GITANJALI DEANE and LISA	*	IN THE
POLYAK, et al.	*	CIRCUIT COURT
Plaintiffs,	*	FOR
v.	*	BALTIMORE CITY
FRANK CONAWAY, et al.	*	Case No.: 24-C-04-005390
Defendants.	*	

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Introduction

Civil marriage is an institution created by the state. Historically, marriage has been recognized, in this and every other state in the union, as a relationship between a man and a woman, sanctioned by the state for the purpose of securing public interests. Although there were only a handful of judicial challenges to this accepted definition approximately thirty years ago, recent judicial and legislative battles have raged with a vigor that recalls the social revolutions of the late 1960's and early 70's. As a result, a number of judicial decisions have emerged across the nation in a few short years.

Nonetheless, the right to marry a partner of the same-sex is available in only one state in the nation – Massachusetts. Moreover, the federal Defense of Marriage Act (DOMA) now specifically provides that no state shall be required to give full faith and credit to same-sex marriages (28 U.S.C. § 1738 C). It also provides that, for purposes of federal law, "marriage" means only the legal union between one man

and one woman and that "spouse" may only be a husband or wife of the opposite-sex (1 U.S.C. § 7).

Despite apparent growing societal acceptance of gays and lesbians in modern society, and the willingness of many states to extend certain benefits to same-sex partners, efforts to modify judicially the traditional structure of marriage itself have met with firm resistance. Though reasons for the resistance may vary, the following rationale, applicable here, was eloquently articulated by J. Cordy, dissenting in *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (2003):

> [T]his case is not about government intrusions into matters of personal liberty. It is not about the rights of same-sex couples to choose to live together, or to be intimate with each other, or to adopt and raise children together. It is about whether the State must endorse and support their choices by changing the institution of marriage to make its benefits, obligations, and responsibilities applicable to them. While the courageous efforts of many have resulted in increased dignity, rights, and respect for gay and lesbian members of our community, the issue presented here is a profound one, deeply rooted in social policy, that must, for now, be the subject of legislative not judicial action.

Id. at 1004-05.

Same-Sex Marriage in Other States and Under Federal Law

All other states in the nation, with the exception of Massachusetts, have maintained the historical definition of civil marriage as a legal relationship between a man and a woman. One of the earliest lawsuits asserting the right to same-sex marriage was decided by the Minnesota Supreme Court in 1971. In *Baker v. Nelson*, Richard Baker and James McConnell sought mandamus compelling the

county clerk to issue a marriage license. *Baker v. Nelson*, 191 N.W. 2d 185 (Minn. 1971), *app. dismissed for lack of substantial federal question*, 409 U.S. 810 (1972). Although Minnesota's statutes did not specifically prohibit the marriage, the trial court ruled that the issuance of the license was not required and directed that no license be issued. On appeal, the Minnesota Supreme Court rejected plaintiffs' contention that the limiting interpretation of Minnesota's statute violated the equal protection and due process guarantees of the U. S. Constitution. The court found that neither *Griswold v. Connecticut*, 381 U.S. 479 (1965), recognizing a right to marital privacy against statutory prohibitions on birth control, nor *Skinner v. Oklahoma*, 316 U.S. 535 (1942), supported a due process right to same-sex marriage. Noting the deep historical underpinnings of the institution of marriage, the court concluded that "[t]he due process clause of the Fourteenth Amendment is not a charter for restructuring [marriage] by judicial legislation." *Baker v. Nelson,* 191 N.W. 2d at 186. Plaintiffs' reliance on the invalidation of anti-miscegenation statutes in *Loving v. Virginia*, 388 U. S. 1 (1967), was similarly misplaced:

> *Loving* does indicate that not all state restrictions upon the right to marry are beyond the reach of the Fourteenth Amendment. But in a 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 in sex.

Baker v. Nelson, 191 N.W. 2d at187.

Subsequently, Baker and McConnell obtained a marriage license, were married by a minister, and sought spousal benefits from the Veterans'

Administration. The benefits were denied, an appeal followed, and the Eighth Circuit Court of Appeals affirmed dismissal of the petition. The court held that *Nelson* was not only dispositive of the plaintiffs' claim, but that "the Supreme Court's dismissal of the appeal for want of a substantial federal question constitutes an adjudication of the merits which is binding on the lower federal courts." *McConnell v. Nooner,* 547 F. 2d (8th Cir.1976) (citing *Hicks v. Miranda*, 422 U.S. 332, 343-345 (1975)); *see also McConnell v. United States*, 2005 WL 19458, 95 A.F.T.R. 2d 2005-568 (D. Minn. 2005).

After *Baker v. Nelson*, a brief crop of legal challenges seeking the recognition of same-sex marriages sprouted, and in each case plaintiffs failed to prevail. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky App. 1973)(no constitutional right to marriage between members of the same-sex); *Singer v. Hara*, 522 P.2d 1187(Wash App. Div. 1, 1974)(denial of marriage license to same-sex applicants is both required by state constitution and permitted by federal and state constitutions); *DeSanto v. Barnsley*, 476 A. 2d 952 (Pa. Super. 1984)(no right to same-sex common law marriage).

Then, in 1993, the Hawaii Supreme Court held that the state's marriage statute established a sex-based classification, which required strict scrutiny analysis. The court held, however, that a prohibition on same-sex marriage did not offend the state constitution's explicit guarantee of privacy because no fundamental right was impaired. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). After remand, plaintiffs prevailed in the trial court, *See Baehr v. Miike* 1196 WL 694235 (Hawaii Cir. Ct

1996), and a summary affirmance by the Hawaii Supreme Court followed. *Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997). However, during the extended appellate and remand proceedings, the citizens of Hawaii ratified a constitutional amendment, giving the legislature the power to reserve marriage to opposite-sex couples. Haw. Rev. Stat. Const. Art I § 23. Hawaii law now provides that marriage "shall only be between a man and a woman." Haw. Rev. Stat. Ann. § 572-1.

After the initial *Baehr* decision, judicial challenges were brought in other states, and these were met or matched by legislative action. Appellate courts in the District of Columbia, Arizona, Indiana, and Oregon have affirmed that neither statutory provisions nor constitutional principles dictate state licensure of marriage between members of the same-sex. In *Dean v. District of Columbia*, 635 A.2d 307 (D.C.1995), the court rejected a challenge to the limitation of marriage to opposite-sex couples on federal constitutional grounds. The court held that there was no constitutional basis under the due process clause for recognizing same-sex marriage, since such a marriage is not deeply rooted in the history and traditions of the nation. *Id.* at 331-333. Although the Supreme Court of Vermont found that under the common benefits clause of the Vermont Constitution the plaintiffs were entitled to obtain "the same benefits and protections afforded by Vermont law to married opposite sex couples," *Baker v. State*, 744 A.2d 864, 886 (1999), it expressly declined to hold, that "the denial of a marriage license operates per se to deny constitutionally-protected rights. . . ." *Id.* In *Standhardt v. Superior Court, Maricopa*

County, 77 P.3d 451 (Ariz. 2003), the Arizona Supreme Court found that same-sex marriage is not a fundamental liberty interest protected by due process, that the state's marriage statute did not offend equal protection, and that limiting marriage to opposite-sex couples is rationally related to the state's interests in promoting procreation and child-rearing. *Id.* Indiana's Supreme Court rejected a similar challenge, finding no violation of equal protection or due process and holding instead that "the Indiana Constitution does not require the governmental recognition of same-sex marriage, although the legislature is certainly free to grant such recognition or create a parallel institution. . . ." *Morrison v. Sadler*, 821 N.E. 2d 15, 35 (Ind. App. 2005). In Oregon, the state supreme court concluded, based on gender-specific language in the state's marriage laws, that marriage was statutorily limited to opposite-sex couples, even before the adoption of a constitutional amendment. *Li v. Oregon,* 110 P.3d 91 (2005). Thus, licenses issued to same-sex couples in Oregon prior to the passage of the amendment were "void *ab initio.*" *Id.* at 102.

In *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005), the plaintiffs sought Florida's recognition of their Massachusetts marriage and challenged both the federal DOMA and Florida's defense of marriage act as unconstitutional. The court found that marriage to a person of the same-sex was not a fundamental right guaranteed by the Due Process Clause, that sexual orientation was not a suspect class requiring strict scrutiny under the Equal Protection Clause, and that both

federal and state statutes were constitutional under a rational basis analysis. *Id.* The court held that *Baker v. Nelson* compelled dismissal of the DOMA challenge: "The Supreme Court has not explicitly or implicitly overturned its holding in *Baker* or provided the lower courts, including this Court, with any reason to believe that the holding is invalid today." *Wilson v. Ake,* 354 F. Supp.2d at 1305.[1]

Several other trial court decisions have yet to be subjected to the crucible of appellate review or the legislative process. *See, e.g., Coordination Proceeding, Special Title, Marriage Cases*, 2005 WL 583129 (Cal. Super. March 14, 2005). In New York, trial courts have reached inconsistent results that have not been finally resolved by the appellate court. *Compare Hernandez v. Robles*, 794 N.Y.S. 2d 579 (N.Y. Sup.Ct. 2005)(statute limiting marriage to same-sex couples invalid under New York's constitution) *with Seymour v. Holcomb*, 790 N.Y.S.2d 858, 866 (N.Y. Sup.Ct. 2005)(rejecting holding in *Hernandez v. Robles,* determining that New York marriage statute passed constitutional muster, concluding that "[t]he decision to extend any or all of the benefits associated with marriage is a task for the legislature, not the courts").

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[1] No Maryland court has addressed the applicability of *Baker v. Nelson*. However, the Court of Special Appeals has cited with approval the rationale of Hicks v. Miranda, 422 U.S. 332, 344-345 (1975), that summary dismissals of cases by the Supreme Court are decisions on the merits and are binding precedent in other cases in which the same question is at issue. *See Ohm v. Ohm,* 49 Md. App. 392 (1981)(citing *Hicks,* 422 U.S. at 344-45).

The Massachusetts Supreme Judicial Court stands alone in its sweeping analysis and remedy. First, in *Goodridge v. Dep't of Public Health*, 798 N.E. 2d 941 (Mass. 2003), the court held that limiting the protections, benefits, and obligations of marriage to opposite-sex couples violated constitutional principles. Then, rejecting the proposed legislative response to the decision, the court ruled that a proposed statute would run afoul of *Goodridge*, even if the legislation offered all the identical "benefits, protections, rights and responsibilities" of marriage through the alternative of a civil union. *Opinions of the Justices to the Senate*, 802 N.E. 2d 565, 568 (Mass. 2004).

The majority of the states have responded to the judicial challenges with legislative action.[2] As noted above, the federal Defense of Marriage Act became law in 1996. Since that time, thirty-seven states have adopted statutes prohibiting the issuance of marriage licenses to same-sex partners.[3] Seventeen states have

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[2] Prior to *Baehr*, three states (Maryland, Wisconsin, and Wyoming) had statutes that expressly limited marriage to a couple consisting of a man and a woman. Md. Family Law Code Ann. § 2-201(adopted 1973); Wis. Stat. Ann. § 765.001 (2001) (adopted 1959); Wyo. Stat. Ann. § 20-1-101 (2004) (adopted prior to 1978).

[3] Ala. Code § 3-1-19 (2004); Alaska Stat. § 25.05.013 (2004); Ariz. Rev. Stat. § 25-101; Ark. Code. Ann. § 9-11-107; Cal. Fam. Code § 308.5; Col. Rev.Stat. § 14-2-104 (2003); Del. Code. tit.13, § 101 (2004); Fla. Stat. Ann. §741.04; Ga. Code Ann. § 19-3-3.1 and 19-3-30 (2004); Haw. Rev. Stat. § 572-1; Idaho Code § 32-201 (2004); 750 Ill. Comp. Stat. § 5/212 (2004); Ind. Code § 31-11-1-1 (2004); Iowa Code § 595.2 (2003); Kan. Stat. Ann. § 23-101 (2004); Ky Rev. Stat. § 402.020 (Baldwin 2004); La. Civ. Code Art. § 89 (2004); Me. Rev. Stat. Ann. tit., 19A §701 (2003); Mich. Comp. Laws § § 551.3, 551.4 (2004); Minn. Stat. Ann. §517.03 (2005 (continued...)

passed state constitutional amendments. *See* http://www.stateline.org. (last visited June 11, 2004).[4] Constitutional amendments have been approved by the legislature and are scheduled for statewide vote in six states.[5]

SUMMARY OF ARGUMENT

This issue is deeply rooted in social policy and, as such, should not be the subject of judicial action, but should be determined by the legislature. The undisputed historical understanding in Maryland, under the Maryland Constitution and all laws enacted under that constitutional authority, holds that marriage is a civil contract between a man and a woman. Maryland law, including Md. Fam. Law Code Ann. § 2-201, providing that only a marriage between a man and a woman is valid in this state, does not violate either Articles 24 or 46 of the Maryland Declaration of

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[3] (...continued)
Supp.); Miss. Code § 93-1-3 (2004); Mo. Ann. Stat. § 451.022 (2004); Mont. Rev. Code Ann. § 40-1-401 (2003); Nev. Rev. Stat. § 122.020 (2004); N.H. Rev. Stat. Ann. § § 457:1 and 457:2 (2004); N.C. Gen. Stat. Ann. § 51-1.2 (2004); N.D. Cent. Code § 14-03-01 (2003); Ohio Rev. Code Ann. § 3101.1 (Supp. 2005); Okla. Stat. Ann. tit. 43 § 3 (2004); Pa. Consol. Stat. tit. 23 §§ 1102, 1704 (2004); S.C. Code Ann. Art. 1 §20-1-10 (2004); S. D. Codified Laws § 25-1-1 (2004); Tenn Code Ann. § 36-3-113 (2004); Tex. Fam. Code tit. 1, §§ 2.001 and 6.204; Utah Code Ann. § 30-1-2 (2004); Vt. Stat.Ann. tit. 15, § 8 (2004); Va. Code Ann. § 20-45.2 (2004); Wash. Rev. Code § § 26.04.010 and 26.04.020 (2004); W. Va. Code § 48-2-104(2003).

[4] Alaska, Arkansas, Georgia, Hawaii, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and Utah.

[5] Alabama, Kansas, South Carolina, South Dakota, Tennessee, and Texas. "Same-sex Unions - A Constitutional Race", March 29, 2005, Updated May 17, 2005 at http://stateline.org, last visited June 13, 2004.

Rights. Principles of constitutional construction mandate an interpretation of Articles 24 and 46 of the Maryland Declaration of Rights that is consistent with a definition of marriage limited to only persons of the opposite-sex.

The plain language of the Equal Rights Amendment of the Maryland Declaration of Rights, its legislative history, and judicial interpretation and application of its provisions, compel the conclusion that the State is not required to extend civil marriage to persons of the same-sex. Nor does Maryland law or its marriage statute violate the plaintiffs' rights to equal protection or due process under Art. 24 of the Maryland Declaration of Rights. The statute impairs no fundamental right, affects no suspect class, and plaintiffs cannot demonstrate that the statute lacks any rational basis.

ARGUMENT

The plaintiffs seek a declaration that the "failure of the Maryland statutory code to permit same-sex couples to marry" constitutes unjustified discrimination under Articles 24 and 46 of the Maryland Declaration of Rights. (Complaint, ¶¶144, 152, 160, and 168.) They also seek to enjoin the defendant clerks from refusing to issue marriage licenses to them.[6] *Id.* Thus, the plaintiffs ask the court to legislate in order to obtain what is available only in one other state: the licensure of marriage between

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[6] Plaintiffs also request this relief on behalf of other same-sex couples. The State does not concede that plaintiffs have standing to represent others, and plaintiffs have not alleged such. Complaint ¶¶144, 151, 160, 168, and Complaint ¶¶ 10-124.

partners of the same-sex. That remedy is one that must be found in the General Assembly, not the courts. The Maryland Court of Appeals has exercised and cautioned judicial restraint in other areas of deep social concern and importance. In a challenge to Maryland's system of public school financing, the Court of Appeals was asked for the first time to declare a right fundamental under the State Constitution and thus trigger exacting judicial scrutiny. *Hornbeck v. Somerset Co. Bd. of Education*, 295 Md. 597 (1984). Despite differing rulings in other states, and the lower court's decision to the contrary, the appellate court declined the invitation and upheld State law under a rational basis analysis. The reasons for the decision were threefold: 1) "[t]he very complexity of the problems" raised in the case; 2) "the legislature's effort to tackle the problem should be entitled to respect"; and 3) the State was making efforts to extend more opportunities. *Hornbeck,* 295 Md. at 652-53. Most importantly, the Court said:

> The expostulations of those urging alleviation of the existing disparities are properly to be addressed to the legislature. . . . Otherwise stated, it is not within the power or province of members of the Judiciary to advance their own personal wishes or to implement their own personal notions of fairness under the guise of constitutional interpretation.

Id. at 658. Reiterating and applying that caution last week, the Court reversed a trial court finding that a law violated the State Constitution. *Maryland State Board of Education v. Bradford,* ____ Md. ____, 2005 WL 1353361 (June 9, 2005). *See id.*, Slip op. at 36 ("declaring a statute enacted by the General Assembly to be unconstitutional and therefore unenforceable is an extraordinary act").

For all the reasons set forth below, similar judicial restraint is appropriate here.

I. THE UNDISPUTED HISTORICAL UNDERSTANDING OF MARRIAGE IN MARYLAND, UNDER THE MARYLAND CONSTITUTION AND ALL LAWS ENACTED UNDER STATE CONSTITUTIONAL AUTHORITY, IS THAT OF A CIVIL CONTRACT BETWEEN A MAN AND A WOMAN.

Maryland's marriage statute, Md. Family Law Code § 2-201, provides that "[o]nly a marriage between a man and a woman is valid in this State." Enacted in 1973, the statute and the policy it articulates are deeply rooted in the tradition and history of the State, not only in its statutes, but in its Constitution.

Marriage is a civil contract, *Fornsbill v. Murray*, 1 Bland 479, 481 (1828); Fader, *Maryland Family Law* § 3.1 (2000), and has been said to be "the most important contract into which individuals can enter, as the parent not the child of civil society." *Fornsbill v. Murray*, 1 Bland 479, 481 (1828). It is an unusual contract, in that it is one in which society is a party and has a deep interest. *Campbell's Case*, 2 Bland 209, 235 (1830). As a result, it cannot be entered into without the prerequisite of a ceremony required by state law. *Henderson v. Henderson*, 199 Md. 449 (1952); *Denison v. Denison*, 35 Md. 361, 379-380 (1872). Many of its terms cannot be altered by the parties. *Harrison v. State*, 22 Md. 468, 493 (1864); *Helms v. Franciscus*, 2 Bland 544, 561 (1830). It cannot be ended, even with mutual consent of the parties, without the participation of the State. *Helms,* 2 Bland at 564. Moreover, unlike other contracts, marriage is subject to dissolution by the State without violation of the Contract Clause. *Campbell's Case*, 2 Bland 209, 236 (1830).

A. Earliest Legislative Enactments Reflect the Definition of Marriage in Maryland as Only Between a Man and a Woman.

Marriage was a part of the law of England brought to Maryland at the State's inception. *Marburg v. Cole*, 49 Md. 402 (1878); Fader, *Maryland Family Law* § 2.1 (2000). To the extent not superseded by statute, this law is still applicable. *Marburg v. Cole*, 49 Md. 389, 411 (1878). However, from its very founding, the legislature of Maryland has consistently exercised plenary power over this institution. *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"). Specifically, the General Assembly has historically regulated the licensing, announcement, and performance of marriages (Chapter 7 of 1640; Chapter 25 of 1666), the registration thereof (Chapter 33 of 1650; Chapter 10 of 1678), 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). One factor has remained constant, however, in all legislative enactments: marriage has always, throughout its history in Maryland, 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 purposes of succession, Cinlar at 97.

In 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 same, and the punishment of clandestine marriage, that is, marriage entered into without the required publication of banns.

Assembly Proceedings, February — March 1638/9, Archives Volume 1 at page 47.[7] In 1640, the General Assembly enacted a law providing that no marriage could be solemnized without publication of banns. Chapter 7 of 1640.[8] Registration of births, marriages and burials was required by Chapter 16 of 1654. Archives Volume 1, page 345. Punishment of adultery and fornication was imposed by Chapter 1 of 1650. Archives Volume 1, page 286. Each of these statutes was amended and added to over time.

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[7] The Archives Volumes are available online at http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/html/index.html. Where historic documents from this source are quoted in this Memorandum, spelling has been modernized. The earliest available records of the General Assembly begin in 1637.

[8] 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 1, pages 52-53. These bills introduced in the 1638 session were 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 4, pages 50 and 51.

Various statutes reflect the legislative assumption of the established practice that marriage joined persons of the opposite-sex. For example, Chapter 25 of 1666, Archives Volume 2 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 2, 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 13, pages 450-451.

The 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 continued after colonial independence. In fact, one of the first acts of the new General Assembly was to pass an act "concerning marriages." Among its other provisions, Chapter 12 of the Laws 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 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 is 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. This continuing post-independence assumption that

marriage involves parties of the opposite-sex is relevant since Article 24 of the Declaration of Rights, relied on by plaintiffs as the source of the guaranties of both Due Process and Equal Protection, originally appeared in the Declaration of Rights of 1776 as Article 21.

B. Principles of Constitutional Construction Mandate an Interpretation of Articles 24 and 46 of the Maryland Declaration of Rights That Is Consistent with a Definition of Marriage Limited to Only Persons of the Opposite Sex.

The historical presumption that marriage is 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 proceedings and the resulting constitutional provisions are significant because Article 24 and Article 46 of the Maryland Declaration of Rights cannot be construed in isolation. Rather, they must be considered in conjunction with all other relevant provisions of the State Constitution. *See Reed v. McKeldin,* 207 Md. 553, 561 (1955)(the Maryland Constitution should be construed as a whole in order to ascertain the meaning of any part). A court should harmonize provisions by giving effect to the more specific over the general. *See* 5 M.L.E. *Constitutional Law* at §10. Also, in constitutional construction, consideration may be given to "the temper and spirit of the people at the time" and "the common usage well known to the people." *See Boyer v. Thurston*, 247 Md. 279, 292 (1967). *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"). Finally, a legislature's construction of its powers under the Constitution is entitled to "great consideration." *County Commissioners of Montgomery County v. Supervisors of Elections,* 192 Md. 196, 210 (1949).

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. 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 practice of the time.[9] Moreover, the fact that the provision called for legislative action rather than simply making the proposed provision part of the constitution shows that the legislature continued to be viewed as the appropriate forum for the regulation of marriage.

The 1864 Constitution provided 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.

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[9] Until 1851, the legislature had the authority to grant divorces. All 25 divorces granted in the session preceding the 1850 convention were to couples consisting of one man and one woman. Laws of Maryland 1849.

Article III, § 49, Constitution of 1864. Moreover, the debates on this provision clearly reflect the 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 102 page 982.

And Delegate Belt 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 102 at page 988.[10] Article 24 of the Declaration of Rights appeared in the 1864 Constitution as Article 23.[11]

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[10] The debates on the provision also demonstrate that this convention continued to view marriage as a matter for regulation by the Legislature. 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.

Archives Volume 102 at page 983.

[11] To this date, Article III, §43 still states that "[t]he property of the wife shall be protected from the debts of her husband." For nearly 120 years the Constitution (continued...)

Thus, plaintiffs cannot simply ignore the marriage-related provisions of the 1851 and 1864 Constitutions that indicate State recognition only of opposite-sex marriage. The framers of Maryland's Constitution could not have been unaware of the usages, customs and practices then existing and the state of the law regarding who may marry. A coherent reading of the Maryland Constitution militates in favor of the conclusion that denial of State recognition of same-sex marriages does not violate Article 24 or Article 46 of the Maryland Constitution.

C. More Recent Enactments of the General Assembly, Including the Statute Challenged Here, Reflect the Continuing Policy Determination and Understanding that Marriage is the Union of a Man and a Woman.

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 entrenched in the collective consciousness and 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, following the issuance of an Opinion of the Attorney General advising that the clerks of court should refuse to

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[11] (...continued)
contained an express reference to existing marriage laws, under which same sex marriage was not valid. Article IV, §38 provided that the "[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. 940-941.

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." Exhibit 1. *See Jennings v. Jennings*, 20 Md.App. 369, 374, n. 7 (1974). Following adoption of this provision, codified now as Family Law Article § 2-201, the Legislative Policy 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. Legislative Council, *Report to the General Assembly of 1975*, p. 457. Exhibit 2.

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." Chapter 794 of 1978 (emphasis added). This language has been cited by the Court of Appeals 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), *app.*

dism'd, 449 U.S. 807 (1980). In addition, the Court has stated that the State does not recognize unions of homosexuals or lesbians as "bestowing upon two people a legally cognizable marital status." *Maryland Com'n on Human Relations v. Greenbelt Homes, Inc.*, 300 Md. 75, 83-84 (1984), *cited in Tyma v. Montgomery County*, 369 Md. 497, 508 (2002).

The Antidiscrimination Act of 2001, which bars 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." Chapter 340 of 2001, Section 2. And in the 2005 legislative session, Senate Bill 796, which passed the General Assembly, but has been 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. 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, Page 20, line 31 through Page 21, line 2. Exhibit 3.

II. MARYLAND LAW RECOGNIZING AS VALID A MARRIAGE ONLY BETWEEN A MAN AND A WOMAN DOES NOT VIOLATE THE EQUAL RIGHTS AMENDMENT OF THE MARYLAND DECLARATION OF RIGHTS.

Plaintiffs argue that it constitutes "unjustifiable discrimination based on sex" and a violation of the Equal Rights Amendment (ERA) for the State of Maryland to recognize as valid a marriage only between a man and a woman.[12] They are wrong. First and foremost, the statute does not create a classification based on gender. Men and women are equally disadvantaged: neither may marry a person of the same-sex. To the extent the codification of the historic understanding of marriage effectively classifies on the basis of apparent sexual orientation, that does not constitute gender discrimination under the Maryland ERA.

Even if the classification is analyzed as gender-based, plaintiffs' challenge on this basis must fail. The contention is clearly rebutted by the language and history of the Maryland ERA, its consistent interpretation by State courts and other relevant authorities and decisions of the majority of out-of-state appellate courts that have considered the question.

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[12] The ERA is contained in Article 46 of the Declaration of Rights and provides that "[e]quality of rights under the law shall not be abridged or denied because of sex."

A. The Legislative History of the Maryland ERA, Which Was Adopted Contemporaneously with the Proposed Federal ERA and Maryland Family Code Ann. §2-201, Conclusively Establishes 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 approving a proposed federal ERA and proposed a similarly-worded State ERA as an amendment to the Maryland Constitution.[13] 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 scare tactic often used by ERA opponents to counter these and other state efforts was to predict that such constitutional amendments would require states to recognize same-sex marriage. However, in the midst of the Maryland ERA debate and the Congressional debate on the federal counterpart, United States Senator and Floor Leader, Birch Bayh, told that body 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). Exhibit 4. *See also* Memorandum of Eleanor M. Carey, Office of the Attorney General, to the Maryland Commission on the Status of

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[13] *See* H.J.R. 102 and S.J.R. 80 (1972); Chapter 366, *Laws of 1972* (H.B. 687).

Women, dated September 19,1972 at p. 4[14]. Exhibit 5. Senator Bayh's comments occurred before General Assembly votes on both the state and federal ERAs.[15]

In 1973, the same General Assembly that proposed the ERA enacted legislation -- virtually without dissent -- clarifying that Maryland law did not recognize same-sex marriage. *See* Chapter 213, *Laws of 1973* (SB122) (now Fam. Law §2-

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[14] In the Maryland Department of Legislative Services file on HB 687 is a 1973 leaflet patterned after one distributed by the National American Women 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.*" (Italics in original) Exhibit 6. To show that some myths die hard, a website devoted to present ratification of 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 http://www/equalrightamendment.org/faq.htm (last visited July 15, 2004). Exhibit 7.

[15] 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 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 and the Senate on April 1. 1972 House Journal at 1499; 1972 Senate Journal at 1900-01. Exhibit 8.

201).[16] This legislation confirmed the same conclusion reached in a 1972 opinion of the Attorney General. *See* 57 *Opinions of the Attorney General* 71 (1972). Exhibit 1. 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. Exhibit 2.

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 Condore v. Prince George's County,* 289 Md. 516, 528 (1981). The Commission's reports

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[16] 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. Exhibit 8. All of this legislation was considered by the same Senate committee. Clearly, those approving ERAs in 1972 saw no inconsistency in voting in 1973 to clarify that the State would not recognize same-sex marriage.

(which ended in 1978) never listed either §2-201 of the Family Law Article or its legislative predecessors as constitutionally suspect.[17] Exhibit 9.

Even after the state ERA was adopted, State authorities interpreted the constitutional provision as not sanctioning same-sex marriage. 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. Exhibit 10. 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.

Exhibit 11. This history and post-enactment analysis of the ERA shows that the "framers" of the amendment rejected the plaintiffs' contention that Article 46 is violated by the State's decision not to license same-sex marriage.

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[17] Neither did the 1972 Carey Memorandum, *supra,* which was prepared prior to voter approval of the State ERA.

B. The Plain Meaning of the ERA and Judicial Interpretation of Its Provisions Compel the Conclusion That The State is not Required to Extend Civil Marriage to Persons of the Same Sex.

Maryland's ERA prohibits discrimination "because of sex." Art. 46, Maryland Declaration of Rights. The ordinary meaning of the term "sex" in this context is "biological male or biological female" or "membership in a class delineated by gender," not sexual orientation. *See Spearman v. Ford Motor Co.,* 231 F. 3d 1080, 1084 (7th Cir. 2000), *cert. denied,* 532 U.S. 995 (2001); *Simonton v. Runyon,* 232 F. 3d 33, 36 (2nd Cir. 2000). *See also Holloway v. Arthur Andersen & Co.,* 566 F.2d 659, 662 (9th Cir. 1977)("sex should be given its traditional definition based on the anatomical characteristics which divide organisms into males and females").[18] The General Assembly 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). Thus, the fact that the Legislature has not included the term "sexual orientation" in Article 46 of the Declaration of Rights is conclusive.

Maryland case law interpreting Article 46 further supports this conclusion. *See Giffin v. Crane,* 351 Md. 133, 148 (1998); *Burning Tree Club v. Bainum,* 305 Md. 53,

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[18] The judicial definition of "sex" discrimination has most often arisen in employment discrimination cases under Title VII of the federal Civil Rights Act, 42 U.S.C. §2000(e) *et. seq.* Most federal circuits have concluded that "sex" under this statute does not include sexual orientation. *See Simonton v. Runyan*, 232 F.3d at 35-6 (collecting cases).

64 (1985) ("sex is not a permissible factor in determining the legal rights *of women or men*, so that the treatment of any person by the law may not be based upon the circumstances that such person is *one sex or the other*") (emphasis added); *Rand v. Rand,* 280 Md. 508, 513 (1973); *Turner v. State,* 299 Md. 565, 574 (1984)("The law will not impose different benefits or different burdens upon the members of a society based upon the fact that they "may be *man or woman.*") (emphasis added).

This significant body of legislative and judicial authority in Maryland supports the conclusion that in not recognizing same-sex marriage, Maryland statutes do not discriminate on the basis of gender and do not burden persons because they are "man or woman" or "one sex or the other." Nor does other authority support plaintiffs' claim. Legal advocates for same-sex marriage frequently cite *Loving v. Virginia*, 388 U.S. 1 (1967), in arguing against the gender neutrality of a same-sex marriage statute. However, that analogy is false. To rely upon *Loving* in this context is to ignore later decisions of the Supreme Court. *See Baker v. Nelson*, 409 U.S. 810 (1971(Mem.)(summarily rejecting challenge of marriage license denial to same-sex couple); *Zablocki v. Redhail*, 434 U.S. 374, 386 and 396 (1978)(decision to marry "in a traditional family setting" must receive constitutional protection); and *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (denying that the Court was deciding any issue relating to same-sex marriage).

Nor is there any appellate decision from any other state, supported by a majority of judges, which concludes that a State's refusal to recognize same-sex marriage amounts to unconstitutional sex discrimination or violates a state ERA. Even in *Baehr v. Lewin,* 852 P.2d 44 (Haw. 1993), only 2 of 5 appellate judges found that a same-sex marriage ban was subject to heightened scrutiny as a sex classification, and that case was quickly overturned by constitutional amendment.

On the other hand, at least two State appellate courts have rejected Plaintiffs' arguments as to gender discrimination, including Vermont's highest court, *Baker v. State of Vermont,* 744 A. 2d 864, 880 (Vt. 1999), and Washington's Court of Appeals, *Singer v. Hara,* 522 P. 2d 1187(Wash. App. 1974). The dearth of real authority supporting plaintiffs is telling. Therefore, this Court should conclude that Maryland's decision not to recognize same-sex marriage is not sex discrimination and is not violative of Maryland's ERA.

III. MARYLAND'S MARRIAGE STATUTE DOES NOT VIOLATE THE PLAINTIFFS' RIGHTS TO EQUAL PROTECTION OR DUE PROCESS UNDER ART. 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.

The Complaint 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). Despite the apparent differences in these legal theories, under each of them, Maryland's marriage statute ultimately must be upheld if there is any rational basis to support it, as there is. "Equal protection claims will be reviewed under the rational basis standard unless the classification burdens a 'suspect class' or impinges upon a 'fundamental right.'" *Committee for Responsible Development on 25th Street v. Mayor and City Council of Baltimore*, 137 Md. App. 60, 77 (2001)(citing *Gooslin v. State*, 132 Md. App. 290, 297-98 (2000), *cert. denied*, 359 Md. 334 (2000)). Similarly, where "no fundamental right is involved," a statute challenged on substantive due process grounds "receives rational basis review – whether the law is rationally related to a legitimate state interest." *Hunter v. State*, 110 Md. App. 144,161 (1996)(citations 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).

Here, 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 and appellate courts throughout the Nation, this Court should uphold the statute as constitutional.

A. Sexual Orientation Is Not A Suspect Classification.

The classification identified by plaintiffs, sexual orientation, has not been recognized as a suspect classification in any constitutional provision, state or federal; nor in any pertinent enactment of Congress or the State Legislature; nor in any reported decision of Maryland courts or federal appellate courts. 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. *Veney v. Wyche* 293 F.3d 726, 732 (4th Cir. 2002)(citing the Supreme Court's application of rational basis review in *Romer v. Evans*, 517 U.S. 620, 631-32 (1996)). *See Thomasson v. Percy*, 80 F.3d 915, 928 (4th Cir. 1996), *cert. denied*, 519 U.S. 948 (1996)(same). *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"). Moreover, no such suspect class should be established for the first time by this Court, 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 class. *See Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 961 (2003).

Therefore, plaintiffs' assertion of a suspect classification should be rejected.

B. There Is No Fundamental Right Requiring The State To Recognize Marriage Between Persons Of The Same Sex And The Conditions For Establishing A New Fundamental Right Are Not Present.

While case law recognizes 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), no reported decision of any Maryland court or any federal court has ever suggested that there is a fundamental right to compel the State to recognize as valid a marriage between persons of the same sex. The appellate courts of other states have concluded that there is no such fundamental right, because a right to same-sex marriage is not "so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions." *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993).[19] *Accord*

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[19] While finding no fundamental right, the Hawaii Supreme Court initially (continued...)

Standhardt v. Superior Court, 77 P.3d 451, 459 (Ariz. 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.

Nor should this Court take it upon itself to create such a fundamental right. As the Court of Special Appeals has explained, the history of fundamental rights jurisprudence "counsels caution and restraint" on the part of courts. *Samuels v. Tschechtelin*, 135 Md. App. at 534 (quoting *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 229-30 (1985)(Powell, J., concurring)). 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 careful description of the asserted right," which

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[19] (...continued)
invalidated Hawaii's prohibition of same-sex marriage based on a state constitutional claim of gender discrimination. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *aff'd after remand sub nom Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997). Hawaii's high court subsequently reversed that decision by dispositional order, *see Baehr v. Miike*, 994 P.2d 566 (1999)(Table No. 20371), following the adoption of an amendment to the Hawaii state constitution, which provides "[t]he legislature shall have the power to reserve marriage to opposite-sex couples." Haw. Const., Art. 1, § 23, *ratified* Nov. 3, 1998.

then "must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." *Samuels v. Tschechtelin*, 135 Md. App. at 537, 534. An asserted interest will not be deemed a fundamental right if it "is not closely tied to 'respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.'" *Samuels v. Tschechtelin*, 135 Md. App. at 537, 534-35. Moreover, "whether 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.'" *Samuels v. Tschechtelin*, 135 Md. App. at 537.

Here, the interest asserted by plaintiffs cannot possibly satisfy these 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 necessarily eschew "respect for the teachings of history," *Samuels v. Tschechtelin*, 135 Md. App. at 534. 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. Therefore, this Court should reject plaintiffs' attempt to impose strict scrutiny and should instead apply rational basis review.

C. 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 historical and still widely accepted definition of marriage as a union of a man and a woman.

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*, 449 U.S. 456, 464 (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 economic and economic 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. As the Court of Appeals 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).

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 Md. Fam. Law Code § 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,[20] but is also codified in the more recently enacted federal Defense of Marriage Act ("DOMA");[21] by the considerable testimony and evidence presented to Congress in support of that legislation;[22] by the decision of at least 37 other States to adopt legislation or constitutional provisions in recent years emulating the federal DOMA;[23] and by the numerous court decisions that have upheld as rational the federal DOMA and similar marriage laws in other states.[24]

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[20] *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 is founded on the distinction of sex.").

[21] 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").

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

[23] N.3, *supra*. *See* 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).

[24] *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 (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.

In recognizing the rationality of the legislative decision to define and recognize marriage as a union between a man and a woman, the United States Congress and various courts have acknowledged a number of legitimate government interests that may be served by such a statute. *See, e.g.*, H.R. Rep. No. 104-664 (1996) at 1-18, *reprinted in* 1996 U.S.C.C.A.N. 2905-23. These interests include, among other objectives, promoting and preserving the institution of marriage as historically understood to include a man and a woman, *see, e.g., In re Kandu*, 315 B.R. at 148;

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[24] (...continued)
couples as rational); *Standhardt v. Superior Ct. of Arizona*, 77 P.3d 451, 462-63 (Ariz. 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); *Lewis v. Harris*, 2003 WL 23191114 (N.J. Sup. Ct. 2003)(upholding New Jersey marriage law as rational); *Seymour v. Holcomb*, 790 N.Y.S.2d 858, 863 (Sup. Ct. 2005)(upholding New York marriage law as rational); *Shields v. Madigan*, 783 N.Y.S.2d 270, 276 (Sup. Ct. 2004)(same); *In the Matter of Cooper*, 592 N.Y.S.2d 797, 800 (N.Y. App.1993)(same); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. 1974)(upholding Washington state marriage law as rational).

Adams, 486 F. Supp. at 1123; promoting the traditional family as the fundamental unit of a free society, *see, e.g., In the Matter of Cooper*, 564 N.Y.S.2d 684, 688 (Surrogate's Ct. 1990), *aff'd*, 592 N.Y.2d 797 (N.Y. App. Div. 1993); encouraging procreation and child rearing within the stable environment traditionally associated with marriage between biological parents, *see, e.g., In re Kandu*, 315 B.R. at 146 (citing *Bowen v. Gilliard*, 483 U.S. 587, 614 (1987)(Brennan, J., dissenting)); *Standhardt*, 77 P.3d at 462-63; *Adams*, 486 F. Supp. at 1124; *Dean*, 653 A.2d at 363-64 (Steadman, J., concurring); *Morrison v. Sadler*, 821 N.E.2d at 24-30; *Baker v. Nelson*, 191 N.W.2d at 186-87; *Singer*, 522 P.2d at 1197; preserving conformity with federal law[25] and uniformity among the States with respect to the definition of marriage, *see, e.g., Wilson v. Ake*, 354 F. Supp. 2d at 1303; and promoting and preserving societal values as expressed in legislation adopted through the democratic process, *see, e.g., id.* at 1307; *cf. Neville v. State*, 290 Md. 364, 384, 385

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[25] Given Congressional enactment of DOMA, the dictates of the Supremacy Clause, and the high degree of interdependence that links federal and state laws, it is at least minimally rational for Maryland to retain its statute that comports with federal law. To choose but one example, the Maryland tax code is to a great extent "'inextricably keyed' to the federal tax code by virtue of its adoption of the federal law, and, thus, is designed to avoid the 'anomalous result' of a taxpayer having [a] different result regarding payment of his Maryland and federal tax, even though the Maryland tax provision incorporates the federal tax provision." *Comptroller of the Treasury v. Kolzig*, 375 Md. 562, 572 (2003)(citations omitted). *See Comptroller of the Treasury v. Diebold, Inc.*, 279 Md. 401, 409 (1977)(requiring consistent interpretation of comparable Maryland and federal tax provisions). Such an anomalous result would be likely if Maryland's definition of marriage were judicially altered to conflict with the definition mandated by DOMA for all federal purposes, since marital status may play a significant role in computing the federal income tax, which in turn is the starting point for computing the Maryland income tax.

(1981)(finding rational basis where legislation promotes societal values and regulates public behavior that may be "offensive to the sensibilities of a large segment of the community").

The reasonableness of a legislative policy that seeks to advance these interests is further supported by decisions of the Supreme Court and Maryland appellate courts addressing issues bearing upon marriage and families, as well as various published academic studies. For example, the Supreme Court has long deemed marriage, as historically defined, to be "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888). Similarly, the Maryland Court of Appeals recognizes that "[t]he State has a strong interest in protecting the integrity of the marital family unit and in promoting family harmony," which, in turn, is related to "the State's longstanding policy in favor of protecting the best interests of the child." *Evans v. Wilson*, 382 Md. 614, 641 n.7 (2004)(citing *Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989))(other citations omitted).

Moreover, unlike the relatively novel concept of licensing same-sex unions, the long history of traditional opposite-sex marriage has provided the Legislature ample experience from which to determine that Maryland's marriage laws continue to advance these interests. In addition to the lessons legislators learn from their own experiences and those of their constituents, there exists a body of scholarship from which legislators could conclude that "[t]raditional male-female marriage is the

institution that has functioned most consistently to facilitate, support and protect responsible human procreation," and "[t]he natural commitments, restraints, complementarity, and shared responsibilities of traditional marriage create the best environment into which offspring may be born." Lynn D. Wardle, "'Multiply and Replenish': Considering Same-Sex Marriage in Light of State Interests in Marital Procreation," 24 Harv. J.L. & Pub. Policy 771, 784 (2001). *See, e.g.*, Maggie Gallagher, "What is Marriage For? The Public Purposes of Marriage Law," 62 La. L. Rev. 773, 782 (2002); Monte Neil Stewart, "Judicial Redefinition of Marriage," 21 Can. J. Fam. L. 13, 47-50 (2004); Degler, "The Emergence of the American Family," in *The American Family in Social-Historical Perspective* 61 (3d Ed. 1983).

Nor does it matter for purposes of rational basis review that the marriage statute may be overinclusive, in that it recognizes marriages of opposite-sex couples who neither are nor wish to become parents, or that it may be underinclusive, in that it does not license same-sex couples who may actually be parents. "Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn" by the Legislature "is imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'" *Vance v. Bradley*, 440 U.S. 93, 108 (1979)(citation omitted). On the one hand, courts have recognized that "[t]here is no real alternative to some overbreadth in achieving this goal," since if the government attempted to limit marriage solely to those able or desiring to produce children, it would need to make inquiries about license applicants' procreation plans

or perhaps require fertility testing, either of which would "raise serious constitutional questions." *Adams*, 486 F. Supp. at 1124-25. *Accord In re Kandu*, 315 B.R. at 147. On the other hand, even though same-sex couples also may raise children produced in a prior opposite-sex relationship, through artificial insemination, or through adoption, that fact "does not negate the reasonableness of the link between opposite-sex marriage and child-rearing," *Id.*, 315 B.R. at 147, given that "[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, 462-63 (Ariz. App. 2003).

Furthermore, though a child raised by a same-sex couple may also benefit from the stable family setting that the statute encourages, the Constitution does not demand either "mathematical nicety," *Piscatelli*, 378 Md. 644, or "abstract symmetry" in economic and social legislation, *Nelson*, 191 N.W.2d at 186, and the State need not address that concern in the same manner. *See Neville v. State*, 290 Md. 364, 384 (1981)("a legislative body is free to recognize degrees of harm, and may confine its restrictions to instances where it determines the need for them is clearest"). As the Supreme Court has recognized, classifying governmental beneficiaries "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *FCC v. Beach Communications*, 508

U.S. at 315-16 (citation omitted). Yet, "as long as plausible reasons exist for placement of the current line," the legislative determination is rational and must not be set aside by this Court. *Standhardt*, 77 P.3d at 463.

The rationality of the legislative determination is further demonstrated by the significant statutory enactments that address many of the effects flowing from the non-marital status of plaintiffs. The legislature may well have determined that those effects should more properly be addressed in a way different from that sought by plaintiffs.[26] For example, the State has extended significant benefits, providing benefits equally to same-sex and opposite-sex couples, or permitting designation of same-sex partners for benefits. Eligibility for workers' compensation survivorship benefits requires actual dependency whether the parties are married or not. *See*

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[26] While plaintiffs allege that "but for" the fact that they are same-sex couples, they could be married, they do not allege that, but for the effect of Maryland's determination not to permit marriage between men and women of the same sex, plaintiffs would receive all the incidents and benefits and privileges they seek. See Complaint ¶¶ 10-136. Nor do they allege that extension of a marriage license is necessary to enjoy these benefits. In fact, many of the effects of which they complain are the result of the application of federal law, which is beyond the power of the State to alter. Under the DOMA, State recognition of same-sex marriage would not alter the status of the parties with respect to their immigration status (Complaint ¶¶ 14 and 65), their treatment by United States customs (Complaint ¶ 21), their Social Security benefits (Complaint ¶ 119), exemptions from State liens for the costs of long term care under the Medicaid program (Complaint ¶ 6 and *see* 42 U.S.C. § 1396p(A)(2)(a)), or the ability to rollover retirement accounts (Complaint ¶ 82, and *see* 26 U.S.C. § 408(c)(ii)(II)). These areas are all controlled by federal law, and under DOMA, for purposes of federal law, "marriage" means only the legal union between one man and one woman and "spouse" may only be a husband or wife of the opposite sex (1 U.S.C. § 7). And Maryland must administer federal programs in accord with federal law. *See* Md. Constitution Art. 11, § 46.

Kendall v. Housing Authority, 196 Md. 370 (1950); Md. Labor & Emp. Code Ann. § 9-678, *et seq.* Most Maryland state retirement systems place no limit on who can be named as a beneficiary for purposes of optional forms of allowance. Md. State Pers. & Pen. Code Ann. §§ 20-101(n), 21-401. Others restrict designation of a beneficiary only if the member has a spouse (Law Enforcement Officers' Pension System and State Police Retirement System) or a spouse or dependent child (Judges' Retirement System). Id. at § 21-401(a). The Domestic Violence subtitle protects co-habitants and persons who have a child in common with the abuser, as well as spouses. Md. Family Law Code Ann. § 4-501(l). The General Assembly has outlawed discrimination on the basis of sexual orientation in public accommodations, employment and housing, Chapter 340 of 2001, and has also extended the protections of the hate crimes laws to crimes based on sexual orientation. Chapter 571 of 2005.

In still other areas, plaintiffs can take steps available to any persons to ameliorate the harms they claim to suffer with respect to property rights and health care decision making. The Advance Directives Act authorizes any competent adult to execute an advance directive designating any individual as a legal representative to make health care decisions in the event the declarant subsequently lacks decision making capacity. Md. Health General Code Ann. § 5-602(b)(2). Both federal and State law authorize health care providers to share information concerning a patient with family members, relatives and close personal friends. See 45 C.F.R.

§164.510(b) and Md. Health Gen. Code Ann. § 4-305(b)(7). In addition, same-sex partners can execute wills to control the inheritance of their property upon death, purchase property as joint tenants with a right of survivorship, and enter into agreements with respect to the distribution of property upon the termination of their relationships.

As the Complaint clearly shows, Maryland permits adoption by same-sex couples and second parent adoptions by two persons of the same-sex. (Complaint ¶¶ 19, 50, 117). And the adopted child is the child of the adoptive parent "for all intents and purposes" as a matter of State law. Md. Fam. Law Code Ann. §5-308(b)(1). Department of Human Resources regulations expressly prohibit a private child placement agency from denying an application for adoption based on the sexual orientation of the applicant or the adoptive child. COMAR 07.05.03.09A(2).

Proper review of a challenge like the one now before this Court is exemplified by the opinion of the court in *In re Kandu*, which candidly acknowledged that its own views did not necessarily agree with the government's arguments in support of the federal DOMA, 315 B.R. at 146 & n.9, but nevertheless upheld the legislation as rational because "[t]he review afforded under this rational basis standard is very deferential to the legislature, and does not permit this Court to interject or substitute its own personal views of DOMA or same-sex marriage," *id.* at 145. Similarly, in this case the test is not whether this Court deems the rationale that may support Maryland's marriage statute to be "persuasive, but whether it satisfies a minimal

threshold of rationality." *Id.* Because plaintiffs cannot meet their burden of proving that the statutory definition of marriage is ""wholly irrelevant to the achievement of the State's objective,'" *Heller v. Doe*, 509 U.S. at 324, the statute must be upheld as constitutional.

CONCLUSION

For all of the above reasons, defendants respectfully ask that this court enter judgment in favor of the defendants, consistent with the proposed order submitted contemporaneously with defendants' Motion for Summary Judgment and this Memorandum.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 15th day of June, 2005, I mailed a copy of the Memorandum in Support of Motion for Summary Judgment as corrected to:

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