IN THE CIRCUIT COURT FOR BALTIMORE CITY

GITANJALI DEANE and LISA POLYAK, et al.,	*	
Plaintiffs,	*	
v.	*	Case No. 24-C-04-005390
FRANK CONAWAY, et al.,	*	
Defendants	*	

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MEMORANDUM OF *AMICI CURIAE* EQUALITY MARYLAND; AFL-CIO PRIDE AT WORK, DISTRICT OF COLUMBIA/MARYLAND CHAPTER; AMERICAN FRIENDS SERVICE COMMITTEE'S MIDDLE ATLANTIC REGION; BALTIMORE BLACK GAY PRIDE; BALTIMORE PREVENTION COALITION; EMPOWERING NEW CONCEPTS/THE PORTAL; GAY FATHERS COALITION, BALTIMORE; GAY, LESBIAN, BISEXUAL, AND TRANSGENDER COMMUNITY CENTER OF BALTIMORE AND CENTRAL MARYLAND; MARYLAND ADAPT; MARYLAND LATINO COALITION FOR JUSTICE; MARYLAND LESBIAN AND GAY LAW ASSOCIATION; MARYLAND LOG CABIN REPUBLICANS; MARYLAND NOW; NATIONAL LAWYERS GUILD-MARYLAND; PARENTS, FRIENDS AND FAMILY OF LESBIANS AND GAYS—METRO D.C., BALTIMORE, HOWARD COUNTY, BEL AIR/SUSQUEHANNA & WESTMINSTER/CARROLL COUNTY CHAPTERS; PUBLIC JUSTICE CENTER; JAMES & COLETTE ROBERTS; THE WOMEN'S LAW CENTER OF MARYLAND, INC.

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SUMMARY OF ARGUMENT

The history of marriage laws in Maryland is comprised of individual examples of under-represented and disfavored groups overcoming discrimination and exclusion to create a more equal and accessible marriage relationship for all couples. A long-standing requirement that all marriages in Maryland be solemnized by a religious ceremony was gradually opened up to minority religions, and ultimately eliminated in 1963. Bans on interracial marriages in Maryland, which had their genesis in colonial times, finally were repealed in 1967. The passage of the Equal Rights Amendment in 1972 committed the state of Maryland to ensuring an equal status for women in marriage, rejecting a common law tradition of the legal subordination of wives and mothers. In each of these examples, progressive changes have prevailed over hundreds of years of discriminatory social and legal convention. These three historical evolutions in the marriage laws provide poignant examples of the struggles that different groups and individuals have overcome in order to achieve greater equality and inclusiveness in marriage in Maryland. Importantly, the Maryland courts have played a critical role in eliminating these historical vestiges of discrimination and exclusion.

The relief requested by the Plaintiffs in the instant case, which would allow same-sex couples to marry, simply represents the next logical step in the historical evolution of marriage laws in Maryland towards greater inclusion and equality for all. The growing trend in the United States, and around the globe, is toward marriage equality for same-sex couples. Guaranteeing the right of gays and lesbians in Maryland to marry is consistent with this state's existing strong commitment to the adoption of laws and policies that guarantee equal treatment for gays and lesbians in all aspects of their lives, from the workplace to child-rearing to other intimate personal decisions. Maryland laws and judicial decision already prohibit discrimination against

gays and lesbians in a myriad of areas, and protect the rights of gays and lesbians in their role as parents. The Maryland courts have played a vital role in these developments, issuing decisions that protect the rights of gays and lesbians to equal treatment under the law. This Court should continue this strong commitment to equal rights, by holding that denying the right to marry to same-sex couples violates the rights of gays and lesbians under the Maryland Declaration of Rights to equality of rights under the law and the fundamental right to marry.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Equality Maryland (begun as Free State Justice in 1990) is Maryland's largest lesbian, gay, bisexual and transgender (LGBT) civil rights organization, with thousands of members across the entire state. The mission of Equality Maryland is to make life better for LGBT Marylanders, by promoting legislative initiatives on the state, county, and municipal levels. Equality Maryland's sister arm, the Equality Maryland Foundation, works to eliminate prejudice and discrimination against LGBT Marylanders through outreach, education, research, community organizing, training, and coalition building. Equality Maryland has an interest in ensuring that its members and other LGBT Marylanders have the right to marry.

AFL-CIO Pride at Work, District of Columbia/Maryland Chapter is the local chapter for AFL-CIO Pride at Work, the newest constituency group of the AFL-CIO (American Federation of Labor & Congress of Industrial Organizations). This chapter has seventy members from Maryland and the District of Columbia. The mission of Pride at Work is to mobilize mutual support between the organized Labor Movement and the LGBT Community around organizing for social and economic justice. Pride at Work seeks full equality for LGBT workers in their workplaces and unions, including equal benefits for families of gay and lesbian workers. AFL-CIO Pride at Work, District of Columbia/Maryland Chapter has an interest in enabling gay

and lesbian workers to achieve full equality in the workplace, by gaining access to the numerous employment benefits bestowed on married couples.

The American Friends Service Committee (AFSC) is a Quaker non-profit organization which includes people of various faiths who are committed to social justice, peace, and humanitarian service throughout the world. The **American Friends Service Committee's Middle Atlantic Region**, whose main office is in Baltimore, supports programs in the District of Columbia, Maryland, upstate New York, Pennsylvania, New Jersey, Delaware, and West Virginia on issues related to youth, criminal justice, economic and social justice, and peace building. Its programs in Maryland include the Baltimore Urban Peace Program, focused on combating violence in the local community, and the Vet Net: Conflict Transformation Program, which works with military veterans serving time in the Maryland House of Corrections. AFSC's work is based on the Quaker belief in the worth of every person and faith in the power of love to overcome violence and injustice. AFSC believes that recognition of the right of same-sex couples to marry is necessary to afford these individuals justice and to affirm their individual worth as persons.

Baltimore Black Gay Pride, Inc. (BBGP) is a non-profit community organization dedicated to organizing and promoting unity for diverse people of African descent, and to bridging the gap with the lesbian, gay, bi-sexual, transgender, and questioning community. BBBG is a member of the International Federation of Black Gay Prides, a predominate force in unifying the gay, lesbian, bi-sexual, transgender and questioning communities throughout the country. BBBG helps to build an awareness of pride and provides outreach and prevention education on HIV/AIDS, other health conditions prevalent among men and women of color, and

other social-economical issues affecting the community. The issue of marriage equality is of vital importance to the community served by BBBG.

The **Baltimore Prevention Coalition** (BPC) is a nonprofit, community service organization committed to reducing, delaying and preventing the risks associated with the use of alcohol, tobacco, and other drugs, HIV/AIDS and other diseases, violence, and other issues that disproportionately impact the African American community and other oppressed persons. Among its coalition members are TransAm (African American Transgender) and Baltimore Black Gay Pride. BPC also provides a home and serves in an advisory capacity for Baltimore Black Gay Pride. BPC supports the rights of all citizens to be afforded equal protection under the law of the land, regardless of race, ethnicity, religion (or lack thereof), sexual identity, or sexual orientation.

Empowering New Concepts/The Portal is a non-profit organization whose mission is to ensure inclusion of the African-American LGBT community, socially, economically, and politically. The Portal is a piece of Empowering New Concepts which provides a safe space for the African-American LGBT community, and focuses on health and wellness, education, and support. Empowering New Concepts/The Portal has an interest in seeing that African-American LGBT Marylanders are afforded an equal and inclusive right to marriage.

The **Gay, Lesbian, Bisexual, and Transgender Community Center of Baltimore and Central Maryland** (GLCCB) was established in 1977 and remains one of Maryland's oldest gay, lesbian, bisexual, and transgender (GLBT) organizations. The mission of the GLCCB is to achieve equality, understanding, and respect for the GLBT community; to unify gay, lesbian, bisexual, and transgender persons; and to provide quality support services, safe and appropriate facilities, and professional resources for the development of individuals and groups of the GLBT

community of Baltimore and Central Maryland. Marriage equality is consistent with the mission of the GLCCB, and is of great importance to its constituency and all GLBT communities in Maryland.

Gay Fathers Coalition, Baltimore (GFC) is an organization which was started in 1995 in order to assist gay men who have or who are contemplating having children understand the issues surround being a gay parent in our society. GFC provides a support and communications network for gay fathers; encourages cooperative action in promoting the common interests of gay fathers and their families; provides opportunities for social interaction between gay fathers, their children, and friends; promotes and sponsors activities that present a positive image of gay fathers; and encourages acceptance of alternative parenting within the community. GFC currently has a membership of over sixty gay parents, their partners, and family members from all over Maryland. This case is significant to GFC and its members because of the considerable burden that is placed on the children of gay parents as a result of their parents and de facto step-parents not being able to marry.

Maryland ADAPT is a not for profit organization composed primarily of activists with disabilities and their friends and families who support disability rights. Maryland ADAPT is a chapter of the National ADAPT disability civil rights organization. ADAPT acts through nonviolent methods of social change, including education, information, direct action, negotiations, and reconciliation. ADAPT has a long history of enforcing the civil rights of people with disabilities, including the integration of disabled people into all aspects of society. Maryland ADAPT is mindful of the historical, and, in some cases, continuing, discrimination against individuals with disabilities in the laws governing marriage. Maryland ADAPT supports the rights of all persons, including gays and lesbians, to enjoy the right to marry.

The **Maryland Latino Coalition for Justice** (MLCFJ) is a membership organization composed of organizations, coalitions, and individual members that are working to advance the interests of the Latino community in Maryland. The mission of the MLCFJ is to promote and advocate for the human rights, civic participation, and well-being of members of the Latino community in Maryland. Since its founding in 2000, the MLCFJ has achieved its mission principally through legislative advocacy before the General Assembly. The MLCFJ has an interest in this case because it touches on the rights of gay and lesbian Marylanders, including Latinos, to enjoy full and equal access to marriage.

The **Maryland Lesbian and Gay Law Association**, founded in 1991, is a non-profit organization composed of approximately 125 attorneys from across Maryland. It seeks to become involved in issues that affect the LGBT community, including the right of gays and lesbians to marry. The Association achieves this mission through legislative advocacy, public outreach, and involvement in judicial selections and amicus briefs. The Association also actively participates with the Maryland State Bar Association through its Bar Leader's Conference and Local Specialty Bar Committee. The Maryland Lesbian and Gay Law Association supports the right of same-sex couples in Maryland to equality in marriage.

The **Maryland Log Cabin Republicans** is a chapter of the Log Cabin Republicans (LCR), the nation's largest organization of Republicans who support fairness, freedom, and equality for gay and lesbian Americans. Maryland LCR has members from across Maryland and includes conservative members of the GLBT community, their family members, and straight supporters. Maryland LCR believes that fair-minded laws that support strong families of all types have a fundamental basis in long-standing conservative principles and values, including civil equality, individual liberty, and personal responsibility. Civil marriage equality for same-

sex couples is of concern to members of Maryland Log Cabin Republicans who wish to fully participate in their society and share both the rights and responsibilities that come with civil marriage.

Maryland National Organization for Women (Maryland NOW) is the statewide organization for the National Organization for Women (NOW), a national network of feminist activists which has over 500,000 contributing members and 550 chapters in all fifty states and the District of Columbia. Since its founding in 1966, NOW's mission has been to promote equality for women—all women. NOW has been a leader in the struggle for lesbian rights since 1971, when it issued a policy statement recognizing that a woman's right to independence and self-determination includes the right to define and express her own sexuality and to choose her own lifestyle. In 1995, NOW made official its support for same-sex marriage, stating that the choice of marriage is a fundamental constitutional right, protected under the equal protection clause of the Fourteenth Amendment, and should not be denied because of a person's sexual orientation. The struggle for equal marriage rights is a feminist issue, because women will not be equal until they can pursue their dreams free from discrimination. Maryland NOW has an interest in this case because it is committed to making these rights a reality, especially for the thousands of lesbian women throughout Maryland.

The **National Lawyers Guild-Maryland** (NLG-Maryland) represents the Maryland chapter of the National Lawyers Guild, a national non-profit legal and political organization of lawyers, law students, legal workers, and jailhouse lawyers. The National Lawyers Guild was founded in 1937 as an alternative to the American Bar Association, which was racially segregated at the time. Since its inception, the National Lawyers Guild has provided legal support for (and conducted legal advocacy on behalf of) underrepresented communities who are

targets of institutionalized discrimination. NLG-Maryland works at the Maryland level through public education and legal advocacy to promote issues of social, economic, and racial justice. NLG-Maryland has a strong interest in this case, because NLG-Maryland advocates for protection of the civil rights and liberties of LGBT individuals, and advocates for ending institutionalized discrimination against the LGBT community, represented through discriminatory marriage laws.

Parents, Families & Friends of Lesbians & Gays (PFLAG) is a national non-profit organization with over 200,000 members and supporters and over 500 affiliates in the United States. The chapters for **PFLAG Metro D.C., PFLAG Baltimore, PFLAG Howard County, PFLAG Bel Air/Susquehanna,** and **PFLAG Westminster/Carroll County** join in this amicus memorandum. PFLAG promotes the health and well-being of gay, lesbian, bisexual and transgendered persons, their families, and friends through: support, to cope with an adverse society; education, to enlighten an ill-informed public; and advocacy, to end discrimination and to secure equal civil rights. **PFLAG Metro D.C.** is the largest PFLAG chapter in the United States, and provides support groups and statewide legislative advocacy in Maryland, including working successfully for the inclusion of sexual orientation in the state's non-discrimination laws. **PFLAG Howard County** has succeeded in helping to bring about the inclusion of domestic partnership benefits in the Howard County government, Howard Community College, the Howard County Public School System, and the Columbia Association. **PFLAG Westminster/Carroll County** has been active and successful in lobbying some members of the Carroll County delegation to vote affirmatively on pro-LGBT legislation. This case is extremely vital to these PFLAG chapters and their missions, as advocacy in support of marriage equality is among PFLAG's highest priorities. The members of the PFLAG chapters joining in this

memorandum include the friends and family members of thousands of gays and lesbian across the state of Maryland.

The **Public Justice Center**, a non-profit civil rights and anti-poverty legal services organization founded in 1985, has a longstanding commitment to combating discrimination, including discrimination against gays and lesbians. PJC's programs include its Appellate Advocacy Project, which seeks to improve the representation of indigent and disadvantaged persons and their interests before state and federal appellate courts. PJC previously joined an *amicus curiae* brief urging the Maryland Court of Appeals to uphold the constitutionality of the Montgomery County domestic partner benefits program. *See Tyma v. Montgomery County*, 369 Md. 497, 801 A.2d 148 (2002). PJC has an interest in ending discrimination against gay and lesbian couples in Maryland seeking to marry.

James and Colette Roberts are an interracial couple who have been married for forty-six years, and have lived in Maryland for the past twenty years. The Roberts were married in New York in 1959, at a time when their marriage would have been illegal in Maryland and many other states. They have four children and seven grandchildren, and are active in PFLAG-Howard County. Two of the Roberts' grown daughters and one son are happily married. The Roberts believe that their lesbian daughter also should have legal recognition for her own family unit, and that marriage should be available to all couples, regardless of race, ethnicity, religion, sexual orientation, or other such designations.

The **Women's Law Center of Maryland, Inc.** is a nonprofit, public interest, membership organization of attorneys and community members with a mission of improving and protecting the legal rights of women. Established in 1971, the Women's Law Center achieves its mission through direct legal services through representation and hotlines, research, policy

analysis, legislative initiatives, education, and implementation of innovative legal services programs to pave the way to systematic change. The Women's Law Center has dedicated substantial advocacy efforts to reform family law through its Kaufman Center for Family Law. The Women's Law Center supports the right for same-sex couples to marry, because this is a necessary and appropriate expansion of family law which will make the rights, benefits, and responsibilities of marriage available to all women, including lesbians who wish to marry.

INTRODUCTION

Our nation has a shameful history of discriminatory and exclusionary marriage laws, which have restricted access to and equal status in marriage. States[1] barred slaves from marrying until after the Civil War, and forty of the fifty states at some point had laws restricting interracial marriages. *See* Am. Bar Ass'n, Section of Family Law Working Group on Same-Sex Marriages and Non-Marital Unions, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships* 11 (2004) (hereinafter "*ABA White Paper*"); Cott, *supra*, at 32-35, 40-45. Similarly, "a number of States have prohibited and continue to prohibit persons with disabilities from. . .marrying." *Tennessee v. Lane*, 541 U.S. 509, 524 (2004); *see also* Jill Elaine Hasday, *The Canon of Family Law*, 57 Stan. L. Rev. 825, 865 (2004) (noting that at least nine states continue to impose special restrictions on the marriage of individuals with disabilities). Under the common law regime of coverture, followed by most states until the twentieth century, married women were subjected to systematic discrimination and subordination based on their gender, through the denial of the legal rights afforded to married men. *See generally* Cott, *supra*, at 11-12; Hendrik Hartog, *Man & Wife in America, A History* 115-22 (2000). Over time, many of these discriminatory measures have been abandoned or declared

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[1] In the United States, the regulation of marriage has fallen primarily to the states. *See, e.g.*, Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 4, 6, 28-29 (2000).

unconstitutional in favor of greater inclusion and equality in the laws governing the marriage relationship.

Maryland shares in this regrettable past, with its own history of laws that imposed specific religious requirements on the marriage ceremony, barred interracial marriages, and denied equal rights to married women. Today this discrimination continues with a statute that limits legal recognition of marriages in Maryland to those entered into between a man and a woman, thus denying the right to marry to same-sex couples. *See* Md. Code Ann., Fam. Law § 2-201 (2004). Like other statutes that preceded it, this restriction denies access to and equal status in marriage to a disfavored and under-represented group, based on a single attribute. Maryland also shares in the gradual progress toward greater inclusion and equality in the laws governing marriage—the religious ceremony requirement has been eliminated, miscegenation statutes have been repealed, and Maryland has made a constitutional commitment to equal rights for women.

The Plaintiffs in this case, same-sex couples in Maryland who wish to marry, ask this Court to declare that the Maryland statute denying same-sex couples the right to marry violates the Declaration of Rights, and to enjoin the Defendants, clerks of the circuit courts, from refusing to issue marriage licenses to them and other couples like them because of their status as same-sex couples. The history of marriage laws in Maryland reveals two major themes relevant to the questions presented in this case. First, marriage laws in Maryland have evolved significantly over time, through a gradual but continuous progression toward greater inclusion and equality. Second, the courts have played a critical role in this historical progression, by ameliorating the effects of or, in some cases, invalidating discriminatory marriage laws based on constitutional principles. It is entirely appropriate for this Court now to weigh the next question presented in

this historical evolution, and to hold that excluding same-sex couples from the rights, benefits, and responsibilities of marriage violates the Maryland Declaration of Rights, by discriminating against these couples on the basis of sex and sexual orientation and denying them the fundamental right to marry.

The State likely will argue that any ruling from this Court invalidating existing marriage laws will have radical social consequences. As the history recounted below demonstrates, progressive changes to the laws governing marriage often have been presaged by naysayers warning that social disaster would follow. Not only are such arguments irrelevant in the face of contrary constitutional rights, these arguments in fact are belied by the actual history of marriage laws. Maryland has over a period of many years, and often at the behest of the courts, eliminated prior laws that restricted access to and equal status in marriage based on religion, race, and gender. Gradual but dramatic changes have transformed the legal definition of marriage, without altering its importance or continuing viability as a social institution. The same result can and should obtain in this case.

ARGUMENT

I. Marriage Laws in Maryland Have Evolved to Eliminate Past Discrimination and Inequalities Based on Religion, Race, and Gender.

A. Maryland Has Eliminated Laws That Imposed Religious Barriers of Entry to Marriage.

1. Maryland's historical limitation on marriage to couples willing and able to wed in a religious ceremony has been eliminated.

For most of this state's history a marriage was not valid under Maryland law unless the ceremony was officiated by a specified religious authority. The earliest marriage laws in Maryland limited the right to marry to couples willing and able to wed according to the dictates of the Church of England—excluding not only the non-religious and non-Christians, but also

members of many Christian denominations. In 1702, the General Assembly decreed that "no justice or magistrate being a lay man" could perform a marriage ceremony in any parish where a minister was available, and prohibited any marriages that were barred by the Church of England's table of prohibited degrees of affinity. 24 *Archives of Maryland: Proceedings and Acts of the General Assembly, April 26, 1700 – May 3, 1704* 265-66 (William Hand Browne, ed., 1904).[2] The General Assembly clarified the religious ceremony requirement in 1717, to provide that all persons wishing to marry had to publish their intent to marry "according to the Rubrick of the Church of England," and be married "according to the Liturgy of the Church of England." 33 *Archives of Maryland: Proceedings and Acts of the General Assembly, May 28, 1717-April 22, 1720* 114 (Clayton Colman Hall, ed., 1913).

The religious ceremony requirement eventually was expanded to allow for ceremonies by all Christian denominations, but the law continued to enshrine discrimination against most non-Christian marriage rites. In 1777, the category of qualifying officiators was broadened to "ministers of the church of England, ministers dissenting from that church, or Romish priests," and an exception was provided allowing Quakers to marry according to Quaker rites. 141 *Archives of Maryland: The General Public Statutory Law and Public Local Law of the State of Maryland* 131-32 (Clement Dorsey, ed., 1840). This phrasing had been replaced by 1860 to allow marriages to be performed by "some minister of the Gospel, ordained according to the rites and ceremonies of his or her church, or in such manner as is used and practiced by the society of

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[2] These provisions were part of "An Act for the Establishment of Religious Worship in this Province According to the Church of England; and for the Maintenance of Ministers." 24 *Archives of Maryland*, *supra*, at 265. Interestingly, Maryland law initially allowed for marriages to be celebrated by a "priest minister Pastor *or Magistrate*." 2 *Archives of Maryland: Proceedings and Acts of the General Assembly, April 1666-June 1676* 522 (William Hand Browne, ed., 1884) (emphasis supplied). The history of the religious ceremony requirement, however, originates in English common law. *See Henderson v. Henderson*, 199 Md. 449, 452-54, 87 A.2d 403, 405-06 (1952); *Denison v. Denison*, 35 Md. 361, 371-78 (1872).

people called Quakers." Md. Ann. Code art. 60, § 4 (1860). Although this revision apparently eliminated any exclusion of Christian denominations, the phrase "minister of the Gospel" continued to exclude any non-Christian religious officials.[3]

That the law continued to embody religious discrimination and to infringe on the religious freedom of thousands of Maryland citizens was recognized publicly at the 1864 Constitutional Convention in Maryland. Delegates debated several proposals to instruct the General Assembly either to allow for civil marriage ceremonies or to broaden the description of qualifying religious ceremonies. *See generally* 102 *Archives of Maryland: Proceedings of the State Convention of Maryland to Frame a New Constitution* 323-26, 328-32, 975-96 (Richard P. Bayly, ed., 1864). Supporters of an amendment argued that the current law discriminated against believers in non-Christian faiths, as well as non-believers, by denying these individuals the right to celebrate the marriage ceremony in a manner of their own choosing. *See id.* at 976, 978, 979-80, 981-82, 985, 987, 989, 993, 994. Supporters of the religious ceremony requirement responded in part by invoking the religious sanctity of marriage under Christian doctrines. *See id.* at 979, 982-83, 986-87. Some argued that it would be improper to adopt a law that would accommodate the interests of a small minority of the population, while offending "a large portion of the best religious sentiment of the State." *Id.* at 984; *see also id.* at 986, 991, 996.

The convention ultimately agreed to urge the General Assembly to adopt a new exception to the religious ceremony requirement for conscientious objectors:

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[3] Quakers continued to enjoy a special exemption from the religious ceremony requirement, but also were burdened with an additional administrative requirement beginning in 1868, with the marriage laws requiring spouses wed in a Quaker ceremony to "sign a certificate to the effect that they have agreed to take each other for husband and wife," and to find at least twelve witnesses to attest to the certificate. 1868 Md. Laws ch. 42, § 1. This remained part of the law until 1963. *See* 1963 Md. Laws ch. 406, §2.

> The General Assembly . . . shall pass laws providing for the celebration of marriage between any persons legally competent to contract marriage, and shall provide that any persons prevented by conscientious scruples from being married by any of the existing provisions of law, may be married by any Judge or Clerk of any Court of Record, or any Mayor of any incorporated city in this State.

Md. Const. art. III, § 49 (1864). Although this amendment was a compromise, it also represented recognition of the need for change.

The General Assembly initially responded to the recommendation from the convention by eliminating the religious ceremony requirement altogether. Unfortunately, the law was re-enacted in 1927, and the recommendation to allow for civil ceremonies for conscientious objectors was ignored. The revised statute allowed "any minister of the Gospel, or official of a religious order or body authorized by the rules and customs of said order or body" to perform marriage ceremonies, and continued the express exemption for Quakers. *See* 1927 Md. Laws ch. 380, § 4; *see also* Md. Ann. Code art. 62, § 4 (1924 & 1935 Supp.). This revision eliminated the prior exclusion of non-Christian religious rites, but continued to discriminate against couples that, for whatever reason, wished to celebrate their marriage outside the confines of an official religious body. It was not until 1963 that the General Assembly finally moved to eliminate this vestige of religious discrimination by enacting a law allowing clerks and deputy clerks of the circuit courts to perform civil marriage ceremonies. *See* 1963 Md. Laws ch. 406, § 2. The General Assembly responded further in 1984, by removing the explicit reference allowing for ceremonies performed by a "minister of the Gospel" without specifying any other religious rites—which had implicitly favored Christianity. *See* 1984 Md. Laws ch. 296, § 2.

The religious ceremony requirement—even in its least discriminatory form—infringed on the free choices of a substantial number of couples. In 1964, the year after the religious ceremony requirement was eliminated, twenty-one percent of couples marrying in Maryland

opted for a civil ceremony. *See* Div. of Statistical Research & Records, Md. State Dep't of Health, *Final Vital Statistics Tables, Maryland, 1964* 48 (1965). The percentage of couples choosing a civil ceremony has increased gradually but steadily over the years. *See, e.g.*, Div. of Health Statistics, Md. Dep't of Health & Mental Hygiene, *Maryland Vital Statistics Annual Report 1995* 134 (1996); Div. of Health Statistics, Md. Dep't of Health & Mental Hygiene, *Maryland Vital Statistics Annual Report 1985* 16 (1986). Today approximately forty percent of all marriages performed in Maryland are civil ceremonies. *See* Vital Statistics Admin., Md. Dep't of Health & Mental Hygiene, *Maryland Vital Statistics Annual Report 2002* 185 (2003). The reasons that a couple might choose a civil ceremony no doubt are complex and varied.[4] What is clear is that by eliminating this form of religious discrimination, Maryland has opened the way for a significant percentage of couples that marry to express their preference for a non-religious ceremony.

The history of the religious ceremony requirement illustrates a reluctance to depart from traditional notions of marriage in response to minority rights, and a desire to close off the institution to those perceived as outsiders, tensions evident in the 1864 constitutional debates. Yet this history also illustrates the resilience of marriage as an institution and its flexibility in the face of changing social and legal norms. Speaking at the 1864 constitutional convention, Delegate Robert W. Todd predicted dire consequences should the religious ceremony requirement be repealed: "the foundations of human society would be undermined; all our social relations would become null and void; and general moral ruin and desolation would sweep over

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[4] In a 1968 study, Maryland court clerks reported a range of reasons cited by couples choosing civil ceremonies: for example, neither person is formally affiliated with a church, their church will not sanction their marriage, each person is of a different religious faith and they compromise on a non-religious ceremony, or the couple desires a quick and quiet wedding. *See* Sidney M. Norton, Pub. Health Serv., U.S. Dep't of Health, Educ. & Welfare, *Interracial Marriages in Maryland*, 85 Pub. Health Reps. 739, 746-47 (1970).

our land." 102 *Archives of Maryland, supra*, at 979. When the law eventually was repealed in 1963, there was little debate or fanfare, and today approximately two-fifths of all couples that marry in Maryland opt for a civil ceremony.

2. Maryland courts adopted doctrines that ameliorated the discriminatory effects of the religious ceremony requirement.

In tandem with the slow march toward legislative reform of the marriage ceremony requirement, the Maryland courts adopted several doctrines that ameliorated the law's harsh effects. On the surface, the courts invoked the religious ceremony requirement as a necessary formality for the marriage relationship. *See, e.g.*, *Henderson*, 199 Md. at 454, 87 A.2d at 406; *Behr v. Behr*, 181 Md. 422, 426, 30 A.2d 750, 752 (1943); *Knapp v. Knapp*, 149 Md. 263, 267, 131 A. 329, 331 (1925); *Denison*, 35 Md. at 379.[5] An analysis of the handful of published judicial opinions on the requirement, however, suggests a reluctance by the courts to invalidate marriages based on nothing more than the apparent lack of a proper religious ceremony. These cases show the Maryland courts playing an active role in ameliorating the potentially harsh effects of a discriminatory and inequitable marriage law.

Several doctrines adopted by the Court of Appeals, beginning at the end of the nineteenth century, made clear that the religious ceremony requirement did not have to be met in all cases. Applying a general doctrine to this specific issue, the Court concluded that where a marriage is proven by general reputation, cohabitation and acknowledgement, "it will be inferred that a religious ceremony has taken place." *Richardson v. Smith*, 80 Md. 89, 93, 30 A. 568, 569 (1894); *see also Bauder v. Blackiston*, 149 Md. 322, 324-26, 131 A. 454, 455 (1925). Similarly,

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[5] At the same time, the Maryland courts rejected any suggestion that marriage was a religious sacrament—marriage was considered a civil contract with a "superadded" religious component. *See Denison*, 35 Md. at 380; *see also Behr*, 181 Md. at 426, 30 A.2d at 752; *Picarella v. Picarella*, 20 Md. App. 499, 504, 316 A.2d 826, 830 (1974).

the Court recognized that a marriage performed outside of the state and valid where it was performed would be recognized in Maryland, even without any religious ceremony. *See Jackson v. Jackson*, 82 Md. 17, 30, 33 A. 317, 319 (1895) ("[A]t most, the statutory provisions relative to the methods of solemnizing marriages in Maryland relate to form and ceremony only."); *see also Henderson*, 199 Md. at 459, 87 A.2d at 409.

Other cases illustrate a reluctance by the Court of Appeals to inquire into the specifics and validity of the religious ceremony itself. For example, the Court declined to invalidate a marriage based on one spouse's assertion that the religious ceremony was a "blessing" rather than a "marriage" ceremony. *See Feehley v. Feehley*, 129 Md. 565, 567-68, 99 A. 663, 664-65 (1916). Similarly, evidence that the official who presided over a religious marriage ceremony actually lacked authority within his own religious establishment to perform marriages was held to be irrelevant, as long the parties to the marriage believed that the officiator was authorized to solemnize marriages. *See Knapp*, 149 Md. at 267-68, 131 A. at 331; *see also Schaffer v. Richardson's Estate*, 125 Md. 88, 92, 93 A. 391, 392 (1915) (allowing a presumption "that the person assuming to officiate at the ceremony was authorized to perform it"). Consistent with these decisions, the Court interpreted the religious ceremony requirement as "not prescribe[ing] the form, nor according to the rites of what church, the marriage shall be celebrated." *Feehley*, 129 Md. at 568, 99 A. at 664 (quoting *Denison*, 35 Md. at 380).

In spite of the apparent statutory strictures, these court decisions relegated the religious ceremony requirement to a position "incidental to the parties' own agreement to marry." John S. Strahorn, Jr., *Void and Voidable Marriages in Maryland and Their Annulment*, 2 Md. L. Rev.

211, 221-22 (1938).[6] The religious ceremony requirement thus was placed on par with other formal requirements such as obtaining a proper marriage license—necessary in theory, but its absence seldom considered an adequate basis for invalidating an otherwise valid marriage. *Cf. Feehley*, 129 Md. at 568-71, 99 A. at 665-66; *Picarella*, 20 Md. App. at 512-14, 316 A.2d at 834-35. Indeed, the only published decision in Maryland enforcing the religious ceremony requirement to invalidate a marriage involved two parties who had made no attempt to solemnize their marriage. *See Denison*, 35 Md. at 370 ("It is not pretended that there was ever any solemnization of marriage . . ."). In all other published decisions in which a party challenged the validity of a marriage based on an apparent failure to meet the religious ceremony requirement, the courts found a way around the requirement. *See Henderson*, 199 Md. at 459, 87 A.2d at 409; *Bauder*, 149 Md. at 324-26, 333-36, 131 A. at 455, 458-59; *Knapp*, 149 Md. at 268-71, 131 A. at 331-32; *Feehley*, 129 Md. at 567-68, 99 A. at 664-65; *Jackson*, 82 Md. at 31-34, 33 A. at 319-20. By adopting doctrines that ameliorated the potentially harsh effects of the religious ceremony requirement, the courts elevated the parties' consent and desire to marry over a discriminatory and inequitable marriage law.

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[6] Strahorn continues: "Thus the theory of the religious ceremony as a marriage requirement in Maryland is that the ceremony does not make the parties married, but that the parties marry themselves by their contractual offer and acceptance." Strahorn, *supra*, at 222.

B. Historical Prohibitions on Interracial Marriages in Maryland Have Been Repealed.

1. Maryland has overcome its discriminatory history of denying equal access to marriage on the basis of race.

The miscegenation[7] laws of Maryland became a model in the United States for enforcing social conventions of discrimination through legal regulation of the marriage relationship. Maryland has the unfortunate distinction of being the first state in the nation to prohibit interracial marriages by statute. *See* Cott, *supra*, at 44; Wallenstein, *supra*, at 22-25. In 1664, the General Assembly enacted a law providing that any freeborn woman who intermarried with a slave, making "shamefull Matches" "to the disgrace of our Nation," would become a slave to her husband's master during the life of her husband. *See* 1 *Archives of Maryland: Proceedings and Acts of the General Assembly, January 1637/8-September 1664* 533-35 (William Hand Browne, ed., 1883). An even harsher fate befell any children born of such a marriage, who would become slaves for life, and whose children in turn would be born into slavery and remain slaves for life. *See id.*

The scope of Maryland's prohibition on interracial marriages was expanded by several amendments over the next two hundred years. In 1717, the law was rewritten to punish all participants in all interracial marriages between whites and blacks. All marriages between a white and a black or "mulatto" were forbidden, regardless of whether the individuals involved were slave, servant, or free, and both the man and the woman were subject to punishment. *See* 33 *Archives of Maryland*, *supra*, at 112. White men or women who intermarried were condemned to a term of servitude of seven years, while free black men who intermarried were

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[7] "Miscegenation" literally means "mixing of species;" the phrase was first used in the U.S. to describe interracial marriages in 1863, by opponents of President Lincoln's reelection. *See* Cott, *supra*, at 98-99; Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law – An American History* 51-52 (2002).

committed to slavery for life. *See id.*[8] Similar provisions remained in place through the 1860s. *See, e.g.*, Md. Ann. Code art. 30, § 128 (1860).[9]

The early ban on interracial marriages in Maryland was cited by the Supreme Court in the infamous decision of *Dred Scott v. Sandford*, 60 U.S. 393 (1856), as evidence that African-Americans were regarded as property at the time of the American Revolution. Chief Justice Roger Taney, a Maryland native himself, described the Maryland law and a similar law from Massachusetts as "show[ing], too plainly to be misunderstood, the degraded condition of this unhappy race" at the time, namely:

> [T]hat a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

Id. at 408-09.

In the wake of the Civil War and the end of slavery, Maryland reaffirmed its adherence to discrimination in marriage on the basis of race and punishment of any mixing of the races.[10] In

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[8] "Mulattoes" born of a white woman were limited to a penalty of seven years of servitude. *See* 33 *Archives of Maryland*, *supra*, at 112.

[9] The legal prohibition on any mixing of the races was reinforced by parallel statutes that punished the conception of mixed-race children outside of marriage. Early laws provided that the parents of a mixed-race child born outside of marriage would have to serve terms of seven years of servitude, while the child would be a servant until reaching the age of thirty-one years. *See* 13 *Archives of Maryland: Proceedings and Acts of the General Assembly, April 1, 1684-June 9, 1692* 546-49 (William Hand Browne, ed., 1894); *see also* 141 *Archives of Maryland*, *supra*, at 29-30. By 1860, the law had been amended to condemn a white woman who became pregnant by a black or "mulatto" man to eighteen months to five years in the state penitentiary, while the father of the child, if a free man, would be transported out of the state and sold into slavery. *See* Md. Ann. Code art. 30, § 151-52 (1860).

1884, the General Assembly enacted a law prohibiting all marriages "between a white person and a person of negro descent, to the third generation inclusive," and declaring such marriages void. 1884 Md. Laws ch. 264. Violators would be deemed guilty of an infamous crime and imprisoned for a term of eighteen months to ten years in the penitentiary. *Id.*; *see also* Md. Ann. Code art. 27, § 200 (1888); *id.* § 305 (1904); *id.* § 330 (1914); *id.* § 365 (1924). The law was amended in 1935 to add a prohibition on marriages between a white or black individual and "a member of the Malay race." *Id.* § 365 (1924 & 1935 Supp.); *see also id.* § 398 (1957).[11] The miscegenation statutes remained on the books in Maryland until 1967, when litigation attacking the constitutional validity of these statutes finally forced Maryland and other states to retreat.

2. Courts ultimately forced the rescission of miscegenation statutes, by holding the laws unconstitutional.

The constitutional revolution against miscegenation statutes started with a decision from the Supreme Court of California in 1948.[12] Citing the equal protection and due process clauses of the Fourteenth Amendment,[13] the Court held that a California state law that prohibited any

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[10] With the end of the Civil War and the passage of the Thirteenth and Fourteenth amendments, Maryland did enact a statute in 1867 which retroactively validated all marriages "between colored people." 1867 Md. Laws. ch. 423, § 9.

[11] A parallel statute in existence throughout this same period provided that a white woman who became pregnant by a black or "mulatto" man could be sentenced to between eighteen months and five years in the state penitentiary. *See* Md. Ann. Code art. 72, § 113 (1879); *id.* art. 27, § 218 (1888); *id.* § 337 (1904); *id.* § 370 (1914); *id.* § 415 (1924); *id.* § 493 (1939); *id.* § 416 (1957).

[12] An earlier round of cases had been filed in a variety of states in the late 1800s to challenge miscegenation statutes, based on the newly-enacted Fourteenth Amendment and Civil Rights Act of 1866. *See* Cott, *supra*, at 101 & n.72. All of these efforts failed, except for a decision in Alabama, which was overturned three years later, and a decision in Louisiana, which was mooted by a subsequent legislative reenactment. *See id.*

[13] Interestingly, the couple seeking to marry had argued that the statute prohibited their free exercise of religion, in violation of the First and Fourteenth Amendments, because the law denied them the right to celebrate the sacrament of marriage in their Catholic church, which itself had no rule prohibiting interracial marriages. *Perez*, 32 Cal. 2d at 713, 198 P.2d at 18.

white person from marrying "a Negro, mulatto, Mongolian or member of the Malay race" was unconstitutional and invalid. *Perez v. Sharp*, 32 Cal. 2d 711, 715-18, 198 P.2d 17, 19-21 (1948). In response to an argument that the miscegenation statute reduced race tension and social problems, the Court noted that the law in fact "perpetuat[ed]. . .the prejudices that give rise to the tension" and that concerns about public peace could not overcome an individual's constitutional rights. *Id.* at 725, 198 P.2d at 25-26.

At the time of the *Perez* decision, thirty states had statutes prohibiting interracial marriages. *See* Wallenstein, *supra*, at 253-54. During the next eighteen years, from 1948 through 1966, twelve states joined California in repealing their laws. *See id.* The United States Supreme Court finally finished what *Perez* had started, with the Court's holding in 1967 in the case of *Loving v. Virginia* that state laws restricting the freedom to marry based on race violate the equal protection and due process clauses of the Fourteenth Amendment. *See* 388 U.S. 1, 11-12 (1967). At the time of the *Loving* decision, sixteen states still had statutes prohibiting or punishing interracial marriages. *Id.* at 6. The persistence of these statutes apparently reflected public opinion in the United States at the time—in 1967, approximately three-quarters of Americans disapproved of interracial marriages. *See* E.J. Graff, *What Is Marriage For?* 156 (1999). Almost forty years later, those figures are reversed, with three-quarters of Americans today approving of interracial marriages. *See* The Gallup Organization for AARP, *Civil Rights and Race Relations* 70-75 (Jan. 2004).[14] The lasting effects of the *Loving* decision also can be seen in Census estimates showing that the percentage of interracial married couples in the United States has increased tenfold since 1960. *See* U.S. Census Bureau, *MS-3: Interracial Married*

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[14] *Available at* http://assets.aarp.org/rgcenter/general/civil_rights.pdf.

Couples: 1980 to 2002 (Sept. 15, 2004);[15] U.S. Census Bureau, *MS-3: Interracial Married Couples: 1960 to Present* (Jan. 7, 1999).[16]

Maryland remained one of the holdout states until the very end, not repealing its miscegenation statutes until 1967, while *Loving v. Virginia* was pending before the Supreme Court. *See* 1967 Md. Laws ch. 6, § 1. During the 1966 legislative session, Verda Welcome, the only African-American member of the Maryland Senate, had sponsored a bill to repeal the laws, which had passed the Senate but failed in the House of Delegates by a vote of 66 to 50. *See* Wallenstein, *supra*, at 208. The measure was reintroduced in the next legislative session, and passed both the Senate and the House in March 1967. *See id.* To its credit, Maryland was the only southern state to repeal its miscegenation statutes before the *Loving* decision. *See id.* at 253-54. The state's repeal earned Maryland a specific mention in the *Loving* decision, *see Loving*, 388 U.S. at 6 n.5, in some sense completing the circle from the *Dred Scott* opinion.

The Maryland courts were not at the forefront in the legal battles against miscegenation statutes. There are several historical examples, however, of cases in which the Maryland courts acted in limited respects to soften the impact of the miscegenation statutes. As noted above, Maryland's original miscegenation statute from 1664 contained a harsh provision that condemned the children of interracial marriages to slavery for life, an effect that carried over to condemn all proceeding generations to slavery as well. This provision of the law was repealed in 1681, only seventeen years later. *See* 7 *Archives of Maryland: Proceedings and Acts of the General Assembly, October 1678-November 1683* 204-05 (William Hand Browne, ed., 1889); *see also* Wallenstein, *supra*, at 23. In the interim, a number of families descended from white women who had married African-Americans were enslaved. *See* Wallenstein, *supra*, at 23.

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[15] *At* http://www.census.gov/population/socdemo/hh-fam/tabMS-3.pdf.

[16] *At* http://www.census.gov/population/socdemo/ms-la/tabms-3.txt.

Around the time of the Revolutionary War, several of the descendants of these white women—descendants born into slavery on the basis of interracial marriages a hundred years earlier—succeeded in petitioning the Maryland courts for their freedom. *See id.* at 24. In several published decisions, the General Court of Maryland accepted the argument that the petitioner should be adjudged free, based on the petitioner's descent many generations ago from a white woman, even though that same white woman had violated the 1664 law by marrying an African-American man. *See Shorter v. Rozier*, 3 H. & McH. 238 (1794); *Butler v. Craig*, 2 H. & McH. 214 (1787); *Toogood v. Scott*, 2 H. & McH. 26 (1782). These decisions ameliorated some of the effects of one of the harshest laws in Maryland's long history of denying equal marriage rights to non-whites, but only for litigants with some claim to white female blood.

Many years later, in 1964, Judge W. Albert Menchine on the Circuit Court for Baltimore County reached a similar result by interpreting the miscegenation statutes to allow an interracial marriage for two litigants with claims to white lineage. Elizabeth Medaglia, a white woman, wished to marry Benjamin A. deGuzman, a Filipino man with a white grandmother. *See* Wallenstein, *supra*, at 207. The Maryland miscegenation statute in place at the time prohibited marriages between whites and "members of the Malay race." After they were denied a marriage license by the clerk of the courts in Baltimore County, Ms. Medaglia filed suit in Circuit Court arguing that the miscegenation statute was unconstitutional under the Fourteenth Amendment because it deprived her of due process of law. *See id.* Judge Menchine avoided the constitutional question but assured the party's right to marry by holding that, even assuming that in general Filipinos would be considered "Malay," Dr. deGuzman was not "Malay" because of his white heritage. *See id.* Again, this decision was only helpful for litigants with some claim to white blood.

There is only one known decision in which a Maryland court addressed the constitutionality of the miscegenation statutes. In 1957, a criminal charge was filed in the Circuit Court for Baltimore City against a white woman who had become pregnant by an African-American man, exposing the mother to a potential sentence of eighteen months to five years in the state penitentiary under one of the state's miscegenation statutes. *See State of Maryland v. Shirley Ann Howard*, The Daily Record, April 22, 1957, at 3; *see also* Md. Ann. Code art. 27 § 416 (1957). This case apparently was the only known prosecution in the City under this statute. *See id.* Chief Judge Emory Hamilton Niles held that the statute was unconstitutional and void, because it violated the principles of equal protection under the Fourteenth Amendment, by subjecting a white woman to punishment for certain conduct without subjecting women of other races to the same punishment for engaging in the same conduct. *See id.*[17] Although this decision was progressive for its time, it still did not challenge the ban on interracial marriages. That constitutional question had to await the *Loving* decision.

It is hard to overstate the sea change wrought by the rescission of miscegenation statutes across the United States. In those thirty states that still had such statutes on the books at the time of the *Perez* decision in 1948, the statutory bans on interracial marriages codified a time-honored social convention.[18] As the Court of Appeals of Maryland reaffirmed in a 1952 decision, interracial marriages were "condemned by the State of Maryland as contrary to its public policy" and considered "absolutely void in Maryland." *Henderson*, 199 Md. at 459, 87 A.2d at 409. Such marriages always had been "denounced by [Maryland's] own positive state policy as

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[17] The ACLU of Maryland supported the mother in an *amicus curiae* brief filed by Francis D. Murnaghan, Jr. *See State of Maryland v. Shirley Ann Howard, supra.*

[18] It is worth noting that *Perez* was decided at a time when the doctrine of "separate but equal," pronounced by the Supreme Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896), still governed race relations in the United States.

affecting the morals or good order of society." *Jackson*, 82 Md. at 30, 33 A. at 319. Adherence to the policy that any interracial marriage would be considered absolutely void in Maryland was significant—although marriages were "voidable" under Maryland law for any number of reasons, there were few defects that would render a marriage absolutely void, meaning that the marriage is without legal effect and subject to collateral attack at any time. *See generally* Strahorn, *supra*.[19]

The repeal of the miscegenation statutes in Maryland thus was a significant social reform. The effects were immediate. Maryland's repeal became effective June 1, 1967; within the first eighteen months, over five hundred interracial couples across Maryland were able to marry lawfully. *See* Norton, *supra*, at 740. The repeal ended hundreds of years of past discrimination against couples like them, and finally opened the way for many thousands of Maryland couples to exercise their right to marry in the coming years.

C. Maryland Law Has Evolved to Guarantee Equal Rights for Women, Including the Legal Rights of Wives and Mothers.

1. Maryland has a constitutional commitment to end past gender discrimination against wives and mothers in the marriage relationship.

Although Maryland laws never have barred women from marrying men based on gender,[20] wives and mothers historically have been subjected to gender discrimination through common law doctrines governing the marriage relationship itself. For many years, Maryland

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[19] Other examples of impediments that would render a marriage absolutely void include bigamy, a spouse under the age of seven, certain blood relationships (e.g., brother-sister), and limited types of fraud or mental incapacity. *See* Strahorn, *supra*, at 225-35, 236-38. By contrast, failure to follow the religious ceremony or marriage license requirements, blood relationships such as uncle and niece, an underage spouse over seven, impotence, mistake, intoxication, certain types of fraud, and duress all could render a marriage voidable but not absolutely void. *See id.* at 220-24, 228-31, 233-38.

[20] Of course, Maryland law continues to bar women from marrying women. *See* Md. Code Ann., Fam. Law § 2-201.

followed the common law regime of coverture, which essentially stripped married women of many of their personal rights and barred wives from having any legal identity independent of their husbands. *See generally* Cott, *supra*, at 11-12; Hartog, *supra*, at 115-22. In sum:

> [Coverture] placed married women under various legal disabilities, e.g., (1) the legal existence of the wife was deemed merged in that of the husband and they were regarded as one person; (2) upon marriage, the wife's personal property became vested in the husband and was subject to the claims of his creditors; and (3) the husband was legally entitled to the wife's services and she was legally incapable of making contracts in her own name.

Condore v. Prince George's County, 289 Md. 516, 521, 425 A.2d 1011, 1013 (1981). Coverture grew out of and reinforced prevailing beliefs about natural differences between men and women, and the idea that God had intended women to hold a subordinate position in the marriage relationship. *See* Cott, *supra*, at 13, 19-20, 61-63. The loss of the wife's property and economic rights supported an idealized division of labor in which the husband was the primary or sole income-earner. *See id.* at 3, 11-12, 49, 54, 61-62.

By the late 1800s, Maryland began to enact legislative changes to the common law regime. The 1867 revision of the Maryland Constitution included a provision protecting the property of the wife from the debts of the husband. Md. Const. art. III, § 43 (1867). This was followed in 1892 and 1898 by the passage of several "Married Women's Acts" in Maryland, which attempted to place a wife "on the same footing as her husband with respect to her property and personal rights." *Sezzin v. Stark*, 187 Md. 241, 258, 49 A.2d 742, 750 (1946). The 1892 Act implemented the 1867 constitutional revision, by providing that property belonging to a woman upon her marriage, or acquired by the woman after her marriage, would be protected from the debts of her husband. *See* 1892 Md. Laws ch. 267. The 1898 Act was much more expansive, guaranteeing married women the same rights as unmarried women to hold and dispose of their property independently; to appoint a trustee for that purpose if desired; and to engage in

business, make contracts, and bring suit on contract, property, or tort claims. *See* 1898 Md. Laws ch. 457.

Maryland actually was behind the times in its enactment of the Married Women's Acts. Other states had enacted married women's property laws beginning in the 1830s, although many of the early laws, like Maryland's 1867 constitutional amendment and 1892 Act, focused on the right to hold property without including provisions for entering into contracts or other economic rights. *See* Cott, *supra*, at 52-53; Graff, *supra*, at 30-31. Beginning in the 1850s and 1860s, a number of these states passed updated statutes that provided fuller economic rights for married women. *See* Cott, *supra*, at 53-54; Graff, *supra*, at 30-31.

Although the Married Women's Acts equalized a number of the rights and duties of spouses in the marriage relationship, the Maryland courts continued to follow various common law doctrines that treated husbands and wives and fathers and mothers differently.[21] A full guarantee of equal rights for women did not come until the adoption of Maryland's Equal Rights Amendment (ERA) in 1972. Article 46 of the Declaration of Rights provides: "Equality of rights under the law shall not be abridged or denied because of sex." With the passage of the ERA, Maryland, finally, formally committed itself to full equality for women, including female spouses in the marriage relationship. The amendment "was intended to, and did, drastically alter traditional views of the validity of sex-based classifications." *Rand v. Rand*, 280 Md. 508, 516,

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[21] A prime example is the survival of the common law doctrine of interspousal immunity, which prevented a wife from suing her husband for damages caused by him. The Court of Appeals initially held that the doctrine had not been altered by the Married Women's Acts, *see Furstenburg v. Furstenburg*, 152 Md. 247, 252-53, 136 A. 534, 536 (1927), a narrow and somewhat inexplicable reading of the Acts. It was only after the passage of the Equal Rights Amendment that the Court of Appeals gradually abrogated the doctrine, through a series of decisions stretching over twenty-five years. *See Lusby v. Lusby*, 283 Md. 334, 357-58, 390 A.2d 77, 88-89 (1978); *Boblitz v. Boblitz*, 296 Md. 242, 273-75, 462 A.2d 506, 521-22 (1983); *Bozman v. Bozman*, 376 Md. 461, 467-68, 830 A.2d 450, 454 (2003).

374 A.2d 900, 905 (1977). The realization of the expansive guarantee of the ERA has come only gradually, however, through judicial decision-making removing remaining vestiges of discrimination that had been part and parcel of the coverture regime. The march toward gender equality in marriage provides perhaps the best historical example of the role played by the Maryland courts in guaranteeing greater inclusion and equality in the marriage relationship.

2. Maryland courts have played a vital role in enforcing the equal rights of women in the marriage relationship.

Ensuring greater equality for women in the marriage relationship inevitably creates conflicts with common law and statutory principles that have been enshrined in the law for generations. Since the passage of the ERA in Maryland in 1972, the Maryland courts have played a vital role in sorting out these conflicts. Many of these decisions have required the courts to impose upon women in a marriage various obligations that historically have been imposed primarily on men. In one of the earliest decisions to consider the effect of the ERA, the Court of Appeals held that the obligation to provide child support must be shared equally by both parents. *See Rand*, 280 Md. at 516, 371 A.2d at 905. The holding invalidated the common law doctrine that the father was primarily responsible for financially supporting his minor children. *See id.* at 510-11, 371 A.2d at 902; *see also Kemp v. Kemp*, 287 Md. 165, 172 n.3, 411 A.2d 1028, 1032 n.3 (1980) (recognizing that after the passage of the ERA, the obligation to provide necessaries for support of minor children applies equally to mothers and fathers). Other decisions have elevated the rights of men in certain areas, for example holding that it would be error for a court to assume that a mother would be a better custodial parent based on her gender. *See Giffin v. Crane*, 351 Md. 133, 154-55, 716 A.2d 1029, 1040 (1998).

In other cases, the courts have invalidated common law doctrines or statutory enactments that treated men and women unequally as spouses. In *Coleman v. State*, 37 Md. App. 322, 377

A.2d 553 (1977), the Court of Special Appeals invalidated a state law that made it a crime for a husband not to support or to desert his wife, but which did not create any reciprocal crime for women who fail to support or desert their spouses. *Id.* at 327-29, 377 A.2d at 556-57. The Court held that the statute violated the ERA, because it had the effect of creating a distinction based solely on sex. *See id.* The Court of Appeals applied the same logic several years later to hold that the common law cause of action for criminal conversation[22] was unconstitutional and no longer valid in Maryland. *See Kline*, 287 Md. at 592-93, 414 A.2d at 933. As the Court recognized, the doctrine of criminal conversation violated the ERA's principle of gender equality, because only a man could sue or be sued under the doctrine. *See id.* In other cases, the Maryland courts similarly have abrogated common law doctrines or statutory provisions that provided unequal rights or imposed unequal duties on men and women in the marriage relationship. *See, e.g.*, *Condore*, 289 Md. at 530, 425 A.2d at 1018 (holding that the ERA abrogated the common law doctrine of necessaries, which required a man but not a woman to provide for necessaries for his spouse).

These are but some of the examples of the cases in which the Maryland courts have intervened to enforce gender equality in marriage. *See also, e.g., Blount v. Boston*, 351 Md. 360, 385 n.5, 718 A.2d 1111, 1124 n.5 (1998) (recognizing that legal presumption that a wife's domicile is the same as that of her husband is invalid under the ERA); *Schroeder v. Broadfoot*, 142 Md. App. 569, 585-86, 790 A.2d 773, 783 (2002) (holding that court determining proper surname for child cannot employ any presumption that adopting the father's surname rather than the mother's is in the child's best interests); *Eckstein v. Eckstein*, 38 Md. App. 506, 511, 379

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[22] This cause of action was akin to a tort action for adultery, allowing a husband to sue another man with whom his wife had sexual relations for damages. *See Kline v. Ansell*, 287 Md. 585, 587-88, 414 A.2d 929, 930 (1980).

A.2d 757, 761 (1978) (recognizing that traditional legal presumption that the husband is the dominant figure in a marriage is no longer valid after the ERA). In each of these decisions, the Maryland courts have acted to fulfill the broad mandate of the ERA and the changed social policies that it represents, even when this requires the abrogation of common law doctrines and statutory provisions. The lengthy history of discrimination and the subordination of women in the marriage relationship has been forced to yield to the dictates of the Maryland Declaration of Rights. This case presents the Maryland courts with the same type of challenge—to fulfill the constitutional rights of the individual plaintiffs, even in the face of a contrary statutory provision and a lengthy history of discriminatory treatment and contrary social convention.

II. The History of Marriage Laws in Maryland Provides a Path to Marriage Equality for Gays and Lesbians.

A. Many States and Nations Are Moving Toward Marriage Equality for Gays and Lesbians.

The laws of most states, including Maryland, continue to deny the rights, benefits, and responsibilities of marriage to same-sex couples. *See, e.g.*, Md. Code Ann., Fam. Law § 2-201. Nonetheless, in recent years several states have moved towards the legalization of same-sex marriage, many compelled by decisions from their state courts declaring existing restrictions unconstitutional. Courts in Hawaii held that a state law limiting marriage to opposite-sex couples violated the equal protection clause of the state constitution, *see Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *18-22 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd* 87 Haw. 34, 950 P.2d 1234 (1997); *Baehr v. Lewin*, 74 Haw. 530, 579-80, 852 P.2d 44, 67 (1993), only to be reversed by the adoption of a state constitutional amendment sanctioning the law. *See* Haw. Const. art. I,

§ 23 (1993 & 2004 Supp.).[23] In 1999, the Supreme Court of Vermont held that excluding same-sex couples from the rights, benefits, and responsibilities of marriage under state law violated the "common benefits" provision in the state constitution. *See Baker v. State*, 170 Vt. 194, 224, 744 A.2d 864, 886 (1999). The Vermont legislature responded by allowing same-sex couples to join together in "civil unions," under which couples "may receive the benefits and protections and be subject to the responsibilities of spouses." Vt. Stat. Ann. tit. 15, § 1201(2) (2004); *see id.* §§ 1201-07. Connecticut also has adopted a statutory scheme for civil unions, which guarantees the "same benefits, protections and responsibilities" currently provided to spouses in marriage. 2005 Conn. Acts. 10, § 14.

Massachusetts has become the first state in the nation to allow same-sex marriages. In *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003), the Massachusetts Supreme Judicial Court held that a state law limiting marriage in Massachusetts to individuals of the opposite sex violated the equal protection and due process provisions of the Massachusetts Constitution. *See id.* at 341-42, 798 N.E.2d at 968. In the wake of the *Goodridge* decision, lower courts in California, New York, Washington, and Oregon likewise have held that laws in their states banning same-sex marriage violate provisions in their state constitutions; the Oregon decision was reversed based on a subsequent constitutional amendment, and the California, New York, and Washington decisions are on appeal. *See In re Coordination Proceeding, Special Title [Rule 1550(c)], Marriage Cases*, No. 4365, 2005 WL 583129, at *11-12 (Cal. Super. Ct. Mar. 14, 2005); *Hernandez v. Robles*, 794 N.Y.S. 2d 579, 608-10 (Sup. Ct.

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[23] Alaska likewise enacted a constitutional amendment overruling a lower court decision which had cast doubt on whether a state policy directive prohibiting same-sex marriages violated the equal protection clause of the state constitution. *See* Alaska Const. art. I, § 25 (2004); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998).

2005); *Li v. State*, No. 0403-03057, 2004 WL 1258167, at *6-7 (Or. Cir. Ct. April 20, 2004), *reversed by Li v. State*, 338 Or. 376, __, 110 P.3d 91, 98 (2005);[24] *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215, at *13-16 (Wash. Super. Ct. Sept. 7, 2004); *Andersen v. King County*, No. 04-2-04964-4, 2004 WL 1738447, at *11 (Wash. Super. Ct. Aug. 4, 2004). Similar legal challenges are pending in Connecticut and New Jersey. *See Kerrigan v. State*, No. CV-044001813 (Conn. Super. Ct. filed Aug. 25, 2004); *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Nov. 5, 2003).

In tandem with these developments, state and local governments and private employers across the United States have extended legal recognition and protection to unmarried same-sex couples. Four states—California, Hawaii, Maine, and New Jersey—have established statewide procedures for same-sex couples to register formally as "partners," entitling the couples to some or all of the same rights, benefits, and responsibilities available to married spouses. *See* Cal. Fam. Code § 297 (1982 & 2005 Supp.); *id.* § 297.5; Haw. Rev. Stat. §§ 572C-1 to -7 (1993 & 2004 Supp.); Me. Rev. Stat. Ann. tit. 22, § 2710 (2004); N.J. Stat. Ann. §§ 26:8A-1 to -12 (1996 & 2005 Supp.). Alaska, Arizona, and New York provide limited legal protections to domestic partners. *See, e.g.*, Alaska Stat. § 47.24.016(a)(2) (2004); Ariz. Rev. Stat. §§ 36-843(A)(6), 36-3231(A)(4) (2003); N.Y. Exec. Law § 354-b(2)(b)(i) (2001 & 2005 Supp.); N.Y. Pub. Health Law § 2805-q (2002 & 2005 Supp.); N.Y. Workers' Comp. Law § 4 (2005). In at least eight other states—Connecticut, Delaware, Iowa, New Mexico, Oregon, Pennsylvania, Rhode Island, and Washington—state employees with domestic partners are entitled to related employment benefits. *See, e.g.*, R.I. Gen. Laws § 36-12-1(3) (1997 & 2004 Supp.); Wash. Admin. Code § 182-12-119(1) (2004). The District of Columbia and a number of local governments have

[24] Effective December 6, 2004, Oregon adopted a constitutional amendment that expressly limits marriage to opposite sex couples. *See Li*, 338 Or. at __, 110 P.3d at 98.

adopted similar policies. *See, e.g.*, D.C. Code Ann. §§ 32-701 to -710 (2001); *see also ABA White Paper*, *supra*, at 29. Finally, thousands of private employers across the nation offer benefits to domestic partners of their employees, and this figure continues to rise. *See ABA White Paper*, *supra*, at 34.

Similar trends are occurring around the world, as other nations move toward eliminating legal restrictions on same-sex marriage. Belgium and the Netherlands allow same-sex couples to marry, *see id.* at 36-38, and Spain is in the process of passing legislation to allow same-sex couples to marry there. *See* Ciaran Giles, *Spain set to become third country in Europe to ok same-sex marriage*, Chicago Sun Times, April 22, 2005, at 39. Appellate courts in Canada have held that excluding same-sex couples from the rights, benefits, and responsibilities of marriage violates the equality of rights provision of Canada's Charter of Rights and Freedoms. *See, e.g.*, *Halpern v. Attorney General*, (2003) 65 O.R. (4th) 161, slip op. at 36, 38-39.[25] A recent appellate court decision in South Africa likewise held that, pursuant to the South African Constitution's equality guarantee expressly prohibiting discrimination based on sexual orientation, the common law definition of marriage must include same-sex couples. *See Fourie v. Minister of Home Affairs*, No. 232/2003 (SA Nov. 30, 2004).[26] Denmark, Norway, Sweden, Hungary, Iceland, France, Germany, and Finland all provide for formal legal recognition of unmarried couples, including same-sex couples, and extend most of the legal rights, benefits, and responsibilities of marriage to these couples. *See ABA White Paper*, *supra*, at 36-38. Eight other nations have laws providing limited legal recognition and protection to unmarried same-sex

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[25] Available at http://www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.pdf. In December 2004, the Supreme Court of Canada issued an advisory opinion approving the constitutionality of a federal proposal to extend civil marriage to same-sex couples. *See Reference re Same-sex Marriage*, 3 S.C.R. 698 (Can. 2004), *available at* http://www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol3/index.html.

[26] *Available at* http://wwwserver.law.wits.ac.za/sca/files/2322003/2322003.pdf.

couples. *See id.* at 36-38.[27] The growing trend around the globe, including in the United States, is toward marriage equality for same-sex couples.

B. Guaranteeing Equal Rights For Gays and Lesbians Is the Next Step In The Continuing Evolution of Marriage Laws in Maryland.

The history of marriage laws in Maryland is a history of gradual, progressive changes that have guaranteed greater inclusion and equality in the marriage relationship for all couples. The Maryland courts have played a powerful role in shaping this history. The courts' intervention itself has been shaped by different forces—at times the equities of the issues and at times the constitutional rights of the parties. In the case of the religious ceremony requirement, the Court of Appeals may have recognized that strict enforcement of the law would have led to inequitable results. *Cf. Feehley*, 129 Md. at 570, 99 A. at 665 (rejecting strict enforcement of technical statutory requirements for marriage, which would have the "radical [effect] of rendering void and immoral a matrimonial union otherwise validly contracted and solemnized"). The courts' decisions in the areas of racial and general equality also have been based on equitable considerations, but ultimately the results were compelled by the constitutional rights of the individuals involved—the right to equal treatment under the law and the fundamental right to marry. Recognition of the right of gays and lesbians to marry likewise is compelled by these same constitutional guarantees.

Pushing against these gradual evolutions to the marriage laws have been the naysayers, always claiming that each progressive change would have dire social consequences. *See generally* Graff, *supra*, at 30-33, 107-09, 157-58, 220-22, 251-52. Supporters of Maryland's religious ceremony requirement warned at the 1864 constitutional convention that repealing the

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[27] These countries are Argentina, Brazil, Croatia, the Czech Republic, New Zealand, Spain, Switzerland, and the United Kingdom. *ABA White Paper*, *supra*, at 36-38.

law would only serve minority interests and would result in "general moral ruin and desolation." *See* 102 *Archives of Maryland*, *supra*, at 979, 982-83, 986-87. Supporters of Maryland's miscegenation statutes warned during a 1966 debate in the General Assembly that lifting the laws would "make this country a brown race." Wallenstein, *supra*, at 208. Similar arguments of moral and social ruin are raised today in response to the demands of gays and lesbians for their constitutional rights to marry.

History belies the naysayers' warnings. Even as the legal definition of marriage has changed in this continuing march towards greater equality and inclusiveness, marriage has remained an enduring social relationship. In retrospect, the changes to marriage laws in Maryland appear fairly dramatic—ending religious exclusion and harsh prohibitions on interracial marriages that had endured for hundreds of years, and guaranteeing an equal role for women in the marriage relationship after centuries of inequality. In actuality, each progressive change was the capstone of an evolutionary process of greater acceptance, inclusion, and equality for an under-represented and disfavored group. Today Maryland is in the midst of a similar evolution toward greater equality for gays and lesbians in all aspects of their lives, from the workplace to child-rearing to other intimate personal decisions.

Guaranteeing the right of gays and lesbians to marry is consistent with Maryland's strong commitment to the adoption of laws and policies that guarantee equal treatment for gays and lesbians. Maryland statutes already prohibit discrimination based on sexual orientation in public accommodations, employment, housing, and real estate services. Md. Ann. Code art. 49B, §§ 5, 8, 16, 22, 23 (2003).[28] Maryland is one of only sixteen states nationwide that have adopted

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[28] The General Assembly added these statutory protections in 2001. *See* 2001 Md. Laws ch. 340. Governor Parris Glendening, by executive order, prohibited sexual orientation

statewide bans on discrimination against gays and lesbians in one or more of these areas. *See, e.g.*, Human Rights Campaign, *Statewide Anti-Discrimination Laws & Policies* (April 2005);[29] Michael C. Falk, Note, *Lost in the Language: The Conflict Between the Congressional Purpose and Statutory Language of Federal Employment Discrimination Legislation* 35 Rutgers L.J. 1179, 1180 n.8 (2004).[30] In addition, Maryland regulations prohibit sexual orientation discrimination in a variety of state-regulated programs. *See e.g.,* Md. Regs. Code tit. 5, § 04.11.18A (Special Housing Opportunities Program); *id.* § 05.02.14A (Multi-Family Housing Revenue Bond Financing Program); *id.* § 17.01.10A (Community Legacy Program); *id.* tit. 10, § 18.06.03A(6) (Aids Drug Assistance Program); *id.* tit. 11, § 07.06.13 (Department of Transportation Public-Private Partnership Program); *id.* tit. 14, § 29.04.09C(1) (Heritage Areas Authority Loan Program). These statutes and regulations, although not directly implicated in the question of same-sex marriage, reflect a public policy commitment in Maryland to full legal and social equality for gays and lesbians.

Significantly, Maryland law also recognizes and validates the critical role that gays and lesbians play as parents. The Court of Appeals has held that a biological parent's visitation rights cannot be restricted based on the presence of a same-sex partner in the parent's home, unless there is a specific showing of harm to the child's health or welfare resulting from contact with the partner. *See Boswell v. Boswell*, 352 Md. 204, 236-38, 721 A.2d 662, 678 (1998); *see*

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discrimination in state employment in 1995. *See* Md. Regs. Code tit. 1, § 01.1995.19A(11) (2004).

[29] *Available at* http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14821.

[30] The fifteen other states are California, Connecticut, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Wisconsin. Human Rights Campaign, *supra*; Falk, *supra*, at 1180 n.8 (citing statutory provisions). The District of Columbia also prohibits discrimination based on sexual orientation. *Id.*

also North v. North, 102 Md. App. 1, 15-17, 648 A.2d 1025, 1032-33 (1994). Maryland law also protects the rights of gay and lesbian non-biological parents, whose familial ties to their children often grow out of a committed relationship with the child's biological or adoptive parent. Trial courts in Maryland have recognized "second-parent adoptions," in which a non-biological parent in a same-sex couple legally adopts the couple's child. *See ABA White Paper*, *supra*, at 14 & n.78.[31] The Court of Special Appeals has recognized a same-sex partner who is neither a biological nor adoptive parent of the same-sex couple's child as a "de facto parent," who has standing to seek custody or visitation. *See S.F. v. M.D.*, 132 Md. App. 99, 110-12, 751 A.2d 9, 15 (2000); *see also Gestl v. Frederick*, 133 Md. App. 216, 237, 241, 244-45, 754 A.2d 1087, 1098, 1100-01, 1102 (2000).[32] Maryland regulations also bar discrimination in private adoption services based on an adoptive parent's sexual orientation. Md. Regs. Code tit. 7, §§ 05.03.09A(2), 05.03.15C(2).

Same-sex couples in Maryland thus face a cruel dilemma—while their role as parents has been legally validated, they cannot complete the family circle by legally wedding. This denial of the legal rights, benefits, and responsibilities of marriage affects not only the two partners, but also their children, who are denied various statutory protections that apply to the children of opposite-sex couples who legally wed. *See, e.g.*, Danya K. Shah, U.S. Gen. Accounting Office,

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[31] According to one recent survey, second-parent adoptions are recognized by statute or appellate court decisions in nine states and the District of Columbia, and have been allowed by lower courts in at least fifteen other states, including Maryland. *See ABA White Paper*, *supra*, at 14.

[32] In *S.F.* the court held that a de facto parent is not required to show unfitness of the biological parent or exceptional circumstances in order to be entitled to visitation, even though other third parties might have to make such a showing. *See* 132 Md. App. at 111-12, 751 A.2d at 15. The court thus placed de facto parents in "a somewhat privileged subcategory of 'third party.'" Nancy D. Polikoff, *The Impact of* Troxel v. Granville *on Lesbian and Gay Parents*, 32 Rutgers L.J. 825, 841 (2001).

Defense of Marriage Act: Update to Prior Report (Jan. 23, 2004) (identifying 1,138 federal laws in which marital status is a factor in determining benefits, rights, or privileges).

Maryland recently attempted to join those states that have established statewide procedures for couples to register as domestic partners, entitling them to certain legal rights and protections similar to those enjoyed by married spouses. The Medical Decision-making Act of 2005 passed with strong support in the House of Delegates (32-15) and the Senate (82-46), but was vetoed by Governor Robert Ehrlich on May 20, 2005. The Act would allow two adults of either the same or opposite sexes to register with the Secretary of the Department of Health and Mental Hygiene as "life partners." S.B. 796, 2005 Leg., 419th Sess. (Md. 2005). Registered life partners would be placed on the same footing as spouses under various Maryland statutes which grant authority to make decisions about an individual's medical care and, in case of death, organ donation and burial. *Id.* A number of county and city governments in Maryland already had adopted measures recognizing domestic partnerships, including Baltimore City, City of Mount Ranier, College Park, Greenbelt, Howard County, Hyattsville, Montgomery County, Rockville, and Takoma Park. *See* Equality Maryland, "The Issues: Domestic Partner Benefits."[33] Despite Governor Ehrlich's veto of the Act, the successful passage of the law by strong majorities in both the Senate and the House of Delegates reflects the sentiments of a majority of Marylanders in support of ensuring equal rights for gays and lesbians.

Enforcing the constitutional rights of same-sex couples in this case also would continue the vital role played by the Maryland courts in ensuring that gays and lesbians receive equal treatment under state law. In *Williams v. Glendening*, No. 98036031, 1998 WL 965992 (Md.

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[33] *At* http://www.equalitymaryland.org/domesticpartner.htm (last visited May 30, 2005). In *Tyma v. Montgomery County*, 369 Md. 497, 801 A.2d 148 (2002), the Court of Appeals confirmed that home rule counties have the authority to adopt ordinances extending employment benefits to the domestic partners of county employees. *See id.* at 518, 801 A.2d at 160.

Cir. Ct. 1998), the Circuit Court for Baltimore City extended a prior ruling protecting private, consensual, non-commercial heterosexual activity between adults from criminal prosecution to similar homosexual activity, noting "[i]t cannot be doubted. . .that there would be an equal protection violation if acts, considered not criminal when committed by a heterosexual couple, could be prosecuted when practiced by a homosexual couple." *Id.* at *7.[34] In *Boswell*, the Court of Appeals emphasized that the standard for restricting a parent's visitation rights based on the presence of a non-marital partner must be the same for homosexual and heterosexual relationships. *See* 352 Md. at 237-38, 721 A.2d at 678.[35] In *Gestl*, the Court of Special Appeals held that a custody case involving a non-biological parent from a former same-sex relationship should remain in Maryland rather than be transferred to Tennessee, because the parent was entitled to greater legal protections under Maryland law. *See* 133 Md. App. at 241, 244-45, 754 A.2d at 1100-01, 1102-03. In each of these cases, Maryland courts acted to ensure that gay and lesbian couples and parents would receive the same legal protections and recognition enjoyed by heterosexuals. This case simply asks the courts to extend this protection of equal rights to the sphere of marriage.

Finally, eliminating the ban on same-sex marriage addresses a demographic reality–the small but significant number of committed same-sex couples already living, working, and raising

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[34] In *Schochet v. State*, 320 Md. 714, 580 A.2d 176 (1990), the Court of Appeals had construed a criminal statute narrowly in order to avoid the serious constitutional questions that would arise under the state constitutional right to privacy if the law reached private, consensual, non-commercial *heterosexual* activity between adults. *See id.* at 725-30, 580 A.2d at 181-84. Since the *Willliams* decision, the Supreme Court has held that state laws criminalizing private, consensual homosexual activity between adults violate the individual right to liberty under the Fourteenth Amendment due process clause. *See Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003), *overruling Bowers v. Hardwick*, 478 U.S. 186 (1986).

[35] The *Boswell* court noted that restrictions on visitation based on the trial court's "personal bias or stereotypical beliefs" could be clearly erroneous and subject to reversal. 352 Md. at 237, 721 A.2d at 678.

their children in communities across Maryland, and their desire for legal recognition and protection. According to the 2000 Census estimates, there are at least 11,000 same-sex couples living together in Maryland who identify themselves as "unmarried partners." *See* Tavia Simmons & Martin O'Connell, U.S. Census Bureau, *Married Couple and Unmarried-Partner Households: 2000* 4 (Feb. 2003).[36] About one quarter of the male partners in Maryland and one third of the female partners are raising children under the age of eighteen years. *See id.* at 9. Unmarried same-sex partners living together can be found in every county in Maryland. *See* U.S. Census Bureau, *Census 2000 Summary File 1 (SF-1) 100-Percent Data*, "Maryland: All Counties: PCT14: Unmarried-Partner Households By Sex of Partners."[37] As long as these same-sex couples are barred from accessing the legal rights, benefits, and responsibilities accorded to married couples, they will be forced to rely on novel legal strategies such as domestic partnership agreements or adoptions to ensure legal recognition and protection of their relationships. *See generally* E. Todd Bennett & James D. Milko, *Gay and Lesbian Rights in Family Law: A Demographic Inevitability* 35 Md. Bar J. 24 (2002). These legal options are simply inadequate to cover the thousands of legal rights, privileges, and benefits that married couples are entitled to with one fell swoop. *See, e.g.*, Shah, *supra*. Equally important, denying the right to marry robs same-sex couples of a fundamental, personal choice guaranteed to all other couples: to make a private commitment that will be accorded public recognition and respect as a matter of law.

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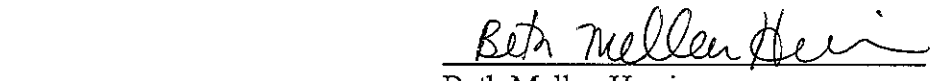
[36] *Available at* http://www.census.gov/prod/2003pubs/censr-5.pdf. Other survey results indicate that the Census figures understate the actual number of unmarried same-sex partners. *See generally, e.g.*, M.V. Lee Badgett & Marc A. Rogers, Institute for Gay & Lesbian Strategic Studies, *Left Out of the Count: Missing Same-sex Couples in Census 2000* (2003) (estimating that the Census 2000 figures undercounted same-sex couples by 16 to 19 percent), *available at* http://www.iglss.org/media/files/c2k_leftout.pdf.

[37] *At* http://factfinder.census.gov.

CONCLUSION

The relief requested by the Plaintiffs in the instant case, which would allow same-sex couples to marry, simply represents the next logical step in the historical evolution of marriage laws in Maryland towards greater inclusion and equality for all. Guaranteeing marriage equality for same-sex couples also is consistent with Maryland's strong commitment to ensuring equal treatment for gays and lesbians. This Court can and should resolve the questions presented in this case by holding that, pursuant to the Maryland Declaration of Rights, same-sex couples cannot be excluded from the legal rights, benefits, and responsibilities of marriage under Maryland law.

Respectfully submitted,



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