IN THE COURT OF APPEALS OF MARYLAND

September Term, 2006

No. 44

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-Appellants,

v.

GITANJALI DEANE & LISA POLYAK; ALVIN WILLIAMS & NIGEL SIMON; TAKIA FOSKEY & JOANNE RABB; JODI KELBER-KAYE & STACEY 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,

Plaintiffs-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 PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutory Provisions

Regulatory Provisions

Other Authorities

STATEMENT OF THE CASE

This case presents for decision whether the exclusion of same-sex couples from marriage under Md. Code Ann., Fam. Law § 2-201 ("§ 2-201") violates Article 46 or 24 of the Declaration of Rights. Plaintiffs-Appellees ("Plaintiffs") are nine lesbian or gay couples and one gay individual. Each seeks the opportunity to marry a same-sex partner. Defendants-Appellants ("the State") are circuit court clerks. Their duties include the issuance of marriage licenses.

On July 7, 2004, Plaintiffs filed their complaint in the Circuit Court for Baltimore City. Seeking declaratory and injunctive relief, they claim that the exclusion of same-sex couples from marriage classifies based on sex without constitutionally sufficient justification in violation of Article 46, burdens the exercise of the fundamental right to marry without constitutionally sufficient justification in violation of Article 24, and classifies based on sexual orientation without constitutionally sufficient justification in violation of Article 24. (E. 69-76.)

On January 20, 2006, following briefing and argument on the parties' cross-motions for summary judgment, the Circuit Court issued an opinion in which it held that the exclusion of same-sex couples from marriage classifies based on sex without constitutionally sufficient justification in violation of Article 46. (E. 640-59 (Murdock, J.).) Accordingly, the Circuit Court granted Plaintiffs' motion for summary judgment, denied the State's motion for summary judgment, and entered judgment for Plaintiffs and against the State on all counts. (E. 660-61.) The Circuit Court stayed enforcement of its ruling pending the resolution of this appeal. Id.

On July 26, 2006, following the timely filing of the State's notice of appeal, this Court issued a writ of certiorari.

QUESTIONS PRESENTED

1. Under Article 46, is the exclusion of same-sex couples from marriage under § 2-201 subject to strict scrutiny because it classifies based on sex, and, if so, is it narrowly tailored to further a compelling governmental interest?

2. Under Article 24, is the exclusion of same-sex couples from marriage under

§ 2-201 subject to strict scrutiny because it significantly or disparately burdens the exercise of the fundamental right to marry, and, if so, is it narrowly tailored to further a compelling governmental interest?

3. Under Article 24, is the exclusion of same-sex couples from marriage under § 2-201 subject to strict scrutiny because it classifies based on sexual orientation, and, if so, is it narrowly tailored to further a compelling governmental interest?

4. Under Article 24, does the exclusion of same-sex couples from marriage under § 2-201 rationally further a legitimate governmental interest?

STATEMENT OF FACTS

I. Plaintiffs have formed loving and committed relationships with same-sex partners, and are raising children

Plaintiffs, each of whom is lesbian or gay, have same-sex partners whom they love and seek to marry. (E. 205, 214, 225, 229, 238, 247, 251, 255, 259; see also E. 241, 245.) Their relationships have endured for years, even decades, and have reflected their day-to-day emotional, spiritual, and financial interdependence.[1]

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[1] (E. 248 (Charles Blackburn and Glen Dehn met in a social setting and committed to a lifelong relationship in 1978), 205 (Gitanjali (Gita) Deane and Lisa Polyak met as college classmates, and committed to a lifelong relationship in 1981), 229 (Jodi Kelber-Kaye and Stacey Kargman-Kaye met in an airport and committed to a lifelong relationship in 1993), 215 (Alvin Williams and Nigel Simon met in a discussion group for African-American gay men and committed to a lifelong relationship in 1997; they celebrated their relationship with a religious ceremony in 2000), 251-52 (Steven (Steve) Palmer and Ryan Killough met in the workplace, and committed to a lifelong relationship in 1998), 255 (Patrick Wojahn and David (Dave) Kolesar met in a coffee shop and committed to a lifelong relationship in 2001; they celebrated their relationship with a religious ceremony in 2005), 259-60 (Mikkole (Mikki) Mozelle and Phelicia (Lisa) Kebreau met through a mutual friend, and committed to a lifelong relationship in 2002; they celebrated their relationship with a commitment ceremony in 2003), 239 (Donna Myers and Maria Barquero met playing roller hockey, and committed to a lifelong relationship in 2002), 225 (Takia Foskey and Joanne (Jo) Rabb met while Takia and her children were boarding the bus that Jo was driving and committed to a lifelong relationship in 2003; they celebrated their relationship with a commitment ceremony in 2004); see also E. 242, 245 (John Lestitian, the surviving partner of a thirteen-year same-sex relationship, has formed a new same-sex relationship).)

Many Plaintiffs are raising children. Some are raising children who were brought into their families through donor insemination.[2] Some are raising children who were brought into their family through adoption.[3] And some are raising children from previous relationships.[4] Some Plaintiffs intend to raise children in the future.[5]

II. Plaintiffs may not marry solely because they seek to marry same-sex partners

Plaintiffs may not marry solely because they seek to marry same-sex partners. Each partner is unrelated to the other by blood or marriage; neither partner is married to another person; each partner is over the age of 17; and each partner consents to marry the other, and has the capacity to do so. (E. 205, 214, 225, 229, 238, 247, 251, 255, 259.) Each couple properly tendered to a circuit court clerk all of the paperwork and fees necessary to obtain a marriage license. (Id.) In each instance, the circuit court clerk refused to issue a marriage license solely because the couple is a same-sex couple. (Id.)

III. Plaintiffs and their children suffer significant injury because Plaintiffs may not marry their same-sex partners

A. Plaintiffs and their children are denied important protections that are afforded to married couples and their children under state law

Because Plaintiffs may not marry, they and their children are denied hundreds of

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[2] (E. 206 (Gita Deane and Lisa Polyak are raising two daughters, both of whom were brought into their family through donor insemination), 229-30 (Jodi Kelber-Kaye and Stacey Kargman-Kaye are raising two sons, both of whom were brought into their family through donor insemination), 260 (Mikki Mozelle and Lisa Kebreau are raising two sons and one daughter, two of whom were brought into their family through donor insemination).)

[3] (E. 215 (Alvin Williams and Nigel Simon are raising a daughter and two sons, including a pair of biological siblings, all of whom were brought into their family out of foster care through adoption).)

[4] (E. 259 (Mikki Mozelle and Lisa Kebreau are raising Lisa's son from a previous relationship, who considers both Lisa and Mikki to be his parents), 225 (Takia Foskey and Jo Rabb are raising Takia's daughter and son from previous relationships, both of whom consider both Takia and Jo to be their parents).)

[5] (E. 227 (Takia Foskey and Jo Rabb intend to bring another child into their family through donor insemination), 239 (Donna Myers and Maria Barquero intend to bring a child into their family).)

important statutory, regulatory, common law, and other legal protections that are afforded to married couples and their children under state law. See Equality Md., Marriage Inequality in the State of Maryland (2006) (www.equalitymaryland.org/marriage/marriage_inequality_in_maryland.pdf) (identifying over 425 statutory protections that are afforded to married couples and their children under state law); see also Br. of Amici American Acad. of Matrimonial Laws., et al. ("AAML Br."); Br. of Amici American Psychol. Ass'n, et al. ("APA Br.").

1. Plaintiffs and their children are denied important protections associated with the death a partner

Marriage protects a spouse when his or her partner dies in ways that are not available to a same-sex partner in the same circumstance. For example, same-sex partners may not avail themselves of the spousal priority in intestate succession, Md. Code Ann., Est. & Trusts § 3-102, the spousal priority in authority to dispose of a body, Md. Code Ann., Health Occ. § 7-410(c)(1), or the spousal exemption from inheritance tax, Md. Code Ann., Tax-Gen. § 7-203(b)(2)(iii).

Before his death in July of 2003, John Lestitian's deceased partner sought to leave John his estate and to authorize John to dispose of his body. (E. 242-43.) After his death, however, his will was deemed invalid on account of a technical deficiency. (E. 242.) As a result, John had to give up his own house. (E. 243.) Moreover, he had to negotiate with his deceased partner's surviving family over the disposition of the body. (Id.) In addition, he had to pay state taxes on half of the balances of the joint bank accounts that he had shared with his deceased partner. (Id.)

Such disparities – whether those involving the authority to dispose of a body or those involving the payment of state taxes on an inheritance – are of particular and increasing concern to Charles Blackburn, age 73, and Glen Dehn, age 68. (E. 248.)

Because Plaintiffs do not enjoy the safeguards that married couples enjoy, they have had to incur the expense of attempting to protect their rights through wills and other legal instruments, none of which affords the same measure of security that the default protections enjoyed by spouses do. (E. 215-16, 248, 256.)

2. Plaintiffs and their children are denied important protections associated with the illness of a partner

Marriage also protects a spouse when his or her partner is ill in ways that are not available to a same-sex partner in the same circumstance. For example, same-sex partners may not avail themselves of the spousal priority in authority to make health care decisions, Md. Code Ann., Health-Gen. § 5-605(a)(2)(ii),[6] or the spousal entitlement to share a room in a health care facility, Md. Code Ann. Health-Gen. § 19-344(h).

In September of 2003, Jo Rabb was rushed to a local hospital for emergency gallbladder surgery. (E. 226.) Takia Foskey sought to participate in discussions with hospital staff about Jo's medical care, and simply to be by Jo's side. (E. 226-27.) Hospital staff, however, instructed Takia to sit in the waiting room because, according to hospital staff, she was not a member of Jo's family. (E. 227.) Hospital staff refused to inform Takia of the medical procedures that they were performing on Jo, or even to tell Takia whether Jo would be okay. (Id.) This caused great anxiety for Takia, especially because she knew that Jo was heavily medicated and therefore unable to make informed decisions for herself. (Id.)

In January of 2001, Stacey Kargman-Kaye was unexpectedly admitted to a local hospital for ten days. (E. 230.) As Stacey was returning from surgery, a nurse pushed Jodi Kelber-Kaye out of the room despite Jodi's repeated protests that Stacey was Jodi's partner and would want Jodi to be there to comfort her in her time of need. (Id.)

In May of 2003, Jodi gave birth prematurely at a state hospital. (Id.) While Jodi was in post-delivery recovery, the child was whisked away to a special nursery for premature infants. (Id.) Stacey, a naturopathic doctor, followed to advocate on his behalf. (Id.) A nurse attempted to exclude her from discussions about his care, repeatedly and hostilely asking, "Just who are you?" and failing to understand that she

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[6] The modifications to Md. Code Ann., Health-Gen. §§ 5-601, et seq., that were enacted in 2006 do not change the fact that, in the absence a valid advance directive, a spouse is protected under Md. Code Ann., Health-Gen. § 5-605(a)(2)(ii), but a same-sex partner is not.

was his parent. (Id.) The nurse stood down only when Jodi was compelled to join them in order to confirm what Stacey had said. (Id.)

In May of 2003, Ryan Killough was admitted to the emergency room of a local hospital where an electrocardiogram revealed an abnormality. (E. 252.) Steve Palmer sought to see Ryan so that Steve could comfort Ryan in his time of need. (Id.) The emergency room physician, however, told Steve that he could not see Ryan because he was not "family." (Id.) This caused great anxiety for Steve. (Id.) Ultimately, a nurse whom Steve happened to know interceded on his behalf. (Id.)

Such disparities – whether those involving the entitlement to share a room with a partner in a nursing home or those involving the authority to make health care decisions on behalf of a partner – are of particular and increasing concern to Charles Blackburn and Glen Dehn. (E. 248.)

Because Plaintiffs do not enjoy the safeguards that married couples enjoy, they have had to incur the expense of attempting to protect their rights through health care proxies and other legal instruments, none of which affords the same measure of security that the default protections enjoyed by spouses do. (E. 215-16, 230, 248.)

3. Plaintiffs and their children are denied important protections associated with public employment

Benefits available to spouses through public employment are not available to same-sex partners. For example, same-sex partners may not avail themselves of the spousal eligibility for health benefits, Md. Regs. Code tit. 17, § 04.13.03(11)(a), or the spousal eligibility for death benefits, Md. Code Ann., State Pers. & Pens. § 10-404(d)(2).

Jo Rabb is a Maryland Transit Administration bus driver. (E. 225.) For a period of ten months, Takia Foskey and her children did not have health insurance, which caused great anxiety for Takia and Jo. (E. 226.) As a same-sex partner, Takia is ineligible to enroll in Jo's state employer-sponsored health plan. (Id.) Because Takia and Jo are not married, Takia's children are also ineligible to enroll in Jo's state employer-sponsored health plan. (Id.) Until July of 2004, Takia and her children were ineligible to enroll in Takia's employer-sponsored health plan because, until then, Takia worked only

part-time. (Id.) Until September of 2003, Takia and her children qualified for Medicaid coverage. (Id.) Thereafter, however, they no longer qualified for Medicaid coverage on account of an increase in Takia's income level. (Id.) At the same time, Takia and Jo earned too little to afford private health insurance for Takia and her children. (Id.) Takia suffers from adenomyosis, a medical condition involving the reproductive system and, in August of 2003, underwent surgery related to that condition. (Id.) Medicaid covered the cost of the surgery itself, but, soon after the surgery, she lost her Medicaid coverage. (Id.) While Takia was uninsured, Takia and Jo incurred out-of-pocket post-surgical medical expenses, and Takia had to forego follow-up medical care. (Id.) Takia's son suffers from asthma. (Id.) While he was uninsured, Takia and Jo incurred out-of-pocket medical expenses related to his medical condition. (Id.) Although Takia and her children are now enrolled in Takia's employer-sponsored health plan, their health benefits are costlier than and inferior to the health benefits that they would enjoy if they were enrolled in Jo's state employer-sponsored health plan. (Id.)

Ryan Killough is the public relations coordinator and a paramedic for the City of Cambridge's Emergency Medical Services. (E. 251.) In the summer of 2000, Steve Palmer enrolled in nursing school. (E. 252.) In doing so, he left full-time employment and, as a result, lost his health benefits. (Id.) As a same-sex partner, Steve is ineligible to enroll in Ryan's public employer-sponsored health plan. (Id.) Throughout the course of Steve's studies, Steve and Ryan had to pay for expensive private health insurance to ensure that Steve's health needs were covered. (Id.)

Takia and Jo and their children live with the possibility of a vehicular accident while Jo is performing her duties as a bus driver. (E. 227.) If Jo were killed in such an accident, the death benefits that are available to stabilize the surviving families of Maryland Transit Administration employees who are killed on the job would not be available to Takia and her children because Takia and Jo are not married. (Id.)

Lisa Kebreau is a teacher within the Prince George's County public school system. (E. 259.) As a same-sex partner, Mikki Mozelle does not enjoy automatic recognition by Lisa's public employer-sponsored pension plan. (E. 261); see also Md. Code Ann., State

Pers. & Pens. § 21-406(b)(2)(ii) (where a state retiree fails to designate a beneficiary, payment is to be made to his or her estate).

4. Plaintiffs and their children are denied important protections associated with family relationships

Maryland courts routinely grant second-parent adoptions to same-sex partners. (See E. 351-55 (Letter from Kathryn M. Rowe, Assistant Att'y Gen., Office of the Att'y Gen., Sharon Grosfeld, Delegate, Maryland Gen. Assemb. (June 9, 2000)); see also E. 206 (second parent adoptions by Gita Deane and Lisa Polyak), 215 (second parent adoption by Alvin Williams), 229, 231 (second parent adoptions by Stacey Kargman-Kaye), 260 (second parent adoption by Mikki Mozelle).) Even so, where one partner gives birth to a child, the other partner may not secure a second-parent adoption until after a period of delay. (See E. 260.) Similarly, where one partner adopts a child, the other partner may not secure a second-parent adoption until after a period of delay. (See E. 215.) Either way, the delay in the establishment of legal relationships between the child and both of his or her parents is a source of concern for same-sex couples, given that the second parent would have no authority to act on behalf of the child if the first parent were to die or become incapacitated during the period of delay. (See E. 215, 260.)

In contrast, there is no delay in the establishment of legal relationships between a child and both of his or her parents where the child is born into a marriage. Md. Code Ann., Fam. Law. § 5-1027(c)(1) (spousal presumption of parenthood). Similarly, there is no delay in the establishment of legal relationships between a child and both of his or her parents where the child is adopted into a marriage. Md. Code Ann., Fam. Law. § 5-315(a) (spousal entitlement to joint adoption).

Moreover, although same-sex couples can enter into contractual agreements governing division of property should their relationships terminate, they, unlike married couples, do not enjoy the safeguard of divorce where their contractual agreements are deemed invalid or where they fail to enter into contractual agreements. See Md. Code Ann., Fam. Law §§ 7-101 to 7-107 (divorce provisions).

Furthermore, same-sex partners enjoy less protection from domestic violence than

marital partners. See Md. Code Ann., Fam. Law § 4-501(l)(1) (affording protection from a current or former spouse regardless of whether he or she is or was a cohabitant or is a co-parent).

5. Plaintiffs and their children are denied important protections associated with economic security

Plaintiffs and their children are also denied important protections associated with economic security. (See E. 322-50 (declaration of M.V. Lee Badgett, Ph.D.) ("Badgett Declaration").) For example, Plaintiffs do not enjoy the greater security that comes with joint ownership through a tenancy by the entirety. (E. 231, 256); see also, e.g., McManus v. Summers, 290 Md. 408, 412 (1981) (tenancy by the entirety is reserved to spouses). Plaintiffs also do not enjoy state tax equity. (E. 248); see also, e.g., Md. Code Ann., Tax-Gen. § 10-807(a) (spousal entitlement to joint return).

B. Plaintiffs and their children are more likely to be denied important protections under federal law

By its own count, the federal government affords 1,138 benefits to married couples and their children. Letter from Dayna K. Shah, Associate Gen. Couns., United States Gen. Acct. Off., to Bill Frist, Senate Majority Leader, United States Cong. (Jan, 23, 2004) (www.gao.gov/new.items/d04353r.pdf). Although married same-sex couples and their children do not enjoy these benefits at this time on account of 1 U.S.C. § 7, Plaintiffs and their children would be positioned to enjoy these benefits upon repeal or invalidation of the statute if Plaintiffs were married to their same-sex partners.

C. Plaintiffs and their children are more likely to be denied social recognition as family units

Plaintiffs also seek the intangible protections of marriage for themselves and especially for their children. As Mikki Mozelle stated:

> With our elder son starting high school, our younger son starting life, and another child on the way, Lisa and I seek to protect our children from harm and to ensure their happiness. We want our children to know a stable family and home. Marriage would contribute significantly to such stability. We want our children to feel proud of who they are and where they come

from. Marriage would contribute significantly to such a sense of dignity. We are fearful that our exclusion from marriage serves to stigmatize our children.

(E. 260-61.) All other Plaintiffs share this concern.[7] See also AAML Br.; APA Br.

IV. Historical exclusions, restrictions, and inequalities within the institution of marriage have been eliminated

Although marriage was historically conditioned on race-, class-, religion-, and sex-based considerations, all such exclusions, restrictions, and inequalities have been eliminated. (See E. 291-321 (declaration of Nancy F. Cott, Ph.D. ("Cott Declaration"))); see also Br. of Amici Organization of Am. Historians, et al. ("History Br.").

A. Historical exclusions and restrictions based on race and class have been eliminated

In 1664, Maryland, then a colony, enacted a law prohibiting marriages between "freeborn[] English women" and "Negro Sla[v]es." 1 Proceedings & Acts of the Gen.

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[7] (E. 207 ("The legal sanction of our relationship through the institution of civil marriage would greatly diminish the stigma that our daughters will otherwise bear, simply because their parents are a same-sex couple."); 216 ("We want our family to have the sense of security that comes with the knowledge that our relationship is recognized by our community and by the laws of our state."); 227 ("[We] seek for ourselves and our children the same sense of security that married couples and their children enjoy."); 231 ("[We] are concerned that, because we cannot marry, we and our sons are at constant risk that we will not be recognized as a family unit."); 240 ("I suffer dignitary harm on account of the fact that the law effectively requires me to choose between my life in Maryland and my relationship with Maria, simply because we are not recognized as spouses."); 245 ("I also seek the right to marry because I risk discrimination fostered by the stigmatizing message about the worth of lesbian and gay people that my government sends to my community by excluding them from the right to marry."); 248-49 ("[We] believe that anything short of civil marriage for same-sex couples would perpetuate second-class citizenship for lesbian and gay families . . . . We believe that we, too, are entitled to the dignity and respect that marriage bestows."); 252 ("[W]e still risk discrimination fostered by the stigmatizing message about the worth of our relationship that our government sends to our community by excluding us from marriage."); 257 ("Most of all, [we] wish for our relationship to enjoy the same social recognition as well as legal recognition as the relationships of our heterosexual peers. Our relationship can attain this level of respect only through the institution of marriage.").)

Assemb. Jan. 1637/8-Sept. 1664 533-34.[8] To punish such marriages, such women "forgetful[] of their free Condi[ti]on and [who] to the disgrace of our nation [did] intermarry" were to become slaves of their husbands' masters during their husbands' lifetimes. Id. Moreover, their children were to become "Sla[v]es as their fathers were." Id. at 534. In enacting this law, Maryland became the first colony to prohibit interracial marriages. John D'Emilio & Estelle B. Freedman, Intimate Matters: A History of Sexuality in America 35-36 (1988).

In subsequent years, Maryland enacted laws reaffirming and expanding its race- and class-based conditions on marriage. In 1678, Maryland excluded marriages of "Negroes Indians & Molottos" from marriage registers. 7 Proceedings & Acts of the Gen. Assemb. Oct. 1678-Nov. 1683 76. In 1716, Maryland imposed a penalty of five thousand pounds of tobacco on any person who joined in marriage "any negro whatsoever or mulatto slave with any white person." 141 General Pub. Statutory Law & Pub. Local Law 29. In 1777, Maryland imposed a penalty of fifty pounds on any minister who joined in marriage "any servants" or "a free person and a servant." Id. at 141 General Pub. Statutory Law & Pub. Local Law 133. Even as late as 1935, Maryland enacted a law reaffirming and expanding its prohibition of interracial marriages:

> All marriages between a white person and a negro, or between a white person and a person of negro descent, to the third generation, inclusive, or between a white person and a member of the Malay race or between a negro and a member of the Malay race, or between a person of negro descent, to the third generation, inclusive, and a member of the Malay race, are forever prohibited, and shall be void; and any person violating the provisions of this Section shall be deemed guilty of an infamous crime, and punished by imprisonment in the penitentiary not less than eighteen months nor more than ten years.

378 1935 Cumulative Supplement to the Annotated Code of the Pub. Gen. Laws 348.

Not until 1967, on the eve of the issuance of the ruling in Loving v. Virginia, 388 U.S. 1 (1967), which held that all bans on interracial marriage are unconstitutional, did

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[8] The historical documents to which Plaintiffs cite are available in the Archives of Maryland Online (www.aomol.net/html/index.html).

Maryland repeal its ban on interracial marriage. Keith E. Sealing, Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation, 5 Mich. J. Race & L. 559, 560 n.4 (2000); see also Md. Code Ann. art. 27, § 398 (repealed).

B. Historical exclusions and restrictions based on religion have been eliminated

In 1702, Maryland prohibited marriages that were not religiously solemnized. 24 Proceedings & Acts of the Gen. Assemb. 266 ("[N]o[] Justice or Mag[i]strate being a Lay man shall Jo[i]n[] any Person in Marriage; [U]nder the Penalty of []five Thousand Pounds of Tob[acco]."). In 1717, Maryland specifically prohibited marriages that were not religiously solemnized in accord with the customs of the Church of England. 33 Proceedings & Acts of the Gen. Assemb. 1717-Apr. 1720 114 ("[A]ll Persons who desire Marriage, shall apply themselves to a Minister for the contracting thereof, and shall cause due Publication to be made, according to the Rubric[] of the Church of England, of their Intent to marry, at some Church or Chapel of Ease . . . . [I]t shall and may be lawful after such Publication, and Certificate thereof had, for any Minister, duly qualified, to join together in Matrimony, any such Persons so Published, according to the Liturgy of the Church of England."). Maryland imposed a penalty of five thousand pounds of tobacco on any minister who otherwise solemnized a marriage, as well as any man who entered into the otherwise solemnized marriage. Id.

In 1777, Maryland modified the law, prohibiting marriages that were not religiously solemnized "by ministers of the church of England, ministers dissenting from that church, or Romish priests, appointed or ordained according to the rites and ceremonies of their respective churches, or in such manner as hath been heretofore used and practi[c]ed in this state by the society of people called Quakers." 141 General Pub. Statutory Law & Pub. Local Law 131. Maryland imposed a penalty of five hundred pounds on any person who otherwise solemnized a marriage. Id. at 131-32.

Courts consistently observed such laws. See, e.g., Knapp v. Knapp, 149 Md. 263, 267 (1925) ("The requirement of a religious ceremony in Maryland is fixed, and this Court has not the slightest disposition to relax it."); Feehley v. Feehley, 129 Md. 565, 568

(1916) ("It is the settled law of this state that 'some religious ceremony' must be 'superadded to the civil contract' in order that a marriage may be valid."); Denison v. Denison, 35 Md. 361, 377 (1872) ("To constitute lawful marriage . . . there must be superadded to the civil contract, some religious ceremony.").

But, today, Maryland permits marriages that are solemnized by "(i) any official of a religious order or body authorized by the rules and customs of that order or body to perform a marriage ceremony; (ii) any clerk; (iii) any deputy clerk designated by the county administrative judge of the circuit court for the county; or (iv) a judge." Md. Code Ann., Fam. Law § 2-406(a)(2).

C. Historical inequalities based on sex have been eliminated

The common law treated a married woman as legally subsumed within her husband's identity. Thus, she was legally incapable in matters of property and contract: "The early common law . . . placed married women under various disabilities, e.g., (1) the legal existence of the wife was deemed merged in that of the husband and they were regarded as one person; (2) upon marriage, the wife's personal property became vested in the husband and was subject to the claims of his creditors; and (3) the husband was entitled to the wife's services and she was legally incapable of making contracts in her own name." Condore v. Prince George's County, 289 Md. 516, 521 (1981) (citations omitted).

In 1842, Maryland began to dismantle the legal regime of coverture, providing that "any married women may become seized or possessed of any property, real or of slaves by direct bequest, demise, gift, purchase or distribution, in her own name, and as of her own property." 594 Session Laws 1842 254. It further provided that "any married woman who by her skill, industry or personal labour, shall hereafter earn any money or other property, real personal or mixed to the value of one thousand [d]ollars or less, shall and may hold the same and the fruits, increase and profits thereof, to her sole and separate use with power as a feme sole to invest and re-invest, and sell and dispose of the same." Id. at 255. In addition, it provided that "a wife shall have a right to make a will and give all her property or any part thereof to her husband, and to other persons with the

consent of the husband subscribed to said will." Id. In 1898, Maryland went further, providing as follows: "Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue upon their contracts, and also to sue for the recovery, security or protection of their property, and for torts committed against them, as fully as if they were unmarried." Furstenburg v. Furstenburg, 152 Md. 247, 249 (1927) (quotation omitted).

Finally, "all vestiges of coverture [were] abolished in 1972 [upon the adoption of Article 46 of the Declaration of Rights]." Hatzinicolas v. Protopapas, 314 Md. 340, 348 n.7 (1988).[9]

SUMMARY OF ARGUMENT

The exclusion of same-sex couples from marriage under § 2-201 is subject to strict scrutiny for each of three reasons. First, under Article 46, it classifies based on sex, a suspect classification. Second, under Article 24, it significantly and disparately burdens the exercise of the fundamental right to marry, which is equally guaranteed to same-sex couples. And, third, under Article 24, it classifies based on sexual orientation, a suspect classification.

Regardless, the exclusion of same-sex couples from marriage under § 2-201 violates Article 24 because it does not even rationally further a legitimate governmental interest. Simply put, it fails any level of scrutiny.

ARGUMENT

Plaintiffs hail from across the state and all walks of life. Their common connection is that, despite the fact that they have formed committed relationships and loving households, the State excludes them and their children from the protections that only marriage affords, solely because the person whom they love is a person of the same

[9] See also, e.g., Giffin v. Crane, 351 Md. 133 (1988) (child custody); Condore v. Prince George's County, 289 Md. 516 (1981) (necessaries); Kline v. Ansell, 287 Md. 585 (1980) (criminal conversation); Rand v. Rand, 280 Md. 508 (1977) (child support); Deems v. Western Md. Ry. Co., 247 Md. 95 (1967) (loss of consortium); Hofmann v. Hofmann, 50 Md. App. 240 (1981) (alimony); Coleman v. State, 37 Md. App. 322 (1977) (criminal desertion).

sex.

Plaintiffs seek for themselves and their children the protections unique to marriage that would strengthen their families. Such protections are not only tangible but also intangible:

> Marriage . . . bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.

Goodridge v. Department of Public Health, 798 N.E.2d 941, 954-55 (Mass. 2003) (quotation omitted). Plaintiffs know firsthand how important these protections are. They know the anxiety of foregoing medical care because they cannot enroll in a partner's health plan. They know the helplessness of being denied the chance even to sit by the side of a partner during a medical emergency. And they know the anguish of surviving not only the death of a partner but also the loss of a home because the law treats them as strangers to their own partners when it comes to inheritance rights.

The Maryland Constitution does not tolerate such discrimination. The exclusion of same-sex couples from marriage under § 2-201 violates the most basic constitutional guarantees of equality and liberty for all Marylanders.[10]

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[10] Plaintiffs seek a ruling solely on independent state grounds; they cite federal case law only as persuasive authority. In addition, Plaintiffs complain only of their exclusion from civil marriage, which is distinct from religious marriage; they do not – and indeed may not – complain of any exclusion from religious marriage. See, e.g., Md. Const. Decl. Rts. art. 36 (guaranteeing religious liberty); see also Br. of Amici Religious Organizations and Leaders. Plaintiffs note that the extension of civil marriage to same-sex couples would not occasion any change in the existing legal framework for resolving any tension between religious liberty and non-discrimination laws or policies. See id.

I. STANDARD AND SCOPE OF REVIEW

"The question of whether a trial court's grant of summary judgment was proper is a question of law subject to de novo review on appeal. In reviewing a grant of summary judgment under Md. Rule 2-501, [this Court] independently review[s] the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Miller v. Bay City Prop. Owners Ass'n, Inc., 393 Md. 620, 632 (2006) (quotation and citations omitted). "The standard of review is whether the trial court was legally correct." Prince George's County v. Local Gov't Ins. Trust, 388 Md. 162, 172 (2005) (citation omitted).

"On an appeal from the grant of a summary judgment which is reversible because of error in the grounds relied upon by the trial court the appellate court will not ordinarily undertake to sustain the judgment by ruling on another ground, not ruled upon the trial court, *if the alternative ground is one as to which the trial court had a discretion to deny summary judgment.*" Lovelace v. Anderson, 366 Md. 690, 696 (2001) (quotation omitted) (emphasis added). Thus, contrary to the State's assertion, Revised & Corrected Br. of Appellants ("State Br.") at 15, this Court may affirm the Circuit Court's ruling on any of the alternative grounds that Plaintiffs raised below because this case presents for decision a pure question of law that may not properly be submitted to a trier of fact. See Ragin v. Porter Hayden Co., 133 Md. App. 116, 134 ("When a motion is based solely upon a pure issue of law that could not properly be submitted to a trier of fact, then we will affirm on an alternative ground.") (quotations omitted), cert. denied, 361 Md. 232 (2000); see also Rule 8-131(a).

II. THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE IS SUBJECT TO STRICT SCRUTINY

A. The Exclusion of Same-Sex Couples from Marriage Is Subject to Strict Scrutiny Because It Classifies Based on Sex

As the Circuit Court correctly concluded (E. 645-53), the exclusion of same-sex couples from marriage is subject to strict scrutiny because it classifies based on sex.

1. Classifications Based on Sex Are Subject to Strict Scrutiny

It is undisputed that, "[i]n Maryland, because of the Equal Rights Amendment to the Maryland Constitution (Article 46 of the Maryland Declaration of Rights), classifications based on gender are suspect and subject to strict scrutiny." Tyler v. State, 330 Md. 261, 266 (1993) (quotation omitted).

In subjecting sex-based classifications to strict scrutiny under Article 46, this Court has embraced the hallmarks of traditional strict scrutiny. First, "the burden of justifying [sex-based] classifications falls upon the State." State v. Burning Tree Club, Inc., 315 Md. 254, 295 (Burning Tree III), cert. denied, 493 U.S. 816 (1989). Second, "the level of scrutiny to which [sex-based] classifications are subject is at least the same scrutiny as racial classifications." Burning Tree III, 315 Md. at 295 (quotation omitted). Thus, sex-based discrimination "will be upheld . . . only if it is shown that [it] . . . serve[s] a compelling state interest," Murphy v. Edmonds, 325 Md. 342, 356 (1992) (quotation and citations omitted), and that it is "narrowly tailored and precisely limited to achieving those legitimate ends," Burning Tree III, 315 Md. at 296.

2. The Exclusion of Same-Sex Couples from Marriage Classifies Based on Sex

Article 46 guarantees that "[e]quality of rights under the law shall not be abridged or denied because of sex." In the wake of "legislative passage and approval by the people of Article 46 of the Declaration of Rights, *any* ancient deprivation of rights based upon sex would contravene the basic law of this State." Boblitz v. Boblitz, 296 Md. 242, 274-75 (1983) (emphasis added); see also Rand, 280 Md. at 515-16 ("The adoption of the E.R.A. in this state was intended to, and did, drastically alter traditional views of the validity of sex-based classifications."). Simply put, under Article 46, "sex is not, and cannot be, a factor in the enjoyment or the determination of legal rights." Giffin, 351 Md. at 148 (citation omitted).

As the Circuit Court correctly concluded (E. 645-52), by permitting opposite-sex couples but not same-sex couples to marry, § 2-201 makes sex a factor in the enjoyment and the determination of one's right to marry. A man who seeks to marry a woman can

marry, but a woman who seeks to marry a woman cannot. Similarly, a woman who seeks to marry a man can marry, but a man who seeks to marry a man cannot. In other words, one's sex is a factor in determining whether one can marry the person of one's choosing. Thus, by definition, permitting opposite-sex couples but not same-sex couples to marry constitutes a sex-based classification. See Baehr v. Lewin, 852 P.2d 44, 64 (Haw. 1993);[11] Li v. Oregon, No. 0403-03057, 2004 WL 1258167, at *6 (Or. Cir. Ct. Apr. 20, 2004), rev'd on other grounds, 110 P.3d 91 (Or. 2005); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998);[12] see also Andersen v. King County, 138 P.3d 963, 1037-39 (Wash. 2006) (motion for reconsideration pending) (Bridge, J., concurring in the dissent); Hernandez v. Robles, Nos. 86-89, at 16-17 (N.Y. July 26, 2006) (Kaye, C.J., dissenting) (www.courts.state.ny.us/ctapps/decisions/jul06/86-89opn06.pdf); Goodridge, 798 N.E.2d at 971-72 (Greaney, J., concurring); Baker v. Vermont, 744 A.2d 864, 904-06 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part); Holguin v. Flores, 18 Cal. Rptr. 3d 749, 757 (Ct. App. 2004).

a. Because constitutional rights are individual rights, not class rights, the proper inquiry is how a classification affects each individual, not each class

The State incorrectly argues that, because the exclusion of same-sex couples from marriage applies equally to men as a class and women as a class, it is not a sex-based classification. State Br. at 20-25. It is well-established that, because constitutional rights

[11] Contrary to the State's assertion, State Br. at 18 n.9, the Hawaii Supreme Court has expressly clarified that the fact that the exclusion of same-sex couples from marriage classifies based on sex exists separate and apart from the fact that it also classifies based on sexual orientation. Baehr v. Miike, No. 20371, at 2 n.1 (Haw. Dec. 11, 1996) (per curiam) (www.hawaii.gov/jud/ 20371.htm).

[12] The fact that Baehr, Li, and Brause were mooted by subsequent state constitutional amendments does not diminish their persuasive value. These decisions continue to stand for the proposition that a disparity between same-sex couples and opposite-sex couples is a sex-based classification, even if there is an overriding provision that categorically precludes constitutional remediation of the exclusion of same-sex couples from marriage.

are *individual* rights, not class rights, the proper inquiry is how a classification affects each *individual*, not each class. This is no less true of sex-based classifications than it is of race-based classifications.

In McLaughlin v. Florida, 379 U.S. 184 (1964), the Supreme Court held that a penalty on interracial cohabitation was a race-based classification even though "each member of the interracial couple [was] subject to the same penalty." Id. at 188. In striking down the "racial classification," id. at 192, the Court expressly overruled Pace v. Alabama, 106 U.S. 583 (1883), which reasoned that an enhanced penalty on adultery or fornication by an interracial couple did not constitute a race-based classification because "all who committed it, white and Negro, were treated alike." McLaughlin, 379 U.S. at 189 (footnote omitted). In Loving, the Court similarly held that a penalty on interracial marriage was a race-based classification even though "[the] miscegenation statutes punish[ed] equally both the white and the Negro participants in an interracial marriage." Loving, 388 U.S. at 8; see also id. at 11 ("There can be no question but that [the] miscegenation statutes rest solely upon distinctions drawn according to race."). The Court flatly "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." Id. at 8.

Both McLaughlin and Loving reflect the fundamental principle that constitutional rights are individual rights, not class rights. Acknowledging this fundamental principle in the course of holding that racially discriminatory restrictive covenants are judicially unenforceable, the Supreme Court in Shelley v. Kraemer, 334 U.S. 1 (1948), rejected the argument that, "since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected." Id. at 21. Recognizing that "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual" and "are personal rights," the Court concluded that "[i]t is . . . no answer to these petitioners to say that the courts may

also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." Id. at 22.

Similarly, in the course of becoming the first court in the nation to strike down a ban on interracial marriage, the California Supreme Court in Perez v. Lippold, 198 P.2d 17 (Cal. 1948), rejected the argument that the statute "does not discriminate against any racial group, since it applies alike to all persons whether Caucasian, Negro, or members of any other race." Id. at 20. The court concluded that "[t]he decisive question . . . is not whether different races, each considered as a group, are equally treated." Id. It did so because "[t]he equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals" and, therefore, "[t]he right to marry is the right of individuals, not of racial groups."[13] Id. at 20 (citations omitted).

The fundamental principle that constitutional rights are individual rights, not class rights, extends to sex-based classifications. In J.E.B. v. Alabama ex rel. T.B., 511 U.S.

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[13] The nature of a classification (e.g., race-based) is analytically distinct from the nature of the interest that the classification seeks to further (e.g., white supremacy). The former determines the level of scrutiny; the latter determines whether the classification survives that level of scrutiny. Thus, the fact that the laws at issue in McLaughlin, Loving, Shelley, and Perez sought to further white supremacy was not essential to the conclusions that they classified based on race. Rather, they were essential to the conclusions that that they did not further any legitimate (let alone compelling) interest. See, e.g., Loving, 388 U.S. at 11 ("[T]he *racial classifications* must stand on their own *justification*, as measures designed to maintain White Supremacy.") (emphases added).

Moreover, the fact that the laws at issue in McLaughlin, Loving, Shelley, and Perez resulted in racial segregation, as opposed to racial integration, was not essential to the conclusions that they classified based on race. A ban on *intra*racial marriages would be no less race-conscious than a ban on *inter*racial marriages. See, e.g., North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971) (racial integration of public schools is a race-conscious act, albeit one with sufficient justification).

In Maryland, the analytical framework for assessing the constitutionality of sex-based classifications is no different than that for assessing the constitutionality of race-based classifications. See Burning Tree III, 315 Md. at 295. That certain sex-based classifications may survive strict scrutiny does not change this fact.

127 (1994), the Supreme Court held that, because "individual jurors themselves have a right to a nondiscriminatory selection process," a peremptory strike of either a male or a female potential juror based on his or her sex is a sex-based classification. Id. at 141. In doing so, the Court rejected Justice Scalia's contention that, because both male and female potential jurors were struck based on their sex, "the system as a whole [was] evenhanded." Id. at 159 (Scalia, J., dissenting). Justice Kennedy elaborated on the Court's reasoning:

> The Equal Protection Clause and our constitutional tradition are based on the theory that an individual possesses rights that are protected against lawless action by the government. The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question). At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial or sexual . . . class.

Id. at 152-53 (Kennedy, J., concurring) (quotation omitted); see also Califano v. Westcott, 443 U.S. 76, 83-85 (1979) (a classification can be sex-based even if the effects of its applications are felt equally by men and women); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 287 A.2d 161, 168-69 (Pa. Commw. Ct. 1972) (newspaper listings of "male" job postings and "female" job postings violated a prohibition on sex-based discrimination), aff'd on other grounds, 413 U.S. 376 (1973).

That constitutional rights are individual rights, not class rights, is equally true in Maryland. Indeed, this Court has repeatedly recognized that this is so in the very context of sex-based classifications. In Burning Tree Club, Inc. v. Bainum, 305 Md. 53 (1985) (Burning Tree II), a majority of this Court concluded that preferential tax treatment for single-sex country clubs was a sex-based classification. Rejecting Chief Judge Murphy's minority viewpoint that the statute did not classify based on sex because it applied equally to men and women, id. at 70-71 (Murphy, C.J.), Judge Rodowsky, in his

controlling opinion,[14] observed that "[i]t is not an answer . . . to say that . . . the program is neutral with respect to sex, in the sense that an all female or an all male country club is eligible to participate." Id. at 87 (Rodowsky, J., concurring in the judgment). Recognizing that "[t]he ostensible prohibition against sex discrimination applies to *each individual* country club," Judge Rodowsky concluded that "[t]he universe of consideration for the particular problem created by this anti-discrimination law is *any* participating country club, *in and of itself*." Id. (emphases added). Fearing that "the effectiveness of the Equal Rights Amendment to the Maryland Constitution would be substantially impaired" "if the views set forth in . . . Chief Judge Murphy's opinion were in the future to be adopted by a majority of [the] Court," Judge Eldridge took pains to reinforce Judge Rodowsky's conclusion:

> [The minority] apparently do not view the express sanctioning of single sex clubs as imposing a burden upon the excluded sex, as long as the governmental action in theory equally sanctions discrimination by single sex facilities against persons of the other sex. *While it is true that many of our prior cases have involved government action directly imposing a burden or conferring a benefit entirely upon either males or females, we have never held that the E.R.A. is narrowly limited to such situations.* On the contrary, we have viewed the E.R.A. more broadly, in accordance with its language and purpose.

Id. at 88, 95 (Eldridge, J., concurring in part, dissenting in part) (emphases added). Accordingly, Judge Eldridge agreed that the statute, "on its face, violate[d] the E.R.A." Id. at 100; see also Coalition for Open Doors v. Annapolis Lodge No. 622, Benevolent & Protective Order of Elks, 333 Md. 359, 383 n.40 (1994) ("[T]he state statute involved in Burning Tree . . . expressly drew classifications based on gender.").

Similarly, in Giffin, this Court concluded that presumptive placement of a child

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[14] See id. at 91 & n.5 (Eldridge, J., concurring in part and dissenting in part) ("[A] majority of the Court rejects Chief Judge Murphy's views and holds that the primary purpose provision does constitute state action violative of the E.R.A., [but] a different majority decides in . . . Judge Murphy's opinion that the primary purpose provision is not severable . . . . In effect, the Court's entire mandate in this case reflects the conclusions of only one member, Judge Rodowsky.").

with a parent of the same sex solely because they are of the same sex (i.e., absent any evidence that such placement would further a particular child's interests) is a sex-based classification, notwithstanding the fact that it applies equally to men and women. Giffin, 351 Md. at 155; see also Baker, 744 A.2d at 906 n.10 (Johnson, J., concurring in part and dissenting in part). In doing so, this Court expressly recognized the fundamental principle that constitutional rights are individual rights, not class rights: "[T]he treatment of *any person* by the law may not be based upon the circumstance that *such person* is of one sex or the other." Giffin, 351 Md. at 148 (citation omitted) (emphases added); see also Tyler v. State, 330 Md. 261 (1993) (a peremptory strike of either a male or a female potential juror based on his or her sex is a sex-based classification).

Indeed, this Court has recognized the universality of the rule that, because constitutional rights are individual rights, not class rights, the proper question is how a classification affects each individual, not each class. In Bruce v. Director, Dep't of Chesapeake Bay Affairs, 261 Md. 585 (1971), this Court struck down laws that prohibited crabbers and oystermen from taking or catching crabs or oysters from waters other than those of their own county. In doing so, this Court recognized, among other things, that the laws classified based on geography despite the fact that they applied equally to each class of crabbers and oystermen from each tidewater county, i.e., each was subject to the vagaries of its own waters. Id. at 590, 593, 601.

Accordingly, it is of no moment that the exclusion of same-sex couples from marriage applies equally to men as a class and women as a class. It is enough that sex is a factor in the enjoyment and the determination of one's right to marry.[15] See Br. of

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[15] Contrary to the State's assertion, State Br. at 21, neither Massage Parlors, Inc. v. Mayor & City Council, 284 Md. 490 (1979), nor Maryland State Bd. of Barber Examiners v. Kuhn, 270 Md. 496 (1973), suggests otherwise. In Massage Parlors, a massage establishment argued that an ordinance prohibiting a massagist from administering a massage to a person of the opposite sex classified based on sex in violation of Article 46. Massage Parlors, 284 Md. at 493. This Court, however, expressly declined to reach the issue because, by its terms, the ordinance did not in fact prohibit a massagist from administering a massage to a person of the opposite sex. Id. at 494-96. Whether the ordinance impermissibly discriminated between opposite-sex pairs

Amicus NAACP Legal Def. & Educ. Fund, Inc. ("NAACP LDF Brf."); Br. of Maryland Law Professors ("Law Professors Br.").

b. Article 46 of the Declaration of Rights is an expansive and dynamic guarantee of equality

The State also incorrectly argues that the exclusion of same-sex couples falls outside the ambit of Article 46. State Br. at 17-20, 25-29. The canons of constitutional construction confirm that Article 46 is an expansive and dynamic guarantee of equality that does not provide for such an exception.

This Court has emphasized that, in construing a constitutional provision, the meaning of the text is the primary inquiry: "[T]o ascertain the meaning of a constitutional provision or rule of procedure we first look to the normal, plain meaning of the language." Davis v. Slater, 383 Md. 599, 604 (2004) (citations omitted); accord Brown v. Brown, 287 Md. 273, 278 (1980). The text is assigned its plain meaning. Andrews v. Governor of Md., 294 Md. 285, 290 (1982) ("[A constitutional provision], unlike the Acts of our legislature, owes its whole force and authority to its ratification by the people, and they judged of it by the meaning apparent on its face.") (quotation omitted); Norris v. Mayor & City Council, 172 Md. 667, __, 192 A. 531, 535 (1937) ("Since Constitutions are the basic and organic law, and are meant to be known and understood by all the people, the words used should be given the meaning which would be given to them in common and ordinary usage by the average man in interpreting them in relation to every day affairs."). If the meaning of the text is clear, the inquiry ends. Brown, 287 Md. at 278 ("[I]f the words are not ambiguous, the inquiry is terminated, for the Court is not at liberty to search beyond the Constitution itself where the intention of the framers is

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and same-sex pairs seeking massages in the same room was not presented for decision. In Kuhn, this Court rejected an argument that a statute prohibiting both male and female cosmetologists from serving male customers discriminated against cosmetologists based on *their* sex in violation of Article 46. Kuhn, 270 Md. at 505-06. The sex of a *cosmetologist* seeking to serve a male customer was simply not a factor in the enjoyment or the determination of the right at issue. Id. Whether the statute impermissibly discriminated between male customers and female customers seeking the services of a cosmetologist was not presented for decision.

clearly demonstrated by the phraseology utilized.") (citation omitted); Norris, 192 A. at 535 ("[I]t is axiomatic that where the language of a Constitution is clear and unambiguous, there can be no resort to construction to attribute to the founders a purpose or intent not manifest in its letter.") (citation omitted).

"The words of the E.R.A. are clear and unambiguous; they say without equivocation that 'Equality of rights under the law shall not be abridged or denied because of sex.' This language mandating equality of rights can only mean that sex is not a factor." Rand, 280 Md. at 511-12 (citation omitted). Accordingly, this Court has concluded that "the Maryland E.R.A. *absolutely* forbids the determination of . . . 'rights,' as may be accorded by law, solely on the basis of one's sex, i.e., sex is an impermissible factor in making *any* such determination . . . . It is clear . . . that the Equal Rights Amendment *flatly* prohibits gender-based classifications, absent substantial justification, whether contained in legislative enactments, governmental policies, or by application of common law rules." Giffin, 351 Md. at 149 (citations omitted) (emphases added). In other words, this Court has recognized that, when it comes to subjecting sex-based classifications to strict scrutiny, the text of Article 46, by its terms, does not provide for any exception.[16]

Even if the text of Article 46 were unclear (which it is not), the history of Article 46 – which the State invokes in support of its argument, State Br. at 25-29 – is also unclear and therefore not dispositive of the scope of Article 46. The record confirms the historical understanding that "there is no legislative history expressing the intention of the

[16] The State's observation that the exclusion of same-sex couples is a sexual orientation-based classification, State Br. at 17-20, does not change the fact that the exclusion of same-sex couples from marriage is also a sex-based classification. The exclusion of same-sex couples from marriage is a sex-based classification and, independently, a sexual orientation-based classification just as a penalty on those who wear yarmulkes is both a headwear-based classification and, independently, a religion-based classification. See Baehr v. Miike, No. 20371, at 2 n.1; Li, 2004 WL 1258167, at * 6-*7; see also Nabozny v. Podlesny, 92 F.3d 446, 454-58 (7th Cir. 1996). Because the text of Article 46 is clear, the State's resort to extrinsic interpretive aids (the historical takes of legislative and judicial bodies) to suggest otherwise, State Br. at 18-20, is improper. See Brown, 287 Md. at 278.

drafters of the Maryland Amendment." (E. 479; see also id. ("[I]t is not possible at this time to surmise how the Maryland Amendment will be interpreted").) The State invokes instead the legislative history of the proposed federal Equal Rights Amendment – specifically, a single statement of a single legislator. State Br. at 26-27. But the record also confirms the historical understanding that such legislative history is not controlling: "Maryland courts are not, of course, bound by the interpretation of the federal Amendment." (Id.; see also E. 477 ("It is not possible now to predict how the [federal] Amendment will be interpreted or precisely what impact it will have.").) Indeed, it is a fundamental tenet of our federal system that the scope of protection afforded by state constitutional provisions is distinct from that afforded by their federal analogs. Attorney General v. Waldron, 289 Md. 683, 714-15 (1981); Maryland Green Party v. Maryland Bd. of Elections, 377 Md. 127, 157 (2003); Dua v. Comcast Cable of Md., Inc., 370 Md. 604, 621-22 (2002); Frankel v. Board of Regents of Univ. of Md. Sys., 361 Md. 298, 313 (2000); Verzi v. Baltimore County, 333 Md. 411, 417 (1994); Kirsch v. Prince George's County, 331 Md. 89, 97 (1993).

Although, as the State observes, State Br. at 27-28, § 2-201 was enacted soon after Article 46 was ratified, contemporaneous legislation is not dispositive of the scope of a constitutional provision. Indeed, the statutory provisions at issue in Burning Tree II and Burning Tree III were enacted in 1974, only eighteen months after Article 46 was ratified.[17] Burning Tree III, 315 Md. at 259; Burning Tree II, 305 Md. at 57. Yet they did not fall outside the ambit of Article 46. Like the statutory provisions at issue in Burning Tree II and Burning Tree III, § 2-201 is not shielded from judicial review under Article 46 because, like the statutory provisions at issue in Burning Tree II and Burning Tree III, it does not purport to interpret Article 46.[18]

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[17] Plaintiffs note that, in 1974, the General Assembly had specific occasion to re-consider Article 46, ultimately declining to propose its repeal. (Apx. 1.)

[18] In contrast, in Levin v. Hewes, 118 Md. 624 (1912), the contemporaneous legislation at issue and the constitutional provision at issue directly addressed the same subject (appointments of justices of the peace).

If anything, the history of Article 46 reveals the historical understanding that Article 46 was intended to be an expansive and dynamic guarantee of equality, one that would not be forever frozen in time based on notions of equality as they existed in 1972. Editorials and articles repeatedly emphasized the far-reaching consequence of ratification, especially in the area of family law.[19] Of even greater significance, the way in which editorials and articles characterized Article 46 was consistent with the way in which scholars characterized a classic equal rights amendment, i.e., one that simply provides the analytical framework for determining whether a particular classification is sex-based.[20] See Barbara A. Brown, et al., The Equal Rights Amendment: A

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[19] (See, e.g., Apx. 3 (Changes in Md. Constitution on Ballot, Washington Post, Oct. 23, 1972, at B4 ("This amendment . . . [is] likely eventually to have a far-reaching impact on court decisions in the areas of family and domestic relations laws dealing with such matters as child custody, alimony and paternity cases.")), 4 (18 Referendum Issues Confront Voters, News Am., Oct. 24, 1972, at A4 (same)), 6 (Voter's Guide, Baltimore Sun, Oct. 22, 1972, at 25 ("If this amendment is approved, a wide variety of Maryland statutes would have to be revised to eliminate discrimination on the basis of sex.")), 7 (Record Vote Expected, Bethesda-Chevy Chase Trib., Nov. 3, 1972, at 12 ("Equal Rights Amendment . . . passage of which could mean 227 other Maryland laws, including rape laws, might be ruled unconstitutional because they make distinction between the sexes.")), 8 (More on the Questions, Frederick News, Nov. 3, 1972, at A4 ("The adoption of the amendment to the State Constitution . . . perhaps would modify court rulings through the entire area of family and domestic relations laws.")), 9 (Barbara M. Morris, Ladies, Beware, Baltimore Sun, Oct. 20, 1972, at A18 (same)), 10 (Louis Azrael, Women's Rights vs. Fatti Maschi, News Am., Oct. 27, 1972, at 7B ("[The Attorney General] . . . says [equal rights for women] may change many . . . things that hardly anyone thinks of when considering the equal rights amendment on which Marylanders will vote next month")).)

[20] (See, e.g., Apx. 11 (Equal Rights, Columbia Times, Nov. 2, 1972, at 4A ("The Equal Rights Amendment (ERA) places the issue of sex squarely where it belongs, and that is out of the picture altogether where rights in our society are concerned . . . . Americans, tragically, have for too long been too sex-conscious. They have allowed the words 'male' 'female' 'man' 'woman' to dictate how a person must live life, and blocked the understanding of something much more fundamental than gender, and that is an individual's human beingness.")), 12 (Question No. 3: Equal Rights, Catonsville Times, Nov. 2, 1972, at 1B (same)), 13 (Equal Rights, Arbitus Times, Nov. 2, 1972, at 2A (same)), 14 (Make This Tuesday Count, Maryland Indep., Nov. 2, 1972, at A2 ("Why should one person be penalized or rewarded just because of their sex? With the state . . .

Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871, 979 (1971) ("In the tradition of other great constitutional mandates, such as equal protection for all races, the right to freedom of expression, and the guarantee of due process, [an equal rights amendment] supplies the *fundamental legal framework* upon which to build a coherent body of law and practice designed to achieve the specific goal of equal rights.") (emphasis added); see also id. at 902 (acknowledging, in the context of privacy concerns, that, because "[e]xisting attitudes toward relations between the sexes could change over time – are indeed now changing," an equal rights amendment is dynamic).

Accordingly, the State's reliance on one article quoting one proponent of Article 46 as speculating that the exclusion of same-sex couples from marriage would fall outside the ambit of Article 46 is misplaced. (See App. 24.) Moreover, the article itself implicitly qualified such speculation by quoting another proponent of Article 46 as acknowledging, "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." (App. 23.) Indeed, given that Article 46 provoked little debate, it is likely that most voters simply did not have occasion to consider whether the exclusion of same-sex couples from marriage would fall outside its ambit. (See Apx. 15 (Barry C. Rascovar, Feminists Find Few Foes of Ballot Question, Baltimore Sun, Oct. 31, 1972, at C24).)

Moreover, the fact that the pre-ratification compilation of statutory provisions subject to Article 46 by the Maryland Commission on the Status of Women, on which the State relies, State Br. at 26-27, did not include any statutory provision excluding same-sex couples from marriage is of no moment. (See E. 480-501.) Section 2-201 was enacted post-ratification.

Furthermore, to the extent that the post-ratification compilation of legal concerns subject to Article 46 by the Governor's Commission to Study Implementation of the Equal Rights Amendment, on which the State also relies, State Br. at 28-29, illuminates the pre-ratification understanding of the legislature and the electorate, it is significant that

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adoption of this amendment, our nation will have an even truer democracy.")).)

the commission expressly listed the exclusion of same-sex couples from marriage among the legal concerns that might be subject to Article 46. (Apx. 18.) Although the commission deferred action on it and ultimately did not identify it as a priority area, its inclusion on the list is significant. At a minimum, it confirms that, at the time, it was not clear whether the scope of Article 46 was or was not intended to encompass the exclusion same-sex couples from marriage.

In the absence of a clear showing that the legislature and the electorate specifically intended to exempt the exclusion of same-sex couples from marriage from the scope of Article 46, this Court must not conclude that the pre-ratification understanding of the legislature and the electorate was that the exclusion of same-sex couples from marriage would fall outside the ambit of Article 46:

> [I]t is . . . well settled that contemporaneous construction should be resorted to with caution and reserve . . . . No acquiescence for any length of time can legalize a usurpation of power . . . . While a long established custom of the Chief Executives of the State may be shown as an aid in interpreting the Constitution, the failure of the Judiciary to acquiesce in that construction nullifies its effect.

Johnson v. Duke, 180 Md. 434, 442-43 (1942) (citations omitted). Because the history of Article 46 is unclear in this regard, this Court must instead employ general maxims of constitutional construction to ascertain the meaning of Article 46. See, e.g., Jones v. State, 336 Md. 255, 261-62 (1994); see also Luppino v. Gray, 336 Md. 194, 204 n.8 (1994) ("The rules governing the construction of statutes and constitutional provisions are the same."). Accordingly, this Court must construe Article 46 in a way that disfavors any diminishment of the equality that it guarantees. Norris, 192 A. at 535 ("[I]t is an accepted canon of constitutional construction that [constitutions] are to be liberally construed to accomplish the purpose for which they were adopted.").[21]

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[21] See also Rhode Island v. Cianci, 591 A.2d 1193, 1202 (R.I. 1991) ("When more than one construction of a constitutional provision is possible, one of which would diminish or restrict a fundamental right of the people and the other of which would not do so, the latter must be adopted.") (quotation omitted); Oregon ex rel. Gladden v. Lonergan, 269 P.2d 492 (Or. 1954) ("It is a fundamental canon of construction that a Constitution

That Article 46 is an expansive and dynamic guarantee of equality is fully consistent with this Court's constitutional jurisprudence:

> [T]he rule which above all others gives life to the written law and makes its use possible for the government and control of men in carrying on the actual business of life . . . is that while the principles of the constitution are unchangeable, in interpreting the language by which they are expressed, it will be given a meaning which will permit the application of those principles to changes in the economic, social, and political life of the people, which the framers did not and could not foresee. So it has been said that a constitution is to be interpreted by the spirit which vivifies, and not by the letter which killeth.

Norris, 192 A. at 535 (quotation and citation omitted). Accordingly, the State's radical proposition that the guarantee of equality of Article 46 is forever frozen in time based on notions of equality as they existed in 1972 is indefensible. See Law Professors Br.

For the foregoing reasons, the exclusion of same-sex couples from marriage is subject to strict scrutiny because it classifies based on sex.

B. The Exclusion of Same-Sex Couples from Marriage Is Subject to Strict Scrutiny Because It Significantly and Disparately Burdens the Exercise of the Fundamental Right to Marry

The exclusion of same-sex couples from marriage is also subject to strict scrutiny because it significantly and disparately burdens the exercise of the fundamental right to marry.

1. A Significant or Disparate Burden on the Exercise of the Fundamental Right to Marry Is Subject to Strict Scrutiny

It is undisputed that a significant or disparate burden on the exercise of the fundamental right to marry is subject to strict scrutiny.

A classification is subject to strict scrutiny under *due process* jurisprudence where it *significantly* burdens the exercise of the fundamental right to marry. The due process strand of fundamental rights jurisprudence "provides heightened protection against

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should receive a liberal interpretation in favor of a citizen, especially with respect to those provisions which were designed to safeguard the liberty and security of the citizen in regard to both person and property.") (quotation omitted).

government interference with certain fundamental rights and liberty interests." Samuels v. Tshechtelin, 135 Md. App. 483, 533 (2000) (quotation omitted). Thus, under due process jurisprudence, governmental action "significantly curtailing a fundamental right must undergo strict scrutiny – it must be narrowly tailored to serve a compelling public interest." Wolinski v. Browneller, 115 Md. App. 285, 301 (1997) (citation omitted).

A classification is also subject to strict scrutiny under *equal protection* jurisprudence where it *disparately* burdens the exercise of the fundamental right to marry. The equal protection strand of fundamental rights jurisprudence demands strict scrutiny where governmental action disadvantages a class, whether suspect or non-suspect, in its access to a fundamental right. Massage Parlors, 284 Md. at 496 ("When the statute or ordinance restricts a fundamental right, (such as the right to privacy, right to vote, or the right to marry) *or* creates an inherently suspect classification (such as race, nationality or alienage), courts employ the strict scrutiny test requiring the state to establish that the classification is necessary to promote a compelling state interest.") (emphasis added). Thus, under equal protection jurisprudence, governmental action that disparately burdens the exercise of the fundamental right to marry must also further a compelling governmental interest in a narrowly tailored manner.

Either way, a burden on the exercise of the fundamental right to marry is subject to strict scrutiny under fundamental rights jurisprudence.

2. The Exclusion of Same-Sex Couples from Marriage Significantly and Disparately Burdens the Exercise of the Fundamental Right to Marry

Article 24 guarantees 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." This Court "long ago determined that the phrase, 'the Law of the land,' 'mean[s] the same thing' as 'due process of law.'" Clark v. State, 364 Md. 611, 644 (2001) (quotation omitted). This Court has also long recognized that, "[a]lthough the Maryland Constitution contains no express equal protection clause," it is "settled that

[the] concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights."[22] Waldron, 289 Md. at 704 (citations and footnotes omitted).

The longstanding recognition of the right to marry as a fundamental right reflects the extraordinary respect historically afforded to personal autonomy. The Supreme Court has used the strongest language possible to describe the importance and the breadth of the right to autonomy: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 851 (1992); see also Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an

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[22] This Court has repeatedly emphasized that the scope of the guarantee afforded by Article 24 is distinct from that afforded by the Fourteenth Amendment to the United States Constitution:

> Although the equal protection clause of the fourteenth amendment and the equal protection principle embodied in Article 24 are "in pari materia," and decisions applying one provision are persuasive authority in cases involving the other, we reiterate that each provision is independent, and a violation of one is not necessarily a violation of the other.

Id. at 714 (citation omitted). Thus, the Court has held that "a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone." Id. at 715 (citation omitted); see also, e.g., Maryland Green Party, 377 Md. at 157; Dua, 370 Md. at 621-22; Frankel, 361 Md. at 313; Verzi, 333 Md. at 417; Kirsch, 331 Md. at 97.

At the same time, this Court has made clear that state constitutional jurisprudence is informed by federal constitutional jurisprudence:

> While it is true . . . that the equal protection guarantees of Article 24 and the fourteenth amendment are independent [and] capable of divergent effect, it is apparent that the two are so intertwined that they, in essence, form a double helix, each complementing the other . . . . [T]he decisions of the United States Supreme Court are . . . persuasive as we undertake to interpret Article 24.

Waldron, 289 Md. at 705. Thus, federal constitutional case law is instructive, but not controlling.

autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct."). At the core of the right to autonomy are personal decisions made by adults about child-bearing, child-rearing, intimate association, sexual intimacy, and, of particular relevance to this case, marriage.[23] See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003) (sexual intimacy); Turner v. Safley, 482 U.S. 78 (1987) (marriage); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (intimate association); Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Roe v. Wade, 410 U.S. 113 (1973) (child-bearing); Stanley v. Illinois, 405 U.S. 645 (1972) (child-rearing); Eisenstadt v. Baird, 405 U.S. 438 (1972) (sexual intimacy); Boddie v. Connecticut, 401 U.S. 371 (1971) (marriage); Loving v. Virginia, 388 U.S. 1 (1967) (marriage);[24] Griswold v. Connecticut, 381 U.S. 479 (1965) (sexual intimacy); see also Wolinski, 115 Md. App. at 297 n.6 (noting that the Maryland Constitution similarly recognizes the right to autonomy); id. at 302 ("[T]he rights may properly be regarded as part of a person's autonomy – the right to participate in the control of important parts of one's destiny through one's own choices.") (quotation omitted).

Like other fundamental rights, the right to marry is plainly a right "which [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 [it was]

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[23] Significantly, the Supreme Court has made clear that the contours of the right to autonomy are not static: "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." Lawrence, 539 U.S. at 579; see also Schochet v. State, 75 Md. App. 314, 358-59 (1988) (Wilner, J., dissenting) ("These are broad concepts that take their meaning not just from a frozen slice of history but from contemporary social mores and institutions. Changed perceptions of what is acceptable *does* have Constitutional significance . . . . Great concepts like 'liberty' were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.") (quotation omitted) (emphasis in original), rev'd, 320 Md. 714 (1990).

[24] Loving was decided on both due process and equal protection grounds. See Zablocki, 434 U.S. at 383 ("The leading decision of this Court on the right to marry is Loving v. Virginia.") (citation omitted); see also NAACP LDF Br.

sacrificed." Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (quotations omitted). Indeed, the Supreme Court has long recognized that the right to marry rests at the core of individual liberty, and that the decision to marry is one of the most significant decisions that a person can make. See, e.g., Turner, 482 U.S. at 95-96; Zablocki, 434 U.S. at 383; Boddie, 401 U.S. at 376; Loving, 388 U.S. at 12; Griswold, 381 U.S. at 486; Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Maynard v. Hill, 125 U.S. 190, 211-12 (1888). Thus, in Zablocki, the Court was able to trace a line of cases from 1888 to 1977 to support its assertion that "the right to marry is of fundamental importance for all individuals." Zablocki, 434 U.S. at 384. This Court has likewise acknowledged that the right to marry is a fundamental right. See, e.g., Massage Parlors, 284 Md. at 496.

The exclusion of same-sex couples from marriage *significantly* burdens the exercise of the fundamental right to marry – it is not a mere burden; it is an absolute deprivation. See Wolinski, 115 Md. App. at 304 ("[W]e apply 'strict judicial scrutiny' . . . when legislation may be said to have 'deprived' . . . the free exercise of some such fundamental right or liberty.") (quotation omitted). Moreover, the exclusion of same-sex couples from marriage *disparately* burdens the exercise of the fundamental right to marry – opposite-sex couples can marry; same-sex couples cannot. See Prince George's County Health Dep't v. Briscoe, 79 Md. App. 325, 337 (1989) ("[I]t must be ascertained whether the difference in treatment . . . impinges upon a fundamental right, in which case strict judicial scrutiny must be applied."). Either way, the exclusion of same-sex couples from marriage constitutes a burden on the fundamental right to marry that is subject to strict scrutiny. See Brause, 1998 WL 88743, at *5-*6; see also Andersen, 138 P.3d at 1019-27 (Fairhurst, J., dissenting); Hernandez, Nos. 86-89, at 2-10, 17-18 (Kaye, C.J., dissenting); Goodridge, 798 N.E.2d at 970 (Greaney, J., concurring); In re Marriage Cases, Nos. A110449-51, A110463, A110651-52, 2006 WL 2838121, at *53-*57 (Cal. Ct. App. Oct. 5, 2006) (appeal pending) (Kline, J., concurring in part and dissenting in part); Lewis v. Harris, 875 A.2d 259, 280-84 (N.J. Super. Ct. App. Div. 2005) (Collester, J.A.D., dissenting) (appeal pending).

a. The fundamental right to marry is the right to marry the person of one's choice

The State attempts to dismiss Plaintiffs' argument by asserting that Plaintiffs seek the creation of a *new* fundamental right – the right to marry a same-sex partner. State Br. at 46-50. In fact, Plaintiffs seek only recognition of the fact that the *existing* fundamental right to marry is the right to marry the person of one's choice – and therefore already encompasses the right to marry either a same-sex or an opposite-sex partner. Which framing of the inquiry is the correct one is dispositive. Fundamental rights jurisprudence, applied logically and dispassionately, answers the question decisively in Plaintiffs' favor.

In determining the scope of a fundamental right, "[h]istory and tradition are the starting point." Lawrence, 539 U.S. at 572; see also Glucksberg, 521 U.S. at 720-21. Critically, in assessing history and tradition, the proper inquiry is *what* has historically been enjoyed (e.g., the right to marry), not *who* has historically enjoyed it (e.g., people in heterosexual relationships). In other words, fundamental rights jurisprudence is concerned with the right itself, not the class that enjoys it. If it were otherwise, a class that was historically denied a right would always be denied the right.

In numerous cases involving various fundamental rights, the Supreme Court has recognized that fundamental rights are equally guaranteed to classes that were historically excluded from the enjoyment of those rights. If it were correct that the historical exclusion of a class from the enjoyment of a right ends the inquiry, many landmark fundamental rights cases would have come out very differently.

That the Supreme Court has looked to what was historically enjoyed, not who historically enjoyed it, is reflected in the case law involving the right to sexual privacy. In striking down a prohibition on the use of contraceptives by married couples, Griswold relied on history to conclude that there exists a right to sexual privacy. Griswold, 381 U.S. at 486 ("We deal with a right of privacy older than the Bill of Rights."). In striking down a prohibition on the distribution of contraceptives to unmarried couples, Eisenstadt did not rely on history to conclude that unmarried couples, like married couples, enjoy the right to sexual privacy. Indeed, such a conclusion would have been inconsistent with

history. Instead, it concluded that, if history establishes that the right to sexual privacy exists, then it exists for all couples, whether married or unmarried. Eisenstadt, 405 U.S. at 453 ("[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the married and the unmarried alike."); see also Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (the right to sexual privacy extends to minors notwithstanding history to the contrary).

The case law involving the right to care, custody, and control of one's children similarly reflects an analysis of what was historically enjoyed, not who historically enjoyed it. Historically, a child born out of wedlock was nullius fillius and therefore had no parent in the eyes of the law. See, e.g., Stone v. Gulf Am. Fire & Cas. Co., 554 So. 2d 346, 357 n.9 (Ala. 1989) (noting "the harsh common law concept that illegitimate children were nullius fillius"). Notwithstanding such history, the Supreme Court in Stanley v. Illinois, 405 U.S. 645 (1972), recognized the parental rights of an unwed father. See also Marshall v. Stefanides, 17 Md. App. 364, 376 (1973) ("We conclude that the law of Maryland is that the father of illegitimate children may not be denied the right to seek custody of those children.").

The same analysis holds true where the right to physical liberty is concerned. In colonial times, involuntary confinement of the mentally ill was an issue largely beyond the concern of the courts. Lisa Newell, America's Homeless Mentally Ill: Falling Through the Cracks, 15 New Eng. J. on Crim. & Civ. Confinement 277, 280 (1989). Indeed, this remained the case until the 1960s. Id. at 281. Nevertheless, in O'Connor v. Donaldson, 422 U.S. 563 (1975), the Supreme Court had no trouble recognizing that the fundamental right to physical liberty is equally guaranteed to the mentally ill.

The case law concerning the right to marry is no different in its commitment to the principle that, where a right exists, it is not limited to those who historically enjoyed it. Indeed, Loving, Boddie, Zablocki, and Turner all would have been decided very differently if the right to marry were so limited.

Historically, the right to marry was not enjoyed by people in interracial

relationships.[25] See Peter Wallenstein, Tell the Court I Love My Wife: Race, Marriage, and Law – An American History 253-54 (2002) (anti-miscegenation laws persisted in most colonial and post-colonial states for three centuries). Just nineteen years before the issuance of the ruling in Loving, at least thirty states prohibited interracial marriage, at least six by constitutional provision. See id. at 159-60. Yet Loving held that the right to marry is guaranteed to different-race couples, just as it is guaranteed to same-race couples. Loving, 488 U.S. at 12.

Historically, the right to marry also did not include the right to re-marry.[26] England was a virtually divorceless society until 1857, and, while some states in the nineteenth century allowed legal separation, legal divorce was rare, often requiring an act of a state legislature, and only under limited circumstances, such as adultery. See Lawrence Friedman, A History of American Law 179-86 (1973). Yet the Supreme Court has repeatedly vindicated the right to re-marry. In Boddie, the Court held that the government may not require an indigent person to pay a fee as a condition of divorce. Boddie, 401 U.S. at 380-81. And, in Zablocki, the Court held that the government may not prohibit a "deadbeat" parent from re-marrying. Zablocki, 434 U.S. at 388-90.

Similarly, in Turner, the Supreme Court would not have reached the conclusion that the government may not prohibit a prisoner from marrying if "the right to marry" had been improperly recast as "the right of prisoners to marry."[27] Turner, 482 U.S. at 95-96.

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[25] In Maryland, the ban on interracial marriages predated statehood and persisted until 1967. See supra Statement of Facts § IV.A. Thus, for 191 of Maryland's 230 years of statehood, the racial composition of a marriage was an essential component of the legal definition of marriage.

[26] Maryland did not permit divorce, except by an extraordinary act of the General Assembly, until 1841. In re Heilig, 372 Md. 692, 713-14 (2003). Thus, for much of Maryland's history, the right to marry was not commonly understood to include the right to re-marry.

[27] Given that the right to marry extends even to prisoners who have no expectation that their marriages will be consummated, id. at 96, Turner demonstrates that the right to marry is not part and parcel of the right to procreate, or vice versa. Indeed, the Court has long identified the right to marry and the right to procreate as separate rights. See, e.g., Roe, 410 U.S. at 152. And, as Griswold and Eisenstadt make clear, one has both a right

As a matter of historical fact, the right to marry was enjoyed in none of these circumstances. Nevertheless, the right to marry was ultimately recognized as pertaining to all of them, making clear that the right is not limited to those who historically enjoyed it. See also Goodridge, 798 N.E.2d at 961 n.23 ("[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.").

That this is the correct analysis is confirmed by the repudiation of the one exception to the rule – Bowers v. Hardwick, 478 U.S. 186 (1986). Just as the State in this case seeks to characterize the fundamental right at issue as the right to marry a same-sex partner, the Supreme Court in Bowers characterized the fundamental right at issue as "the right to engage in [same-sex sexual] conduct." Id. at 194. But this case is no more about "the right to same-sex marriage" than Bowers was about "the right to same-sex sodomy." As Justice Blackmun observed in his dissenting opinion in Bowers, "[t]his case is no more about a fundamental right to engage in homosexual sodomy, as the Court purports to declare, than Stanley v. Georgia . . . was about a fundamental right to watch obscene movies, or Katz v. United States . . . was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about the most comprehensive of rights and the right most valued by civilized men, namely, the right to be let alone." Id. at 199 (Blackmun, J., dissenting) (quotations omitted). Seventeen years later, Justice Blackmun was vindicated when Lawrence not only overruled Bowers, but indeed held that "[it] was not correct when it was decided." Lawrence, 539 U.S. at 578. Placing itself squarely in the line of cases following Griswold, Lawrence confirmed that lesbian and gay people "may seek autonomy for [purposes such as sexual intimacy], just as heterosexual persons do." Id. at 574. In doing so, Lawrence reaffirmed that the proper analysis is what was historically enjoyed (e.g., sexual privacy), not who historically enjoyed it (e.g., people in

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to marry, with or without procreating, and a right to procreate, with or without marrying. See also Goodridge, 798 N.E.2d at 961 ("[I]t is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.").

heterosexual relationships).

This Court must not repeat the analytical error of Bowers. "[T]he essence of the right to marry is freedom to join in marriage with *the person of one's choice.*"[28] Perez, 198 P.2d at 21 (emphasis added); see also Goodridge, 798 N.E.2d at 958 ("[T]he right to marry means little if it does not include the right to marry the person of one's choice."); NAACP LDF Br.; Law Professors Br.

b. A number-based marital restriction and a sex-based marital restriction present analytically distinct considerations

The State's argument notwithstanding, State Br. at 58-59, extending marriage to same-sex couples would not necessitate extending marriage to polygamous units any more than extending marriage to interracial couples did. See Perez, 198 P.2d at 46 (Shenk, J., dissenting) ("The underlying factors that constitute justification for laws against miscegenation closely parallel those which sustain the validity of prohibitions against . . . bigamy.") (citations omitted); Tennessee v. Bell, 66 Tenn. 9, 1872 WL 4237, at *1 (1872) ("[By extending marriage to interracial couples,] [t]he Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy."); Peter Irons & Stephanie Guitton, May It Please the Court 282-83 (1993) (the Virginia Attorney General at oral argument in Loving asserted that the "prohibition of interracial marriage . . . stands on the same footing as the prohibition of polygamous marriage, or incestuous marriage"). Each restriction on the partners to a marriage demands its own assessment and stands on its own merit. A

[28] Glucksberg is both consistent with this analysis and distinguishable from this case. In Glucksberg, the Supreme Court found that *no one* historically enjoyed a right to assisted suicide. Glucksberg, 521 U.S. at 728. In contrast, people in heterosexual relationships have historically enjoyed a right to marry, but people in lesbian or gay relationships have not. Suessman v. Lamone, 383 Md. 697 (2004), is also distinguishable from this case. In Suessman, this Court recognized that the contours of the right to vote have always been limited by the competing right of a political party to choose its champion. See id. at 732 n.17. In contrast, the contours of the right to marry are not similarly limited by a competing constitutional consideration.

number-based marital restriction and a sex-based marital restriction present analytically distinct considerations.

Coverture necessitated a male partner to a marriage and a female partner to a marriage because the law assigned different rights and responsibilities to the partners to a marriage based on their sex. Now that coverture has been abolished, the law assigns the same rights and responsibilities to each partner to a marriage. Thus, today, if a male partner were substituted for a female partner to a marriage, or vice versa, the law assigning rights and responsibilities to the partners to a marriage would not need to change to accommodate the substitution. This is so because the law assigning rights and responsibilities to the partners to a marriage is sex-blind.

In contrast, the law assigning rights and responsibilities to the partners to a marriage is not number-blind. If two or more partners were substituted for one partner to a marriage, the law assigning rights and responsibilities to the partners to a marriage would need to change to accommodate the substitution. The law does not contemplate the assignment of rights and responsibilities to the partners to a marriage where two partners have conflicting interests vis-à-vis a third partner, e.g., two partners disagreeing over how to care for an incapacitated third partner, two partners competing over the estate of an intestate third partner. Moreover, the law does not contemplate the rights and responsibilities of one marital partner vis-à-vis a child of two other marital partners. The substitution of two or more partners for one partner to a marriage would therefore necessitate increased governmental involvement in intimate family matters, and could thereby implicate compelling governmental interests.

Such considerations only confirm that a number-based marital restriction requires its own assessment.[29] See Law Professors Br.

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[29] The same is true where consanguinity-based and age-based marital restrictions are concerned. Each presents analytically distinct considerations, e.g., public health, capacity to consent.

c. Article 24 of the Declaration of Rights is an expansive and dynamic guarantee of equality and liberty

Since the framing of the Maryland Constitution in 1776, Marylanders have enjoyed the expansive protections guaranteed by Article 24 (then, Article 21) of the Declaration of Rights. The State's radical proposition that the application of Article 24 may not yield any result at odds with the state of affairs in 1776, State Br. at 31, would effect a significant diminution of such protections.

The State's originalist interpretation of Article 24 is analytically flawed because the proper inquiry is not what the framers of the Maryland Constitution understood marriage in particular (or any other matter subject to Article 24) to mean. Rather, it is what they understood equality and liberty in principle to mean. The historical record does not support the proposition that the framers of the Maryland Constitution intended Article 24 to be a limited and static mandate of equality or liberty. Indeed, the enduring check on the tyranny of the majority over any disfavored class in any context is the sine qua non of any constitutional guarantee of equal protection. And the enduring guarantee of basic liberties to all is the sine qua non of any constitutional guarantee of due process. Article 24 would be meaningless if it guaranteed Marylanders nothing more than the "equality" and "liberty" that existed at the time of the framing of the Maryland Constitution – an "equality" that tolerated pervasive bias based on race, alienage, illegitimacy, and numerous other considerations that have since been repudiated, and a "liberty" that denied fundamental rights to historically disfavored classes. This Court has flatly rejected such originalist notions:

> [W]hile the principles of the Constitution are unchangeable, in interpreting the language by which they are expressed it will be given a meaning which will permit the application of those principles to changes in the economic, social, and political life of the people, which the framers did not and could not foresee. Thus, while we may not depart from the Constitution's plain language, we are not bound strictly to accept only the meaning of the language at the time of adoption . . . . Thus, we construe the Constitution's provisions to accomplish in our modern society the purposes for which they were adopted by the drafters.

Benson v. State, 389 Md. 615, 632-33 (2005) (quotation and citations omitted).

More fundamentally, the State's originalist interpretation of Article 24 is inconsistent with the text, context, and judicial interpretation of Article 24. By its own terms, Article 24 does not limit its own application to the "equality" or "liberty" that existed in 1776. Nor does it exempt marriage (or any other matter subject to Article 24) from its purview. This expansive reading is only reinforced when Article 24 is placed in context with the other articles of the Declaration of Rights. See Md. Const. Decl. Rts. art. 1 ("[A]ll Government of right . . . [is] instituted solely for the good of the whole."). And it is reflected in the interpretation of Article 24 by Maryland courts throughout the past 230 years. See, e.g., Murphy, 325 Md. at 356-57 (all forms of discrimination, including discrimination based on race, alienage, and illegitimacy, are subject to some level of review under Article 24). Indeed, it is inconceivable that, if, for example, the State were to re-enact an anti-miscegenation law, there would be no recourse under Article 24 because the framers of the Maryland Constitution tolerated, even endorsed, such discrimination.

In the end, the State's originalist interpretation of Article 24 proves far too much. It would implicate much more than the exclusion of same-sex couples from marriage, by turning back the clock to 1776 for all disfavored classes in all contexts. It would also implicate much more than Article 24 by turning back the clock to 1776 for all other original provisions of the Maryland Constitution.[30] Throughout the past 230 years,

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[30] The fact that Md. Const. art. III, § 43 protects the property of a wife from the debts of her husband is immaterial. Contra State Br. at 39 n.22. If the constitutional guarantee of equal protection or due process were limited by the social conventions indirectly referenced by the framers of the Maryland Constitution, then not only the exclusion of same-sex couples from marriage but also the unequal treatment of married women (with the exception of unequal treatment of married women involving matters of property) would fall outside the scope of constitutional protection. Cf. Deems v. Western Md. Ry. Co., 247 Md. 95 (1967) (pre-Article 46 case recognizing that disparities between married men and married women implicated the constitutional guarantee of equal protection). Plaintiffs note that this Court has already held that Md. Const. art. III, § 43 does not stand as a jurisdictional barrier to a grant of relief in this case. Duckworth v. Deane & Polyak, 393 Md. 524, 543-45 (2006).

Maryland courts have necessarily rejected this extremely cramped view of the Maryland Constitution.[31] See Law Professors Br.

For the foregoing reasons, the exclusion of same-sex couples from marriage is subject to strict scrutiny because it significantly and disparately burdens the exercise of the fundamental right to marry.

C. The Exclusion of Same-Sex Couples from Marriage Is Subject to Strict Scrutiny Because It Classifies Based on Sexual Orientation

The exclusion of same-sex couples from marriage is also subject to strict scrutiny because it classifies based on sexual orientation.

1. Classifications Based on Sexual Orientation Are Subject to Strict Scrutiny

"[W]hen a statute creates a distinction based upon clearly 'suspect' criteria . . . then the legislative product must withstand a rigorous, 'strict scrutiny.'" Waldron, 289 Md. at 705-06. In subjecting suspect classifications to strict scrutiny under Article 24, this Court has embraced the hallmarks of traditional strict scrutiny: "Laws which are subject to this demanding review violate the equal protection clause unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest."[32] Id. at 706 (quotation omitted).

In addition, the fact that Md. Const. art. IV, § 38, now repealed, provided for the issuance of marriage licenses "subject to such provisions as are now *and may be* prescribed by Law" is immaterial. Contra State Br. at 39 n.22 (emphasis added). Presumably, such "Law" included constitutional law. Regardless, when Md. Const. art. IV, § 38 was repealed, any originalist intent underlying it was necessarily forsaken.

[31] The State's alternative interpretation of Article 24, i.e., the framers of the Maryland Constitution intended to grant the legislative branch sole authority over marriage-related matters, State Br. at 39-40, simply cannot be reconciled with the long history of judicial review of such matters. See, e.g., Giffin v. Crane, 351 Md. 133 (1998); Condore v. Prince George's County, 289 Md. 516 (1981); Kline v. Ansell, 287 Md. 585 (1980); Rand v. Rand, 280 Md. 508 (1977); Deems v. Western Md. Ry. Co., 247 Md. 95 (1967); Hofmann v. Hofmann, 50 Md. App. 240 (1981); Coleman v. State, 37 Md. App. 322 (1977).

[32] This Court also recognizes an intermediate level of scrutiny applicable to

Lesbian and gay people constitute a suspect class because they are "a category of people who have experienced a history of purposeful unequal treatment *or* been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." Id. at 705 (quotation omitted) (emphasis added). First, lesbian and gay people have experienced and continue to experience systemic discrimination on account of their sexual orientation. This historical pattern of prejudice directed against a disfavored class has so often proven to be invidious that it must be viewed with a high degree of suspicion. Second, discrimination based on sexual orientation is highly suspicious because sexual orientation bears no relation to capacity to participate in or contribute to society. It has proven to be an irrelevant consideration in every context in which the government acts, from law enforcement[33] to public education[34] to public employment[35] to child custody and visitation disputes.[36] For each of these reasons, such discrimination must be closely scrutinized to ensure that it is not invidious. See Br. of Amici Equality Md., et al. ("Sexual Orientation Br.").

a. Lesbian and gay people have experienced a history of purposeful unequal treatment

Lesbian and gay people have suffered broad-based prejudice in the past and continue to suffer such prejudice today. The manifestation of such animus has changed over time, but its existence has remained constant. At the turn of the past century, the

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"quasi-suspect classification[s]" which "impact upon sensitive, although not necessarily suspect criteria." Id. at 711 & n.16 (quotations omitted).

[33] See, e.g., Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004); Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997).

[34] See, e.g., Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9th Cir. 2003); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

[35] See, e.g., Miguel v. Guess, 51 P.3d 89 (Wash. Ct. App. 2002), rev. denied, 64 P.3d 650 (Wash. 2003); Quinn v. Nassau County Police Dep't, 53 F. Supp. 2d 347 (E.D.N.Y. 1999); Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279 (D. Utah 1998); Glover v. Williamsburg Local Sch. Dist. Bd. of Educ., 20 F. Supp. 2d 1160 (S.D. Ohio 1998).

[36] See, e.g., Boswell v. Boswell, 352 Md. 204 (1998).

medical establishment "embraced the 'degeneracy' theory of homosexuality . . . . [which] emphasized the depravity of the condition." Patricia A. Cain, Litigating for Lesbian and Gay Rights: A Legal History, 79 Va. L. Rev. 1551, 1555 (1993) (footnote omitted). The post-World War I era was marked by repression of sexual orientation-related expression. Id. at 1557. During the McCarthy era, lesbian and gay people were grouped with Communists as security risks, resulting in a Presidential executive order calling for the purge of such "sex perverts" from government service. Id. at 1565-66. Throughout the 1950s and 1960s, police commonly raided gay bars and arrested patrons as a form of harassment. Id. at 1564-65. Until 1990, lesbian and gay immigrants were precluded from entering the United States, first as "psychopaths," then as "sexual deviants." See Tracey Rich, Sexual Orientation Discrimination in the Wake of *Bowers v. Hardwick*, 22 Ga. L. Rev. 773, 773 n.4 (1988). And, until 2003, the legal consequences of sodomy laws "were sufficiently severe to make lesbians and gay men think of themselves as criminals just for being who they were." Cain, supra at 1564; see also Lawrence, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

Today, many lesbian and gay people continue to hide their sexual orientation for fear of rejection or harassment. Those who choose not to do so often find themselves the targets of discrimination on account of their sexual orientation. In one recent survey, three out of four respondents reported experiencing such discrimination, with one out of three respondents experiencing physical violence. Kaiser Family Found., Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation 3-4 (2001) (www.kff.org/kaiserpolls/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13874). Such results are consistent with the findings of the Surgeon General:

> [O]ur culture often stigmatizes homosexual behavior, identity and relationships. These anti-homosexual attitudes are associated with psychological distress for homosexual persons and may have a negative impact on mental health, including a greater incidence of depression and

> suicide, lower self-acceptance and a greater likelihood of hiding sexual orientation . . . . In their extreme form, these negative attitudes lead to antigay violence. Averaged over two dozen studies, 80 percent of gay men and lesbians had experienced verbal or physical harassment on the basis of their orientation, 45 percent had been threatened with violence, and 17 percent had experienced a physical attack.

HHS, The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior 4 (2001) (www.surgeongeneral.gov/library/sexualhealth/call.htm) (citations omitted). Indeed, lesbian and gay people remain among the leading targets of hate crimes. See FBI, Hate Crime Statistics 9 (2002) (www.fbi.gov/ucr/hatecrime2002.pdf) (1,244 of the 7,462 hate crimes reported in 2002 – sixteen percent of all reported hate crimes – were motivated by sexual orientation bias).

A similar history of discrimination has been experienced by lesbian and gay people in Maryland. This fact has been recognized – even documented – by the State itself.[37]

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[37] See, e.g., Maryland Comm'n on Human Relations, Annual Report 11 (2002) (www.mchr.state.md.us/annrep2002.pdf) (documenting 66 reported hate crimes on the basis of sexual orientation, constituting nine percent of all reported hate crimes, in 2002); Maryland Comm'n on Human Relations, Annual Report 9 (2001) (www.mchr.state.md.us/annrep%202001.pdf) ("The report compared the disposition of home purchase loan applications filed by co-applicants of the same gender with the disposition of applications filed by co-applicants of the opposite gender . . . . and found that the same-gender group was consistently denied a greater percentage of applications for conventional loans, particularly when the lender was a bank or thrift institution."); Maryland Gen. Assemb., Operating Budget Analysis Document 9-10 (2001) (www.mlis.state.md.us/2001rs/budget_docs/All/Operating/D00L00_-_Maryland_Commission_on_Human_Relations.pdf) ("The Interim Report of the Special Commission to Study Sexual Orientation Discrimination in Maryland . . . . reported that the public hearings produced numerous testimonials of discrimination against Maryland citizens based upon their sexual orientation. Some testimony detailed incidents of threats and violence, as well as indifference from authorities investigating such incidents. Some involved wrongful dismissal from employment and some, eviction from, and denial of housing. Testimony was also heard from citizens with objections to certain sexual orientations who had concerns about having to employ or rent to people with such orientations."); Maryland Comm'n on Human Relations, Press Release (2001) (www.mchr.state.md.us) ("As testimony at public hearings and before Senate and House

In sum, there exists a pattern of prejudice directed against lesbian and gay people that has proven to be extraordinarily pernicious, which is independently sufficient to render sexual orientation a classification of which this Court should be especially suspicious.

b. Lesbian and gay people have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities

Despite the fact that homosexuality "implies no impairment in judgment, stability, reliability or general social and vocational capabilities," harmful stereotypes about lesbian and gay people have long served as justifications for the discrimination that lesbian and gay people have experienced. American Psychiatric Ass'n, Fact Sheet: Gay, Lesbian and Bisexual Issues 2 (2000) (www.psych.org/public_info/gaylesbianbisexualissues22701.pdf).

> Homosexuals have suffered from the extreme fear and hatred of the heterosexual majority. They have at various times been viewed as psychotic, immoral, and generally repulsive. As a result of these characterizations, homosexuals have been deprived of many opportunities open to heterosexuals. This deprivation is rarely based on any lack of capability but is instead usually based on the majority's perception of homosexuality as contrary to nature and morality.

Rich, supra at 773-74 (footnotes omitted).

The evidence dispelling odious myths that persist about homosexuality is overwhelming. With respect to the notion that lesbian and gay people are mentally ill,

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Committees confirmed, discrimination based on sexual orientation has been a harsh reality for many gays, lesbians and bisexuals who live, work in, and visit Maryland."); Maryland Comm'n on Human Relations, Annual Report 3 (2000) (www.mchr.state.md.us/annrep2000.pdf) ("[Housing] discrimination based on . . . sexual orientation was widely reported."); Special Comm'n to Study Sexual Orientation Discrimination in Md., Interim Report Transmittal Memorandum 1-2 (2000) ("[I]ndividuals whose sexual orientation differs from the presumed majority . . . . pay taxes, participate in our democracy and add to the richness of our culture. Yet, the Commission was disturbed to find that they are regularly victimized on the basis of who they are rather than on what they do.").

"[a]ll major professional mental health organizations have gone on record to affirm that homosexuality is *not* a mental disorder." American Psychiatric Ass'n, supra at 1 (emphasis in original); see also APA Br. Moreover, all such organizations, as well as the Surgeon General, have emphatically rejected the suggestion that lesbian and gay people can or should change their sexual orientation. American Psychiatric Ass'n, supra at 2 ("There is no published scientific evidence supporting the efficacy of 'reparative therapy' as a treatment to change one's sexual orientation."); id. at 4 (noting that the American Psychological Association, the National Association of Social Workers, and the American Academy of Pediatrics agree); HHS, supra at 4 ("Sexual orientation is usually determined at adolescence, if not earlier, and there is no valid scientific evidence that sexual orientation can be changed.") (citations omitted); see also APA Br.

Many stereotypes about lesbian and gay people falsely brand them as threats to child welfare. Yet "[n]umerous studies have shown that the children of gay parents are as likely to be healthy and well-adjusted as children raised in heterosexual households. Children raised in gay or lesbian households do not show any greater incidence of homosexuality or gender identity issues than other children." American Psychiatric Ass'n, supra at 3; see also (E. 265-90 (declaration of Judith Stacey, Ph.D.) ("Stacey Declaration")); Br. of Amici National Ass'n of Soc. Workers ("Child Welfare Br."); APA Br. Furthermore, there is simply no correlation between sexual orientation and child molestation. See Carole Jenny, et al., Are Children at Risk of Sexual Abuse by Homosexuals?, 94 Pediatrics 44 (1994) (finding that less than one percent of child molesters are gay); see also Child Welfare Br.; John Boswell, Christianity, Social Tolerance and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century (1980) (noting that, historically, baseless accusations of child molestation have been leveled against various disfavored minorities vulnerable to such propaganda).

The notion that lesbian and gay people favor sexual promiscuity over committed, family-centered relationships similarly lacks any empirical support. Like their heterosexual counterparts, most lesbian and gay people desire stable relationships.

Indeed, one recent survey showed that 74% of lesbian and gay people would marry if they could. Kaiser Family Found., supra at 4; APA Br.

Thus, lesbian and gay people have been disadvantaged, not on account of their capacity to participate in or contribute to society, but rather on account of insidious untruths about their sexual orientation, which is independently sufficient to render them a suspect class.

* * *

Both because lesbian and gay people have experienced a history of purposeful unequal treatment and, separately, because they have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities, the Oregon Court of Appeals has held that they are a suspect class:

> [W]e have no difficulty concluding that [lesbian and gay people] are members of a suspect class. Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.

Tanner v. Oregon Health Scis. Univ., 971 P.2d 435, 447 (Or. Ct. App. 1998). This Court should hold likewise.[38] See Children's Hosp. & Med. Ctr. v. Bonta, 118 Cal. Rptr. 2d

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[38] Federal courts have sporadically identified immutability and, separately, political powerlessness as alternative avenues to recognition as a suspect class for purposes of federal equal protection jurisprudence. Maryland courts have not done likewise for purposes of state equal protection jurisprudence. Nevertheless, Plaintiffs note that sexual orientation would be immutable even if it were true that, like alienage, and sex, it could be changed. See Ehrlich v. Perez ex rel. Perez, No. 137, 2006 WL 2882834 (Md. Oct. 12, 2006) (reaffirming that alienage is a suspect classification); In re Heilig, 372 Md. 692 (2003) (acknowledging transsexualism). Suspect classes include classes defined by a characteristic that people "should not be required to change because [they are] fundamental to . . . individual identities or consciences." Hernandez-Montiel v. INS, 225 F.3d 1084, 1092 (9th Cir. 2000). Plaintiffs further note that lesbian and gay people are politically powerless, especially given that many feel that they must conceal their sexual orientation to avoid discrimination. They have yet to achieve anything close to comprehensive protection for themselves and their families – and indeed have achieved far less than racial minorities or women have in this regard. Moreover, they

629, 650 (Ct. App. 2002); Hernandez, Nos. 86-89, at 12-16 (Kaye, C.J., dissenting); Marriage Cases, 2006 WL 2838121, at *60-*62 (Kline, J., concurring in part and dissenting in part); Watkins v. United States Army, 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J., concurring).

c. The State's reliance on federal case law is misplaced

Tellingly, the State does not contest whether lesbian and gay people meet the definition of a suspect class as set forth under Maryland case law. Rather, it relies solely on federal case law on this topic. State Br. at 43-46. Such case law, however, is not persuasive.

First, because the scope of the Maryland equal protection guarantee is distinct from that of the federal equal protection guarantee, federal case law on this topic is not controlling. See Waldron, 289 Md. at 714-15; Maryland Green Party, 377 Md. at 157; Dua, 370 Md. at 621-22; Frankel, 361 Md. at 313; Verzi, 333 Md. at 417; Kirsch, 331 Md. at 97. Moreover, where, as here, the Supreme Court has not yet decided an issue under the federal constitution, compare Romer v. Evans, 517 U.S. 620 (1996) (whether sexual orientation is a suspect classification is an open question in federal jurisprudence) with San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (wealth is not a suspect classification in federal jurisprudence), Maryland courts enjoy that much more latitude in deciding the issue under the Maryland Constitution.

Second, federal case law on this topic erroneously relies on Bowers for the proposition that the fundamental right to sexual intimacy does not extend to people in lesbian or gay relationships. Bowers has been wholly repudiated. The Supreme Court has held not only that Bowers "is not correct today" but indeed that it "was not correct when it was decided."[39] Lawrence, 539 U.S. at 578.

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remain the target of persecution through majoritarian processes, including popular referenda that are aimed precisely at taking away what political victories they have achieved. See Sexual Orientation Br.

[39] Thus, Thomasson v. Percy, 80 F.3d 915, 928 (4th Cir. 1996), is unpersuasive because it relies on Steffan v. Perry, 41 F.3d 677, 685 n.3 (D.C. Cir. 1994), which in turn relies on Bowers: "[I]f the government can criminalize homosexual conduct, a group that

Third, federal case law on this topic erroneously relies on Romer for the proposition that the Supreme Court has addressed whether sexual orientation is a suspect classification. In Romer, the Court did not address whether sexual orientation is a suspect classification. The Court did not do so because, "if [a law] cannot pass even the minimum rationality test," as in Romer, "our inquiry ends." Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1985). Thus, such case law is unpersuasive.[40] Indeed, such case law reinforces the prudential rule articulated in Hooper.[41]

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is defined by reference to that conduct cannot constitute a 'suspect class.'" Steffan, 41 F.3d at 684 n.3 (citation omitted). Likewise, Lofton v. Secretary of the Dep't of Children & Fam. Servs., 358 F.3d 804, 818 & n.6 (11th Cir. 2004), is unpersuasive because it relies on federal case law that in turn relies on Bowers. See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 292-93 (6th Cir. 1997) ("[U]nder Bowers . . . and its progeny, homosexuals [do] not constitute either a 'suspect class' or a 'quasi-suspect class' because the conduct which define[s] them as homosexuals [is] constitutionally proscribable.") (citation and footnote omitted); Holmes v. California Army Nat'l Guard, 124 F.3d 1126, 1132 (9th Cir. 1997) (relying on progeny of Bowers); Richenberg v. Perry, 97 F.3d 256, 260 & n.5 (7th Cir. 1996) (relying on Bowers and its progeny); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) ("[A]lthough the Court in [Bowers] analyzed the constitutionality of the sodomy statute on a due process rather than equal protection basis, by the [Bowers] majority holding that the Constitution confers no fundamental right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes.") (citations and footnote omitted); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.") (footnote omitted); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After [Bowers] it cannot be logically asserted that discrimination against homosexuals is constitutionally infirm."). The remaining federal case law on which Lofton relies does not address whether sexual orientation is a suspect classification. The other two cases on which the State relies, In re Kandu, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004), and Wilson v. Ake, 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005), show the same absence of meaningful analysis.

[40] See, e.g., Lofton, 358 F.3d at 818 & n.6 (relying on Holmes, 124 F.3d at 1132, and Richenberg, 97 F.3d at 260 n.5, both of which in turn rely on Romer); Veney v. Wyche, 293 F.3d 726, 732 (4th Cir. 2002) (relying on Romer).

[41] See Able v. United States, 155 F.3d 628, 632 (2d. Cir. 1998) ("We need not

2. The Exclusion of Same-Sex Couples from Marriage Classifies Based on Sexual Orientation

It is undisputed that the exclusion of same-sex couples from marriage classifies based on sexual orientation. Whether a couple can marry turns on whether the couple is an opposite-sex couple or a same-sex couple. In other words, whether a couple can marry turns on the essential distinction between a heterosexual couple and a lesbian or gay couple. Indeed, § 2-201, the first statutory provision of its kind, was specifically intended to codify the exclusion of same-sex couples from marriage. It was enacted in 1973 in response to the submissions of applications for marriage licenses to county clerks by lesbian and gay couples in 1972. See Clerks of Court – Marriage Licenses; Not to Be Issued to Members of the Same Sex, 57 Md. Op. Att'y Gen. 71 (1972); see also Alaska Civil Liberties Union v. Alaska, 122 P.3d 781, 789 n.38 (Alaska 2005) ("Allowing a discriminatory classification to remain in force is no different than giving it the force of law in the first place.").

There is no merit to the argument that the exclusion of same-sex couples from marriage does not constitute sexual orientation-based discrimination because a lesbian or gay person can marry a person of the opposite sex and a heterosexual person cannot marry a person of the same sex. See Perez, 198 P.2d at 25 ("A [person] may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains."); see also Peppin v. Woodside Delicatessen, 67 Md. App. 39, 46 (1986) (concluding that a discount for patrons wearing skirts or gowns discriminated against men, notwithstanding its recognition of the fact that men can wear skirts or gowns). In Lawrence, in which the Supreme Court struck down a law prohibiting "deviate sexual intercourse with another individual of the same sex," Lawrence, 539 U.S. at 563 (quotation omitted), the State of Texas argued that, because the law, by its own terms, prohibited sexual intimacy between "same-sex" couples

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decide [the] question [whether sexual orientation is a suspect classification].").

instead of "lesbian or gay" couples, it did not discriminate based on sexual orientation. Lawrence v. Texas, No. 09-102, 2003 WL 470184, at *34 (Feb. 17, 2003) (Resp. Br.) ("Under the facially neutral conduct prohibitions of section 21.06, everyone in Texas is foreclosed from having deviate sexual intercourse with another person of the same sex."). The majority opinion implicitly rejected this argument by acknowledging throughout its analysis that the law discriminated against lesbian and gay people. Justice O'Connor's concurring opinion explained the underlying reasoning:

> Texas argues . . . that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class.

Lawrence, 539 U.S. at 583 (O'Connor, J, concurring); see also Williams v. Glendening, No. 98036031/CL-1059, 1998 WL 965992, at *7 (Md. Cir. Ct. Oct. 15, 1998) ("It cannot be doubted, as [the State] concede[s], that there would be an equal protection violation if acts, considered not criminal when committed by a heterosexual couple, could be prosecuted when practiced by a homosexual couple.").

Like the law at issue in Lawrence, § 2-201 discriminates against lesbian and gay people based on their sexual orientation. Just as a law that criminalizes the sexual intimacy of same-sex couples criminalizes the sexual intimacy of lesbian and gay couples, a law that prohibits marriages of same-sex couples prohibits marriages of lesbian and gay couples. See Goodridge, 798 N.E.2d at 958.

For the foregoing reasons, the exclusion of same-sex couples from marriage is subject to strict scrutiny because it classifies based on sexual orientation.[42]

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[42] Baker v. Nelson, 191 N.W.2d 185 (Minn.), appeal dismissed, 409 U.S. 810 (1972), is not persuasive authority. Continued reliance on a summary dismissal for want of a substantial federal question is unwarranted where there have been "extensive intervening doctrinal developments." Jones v. Bates, 127 F.3d 839, 851 n.13 (9th Cir. 1997). Intervening case law of the Supreme Court has altered the legal landscape so

III. THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE FAILS ANY LEVEL OF SCRUTINY

A. At a Minimum, the Exclusion of Same-Sex Couples from Marriage Must Rationally Further a Legitimate State Interest

The exclusion of same-sex couples from marriage is unconstitutional because it cannot survive regardless of the level of scrutiny to which it is subject. Observing that, "[e]ven under the 'minimal' rational basis test, this Court has not hesitated to strike down discriminatory [law] that lacked any reasonable justification," this Court has recognized that "[t]he vitality of this State's equal protection doctrine is demonstrated by our decisions which, although applying the deferential standard embodied in the rational basis test, have nevertheless invalidated many legislative classifications which impinged on privileges cherished by our citizens." Frankel, 361 Md. at 315 (quotations omitted).[43] Thus, contrary to the State's suggestion that rational basis review is effectively no review at all, State Br. at 53-56, this Court has repeatedly demonstrated its willingness to strike down laws under rational basis review where they, like § 2-201, are arbitrary and

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drastically that Baker now has little, if any, precedential value. Perhaps most significantly, since the summary dismissal in Baker, the Court has expressly held that sex discrimination is subject to heightened scrutiny. Compare Frontiero v. Richardson, 411 U.S. 677, 682 (1973), with Reed v. Reed, 404 U.S. 71, 76 (1971). This is significant because Baker expressly acknowledged that the exclusion of same-sex couples from marriage is a form of sex discrimination, Baker, 191 N.W.2d at 187 (characterizing the exclusion as "a marital restriction . . . based upon the fundamental difference in sex"), yet subjected the exclusion to rational basis review, id. ("There is no irrational or invidious discrimination."). Moreover, since 1972, the Court has continued to recognize that the right to marry is equally guaranteed to historically disfavored classes. Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978). Finally, since 1972, the equality jurisprudence of the Supreme Court with respect to sexual orientation has been revolutionized. Romer, 517 U.S. at 634-35; Lawrence, 539 U.S. at 574. In light of such case law, continued reliance on Baker is no longer warranted.

[43] See also id. ("[S]uch invalid regulations have often imposed economic burdens, in a manner tending to favor some Maryland residents over other Maryland residents.") (quotation omitted); (E. 322-50 (Badgett Declaration) (marriage brings with it important economic protections)).

irrational and therefore do not have a constitutionally sufficient justification.[44]

Maryland jurisprudence makes clear that, at a minimum, "a legislative classification [must] rest upon some ground of difference having a fair and substantial relation to the object of the legislation," and that the object of the legislation must be a "legitimate" one. Frankel, 361 Md. at 315, 317 (quotations omitted). As a prudential matter, this Court need not decide whether Maryland jurisprudence requires a more searching review than federal case law does.[45] As the Circuit Court correctly concluded (E. 653-59), the exclusion of same-sex couples from marriage fails even the classic rational basis review inquiry – whether "the *classification* drawn by the statute is

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[44] See e.g., Frankel v. Board of Regents of Univ. of Md. Sys., 361 Md. 298 (2000) (striking down, under rational basis review, tuition policy discriminating against certain in-state residents); Verzi v. Baltimore County, 333 Md. 411 (1994) (striking down, under rational basis review, ordinance discriminating against out-of-county tow truck operators); Kirsch v. Prince George's County, 331 Md. 89 (1993) (striking down, under rational basis review, zoning ordinance discriminating against university student tenants); Attorney General v. Waldron, 289 Md. 683 (1981) (striking down, under rational basis review, statute discriminating against retired judge practitioners); Maryland State Bd. of Barber Examiners v. Kuhn, 270 Md. 496 (1973) (striking down, under rational basis review, statute discriminating against cosmetologists); Bruce v. Director, Dep't of Chesapeake Bay Affairs, 261 Md. 585 (1971) (striking down, under rational basis review, statute discriminating against out-of-county crabbers and oystermen); City of Baltimore v. Charles Ctr. Parking, Inc., 259 Md. 595 (1970) (striking down, under rational basis review, ordinance discriminating against painted signs); Maryland Coal & Realty Co. v. Bureau of Mines, 193 Md. 627 (1949) (striking down, under rational basis review, mining statute discriminating against non-exempt counties); Dasch v. Jackson, 170 Md. 251 (1936) (striking down, under rational basis review, statute discriminating against paper hangers); City of Havre de Grace v. Johnson, 143 Md. 601 (1923) (striking down, under rational basis review, an ordinance discriminating against out-of-city automobiles for hire); see also, e.g., Wheeler v. State, 281 Md. 593 (1977) (striking down, under federal analog, a statute discriminating against adult bookstore employees).

[45] See Lawrence, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause. We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where . . . the challenged legislation inhibits personal relationships."); Br. of Amici Bazelon Ctr. for Mental Health Law, et al. "Rational Basis Review Br."; Law Professors Br.

rationally related to a *legitimate* state interest."[46] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (emphases added); see also Rational Basis Review Br.; Law Professors Br.

B. The Exclusion of Same-Sex Couples from Marriage Does Not Rationally Further a Legitimate Governmental Interest

1. Excluding same-sex couples from marriage does not rationally further the governmental interest in child welfare

The Circuit Court correctly concluded that the exclusion of same-sex couples from marriage does not rationally further the governmental interest in child welfare. (E. 654-56.) Ignoring both the reasoning of the Circuit Court and the plight of Plaintiffs' children, the State continues to seek to justify the exclusion of same-sex couples and their children from marriage by reference to its interest in child welfare. State Br. at 60-63. There is no merit to the State's argument.

As stated above, the classic rational basis review inquiry is whether "the *classification* drawn by the statute is *rationally* related to a legitimate state interest." Cleburne, 473 U.S. at 440 (emphases added); see also Romer, 517 U.S. at 632 ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification to be adopted and the object to be obtained."). Accordingly, as Chief Judge Kaye of the New York Court of Appeals correctly observed in her dissenting opinion in Hernandez:

> Properly analyzed, equal protection requires that it be the legislated *distinction* that furthers a legitimate state interest, not the discriminatory law itself. Were it otherwise, an irrational or invidious exclusion of a particular group would be permitted so long as there was an identifiable group that benefitted from the challenged legislation. In other words, it is not enough that the State have a legitimate interest in recognizing or supporting opposite-sex marriages. The relevant question here is whether there exists a rational basis for *excluding* same-sex couples from marriage, and, in fact, whether the State's interests in recognizing or supporting opposite-sex marriages are rationally *furthered* by the exclusion.

[46] A fortiori, because the exclusion of same-sex couples from marriage fails rational basis review, it also fails strict scrutiny.

Hernandez, Nos. 86-89, at 18-19 (Kaye, C.J., dissenting) (citations omitted) (emphases in original); see also id. at 11. In her dissenting opinion in Andersen, Justice Fairhurst of the Washington Supreme Court properly articulated the same analysis:

> Even if we accept the proffered interests as legitimate, the plurality and the State fail to address or explain the issue this case raises, that is, how those interests are furthered by *denying* same-sex couples the right that heterosexual couples already enjoy. That failure is in part due to the plurality's incorrect framing of the issue. Contrary to the plurality's discussion, this case does *not* present the issue of whether allowing *opposite-sex* couples the right to marry is rationally related to the State's supposed interests in encouraging procreation, marriage for relationships that result in children, and traditional child rearing . . . . [T]he question we are called upon to ask and answer here, which the plurality fails to do, is how *excluding* committed same-sex couples from the rights of civil marriage furthers any of the interests that the State has put forth. Or, put another way, would giving same-sex couples the same right that opposite-sex couples enjoy injure the State's interest in procreation and healthy child rearing?

Andersen, 138 P.3d at 1017-18 (Fairhurst, J., dissenting) (footnotes omitted) (emphases in original). Thus, the question to be answered is not whether the inclusion of opposite-sex couples in marriage rationally furthers a legitimate interest – as Chief Judge Kaye noted, "any discriminatory classification does that," i.e., "properly benefit those [it is] intended to benefit, Hernandez, Nos. 86-89, at 11 (Kaye, C.J., dissenting). Rather, the question to be answered is whether the exclusion of same-sex couples from marriage rationally furthers a legitimate interest.

That this is so is confirmed by Cleburne. In Cleburne, the Supreme Court struck down a zoning ordinance requiring a home for the mentally retarded to obtain a special use permit. The city offered various rationales for the requirement, including the home's location in a flood plain, potential liability for the acts of the home's residents, the risk of overcrowding, potential traffic congestion, and the risk of fire hazards. Cleburne, 473 U.S. at 449-50. Although all of these reasons plausibly explain why a city would require a special use permit for a home for the mentally retarded, the Court struck down the

zoning ordinance because they do not plausibly explain why a special use permit would be required of a home for the mentally retarded but not of boarding houses, nursing homes, fraternity and sorority houses, dormitories, apartment houses, or hospitals. Id. In other words, the Court assessed not only whether the inclusion of a home for the mentally retarded in a special use permit requirement rationally furthered the proffered interests but also whether the exclusion of comparable land uses rationally furthered the proffered interests.

Similarly, in holding unconstitutional the denial of partner benefits to gay and lesbian public employees, the Alaska Supreme Court in Alaska Civil Liberties Union recognized that the exclusion of gay and lesbian public employees did not rationally further the governmental interest in promoting marriage among heterosexual public employees:

> There is no indication here that denying benefits to public employees with same-sex domestic partners has any bearing on who marries. There is no indication here that granting or denying benefits to public employees with same-sex domestic partners causes employees with opposite-sex domestic partners to alter their decisions about whether to marry . . . . In short, there is no indication that the programs' challenged aspect – the denial of benefits to all public employees with same-sex domestic partners – has any relationship at all to the interest in promoting marriage. To repeat: making benefits available to spouses may well promote marriage; denying benefits to the same-sex domestic partners . . . has no demonstrated relationship to the interest of promoting marriage.

Alaska Civil Liberties Union, 122 P.3d at 793.

This Court, too, insists on an explanation for the exclusion of a class, as opposed to the inclusion of a class. For example, in Kuhn, it was not enough that allowing barbers to cut the hair of male customers furthered the governmental interest in providing male customers with properly trained professionals. Indeed, it was fatal that *dis*allowing cosmetologists – who were also properly trained professionals – to do the same did *not* further the proffered interest. Kuhn, 270 Md. at 512.

The need to explain the exclusion of a class is especially great in a case like this one, in which the law at issue was specifically intended to exclude a class, as opposed to

include a class. Section 2-201, the first statutory provision of its kind, was specifically intended to codify the exclusion of same-sex couples from marriage. See Clerks of Court – Marriage Licenses; Not to Be Issued to Members of the Same Sex, 57 Md. Op. Att'y Gen. 71 (1972). Thus, it is especially incumbent on the State to explain how its proffered interests are rationally furthered by the exclusion of same-sex couples from marriage, because that is what § 2-201 was enacted to accomplish.

In sum, the question to be answered is whether *the exclusion of same-sex couples from marriage*, not the inclusion of opposite-sex couples in marriage, rationally furthers a legitimate interest. See Rational Basis Review Br.; Law Professors Br.

a. Excluding same-sex couples from marriage does not rationally further the governmental interest in the welfare of children who are the result of accidental procreation, while harming children of same-sex couples

On appeal, the State specifically invokes the governmental interest in the welfare of children who are the result of accidental procreation to justify the exclusion of same-sex couples from marriage. State Br. at 60-63. It argues that the exclusion of same-sex couples from marriage is justified because children of opposite-sex couples need the stabilizing force of marriage more than children of same-sex couples do. This is so, according to the State, because, unlike same-sex couples, opposite-sex couples can accidentally procreate and thereby suffer the strain on a relationship that comes with accidental procreation. Its argument is without merit. The exclusion of same-sex couples from marriage not only does not rationally further the governmental interest in the welfare of children who are the result of accidental procreation, but indeed harms children of same-sex couples.

First of all, if the exclusion of same-sex couples from marriage is justified by reference to the way in which couples exercise their fundamental right to procreate, then it is subject to strict scrutiny, not rational basis review. Where members of one class exercise a fundamental right one way and members of another class exercise the fundamental right another way (e.g., voters casting ballots for Republicans and voters

casting ballots for Democrats), the government may not deny a benefit to one class but not the other class based on the way in which their members exercise the fundamental right, absent a showing that the differential treatment furthers a compelling governmental interest in a narrowly tailored manner. Indeed, "a classification necessarily lacks any positive relationship to a legitimate state purpose, and consequently fails [even] rational-basis scrutiny, when it withdraws a general public benefit on account of the exercise of a right otherwise guaranteed by the Constitution." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 303 (1993) (Souter, J., concurring in judgment in part and dissenting in part) (citation omitted); see also Saenz v. Roe, 526 U.S. 489, 499 n.11 (1999) ("If a law has no other purpose – than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.") (quotation omitted); Attorney General v. Soto-Lopez, 476 U.S. 898, 903 (1986) ("A state law implicates the right to travel . . . when impeding travel is its primary objective.") (citations omitted). Here, the State asserts that it denies the right to marry to same-sex couples but not to opposite-sex couples because opposite-sex couples can exercise the right to procreate by engaging in sexual intercourse but same-sex couples can exercise the right to procreate only by resorting to artificial reproductive technology. Given its gross overinclusiveness and underinclusiveness, the exclusion of same-sex couples from marriage cannot survive the strict scrutiny that the State's assertion triggers.[47]

That said, the proffered justification fails even rational basis review.

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[47] Plaintiffs note that the State's argument is inconsistent with the principle that children should not be denied benefits on account of the way in which their parents exercise their fundamental rights. See Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimate children may not be denied benefits on account of the fact that their parents did not exercise their fundamental right to marry); see also Plyler v. Doe, 457 U.S. 202, 220 (1982) ("[I]mposing disabilities on the child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the child is an ineffectual – as well as unjust – way of deterring the parent.") (quotation omitted). Children of same-sex couples should not be denied the protections that come with marriage on account of the fact that their parents exercised their fundamental right to procreate by resorting to artificial reproductive technology.

Significantly, unlike other classifications, the classification at issue does not involve the allocation of a scarce resource – marriage licenses are available in an unlimited supply. See Hernandez, Nos. 86-89, at 19 (Kaye, C.J., dissenting) ("There are enough marriage licenses to go around for everyone."). Thus, unlike in other cases, here, there is no zero-sum game in play. Children of same-sex couples enjoying the protections that come with marriage would not take away from children of opposite-sex couples doing the same.[48] Accordingly, the welfare of children of opposite-sex couples, including children who are the result of accidental procreation, is not rationally furthered by the exclusion of same-sex couples and their children from the protections that come with marriage. Indeed, the exclusion of same-sex couples and their children from the protections that come with marriage serves only to diminish the welfare of children of same-sex couples, who need the stabilizing force of marriage, too.[49] Given that marriage is a limitless good, the governmental interest in the welfare of children, including children who are the result of accidental procreation, is furthered by allowing more couples to marry, not fewer.

Accordingly, "while encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the *exclusion* of gay men and lesbians from marriage in no way furthers this interest." Hernandez, Nos. 86-89, at 19 (Kaye, C.J., dissenting) (emphasis in original).[50]

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[48] Any suggestion that marriages of same-sex couples would diminish marriages of opposite-sex couples is, at its core, animus-based and therefore illegitimate. See infra Argument § III.B.2.a.

[49] If marriage is intended to benefit children who are the result of accidental procreation, then there is cruel irony in the fact that many such children are ultimately adopted by same-sex couples.

[50] See also Andersen, 138 P.3d at 1018 (Fairhurst, J., dissenting) ("Undoubtedly, state-sanctioned, opposite-sex marriage has a conceivable rational basis – some opposite-sex couples can procreate, and the State may have a legitimate interest in encouraging procreation and family stability by allowing such couples to marry. But DOMA in *no way* affects the right of opposite-sex couples to marry – the *only* intent and effect of DOMA was to explicitly deny same-sex couples the right to marry.") (emphases in original); Kansas v. Limon, 122 P.3d 22, 37 (Kan. 2005) ("[T]he relationship between the

b. Excluding same-sex couples from marriage does not rationally further any governmental interest in encouraging children to be brought into their families through "traditional" procreation, while harming children of same-sex couples

Some amici curiae, e.g., Amici Curiae James Q. Wilson, et al., advance a governmental interest in encouraging children to be brought into their families through "traditional" procreation. The exclusion of same-sex couples from marriage not only does not rationally further any such an interest, but indeed harms children of same-sex couples.

Opposite-sex couples will continue to bring children into their families through "traditional" procreation regardless of whether same-sex couples are permitted to marry. See Hooper, 472 U.S. at 622 (striking down a statute under rational basis review because it "[was] not written to require any connection between [the classification] and [the proffered interest].").

Moreover, even under rational basis review, a proffered justification must have some basis in reality. See Heller v. Doe ex rel. Doe, 509 U.S. 312, 321 (1993) ("[E]ven the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation."). The reality is that the State's

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objective [i.e., furthering the welfare of children who are the result of accidental procreation] and the classification [i.e., subjecting same-sex sexual relations with a minor to greater criminal penalty than opposite-sex sexual relations with a minor] is so strained that we cannot conclude it is rational."); Goodridge, 798 N.E.2d at 962 ("[S]ingl[ing] out the one unbridgeable difference between same-sex and opposite-sex couples, and transform[ing] that difference into the essence of legal marriage . . . . impermissibly identifies persons by a single trait and then denies them protection across the board.") (quotation omitted); Lawrence, 539 U.S. at 605 (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising the liberty protected by the Constitution? Surely not the encouragement of procreation.") (quotation omitted); Baker, 744 A.2d at 911 (Johnson, J., concurring in part and dissenting in part) ("[T]he State cannot explain how the failure of *opposite-sex* couples to accept responsibility for the children they create relates at all to the exclusion of same-sex couples from the benefits of marriage.") (emphasis in original).

interest in marriage is not to encourage children to be brought into families through "traditional" procreation. Indeed, 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. See Md. Code Ann., Fam. Law tit. 21. Rather, the reality is that the State's interest in marriage is to support couples and their children, whether their children were brought into their families through "traditional" procreation or through other means. State law treats children who are brought into their families through "traditional" procreation and children who are brought into families through other means (e.g., adoption, donor insemination) equally. See, e.g., Md. Code Ann., Fam. Law § 5-308(b)(1) (adoption); Md. Code Ann., Est. & Trusts § 1-206(b) (donor insemination). Thus, any distinction between same-sex couples and opposite-sex couples that is predicated on the means through which children are brought into their families is arbitrary and irrational.

Furthermore, where a classification is "so discontinuous with the reasons offered for it," those reasons become "impossible to credit." Romer, 517 U.S. at 632, 635; see also Cleburne, 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.") (citations omitted). The exclusion of lesbian and gay couples from marriage deprives them of the full range of protections that come with marriage, only a small subset of which involves procreation. In light of the "sheer breadth" of the deprivation and its considerable discontinuity with any interest in procreation, it is impossible to credit any state interest in procreation as the reason for the exclusion of same-sex couples from marriage. Romer, 517 U.S. at 632.[51]

Because the exclusion of same-sex couples from marriage does not rationally further any interest in encouraging children to be brought into their families through

[51] See also Baker, 744 A.2d at 881 ("The law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal [of procreation]."); id. at 884 ("Considered in light of the extreme logical disjunction between the classification and the stated purposes of the law – protecting children and 'furthering the link between procreation and child rearing' – the exclusion falls substantially short of this standard.").

"traditional" procreation, any such interest does not justify the exclusion of same-sex couples from marriage. Goodridge, 798 N.E.2d at 961-62 (rejecting proffered interest in procreation); Baker, 744 A.2d at 884 (same).

c. Excluding same-sex couples from marriage does not rationally further any governmental interest in encouraging children to be raised by heterosexual parents, while harming children of same-sex couples

Some amici curiae, e.g., Amicus Curiae Alliance for Marriage, advance a governmental interest in encouraging children to be raised by heterosexual parents. Again, the exclusion of same-sex couples from marriage not only does not rationally further any such governmental interest, but indeed harms children of same-sex couples.

It is undisputed in the record that the social science research and the child welfare community are monolithic in their conclusion that lesbian and gay parents are as fit as heterosexual parents.[52] (E. 265-90 (Stacey Declaration)); see also Child Welfare Br.; APA Br. But even if it were true that heterosexual parents were more fit than lesbian and gay parents (which it is not), the exclusion of lesbian and gay couples from marriage neither increases the number of children raised by heterosexual parents nor decreases the number of children raised by lesbian and gay parents. See Hooper, 472 U.S. at 622.

Moreover, permitting lesbian and gay couples to marry would not diminish the welfare of the children of heterosexual couples; rather, it would only enhance the welfare of their own children:

Excluding same-sex couples from civil marriage will not make children of

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[52] All arguments to the contrary are without merit. See (E. 265-90 (Stacey Declaration)); see also Child Welfare Br.; APA Br. Such arguments rely on studies that compare children of unmarried couples to those of married couples, children of divorced couples to those of intact couples, and children of single parents to children of dual parents; they do not rely on studies that compare children of lesbian and gay parents to children of heterosexual parents. Id. Moreover, they disingenuously suggest that whatever difference in parenting style may exist between some mothers and some fathers bears on child outcomes. Id. Finally, they falsely assert that the social science research over the past few decades that uniformly concludes that lesbian and gay parents are as fit as heterosexual parents is methodologically flawed. Id.

> opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized . . . . It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation.

Goodridge, 798 N.E.2d at 964 (quotation and footnote omitted). Thus, the exclusion of lesbian and gay couples from marriage inhibits, rather than advances, the governmental interest in child welfare. By denying the children of lesbian and gay parents the myriad protections that only marriage affords, the State is contravening its own interest in child welfare. This is especially incongruous in light of the fact that, in many cases, the State establishes the legal relationships between such children and their parents by allowing for adoption by one or both parents.

Furthermore, the State's own laws and practices confirm that it does not have an actual interest in favoring heterosexual parents over lesbian and gay parents. See Heller, 509 U.S. at 321. In resolving child custody and visitation disputes, state courts disregard the sexual orientation of each parent. Boswell v. Boswell, 352 Md. 204 (1998). Moreover, state courts routinely grant adoptions to lesbian and gay people. See supra Statement of Facts § I. Indeed, adoption agencies "may not deny an individual's application to be an adoptive parent because . . . [o]f the applicant's . . . sexual orientation" and "may not delay or deny the placement of a child for adoption on the basis of the prospective adoptive parent's . . . sexual orientation." Md. Regs. Code tit. 7, §§ 05.03.09(A)(2), 05.03.15(C)(2). Furthermore, state courts routinely grant second-parent adoptions to same-sex partners. See supra Statement of Facts, § III.A.4. In addition, the Maryland Department of Health and Mental Hygiene routinely issues birth certificates recognizing same-sex partners as co-parents. (See E. 206 (birth certificates of Gita Deane and Lisa Polyak's children), 215 (birth certificate for Alvin Williams and Nigel Simon's child), 231 (birth certificate for Jodi Kelber-Kaye and Stacey Kargman-Kaye's child).) Because any governmental interest in favoring heterosexual parents over lesbian and gay parents is belied by the State's own laws and practices, it is "impossible

to credit." Romer, 517 U.S. at 635; see also Waldron, 289 Md. at 723.

Because the exclusion of same-sex couples from marriage does not rationally further any interest in encouraging children to be raised by heterosexual parents, any such interest does not justify the exclusion of same-sex couples from marriage. Goodridge, 798 N.E.2d at 962-64 (rejecting proffered interest in parenting); Baker, 744 A.2d at 884 (same).

2. Discrimination for its own sake is not a legitimate governmental interest

The State invokes governmental interests in tradition and uniformity. State Br. at 50-51; id. at 57-58. But discrimination for its own sake is not a legitimate (let alone compelling) interest.

a. Expressing moral disapproval of a class is not a legitimate governmental interest

Expressing moral disapproval of lesbian and gay people for its own sake is not a legitimate interest. It is simply another way of saying, "we discriminate against lesbian and gay people because we want to discriminate against lesbian and gay people." It is therefore inherently and patently arbitrary and irrational.

The Supreme Court has long recognized that discrimination for its own sake is inherently illegitimate: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973). This Court has recognized the same principle. Kirsch, 331 Md. at 99 ("[S]ome objectives – such as 'a bare . . . desire to harm a politically unpopular group,' – are not legitimate state interests.") (quotation omitted).

The Supreme Court has made express that this principle equally applies where a law expresses moral disapproval of a class. As Justice O'Connor recently explained:

> Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate

> governmental interest of the promotion of morality . . . . This case raises . . . whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons. Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law. Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy.[53]

Lawrence, 539 U.S. at 582-83 (O'Connor, J., concurring) (quotation and citations omitted). Recognizing that, "[n]ecessarily, there are limits to the valid exercise of the police power of the State," this Court has recognized the same principle, observing that, "[o]therwise, the State Legislature would have unbounded power and the Fourteenth Amendment would be ineffective, for then it would be enough to say that any piece of legislation was enacted for the purpose of conserving the . . . morals . . . of the people." Davis v. State, 183 Md. 385, 396-97 (1944) (citation omitted). Accordingly, this Court has held that, "[i]f . . . a statute designed for the promotion of . . . morals . . . has no real or substantial relation to those objects, . . . it is the duty of the court to adjudge accordingly, and thereby give effect to the Constitution." Id. at 397 (citation omitted).

The Supreme Court has also made express that this principle equally applies where a law is intended to accommodate the discriminatory attitudes of the general public, as opposed to those of the government itself. Cleburne, 473 U.S. at 448 ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . , are not permissible bases for [governmental discrimination]."); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or

[53] Accordingly, the law at issue in Lawrence failed any level of scrutiny. See Lawrence, 539 U.S. at 578.

indirectly, give them effect."). Furthermore, the Court has made express that this principle equally applies where a law discriminates against lesbian and gay people. Lawrence, 539 U.S. at 578; Romer, 517 U.S. at 635.

For these reasons, the Circuit Court correctly concluded that "expressing moral disapproval of a class is not sufficient to sustain a classification where there is no other legitimate state interest." (E. 658); see also Goodridge, 798 N.E.2d at 967 (rejecting proffered interest in expressing community consensus that homosexuality is immoral); Baker, 744 A.2d at 885-86 (rejecting proffered interest in maintaining official intolerance of intimate same-sex relationships).

b. Maintaining traditional discrimination against a class is not a legitimate governmental interest

Maintaining traditional discrimination within marriage for its own sake is also not a legitimate interest. It is simply a variation on the same theme – "we discriminate within marriage because we have always discriminated within marriage" – and is therefore inherently and patently arbitrary and irrational.

Blind adherence to traditional discrimination is by definition arbitrary and irrational. See Bowers, 478 U.S. at 199 (Blackmun, J., dissenting) ("It is . . . revolting if . . . the rule persists from blind imitation of the past.") (quotation omitted); see also Limon, 122 P.3d at 34-35 (rejecting proffered interests in traditional sexual mores and development and historical notions of appropriate sexual development of children); Schroeder v. Broadfoot, 142 Md. App. 569, 585 (2002) (noting that, notwithstanding the tradition of giving children their fathers' surnames, constitutional considerations preclude courts from blindly adhering to such tradition); Eubanks v. Louisiana, 356 U.S. 584, 588 (1958) ("[L]ocal tradition cannot justify failure to comply with the constitutional mandate requiring equal protection of the laws."). The justification for a classification must be "independent" of the fact that the classification exists, Romer, 517 U.S. at 633, in order to explain *why* it exists. Goodridge, 798 N.E.2d at 961 n.23 ("[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been."); Baehr, 852 P.2d at 61 ("[The proposition that] the right of

persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman . . . . [is] circular and unpersuasive.") (quotation omitted); Perez, 198 P.2d at 27 ("Certainly the fact alone that . . . discrimination has been sanctioned by the state for many years does not supply justification."). Absent such a justification, the classification is "a classification for its own sake, something the Equal Protection Clause does not permit." Romer, 517 U.S. at 635. Thus, any interest in maintaining traditional discrimination within marriage for its own sake is not a legitimate interest because, no matter how historically entrenched a discriminatory practice may be, the fact of the historical entrenchment does not justify the discriminatory practice, even under rational basis review.

Moreover, the State's own history confirms that it does not have an actual interest in maintaining traditional discrimination within marriage. The State has abandoned many aspects of the historical definition of marriage, which included exclusions, restrictions, and inequalities based on race, class, religion, and sex. See supra Statement of Facts § IV; see also (E. 291-321 (Cott Declaration)); History Br. The State may not selectively assert an interest in maintaining traditional discrimination within marriage only where lesbian and gay people are concerned. Where "the disadvantage imposed is born of animosity toward the class of persons affected," it is constitutionally impermissible. Romer, 517 U.S. at 634.

As the Circuit Court so elegantly put it, "[w]hen tradition is the guise under which prejudice or animosity hides, it is not a legitimate state interest." (E. 658); see also Goodridge, 798 N.E.2d at 965 (rejecting proffered interest in preventing trivialization or destruction of marriage); Baker, 744 A.2d at 884 (rejecting proffered interest in protecting marriage from destabilizing changes).

c. Ensuring uniform discrimination against a class is not a legitimate governmental interest

Ensuring uniform discrimination within marriage for its own sake is also not a legitimate interest. It is simply another variation on the same theme – "we discriminate

within marriage because others discriminate within marriage" – and is therefore inherently and patently arbitrary and irrational.

Blind adherence to the discrimination of others is also by definition arbitrary and irrational. See Cleburne, 473 U.S. at 448 (1985); Palmore, 466 U.S. at 429. This is so even if "the discrimination of others" is the discrimination of other governmental actors. Indeed, it is inconceivable that the Maryland Constitution tolerates an otherwise unconstitutional law simply because a comparable law exists in another jurisdiction. Whatever protections are afforded to citizens of other jurisdictions under the laws of those jurisdictions, such protections do not determine those that are afforded to the citizens of Maryland under Maryland law. See Goodridge, 798 N.E.2d at 967 ("We would not presume to dictate how another State should respond to today's decision. But neither should considerations of comity prevent us from according Massachusetts residents that full measure of protection available under the Massachusetts Constitution."); see also In re Opinions of the Justices to the Senate, 802 N.E.2d 656, 571 (Mass. 2004) ("[W]e would do a grave disservice to every Massachusetts resident, and to our constitutional duty to interpret the law, to conclude that the strong protection of individual rights guaranteed by the Massachusetts Constitution should not be available to their fullest extent in the Commonwealth because those rights may not be acknowledged elsewhere.").

Moreover, given the wide divergence among state marriage laws, it is impossible to ensure uniform discrimination within marriage. For example, Maryland is among a minority of states – just 21 – that permit first cousins to marry each other.[54] Also,

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[54] Compare Md. Code Ann., Fam. Law § 2-202, with Ariz. Rev. Stat. § 25-101; Ark. Code Ann. § 9-11-106; Del. Code Ann. tit. 13, § 101(a); Idaho Code Ann. § 32-206; 750 Ill. Comp. Stat. 5/212; Ind. Code Ann. § 31-11-1-2; Iowa Code § 595.19; Kan. Stat. Ann. § 23-102; Ky. Rev. Stat. Ann. § 402.010; La. Civ. Code Ann art. 90; Me. Rev. Stat. Ann. tit. 19-A., §§ 651, 701; Mich. Comp. Laws § 551.4; Minn. Stat. § 517.03; Mo. Rev. Stat. § 451.020 ; Mont. Code Ann. § 40-1-401; Neb. Rev. Stat. § 42-103; Nev. Rev. Stat. § 122.020; N.H. Rev. Stat. Ann. § 457:2; N.D. Cent. Code § 14-03-03; Ohio Rev. Code Ann. § 3101.01; Okla. Stat. Ann. tit. 43, § 2; Or. Rev. Stat. § 106.020; 23 Pa. Cons. Stat. § 1304; S.D. Codified Laws § 25-1-6; Utah Code Ann. § 30-1-1; Wash. Rev. Code

Maryland is one of just fourteen states that permit otherwise underage individuals to marry where a party to the marriage either is pregnant or has given birth.[55] Our federal system has a well-developed mechanism – comity law – to account for such divergence among state marriage laws. See, e.g., Henderson v. Henderson, 199 Md. 449 (1952) (recognizing out-of-state common law marriage). Because comity law adequately addresses any concern involving uniformity among state governments, any such concern does not justify the exclusion of same-sex couples from marriage. See Moreno, 413 U.S. at 536-37 ("The existence of [laws already addressing the proffered concerns] necessarily casts considerable doubt upon the proposition that the [classification] could rationally have been intended to prevent those very same [concerns].") (citations omitted); see also Verzi, 333 Md. at 426. Furthermore, the State's own laws undermine any claim that it has an actual interest in ensuring uniform discrimination within marriage. The State's own marriage laws have diverged and continue to diverge from the majority of other states' marriage laws in many contexts, including consanguinity, age, and other conditions of marriage, as well as residency and other conditions of divorce.[56]

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§ 26.04.020; W. Va. Code § 48-2-302; Wis. Stat. Ann. § 765.03; Wyo. Stat. Ann. § 20-2-101.

[55] Legal Information Institute, Cornell University Law School, Marriage Laws of the Fifty States, District of Columbia and Puerto Rico (www.law.cornell.edu/topics/Table_Marriage.htm); see also Md. Code Ann., Fam. Law § 2-301(b).

[56] Maryland's marriage laws have historically diverged from other states' marriage laws. For example, Maryland's marriage laws were unique in prohibiting interracial marriages between people of Asian descent and people of African descent. Hrishi Karthikeyan & Gabriel J. Chin, Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950, 9 Asian L.J. 1, 29 n.166 (2002). In fact, the historical divergence between Maryland's marriage laws and other states' marriage laws was widely recognized:

> Elkton, Maryland is the northernmost city in Maryland as one moves south from New York City. New York, New Jersey, Pennsylvania, and Delaware all placed significant limits – waiting times, blood tests, etc. – on marriage; Maryland was more indulgent of passion's fleeting moments. The state therefore became the haven for eloping couples whose hormones did not gladly tolerate delay. And since Elkton was the first city such romantics

Any interest in ensuring uniform discrimination within marriage is no more legitimate where federal law, as opposed to other state law, is concerned. Any assertion that state law cannot operate independently from federal law is simply not true, even where joint federal-state programs are concerned. For example, Medicaid is a program administered by the state government and funded jointly by the state government and the federal government. See 42 U.S.C. § 1396a. Although state constitutional considerations do not govern the federal government's share of Medicaid expenditures, they do govern the state government's share. See, e.g., Simat Corp. v. Arizona Health Care Cost Containment Sys., 56 P.3d 28 (Ariz. 2002) (state constitution requires state government to pay its share of Medicaid expenditures for abortion services even though federal law prohibits federal government from paying its share).

For these reasons, the Circuit Court correctly concluded that "abdicat[ion] [of] its role as reviewing body and substitut[ion] [of] the judgment of other state legislatures for its own . . . . is impermissible, as it is the role of the courts to determine the constitutionality of legislation." (E. 656); see also Goodridge, 798 N.E.2d at 967 (rejecting proffered interest in avoiding interstate conflict); Baker, 744 A.2d at 885 (rejecting proffered interest in maintaining uniformity with marriage laws in other states).

3. Legislative hegemony is not a legitimate governmental interest

The State urges this Court to capitulate to the General Assembly. State Br. at 51-52. Legislative hegemony, however, is not a legitimate (let alone compelling) interest. If it were otherwise, it would justify discrimination under rational basis review in every instance.

The Maryland Constitution already ensures that the legislative branch is protected from improper encroachment by the judicial branch. The judicial branch decides only those cases and controversies over which it has jurisdiction. Of particular significance, a

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would encounter in Maryland, the term "quickie marriage" became synonymous with Elkton.

Richard G. Singer, The Proposed Duty to Inquire as Affected by Recent Criminal Law Decisions in the United States Supreme Court, 3 Buff. Crim. L. Rev. 701, 743 (2000).

presumption in favor of the legislative branch is already a component of the rational basis review inquiry.

Any suggestion that the legislative branch is constitutionally entitled to even greater deference disregards the very framework of government established by the Maryland Constitution. The very role of the judicial branch is to serve as a check on the other branches of government. See Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); see also Duckworth, 393 Md. at 543-45; Md. Const. Decl. Rts. art. 8. And the very purpose of Articles 46 and 24 is to ensure that disfavored classes may seek judicial recourse where majoritarian processes fail to ensure equality and liberty. Indeed, it is in such cases that the judicial branch performs one of its most important functions. As Judge Cathell recently stated:

> It is always easiest to decline to address controversial issues. It is, perhaps, the safest thing to do, even for courts. But the avoiding of such issues is best left to the political processes of the other branches of government. It is our branch of government, the judiciary, under the express and implied doctrine of the separation of powers, to which the toughest and most difficult decisions are delegated. It is our primary role to ensure that the fundamental constitutional rights, which are reserved to the people, are protected. One of the most important roles of the judiciary is to see that the laws equally protect all people.

Frase v. Barnhart, 379 Md. 100, 130-31 (2003) (Cathell, J., concurring). In so stating, Judge Cathell echoed the sentiments of Judge Wilner in his dissenting opinion in Schochet:

> We have never shied from declaring presumptively valid laws unconstitutional, when the conflict seems clear, merely because no higher court had previously done so. We look at the statute and we look at the Constitution, and, if the one appears to us to be repugnant to the other, we declare it so and give effect to the higher, controlling provision. We obviously may not exercise this authority capriciously; we are constrained to give due deference to the Legislature and to sustain its enactments unless their repugnancy to the Constitution is clear. But when that repugnancy *is* clear – clear to *us* – we have no choice, if we are to remain true to our own oaths of office, other than to strike down the offending enactment.

Schochet, 75 Md. App. at 356 (Wilner, J., dissenting) (emphases in original). Thus, the judicial branch has an essential role – indeed, a constitutional duty – when it comes to ensuring equality and liberty for disfavored classes.

Because legislative hegemony is not a legitimate interest, it does not justify the exclusion of same-sex couples from marriage. Goodridge, 798 N.E.2d at 961-62 (rejecting proffered interest in ensuring that legislature can control and define marriage).

4. Excluding same-sex couples from marriage is not rationally related to the governmental interest in cost savings

On appeal, the State does not maintain any governmental interest in cost savings. Regardless, the exclusion of same-sex couples from marriage does not rationally further any such interest.

It is undisputed in the record that the exclusion of same-sex couples from marriage does not achieve cost savings. (E. 322-50 (Badgett Declaration).) Regardless, the Supreme Court has long held that the governmental interest in cost savings, standing alone, is no justification for any classification:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens.[57]

Shapiro v. Thompson, 394 U.S. 618, 633 (1969); see also Romer, 517 U.S. at 635 (rejecting the proffered interest in "conserving resources" as too attenuated). If it were otherwise, cost savings would almost always justify discrimination under rational basis review, because discrimination almost always achieves cost savings. Because there is an infinite number of ways in which a classification could be drawn, almost all of which would achieve cost savings, there must be an independent justification for the choice of one line over the others. Otherwise, an arbitrarily drawn classification would almost always survive scrutiny under rational basis review. This is why the proper inquiry is not

[57] Accordingly, the law at issue failed any level of scrutiny.

whether a classification furthers the governmental interest in cost savings, but rather whether it does so in a non-arbitrary manner. As this Court has recognized:

> [a]lmost every enactment, no matter how invidious, can be justified on the grounds of fiscal restraint. For example, no one can dispute that a statute which denied the non-fundamental right of education to members of a non-suspect class of our citizens would reduce the costs of education, yet neither would anyone dispute that this action, undertaken to serve that sole purpose, would represent a manifest breach of the principles of equal protection.

Waldron, 289 Md. at 724; see also Ehrlich, 2006 WL 2882834, at *18.

Because the exclusion of same-sex couples from marriage does not further the governmental interest in cost savings in a non-arbitrary manner, the governmental interest in cost savings does not justify the exclusion of same-sex couples from marriage. See Goodridge, 798 N.E.2d at 964 (rejecting proffered interest in conserving scarce resources).

* * *

Whatever good results when an opposite-sex couple makes a commitment of the highest order to each other – whether for themselves, their children, or society at large – would be equally realized if a same-sex couple were to make the same commitment. Thus, it is arbitrary and irrational to allow opposite-sex couples to make such a commitment to each other but not to allow same-sex couples to do the same. The exclusion of same-sex couples from marriage is nothing more than discrimination for its own sake, something that has long been recognized as anathema in constitutional jurisprudence. Accordingly, the exclusion of same-sex couples from marriage fails any level of scrutiny.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court affirm the ruling of the Circuit Court.

The foregoing Brief of Plaintiffs-Appellees was prepared using 13-point Times New Roman font.

Respectfully submitted,

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Attorneys for Plaintiffs-Appellees

October 19, 2006

APPENDIX

TABLE OF CONTENTS

Page

Rec'd Ltr

July 13, 1978

Mr. Vincent A. Borlaug
25 West Glebe Road
Apartment C-10
Alexandria, Virginia 22305

Dear Mr. Borlaug:

The Secretary of State's office has referred your letter to this office for reply.

Chapter 366 of the Acts of Maryland of 1972 (H.B. 687) proposed an amendment to the Constitution of Maryland by adding Article 46 to the Bill of Rights, "Equality of rights under the law shall not be abridged or denied because of sex." This amendment was ratified by the voters at the November 7, 1972, election.

Additionally, also in 1972, two joint resolutions were passed, H.J.R. 102 (Joint Resolution 35) and S.J.R. 80 (Joint Resolution 34) ratifying the proposed amendment to the United States Constitution relative to equal rights for men and women.

In 1973 two resolutions (S.R. 135 and 136) and one joint resolution (H.J.R. 96) were introduced. House Joint Resolution 96 to repeal the 1972 Joint Resolutions 34 and 35 failed, as did S.R. 135 requesting that the Legislative Council appoint a committee to study the application of the Maryland Equal Rights Amendment in the area of domestic relations. Senate Resolution 136 requesting the same thing was approved and referred to the Legislative Council's Committee on Judicial Proceedings as Item 10-1. The Judicial Proceedings Committee did not act on this request because on September 5, 1973, the Governor appointed a special commission to make this study.

The Governor's Commission to Study the Implementation of the Equal Rights Amendment ceased functioning as of July 1, 1978. A report is expected to be published concerning the Commission's findings by the Department of Human Resources, Mr. Dave Glen, 1100 North Eutaw Street, Baltimore, Maryland 21201.

H.J.R. 5 and H.B. 125 of the 1974 Session of the legislature, both of which failed passage, also would have repealed the ratification of the proposed U. S. amendment and the Maryland Constitutional amendment.

H.J.R 37 of the 1978 Session of the General Assembly was introduced requesting the Executive Branch to disapprove expenditures of tax payers' money for nonessential travel and conference attendance in states which have refused to ratify the federal Equal Rights Amendment. This resolution received an unfavorable report from the House Judiciary Committee, and thus failed passage.

Sincerely,

(Mrs.) Ruth D. Eaton
Librarian

RDE/ams

Changes in Md. Constitution on Ballot

BALLOT, From B1

Gov. Mandel vetoed a second lottery bill that would have established what its sponsors call a "no losers lottery, modeled on the British national lottery, whereby the state would sell $10 bonds and periodically award a portion of the interest on the bonds in prizes to the winning bondholders. The bonds themselves would not earn interest for their holders, but persons could cash them in losing only the potential interest on the bonds.

QUESTION 3: Denial of Rights Because of Sex

Question three would amend Maryland's Declaration of Rights to guarantee that "Equality of rights under the law shall not be abridged or denied because of sex."

That language is almost identical to the words of the proposed amendment to the U.S. Constitution that the Maryland legislature ratified earlier this year. However, the federal amendment won't take effect until three-fourths of the states have ratified it.

This amendment, sponsored by a majority of the legislators, would be effective immediately with referendum approval and would, at the least, place the state Constitution in agreement with the U.S. Constitution in assuring equal rights for men and women.

This amendment is often referred to as a "women's rights" measure, but it also would assure men that they could not be discriminated against because of their sex.

This amendment and the pending amendment to the U.S. Constitution are likely eventually to have a far-reaching impact on court decisions in the areas of family and domestic relations laws dealing with such matters as child custody, alimony and paternity cases.

Ratification of the amendment will require repeal of a wide variety of state statutes that now make some distinction between the sexes which would no longer be constitutional.

Question 4: Omnibus Constitutional Amendments

Question four contains amendments to the state's Constitution that would correct obsolete, inaccurate, invalid, unconstitutional or duplicative provisions.

Generally, laws entered by the legislature may embrace only one subject. Maryland Attorney General Francis B. Burch has held therefore, that corrective constitutional amendments that deal with more than one subject are themselves unconstitutional.

Ratification of question four would authorize the legislature to enact a constitutional amendment that involves more than one subject if the amendment is merely corrective. It would thus seek to prevent any future constitutional challenge of such amendments.

Question 5: Voting Rights for Criminals and Mental Incompetents

Question five would repeal the Maryland Constitution's provision that bars anyone convicted of larceny or another "infamous" crime from ever again voting, unless pardoned by the governor.

Instead, the constitutional amendment would allow the legislature to "regulate or prohibit the right to vote of a person convicted of infamous or other serious crime or under care of guardianship for mental disability."

The amendment itself would not directly affect anyone's right to vote, but it would broaden the legislature's power to withdraw voting rights to those convicted of serious crimes as well as infamous crimes.

Under the amendment, the legislature also could restore voting rights to persons who have lost them but are found to have redeemed themselves. The proposed amendment also makes the loss of voting rights applicable to 18-to-21-year-olds, who category that is somewhat unclear.

QUESTION 6: Consent Calendar in the General Assembly

Question six would allow bills to be read and voted upon as a group rather than independently in the Maryland Senate and House, if no legislator objects.

House Speaker Thomas Hunter Lowe has said that ratification of the amendment would save hours of time in reading and approving noncontroversial bills that are unopposed. The delays often keep the legislature from moving promptly to more important, controversial bills.

Lottery, School Aid Rated Key Proposals

18 Referendum Issues Confront Vo

When Marylanders go to the polls Nov. 7, they will be confronted by 18 ballot questions in addition to the presidential and congressional elections.

Some of the referendum questions are highly significant and involve fundamental changes in state policy.

Among the most significant is the proposed constitutional amendment to permit establishment of a state lottery. Another is the legislation which would create a scholarship program of financial aid for students of private schools.

Here are the first six referendum questions. The others will be discussed in following articles.

"QUESTION 1: Membership and Apportionment of the General Assembly.

Question one would provide that the state be divided into legislative districts, each of which would be represented by one state senator and three delegates.

To provide the necessary 3-to-1 ratio between the Maryland House and Senate, the amendment would reduce the House's membership from 142 to 141, and raise the Senate's membership from 42 to 47.

Supporters of the amendment describe Maryland's present legislative districts as "chaotic," with senators and delegates often chosen from separate, overlapping districts and voters frequently confused about who represents them.

This amendment seeks to reduce the confusion by having each state senator represent a district served by three delegates. The delegates could either be elected at-large or by separate areas within the senatorial district.

The amendment does not set district lines, a job the two houses of the legislature spent much time on in this year's session, but couldn't agree upon. A districting plan submitted by Gov. Marvin Mandel will go into effect if the amendment is rejected. If it is adopted, the task of districting will still be before the legislature.

Under the amendment, the governor must present a redistricting plan to the legislature after each census that keeps the districts equal in population. The legislature will have 45 days to adopt its own plan according to the three delegates-one senator formula. If it doesn't act in that period, the governor's plan would automatically go into effect.

This amendment would not immediately apply to any present legislators, taking effect with the 1974 election.

Question 2: State Lottery

Question two, one of the most controversial on the ballot, would enable the state to operate a lottery by amending Maryland's present ban on lotteries.

In its session earlier this year, the legislature enacted a lottery measure that would become effective Jan. 4, 1973, if this amendment is ratified.

The lottery legislation would create a commission to establish a lottery similar to those in New York, Pennsylvania, New Jersey, New Hampshire, Massachusetts and Connecticut. Lottery tickets would be sold throughout the state and cash prizes would be awarded weekly.

The amendment is supported by those who say a lottery will provide much-needed revenue for the state, making tax increases less necessary. The proponents also contend that such gambling is a popular activity that hasn't been stopped by keeping it illegal.

The amendment's opponents say that the state should not get into the business of encouraging people to gamble, that projected revenue estimates are inflated, and that authorization of state lotteries will lead to lifting the ban on slot machines and other kinds of gambling they feel attracts organized crime.

Maryland's legislature authorized many special lotteries during the 18th and early 19th centuries. However, they were banned throughout the state in 1851.

Question 3: Denial of Rights Because of Sex

Question three would amend Maryland's Declaration of Rights to guarantee that "Equality of rights under the law shall not be abridged or denied because of sex."

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This amendment, sponsored by a majority of the legislators, would be effective immediately with referendum approval.

This amendment is often referred to as a "women's rights" measure, but it also would assure men that they could not be discriminated against because of their sex.

This amendment and the pending amendment to the U. S. Constitution are likely eventually to have a far-reaching impact on court decisions in the areas of family and domestic relations, laws dealing with such matters as child custody, alimony and paternity cases.

Ratification of the amendment will require repeal of a wide variety of state statutes that now make some distinction between the sexes, which would no longer be constitutional.

Question 4: Omnibus Constitutional Amendments

Question four concerns amendments to the state's Constitution that would correct obsolete, inaccurate, invalid, unconstitutional or duplicative provisions.

Generally, laws enacted by the legislature may embrace only one subject. Maryland Attorney General Francis B. Burch has held therefore, that corrective constitutional amendments that deal with more than one subject are themselves unconstitutional.

Ratification of question four would authorize the legislature to enact a constitutional amendment that involves more than one subject if the amendment is merely corrective. It would thus seek to prevent any future constitutional challenge of such amendments.

Question 5: Voting Rights for Criminals and Mental Incompetents

Question five would repeal the Maryland Constitution's provision that bars anyone convicted of larceny or another "infamous" crime from ever again voting, unless pardoned by the governor.

Instead, the constitutional amendment would allow the legislature to

Bowles New Circulation Supervisor

Howard R. Bowles, who has 12 years newspaper experience, has been named city home circulation supervisor of The Baltimore News American.

The appointment of Bowles was announced by William T. Ruckle, circulation director.

Before coming to The News American, Bowles was city circulation manager for the Newark, N. J. Evening News.

He has also served as an area zone manager, supervisor and district manager. He held the News franchise for the Weequahic area of Newark.

Bowles is a former U.S. Army staff sergeant. He majored in mathematics at Seton Hall University in Newark and holds seminar certificates in sales and management.

Yule Bazaar Scheduled by Glyndon WSCS

The annual Christmas bazaar and buffet luncheon, sponsored by the Women's Society of Christian Service at Glyndon United Methodist Church, 116 Butler Rd., Glyndon, will be held Thursday, Nov. 9.

Bazaar tables will be open at 9:30 a.m. with attic treasures, gifts, Christmas decorations, baked goods, candy, country

The News American

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MARK F. COLLINS
Publisher

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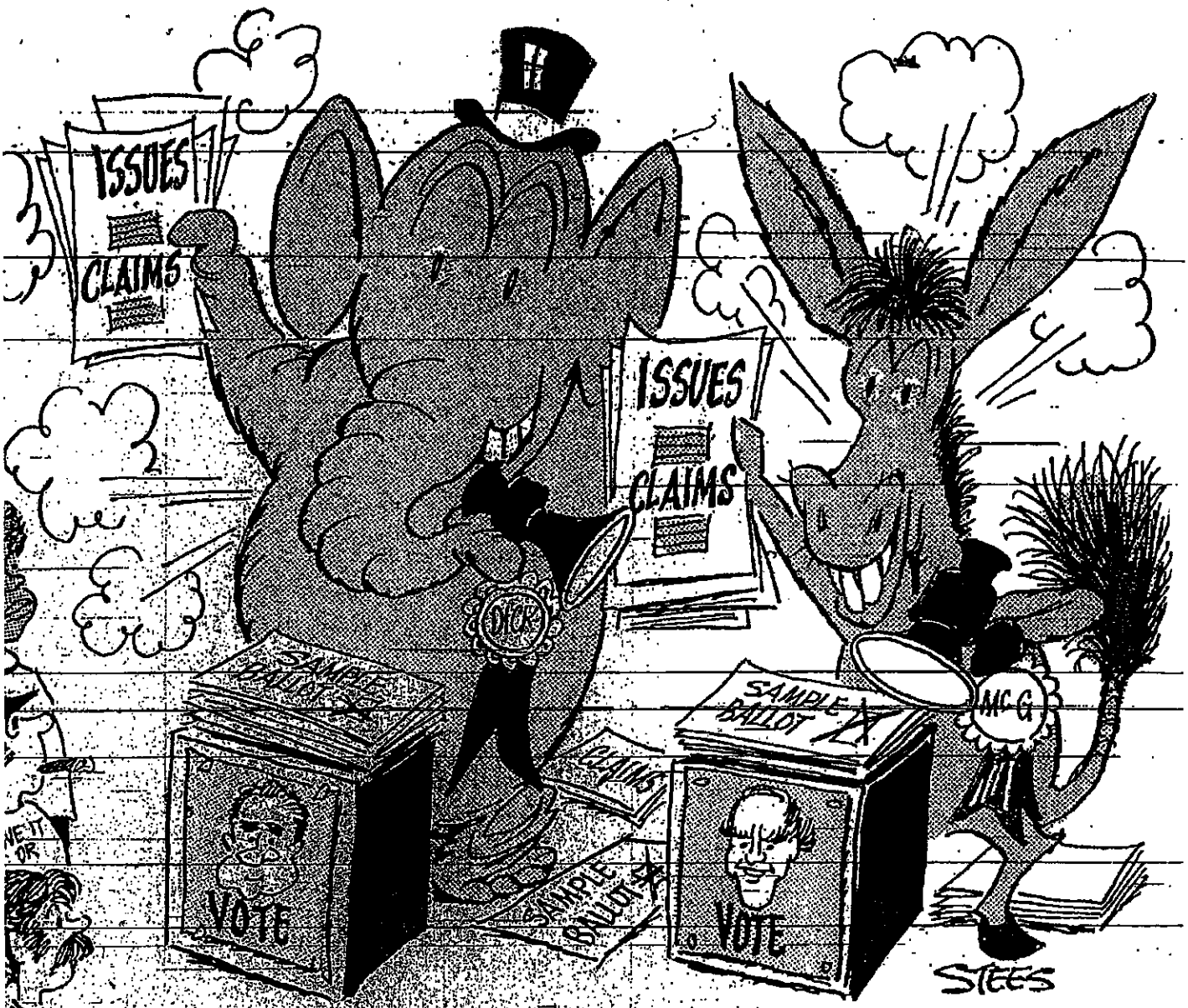


Voters' Guide

Published as a public service by the Sunpapers in cooperation with the League of Women Voters.

Index

and House district boundaries will not coincide in any political subdivision.

PROPOSED CHANGE: The General Assembly would be enlarged to 188 members on a 3 to 1 ratio between the Senate and the House. This would allow common-boundary Senate and House districts. It would avoid possible election-ballot confusion.

Next year, the Governor would have to submit a new reapportionment plan to the legislature. The General Assembly would have 45 days to come up with its own proposal before the Governor's plan automatically became law.

A vote FOR means: Enlarging the General Assembly to 188 members to permit common boundaries for all House and Senate districts.

A vote AGAINST means: Retaining the present 185-member General Assembly. The reapportionment plan adopted this year - with separate boundary lines for House and Senate districts - would go into effect in 1974.

QUESTION NO. 2—Lottery

An act lifting the 121-year-old ban on lotteries in Maryland to allow a state-operated lottery.

PRESENT PROCEDURE: The Maryland Constitution prohibits any state or private lotteries. Raffles held by charitable or volunteer organizations do not qualify as lotteries, according to an opinion from the attorney general's office.

PROPOSED CHANGE: The Constitution would be modified to allow lotteries "operated by and for the benefit of the state." No private lotteries would be permitted. A lottery bill passed this year would go into effect January 1 if the constitutional amendment is ratified.

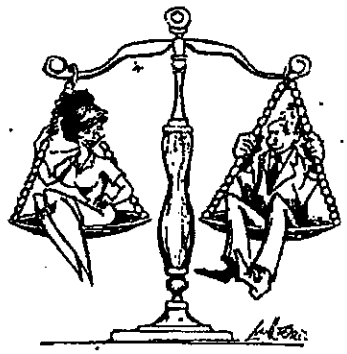
It would create a State Lottery Agency with a director and a commission of five members appointed by the Governor with the advice and consent of the Senate. Their powers, duties and functions are enumerated in the law.

Regular drawings would be held at least once a week. After deduction of administrative costs, 50 per cent of the revenue would be distributed as prizes to holders of winning tickets, and 50 per cent would be deposited into the state's general fund.

A vote FOR means: The state would be allowed to operate a lottery. The State Lottery Agency would begin operation January 1.

A vote AGAINST means: The constitutional ban on lotteries would continue. The state lottery bill would not go into effect.

QUESTION NO. 3—Equal Rights Amendment



An act to amend the Declaration of Rights of the State Constitution to require equality of rights under the law to both sexes.

PRESENT PROCEDURE: There is no provision in the Maryland Constitution assuring equal rights regardless of sex.

A proposed equal-rights amendment to the United States Constitution has been ratified by 21 states, including Maryland. Approval by 38 states is needed for it to become the 27th Amendment to the Constitution.

PROPOSED CHANGE: A new section would be added to the state's constitution. It would state: "Equality of rights under the law shall not be abridged or denied because of sex."

If this amendment is approved, a wide variety of Maryland statutes would have to be revised to eliminate discrimination on the basis of sex.

A vote FOR means: Adding to the Maryland Constitution an equal-rights amendment.

Record Vote Expected

(Continued from Pg 1)

retired Bethesda-Chevy Chase High School teacher, Thomas L. Kugel, a program planner with the U.S. geological Survey, and Marquis R. Seidel, an economist.

Judgeships

Running unopposed for 15-year judgeships on the Court of Special Appeals at large are J Deweese Carter and Charles E. Moylan, Jr.

Also unopposed is 6th Judicial Circuit Court Judge David L. Cahoon, who is seeking a 15-year-term after being appointed by Governor Marvin Mandel to fill a vacancy.

Ballot Questions

The 18 questions on the Maryland ballot are:

1) General Assembly Size — an act that would enlarge the General Assembly by three seats, from 185 to 188, to provide common boundaries for House of Delegates and State Senate districts.

2) Lottery — an act to legalize a State operated Lottery.

3) Equal Rights Amendment — an act stating that "equality of rights under the law shall not be abridged or denied because of sex," passage of which could mean 227 other Maryland laws, including rape laws, might be ruled unconsitutional because they make distinction between the sexes.

4) an act to allow introduction of more than one Constitutional amendment into the General Assembly in one bill to correct invalid or inaccurate provisions or where one bill proposes more than one amendment on the same subject.

5) Voting Rights — an act to allow the General Assembly to determine the voting rights of convicted felons and mental incompetents, rights now prohibited in the state Constitution.

6) Consent Calendar — an act to allow the State Senate and House Delegates to read and vote on certain bills in a group on second or third readings rather than read each separately three different days as is done now.

7) Elective Boards of Education — an act to allow counties that have elected boards of education to stagger the terms of the members as is done now in Montgomery County.

8) Advertising Laws — an act to provide for publication in the newspaper of certain laws two successive weeks before enactment and once after instead of three successive weeks after enactment.

9) State Debt Funding — an act to include an appropriation in the State budget for principal and interest on debts rather than taxing only property owners in a levy to pay for capital improvements.

10) Judicial Budget — an act to allow the General Assembly to decrease the budget of the Judiciary Department as well as to increase it which it may do now.

11) Harford County Orphans Court — an act which would abolish the Orphans Court in Harford County and turn its responsibilities over to the Circuit Court.

12) Baltimore City Loans — an act to allow Baltimore City to make, guarantee or insure loans to residents for rehabilitation or improvement of property.

13) Washington County Court Clerks — an act removing Washington Circuit Court clerks from the merit system and putting them on an appointive basis.

14) Voting Rights — an act to delete obsolete language, specifically "white male," from the Declaration of Rights description of citizens entitled to vote.

15) Baltimore County Council Election — an act to allow Baltimore County to elect its Councilmen by councilmanic districts or a combination of methods rather than at large as is now required.

16) WSSC 'Quick-Take' — an act allowing the Washington Suburban Sanitary Commission to acquire private property in Montgomery County for public projects without first going through condemnation proceedings in court, but by paying the compensation determined by a jury award later.

17) Surveyor — an act to abolish the constitutional office of surveyor in Baltimore City and all the counties of Maryland other than Montgomery, Carroll, Charles and Garrett.

18) State Aid to Non-Public Education — a referendum asking approval or rejection by the voters of a Maryland Non-Public Education Scholarship Program under which parents of children attending approved non-public schools would be given state funded vouchers toward tuition payment in amounts determined by parent income.

Charter Amendment

The Montgomery County Charter amendment which voters will be asked to take a position on proposes changing the proceedure of publication of the County Code.

The Code is presently published every five years. The amendment would change that to publications every ten years with annual updating.

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A former new equated with an especially if that press has been a

In this reporter's the absence has been things very differently rap.

Hence it is a joy fo ex-correspondent on Washington, D.C. scen be granted an opportu to express her though a capital area publica such as The Bethe Chevy Chase Tribune

As a reporter I o had cause to criticiz severely at times — national administrat for their manif disinterest in the futu America's merc marine. Year after ye the early and mid-1 the Kennedy and Joh forces relegated the fleet to a positio declining importanc the political schem things.

It was not until Ric Nixon came to office our national shippin dustry began to turn tide, by virtue of the sive shipbuildin program provided fo the Merchant Marine of 1970 — impo legislation that Con had neglected to before being proddu President Nixon.

As a result of presidential initiativ now have a pro underway designed construct some merchant ships American yards. schedule providing decreasing level government subsidy an eye toward makin industry a competitive in markets.

In my Gover position, my effort interests have bee panded to include areas of national in — notably the expa of American trade. under President N leadership there has significant and dra progress in this are

The News

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Second Class Postage Paid At Frederick, Maryland

PAGE A-4 FRIDAY, NOVEMBER 3, 1972 FREDERICK, MARYLAND

More On The Questions

To date we have discussed and recommended a vote FOR or — AGAINST the following questions:

No. 1 — FOR — To set the size of the General Assembly at 47 senators and 141 delegates; establishing guidelines for drawing legislative districts.

No. 2 — AGAINST — A state operated lottery.

No. 17 — FOR — Elimination of the office of surveyor which no longer exists in Frederick County.

No. 18 — FOR — To decide whether the 1971 act of the General Assembly setting up a scholarship program for non-public school students will go into effect.

Also endorsed for election were incumbent Congressmen Goodloe E. Byron and Gilbert Gude of the 6th and 8th districts, respectively.

Today we weigh several more ballot questions.

● Vote FOR Question No. 10, which will allow the legislature to decrease items in the budget of the Judiciary Department, a move to remove from the Executive control over this branch of state government.

Question No. 10 is a proposed amendment to Section 52 (6) of Article 3 of the Constitution of Maryland, to permit the General Assembly to diminish items in the budget of the Judiciary Department, as submitted by the Governor to the Legislature.

Maryland has what is usually styled an executive type budget. It is compiled by the Governor, following the requirements of law where they exist and otherwise being in the Governor's discretion. The General Assembly is constitutionally limited in its powers to alter the budget, and finally the Governor has no power of veto over it.

The thrust of this proposed amendment is to change the powers of the General Assembly regarding its action on the State Budget. At the present time, the General Assembly may reduce but may not increase the Executive Budget. It may either increase or decrease the budget of the Legislative Department; and finally, it may increase but otherwise

It states simply that "equality of rights under the law shall not be abridged or denied because of sex."

There has been no specific provision in the Constitution of Maryland requiring equality of rights for the sexes.

The language in the Maryland amendment is almost identical to the newly proposed amendment to the Constitution of the United States, this proposal being that "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 General Assembly in 1972 (JR 34 and JR 35) ratified the proposed amendment to the United States Constitution, making Maryland the tenth State to take this Action.

If three-fourths of the states ratify, the equal rights of sex bill would become the twenty-seventh amendment to the Constitution of the United States.

The adoption of the amendment to the State Constitution as well as the adoption of the amendment to the Federal Constitution, either or both, would require the review and probable repeal of a wide variety of State statutes now making some distinction between the sexes and perhaps would modify court rulings throughout the entire area of family and domestic relations laws.

● Vote FOR Question No. 14, right of suffrage for men, which would remove obsolete language in the Maryland Constitution which limits the right to vote to "white males."

● Likewise, for FOR Question No. 5, which would permit the General Assembly, by law, to restore the right to vote to convicted felons or to persons who WERE previously under guardianship or care for mental illness.

Question 5 would repeal Section 2 of Article 1 of the Maryland Constitution which now prohibits persons over 21 years of age from ever again voting if convicted of larceny or any other "infamous" crime, unless pardoned by the Governor. It also prohibits from voting one under guardianship as a

Letters

URGES VOTE AGAINST QUESTION NO. 18

To the Editor, Sir:

It is fine to define Question 18 as it now stands as you did in Tuesday's editorial. But don't you think that the voters of Maryland have the right to know the far-reaching effects if this Question were to pass?

Shouldn't the voters realize that the $12.1 million only applies to the first year, and that the amount is only a "drop in the bucket" to what it will become?

Surely voters will agree that taxes are high enough in the State! In order to support this aid to private schools, funds will be drained from already tight public school educational budgets, and higher taxes are inevitable.

Does the State really have the right to use our tax money to send a particular child to a private institution at public expense?

This aid is supposed to be of financial help to parents who

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early in 1970 when a British diplomat in Peking reported that in a conversation over dinner a Chinese official had blamed Australian Government hostility for the breakdown in wheat trading.

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There were reports also that Australian Security Intelligence Organization men had been involved in bugging attempts on Chinese officials in Hong Kong and that there had been threats by Australian ministers to cut off wheat supplies unless Chinese Communists ended their rioting in Hong Kong.

It was in this atmosphere that an Australian Labor party delegation went to Peking in July of last year. It was led by the party leader Mr. Gough Whitlam who said his aim was to discuss improving trade and trade was regarded seriously in Australian country areas, for although other customers were found —notably the Soviet Union—the farmers were conscious that the Chinese had always been good to deal with and represented a bright long-term prospect.

The Victorian farmers' federation urged the government to recognize China to restore the wheat trade. Newspaper editorials across the country criticized the China policy of Canberra.

But in what was stressed as a definitive statement, Foreign Minister Mr. Nigel Bowen in May said the government was reluctant and unwilling to "abandon" Taiwan as a pre-condition for recognizing Peking.

The Labor party continued to lunch in Sydney for a visiting Chinese table tennis team in July.

At least, the Chinese deal will ensure that the Country party loses no seats in the coming election. And the heat has been taken off the government over its policy towards China.

• • •

The cynics are reasoning that Chou En-lai has thus had it both ways in Australia. Labor is committed to recognition. The Liberal-Country Party government, if returned, must recall that in times of difficulty, Peking's leaders helped.

And in that sense Mr. McMahon would find it easier to move quickly towards improving relations with China, once the election was over.

Letters to the Editor

Nixon

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media mentions only two. John Schmitz's solutions include all of Governor Wallace's planks presented at the Democratic convention. If the news media doesn't mention his name, whose name do they mention? They say Nixon is against busing, but who brings the cases to the courts? It's Nixon's own HEW. They say Nixon is against crime, but crime has advanced one-third in four years.

If the American voters had been presented with John Schmitz's name, his record and his solutions fairly, with half as much publicity as either Nixon or McGovern, he would get twice as many votes as either candidate.

Dewey B. Miller.

Joppa.

Surrender

Sir: George McGovern could have saved himself a lot of campaign money and the American people a lot of time if, in place of his long-winded TV speech explaining his "new" panacea for Vietnam, he had been more forthright. Stripped of its verbosity and deception, McGovern's solution to Vietnam can be summed up in a word which is anathema to freedom-loving Americans everywhere: surrender!

Mary Nydegger.

Washington.

Ladies, Beware

Sir: On November 7 Maryland voters will be voting on an amendment to the Maryland Constitution which promises to change radically the lives of Maryland women. It will be question No. 3 on the ballot and is known as the "equal rights" or "women's rights" amendment.

Those who are pushing the equal rights amendment are painting a very rosy future for women if and when women are made "equal" with men. But for a realistic interpretation of Question No. 3, one should read the "Summary and Explanation" of the ballot questions prepared by the State Department of Legislative Reference. I quote from that summary on the equal rights amendment:

"The adoption of the amendment to the State Constitution as well as the adoption of the amendment to the Federal Constitution, either or both, would require the review and possible repeal of a wide variety of state statutes now making some distinctions between the sexes and, perhaps, would greatly complicate proceedings in the area of family and domestic relations laws."

It would rather seem that the interpretation of the equal rights amendment offered by the Department of Legislative Reference rather than the shrill noisy ravings and ravings of a militant minority of disgruntled females who are unhappy with the special status that is the privilege of American women, and who want to become the same as men.

A vote against Question No. 3 on election day is a vote against radical, revolutionary "women's liberation."

Barbara M. Morris.

Ellicott City.

'Two-Way Street'

Sir: As a black retired Army sergeant I have nothing but admiration and respect for Delegate Troy Brailey. However, this doesn't mean that I can not nor will not find a time when we do not agree on an issue or point.

For Mr. Brailey to organize a boycott of the James Brown show because as a black he doesn't share his political views is seriously wrong. Just as we separate the occupation, profession, religion of a white voter, we must allow Mr. Brown and any other black to vote for the candidate of his own choosing, race notwithstanding. The black general public should be free to ascertain what value Mr. Brown will be to them or if he did in fact "sell them out" for backing President Nixon.

When I enter the voter booth it is me and my conscience, nothing more or less.

A decade ago, we had blacks in another region of this country beaten, jailed, harassed, and in some instances killed for pursuing the very right Mr. Brailey is denying Mr. Brown.

The right to vote for the candidate of his choice—freedom—is truly a two-way street. It must be free of any intimidation no matter whether white or black is doing the denying. Otherwise, the words of Frederick Douglass, Dr. Martin Luther King, Mohandas Gandhi, John F. Kennedy and his brother Robert F. Kennedy and what all these men stood for would be for naught. Even as blacks we can not have it both ways.

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LOUIS AZRAEL SAYS:

Women's Rights vs. Fatti Maschi

The News American
THE PAGE—OPPOSITE
Friday, October 27, 1972 ★ 7B

WHO WOULD HAVE THOUGHT equal rights for women may force Maryland to change its official Great Seal and the motto which it bears?

But it may, says the state's chief legal official.

He also says it may change many other things that hardly anyone thinks of when considering the equal rights amendment on which Marylanders will vote next month.

THE STATE Attorney-General studied the subject because he knows that equal rights, as far as the law is concerned, are coming in Maryland. The only question is whether they are coming first by way of amendment to the U.S. Constitution, which will take two or three years, or coming next month, as they will if voters approve a change in the state constitution.

When approval comes, either way, many state laws will have to be changed in order to adapt to the new policy.

So be poured through eleven fat volumes of Maryland laws to spot those which make distinctions between the sexes.

SOME OF THEM won't have to be changed. For instance, the law that permits the Governor to let female prisoners out of jail temporarily if they are pregnant. There's not much likelihood (though who knows what wonders science may ultimately achieve?) that male prisoners will be pregnant.

THE GREAT SEAL however, raises sharp questions. On it, beside the hereditary coat of arms of Lord Baltimore, are pictured a fisherman and a farmer and beneath the group is the motto, "Fatti Maschi Parole Femine." It means in Italian, "Deeds are manly, words are womanly."

This flies in the face of everything that women's libbers, and even less militant equal rightsters, proclaim. Therefore, the Attorney-General suggests, it may be necessary to eliminate this legal slur against female prowess.

MANY WOMEN MAY be less happy about some other changes which the Attorney-General suggests.

For instance, forest wardens can now call upon any able-bodied men, but not women between 18 and 50 years old, to help fight forest fires. Those who refuse can be fined. Clearly a sex discrimination.

On demand of the Commissioners of any county, able-bodied male prisoners may be sent to work on county roads or quarries. To end discrimination, women prisoners must also be made eligible.

PRESENT LAW provides that any woman, married or single, can sue and collect damages from anyone who traduces her character or reputation "as a woman of chastity." And husbands can maintain slander suits for "words falsely and maliciously spoken, subsequently to the marriage, touching his wife's character or reputation for chastity before or during her marriage."

No law specifies it is slander to call a man unchaste. Nor is there any legal authority for a slander suit by a wife on the ground that someone said her husband was unchaste before their marriage.

These discriminations, obviously, can be removed in either of two ways. The special care for women's reputations can be ended—or it can be extended to include men.

THE ATTORNEY-GENERAL found many other he-she discriminations.

There is, for instance, a Maryland Commission on the Status of Women but none on the status of men. Barbers are subject to less rigid regulations than beauticians. Women, but not men, are prohibited from working more than ten hours a day in most industries. Only a man may be Director of the Bureau of Mines or serve on the State Banking Commission. "White Slave Laws" apply only to female victims. There are laws against female, but not male, "sitters" in night clubs.

Etc., etc., etc.

"I am woman. I am strong. I can do anything" a popular song proclaims. When these laws are changed, the assertion will be true—at least as to anything covered by Maryland law.

KEVIN P. PHILLIPS

What a Boring Presidential Race

RABBI SAMUEL ROSENBLATT

Let Us Strive For Excellence

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Board

progress of county programs in pettiness and intra-county tensions.

Under the present system, we believe board members are afforded the opportunity to vote clearly in the best interests of education without considering the political ramifications of their decisions. An elected board could become trapped in a web of political schemes as so-called "dedicated" members use the board as a political stepping stone.

The significance of this question and the importance of its ramifications for the future of Howard County are such that it will be a tragedy if it is made without care or consideration. The proponents of an elected school board have a strong selling point in the undisputed claim that the direct election process is participatory democracy. To refute this would be tantamount to rejecting motherhood and the American flag. What we do say, however, is that our government historically, is one of representational democracy - the philosophy underlying the delegation of authority by an elected official to an appointed person or body.

The TIMES commends Dr. John Murphy and his ad hoc group, the Committee for an Elected School Board, for their efforts to educate countians concerning this question and the sincerity with which they pursued their goal.

The Lottery

The TIMES endorses the amendment to the state Constitution (Question 2) that will allow the staterun lottery.

We feel that even though the funds for a staterun lottery is unpredictable, the funds accrued by the lottery will be a necessary asset to operating governmental agencies, but we do feel that instead of just placing these funds into a general fund, that it be placed in a designated high priority budget as education or highways each year.

The TIMES does not feel that a statcrun lottery will be to the detriment of the poor since statistics in other states now operating lotteries proves that the majority of the gamblers purchasing lottery tickets have been from the middle income bracket, and since cash is necessary to buy a lottery ticket and gives no credit as is the procedure used by many bookmakers today, the gambler's family will not suffer by losing next week's pay check.

Vote FOR the statewide lottery, Question 2 on the ballot November 7.

Equal Rights

The Equal Rights Amendment (ERA) places the issue of sex squarely where it belongs, and that is out of the picture altogether where rights in our society are concerned.

With the extraction of discriminatory material from state statutes and the emphasis on equality for men and women, the constitution cannot help but emerge a stronger more viable set of principles for all citizens.

Americans, tragically, have for too long been too sex-conscious. They have allowed the words "male" "female" "man" "woman" to dictate how a person must live life, and blocked the understanding of something much more fundamental than gender, and that is an individual's human beingness.

It is to this that the ERA addresses itself. It provides in effect, that because both men and women are human beings, they deserve equal rights under the law.

The traditional concept of a woman being weak and passive and needing the laws of a paternalistic society to "protect" her is outdated. Mature women, must, as well as men, be able to accept the burdens of the law as well as its privileges, and share in the responsibility for making the dream of democracy a reality.

The ERA has become associated with the cause of Women's Liberationists, and yet, to us, its passage cannot be construed as an advance just for women. Men, too, have lost out in a society so shackled by narrow views which slip individuals into roles as quickly as tape into a computer, with little regard for the person's unique talents or abilities.

While our society has been quick to grasp technological and scientific advances, it has been far too slow in coming to grips with wholesome social and ethical principles which allow its members more freedom.

The passage of the ERA--focusing attention on the individual's importance--regardless of sex--we can only hope will speed up the process.

With this in mind, we urge you to vote FOR Question 3.

All Together

QUESTION NO. 1, on Omnibus Constitutional Amendments, would authorize the General Assembly to introduce more than one constitutional amendment in a single bill where the purpose would be to correct obsolete, inaccurate, invalid, unconstitutional or duplicative provisions when the amendments deal with the same subject. At present, each amendment to the State Constitution must embrace only one subject. The proposed change would provide an omnibus bill procedure which could amend one or more parts of the Constitution at the same time.

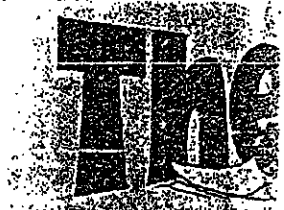
On the surface it might appear than an omnibus bill would be wise, but we believe that the same difficulty would arise as in the Maryland Constitutional Convention in 1968 when the voters rejected the sweeping proposed changes in the Constitution because all changes were lumped together, with some acceptable and others unacceptable. As a result, in this Question No. 4, some advantageous changes would be lost because other less popular changes would be included in the same package. We recommend citizens voting AGAINST Question No. 4

On Voting Rights

QUESTION NO. 5, on Voting Rights for Criminals and Mental Incompetents, has a similar disadvantage as Question No. 4 because in this question, several changes are linked in the same question. The present procedure prohibits from voting any person over the age of 21 convicted of a felony (except felons pardoned by the governor) or any person who has been declared mentally incompetent. With passage of Question No. 5 the General Assembly would have the power to regulate or prohibit from voting, those persons convicted of serious crimes or persons judged to be mentally incompetent.

It is our belief that anything as important as voting rights should be contained in the constitution and not be left to the legislative branch of government which theoretically could continually alter these rights. If supporters of equal rights want such rights for the rehabilitated felon they should seek a well worded amendment to the constitution.

We urge the voter to vote against Question 5.



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ticket and gives no credit as is the procedure used by many bookmakers today, the gambler's family will not suffer by losing next week's pay check. Vote FOR the statewide lottery. Question 2 on the ballot November 7.

Question No. 3

Equal Rights

The Equal Rights Amendment (ERA) places the issue of sex squarely where it belongs, and that is out of the picture altogether where rights in our society are concerned.

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Americans, tragically, have for too long been too sex-conscious. They have allowed the words "male" "female" "man" "woman" to dictate how a person must live life, and blocked the understanding of something much more fundamental than gender, and that is an individual's human beingness.

It is to this that the ERA addresses itself. It provides in effect, that because both men and women are human beings, they deserve equal rights under the law.

The traditional concept of a woman being weak and passive and needing the laws of a paternalistic society to "protect" her is outdated. Mature women, must, as well as men, be able to accept the burdens of the law as well as its privileges, and share in the responsibility for making the dream of democracy a reality.

The ERA has become associated with the cause of Women's Liberationists, and yet to us, its passage cannot be construed as an advance just for women. Men, too, have lost out in a society so shackled by narrow views which slip individuals into roles as quickly as tape into a computer, with little regard for the person's unique talents or abilities.

While our society has been quick to grasp technological and scientific advances, it has been far too slow in coming to grips with wholesome social and ethical principles which allow its members more freedom.

The passage of the ERA—focusing attention on the individual's importance regardless of sex—we can only hope will speed up the process.

With this in mind, we urge you to vote FOR Question 3.

Question No. 4

All Together

QUESTION NO. 4, an Omnibus Constitutional Amendments would [illegible]

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We urge the voter to vote against Question 5.

Question No. 6

Curbs Red Tape

On State wide question No. 6, the Consent Calendar: passage of this legislation could provide for hastening the process of bills handled within the state legislature. At present, all bills are required to be read individually on second and third reader. Question No. 8 would allow voting on bills in groups on second and third reader and could provide additional time for specific bills that attract strong public reaction. Anyone who has ever sat through the "reading" of bills will quickly recall that it is virtually impossible to comprehend the "reading". We urge you to vote FOR Question No. 6.

Question No. 7

School Boards

If a county already has an elected school board it would seem that this question to provide for staggered terms for school board members is part of good management. A vote FOR is recommended. However on the bigger question of Elected School Boards we stand opposed.

Question No. 8

On Advertising

On State-wide Question No. 8, Advertising Ordinance: this bill appears to be in the public interest in that it supposedly could save dollars on required publication of advertising bills and laws. However, the wording of the enabling legislation is such that only the titles of the bills or laws would have to be printed, leaving the public without a full understanding of the content of the measures. This change would, in our opinion, deprive the public of information necessary to keep pace with bills, laws and ordinances affecting them. We urge you to vote NO on Question No. 8.

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Question No.

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Question No.

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3 To 1 Ratio

Question Number 1 on the state-wide ballot of proposed constitutional amendments asks to increase the present General Assembly from 185 members to 188. It would allow for a 3 to 1 ratio giving the House 141 seats and the Senate 47.

The 3 to 1 House-Senate ratio would enable the drawing of common boundary legislative districts to help eliminate election ballot confusion. We wholeheartedly endorse this proposal and urge a vote FOR Question No. 1.

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The public is hearing a great deal about the strike against the Farah Manufacturing Co. in this city, the nation's largest manufacturer of men's slacks. Political figures such as Sens. Edward Kennedy George McGovern and Mayor John Lindsay of New York City have made the strike their cause and formed a "Citizens Committee for

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On Advertising

On State-wide Question No. 8, Advertising Ordinance: this bill appears to be in the public interest in that it supposedly could save dollars on required publication of advertising bills and laws. However, the wording of the enabling legislation is such that only the titles of the bills or laws would have to be printed, leaving the public without a full understanding of the content of the measures. This change would, in our opinion, deprive the public of information necessary to keep pace with bills, laws and ordinances affecting them. We urge you to vote NO on Question No. 8.

Property Tax

The present state property tax is rampant with exceptions, for instance it excludes farmers, manufacturers and a county can exempt itself. Question 9 would eliminate the state property tax and allow the state to seek funds for retiring its capital improvement debt from the general fund

Marylander, we are proud of him. His candid criticisms of the news media have been correct. His verbal chastisement of disruptive groups has been just. His affirmation that this is a great and good country, the best government devised by man, is unquestionably true. Spiro Agnew is not only a good vice president, but a man highly qualified for the presidency.

William Mills, incumbent Congressman, has an enviable record on Capital Hill. His reelection will help ensure the success of the Nixon program in the next four years. We endorse him heartily.

Make this Tuesday count

General Election Day, Nov. 7, 1972 is a day of many decisions for the voters in Charles County. A day when the people exercise the only right they have to keep American free.

We have surveyed the issues on the state level, particularly the constitutional referendums on this Tuesday's ballot. We have examined our conscience and made our decisions.

There are 17 constitutional referendums on the 1972 ballot. Of these 17 we feel four are relevant to the voters both as citizens of Charles County and of Maryland. We urge the voters to pull the affirmative levers for proposed constitutional amendments one, two, three, and five.

Question one expands the number of state senators. Although senators will go to the urban, more populated counties rural counties will retain their present minimal representation. The question urges Senatorial redistricting along present delegate districts allowing a minimum of three delegates per senatorial district. This will place Charles and St. Mary's in the same district and one of the counties will lose a delegate, but redistricting, according to population, would have done this also. If this amendment passes, our shared senator will not be spread even further.

A state run lottery for the benefit of the state is proposed amendment two. We strongly urge the voters of Charles to approve this question. The lottery would fill empty state coffers without an additional tax burden. The lottery will cut severely into the illegal numbers racket which flourishes in every part of the state. New York and New Hampshire have state lotteries and their states are prospering. Legal lotteries will help abate many citizens' urge to gamble without creating mafia controlled gambling strips.

Question number three deals with equal rights for women. Why should a man have to pay a woman alimony when the woman is able bodied and no children are involved. Why should one person be penalized or rewarded just because of their sex? With the state and eventual federal adoption of this amendment, our nation will have an even truer democracy.

Amendment five lessens voting restrictions. Only those convicted of infamous or serious crimes or those under care for a mental disability are exempt from the right of voting, question five proposes. Now, persons who have been treated for mental illness or convicted of a crime may permanently lose their right to vote. We feel this proposed amendment is fair yet will not jeopardize our system. The present law should be amended.

Make this Tuesday count – go to the polls and vote!

Would you care to comment
person you're voting for?

Mrs. Robert M. Ashly, Jr., co
dealer, Bryans Road:

Let me see, I haven't made
mind. I guess I can say I agr
one candidate's foreign policy
other's domestic policy.

Mrs. Thomas L. Va
housewife, Potomac Heights:

Right at this point I don't k
whom I'm going to vote. I coul
even though it's this close
election.

Mrs. Margaret Tolson, em
Newburg:

I haven't decided yet.

Mrs. Beulah J. Robey, cle
department store, Waldorf:

Right now I haven't made
mind completely.

Mrs. Jack D. Salyers, house
Plata:

Really, I haven't made my
I never did care for Nixon. I
might vote for McGovern.
Wallace were running I just d
Nixon.

Mrs. John A. Ring,
homemaker, Waldorf:

I haven't made up my
haven't decided on a choice
more of Nixon. Politics is p
didn't approve of the Wate
Nixon has done well on some
haven't made up my mind
haven't made my choice. I don
busing at all. It'll do more re
guess. It's the United States a
free to do what one wants. Th
pressure.

Mrs. Louis M. Adams, ho
White Plains:

I really don't know who I
to vote for. I just haven't
which one I'm going to vo
would probably be for Nix
done pretty good so far.

Mr. William P. Anderson, em
Waldorf:

Well, I really haven't decide

Mrs. Paul A. Wallace, bab
White Plains:

It's going to be Richard
Nixon because I think he h
problems on his hand and he
to straighten them out.

Dear Sir:

Congratulations! Enjoye
anniversary edition. A job w

Mrs. Thom
in:

State economy shows indications of slump

By FRED BARBASH

Maryland's economy—healthier than the nation's for the past year—declined "significantly" during the summer, according to state economists.

"Almost every major economic indicator such as employment, business failures and real income showed new signs of weakness in August," the state Department of Economic and Community Development reported.

The Maryland consumer displayed new pessimism, the department's "*Maryland Development Digest*" said, by placing more money in time deposits than the average for consumers across the country.

This is "an indication that residents here were possibly not quite as sure of their jobs as Americans in general appeared to be," the *Digest* said.

A spokesman for the department could offer no immediate explanation for the bad news. But the digest cautioned that "it is not yet possible to assess fully the significance of the declines, which may have been only temporary."

The August declines could reflect results of tropical storm Agnes, which destroyed or damaged businesses and homes in all parts of the East Coast.

"Unusual changes" occurred in the number of business incorporations and business failures, as the former went down and the latter up during the late summer. Twenty-two businesses failed in August, according to the figures, more than double the number a year ago at the same time. The number of incorporations declined by over 70 per cent compared with last year.

Employment lags

"The clearest indication of the new weakness was the fact that employment in Maryland was not expanding rapidly enough to keep pace with the high number of new workers," the *Digest* said. While the labor force grew an average of 3.5 per cent monthly from January through August, employment increased by an average of 1.03 per cent.

The reverse was true nationally, the department reported. And while the number of unemployed went ● 2.8 per cent in Maryland during this period, it declined 5 per cent nationally.

The layoff rate also outpaced the national rate. In Maryland in July, there were 1.8 layoffs per hundred workers, while there were 1.3 per hundred nationally, the *Digest* said.

Sales sluggish

The fact that Marylanders were banking more of their money produced a "general sluggishness" of retail sales. Nationally, "sales grew at a 9.3 per cent rate from July to

See ECONOMY, C9, Col. 1

Tests of basic skills

Baltimore pupils lag 4th year in succession

By MIKE BOWLER

Results of the fourth year of citywide testing in Baltimore indicate that students here remain up to a year behind their big-city counterparts in the basic skills of vocabulary, reading, language and arithmetic.

The 1972 Iowa Tests of Basic Skills found Baltimore students behind the average of those in other big cities, such as Omaha, Detroit and Philadelphia, by as little as six months in the third grade and as much as a year and four months in the eighth grade.

In releasing the 1972 results, city school officials issued their usual warnings that the tests provide but one indication of a student's school ability—or lack of it—and that they do not tell the whole story of why one student scores well and another doesn't.

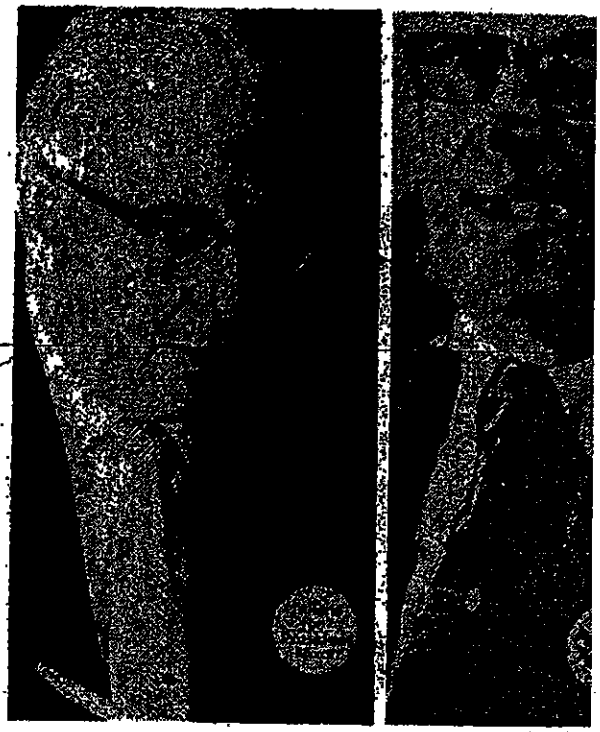
In fact, as the 1972 results are released, the entire concept of nationally standardized achievement tests is under fire, and Dr. Roland N. Patterson, the city school superintendent, has appointed a 30-member study committee of staff members, teachers and students whose recommendations could lead to major changes in the city's testing program.

A basic charge against the tests is that they are "norm-referenced," rather than "criterion-referenced"—that is, they are graded in terms of average group performance, no matter how good or bad that is.

One can look at any Baltimore school's third-grade score, for example, and not be able to tell how many pupils in

See SCORES, C9, Col. 2

A new law requires the state's public schools to be accountable for educational quality and pupil achievement . . . C9



Sunpapers photo

They ran out of buttons

. . . for City Councilman Frank X. Gallagher (l and Reuben Caplan, who is Jewish, so they w night's meeting of the City Council. A consum also was introduced at the session. (See story on

All-woman jury is selecte in Brewster case; trial del

By FREDERIC B. HILL
Sun Staff Correspondent

Washington — An all-woman jury was selected yesterday for the bribery trial of former Senator Daniel B. Brewster and two co-defendants, but a sudden, undisclosed hitch delayed the trial until today.

Judge George L. Hart, Jr. announced that "a development" had arisen that prevented him from swearing in the jury and proceeding with the case yesterday.

Judge Hart and lawyers for both the government and the three defendants refused to reveal what had happened. All insisted there was no serious problem and that the trial would go ahead this morning.

There still seem to be prospects of a longer delay in the case — one in which various pre-trial developments, including a Supreme Court decision, have taken nearly three years.

Judge Hart indicated he did not impanel the jury so that in the ever obstacle— missed a. —lawyers not claim problem and that the trial "I hav would go ahead this morning. be here- There still seem to be pros- the judg pects of a longer delay in the nouncem case — one in which various will notic pre-trial developments, includ- jury." ing a Supreme Court decision, have taken nearly three years.

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Lost

Mr. B from Mar re-electio was char ing $24.50 gel. Inc. order fir derson, ir lator's ir postal r company its Wash charged official.

Mr. Br trial orig cause of holism, a terday. h

See BR

Feminists find few foes of ballot question

This is the second of four articles on some of the 18 statewide questions on the ballot November 7.

By BARRY C. BASCOVAR

The women's liberation movement, which has run into entrenched male opposition in many of its campaigns, apparently has found the going surprisingly easy in its quest to insure equal rights to both sexes under the Maryland Constitution.

"Apathy is the main thing," said Be Be Bailey, who heads a group calling itself Citizens Coalition for the Equal Rights Amendment.

"We're going to have to fight to get the vote out, but we've found no political opposition."

The only vocal resistance has come from several women's groups—Happiness of Womanhood (with national headquarters in Arizona), Committee for the Status of Woman, League of Housewives and Voters Interest League.

Maude Ellen Zimmerman, the chairman of the Voters Interest League — a statewide conservative organization — has been among the most active opponents of the equal rights amendment.

"It should be called the unequal wrongs amendment," she declared. She said the amendment would nullify all state laws that apply only to one sex.

Miss Zimmerman, a community college mathematics teacher, said the amendment would mean that all rape laws would be invalid, that husbands would no longer be held primarily responsible for the support of a family and that "segregation of the sexes" in hospitals, prisons, college dormitories, and rest rooms in state facilities would be prohibited.

Mrs. Bailey referred to this last charge as "the bath-

See WOMEN, C7, Col. 1

ings Bank of Baltimore, Charles and Baltimore streets.

The man, who said he was a bank auditor, said officials suspected a teller and wanted Mrs. Naylor to withdraw an- [illegible] to pick up the cash and return it to the bank.

Five minutes later, a white man about 35 years old, wearing glasses with dark frames and a brown suit and coat [illegible] ance now was $3,000.

Bank officials said they had no knowledge about any auditor investigating Mrs. Naylor's account. City police yesterday reported no arrests in the flim-flam case.

What the law allows

Under the anti-pollution law, one half of the fine could be paid as a bounty to persons who aided the government in bringing the case.

Judge Herbert F. Murray spent several days hearing claims to the $31,250 bounty before deciding to split the money four ways.

Joseph Bormel, a member of the Mayor's harbor committee, Dr. D. Marc Eny, a chemist and long-time friend to Mr. Bormel, Howard Byrd, a former employee of Baltimore Import, and Melvin C. Ridge, another former employee, should share equally in the bounty, the judge ruled.

Washing lot moved

Mr. Bormel and Dr. Eny originally claimed the entire $31,250 bounty on grounds that they took pictures and gathered water samples to first bring the case to the attention of the United States attorney.

director of the ag[illegible] be appointed by the [illegible]

Mayor Schaefer [illegible] night he had not re[illegible] but he expressed [illegible] about any agency [illegible] overlap already ex[illegible] and federal controls [illegible]

At a press con[illegible] week, Mr. Orlinsk[illegible] bill would ensure [illegible] forced rule of [illegible] fairness."

"The new city ag[illegible] be able to issue su[illegible] cease and desist [illegible] levy fines up to $50[illegible]

The commissione[illegible] of the new agency [illegible] have the power to [illegible] consumer protectio[illegible] responsibilities wo[illegible] consumer advoca[illegible] state and federal le[illegible]

At least one c[illegible] co-sponsors admitte[illegible] that he thought th[illegible] present form migh[illegible] reaching, if not [illegible] tional in parts.

Councilman Alex[illegible]

Women's-question foes few

WOMEN, from C24

room issue. It is simply not true that boys and girls would have to use the same bathrooms in the schools," she said.

However, she conceded that the amendment would mean many state laws dealing with divorce, marriage, alimony and property rights would have to be revised so as not to favor one sex.

The proposed amendment would insure equality under the law to both sexes. A similar amendment to the United States Constitution has been ratified by 21 states and needs approval from another 17.

If the Maryland amendment is approved by the voters 227 sections of state law would have to be modified. These range from criminal laws that apply to one sex to laws that exempt women from paying fees for oyster tonging licenses and prohibit [illegible]

state forest wardens from asking women to assist in fighting forest fires.

Mrs. Bailey, who is editor of the biweekly Wheaton News, said more than 1,000 women are actively working for the amendment. Additionally, several state politicians and women's groups are supporting their drive.

There has been little visible statewide activity on many of the other constitutional amendments that will be on the ballot November 7. Among these proposals are the following nine:

1. An amendment abolishing the office of surveyor in all but four Maryland counties. Although this is a constitutional office, few counties still elect a surveyor, whose duties have been reduced significantly in recent years.

2. An amendment to remove language from the Constitution that has been invalid for 102 years. The Constitution still states that only "white male citizens" have the right to vote.

Advertising of proposals

3. An amendment to require charter counties to advertise proposed ordinances in local newspapers before enactment. The current law requires only publication of ordinances after enactment.

4. [illegible] amendment to remove from the Constitution [illegible]

[illegible] ton county under the state merit system.

8. An amendment to give the Washington Suburban Sanitary Commission the power of "quick-take" condemnation in Montgomery county. It already has this power in Prince Georges county.

9. An amendment to allow Baltimore city to set up a rehabilitation loan program for homeowners. There is an accompanying bond authorization question on the city ballot.

16-year-old charged in rape

Police have charged a 16-year-old youth with raping and robbing a [illegible]-year-old woman Sunday morning in the [illegible] block Cathedral street.

[illegible]

City Jail.

[illegible]

When she started to pick up the papers, the young man leaped on her, dragged her into a rear yard [illegible] and then fled with $1.50 [illegible] said she was treated [illegible] and four fractured ribs at Mercy Hospital.

About 20 minutes later, police arrested young Williams in the first block East Mulberry street after a description of the suspect was broadcast over police radio.

7 centers offer dish[illegible]

REPORT to the GOVERNOR

GOVERNOR'S COMMISSION
TO STUDY
IMPLEMENTATION
OF THE
EQUAL RIGHTS AMENDMENT

DHR Pub. 5009-15/79

AREA	ISSUE	DECISION
- Children	Children living apart from either parent take their father's domicile. (Miller, supra, 364)	A child's domicile when living apart from both parents is domicile of whoever stands in loco parentis to the child.
GROUNDS FOR DIVORCE	Impotency which is grounds for divorce is considerably more prevalent in males than females. (Art. 16, Sec. 24)	Reexamine all grounds for divorce; a no fault system is more amenable to ERA application.
	Application of some grounds for divorce may be sexually discriminatory.	
SLANDER OF CHASTITY	Only the slander of a woman's chastity is actionable without proof of damages. (COURTS Art., Sec. 3-501)	Extend to males so that men and their wives can sue for slander to the male's chastity.
NAMES OF MARRIED WOMEN - General	Apparently married women may register to vote and run for office as either Betty Smith or Mrs. John Smith. Married men are not afforded similar options.	Defer Study issue of what is legal name of married woman.
- Election Board	Only women are sent notices by the Election Board and must show cause and reply that their names have not changed upon marriage. If they do not respond, their names are removed from the voter's rolls. (Art. 33, Sec. 3-18(a)(3) and (c))	Procedure should be changed so that names of notified newly married voters are not removed for failure to respond to notices from Election Board.
- Motor Vehicles	The MVA refuses to allow a married woman who has used her husband's surname to resume her maiden name on her driver's license without a court order. (O.P.A.G., DR 5/23/74)	Permit women who have assumed their husband's last names on their driver's licenses to resume their maiden names.
NAMES - Children	A father has the right to have his legitimate children bear his last name. (West v. Wright, 263 Md. 297, 300)	Defer***
SAME SEX MARRIAGES	Only persons of the opposite sex can marry. (Art. 62, Sec. 1)	Defer***

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of October, 2006, I sent two copies of the foregoing Brief of Plaintiffs-Appellees by first class mail, postage prepaid, to:

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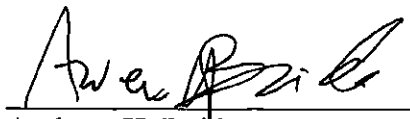

Andrew H. Baida