In The
Court of Appeals of Maryland

No. 44

September Term 2006

FRANK M. CONAWAY, *et al.*,

Appellants,

v.

GITANJALI DEANE & LISA POLYAK, *et al.*,

Appellees.

APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY
(Hon. M. Brooke Murdock)

BRIEF OF *AMICI CURIAE* MARYLAND LAW PROFESSORS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONS AND STATUTES

LAW REVIEWS, JOURNALS, ARTICLES, AND BOOKS

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As teachers and scholars of state and federal constitutional law, family law, civil rights, gender discrimination, jurisprudence, property law, legal analysis and related subjects, we have a special interest and expertise in the interpretation of the Maryland Constitution and the development of Maryland law. We submit this brief to bring to the Court's

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[1] *Amici* are identified by name, title, and institutional affiliation in the Addendum.

attention legal principles, issues, and authorities that have not been fully developed elsewhere.

SUMMARY OF ARGUMENT

Interpreting and applying the Maryland Constitution is this Court's most vital task. The citizens of Maryland depend on an independent judiciary to preserve their most cherished individual rights and to safeguard them from arbitrary and unequal governmental action. In interpreting the guarantees of the Maryland Constitution, courts are not tethered to popular opinion, nor are they bound by the specific expectations of legislators. Rather, the role of the courts as constitutional interpreters is to ascertain the meaning and purposes of the constitutional text and to apply that meaning to the present-day controversies that come before it.

Application of these interpretive principles to the instant case compels the conclusion that the statutory ban on same-sex marriage contained in the Annotated Code of the Public General Laws of Maryland, Family Law Article, Section 2-201 ("Family Law 2-201") is inconsistent with Articles 46 and 24 of the Maryland Declaration of Rights. The prohibition violates Article 46 because it contains an unjustified sex-based classification that rests on impermissible gender stereotypes and enforces state-mandated gender roles. The prohibition violates the due process component of Article 24 because it infringes on plaintiffs' well-established, fundamental right to marry. Finally, the prohibition contravenes the equal protection guarantee of Article 24, regardless of the applicable level of scrutiny, because the exclusion of same-sex couples from marriage is not rationally related to a permissible state objective.

STATEMENT OF THE CASE, QUESTION PRESENTED, AND STATEMENT OF THE FACTS

Amici adopt the representations of the appellees with respect to statement of the case, question presented, and statement of facts.

ARGUMENT

Introduction: Principles of Constitutional Interpretation

The highest duty of the Court of Appeals of Maryland is faithfully to interpret Maryland's Constitution and Declaration of Rights. It is with respect to this task alone that the Court of Appeals is the final arbiter; its decisions are subject to revision only by the people themselves. In performing this vital interpretive role, the Maryland judiciary is not bound by the views of the majority or by a particular legislature's understanding of constitutional meaning. Indeed, a core purpose of judicial review is to prevent legislative majorities from infringing on minority rights or from violating fundamental freedoms. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. . . . [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

Scholars of constitutional interpretation—federal and state—agree that, when the relevant text is unambiguous and determinative of a constitutional question, the judicial inquiry need not extend beyond the words of the constitution. *See Davis v. Slater*, 383 Md. 599, 604, 861 A.2d 78, 81 (2004); *Rand v. Rand,* 280 Md. 508, 511, 374 A.2d 900,

902 (1977). On the other hand, where a constitutional provision is phrased broadly, or is open to more than one plausible reading, the interpretive process requires a court to consider materials beyond the four corners of the constitutional document itself. In examining these materials, a court's overriding task is to discern the purposes and principles that animate the constitutional text and to apply those principles to the question before it. *Norris v. Mayor and City Council of Baltimore*, 172 Md. 667, 676, 192 A. 531, 535 (1937).

The very choice to employ language that is not narrowly constraining is a choice to embed broad values within a constitution. Like their federal counterparts, the framers of the Maryland Declaration of Rights deliberately chose broad language to express ideals that would endure and protect for generations. In interpreting this language, judges must give effect to these animating ideals. As this Court has emphasized, "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." *Benson v. State*, 389 Md. 615, 633, 887 A.2d 525, 535 (2005) (*quoting Johns Hopkins University v. Williams,* 199 Md. 382, 386, 86 A.2d 892, 894 (1952)). It is for this reason that "[t]he meaning of the Constitution is not restricted to the meaning of particular words as they were understood at the time of its adoption." *Boyer v. Thurston*, 247 Md. 279, 292, 231 A.2d 50, 57 (1967) (*quoting Clauss v. Bd. of Educ. of Anne Arundel County*, 181 Md. 513, 523, 30 A.2d 779, 783 (1943)). Rather, as this Court has emphasized, "we construe the Constitution's

provisions to accomplish in our modern society the purposes for which they were adopted by the drafters." *Benson*, 389 Md. at 633, 887 A.2d at 535.

Constitutional theorists as ideologically diverse as Antonin Scalia and Laurence Tribe agree that a court charged with interpreting a constitution, whether federal or state, should never treat the supposed intentions of drafters, promulgators, or ratifiers as a "substitute for what was in fact *enacted as law*." Laurence H. Tribe, *Comment* in Antonin Scalia, *A Matter of Intrepretation: Federal Courts and the Law* 65 (1997) (emphasis in original). As Professor Tribe has explained it:

> we ought *not* to be inquiring (except perhaps very peripherally) into the ideas, intentions, or expectations subjectively held by whatever particular persons were, as a historical matter, involved in drafting, promulgating, or ratifying the text in question.

Id. (emphasis in original).

A legislature's assertions about how it expects constitutional provisions to be interpreted are not sources of law. As Justice Scalia has written, "[i]t is the *law* that governs, not the intent of the lawgiver." Antonin Scalia, *A Matter of Intrepretation: Federal Courts and the Law* 17 (1997) (emphasis in original). Nor does the popularity or longevity of an exclusionary practice insulate it from constitutional scrutiny. "As in the case of racial segregation, it is often when public sentiment is most sharply divided that the independent judiciary plays its most vital role in expounding and protecting constitutional rights." Laurence H. Tribe, *American Constitutional Law* § 15-10, at 1351 (2d ed. 1988); *see* Gerald E. Rosen and Kyle W. Harding, *Reflections Upon Judicial Independence As We Approach the Bicentennial of Marbury v. Madison: Safeguarding*

the Constitution's Crown Jewel, 29 Fordham Urb. L.J. 791, 798 (2002) ("[G]enuflecting before polling data is not—and must not be—part of a judge's job description. . . . [I]f a popular law clearly contradicts constitutional freedoms, the Court has a duty to strike it down."). If tradition or popular sentiment alone could satisfy constitutional requirements, then the "separate-but-equal" doctrine of *Plessy v. Ferguson*[2] would still be the law of the land, and women could still be excluded from a wide range of opportunities and occupations, including the legal profession.[3]

These core principles control how Maryland's Constitution and Declaration of Rights should be interpreted. The legislature and the people of Maryland ratified the words contained in Article 24 and Article 46 of the Maryland Declaration of Rights. They did not ratify and could not have ratified any legislative or political speech offering partisan assertions about the meaning of those words. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803).

In interpreting Article 24 of the Maryland Declaration of Rights, this Court has considered the historical evidence from the time of the provision's drafting. There can be no doubt, however, that modern interpretations and applications of Article 24 are beyond the wildest dreams of the feudal barons at Runnymeade, or William Blackstone, or

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[2] 163 U.S. 537 (1896).

[3] *See Bradwell v. Illinois*, 83 U.S. 130 (1872) (upholding Illinois' refusal to admit women to the bar).

Charles Carroll and Samuel Chase, or any of the others who helped draft Article 24.[4] It is the core principles of Article 24—liberty, equality, freedom, privacy—that have remained constant, and these principles fully support the trial court's ruling.

The same interpretive principles apply to Article 46 of the Maryland Declaration of Rights. Even though every member of the current Court of Appeals was alive at the time of Article 46's drafting and adoption, the Court may not freeze its interpretation at those relatively recent, but still historical, moments. Nor is this Court bound by the specific expectations of some of the legislators who promulgated Article 46. Rather, it is the language and core purposes of Article 46 that govern. The interpretation of Article 46 adopted by the court below, and urged by Appellees and these *amici,* is consistent with both the plain language of Article 46 and the core principles underlying that Article—gender equality, fairness, and an adamant refusal to allow sexual stereotypes to dictate public policy.

I. The Statutory Ban on Same-Sex Marriage Violates the Plain Language, Core Purpose, and Consistent Judicial Understanding of Article 46 of the Maryland Declaration of Rights

The language, purpose, and consistent judicial understanding of Article 46 of the Maryland Declaration of Rights all support the trial court's holding that Family Law 2-

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[4] The text of Article 24 is derived from the *Magna Carta*, read through the prism of Blackstone's *Commentaries*, incorporated as part of the Maryland Constitution in 1776, and repeatedly amended, in 1851, 1864, and 1867. Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 Rutgers L.J. 929, 966-67 (2002); Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 Temple L. Rev. 637, 660, 697-98 (1998).

201 "constitutes unjustified discrimination based on gender in violation of Article 46 of Maryland's Declaration of Rights." *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145, at *6 (Balt. City Cir. Ct. Jan. 20, 2006). By imposing a gender-based restriction on an individual's decision to marry, Family Law 2-201 contravenes the basic principle of Article 46—"that sex is not a permissible factor in determining the legal rights of women, or men . . . ." *Giffin v. Crane*, 351 Md. 133, 148, 716 A.2d 1029, 1037 (1998). Moreover, the prohibition on same-sex marriage embodies precisely the sort of gender stereotypes and state-mandated gender roles that this Court has repeatedly condemned and that Article 46 was designed to eradicate.

A. The Statutory Ban on Same-Sex Marriage Violates the Plain Language of the Maryland Equal Rights Amendment Because It Treats Individuals Unequally on the Basis of Sex

To ascertain the meaning of a constitutional provision a court first looks "to the normal, plain meaning of the language. If that language is clear and unambiguous, [a court] need not look beyond the provision's terms to inform [its] analysis." *Davis*, 383 Md. at 604, 861 A.2d at 81 (internal citations omitted); *see also Rand*, 280 Md. at 511, 374 A.2d at 902. Such is the case with the Article 46 of the Maryland Declaration of Rights—the Maryland ERA. Since its earliest decisions interpreting the ERA, this Court has emphasized that "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, 374 A.2d at 902-03. This Court recently reaffirmed that the words of the ERA are "clear, unambiguous and unequivocal; the

Amendment 'mandated equality of rights under the law and rendered state-sanctioned sex-based classifications suspect.'" *Giffin*, 351 Md. at 148, 716 A.2d at 10 (*quoting State v. Burning Tree Club, Inc.*, 315 Md. 254, 269, 554 A.2d 366, 374 (1989) ("*Burning Tree II*")).

The "basic principle" of the ERA "is that sex is not a permissible factor in determining the legal rights of women, or men, so that the treatment of any person by the law may not be based upon the circumstance that such person is of one sex or the other . . . ." *Giffin*, 351 Md. at 148, 716 A.2d at 1037; *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 64, 501 A.2d 817, 822 (1985) ("*Burning Tree I*"). As this Court has repeatedly emphasized, it is sex-based *classifications* that implicate the equality guarantees of Article 46 and are therefore subject to strict judicial scrutiny. *See Burning Tree II*, 315 Md. at 269, 554 A.2d at 374 ("The Maryland Equal Rights Amendment, enacted in 1972, rendered state-sanctioned sex-based classifications suspect. Decisions by this Court prior to 1981 made it clear that sex-based classifications were generally forbidden by the E.R.A.").[5] Thus, the ERA "drastically altered traditional views of the

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[5] *Accord Burning Tree I,* 305 Md. at 98, 501 A.2d at 840 ("[T]he E.R.A. renders sex-based *classifications* suspect and subject to at least strict scrutiny . . .") (Eldridge, J., concurring and dissenting) (emphasis in original); *Briscoe v. Prince George's County Health Dep't*, 323 Md. 439, 452 n.7, 593 A.2d 1109, 1115 (1991) ("because of Article 46 of the Maryland Declaration of Rights, gender-based classifications are suspect and are subject to strict scrutiny"); *Murphy v. Edmonds*, 325 Md. 342, 357 n.7, 601 A.2d 102, 109 (1992) ("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, 623 A.2d 648, (1993) ("because of Art. 46, sex, like race, is a suspect classification subject to strict scrutiny.") (*quoting Briscoe*, 323 Md. 439, 452 n.7, 593 A.2d 1109, 1115 (1991).

validity of sex-based classifications imposed under the law . . . . And the equality between the sexes demanded by the [ERA] focuses on rights of individuals under the law, which encompasses all forms of privileges, immunities, benefits and responsibilities of citizens." *Giffin*, 351 Md. at 149, 716 A.2d at 1037 (internal quotation marks omitted). Further, the ERA "absolutely forbids the determination of such rights . . . solely on the basis of one's sex, i.e., sex is an impermissible factor in making any such determination." *Id.* (internal quotation marks omitted).

The trial court correctly concluded that Family Law 2-201 facially discriminates based on gender. Under the statute, a person who wishes to marry may do so if, and only if, the intended spouse is of a different gender. "The relative genders of the two individuals are facts that lie at the very center of the matter; those whose genders are the same as their intended spouses may not marry, but those whose genders are different from their intended spouses may." *Deane*, No. 24-C-04-005390, 2006 WL 148145, at *3. Section 2-201 thus allocates rights and obligations solely on the basis of an individual's sex, in violation of the plain language and core meaning of the ERA. The statute "bars a man from marrying a male partner when a woman would enjoy the right to marry that same male partner. As compared to the woman, the man is disadvantaged solely because of his sex." *Id.* at 5.[6]

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[6] Contrary to the State's argument, the Circuit Court did not misread the word "sex" in Article 46 as if it meant "sexual orientation." State's Brief at 17. Family Law 2-201 invalidates any marriage between two people of the same sex, regardless of their sexual orientation. The statute allows a gay man to marry a woman and a lesbian woman to marry a man. By contrast, it forbids any man from marrying another man and any woman from marrying another woman. The statute thus classifies individuals

The fact that the statutory prohibition imposes burdens on both women and men does not immunize it from strict scrutiny under the ERA. While a majority of court decisions applying the ERA have involved government action that burdens or benefits a single sex, this Court has made clear that the ERA is not limited to such situations. *Burning Tree I*, 305 Md. at 95, 501 A.2d at 838 (Eldridge, J., concurring and dissenting) (discussing this Court's treatment of the ERA in earlier decisions). Indeed, both the Maryland Court of Appeals and the United States Supreme Court have explicitly rejected the "equal burdens" theory relied on by the State and its *amici* here. A simple example illustrates the fallacy of the State's position. Suppose a municipality insists that it will hire only those administrative assistants who are the opposite gender as the prospective assistant's immediate boss. Under the State's argument, such a sex-based employment restriction would be immune from scrutiny under the ERA because it applies "equally" to male and female job applicants.[7]

This Court's ERA jurisprudence properly rejects such an untenable position. In *Burning Tree I*, this Court invalidated a tax preference for private clubs whose primary purpose was "to serve or benefit members of a particular sex." 305 Md. at 89-90, 501 A.2d at 835. A majority of the Court rejected the argument that the preference did not implicate the ERA's ban on sex-based discrimination because it applied equally to all-

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on the basis of their sex. While the statute may also discriminate on the basis of sexual orientation, the fact that it is a sex-based classification implicates Article 46.

[7] Under the ERA, the employer could, of course, attempt to show that the restriction is narrowly tailored to achieve a compelling state objective. *See Burning Tree II*, 315 Md. at 296, 554 A.2d at 387.

male and all-female clubs. *Id.* at 84-85, 501 A.2d at 832-33. Rather, the majority held that while the word "sex" was used generically in the tax statute, the primary purpose exemption violated the ERA because it would always be applied to a particular sex: the sex excluded by a given country club. *Id.*[8] The Court reaffirmed this position in *Burning Tree II*, which invalidated a related tax preference for clubs that excluded one sex or the other on specific days or at specific times. 315 Md. at 300, 554 A.2d at 389. Again, the State argued that the statutory classification was not discriminatory because it did not create a "substantial" inequality and because it applied equally to all-male and all-female sports events. *Id.* at 295, 554 A.2d at 387. And again, this Court rejected the State's position, emphasizing that state action that classifies or segregates based on sex, absent substantial justification, violates the ERA, "just as segregation based on race violates the Fourteenth Amendment." *Id.* at 295, 554 A.2d at 387 ("We reject the State's views that only a 'substantial' discrimination requires justification of the State. . . . The E.R.A. 'absolutely forbids the determination of such rights as may be accorded by law, solely on the basis of one's sex.'") (*quoting Burning Tree I,* 305 Md. at 70, 501 A.2d at 825) (internal quotation marks omitted).

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[8] Contrary to the State's assertion, the Court's analysis in *Burning Tree I* did not turn on the fact that the particular country club involved in the case was all-male. The Court's opinion in *Burning Tree II* makes this clear: "Contrary to Burning Tree's contention that it is the only entity affected by [the tax provision], the prohibition of sex discrimination in that enactment applies to all current and future county clubs with open spaces contracts, including the other members of Burning Tree's self described class." 315 Md. at 274, 554 A.2d at 376; *see id.* at 275, 554 A.2d at 377 ("This is clearly not a case where a single entity is affected by a law.").

This Court's decision in *Giffin v. Crane* also indicates that the State may not use the equal application theory to evade the clear mandate of the Maryland ERA. In *Giffin*, the Court rejected a sex-matched custody determination and held that the trial court erred as a matter of law by assuming the mother would be a better custodian solely because she was the same sex as her daughter. *Giffin*, 351 Md. at 155, 716 A.2d at 1040. Like the discriminatory tax provisions in *Burning Tree I* and *II*, a sex-matched custody determination applies "equally" to men and women, but violates the ERA because it allocates legal rights and responsibilities on the basis of an individual's sex.[9] *Id.* at 149, 716 A.2d 1037; *see also Tyler*, 330 Md. at 270, 623 A.2d at 653 (ERA prevents State from using peremptory challenges to exclude male or female jurors because of their gender). The same reasoning applies to Family Law 2-201, which restricts an individual's access to marriage on the basis of that individual's sex.

The United States Supreme Court has flatly rejected the "equal application" theory in the context of both race and gender. In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court held that Virginia's anti-miscegenation statute violated the due process

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[9] The State's attempt to use *Giffin* to support its equal burdens theory is misleading. The sentence fragment that the State quotes at page 23 of its brief is part of a full sentence that begins as follows: "The basic principle of the Maryland Equal Rights Amendment, thus, is that sex is not a permissible factor in determining the legal rights of women, or men, so that the treatment of any person by the law may not be based upon the circumstance that such person is of one sex or the other." *Giffin*, 351 Md. at 148-49, 716 A.2d at 1037. The *Giffin* Court concludes its analysis: "It is clear therefore 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." *Id.* at 149, 716 A.2d at 1037. Thus, both the reasoning and the result of *Giffin* reject the equal burdens theory.

and equal protection clauses of the Fourteenth Amendment. Virginia attempted to defend its statute by arguing that the ban on interracial marriage did not discriminate on the basis of race because it applied equally to blacks and whites. The Supreme Court emphatically rejected the state's position, insisting that "equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Loving*, 388 U.S. at 9. Similarly, in *J.E.B. v. Alabama*, 511 U.S. 127 (1994), the Supreme Court held that the government's use of peremptory challenges to strike jurors based on their sex violated the Equal Protection Clause of the Fourteenth Amendment; the fact that such challenges could be exercised "equally" against either gender did not insulate the practice from heightened equal protection scrutiny. *Id.* at 141 n.12; *see* 511 U.S. at 153-54 (Kennedy, J. concurring) (noting that equal protection clause requires government to treat citizens as *individuals*, not simply as components of a racial or sexual class)

Under the Maryland ERA, statutes that classify according to sex face an exceedingly high burden of justification. The Maryland ERA "renders sex-based classifications suspect and subject to at least strict scrutiny, with the burden of persuasion being upon those attempting to justify the classifications. In this respect, the ERA makes sex-based classifications subject to at least the same scrutiny as racial classifications." *Burning Tree I*, 305 Md. at 98, 501 A.2d at 840 (Eldridge, J., concurring and dissenting).[10] This constitutional commitment to strict judicial scrutiny of all sex-based

[10] Because of the biological differences between the sexes, some sex-based classifications, such as separate bathroom facilities for men and women, may satisfy

classifications distinguishes Maryland's sex discrimination jurisprudence from the legal analysis that governs sex discrimination claims in other states, and under the federal Constitution. Thus, decisions from other jurisdictions that have rejected sex discrimination challenges to same-sex marriage prohibitions are not instructive here. *See* cases cited at pp. 24-25 of the State's Brief.

The State also attempts to distinguish the discriminatory purpose behind the anti-miscegenation statute in *Loving* from the allegedly more benign objectives that animate the ban on same-sex marriage. State's Brief at 24. This attempt is unpersuasive. As the following section demonstrates, the marriage prohibition in Family Law 2-201 is not benign; it embodies and perpetuates precisely the gender-based stereotypes and assumptions about the appropriate roles of men and women within the marital union that the ERA forbids.

B. The Statutory Ban on Same-Sex Marriage Violates the ERA's Core Purpose of Abolishing Gender Stereotypes and Eliminating State-Mandated Gender Roles

The constitutional guarantee that "equality of rights shall not be abridged or denied because of sex" prohibits the State from relying on stereotypical gender roles to justify sex-based classifications.[11] From its earliest cases interpreting the ERA, this

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strict scrutiny. *Burning Tree I*, 305 Md. at 98, 501 A.2d at 840 (Eldridge, J., concurring and dissenting). The State, however, does not seriously attempt to defend the ban on same-sex marriage as a closely tailored response to the biological differences between men and women.

[11] See *Rand*, 280 Md. at 513, 374 A.2d at 903 ("[The ERA] prohibits unequal treatment based exclusively on the circumstance of sex, social stereotypes connected with

Court has emphasized that "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." *Rand*, 280 Md. at 515-16, 374 A.2d at 905. By restricting marriage partners on the basis of sex, Family Law 2-201 mandates that only women can fulfill the role of wife and only men can fulfill the role of husband. This gender-based assignment of marital roles violates the core meaning of the ERA.

The Maryland judiciary has consistently rejected common law and statutory doctrines that relied on, enforced, or perpetuated state-mandated gender roles within marriage. In *Rand v. Rand*, the Court invalidated the common law doctrine that assigned primary child support responsibilities to fathers, noting that "[s]ex of the parent in matters of child support cannot be a factor in allocating this responsibility." 280 Md. at 516, 374 A.2d at 905. Similarly, in *Giffin v. Crane*, the Court held that a judicial preference for either parent based on the gender of the child in question violated the ERA's requirement of gender neutrality with respect to parental roles. 351 Md. at 152-53, 716 A.2d at 1038-39.

The Court has also struck down statutes and common law doctrines that treated husbands differently from wives. In *Kline v. Ansell*, this Court abrogated a husband's common law cause of action for criminal conversation because the action "provides different benefits for and imposes different burdens upon . . . citizens based solely upon their sex." 287 Md. 585, 593, 414 A.2d 929, 933 (1980). The Court noted the doctrine

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gender, and culturally induced dissimilarities.") (*quoting People v. Salinas*, 551 P.2d 703, 706 (Colo. 1976)).

was "a vestige of the past" that could not be "reconciled with our commitment to equality of the sexes." *Id.* Similarly, in *Condore v. Prince George's County*, this Court held that the necessaries doctrine, which rendered only husbands liable for the necessaries provided to a spouse, violated the ERA. 289 Md. 516, 530, 425 A.2d 1011, 1018 (1981) ("[W]e think the common law doctrine of necessaries is predicated upon a sex-based classification, which is unconstitutional under the ERA.").

In addition to affecting statutes and common law doctrines, the ERA has altered the Court's interpretation of constitutional language. This Court has noted that portions of the Constitution adopted prior to the ERA must accommodate the later dictates of the ERA. In *Condore*, the Court stated, "[p]lainly, if the necessaries doctrine is to be retained, the provisions in Art. III, Section 43 of the Constitution, protecting the property of the wife from the debts of the husband, must yield to the extent necessary to accommodate the later enacted dictates of the ERA." *Condore*, 289 Md. at 532, 425 A.2d at 1019. Further, the Court has noted the gloss of Article 46 on other constitutional language, making it gender inclusive. *See Frase v. Barnhart*, 379 Md. 100, 127, 840 A.2d 114, 129-30 (2003) (noting that the ERA made Article 19 gender inclusive); *Bryan v. State Rds. Comm'n*, 356 Md. 4, 7, 736 A.2d 1057, 1059 (1999) (noting that Article 21 should be read as if "every man" is "every person" because of the ERA).

A prohibition on same-sex marriage is inconsistent with this unequivocal commitment to the elimination of state-mandated gender stereotypes. At its core, the prohibition enforces a familiar, but nevertheless impermissible, stereotype: that a man must marry only a woman and a woman must marry only a man. This insistence on

"gender complementarity" within marriage is similar to the gender-based assumptions that justified the maternal preference and necessaries doctrines, and is incompatible with the ERA. It undermines the ERA's core purpose of eliminating gender as a basis for classifying individuals and for assigning roles within the family. Of course, the ERA does not preclude individual marriage partners from defining their roles in accordance with traditional gender norms. But the ERA precludes the State from *insisting* on those norms as part of its definition of marriage. Just as the State may not use gender to determine custody or to allocate child support responsibilities, so too is it precluded from insisting that only a man and a woman may enter a union sanctioned by the State. *See* Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate* 16 Stan. L. & Pol'y Rev. 97, 116 (2005).

In *Loving*, the anti-miscegenation statute failed to satisfy the heavy burden of equal protection under the Fourteenth Amendment, because the law was designed to maintain white supremacy and the classification bore no relation to a legitimate governmental purpose. 388 U.S. at 11. Although Maryland may have legitimate interests in promoting marriage, *limiting* that institution to male-female couples is unrelated to the State's legitimate goals and inconsistent with the ERA's commitment to gender equality and neutrality. Insisting that only a man and a woman may marry reinforces an outdated ideology of family "in which men, but not women, belong in the public world of work . . . while women, but not men, should rear children [and] manage homes . . . ." Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex*

Discrimination, 98 Yale L.J. 145, 159 (1988). These are precisely the gender stereotypes that the Maryland ERA is designed to eradicate.

C. The ERA's Unambiguous Mandate Is Unaffected by Any Legislative History Inconsistent with the Amendment's Language and Purposes

In light of the ERA's "clear, unambiguous and unequivocal" language, there is no reason to resort to legislative history to interpret the amendment's scope. But even if the language of the ERA were less clear, the isolated snippets of legislative history cited by the State are not persuasive. At most, the statements indicate that while some of the federal ERA's sponsors believed that the Amendment would not affect the definition of marriage, other policymakers and scholars believed that it would. Thus, there was no consensus in the legislative history about the effect of the proposed federal ERA on traditional definitions of marriage. Moreover, these legislative debates occurred at the federal level, and the Court of Appeals consistently refers to the passage of the Maryland ERA as evidence that the people of *Maryland* are fully committed to equal rights for men and women. *See, e.g., Rand*, 280 Md. at 512, 374 A.2d at 903; *Giffin*, 351 Md. at 149, 716 A.2d at 1037.

Nor should the specific views of some Maryland legislators on the question of same-sex marriage control this Court's application of the ERA's unequivocal equality mandate. A core principle of our constitutional jurisprudence is that constitutional guarantees ratified by the people take precedence over contrary expressions of legislative intent, including the specific views of the legislators who may have crafted the applicable constitutional provisions. *See Marbury v. Madison*, 5 U.S. 137 (1803) (holding

unconstitutional a federal statute drafted by a Congress that included many of the framers of the Constitution). For example, strong evidence indicates that the framers of the Fourteenth Amendment did not intend to outlaw either racially segregated public schools or anti-miscegenation statutes. Alexander M. Bickel, *The Original Understanding and the Segregation Decision* 69 Harv. L. Rev. 1, 56 (November 1955); *see* Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881, 1881 (October 1995) (noting "the overwhelming consensus among legal academics" that *Brown v. Board of Education* "cannot be defended on originalist grounds"). As the State defendants in *Brown v. Board of Education* pointed out, the Congress that proposed the Fourteenth Amendment also enacted legislation providing for racial segregation in Washington, D.C. schools.[12] Similarly, the Commonwealth of Virginia, in its *Loving v. Virginia* brief, pointed to the intent of the framers of the Fourteenth Amendment to exclude anti-miscegenation statutes from the amendment's scope.[13] Yet, the Supreme Court had no difficulty concluding in

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[12] The State quoted the D.C. Circuit Court of Appeals in *Carr v. Corning*, 182 F.2d 14, 17 (D. C. Cir. 1950), which held that D.C. public school segregation was constitutional: "the fact that in 1862, 1864, 1866 and 1874 Congress . . . enacted legislation which specifically provided for separation of the races in the schools of the District of Columbia, conclusively support[s] our view of the Amendment and its effect." Brief for Appellees at 28, *Brown v. Bd. of Educ.*, 437 U.S. 483 (1954) (No. 24-6227), 1953 WL 78294.

[13] The State cited Congressional debates in the 39th Congress about the potential effect of civil rights legislation that were precursors to the Fourteenth Amendment, quoting Sen. Lyman Turnbull, the sponsor of the supplemental Freedmen's Bureau Bill: "[I]t is a misrepresentation of this bill to say that it interferes with [anti-miscegenation] laws. . . . All this bill provides for is that there shall be no discriminations in punishments on account of color; and unless the Senator from Kentucky wants to

Brown v. Board of Education and *Loving v. Virginia*, respectively, that both of these practices violated core equality guarantees contained in that Amendment.[14] The same logic applies to the conflict between Family Law 2-201 and the ERA's unequivocal commitment to sex-based equality.

Further, the General Assembly's approval of Family Law 2-201 does not insulate the statute from the ERA's reach. The people's passage of the ERA overrides the General Assembly's preferences with regard to sex-based classifications. Similar to the state legislatures that endorsed *de jure* segregation or maintained anti-miscegenation statutes despite passage of the Fourteenth Amendment, the General Assembly's endorsement of sex-based discrimination in Family Law 2-201 flies in the face of the ERA's gender equality mandate. Faced with a similar conflict of views, this Court has not hesitated to invalidate post-ERA legislative enactments that violated the ERA's prohibition on sex-based classifications. For example, in *Kline v. Ansell*, the Court invalidated, as contrary to the ERA, the common law doctrine of criminal conversation despite the fact that the General Assembly had expressly refused to abolish the doctrine subsequent to passage of the ERA. *Kline*, 287 Md. at 590-91, 414 A.2d at 932. Similarly, in *Turner v. State*, this Court struck down a statute that outlawed the

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punish the negro more severely for marrying a white person than a white for marrying a negro, the bill will not interfere with his law." Brief and Appendix on Behalf of Appellee at 17-18, *Loving v. Virginia*, 388 U.S. 1 (1967), 1967 WL 113931 (*quoting* Cong. Globe, 39th Cong., 1st Sess., 420).

[14] *Brown v. Board of Education*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967).

employment of "female sitters" despite the General Assembly's failure to make the statute gender neutral on six occasions or to abolish the prohibition on two occasions. 299 Md. 565, 580, 474 A.2d 1297 (1984). Additionally, in *Burning Tree I* and *II*, this Court invalidated sex-discriminatory statutes enacted by the General Assembly *after* adoption of the ERA. These precedents demonstrate that the General Assembly is not entitled to determine the meaning of constitutional amendments; indeed, that is this Court's ultimate responsibility.

For each of these reasons, a faithful interpretation of Article 46 of the Maryland Declaration of Rights compels an affirmance of the trial court's decision.

II. Family Law 2-201 Impermissibly Burdens the Fundamental Right to Marry Long Recognized Under Article 24 of the Maryland Declaration of Rights and the Due Process Clause of the Fourteenth Amendment

Federal and state courts have long identified the right to marry as central to the happiness and liberty of free men and women. As the Maryland Court of Special Appeals stated in *Samuels v. Tschechtelin*, "in addition to those freedoms enumerated in the Federal Bill of Rights, an individual's Fourteenth Amendment liberty interest 'includes the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion.'" 135 Md. App. 483, 537, 763 A.2d 209, 238 (2000) (*quoting Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). Similarly, the United States Supreme Court has made clear that "the right to marry is of fundamental importance for all individuals" and is therefore "among the personal decisions protected by the right of privacy." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

This Court has interpreted Article 24 of the Maryland Constitution to include guarantees of due process of law and equal protection that provide protection similar to, but distinct from, the Fourteenth Amendment. *Attorney General v. Waldron*, 289 Md. 683, 704, 426 A.2d 929, 940-41 (1981). The decisions of the United States Supreme Court are persuasive, but not limiting, as Maryland courts interpret Article 24.

As the Supreme Court's marriage cases make clear, the fundamental right protected by the federal and Maryland Constitutions is *not* a particular type of marriage, but rather an individual's freedom to make decisions about marriage, including—centrally—the freedom to marry a partner of one's choice. Thus, in *Loving v. Virginia*, it was the individual's "freedom to marry" that the Court characterized as "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12 (emphasizing that "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

In *Zablocki*, the Court reaffirmed that "the right to marry is of fundamental importance for *all individuals*." 434 U.S. at 384 (emphasis added). It also noted that "the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships." *Id.* at 386. The right protected in each of these contexts is the *individual's freedom to decide*, not the particular course of action chosen. As the *Zablocki* Court explained, "it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage." 434 U.S. at 385 (*quoting Carey v. Population*

Services International, 431 U.S. 678, 684-85 (1977)). *See also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-640 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").

The Supreme Court's decision in *Turner v. Safely*, 482 U.S. 78 (1987), directly contravenes the State's argument that the right to marry belongs only to individuals or couples who can be encouraged to procreate responsibly. *See* State's Brief at 37 (characterizing "the underlying purposes of State involvement in the marriage relationship: to encourage men and women who are engaging in sexual relations to do so within a relationship that will provide for the needs of the resulting children, and to create clear lineages for the purpose of succession.") In *Turner*, the Court struck down a prison regulation that prohibited inmates from marrying unless there were "compelling reasons." "Compelling reasons" were understood to include pregnancy or the birth of an illegitimate child—thus satisfying any asserted State interest relating to procreation. *Id.* at 96-97. Notwithstanding this exception, the Court struck down the marriage restriction. *Id.* at 99. Significantly, the Court expressly rejected the State's argument that the constitutional right to marry did not extend to prison inmates, since such inmates were precluded from engaging in conjugal relations. *Id.* at 95. The Court pointed instead to the "many important attributes of marriage" that do not involve sexual relations; it emphasized, in particular, the importance of marriage as an "expression[] of emotional support and public commitment" and the fact that for some individuals and couples "the

commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication." *Id.* at 95-96.

These cases demonstrate that the State's attempt to frame the question as whether there is "a fundamental right to same-sex marriage," State's Brief at 46, misapprehends the constitutional issue. Like the Supreme Court's misstatement of the issue in *Bowers v. Hardwick*,[15] the State's crabbed formulation "fail[s] to appreciate the extent of the liberty interest at stake." *Lawrence*, 539 U.S. at 567. "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Id.* The *Lawrence* Court reiterated that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education," and concluded that the decision to engage in an intimate same-sex relationship is encompassed within this protection. *Id.* at 574. Similar logic compels the conclusion that the decision to marry a person of the same sex is encompassed within the fundamental right to marry.

Just as it was incorrect for the Court in *Bowers* to delimit a constitutional right depending on identity of the individuals who were seeking to exercise that right, so too is it a mistake here to ask whether Article 24 protects the right to "gay marriage." The

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[15] 478 U.S. 186 (1989), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

freedom to marry the partner of one's choice is an *individual* right that does not depend on the identity or sexual orientation of the person or persons who seek to exercise it.

As the Supreme Court recognized in *Lawrence*, fundamental rights, once recognized, cannot be denied to particular individuals or groups simply because those groups have historically been excluded or disfavored. "History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Id.* at 572 (*quoting County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)). Nor does "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral provide sufficient reason for upholding a law prohibiting the practice." *Id.* at 578 (*quoting Bowers v. Hardwick*, 478 U.S. at 216 (Stevens, J., dissenting)). Indeed, the Supreme Court has long recognized that moral disapproval of a group, like a bare desire to harm the group, is not a legitimate state interest. *See, e.g., Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 446-47 (1985); *Romer v. Evans*, 517 U.S. 620, 632 (1996). As the *Lawrence* Court noted, those who drew and ratified the due process clauses of the Fifth and Fourteenth Amendments "knew that times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. 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.

The State attempts to analogize this case to *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 458 A.2d 758 (1983), in which this Court declined to find that

education was a fundamental right for purposes of Article 24 of the Declaration of Rights. *Hornbeck* is inapposite, however, because plaintiffs here are not asking the Court to recognize a new fundamental right. Rather, plaintiffs are asking this Court to apply an established constitutional right—the right to marry—that has been repeatedly recognized as fundamental under both the federal and Maryland Constitutions. Thus, the concerns that this Court expressed in *Hornbeck* are not present here. The constitutional question here is whether the State may *deny* an established fundamental right to particular individuals and couples. Any such restrictions on a fundamental right are subject to strict scrutiny and must be narrowly tailored to serve a compelling state interest. *Wolinski v. Browneller*, 115 Md. App. 285, 693 A.2d 30 (1997); *Murphy*, 325 Md. at 356, 601 A.2d at 109.

Neither the State nor its *amici* have demonstrated that the marriage prohibition in Family Law 2-201 is narrowly tailored to effectuate any compelling state interest. Indeed, the State has largely abandoned several of the governmental interests that it asserted in the court below, including the desire to "promote[ ] and preserve[ ]" traditional heterosexual marriage and the need to protect the welfare of children. *See* Memorandum in Support of Defendant's Motion for Summary Judgment at 41-42. This is not surprising because there is no evidence that prohibiting same-sex marriage is related—closely or otherwise—to any of these goals. Indeed, with respect to the welfare of children, the undisputed evidence establishes otherwise. *See* Brief of *Amici Curiae*, National Association of Social Workers, *et al.* The prohibition on same-sex marriage harms the welfare of the many Maryland children who are being raised by same-sex

couples, by depriving them of the protections and benefits that marriage provides.[16] As the Massachusetts Supreme Court explained in *Goodridge v. Department of Public Health*: "the state's refusal to accord legal recognition to unions of same-sex couples has had the effect of creating a system in which children of same-sex couples are unable to partake of legal protections and social benefits taken for granted by children in families whose parents are of the opposite sex. The continued maintenance of this caste-like system is irreconcilable with, indeed, totally repugnant to, the State's strong interest in the welfare of all children and its primary focus, in the context of family law where children are concerned, on 'the best interests of the child.'" 798 N.E.2d 941, 972 (Mass. 2003) (Greaney, J. concurring).

The State and several *amici* misleadingly suggest that if Family Law 2-201 implicates the fundamental right to marry, then so too must other State regulations of marriage, including restrictions on polygamous and incestuous unions. State's Brief at 59. This "slippery slope" argument is unsupported and unpersuasive. The State presents no evidence that any judicial decision to recognize same-sex marriage has led to litigation over polygamy or incest.

The State's attempted analogy is also legally flawed. The United States Supreme Court has made clear that not all regulations that affect the incidents of or prerequisites for marriage burden the exercise of a fundamental right. Rather, only those restrictions that "directly and substantially" interfere with "decisions to enter the marital

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[16] These children include the children that the State itself places with same-sex couples for purposes of adoption or foster care.

relationship" implicate the fundamental right to marry and are therefore subject to strict scrutiny under the federal Constitution and the Maryland Declaration of Rights. *Zablocki*, 434 U. S. at 386-87. Family Law 2-201's flat prohibition on same-sex marriage directly and substantially interferes with the plaintiffs' ability to marry. Indeed, its practical effect is to preclude the plaintiffs, and other couples like them, from ever entering into marriage. By contrast, the impact of restrictions on polygamous and incestuous unions is considerably less severe. Unlike the ban on same-sex marriage, such restrictions do not absolutely prevent any individual or couple from marrying, nor do they single out constitutionally-protected intimate relationships for disfavored legal treatment.

Moreover, the State has a much stronger interest in regulating polygamy and incest than in preventing same-sex couples from marrying. The Supreme Court has held that states have no legitimate interest in criminalizing intimacy between same-sex consenting adults. *Lawrence*, 539 U.S. at 578. By contrast, restrictions on polygamous and incestuous unions arguably advance the State's interest in protecting potentially vulnerable parties and avoiding exploitative relationships—interests that further equality goals. *See, e.g., State v. Green,* 99 P.3d 820, 830 (Utah 2004) (noting that incest, sexual assault, statutory rape, and failure to pay child support often accompany the practice of polygamy); Maura Strassberg, *The Crime of Polygamy*, 12 Temp. Pol. & Civ. Rt. L. Rev. 353 (2003) (discussing dangers of polygamy for teenage girls and some adult women); William N. Eskridge, Jr., *The Case for Same-Sex Marriage* 148-49 (1996) (suggesting that polygamy may contribute to gender inequality and hierarchy within marriage). By

contrast, the ban on same-sex marriage directly contravenes equality principles by denying the benefits and obligations of marriage to a discrete and disfavored minority.

Because Family Law 2-201 impermissibly burdens the fundamental right to marry, it is unconstitutional, which presents an additional reason why the trial court's decision should be affirmed.

III. The Exclusion of Same-Sex Couples from Marriage Violates Article 24 of the Maryland Declaration of Rights Because It Is Not Rationally Related to a Legitimate Government Interest

As argued above, Family Law 2-201 is subject to heightened scrutiny because it discriminates on the basis of sex and burdens the fundamental right to marry. But even under a lower level of scrutiny—Maryland's rational basis review—the prohibition on same-sex marriage would still violate the equal protection component of Article 24,[17] because the exclusion of same-sex couples from marriage is not rationally related to any of the State's legitimate goals.

Contrary to the State's position, the relevant equal protection question in this case is *not* whether allowing *opposite* sex couples to marry furthers the State's legitimate goals. Rather, the relevant constitutional inquiry is whether *prohibiting* same-sex couples from doing so is rationally related to those goals. Thus, the State's reliance on the

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[17] Although Article 24 does not contain an express equal protection clause, "the concept of equal protection nevertheless is embodied in the Article." *Frankel v. Board of Regents*, 261 Md. 298, 312-313, 761 A.2d 324, 332 (2000) (*quoting Renko v. McLean*, 346 Md. 464, 482, 697 A.2d 468, 477 (1997); *see Kirsch v. Prince George's County*, 331 Md. 89, 96 (1993) (Court of Appeals has "long held that equal protection is implicitly guaranteed by the due process provision found in Article 24 of the Declaration of Rights."); *Ehrlich v. Perez*, No. 137 September Term 2005, 2006 Md. LEXIS 691 (Oct. 12, 2006).

argument that "sanctioning same-sex marriage would do little to advance the State's interest in ensuring responsible procreation," State's Brief at 61, misses the constitutional point. To sustain its prohibition on same-sex marriage, the State must show, at a minimum, that reserving marriage *exclusively* for opposite sex couples is rationally related to a legitimate state interest. In other words, the State must demonstrate that it has a rational, non-invidious reason for denying the benefits of marriage to same-sex couples, while simultaneously granting those benefits to opposite sex unions.

Although the State makes little attempt to address this question, several *amici* suggest that opening marriage to same-sex couples is likely to weaken marriage as a social institution. But *amici* offer no evidence to support this speculation. On the contrary, opening marriage to same-sex couples is likely to enhance, rather than diminish, the importance and value of marriage. As Jonathan Rauch has argued, "Far from decoupling marriage from its core mission, same-sex marriage clarifies and strengthens that mission. Far from hastening the social decline of marriage, same-sex marriage shores up the key values and commitments on which couples and families and societies depend."[18]

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[18] Jonathan Rauch, *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America* 5-6 (2004). Similarly, the Massachusetts Supreme Court in *Goodridge* explained:

> Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex

Although application of the rational basis standard calls for deference to legislative judgments, it does not represent an abdication of the judicial role. Rather, "[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." *Waldron*, 289 Md. at 715, 426 A.2d at 947; *see Frankel v. Bd. of Regents,* 361 Md. 298, 315, 761 A.2d 324, 333 (2000) ("Even under the minimal rational basis test, 'this Court has not hesitated to strike down discriminatory economic regulation that lacked any reasonable justification.'") (internal citations and quotation marks omitted). Where, as here, a legislative enactment "invades protected rights to life, liberty, property or other interests secured by the fundamental doctrines of our jurisprudence," this Court has recognized that "there is reason to be especially vigilant" in the exercise of rational basis review. *Waldron*, 289 Md. at 704, 426 A.2d at 940. This commitment to a meaningful and rigorous rational basis review distinguishes Maryland jurisprudence from that of virtually all of the states that have rejected equal protection challenges to prohibitions on same-sex marriage.

Moreover, while federal equal protection cases "are regarded as persuasive in the application of Article 24 of the Declaration of Rights, nevertheless, the federal and states

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> couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.

798 N.E.2d 941, 965 (Mass. 2003).

guarantees of equal protection are obviously independent and capable of divergent application." *Frankel*, 361 Md. at 313, 761 A.2d at 332 (*quoting Maryland Aggregates v. State*, 337 Md. at 672 n.8, 655 A.2d at 893) (internal quotation marks omitted); *Dua v. Comcast Cable of Maryland*, 370 Md. 604, 621-22, 805 A.2d 1061, 1071 (2002) (noting that "State equal protection principle is possessed of independent animation . . . "). Indeed, this Court has consistently recognized that "a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone." *Verzi v. Baltimore County*, 333 Md. 411, 417, 635 A.2d 967, 970 (1994) (*quoting Waldron*, 289 Md. at 715, 426 A.2d at 947).

Maryland's rational basis jurisprudence has a long history of subjecting classifications like the ban on same-sex marriage to meaningful judicial scrutiny. At a minimum, that scrutiny demands that the State treat similarly-situated persons and groups alike. *Maryland Green Party v. Maryland Board of Elections*, 377 Md. 127, 160-61, 832 A.2d 214, 233-34; *Waldron*, 289 Md. at 726, 426 A.2d at 952. Thus, even where a statutory classification does not burden a suspect class or impinge on a fundamental right, the classification must rest upon "some ground of difference having a fair and substantial relation to the object of the legislation." *Verzi*, 333 Md. at 419, 635 A.2d at 971 (*quoting State Bd. of Barber Examiners v. Kuhn*, 270 Md. 496, 507, 312 A.2d 216, 222 (1973)). This standard requires not only that the legislature's goals be legitimate, but that the groups singled out for unequal treatment differ in some material way with respect to the purposes of the classification.

Rational basis scrutiny applies with particular vigor where a legislative classification works a "significant interference" with an "important" personal interest—as here, in the case of marriage.[19] *See Waldron*, 289 Md. at 713, 426 A.2d at 946 ("[W]hen important personal rights . . . are affected by a legislative classification, a court should engage in a review consonant with the importance of the personal right involved."). Thus, in *Waldron*, this Court closely scrutinized legislation prohibiting a retired judge who received a pension from practicing law. The "important" personal interest in that case was the right to engage in a chosen occupation—a time-tested aspect of citizenship. *See, e.g., Mayor and City Council of Havre de Grace v. Johnson*, 143 Md. 601, 123 A. 65 (1923) (overturning a local ordinance restricting the operation of taxicabs to town residents); *Bruce v. Dep't of Chesapeake Bay Affairs*, 261 Md. 585, 276 A.2d 200 (1971) (overturning regulations limiting Maryland watermen to waters of their home county); *State Bd. of Barber Examiners v. Kuhn*, 270 Md. 496, 312 A.2d 216 (1973) (overturning a statute that denied female cosmetologists the opportunity to cut men's hair); *Kirsch v. Prince George's County*, 331 Md. 89, 626 A.2d 372 (1993) (overturning a statute that regulated group homes of students, but not group homes of other occupations); *Verzi*, 333 Md. at 427, 635 A.2d at 975 (overturning a Baltimore County requirement that towing

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[19] Relying primarily on federal equal protection doctrine, the State points out that a statute reviewed for rational basis enjoys a strong presumption of constitutionality. *See* State's Brief at 53. *Amici* do not quarrel with this general proposition. However, a presumption of constitutionality does not obviate the need for meaningful judicial scrutiny; if it did, then rational basis review would be superfluous. Moreover, none of the cases cited by the State involved important personal interests that are subject to "especially vigilant" rational basis review. *See Waldron,* 289 Md. at 704, 426 A.2d at 940.

operators have a place of business within the county in order to be eligible for police calls to tow disabled vehicles in the county).

Meaningful rational basis review in Maryland has several distinctive features. First, this Court has demanded that the legislature articulate concrete and real justifications for a challenged classification and that it demonstrate that the classification is rationally related to those justifications, based upon relevant empirical evidence. *See Waldron*, 289 Md. at 717, 426 A.2d at 948 ("[W]here vital personal interests . . . are substantially affected by a statutory classification, courts should not reach out and speculate as to the existence of possible justifications for the possible enactment."); *Murphy*, 325 Md. at 369-70, 601 A.2d at 115-16 (scrutinizing the empirical support for the State's cap on non-economic damages in civil actions). Thus, in applying rational basis scrutiny, a court will not tolerate random speculation concerning possible justifications for a challenged enactment; "rather, it pursues the actual purpose of a statute and seriously examines the means chosen to effectuate that purpose." *Waldron*, 289 Md. at 713, 426 A.2d at 946.

The analysis in *Waldron* illustrates this process. In applying rational basis review, the *Waldron* Court refused to speculate as to "the vast range of conceivable purposes" that the statutory classification might serve. *Waldron*, 289 Md. at 722, 426 A.2d at 950. "Rather, we must evaluate either those statutory purposes which are readily discernible or a legitimate purpose that, presumably, motivated an impartial Legislature." *Id.* The Court also summarily dismissed the State's fiscal concerns as a "post hoc rationalization" of the ban on the practice of law. *Waldron*, 289 Md. at 724, 426 A.2d at 951. It rejected

the State's assertion that withholding pensions from retired jurists who practiced law was rationally related to the State's interest in saving money, since "[a]lmost every enactment, no matter how invidious, can be justified on the grounds of fiscal restraint" *Id.* Moreover, the Court rejected the State's proffered purposes of avoiding the appearance of impropriety because of the state's lack of empirical support for the connection between impropriety and the practice of law by ex-judges. *Waldron*, 289 Md. at 725, 426 A.2d at 952 ("And again, no relationship can be found to exist between this statutory distinction and the purpose relating to impropriety.").

If *Waldron* illustrates the kind of purported justifications that fail to satisfy rational basis, *Murphy* illustrates the type of evidence that this Court has required to withstand rational basis scrutiny. In *Murphy*, this Court upheld a statutory damage cap only after closely examining the empirical basis for the relationship between the cap and the legislature's purpose. *Murphy*, 325 Md. at 369-70, 601 A.2d at 115-16. The Court looked closely at the evidence before the legislature—including the Report of the Governor's Task Force to Study Liability Insurance and the Report of the Joint Executive/Legislative Task Force on Medical Malpractice Insurance—to conclude that the damage cap was, in fact, rationally related to the legislature's goal of alleviating the perceived crisis in the availability and cost of liability insurance. *Murphy*, 325 Md. at 370, 601 A.2d at 115.

A second characteristic of this Court's rational basis review is a critical analysis of the fit between the State's asserted interests and the means chosen by the legislature to achieve those goals. "A loose fit between the legislative ends and the means chosen to

accomplish those goals, which leaves a significant measure of similarly situated persons unaffected by the enactment, or conversely, which includes individuals within the statute's purview who are not afflicted with the evil the statute seeks to remedy, is intolerable." *Waldron*, 289 Md. at 713-14, 426 A.2d at 946. For example, in *Verzi*, this Court ruled unconstitutional a Baltimore County requirement that licensed tow operators have a place of business within the county in order to be eligible for police calls to tow disabled vehicles. 333 Md. at 427, 635 A.2d at 975. The Court acknowledged the legitimacy of the county's desire to prevent fraud and to ensure the free flow of traffic, but found that the statutory distinction between in-county and out-of-county towers was not adequately related to those purposes. *Id.* At 425, 635 A.2d at 974. The statute was underinclusive because it restricted nearby out-of-county tow companies from receiving police calls, even as it permitted companies located farther away, but nevertheless in-county, to receive such calls. *Verzi*, 333 Md. at 425-26, 635 A.2d at 974. The statute was also overinclusive in that it restricted the plaintiff, a nearby out-of-county tow company, from receiving police calls. *Id.* At 426, 635 A.2d at 974. The poor fit between the State's asserted goals and the statutory classification led to the statute's invalidation under Maryland's rational basis review. *Id.* At 427-28, 635 A.2d at 975.

Similarly, in *Kirsch*, this Court overturned a classification on rational basis review because it was both underinclusive and overinclusive. 331 Md. at 107-08, 626 A.2d at 381. The *Kirsch* court held unconstitutional a zoning ordinance that restricted the rental of residential property to students pursuing higher education, but not to other groups living together. *Id.* Again, the Court accepted as legitimate the county's stated

objectives of combating noise, litter and parking congestion, but found that classifying rental property on the basis of the occupations pursued by the lessees was insufficiently related to those objectives. *Id.* at 105-06, 626 A.2d at 380. It reasoned that non-student groups living together might create these very same problems. *Id.* at 107, 626 A.2d at 381. The statute was also overinclusive in that it regulated student group homes county-wide, even though the county's asserted purpose was to address perceived noise and traffic problems in a single town. *Id.* at 105-06, 626 A.2d at 380.

Recent decisions have affirmed the vitality of this Court's rational basis jurisprudence. In *Frankel*, the Court found that the tuition policy of the Maryland Board of Regents, which denied in-state tuition status to Maryland residents who received monetary support from non-residents, created "an arbitrary and irrational classification which violates the equal protection principle embodied in Article 24 of the Maryland Declaration of Rights." 361 Md. at 318, 761 A.2d at 334. The Court assumed for purposes of its analysis that the Board's objective of according a reduced tuition benefit to bona fide Maryland residents was "entirely legitimate." *Id.* at 317, 761 A.2d 334. Nevertheless, the Court concluded that the denial of resident status to any student whose primary source of monetary support resides out of state lacked a "fair and substantial relation to the Board's and Policy's objective." *Id.* (internal quotation marks omitted).

These precedents demonstrate that the core requirement of rational basis scrutiny—that the legislature governs impartially and non-arbitrarily—is not an empty promise. Rather, as this Court has recognized, the requirement serves a vital purpose:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected."

Verzi, 333 Md. at 416-17, 635 A.2d at 969 (*quoting Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring)).

These concerns are especially salient here. By prohibiting same-sex couples from marrying, Family Law 2-201 denies to a small minority of Maryland citizens the rights and obligations that the majority of citizens hold dear. It precludes couples in committed, monogamous relationships from enjoying the privileges and assuming the obligations associated with marriage, and it denies the children being raised by these couples the protection, security, and stability that comes with marriage.

Conclusion

For each of the reasons stated above, *amici* urge this Court to affirm the decision of the Circuit Court for Baltimore City.[20]

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