IN THE COURT OF APPEALS
OF MARYLAND

September Term, 2006

No. 44

FRANK M. CONAWAY, et al.,

Appellants,

v.

GITANJALI DEANE, et al.,

Appellees.

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

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REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The best response to the several hundred pages of argument (including a 168-page appendix to one brief) filed by the Deane plaintiffs (collectively, "Deane") and their amici is found in the same-sex marriage decisions of nine State appellate courts and all federal courts that have considered the issue and rejected a constitutional challenge. Even plaintiff-friendly appellate decisions in Vermont and New Jersey reject key contentions advanced by Deane.

No appellate court in the country has declared a right to same-sex marriage to be fundamental or homosexuality to be a suspect class. It has been more than a dozen years

since a plurality in Hawaii's highest court found a restriction against same-sex marriage to be gender discrimination - - a holding rejected by every other appellate court since. A number of amici in support of Deane's position have participated in these decisions and have seen their arguments rejected.

Rather than aim a verbal scattergun at all of the contentions of plaintiffs and their amici, the State will provide an update on pertinent legal developments since the filing of the State's brief two months ago, and respond to the more egregious of Deane's contentions, particularly as to the applicable constitutional standard, the relevance of Maryland's ERA history and the nature of the State's interests at stake here.

The two appellate decisions in New Jersey and California regarding same-sex marriage decided in the last two months to some degree reflect the gulf between the parties' positions in this case.[1] In *Lewis v. Harris,* 188 N.J. 415 (N.J. 2006), the New Jersey Supreme Court concluded that there was no fundamental right to same-sex marriage and that the State was not obliged to confer the label of marriage on the relationship of committed same-sex partners, finding that the right to same-sex marriage is "not deeply rooted in the traditions, history and conscience of the people of this State." *Id.* at 441. The court nevertheless concluded that the State could not deny same-sex couples the statutory benefits and

[1] In addition to these cases, seven more states have amended their constitutions to restrict same-sex marriages, raising the total to 27. Colorado Constitution, Article II § 31; Idaho Constitution, Article III § 28; South Carolina Constitution, Article XVII § 15; South Dakota Constitution, Article XXI § 9; Tennessee Constitution, Article XI; Virginia Constitution Article I, § 15-A; Wisconsin Constitution, Article XIII § 13.

privileges conferred on heterosexual married couples. Surprisingly, a key factor in the court's analysis was the substantial progress made by the New Jersey Legislature in "combating sexual orientation discrimination and advancing equality of treatment toward gays and lesbians," including its passage of a Domestic Partnership Act. *Id.* at 445. The justices reasoned that there was no rational basis in conferring such benefits on "committed" same -sex couples and "on the other hand, giving them an incomplete set of rights when they follow the inclination of their sexual orientation and enter into committed same sex relationships." *Id.* at 452.

Upon a similar legislative record, the California Court of Appeal rejected a challenge to that State's law restricting marriage to opposite sex couples. *In re Marriage Cases,* 49 Cal. Rptr. 3d 675 (2006). Rather than penalizing the State for its legislative progress, the Court said that "[u]nder rational basis review, it is appropriate for us to consider other relevant laws concerning the right of same-sex couples, such as the Domestic Partnership Act." *Id.* at 719. Finding that the changes the plaintiffs sought had to come from their elected representatives in the legislature, the California court cautioned against constitutionalizing a matter and removing it from the democratic process and from the legislative arena where competing policies and their complexities could be balanced. *Id.* at 725, n. 34.

This Court's prior decisions reflect California's approach.[2] In many respects, this

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[2] This is not to suggest that Maryland currently has a domestic partnership statute. However, since 2001, when a law banning discrimination on the basis of sexual orientation was enacted, the General Assembly has been moving in that direction. For example, in 2005 (continued...)

case is like *Hornbeck v. Somerset Co. Bd. of Education,* 295 Md. 597 (1984). There, in a challenge to Maryland's system of public school financing, this Court was asked for the first time to declare a right fundamental under the State Constitution and thus trigger exacting judicial scrutiny. Despite differing rulings in other states, and the lower court's decision to the contrary, the Court declined the invitation and upheld State law on the basis of rational basis analysis. It did so because 1) the "very complexity" of the matter required deference; 2) "the legislature's effort to tackle the problems should be entitled to respect;" and 3) the State was making efforts to extend more opportunities. *Id.* at 651-52. More importantly, the Court said:

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

Id. at 658. This case presents the same imperatives for judicial restraint.

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[2] (...continued)
the Legislature created a life partnership for medical decision-making (SB 796) and authorized an exemption from recordation and transfer taxes for transfers of property by domestic partners (HB 1298). Both bills were vetoed by Governor Ehrlich as undermining "the sanctity of traditional marriage." *See* Veto Messages on SB 796 and HB 298, *Laws of Maryland* (2005) at p. 3899 and p. 4405. Both measures are likely to be reintroduced in 2007. In 2006, the Legislature amended the Advance Directives statute to confer on health care agents hospital visitation privileges and a right to accompany a person in an ambulance and to establish an Advance Directive Registry. *See* Chapters 223 and 522, *Laws of 2006.*

ARGUMENT

I. MARYLAND'S MARRIAGE LAW DOES NOT VIOLATE THE EQUAL RIGHTS AMENDMENT.

Plaintiffs' gender discrimination arguments were anticipated by the State and rebutted in Appellant's Brief at 15-29. The issue of whether restricting marriage to opposite-sex couples is unconstitutional gender discrimination has been considered and rejected by two federal courts and six state appellate courts - - five of these decision were rendered in the last three years. *Wilson v. Ake*, 354 F.Supp.2d 1298, 1307-1308 (Fla. Jan 19, 2005); *In re Kandu*, 315 B.R. 123, 142-143 (Bkrcy., W.D. Wash. 2004); *In re Marriage Cases*, 49 Cal.Rptr.3d 675, 706-709 (Cal.App. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 10-11 (N.Y. 2006); *Anderson v. King County*, 138 P.3d 963, 988-990 (Wash. 2006); *Baker v. State*, 744 A. 2d 864, 880, n. 13 (Vt. 1999); *Dean v. District of Columbia*, 653 A.2d 307, 363 n. 2 (D.C. 1995)(Steadman, J., concurring); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn.) *app.dis* 409 U.S. 810 (1972).[3] All of these courts found such a marriage statute to be gender neutral. All rejected the analogy of the marriage restriction to the antimiscegenation law invalidated in *Loving v. Virginia,* 388 U.S. 1 (1967), which was not a truly neutral marriage classification because its only justification was to "maintain White Supremacy," (*Id.* at 11), and could not

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[3] A plurality in *Baehr v. Lewin,* 852 P.2d. 44 (Haw. 1993), is Deane's only authority to support the theory of gender discrimination. These views were based on Hawaii's gender rights guarantee, which legislative history shows was also intended to prohibit discrimination on the basis of sexual orientation, *see* App. Br. at 18-19, n.9. The decision has been superseded by constitutional amendment.

withstand "the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id.* at 9. Under Maryland's marriage law, it cannot be said that the State burdens lesbians more than gay men or gay men more than lesbians. It does not single out men or women as a class. Men cannot marry men. Women cannot marry women. It does not promote gender stereotypes or subordinate women to men or men to women. It is a stretch to say that the law of sex discrimination should encompass a claim that the ERA is violated when the State promotes opposite-sex marriage. *See Anderson v. King County*, 138 P. 3d at 989 ("Men and women are treated identically under DOMA; neither may marry a person of the same sex. DOMA therefore does not make any "classification by sex," and it does not discriminate on account of sex .... it "stretch[es] the concept of gender discrimination to assert that it applies to treatment of same-sex couples differently from opposite-sex couples."(citations omitted)). Thus, gender is not a factor in the application of this statute.

In the face of all this contrary authority, Deane argues, primarily from federal caselaw, that Maryland's ERA creates individual, not class rights, and that this somehow makes the statute suspect. Br. at 18-24. However, although Supreme Court cases like *Loving* have described marriage as "a personal right," no case has suggested that a state cannot infringe upon that right "for social purposes, such as encouraging procreation and protecting children. Indeed, the Court recognized in *Loving* that 'marriage is a social relation subject to the State's police power.' " *Standhardt v. Superior Court ex rel. County of Maricopa,* 77

P.3d 451, 461-62 (Ariz. App. 2003).

In addition, Deane's and the lower court's reliance on *Burning Tree Club v. Bainum*, 305 Md. 53 (1985), is misplaced. Deane argues that under *Bainum*, a law can violate the ERA even if gender-neutral, in the sense that it does not burden males or females. However, in *Bainum* the only purpose of the challenged exception to an antidiscrimination statue was "to allow Burning Tree to continue discriminating against women and still receive a large state subsidy." *Id.* at 102. (Eldridge, J., concurring and dissenting). Moreover, the case was not a lawsuit involving two different single sex membership clubs, but an action by a woman seeking and being denied admission to an all-male club.

Plaintiffs rely on the concurring opinion of Judge Rodowsky, but a full reading of that opinion confirm's Judge Rodowsky's own insistence that "in the context of sex discrimination, only one sex will be the object of discrimination." *Id.* at 87 (emphasis added). Here, by contrast, plaintiffs of both sexes allege that they are being discriminated against simultaneously. That cannot constitute gender discrimination under Article 46 as interpreted by this Court in *Bainum*, or in any of the Court's decisions since.

Later opinions of this Court recognize the uniqueness and limitations of the *Bainum* decision. In *State v. Burning Tree Club,* 315 Md. 254, 295 (1989), the Court characterized the statute at issue in *Bainum* as "state action providing for segregation based upon sex." *Giffin v. Crane,* 351 Md. 133, 148-49 (1998), also articulated the rule gleaned from the *Bainum* opinions, that the ERA "generally" invalidates government action which imposes

a burden on, or grants a benefit to one sex but not the other - - the only exception to the general rule being state-sanctioned segregation of the sexes. *Id.* at 148-149.

Rather than supporting the lower court's decision here, *Bainum* and its progeny defeat its rationale. This case does not involve an underinclusive discrimination statute or state-sanctioned segregation by sex. Thus, the ERA could be violated here only if the Maryland marriage statute burdened or benefitted one sex, but not the other. *Id.* This is not the case here.

Deane also contends that this Court should ignore the legislative history and contemporaneous construction of Maryland's ERA because its application to the marriage statute is so plain.[4] It would be difficult to find a case where this Court has deliberately ignored available history of a provision of the Constitution. In fact, the Court often consults such materials without first making an express finding of ambiguity. *See, e.g., Benson v. State,* 389 Md. 615, 633 (2005); *Brown v. Brown,* 287 Md. 273, 278 (1980). "[E]ven when the language of a statute is free from ambiguity 'in the interest of completeness' we may and sometimes do, explore the legislative history of the statute under view." *Baltimore v. Chase,* 360 Md. 121, 131 (2000). And the Supreme Court has examined extrinsic sources to determine the application of Title VII's prohibition of discrimination "because of sex." *See, e.g., Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616, 629 (1987);

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[4] If anything is "plain," it is that the ERA excludes sexual orientation from its prohibition of discrimination "because of sex" – a conclusion reached in numerous federal decisions interpreting Title VII of the Civil Rights Act of 1964. *See* Br. at 17-19.

Newport News Shipbuilding & Drydock Co. v. EEOC, 462 U.S. 669, 680 (1983); and *General Electric Co. v. Gilbert,* 429 U.S. 125, 144-45 (1976).

In any event, an examination of history and contemporaneous construction is particularly important here, where Deane's proffered constitutional interpretation so widely departs from conclusions reached by sources this Court has relied upon to interpret the Maryland ERA, *viz.* out-of-state decisions, particularly those of the State of Washington, and Professor Thomas Emerson's landmark law review article on the federal ERA.[5] Since *Rand v. Rand,* 280 Md. 508 (1977), this Court has looked to ERA interpretations by other State courts for guidance in interpreting Maryland's ERA. *Rand, Bainum* and *Condore v. Prince George's Co.,* 289 Md. 516 (1981), placed special reliance on the ERA jurisprudence of the courts of the State of Washington. *See Rand,* 280 Md. at 512, 515; *Bainum,* 305 Md. at 66-67; *Condore,* 289 Md. at 524.[6] Yet the Washington Supreme Court and most other state appellate courts that have reached the issue have not read their ERAs as requiring the invalidation of laws restricting marriage to a man and a woman.[7] Similarly, this Court has often turned to Professor Emerson's anticipatory interpretation of the proposed federal ERA

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[5] *See* Brown, Emerson, Falk & Freeman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 Yale L.S. 871 (1971).

[6] *Condore* notes that "*Rand* and its progeny are in accord with cases construing similar equal rights amendments in other states." *Condore,* 280 Md. at 526.

[7] Washington's intermediate appellate court first reached this conclusion in 1974. *See Singer v. Hara,* 522 P.2d 1187 (Wash. App. 1974). This decision was reaffirmed by the State's highest court 32 years later. *See Andersen v. King County,* 138 P. 3d 963 (Wash. 2006).

to describe the purpose and scope of its Maryland counterpart. *See, e.g., Rand,* 280 Md. at 512; and *Giffin v. Crane, supra,* 351 Md. at 148-49. Professor Emerson omitted same-sex marriage from his list of ERA-mandated legislative changes and testified that a federal ERA would not sanction same-sex marriage. *See* App. Br. at p. 27, n. 14; *Equal Rights for Men and Women 1971,* Hearings before Subcommittee No. 4 of the Committee on the Judiciary, House of Rep., 92nd Cong. 1st Sess. (1971) at 402 (where Emerson stated that "[l]aws dealing with homosexual relations would likewise be unaffected [by the ERA].") At the very least, these variances from Deane's proffered construction warrant an examination of legislative history, contemporaneous construction, and other extrinsic sources of framer intent.

Deane describes these sources as "unclear." Br. at 25-30. However, these sources demonstrate unequivocally that the potential impact of the ERA on same-sex marriage was an issue at pre-enactment, pre-election and post-ratification stages, with the evidence favoring the conclusion that the ERA would not invalidate a law limiting marriage to a man and a woman. App. Br. at 25-29.[8] Foremost among these extrinsic sources was the construction placed upon the 1972 ERA by the Legislature in 1973 when it enacted the very statute challenged here. In *Hornbeck v. Somerset Co. Bd. of Ed., supra,* 295 Md. at 620, this

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[8] One source of extrinsic evidence relied upon by the State is the report of the Governor's Commission to Study Implementation of the Equal Rights Amendment. Br. at 28-29. The Supreme Court of Washington relied upon similar evidence in interpreting its ERA as not invalidating opposite sex marriage. *See Anderson v. King County, supra,* 138 P. 3d at 988-89. ("[T]he Washington State Legislative Council prepared a report studying the impact of the ERA on state law. The report listed hundreds of statutes that would or could violate the ERA but did not identify statutory recognition of marriage as between a man and a woman as violative of the ERA.")

Court said that "a contemporaneous construction placed upon a particular provision of the Maryland Constitution by the legislature, acquiesced in and acted upon without ever having been questioned, followed continuously and uniformly from a very early period, furnishes a strong presumption that the intention is rightly interpreted." Deane has not rebutted this strong presumption that Maryland's marriage law is consistent with the ERA.

II. MARYLAND'S MARRIAGE LAW DOES NOT BURDEN A FUNDAMENTAL RIGHT OR DISCRIMINATE AGAINST A SUSPECT CLASS.

As noted above, since the State's brief was filed in this Court, two more appellate courts have weighed in - - both rejecting Deane's contention that a law restricting same-sex marriage burdens a fundamental right to marry. *Lewis v. Harris,* 188 N.J. 415, 441 (2006); *In re Marriage Cases, supra,* 49 Cal. Rptr. 3d at 699-706. The California appellate court also rejected the argument that sexual orientation is a suspect class meriting strict scrutiny. *Id.* at 709-14.

Of the more than a dozen courts that have considered these issues, none have adopted the positions pressed here by Deane. None have read *Loving v. Virginia, supra,* as requiring the creation of a right to same-sex marriage.[9] And no appellate court when asked to address same-sex marriage has declared homosexuality to be a suspect class.

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[9] To rely upon *Loving* in this context is to ignore later decisions of the Supreme Court. *See Baker v. Nelson,* 409 U.S. 810 (1971)(Mem.)(summarily rejecting challenge of marriage license denial to same-sex couple); *Zablocki v. Redhail,* 434 U.S. 374, 386,396 (1978)(The decision to marry "in a traditional family setting" must receive constitutional protection); and *Lawrence v. Texas,* 539 U.S. 558, 578 (2003)(denying that the Court was deciding any issue relating to same-sex marriage).

For all of the above reasons, the Court should reject Deane's contention that strict scrutiny applies to the Maryland marriage statute and apply the rational basis equal protection and due process standard that is applicable to economic and social welfare legislation.[10]

III. THE MARYLAND STATUTE CANNOT BE SHOWN TO LACK A RATIONAL BASIS.

A. The Plaintiffs Misstate the Applicable Constitutional Standard.

Deane, like the dissenting judge in *Anderson v. King County, supra,* asserts that the key constitutional inquiry with respect to a marriage statute like Maryland's "is not whether allowing opposite-sex couples the right to marry furthers governmental interests in procreation and raising children in a healthy environment, but, rather, whether those interests are furthered by denying same-sex couples the right to marry." *Anderson,* 138 P.3d at 984. The Washington Supreme Court responded that:

> Initially, the dissent's rewording of the issue fails to acknowledge that over- and under-inclusiveness do not invalidate an enactment under rational basis review. Moreover, the correct inquiry under rational basis review is whether allowing opposite-sex couples to marry furthers legitimate governmental interests. As the United States Supreme Court has explained: "In the ordinary case, a law will be sustained *if it can be said to advance a legitimate government interest,* even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer [v. Evans]*, 517 U.S. at 632 (emphasis added). Granting the right to marry to opposite-sex couples clearly furthers the governmental interests

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[10] The State's interests are more than rational, and, in fact, are compelling. *See* Br. at 50-52. *See also* Wardle, *"Multiply & Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation,* 24 Harv.J.L. & Pub. Policy 771, 781 (2001)("Society has a compelling interest in preserving the institution that best advances the social interests in responsible procreation and that institution is traditional male-female marriage.")

> advanced by the State. We add that the constitutional inquiry means little if the entire focus, and perhaps outcome, may be so easily altered by simply rewording the question.

Anderson, 138 P.3d at 984-86. *See also Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 868-69 (8th Cir. 2006); *Morrison v. Sadler*, 821 N.E. 2d 15, 23 (Ind. App. 2005); *Wardle, supra*, 24 Harv. J.L. & Pub. Policy at 773-74. *But see Lewis v. Harris*, *supra,* 188 N.J. 415 (2006).[11]

B. The Maryland Marriage Statute was not Animated by Anti-Homosexual Animus.

Deane seeks to elevate the level of equal protection scrutiny applied to the marriage law by accusing the Legislature of enacting §2-201 of the Family Law Article with an anti-homosexual animus (Br. at 68-69.) This is simply untrue.

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[11] In *Lewis*, the Supreme Court of New Jersey held that the State constitution (like Massachusetts' in *Goodridge v. Department of Public Health*, 798 N.E. 2d 941, 959 (Mass. 2003)), provides greater equal protection rights than the U.S. Constitution. *Lewis v. Harris*, 188 N.J. 415, 456 (2006). Deane tries to squeeze Maryland equal protection cases into this category. However, this Court has said that provisions of the Maryland Constitution and Declaration of Rights, affording protection to its citizens against unreasonable or arbitrary discrimination, are to be interpreted "in like manner and to the same extent as the Fourteenth Amendment of the Federal Constitution." *Kirsch v. Prince George's County*, 331 Md. 89, 97, *cert. denied*, 510 U.S. 1011 (1993), *citing United States Mortgage Company v. Matthews,* 167 Md. 383, 395, *rev'd on other grounds,* 293 U:S. 232 (1934). Thus, the two provisions are similar enough that the Court will consider Supreme Court decisions interpreting the federal clause as persuasive authority. *Verzi v. Baltimore County*, 333 Md. 411, 417 (1994). And in fact, each of the equal protection cases cited by Deane discusses federal cases as authority. Moreover, while federal and State equal protection provisions are capable of divergent effect, this Court has never stated that it is specifically rejecting federal case law in the equal protection context, but has instead expressly said that a decision under the State provision does not carry that implication. *Maryland Green Party v. Board of Elections*, 377 Md. 127, 139 (2003); *Frankel v. Board of Regents*, 361 Md. 298, 313 n. 3 (2003), *citing Dua v. Comcast Cable*, 370 Md. 604, 618 n. 6 (2002). And in *Attorney General v. Waldron*, 289 Md. 683, 714 (1981), the Court expressly stated that it reached the same conclusion under both the federal and State provisions.

The Maryland marriage statute was not enacted in hostile reaction to decisions like *Baehr* and *Goodridge*. It became law in 1973, hard on the heels of a campaign to pass the ERA, where the issue of same-sex marriage had been raised. Moreover, the statute reflected the state of Maryland law that had existed for more than 300 years. (J.E. 401). In addition, in 2001 and 2005, the State enacted legislation banning discrimination on the basis of sexual orientation and creating life partnerships for medical decision-making. *See note 2, supra.* And for the last three years, bills proposing a constitutional amendment to ban same-sex marriage have failed. This history reflects the antithesis of anti-homosexual animus. No appellate court has credited the animus argument Deane advances here. *See Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) ("[O]ther reasons exist [for the State] to promote the institution of marriage beyond mere moral disapproval of an excluded group."); *Citizens for Equal Protection v. Bruning, supra*, 455 F.3d at 868 n. 3; *Anderson v. King County, supra*, 138 P.3d at 980-81. Because Maryland's marriage law is not motivated by hatred of or ill will toward gays and lesbians, it should be gauged by the traditional rational basis test.

C. The Rational Basis Standard that Governs Here is the Deferential Standard Applied in *Hornbeck*.

Deane derides the deferential equal protection standard applied by this Court in *Hornbeck v. Somerset County, supra*, as toothless and a surrender to "legislative hegemony." Instead, Deane argues that some more stringent test must apply in light of cases where this Court has found that statutes or regulations in fact lacked a rational basis. With one

exception, the cases cited to support this proposition belong to one of two classes for which this Court has shown particular solicitude in the application of the rational basis test.

In *Frankel v. Board of Regents*, 361 Md. 298, 316 (2000), this Court noted that it had frequently found invalidity where a statute or regulation treats residents of one geographic area differently from the residents of another. Among the cases the Court cited for this proposition were: *Verzi v. Baltimore County,* 333 Md. 411 (1994); *Bruce v. Director, Department of Chesapeake Bay Affairs*, 261 Md. 585 (1971); *Maryland Coal & Realty Co. v. Bureau of Mines*, 193 Md. 627 (1949); *Dasch v. Jackson*, 170 Md. 251 (1936); and *City of Havre de Grace v. Johnson*, 143 Md. 601 (1923).

Similarly, in *Kirsch v. Prince George's County*, 331 Md. 89 (1993) *cert. denied*, 510 U.S. 1011 (1993), the Court noted that it has "applied the rational basis standard when invalidating classifications in statutes regulating the pursuit of occupations where those classifications lacked a rational relation to a legitimate governmental purpose." *Id.* at 104. (Emphasis added). Among the cases cited for this proposition were *Wheeler v. State*, 281 Md. 593 (1977); *Maryland State Board of Barber Examiners v. Kuhn*, 270 Md. 496 (1973); *Bruce v. Director, Department of Chesapeake Bay Affairs*, 261 Md. 585 (1971); *Dasch v. Jackson*, 170 Md. 251 (1936) and *City of Havre de Grace v. Johnson*, 143 Md. 601 (1923). *See also Attorney General v. Waldron,* 289 Md. 683, 718 (1981). The only Court of Appeals case that falls outside of those two classes, *City of Baltimore v. Charles Center Parking*, 259 Md. 595 (1970), does not establish a new expansive test for rational basis analysis, but

instead is a case where the City presented no possible justification for the classification drawn by the ordinance, and the Court could not find one. *See also Bowie Inn, Inc. v. City of Bowie*, 274 Md. 230, 243-244 (1975). Thus, plaintiffs can find no solace in those cases.

The deferential rational basis standard for challenge to a statute under Article 24 of the Declaration of Rights as set forth in *Hornbeck v. Somerset County, supra*, for economic and social welfare classifications still prevails in Maryland. *See, e.g., Murphy v. Edmonds,* 325 Md. 342 (1997); *Waters v. Montgomery County*, 337 Md. 15 (1994). And that standard clearly applies here. *See* App. Br. at 53-56.

D. Deane Cannot Show the Lack of a Rational Basis Supporting the Marriage Statute.

Numerous rational bases have been proffered in support of a State's decision to favor opposite sex marriage.[12] Recent cases in this area have found additional rationales. *See, e.g., Anderson v. King County, supra*, 138 P.3d at 982 ("[T]he need to resolve the sometimes conflicting rights and obligations of the same-sex couples and the necessary third party in relation to a child also provides a rational basis for limiting traditional marriage to opposite-

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[12] Professor Lynn Wardle has identified eight social interests favoring opposite sex marriage:

> "(1) safe sexual relations; (2) responsible procreation; (3) optimal child rearing; (4) healthy human development; (5) protecting those who undertake the most vulnerable family roles for the benefit of society, especially wives and mothers; (6) securing the stability and integrity of the basic unit of society; (7) fostering civic virtue, democracy, and social order; and (8) facilitating interjurisdictional compatibility."

Wardle, supra, 24 Harv. J.L. & Pub. Policy at 779-80.

sex couples."); *Lofton v. Secretary of Dept. of Children & Family Service*, 358 F.3d 804, 818 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005)(Florida asserts that families with married fathers and mothers provide the presence of both male and female authority figures, which the state considers central to optimal childhood development and socialization). The rationale which has found the most favor with the courts is the promotion of "responsible procreation." *See, e.g., Morrison v. Sadler*, 821 N.E. 2d 15, 25 (Ind. App. 2005)(The institution of marriage not only encourages opposite-sex couples to form a relatively stable environment for the "natural" procreation of children in the first place, but it also encourages them to stay together and raise a child together if there is a "change in plans."). New York's highest court may have articulated this State's interest best:

> Since marriage was instituted to address the fact that sexual contact between a man and a woman naturally can result in pregnancy and childbirth, the Legislature's decision to focus on opposite-sex couples is understandable. It is not irrational for the Legislature to provide an incentive for opposite-sex couples -- for whom children may be conceived from casual, even momentary intimate relationships -- to marry, create a family environment, and support their children. Although many same-sex couples share these family objectives and are competently raising children in a stable environment, they are simply not similarly situated to opposite-sex couples in this regard given the intrinsic differences in the assisted reproduction or adoption processes that most homosexual couples rely on to have children.
>
> As respondents concede, the marriage classification is imperfect and could be viewed in some respects as overinclusive or underinclusive since not all opposite-sex couples procreate, opposite-sex couples who cannot procreate may marry, and opposite-sex partners can and do procreate outside of marriage. It is also true that children being raised in same-sex households would derive economic and social benefits if their parents could marry. But under rational basis review, the classification need not be perfectly precise or narrowly tailored -- all that is required is a reasonable connection between the

> classification and the interest at issue. In light of the history and purpose of the institution of marriage, the marriage classification in the Domestic Relations Law meets that test.
>
> The Legislature has granted the benefits (and responsibilities) of marriage to the class– opposite-sex couples– that it concluded most required the privileges and burdens the institution entails due to inherent procreative capabilities.

Hernandez v. Robles, 855 N.E.2d 1, 21-22 (N.Y. 2006).[13] Clearly, this difference in the procreative capacities of opposite-sex couples justifies the classification drawn by Maryland's law.

This Court does not have to disparage gay parenting in order to uphold Maryland's marriage law. The plaintiffs and their amici assert that studies are "monolithic" in their conclusion that lesbian and gay partners are as fit as heterosexual partners. This is an overstatement regarding research results that courts have refused to accept. *See, e.g.*, *Hernandez v. Robles, supra,* 855 N.E.2d at 8 ("Some opponents of same-sex marriage criticize these studies, but we need not consider the criticism, for the studies on their face do not establish beyond doubt that children fare equally well in same-sex and opposite-sex households. What they show, at most, is that rather limited observation has detected no marked differences. More definitive results could hardly be expected, for until recently few

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[13] The responsible procreation rationale is not simply a product of out-of-state cases. In *Lickle v. Boone*, 187 Md. 579, 585 (1947), the Court "recognized that the marriage relation is a status based upon public necessity and controlled by law for the benefit of society... [I]t is always the duty of the courts to guard the marriage relation. This policy is founded upon the necessity for protecting the interests of children...." This description of marriage bears little relationship to the notion advanced by Deane of emotional "commitment"– a factor which the State is incapable of measuring or regulating.

children have been raised in same-sex households, and there has not been enough time to study the long-term results of such child-rearing."); *Lofton v. Secretary of Department of Children & Family Services, supra,* 358 F.3d at 826 ("[I]t is hardly surprising that the question of the effects of homosexual parenting on childhood development is one on which even experts of good faith reasonably disagree. Given this state of affairs, it is not irrational for the Florida legislature to credit one side of the debate over the other."). *Cf. Anderson v. King County*, 138 P.3d at 983-84 ("It is particularly inappropriate for this court . . . to make its own inquiry into the validity or relationship of any study presented to the legislature."). Plaintiffs cannot satisfy their burden of showing that the State's interest in responsible procreation – accepted as legitimate by so many courts – is wholly irrational.

Deane also contends that by furthering the State's interest in responsible procreation by opposite-sex couples the State is harming the children of same-sex parents, without recognizing the mitigating effects of adoption, wills, health care documents, and other means. However, under the rational basis equal protection standard, if the State's objective is found to be rational (or not wholly irrational), the potentially adverse impact on those not benefitted by the statute is a situation for the legislature to remedy, not the courts. *See In re Marriage Cases, supra,* 49 Cal. Rpt. 3d at 722-23, 726.

Two additional factors counsel against reaching out to invalidate Maryland's marriage law. One is the progress the General Assembly has shown in addressing issues of discrimination on the basis of sexual orientation and in conferring some benefits on domestic

partners. *See* note 2, *supra*. The other is the fact that "[a] sudden change in the marriage laws or the statutory benefits traditionally incidental to marriage may have disruptive or unforeseen consequences." *Baker v. State*, 744 A.2d 864, 887 (Vt. 1999). This is why protracted judicial stays to allow legislative action have occurred in those jurisdictions which have ordered civil unions or (in the case of Massachusetts) same-sex marriage. More importantly, this is a reason why the legislative forum is the most appropriate to address the issue of same-sex marriage and extension of benefits to same-sex couples.

CONCLUSION

For all of the above reasons the decision of the circuit court should be reversed and the case remanded for entry of a declaration that Maryland's marriage statute is constitutional.

Respectfully submitted,

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November 22, 2006

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of November, 2006, I sent two copies of the foregoing Reply Brief of Appellants by electronic transmission and first class mail, postage prepaid, to:

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