she have to become a wage earner on the outside? Representative Florence Dwyer (R., N.J.) gave a widely quoted answer to that during the House debate. "By confirming woman's equality under the law, by upholding woman's right to choose her place in society, the ERA can only enhance the status of traditional women's occupations. These would become positions accepted by women as equals, not roles imposed on them as inferiors."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of September, 2006, two copies of the foregoing Brief of Appellants as revised and corrected were sent by first class mail, postage prepaid, to:

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