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

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

ORDER

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

ORDERED that:

1. Plaintiffs Motion for Summary Judgment is GRANTED; and

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

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

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

M. Brooke Murdock
Judge
The Judges Signature appears
on the original document only

M. BROOKE MURDOCK
Judge

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

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

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

MEMORANDUM

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

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

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

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

Plaintiffs in the present case are nine couples and one individual. Plaintiffs concede that the "Maryland statutory code does not permit marriages of lesbian and gay couples"; but they argue that the statute is unconstitutional. Their Complaint further suggests that the plaintiffs are "representative" of the "thousands of lesbian and gay families throughout

Maryland" who suffer legal, financial, and emotional harm as a result of the same-sex prohibition. The legal benefits from which unmarried couples are excluded include, *inter alia*, the right to bring wrongful death actions under the Courts and Judicial Proceedings Article §§ 3-901 through 3-904 (2002), survivorship actions under §4-202 of the Family Law Article (1999); and surviving spouse's intestate succession rights under the Estates and Trusts Article §3-102 (2001).

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

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

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

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

I. PROCEDURAL HISTORY

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

The Court Clerk for Anne Arundel County, Robert Duckworth filed a Motion to Intervene on July 27, 2005, alleging that his personal interests would be affected by the law suit and requested that he be permitted to participate as an individual with his own attorney. All parties opposed the Motion. [3] All Motions to intervene were denied, the Court having determined that the interventions would unduly delay and prejudice the adjudication of the rights of the original parties. The Hon. Robert P. Duckworth filed an appeal with the Court of Special Appeals on November 21, 2005. The Court of Appeals, on its own motion, issued a writ of certiorari on December 17, 2005. The judgment of the

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

Circuit Court for Baltimore City was affirmed on March 11, 2005.

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

II. FACTUAL HISTORY

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

III. DISCUSSION

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

violation of the equal protection component of Article 24 of Maryland's Declaration of Rights; 3.) the same-sex marriage prohibition constitutes an unjustified, disparate deprivation of plaintiffs' fundamental right to marry, in violation of the equal protection component of Article 24 of Maryland's Declaration of Rights; and 4.) the same-sex marriage prohibition constitutes an unjustified deprivation of Plaintiffs' fundamental right to marry in violation of the due process component of Article 24 of the Maryland's Declaration of Rights.

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

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

Family Law §2-201 specifically bars an individual from marrying a member of the same sex. The relative genders of the two individuals are facts that lie at the very center of the matter; those whose genders are the same as their intended spouses may not marry, but those whose genders are different from their intended spouses may. This Court, therefore,

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

concludes that §2-201 discriminates based on gender. The Court finds unpersuasive the arguments of Defendants and others that statutory prohibitions on same-sex marriage do not create gender-based classifications because each prohibition applies equally to both sexes.[5] These arguments are illogical and inaccurate. The equal application theory must be rejected because the theory has already been addressed and rejected in Maryland. *Burning Tree Club, Inc. v. Bainum (Burning Tree I)* 305 Md. 53, 501 A.2d 817 (1985); *Giffin v. Crane*, 351 Md. 133, 716 A.2d 1029 (1998). Proponents of the equal application theory argue that prohibiting same-sex marriage does not constitute gender discrimination because all men and all women are equally precluded from marrying someone of their own sex; neither gender has greater or lesser rights than the other. *See Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999); *Singer v. Hara*, 11 Wash. App. 247, 253, 522 P.2d 1187, 1191-92 (1974); Paul Benjamin Linton, *Same-Sex Marriage Under State Equal Rights Amendments*, 46 St. Louis U.L.J. 909, 925-29 (2002). According to this theory, no gender classification exists and a state's Equal Rights Amendment is not implicated. Thus, a state need not show that compelling interests support its discrimination.

Proponents of the equal application theory distinguish statutory bans on same-sex marriage from the now defunct anti-miscegenation statutes prohibiting marriage between interracial couples. In *Loving v. Virginia*, 388 U.S. 1, 8-9, 87 S. Ct. 1817, 1822 (1967), where the Supreme Court struck down Virginia's anti-miscegenation statute, Virginia advanced an equal application theory to defend the statute prohibiting interracial marriage.

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

See, *Baehr v.Lewin*, 74 Haw. 530, 565, 852 P.2d 44, 61-64 (1993); Stephen Clark, *Same-Sex But Unequal: Reformulating the Miscegenation Analogy*, 34 Ruters L. J. 107 (2002). Virginia argued that the statute did not create impermissible racial classifications because the statute affected both blacks and whites equally. However, the Supreme Court struck down the statute, finding that the State did not meet its heavy burden of justifying the racial classification. Courts finding same-sex marriage bans constitutional declare their holdings consistent with *Loving's* holding because of key factual and logical differences between the two cases. This Court is unpersuaded that sufficient differences exist to distinguish the cases.

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

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

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

This reasoning is unpersuasive. It makes little sense for the Washington court to deny that the same-sex prohibition created a gender-based classification; and, then to state that the "operative distinction" between *Loving* and the same-sex marriage case is the legal union of a man with a woman. *Id.* at 1191. *Singer* states that same-sex couples are barred from marriage not due to their genders, but owing to a definition of marriage that necessitates an opposite-sex couple. Despite the court's insistence that no gender classification exists, the relative genders of a same-sex couple are the very crux of the matter. Certainly, in *Singer*–it was the couples' gender that placed them outside the definition of marriage. It, therefore, seems logically impossible to resolve the issue of whether an individual plaintiff and his/her partner fall within the definition of marriage without examining their relative genders.

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

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

discriminatory purpose behind the statutory ban on same-sex marriage. The court thus rejected the argument that the statutory prohibition of same-sex marriage constituted sex discrimination, although it did declare the statute unconstitutional on other grounds.[9]

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

Rejection of the equal application theory finds support in case law suggesting that Maryland has already rejected this theory in favor of the view that a statute operating on one gender–though the statute may not specify which gender– draws a gender-based distinction. In *Burning Tree Club, Inc., v. Bainum,* 305 Md. 53, 501 A.2d 817 (1985) (*Burning Tree I*), the Court struck down what Judge Rodowsky termed in his concurring opinion a "unique creature–an unconstitutionally discriminatory anti-discrimination law." *Id.* at 88. In that case, Plaintiffs challenged an "open spaces" tax law extending property tax benefits to an all-male country club. The tax law prohibited recipient clubs from

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[9]Vermont considered "civil unions" to be a constitutionally adequate alternative to same-sex marriage. See *Baker,* 170 Vt. at 225, 744 A.2d at 886-87. Without disparaging the value of unions created in those jurisdictions, this Court concludes that such "separate but equal" remedy is not a remedy at all. Further, Plaintiffs make clear in their brief that they are not requesting this type of relief.

discriminating on the basis of gender, but excepted clubs whose primary purpose was "to serve or benefit members of a particular sex." It was this "primary purpose" exception that four of the seven Court of Appeals judges agreed violated Maryland's Equal Rights Amendment.

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

His observation appears to reject the equal application theory by changing the field of entities affected by the statute's operation. Under the equal application theory, the statute would be constitutional because the burden was equally distributed to the sexes; all women could be excluded from men's country clubs and all men would be excluded

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

from women's country clubs. However, as Judge Rodowsky noted, only women or men will be affected under one particular application of the statute because "the universe of consideration for the particular problem created by this antidiscrimination law is any participating country club, in and of itself." *Id.* That is to say, one must examine the constitutionality of the statute through the lens of one particular country club. Under an individual application of the statute, one country club is affected by operation of the statute, and thus one sex bears a burden that the other, in that particular instance, does not. Such a result constitutes sex-based discrimination.

Further evidence that Maryland rejects the equal application theory appears in *Ciffin v. Crane*, 351 Md. 133, 716 A.2d 1029 (1998), where the Court of Appeals held that it was erroneous for a trial court to transfer custody of two girls to their mother based on the assumption that the mother would be a better custodian because she was the same sex as the children. A striking factual parallel arises between *Ciffin* and the hypothetical proposed by Justice Johnson in her opinion, concurring in part and dissenting in part, in Vermont's same-sex marriage case, *Baker v. State*.[11] Justice Johnson noted that under the equal application theory, a statute requiring courts to give custody of boys to their fathers and girls to their mothers would not discriminate on the basis of gender because it would treat both sexes equally Id. at 254 n.10. Given the holding in *Ciffin*, that "the equality between the sexes demanded by the Maryland Equal Rights Amendment focuses on "rights" of the individual "under the law", which encompasses all forms of privileges,

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

immunities, benefits and responsibilities of citizens. . .", this Court is certain the Court of Appeals would reject such a result. *Giffen,* 351 Md. at 149, 716 A.2d at 1037. It is worthy of note that Justice Johnson agreed with the majority's holding that Vermont's same-sex marriage prohibition violated the state's constitution. However, she disagreed with the majority's use of the equal application argument and stated her belief that the prohibition against same-sex marriage is a "straightforward case of sex discrimination." *Baker,* 170 Vt. At 252, 744 A.2d at 905.

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

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

burden of showing that it is "clearly arbitrary." *Id.*[12]

Because this Court has determined that § 2-201 makes a gender-based classification on its face, it must scrutinize the statute and the governmental interests in applying it to determine whether the Clerks meet their burden of showing that it is narrowly tailored to achieve compelling state interests. See *State v. Burning Tree Club*, 315 Md. 254, 295-96, 554 A.2d 366, 387 (1989); *Condore v. Prince George's Co.*, 289 Md. 516, 425 A.2d 1011 (1981); *Turner v. State* 299 Md. 565, 574, 474 A.2d 1297, 1301-1302 (1984).

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

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

Procreation, child-rearing, and traditional families

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

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

assumptions necessary to do so, exceeds the scope of reasonable legislative speculation.

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

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

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

better parents, or that opposite-sex couples focus more on their children's education. But these assumptions are not rational speculation; they are broad unsupported generalizations that do not establish a rational relation between same-sex marriage and the State's interests in promoting procreation, child-rearing, and the best interests of children.

Uniformity of State and Federal Law

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

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

participation of other States or the federal government.

As Plaintiffs note, federalism permits each state to make its own determinations regarding marital law, and comity law has developed to resolve any conflicts or differences that may arise. Defendants themselves cite to the differing state decisions to adopt legislation or constitutional provisions concerning same-sex marriage and the differing judicial decisions reached by courts analyzing the constitutionality of such provisions. Maryland has an interest in ensuring constitutional activity within its borders and protecting its citizens from unconstitutional burdens, and that interest outweighs any interest in ensuring uniformity of law.

The Existence of Other Remedies

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

Tradition

Defendants argue that promoting and preserving legislatively expressed societal values and the traditional institution of marriage are legitimate state interests served by a statute prohibiting same-sex marriage. Having concluded that preventing same-sex

marriage has no rational relationship to any other legitimate state interest, this Court concludes that tradition and social values alone cannot support adequately a discriminatory statutory classification.

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

This Court has found that there is no other legitimate state interest rationally served by preventing same-sex marriage. Therefore, we need not engage in speculation as to whether § 2-201 was enacted out of prejudice or animus toward Maryland's homosexual population. Tradition and societal values alone cannot sustain an otherwise unconstitutional classification. The Court is not unaware of the dramatic impact of its ruling, but it must not shy away from deciding significant legal issues when fairly presented to it for judicial determination. As others assessing the constitutionality of preventing same-sex marriage note, justifying the continued application of a classification through its

past application is "circular reasoning, not analysis," and that it is not persuasive. *Goodridge v. Department of Public Health*, 440 Mass. 309, 332, 798 N.E.2d 941, 961 n.23 (Mass. 2003); *Anderson v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *8 (Wash. Super. Aug. 4, 2004).

IV. CONCLUSION

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

M. Brooke Murdock
Judge
The Judges Signature appears
on the original document only

M. BROOKE MURDOCK
Judge

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