**IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND**

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

**Defendants.** *

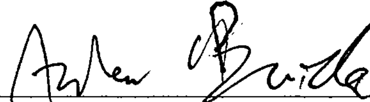
* * * * * * * * * * * *

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 2-501, Plaintiffs respectfully move the Court for entry of summary judgment in their favor and against Defendants on all counts. The grounds for this motion are set forth in the memorandum and exhibits that accompany and are filed in support of this motion. For the reasons stated in the memorandum, Plaintiffs' motion for summary judgment should be granted. A proposed order is attached.

WHEREFORE, Plaintiffs respectfully request that the Court enter an order granting their motion for summary of judgment.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on this 14th day of June, 2005, copies of the foregoing motion and accompanying memorandum, exhibits, and proposed order were mailed via first class mail, postage prepaid, to:

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**IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND**

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| **GITANJALI DEANE & LISA POLYAK;** | * | |
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| **MIKKOLE MOZELLE & PHELICIA KEBREAU,** | | |
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| **Plaintiffs,** | | |
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| **v.** | | **Case No. 24-C-04-005390** |
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| **MICHAEL BAKER, in his official capacity as** | | |
| **Dorchester County Circuit Court Clerk,** | * | |
| | | |
| **Defendants.** | * | |

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

**ORDER**

Upon consideration of Plaintiffs' Motion for Summary Judgment, Defendants' response thereto, and the entire record in this matter, it is this _____ day of ____________________, 2005, ORDERED that

1. Plaintiffs' Motion for Summary Judgment is GRANTED; and

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

________________________________________

The Honorable M. Brooke Murdock
Judge, Circuit Court for Baltimore City, Maryland

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

GITANJALI DEANE & LISA POLYAK;
ALVIN WILLIAMS & NIGEL SIMON;
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* * * * * * * * * * * *

# PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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## INTRODUCTION

Plaintiffs include nine same-sex couples who have formed committed relationships and loving households. They seek for themselves and their children the protections unique to marriage that would protect and strengthen their families. Such protections are not only tangible but also intangible:

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

Goodridge v. Department of Public Health, 798 N.E.2d 941, 954-55 (Mass. 2003) (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)). Md. Code Ann., Fam. Law § 2-201, which provides that "[o]nly a marriage between a man and a woman is valid in this State," excludes them from marriage simply because they are same-sex couples. The Maryland Constitution does not tolerate such discrimination. The exclusion of same-sex couples from marriage violates the most basic constitutional guarantees of equality and liberty for all Marylanders.[1]

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[1] Plaintiffs seek a ruling solely on independent state grounds; they cite federal constitutional case law only as persuasive authority. In addition, Plaintiffs complain only of their exclusion from civil marriage, which is distinct from religious marriage; they do not – and indeed may not – complain of any exclusion from religious marriage. See Md. Const. Decl. Rts. Art. 36 (guaranteeing freedom of religion).

## STATEMENT OF FACTS

### I. Plaintiffs are lesbian and gay individuals who have formed loving and committed relationships with same-sex partners

Plaintiffs, each of whom identifies as lesbian or gay, include nine same-sex couples and one surviving same-sex partner who has begun to date another person of the same sex. Blackburn Decl. ¶ 3 (Ex. 7); Deane Decl. ¶ 3 (Ex. 1); Kelber-Kaye Decl. ¶ 3 (Ex. 4); Williams Decl. ¶ 3 (Ex. 2); Palmer Decl. ¶ 3 (Ex. 8); Wojahn Decl. ¶ 3 (Ex. 9); Mozelle Decl. ¶ 3 (Ex. 10); Myers Decl. ¶ 3 (Ex. 5); Foskey Decl. ¶ 3 (Ex. 3); Lestitian Decl. ¶¶ 3, 7, 9, 19 (Ex. 6).

Each partner loves the other, and wishes to be married to the other. Blackburn Decl. ¶ 4; Deane Decl. ¶ 4; Kelber-Kaye Decl. ¶ 4; Williams Decl. ¶ 4; Palmer Decl. ¶ 4; Wojahn Decl. ¶ 4; Mozelle Decl. ¶ 4; Myers Decl. ¶ 4; Foskey Decl. ¶ 4. And each couple has formed a relationship of significant duration that is otherwise suffused with indicia of commitment, as illustrated below.

Charles Blackburn and Glen Dehn met in 1978 and recognized almost immediately the potential for a meaningful relationship in light of their intellectual and cultural compatibility, complementary personalities, similar tastes, and shared interests. Blackburn Decl. ¶ 11. Soon thereafter, Charles moved in with Glen, and they created a home together. Id. Their love for each other has only deepened after almost 27 years of companionship and shared experiences. Id. They intend to spend the rest of their lives together. Id.

Gita Deane and Lisa Polyak met as college classmates in 1979 and committed to a lifelong relationship in 1981. Deane Decl. ¶ 7.

Jodi Kelber-Kaye and Stacey Kargman-Kaye met in an airport in 1993. Kelber-Kaye Decl. ¶ 7. They discovered many common bonds and, soon thereafter, committed to a lifelong relationship. Id.

Alvin Williams and Nigel Simon met in a discussion group for African-American gay men in 1997. Williams Decl. ¶ 8. They discovered many common bonds and, soon thereafter, Nigel moved in with Alvin. Id. They have explored their shared religious faith together, and that faith is a vital part of their family life. Id. ¶ 9. In 2000, they celebrated their love for each other with a holy union ceremony in the presence of 300 family members and friends. Id. They have long felt as married as anyone who shares with his or her spouse in the joys and responsibilities of raising a child and creating a home. Id. ¶ 12.

Steve Palmer and Ryan Killough met in the workplace in 1995. Palmer Decl. ¶ 7. At that time, Steve was the manager of an ambulance company, and Ryan was a part-time paramedic at one of its bases. Id. Each did not know that the other was gay. Id. Living in small Eastern Shore communities and working with volunteer fire departments, each safeguarded his sexual orientation from public disclosure. Id. In 1998, they spotted each other at a gay nightclub and began dating that very evening. Id. Soon thereafter, they fell in love and moved in together. Id. They intend to spend the rest of their lives together. Id. Together, they designed and constructed their house. Id. ¶ 9. And, together, they purchased their trucks and their boat, on which they enjoy the Chesapeake Bay. Id. Their lives, financial and otherwise, are completely entwined. Id.

Patrick Wojahn and Dave Kolesar met in a coffee shop in January of 2001 and, soon thereafter, began dating. Wojahn Decl. ¶ 7. On the second anniversary of their

meeting, Patrick proposed a lifelong commitment to Dave, which Dave accepted. Id. They agreed to declare their love for and devotion to each other before their families, friends, community, and God. Id. On June 25, 2005, they will celebrate their love for each other with a religious ceremony. Id. ¶ 8.

Mikki Mozelle and Lisa Kebreau met through a mutual friend in 1999 and struck up a close friendship. Mozelle Decl. ¶ 7. On Valentine's Day of 2002, Mikki informed Lisa that she was prepared to commit to a lifelong relationship with Lisa and to form a family with Lisa and her son. Id. Soon thereafter, Mikki moved in with them. Id. In August of 2003, Mikki and Lisa celebrated their love for each other with a commitment ceremony. Id.

Donna Myers and Maria Barquero met playing roller hockey in 1999 and struck up a close friendship. Myers Decl. ¶ 9. In June of 2002, they began dating and, soon thereafter, moved in together. Id. They intend to spend the rest of their lives together. Id.

Takia Foskey and Jo Rabb met in March of 2003 while Takia and her children were boarding the bus that Jo was driving. Foskey Decl. ¶ 7. Takia was immediately taken with the kindness that Jo demonstrated toward her children. Id. Takia and Jo began dating and, soon thereafter, moved in together. Id. On June 26, 2004, they celebrated their love for each other with a commitment ceremony. Id.

John Lestitian is the surviving same-sex partner of a loving and committed thirteen-year relationship. Lestitian Decl. ¶¶ 7, 9. He has begun to date another person of the same sex. Id. ¶ 19.

## II. Plaintiffs include same-sex couples who are raising children

Plaintiffs include five same-sex couples who are raising children, some of whom intend to raise additional children, and a sixth same-sex couple who intends to raise children. Deane Decl. ¶¶ 12-13; Kelber-Kaye Decl. ¶¶ 8-9, 12, 15; Mozelle Decl. ¶¶ 6, 8-9, 11-12; Williams Decl. ¶ 10; Foskey Decl. ¶¶ 6, 15; Myers Decl. ¶ 10.

Three couples are raising children who were brought into their families through donor insemination. Lisa Polyak and Gita Deane are raising two daughters, both of whom were brought into their family through donor insemination. Lisa gave birth to their older daughter in 1996, and Gita gave birth to their younger daughter in 1999. Deane Decl. ¶ 12. Jodi Kelber-Kaye and Stacey Kargman-Kaye are raising two sons, both of whom were brought into their family through donor insemination. Jodi gave birth to their older son in 1998 and their younger son in May of 2003. Kelber-Kaye Decl. ¶¶ 8, 12. Mikki Mozelle and Lisa Kebreau are raising two sons, one of whom was brought into their family through donor insemination. Lisa gave birth to their younger son in September of 2004. Mozelle Decl. ¶ 8. Mikki and Lisa are expecting to bring an additional child into their family through donor insemination. Lisa is expecting to give birth to another child in December of 2005. Mozelle Decl. ¶ 11. A fourth couple, Takia Foskey and Jo Rabb, would like to bring a child into their family through donor insemination. Foskey Decl. ¶ 15.

A fifth couple is raising a child who was brought into their family through adoption. Alvin Williams and Nigel Simon are raising a son who was brought into their family through adoption. Nigel adopted their son, age 7, in September of 2002. Williams Decl. ¶ 10. Alvin and Nigel are expecting to bring additional children into their

family through adoption. Nigel is expecting to adopt a daughter, age 9, and another son, age 7, a sibling pair. Id.

Two of these five couples are raising children from previous relationships. Mikki Mozelle and Lisa Kebreau are raising Lisa's son from a previous relationship, age 15, who considers both Lisa and Mikki to be his parents. Mozelle Decl. ¶ 6. Takia Foskey and Jo Rabb are raising Takia's daughter and son from previous relationships, ages 12 and 7, respectively, both of whom consider both Takia and Jo to be their parents. Foskey Decl. ¶ 6.

A sixth couple, Donna Myers and Maria Barquero, would like to bring a child into their family. Myers Decl. ¶ 10.

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

Plaintiffs may not marry solely because they seek to marry same-sex partners. Each partner is unrelated to the other by blood or marriage. Deane Decl. ¶ 4; Williams Decl. ¶ 4; Foskey Decl. ¶ 4; Kelber-Kaye Decl. ¶ 4; Myers Decl. ¶ 4; Blackburn Decl. ¶ 4; Palmer Decl. ¶ 4; Wojahn Decl. ¶ 4; Mozelle Decl. ¶ 4. Neither partner is married to another person. Id.; see also Lestitian Decl. ¶ 4. Each partner is over the age of 17. Id.; see also Lestitian Decl. ¶ 4. Each partner has the capacity to consent to marry. Id.; see also Lestitian Decl. ¶ 4. Each partner consents to marry the other. Id.

Each couple properly tendered to the proper circuit court clerk's office all of the paperwork and fees necessary to obtain a marriage license. Deane Decl. ¶¶ 2, 5; Williams Decl. ¶¶ 2, 5; Foskey Decl. ¶¶ 2, 5; Kelber-Kaye Decl. ¶¶ 2, 5; Myers Decl. ¶¶ 2, 5; Blackburn Decl. ¶¶ 2, 5; Palmer Decl. ¶¶ 2, 5; Wojahn Decl. ¶¶ 2, 5; Mozelle Decl.

¶¶ 2, 5. In each instance, the circuit court clerk's office refused to issue a marriage license solely because the couple is a same-sex couple. Id.

## IV. Because Plaintiffs may not marry, they and their children suffer significant injury

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

Because Plaintiffs may not marry, they and their children are denied hundreds of important protections that are afforded to married couples and their children by state law, whether statutory, regulatory, common law, or otherwise.[2] The following subsections are merely illustrative of such harm.

#### 1. Plaintiffs and their children are denied important protections associated with times of death

The safeguards and protections available to surviving spouses in times of death are not available to Plaintiffs. For example, Plaintiffs may not avail themselves of the spousal priority in intestate succession, Md. Code Ann., Est. & Trusts § 3-102, the spousal priority in authority to dispose of a body, Md. Code Ann., Health Occ. § 7-410(c)(1), and the spousal exemption from inheritance tax, Md. Code Ann., Tax-Gen. § 7-203(b)(2)(iii), as illustrated below.

Before his death in July of 2003, John Lestitian's deceased partner sought to leave John his estate and to authorize John to dispose of his body. Lestitian Decl. ¶¶ 9-11. After his death, however, his will was deemed invalid on account of a technical deficiency. Id. ¶ 10. As a result, John had to give up his own house. Id. ¶ 13. Moreover, he had to negotiate with his deceased partner's surviving family over the

[2] A partial list of such protections is set forth in the Appendix, infra.

disposition of the body. Id. ¶ 11. In addition, he had to pay state taxes on half of the balances of the joint bank accounts that he had shared with his deceased partner. Id. ¶ 15.

Such disparities – whether those involving the authority to dispose of a body or those involving the payment of state taxes on an inheritance – are of particular and increasing concern to Charles Blackburn, age 72, and Glen Dehn, age 67. Blackburn Decl. ¶¶ 6-7, 12.

Because Plaintiffs do not enjoy the safeguards and protections that married couples enjoy, they have had to incur the expense of attempting to protect their rights through wills and other legal instruments. Wojahn Decl. ¶ 11; Williams Decl. ¶ 11; Blackburn Decl. ¶ 12.

#### 2. Plaintiffs and their children are denied important protections associated with times of illness

The safeguards and protections available to spouses in times of illness are also not available to Plaintiffs. For example, Plaintiffs may not avail themselves of the spousal priority in authority to make health care decisions, Md. Code Ann., Health-Gen. § 5-605(a)(2)(ii), and the spousal entitlement to share a room in a health care facility, Md. Code Ann. Health-Gen. § 19-344(h), as illustrated below.

In September of 2003, Jo Rabb was rushed to a local hospital for emergency gallbladder surgery. Foskey Decl. ¶ 14. Takia Foskey sought to participate in discussions with hospital staff about Jo's medical care, and simply to be by Jo's side. Id. Hospital staff, however, instructed Takia to sit in the waiting room because, according to hospital staff, she is not a member of Jo's family. Id. Hospital staff refused to inform Takia of the medical procedures that they were performing on Jo, or even to tell Takia whether Jo would be okay. Id. This caused great anxiety for Takia, especially because

she knew that Jo was heavily medicated and therefore unable to make informed decisions for herself. Id.

In January of 2001, Stacey Kargman-Kaye was unexpectedly admitted to a local hospital for ten days. Kelber-Kaye Decl. ¶ 10. As Stacey was returning from surgery, a nurse pushed Jodi Kelber-Kaye out of the room despite her repeated protests that Stacey is her partner and that Stacey would want her to be there to comfort Stacey in her time of need. Id.

In May of 2003, Jodi gave birth prematurely at a state hospital. Id. ¶ 12. While Jodi was in post-delivery recovery, the child was whisked away to a special nursery for premature infants. Id. ¶ 13. Stacey, a naturopathic doctor, followed to advocate on his behalf. Id. A nurse attempted to exclude her from discussions about his care, repeatedly and hostilely asking, "Just who are you?" and failing to understand that she is his parent. Id. The nurse stood down only when Jodi was compelled to join them in order to confirm what Stacey had said. Id.

In May of 2003, Ryan Killough was admitted to the emergency room of a local hospital where an electrocardiogram revealed an abnormality. Palmer Decl. ¶ 11. Steve Palmer sought to see Ryan so that he could comfort Ryan in his time of need. Id. The emergency room physician, however, told Steve that he could not see Ryan because Steve is not "family." Id. This caused great anxiety for Steve. Id. Ultimately, a nurse whom he happened to know interceded on his behalf. Id.

Such disparities – whether those involving the entitlement to share a room with a partner in a nursing home or those involving the authority to make health care decisions

on behalf of a partner – are of particular and increasing concern to Charles Blackburn and Glen Dehn. Blackburn Decl. ¶ 12.

Because Plaintiffs do not enjoy the safeguards and protections that married couples enjoy, they have had to incur the expense of attempting to protect their rights through health care proxies and other legal instruments. Kelber-Kaye Decl. ¶ 11; Williams Decl. ¶ 11; Blackburn Decl. ¶ 12.

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

The protections and benefits available to spouses through public employment are also not available to Plaintiffs. For example, Plaintiffs may not avail themselves of spousal eligibility for death benefits, Md. Code Ann., State Pers. & Pens. § 10-404(d)(2), spousal eligibility for health benefits, Md. Regs. Code tit. 17, § 04.13.03(11)(a), and spousal eligibility for donor insemination benefits, 2005-2006 Maryland State Employees/Retirees Health Benefits, at 18 (www.dbm.maryland.gov/dbm_publishing/ public_content/dbm_search/employee_services/health_benefits/2006_health/ active_retiree_wrkbk_2006.pdf), as illustrated below.

Jo Rabb is a Maryland Transit Administration bus driver. Foskey Decl. ¶ 6. For a period of ten months, Takia Foskey and her children did not have health insurance, which caused great anxiety for Takia and Jo. Id. ¶ 8. As a same-sex partner, Takia is ineligible to enroll in Jo's state employer-sponsored health plan. Id. ¶ 10. Because Takia and Jo are not married, Takia's children are also ineligible to enroll in Jo's state employer-sponsored health plan. Id. Until July of 2004, Takia and her children were ineligible to enroll in Takia's employer-sponsored health plan because, until then, Takia worked only part-time. Id. ¶ 11. Until September of 2003, Takia and her children qualified for

Medicaid coverage. Id. ¶ 9. Thereafter, however, they no longer qualified for Medicaid coverage because, thereafter, Takia earned too much. Id. At the same time, Takia and Jo earned too little to afford private health insurance for Takia and her children. Id. Takia suffers from adenomyosis, a medical condition involving the reproductive system and, in August of 2003, underwent surgery related to that condition. Id. ¶ 12. Medicaid covered the cost of the surgery itself, but, soon after the surgery, she lost her Medicaid coverage. Id. While Takia was uninsured, Takia and Jo incurred out-of-pocket post-surgical medical expenses, and Takia had to forego follow-up medical care. Id. Takia's son suffers from asthma. Id. ¶ 13. While he was uninsured, Takia and Jo incurred out-of-pocket medical expenses related to his medical condition. Id. Although Takia and her children are now enrolled in Takia's employer-sponsored health plan, their health benefits are costlier than and inferior to the health benefits that they would enjoy if they were enrolled in Jo's state employer-sponsored health plan. Id. ¶ 11.

Ryan Killough is the public relations coordinator and a paramedic for the City of Cambridge's Emergency Medical Services. Palmer Decl. ¶ 6. In the summer of 2000, Steve Palmer enrolled in nursing school. Id. ¶ 10. In doing so, he left full-time employment and, as a result, lost his health benefits. Id. As a same-sex partner, Steve is ineligible to enroll in Ryan's public employer-sponsored health plan. Id. Throughout the course of Steve's studies, Steve and Ryan had to pay for expensive private health insurance to ensure that Steve's health needs were covered. Id.

Jodi Kelber-Kaye is a professor at the University of Maryland at Baltimore County. Kelber-Kaye Decl. ¶ 6. Stacey Kargman-Kaye is self-employed. Id. ¶ 16. As a same-sex partner, Stacey is ineligible to enroll in Jodi's state employer-sponsored health

plan. Id. Thus, Jodi's state employer-sponsored health plan is not an option for Jodi and Stacey in ensuring that Stacey's health needs are covered. Id.

Takia Foskey and Jo Rabb would like to bring a child into their family through donor insemination but cannot afford to do so on their own. Foskey Decl. ¶ 15. If they were married, Jo's state employer-sponsored health plan would help cover such expenses. Id.

Takia and Jo and their children live with the possibility of a vehicular accident while Jo is performing her duties as a bus driver. Id. ¶ 16. If Jo were killed in such an accident, the death benefits that are available to stabilize the surviving families of Maryland Transit Administration employees who are killed on the job would not be available to Takia and her children because Takia and Jo are not married. Id.

As a same-sex partner, Mikki Mozelle does not enjoy automatic recognition by Lisa Kebreau's public employer-sponsored pension plan. Mozelle Decl. ¶ 14.

#### 4. Plaintiffs and their children are denied important protections associated with the parent-child relationship

Maryland courts routinely grant second-parent adoptions to same-sex partners. Ayers Decl. ¶ 9 (Ex. 11); Deane Decl. ¶ 13; Williams Decl. ¶ 10; Kelber-Kaye Decl. ¶¶ 9, 15; Mozelle Decl. ¶ 9. However, where one partner gives birth to a child, the other partner may not secure a second-parent adoption until after a period of delay. Ayers Decl. ¶ 12; Mozelle Decl. ¶¶ 10, 12. Similarly, where one partner adopts a child, the other partner may not secure a second-parent adoption until after a period of delay. Ayers Decl. ¶ 12; Williams Decl. ¶ 10. Either way, the delay in the establishment of legal relationships between the child and both of his or her parents is a source of concern for same-sex couples, given that the second parent would have no authority to act on

behalf of the child if the first parent were to become incapacitated during the period of delay. Ayers Decl. ¶ 11; Mozelle Decl. ¶¶ 10, 12; Williams Decl. ¶ 10.

In contrast, where a child is born into a marriage, there is no delay in the establishment of legal relationships between the child and both of his or her parents. Ayers Decl. ¶ 13; see also Md. Code Ann., Fam. Law. § 5-1027(c)(1) (spousal presumption of parenthood). Similarly, where a child is adopted into a marriage, there is no delay in the establishment of legal relationships between the child and both of his or her parents. See Md. Code Ann., Fam. Law. § 5-315(a) (spousal entitlement to joint adoption).

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

Other protections and benefits available to spouses are not available to Plaintiffs, as illustrated below. See Badgett Decl. ¶¶ 18-52 (Ex. 14).

Plaintiffs do not enjoy the greater security that comes with joint ownership through a tenancy by the entirety. Kelber-Kaye Decl. ¶ 17; Wojahn Decl. ¶ 11; see also, e.g., McManus v. Summers, 290 Md. 408, 412, 430 A.2d 80 (1981) (tenancy by the entirety is reserved for spouses).

In addition, because they are not married, Plaintiffs do not enjoy state tax equity. Blackburn Decl. ¶ 12; see also, e.g., Md. Code Ann., Tax-Gen. § 10-807(a) (spousal entitlement to joint return).

## B. Plaintiffs and their children are more likely to be denied other important protections that are afforded to married couples and their children

### 1. Plaintiffs and their children are more likely to be denied social recognition as family units and otherwise suffer discrimination

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

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

Mozelle Decl. ¶ 13. All Plaintiffs share this general concern. See, e.g., Deane Decl. ¶ 16 ("The legal sanction of our relationship through the institution of civil marriage would greatly diminish the stigma that our daughters will otherwise bear, simply because their parents are a same-sex couple."); Williams Decl. ¶ 12 ("We want our family to have the sense of security that comes with the knowledge that our relationship is recognized by our community and by the laws of our state."); Foskey Decl. ¶ 17 ("[We] seek for ourselves and our children the same sense of security that married couples and their children enjoy."); Kelber-Kaye Decl. ¶ 18 ("[We] are concerned that, because we cannot marry, we and our sons are at constant risk that we will not be recognized as a family unit."); Myers Decl. ¶ 14 ("I suffer dignitary harm on account of the fact that the law effectively requires me to choose between my life in Maryland and my relationship with Maria, simply because we are not recognized as spouses."); Lestitian Decl. ¶ 20 ("I also seek the right to marry because I risk discrimination fostered by the stigmatizing message about the worth of lesbian and gay people that my government sends to my community

by excluding them from the right to marry."); Blackburn Decl. ¶ 13 ("[We] believe that anything short of civil marriage for same-sex couples would perpetuate second-class citizenship for lesbian and gay families . . . . We believe that we, too, are entitled to the dignity and respect that marriage bestows."); Palmer Decl. ¶ 8 ("[W]e still risk discrimination fostered by the stigmatizing message about the worth of our relationship that our government sends to our community by excluding us from marriage."); Wojahn Decl. ¶ 12 ("Most of all, [we] wish for our relationship to enjoy the same social recognition as well as legal recognition as the relationships of our heterosexual peers. Our relationship can attain this level of respect only through the institution of marriage.").

Because Gita Deane and Lisa Polyak are not married, they and their daughters have been denied social recognition as a family unit. Deane Decl. ¶ 15. In April of 2004, when Gita and Lisa and their daughters were returning to the country after an overseas family reunion, Gita and Lisa were not permitted to complete a single customs forms for their entire family because they are not married. Id. Lisa completed one customs form listing herself and their daughters, while Gita completed another customs form listing only herself. Id. Lisa and their older daughter proceeded through the checkpoint without incident. Id. Gita and their younger daughter, however, were stopped and questioned, and Gita was forbidden from proceeding through the checkpoint with her own daughter. Id. Only after some time, during which Gita and Lisa and their daughters suffered humiliation and inconvenience, did a customs official recognize their family relationship. Id.

Similarly, when Jo Rabb, Stacey Kargman-Kaye, and Ryan Killough were hospitalized, Takia Foskey, Jodi Kelber-Kaye, and Steve Palmer, respectively, were denied visitation and decisionmaking privileges by hospital officials who, because the couples were not married, failed to recognize their family relationships. Foskey Decl. ¶ 14; Kelber-Kaye Decl. ¶¶ 10, 13; Palmer Decl. ¶ 11.

### 2. Plaintiffs and their children are more likely to be denied important protections afforded to married couples and their children by private actors

Because Plaintiffs may not marry, they and their children are more likely to be denied protections and benefits that are afforded to married couples and their children by private actors, as illustrated below.

When Jo Rabb, Stacey Kargman-Kaye, and Ryan Killough were hospitalized, Takia Foskey, Jodi Kelber-Kaye, and Steve Palmer, respectively, were denied visitation and decisionmaking privileges by private hospitals because they were not married. Foskey Decl. ¶ 14; Kelber-Kaye Decl. ¶ 10; Palmer Decl. ¶ 11. Steve, a nurse in the intensive care unit of a private hospital, notes that, "today, if, in a medical emergency, Ryan or I were rushed to the very hospital for which I now work, neither of us would be assured the right to visit the other or to make medical decisions on behalf of the other because we are not married." Palmer Decl. ¶¶ 6, 12.

Charles Blackburn and Glen Dehn are fearful that, despite their commitment to remain together until the end, they will be separated in a private retirement community or a private nursing home because they are not married. Blackburn Decl. ¶ 12.

### 3. Plaintiffs and their children are more likely to be denied important protections afforded to married couples and their children by other governmental actors[3]

#### a. Plaintiffs and their children are more likely to be denied important protections by other state governments

Now that they are retired, Charles Blackburn and Glen Dehn spend a significant amount of time traveling out of state. Blackburn Decl. ¶ 8. They risk a medical emergency that will land one in an out-of-state hospital that will deny the other decisionmaking and visitation rights. Id. ¶ 10.

Because Patrick Wojahn, Dave Kolesar, Nigel Simon, and Mikki Mozelle work across the state line, they and their partners risk the same on a daily basis. Wojahn Decl. ¶ 6; Williams Decl. ¶ 6; Mozelle Decl. ¶ 6. This is of particular concern to Patrick and Dave. In 1996, Dave nearly died as the result of a strep infection in his sinuses that spread to his brain, coupled with meningitis. Wojahn Decl. ¶ 10. Doctors at The Johns Hopkins Hospital gave him a five percent chance of survival, but he miraculously survived experimental medical procedures without any long-term impairment. Id. Due to the rareness of his case, however, doctors have been unable to predict whether he will suffer any ill effect later in his life. Id. As a result, Patrick and Dave live in fear that there will be a recurrence of the condition or an emergence of some latent consequence. Id. Compounding their anxiety, they are fearful that Patrick's relationship to Dave will

[3] Same-sex couples who marry in Maryland would not enjoy recognition by some other state governments and the federal government on account of laws precluding such recognition, but they would be positioned to enjoy recognition by such governments if such laws were repealed or invalidated. See, e.g., In re Coordination Proceeding, No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005) (appeal pending) (challenging California law precluding recognition); Castle v. Washington, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004) (appeal pending) (challenging Washington law precluding recognition); Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004) (appeal pending) (same).

not be recognized in this time of need, depriving Patrick of the ability to care for and visit with Dave. Id.

### b. Plaintiffs and their children are more likely to be denied important protections by the federal government

By its own count, the federal government affords 1,138 protections and benefits to married couples and their children. United States General Accounting Office, Letter to Majority Leader Bill Frist (Jan. 23, 2004) (www.gao.gov/new.items/d04353r.pdf). Because they may not marry, Plaintiffs and their children are more likely to be denied such protections and benefits, as illustrated below.[4]

Because Donna Myers is unable to marry Maria Barquero and sponsor her for permanent residency in the United States, Maria had to return to Costa Rica upon expiration of her work visa in February of 2003. Myers Decl. ¶ 10. Thereafter, to be together with her life partner, Donna spent much of her time with Maria in Costa Rica on a series of tourist visas. Id. In doing so, Donna gave up a steady income, employer-sponsored health benefits, and an opportunity to pursue a master's degree in public health. Id. ¶ 12. The fact that she was uninsured was of particular concern to her as a survivor of both a spinal tumor and a broken neck. Id. Moreover, both her decreased earnings and her uncertain future led her to give up an opportunity to purchase at a discount a parcel of the family farm in Southern Maryland on which she was raised. Id. In doing so, she gave up an opportunity to ensure that, in the future, her own family will

[4] Defendants assert as their "Second Affirmative Defense" that "[t]he federal Defense of Marriage Act, 28 U.S.C. § 1738C bars and preempts the extension of marital rights to same sex couples as to federal benefits and programs including, but not limited to immigration status and [the federal portion of] Medicaid." Answer at 6-7. Plaintiffs do not seek the protections and benefits afforded to married couples by the federal government in this action. See Compl. ¶¶ 137-68. If they were married, however, they would be positioned to enjoy such protections and benefits if the so-called Defense of Marriage Act were repealed or invalidated.

be able to live on the family farm along with her parents and her sisters and their families. Id. Although Donna now has a steady income and employer-sponsored health benefits again, she has them at the price of no longer spending much of her time in Costa Rica with Maria. Id. ¶ 13. Donna and Maria face uncertainty about their future together, not for lack of love or commitment, but rather because there is currently no place in the world where they may permanently and legally reside together. Id. ¶ 10. In light of this uncertainty, they cannot start a family together, although they would like to do so. Id. Moreover, they incur significant costs traveling to visit each other and communicating with each other while they are apart. Id. ¶ 11.

Gita Deane and Lisa Polyak suffered through a similar ordeal because Lisa was unable to marry Gita and sponsor her for permanent residency in the United States. Deane Decl. ¶¶ 8-11.

Lisa is a civilian engineer for the United States Army Medical Department. Id. ¶ 6. In September of 2003, Gita cut back to part-time employment to care for their daughters and, as a result, lost her health benefits. Id. ¶ 14. As a same-sex partner, Gita is ineligible to enroll in Lisa's federal employer-sponsored health plan, even though Lisa pays for family coverage. Id. Until Gita's employer began offering employer-sponsored health benefits to part-time employees in January of 2005, Gita and Lisa had to pay for expensive private health insurance to ensure that Gita's health needs were covered. Id.

Charles Blackburn and Glen Dehn are concerned about their ineligibility to receive certain Social Security benefits – notwithstanding Glen's 31 years of service to the Social Security Administration – because they are not married. Blackburn Decl. ¶¶ 7, 12. Mikki Mozelle and Lisa Kebreau are similarly concerned. Mozelle Decl. ¶ 14.

Unlike a surviving spouse, John Lestitian had to pay federal taxes on half of the balances of the joint bank accounts that he had shared with his deceased partner. Lestitian Decl. ¶ 15. In addition, unlike a surviving spouse, John was precluded from rolling over the funds in his deceased partner's retirement account, of which he was the designated beneficiary, into his own retirement account. Id. ¶ 16. Instead, he was required to take a lump sum distribution, for which he was then penalized. Id.

## V. Marriage has evolved to redress exclusions, restrictions, and inequalities

In defending the exclusion of same-sex couples from marriage, Defendants have proffered governmental interests in "promoting and preserving the institution of marriage as historically understood to include a man and a woman" and "promoting the traditional family as the basic unit of a free society." Defs.' Answer to Pls.' Interrogatory at 2 (Ex. 16). Although, in the past, marriage was a discriminatory institution conditioned on race-, class-, and religion-based considerations, as well as an unequal partnership between men and women, it has evolved to redress such exclusions, restrictions, and inequalities. See Cott Decl. ¶¶ 5-48 (Ex. 13).

### A. Marriage has evolved to redress exclusions and restrictions based on race and class

In 1664, Maryland, then a colony, enacted a law prohibiting marriages between "freeborn[] English women" and "Negro Sla[v]es." 1 Proceedings and Acts of the General Assembly Jan. 1637/8-Sept. 1664, at 533-34 (www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000001/html/am1--533.html). To punish such marriages, such women "forgetful[] of their free Condi[ti]on and [who] to the disgrace of our nation [did] intermarry" were to become slaves of their husbands' masters during their husbands' lifetimes. Id. Moreover, their children were to become "Sla[v]es

as their fathers were." Id. at 534. In enacting this law, Maryland became the first colony to prohibit interracial marriages. John D'Emilio and Estelle B. Freedman, Intimate Matters: A History of Sexuality in America, at 35-36 (2d. ed. 1988).

In subsequent years, Maryland enacted laws reaffirming and expanding its race- and class-based conditions on marriage. In 1678, Maryland excluded marriages of "Negroes Indians & Molottos" from marriage registers. 7 Proceedings and Acts of the General Assembly Oct. 1678-Nov. 1683, at 76 (www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000007/html/am7--76.html). In 1716, Maryland imposed a penalty of five thousand pounds of tobacco on any person who joined in marriage "any negro whatsoever or mulatto slave with any white person." 141 The General Public Statutory Law and Public Local Law of the State of Maryland, at 29 (www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000141/html/am141--29.html). In 1717, Maryland enacted a law providing as follows:

> [I]f any Free Negro, or Mulatto, intermarry with any White Woman, or if any White Man shall intermarry with any Negro, or Mulatto Woman, such Negro or Mulatto shall become a Slave during Life, excepting Mulattoes born of White Women, who for such Intermarriage shall only become Servants for Seven Years .... And any White Man or White Woman, who shall intermarry as aforesaid, with any Negro, or Mulatto, such White Man or White Woman, shall become Servants during the Term of Seven Years.

33 Proceedings and Acts of the General Assembly 1717-Apr. 1720, at 112 (www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000033/html/am33--112.html). In 1777, Maryland imposed a penalty of fifty pounds on any minister who joined in marriage "any servants" or "a free person and a servant." 141 The General Public Statutory Law and Public Local Law of the State of Maryland, at 133 (www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000141/

html/am141--133.html). Even as late as 1935, Maryland enacted a law reaffirming and expanding its prohibition on interracial marriages:

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

378 1935 Cumulative Supplement to the Annotated Code of the Public General Laws of Maryland, at 348 (www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000378/html/am378--348.html).

In 1967, on the eve of Loving v. Virginia, 388 U.S. 1 (1967) (rendering all anti-miscegenation statutes unconstitutional), Maryland repealed its anti-miscegenation statute. Keith E. Sealing, Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation, 5 Mich. J. Race & L. 559, 560 n.4 (2000); see also Md. Ann. Code art. 27 § 398 (repealed).

### B. Marriage has evolved to redress exclusions and restrictions based on religion

In 1702, Maryland prohibited marriages that were not religiously solemnized. 24 Proceedings and Acts of the General Assembly, at 266 (www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000024/html/am24--266.html) ("[N]o[] Justice or Mag[i]strate being a Lay man shall Jo[i]n[] any Person in Marriage; [U]nder the Penalty of []five Thousand Pounds of Tob[acco]."). In 1717, Maryland specifically prohibited marriages that were not religiously solemnized in accord with the customs of

the Church of England. 33 Proceedings and Acts of the General Assembly 1717-Apr. 1720, at 114 (www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000033/html/am33--114.html) ("[A]ll Persons who desire Marriage, shall apply themselves to a Minister for the contracting thereof, and shall cause due Publication to be made, according to the Rubric[] of the Church of England, of their Intent to marry, at some Church or Chapel of Ease . . . . [I]t shall and may be lawful after such Publication, and Certificate thereof had, for any Minister, duly qualified, to join together in Matrimony, any such Persons so Published, according to the Liturgy of the Church of England."). Maryland imposed a penalty of five thousand pounds of tobacco on any minister who otherwise solemnized a marriage, as well as any man who entered into the otherwise solemnized marriage. Id.

In 1777, Maryland modified the law, prohibiting marriages that were not religiously solemnized "by ministers of the church of England, ministers dissenting from that church, or Romish priests, appointed or ordained according to the rites and ceremonies of their respective churches, or in such manner as hath been heretofore used and practi[c]ed in this state by the society of people called Quakers." 141 The General Public Statutory Law and Public Local Law of the State of Maryland, at 131 (www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000141/html/am141--131.html). Maryland imposed a penalty of five hundred pounds on any person who otherwise solemnized a marriage. Id. at 131-32.

Courts consistently observed the law. See, e.g., Knapp v. Knapp, 149 Md. 263, 267, 131 A. 329 (1925) ("The requirement of a religious ceremony in Maryland is fixed, and this Court has not the slightest disposition to relax it."); Feehley v. Feehley, 129 Md.

565, 568, 99 A. 663 (1916) ("It is the settled law of this state that 'some religious ceremony' must be 'superadded to the civil contract' in order that a marriage may be valid."); Denison v. Denison, 35 Md. 361, 377 (1872) ("To constitute lawful marriage . . . there must be superadded to the civil contract, some religious ceremony.").

In 1864, a constitutional amendment that would have permitted marriages solemnized "by any minister or any denomination, by any mayor of a city, by any justice of the peace, or in such manner as is usually practiced by the society of people called Quakers" was proposed and rejected. 102:1 Proceedings and Debates of the 1864 Constitutional Convention, at 975-90 (www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000102/html/am102d--975.html).

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

### C. Marriage has evolved to redress inequalities based on sex

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

own name." Condore v. Prince George's County, 289 Md. 516, 521, 425 A.2d 1011 (1981) (citations omitted).

In 1842, Maryland began to dissemble the legal regime of coverture, providing that "any married women may become seized or possessed of any property, real or of slaves by direct bequest, demise, gift, purchase or distribution, in her own name, and as of her own property." 594 Session Laws 1842, at 254 (www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000594/html/am594--254.html). It further provided that "any married woman who by her skill, industry or personal labour, shall hereafter earn any money or other property, real personal or mixed to the value of one thousand [d]ollars or less, shall and may hold the same and the fruits, increase and profits thereof, to her sole and separate use with power as a feme sole to invest and re-invest, and sell and dispose of the same." Id. at 255. In addition, it provided that "a wife shall have a right to make a will and give all her property or any part thereof to her husband, and to other persons with the consent of the husband subscribed to said will." Id. In 1898, Maryland went further, providing as follows: "Married women shall have power to engage in any business, and to contract whether engaged in business or not, and to sue upon their contracts, and also to sue for the recovery, security or protection of their property, and for torts committed against them, as fully as if they were unmarried." Furstenburg v. Furstenburg, 152 Md. 247, 249, 136 A. 534 (1927) (quotation omitted).

"[A]ll vestiges of coverture [were] abolished in 1972 [upon the adoption of Md. Const. Decl. Rts. art. 46]." Hatzinicolas v. Protopapas, 314 Md. 340, 348 n.7, 550 A.2d 947 (1988); see also, e.g., Giffin v. Crane, 351 Md. 133, 716 A.2d 1029 (1988) (parity in child custody); Condore v. Prince George's County, 289 Md. 516, 425 A.2d 1011 (1981)

(parity in necessaries); Kline v. Ansell, 287 Md. 585, 414 A.2d 929 (1980) (parity in criminal conversation); Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977) (parity in child support); Deems v. Western Md. Ry. Co., 247 Md. 95, A.2d (1967) (parity in loss of consortium); Hofmann v. Hofmann, 437 Md. App. 240, 437 A.2d 247 (1981) (parity in alimony); Coleman v. State, 37 Md. App. 322, 377 A.2d 553 (1977) (parity in criminal desertion).

## VI. Maryland's marriage laws have diverged and continue to diverge from other states' marriage laws

Defendants have also proffered a governmental interest in "preserving uniformity among the States with respect to the definition of marriage." Defs.' Answer to Pls.' Interrogatory at 2-3. Maryland's marriage laws diverge from the majority of other states' marriage laws in at least six ways.

First, Maryland is one of 21 states that permit first cousins to marry each other. Compare Md. Code Ann., Fam. Law § 2-202 with Ariz. Rev. Stat. § 25-101 (2004); Ark. Code Ann. § 9-11-106 (2003); Del. Gen. Stat. § 46b-21 (2003); Idaho Code § 32-206 (2004); 750 Ill. Comp. Stat. 5/212 (2004); Ind. Code Ann. § 31-11-1-2; Iowa Code § 595.19 (2003); Kan. Stat. Ann. § 23-102 (2003); Ky. Rev. Stat. Ann. § 402.010 (2004); La. Civ. Code Art. 90 (2004); Me. Rev. Stat. Ann. tit. 19-A., §§ 651, 701 (2003); Mich. Comp. Laws § 551.4 (2004); Minn. Stat. § 517.03 (2003); Mo. Rev. State. § 451.020 (2004); Mont. Code Ann. § 40-1-401 (2004); Neb. Rev. Stat. § 42-103 (2004); Nev. Rev. Stat. § 122.020 (2004); N.H. Rev. Stat. Ann. § 457:2 (2004); N.D. Cent. Code § 14-03-03 (2004); Ohio Rev. Code Ann. § 3101.01 (2004); Okla. Stat. Ann. tit. 43 § 2 (2004); Or. Rev. Stat. § 106.020 (2004); 23 Pa. Cons. Stat. § 1304 (2004); S.D. Codified Laws § 25-1-6 (2004); Utah Code Ann. § 30-1-1 (2003); Wash. Rev. Code § 26.04.020 (2004); W.

Va. Code § 48-2-302 (2004); Wis. Stat. Ann. § 765.03 (2004); Wyo. Stat. Ann. § 20-2-101 (2003). Second, Maryland is one of fourteen states that permit otherwise underage individuals to marry where a party to the marriage either is pregnant or has given birth. Legal Information Institute, Cornell University Law School, Marriage Laws of the Fifty States, District of Columbia and Puerto Rico (www.law.cornell.edu/topics/Table_Marriage.htm); see also Md. Code Ann., Fam. Law § 2-301(b). Third, of the 25 states with a waiting period, Maryland is one of five states in which the waiting period is 48 hours or less, and the only state in which the waiting period is exactly 48 hours. Id.; see also Md. Code Ann., Fam. Law § 2-405(d)(1). Fourth, Maryland is one of thirteen states in which marriage licenses are valid for six months or more, and one of two states in which marriage licenses are valid for exactly six months. Id.; see also Md. Code Ann., Fam. Law § 2-405(d)(1). Fifth, of the 48 states in which there is a residency requirement for divorce, Maryland is one of ten states in which the residency requirement for divorce is one year, the maximum. American Bar Association, Grounds for Divorce and Residency Requirements (www.abanet.org/family/familylaw/FLQWin05divorcechart.pdf); see also Md. Code Ann., Fam. Law § 7-101(a). Sixth, of the 27 states in which living separate and apart constitutes a ground for divorce, Maryland is one of thirteen states in which living separate and apart for one year or less is a ground for divorce, and one of eight states in which living separate and apart for exactly one year is a ground for divorce. Id.; see also Md. Code Ann., Fam. Law § 7-103(a)(3).

In the past, Maryland's marriage laws also diverged from other states' marriage laws. For example, Maryland's marriage laws were unique in prohibiting interracial marriages between people of Asian descent and people of African descent. Hrishi

Karthikeyan and Gabriel J. Chin, Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950, 9 Asian L.J. 1, 29 n.166 (2002). In fact, the historical divergence between Maryland's marriage laws and other states' marriage laws was widely recognized both within and without the state:

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

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

## VII. State law prohibits sexual orientation discrimination in many contexts

Defendants have also proffered a governmental interest in "promoting and preserving societal values." Defs.' Answer to Pls.' Interrogatory at 2. With respect to lesbian and gay people, such values are reflected in state law that prohibits sexual orientation discrimination.

Maryland prohibits sexual orientation discrimination in employment, housing, and public accommodations. Md. Code Ann. art. 49B §§ 5(b), 8(a) (public accommodations); Md. Code Ann. art. 49B § 16 (employment); Md. Code Ann. art. 49B §§ 22-24 (housing); see also Md. Code Ann. art. 49B § 14 ("It is hereby declared to be the policy of the State of Maryland, in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business and good government and for the promotion of the State's trade, commerce and manufacturers to assure all persons equal opportunity in receiving employment and in all

labor management-union relations regardless of . . . sexual orientation."); Md. Code Ann. art. 49B § 19(a) ("It is the policy of the State of Maryland to provide for fair housing throughout the State of Maryland, to all its citizens, regardless of . . . sexual orientation . . . in order that the peace, health, safety, prosperity and general welfare of all the inhabitants of the State may be protected and insured."). Maryland specifically prohibits sexual orientation discrimination in state employment. Md. Regs. Code tit. 1, § 01.1995.19(A)(11). Moreover, Maryland protects public school students from sexual orientation discrimination: "All students in Maryland's public schools, without exception and regardless of . . . sexual orientation . . . have the right to educational environments that are: A. Safe; B. Appropriate for academic achievement; and C. Free from any form of harassment." Md. Regs. Code tit. 13A, § 01.04.03.

These are just a few of the many contexts in which state law prohibits sexual orientation discrimination. See, e.g., Md. Code Ann., Health Occ. § 19-311(16) (social work); Md. Code Ann. art. 29 §§ 1-107, 3-102(h)(1) (Washington Suburban Sanitary Commission); Md. Regs. Code tit. 1 §§ 04.07.04(A)(7)(d)(viii), 04.07.05(A)(2)(p) (residential child care programs); Md. Regs. Code tit. 5 § 04.11.18(A) (Special Housing Opportunities Program); Md. Regs. Code tit. 5 § 05.02.14(A) (Multi-Family Housing Revenue Bond Financing Program); Md. Regs. Code tit. 5 § 13.01.16(A) (Business Development Program), Md. Regs. Code tit. 5 § 17.01.10(A) (Community Legacy Program); Md. Regs. Code tit. 7 §§ 05.03.09(A)(2), 05.03.15(C)(2) (private adoption); Md. Regs. Code tit. 10 § 18.06.03(A)(6) (Maryland AIDS Drug Assistance Program); Md. Regs. Code tit. 10 § 26.03.03(D)(5) (Board of Acupuncture); Md. Regs. Code tit. 10 § 34.10.06(A)(1) (Board of Pharmacy); Md. Regs. Code tit. 10 § 41.02.04(E) (Board of

Examiners for Audiologists, Hearing Aid Dispensers, and Speech-Language Pathologists); Md. Regs. Code tit. 10 § 42.03.03(B)(5) (Board of Social Work Examiners); Md. Regs. Code tit. 10 §§ 43.14.03(D)(5), 43.18.03(D)(5) (Board of Chiropractic Examiners); Md. Regs. Code tit. 10 § 46.02.01(A)(1) (Board of Occupational Therapy Practice); Md. Regs. Code tit. 10 § 47.01.07(C) (Alcohol and Drug Abuse Administration); Md. Regs. Code tit. 10 § 51.04.01(C)(2)(a)(x) (primary care); Md. Regs. Code tit. 10 § 53.01.01(D)(5) (Board of Electrologists); Md. Regs. Code tit. 10 § 58.03.05(A)(2)(b) (Board of Professional Counselors and Therapists); Md. Regs. Code tit. 11 § 02.04.02(A) (Transportation Service Human Resources System); Md. Regs. Code tit. 11 § 07.06.13 (Transportation Public-Private Partnership Program); Md. Regs. Code tit. 14 § 27.02.03(B) (Environmental Service); Md. Regs. Code tit. 14 § 29.04.09(C)(1) (Maryland Heritage Areas Loan Program).

## VIII. State law requires neither the ability nor the desire to bring a child into one's life through "traditional" procreation as a condition of marriage

Defendants also seek to justify the exclusion of same-sex couples from marriage by proffering a governmental interest in "encouraging procreation and child-rearing within the stable environment traditionally associated with marriage." Defs.' Answer to Pls.' Interrogatory at 2. State law requires neither the ability nor the desire to bring a child into one's life through "traditional" procreation as a condition of marriage. See Md. Code Ann., Fam. Law tit. 2.

## IX. Except for the ability to marry, state law treats lesbian and gay parents and their children and heterosexual parents and their children equally

Both lesbian and gay parents and heterosexual parents bring children into their lives through means other than "traditional" procreation, such as adoption and donor

insemination. Ayers Decl. ¶ 6; Williams Decl. ¶ 10; Deane Decl. ¶ 12; Kelber-Kaye Decl. ¶¶ 8, 12; Mozelle Decl. ¶¶ 8, 11. Whether children are brought into their legal parents' lives through "traditional" procreation or they are brought into their legal parents' lives through other means, state law treats them equally (except for the ability of their parents to marry). Ayers Decl. ¶ 7. This is true for children who are brought into their legal parents' lives through adoption. See, e.g., Md. Code Ann., Fam. Law § 5-308(b)(1); see also, e.g., Md. Code Ann., Est. & Trusts § 1-205 (defining a "child" to include an adopted child for purposes of estate law); Md. Code Ann., Est. & Trusts § 1-207(a) ("An adopted child shall be treated as a natural child of his adopting parent or parents."); Md. Code Ann., Health-Gen. § 7-701 (defining "family" to include an adoptive parent for purposes of Family Support Services Program); Md. Code Ann., Ins. § 15-401 (treating newly born children and newly adopted children equally for purposes of health insurance); Md. Code Ann., Lab. & Empl. § 8-804 (treating natural children and adopted children equally for purposes of unemployment insurance); Md. Code Ann., Lab. & Empl. § 9-101(c) (defining a "child" to include an adopted child for purposes of workers' compensation); Md. Code Ann., Public Safety § 1-202(a)(2)(i) (defining a "child" to include an adopted child for purposes of death benefits); Md. Code Ann., State Pers. & Pens. § 10-404(a)(2) (same); Md. Code Ann. art. 49D § 37 (defining "family" to include an adoptive parent for purposes of family preservation services); Beckman v. Boggs, 337 Md. 688, 692, 655 A.2d 901 (1995) ("The effect of [Md. Code Ann., Fam. Law § 5-308(b)(1)] is that the adopted child is endowed with the status of a natural child of the adoptive parents and the adoptive parents are accorded all the rights and obligations of a natural parent."); Knill v. Knill, 306 Md. 527, 510 A.2d 546 (1986)

("[For purposes of child support,] [t]he term 'parents of a minor child' encompasses both natural and adoptive parents.") (citation omitted); Connor v. O'Hara, 188 Md. 527, 535, 53 A.2d 33 (1947) ("For inheritance tax purposes, an adopted child is a 'child' of the adopting parent."). This is also true for children brought into their legal parents' lives through donor insemination. See, e.g., Md. Code Ann., Est. & Trusts § 1-206(b).

State law also treats lesbian and gay parents and heterosexual parents equally (except for their ability to marry). Ayers Decl. ¶ 7. In resolving custody and visitation disputes, state courts disregard the sexual orientation of each parent. Ayers Decl. ¶ 8; see also Boswell v. Boswell, 352 Md. 204, 721 A.2d 662 (1998). Moreover, state courts routinely grant adoptions to lesbian and gay people. Ayers Decl. ¶ 9; Williams Decl. ¶ 10. Indeed, adoption agencies "may not deny an individual's application to be an adoptive parent because . . . [o]f the applicant's . . . sexual orientation" and "may not delay or deny the placement of a child for adoption on the basis of the prospective adoptive parent's . . . sexual orientation." Md. Regs. Code tit. 7 §§ 05.03.09(A)(2), 05.03.15(C)(2). Furthermore, state courts routinely grant second-parent adoptions to same-sex partners. Ayers Decl. ¶ 9; see also Office of the Attorney General of Maryland, Letter to Delegate Sharon Grosfeld (June 9, 2000) (Ex. 15) (concluding that Maryland courts may grant second-parent adoptions to same-sex partners). Indeed, state courts have done so for Plaintiffs' children who were brought into their legal parents' lives through adoption or donor insemination. Williams Decl. ¶ 10 (Alvin Williams secured second-parent adoption of son in August of 2003); Deane Decl. ¶ 13 (Gita Deane secured second-parent adoption of older daughter in 1999; Lisa Polyak secured second-parent adoption of younger daughter in 1999); Kelber-Kaye Decl. ¶¶ 9, 15 (Stacey Kargman-

Kaye secured second-parent adoption of older son in January of 2001 and younger son in December of 2003); Mozelle Decl. ¶ 9 (Mikki Mozelle secured second-parent adoption of younger son in February of 2005). In addition, the Maryland Department of Health and Mental Hygiene routinely issues birth certificates recognizing same-sex partners as co-parents. Ayers Decl. ¶ 16. Indeed, the Maryland Department of Health and Mental Hygiene has done so for Plaintiffs' children who were born in Maryland and for whom state courts granted second-parent adoptions. Williams Decl. ¶ 10; Deane Decl. ¶ 13; Kelber-Kaye Decl. ¶ 15.

## SUMMARY OF ARGUMENT

Md. Code Ann., Fam. Law § 2-201, which excludes same-sex couples from marriage, is subject to strict scrutiny for each of three reasons. First, the right to marry is a fundamental right which extends to people in lesbian and gay relationships. Md. Code Ann., Fam. Law § 2-201 is subject to strict scrutiny under Article 24 of the Declaration of Rights because the exclusion of same-sex couples from marriage significantly and disparately burdens the exercise of the fundamental right to marry. Second, sex is a suspect classification. Md. Code Ann., Fam. Law § 2-201 is subject to strict scrutiny under Article 46 of the Declaration of Rights because the exclusion of same-sex couples from marriage constitutes discrimination based on sex. Third, sexual orientation is a suspect classification. Md. Code Ann., Fam. Law § 2-201 is subject to strict scrutiny under Article 24 of the Declaration of Rights because the exclusion of same-sex couples from marriage constitutes discrimination based on sexual orientation.

Even if it is not subject to strict scrutiny, Md. Code Ann., Fam. Law § 2-201 is unconstitutional because the exclusion of same-sex couples from marriage does not have

a fair and substantial relation to a legitimate governmental interest under Article 24 of the Declaration of Rights. Neither the proffered governmental interest in discrimination for its own sake nor the proffered governmental interest in legislative hegemony is a legitimate governmental interest. Nor does the exclusion of same-sex couples from marriage have a fair and substantial relation to either the proffered governmental interests in child-bearing and child-rearing or the proffered governmental interest in cost savings. Thus, Md. Code Ann., Fam. Law § 2-201 is unconstitutional because it does not have a constitutionally sufficient justification.

## ARGUMENT

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

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

##### 1. A significant or disparate burden on the exercise of the fundamental right to marry is subject to strict scrutiny under Article 24 of the Declaration of Rights

Md. Code Ann., Fam. Law § 2-201 is subject to strict scrutiny under due process and equal protection jurisprudence because it significantly and disparately burdens the exercise of the fundamental right to marry.

Article 24 guarantees that "no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." The Court of Appeals "long ago determined that the phrase, 'the Law of the land,' 'mean[s] the same thing' as 'due process of law.'" Clark v. State, 364 Md. 611, 644, 744 A.2d 1136 (2001) (quoting Baltimore Belt R.R. Co. v. Baltzell, 75

Md. 94, 99, 23 A. 74 (1891)); see also Wright v. Wright's Lessee, 2 Md. 429, 452 (1852) ("[T]he words 'by the law of the land,' which are copied from Magna Charta, are understood to mean due process of law."). The Court has also long recognized that, "[a]lthough the Maryland Constitution contains no express equal protection clause," it is "settled that [the] concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights." Attorney General v. Waldron, 289 Md. 683, 704, 426 A.2d 929 (1981) (citations and footnotes omitted); see also Md. Const. Decl. Rts. art. 1 ("[A]ll Government of right . . . [is] instituted solely for the good of the whole.").

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

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

Waldron, 289 Md. at 714 (citation omitted). Thus, the Court has held that "a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone." Id. at 715 (citation omitted); see also, e.g., Maryland Green Party v. Maryland Bd. of Elections, 377 Md. 127, 157, 832 A.2d 213 (2003); Dua v. Comcast Cable of Md., Inc., 370 Md. 604, 621-22, 805 A.2d 1061 (2002); Frankel v. Board of Regents of Univ. of Md. Sys., 361 Md. 298, 313, 761 A.2d 324 (2000); Verzi v. Baltimore County, 333 Md. 411, 417, 635 A.2d 967 (1994); Kirsch v. Prince George's County, 331 Md. 89, 97, 626 A.2d 372 (1993).

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

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

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

Md. Code Ann., Fam. Law § 2-201 is subject to strict scrutiny under *due process* jurisprudence because it *significantly* burdens the exercise of the fundamental right to marry. The due process strand of fundamental rights jurisprudence "provides heightened protection against government interference with certain fundamental rights and liberty interests." Samuels v. Tshechtelin, 135 Md. App. 483, 533, 763 A.2d 209 (2000) (quotation omitted). Thus, under due process jurisprudence, governmental action "significantly curtailing a fundamental right must undergo strict scrutiny – it must be narrowly tailored to serve a compelling public interest." Wolinski v. Browneller, 115 Md. App. 285, 301, 693 A.2d 30 (1997) (citation omitted); see also id. at 297 n.6.

Md. Code Ann., Fam. Law § 2-201 is also subject to strict scrutiny under *equal protection* jurisprudence because it *disparately* burdens the exercise of the fundamental right to marry. The equal protection strand of fundamental rights jurisprudence demands strict scrutiny where governmental action disadvantages a class, whether suspect or non-suspect, in its access to a fundamental right. Murphy v. Edmonds, 325 Md. 342, 356, 601 A.2d 102 (1992) ("Where . . . a statutory classification burdens a 'suspect class' *or* impinges upon a 'fundamental right,' the classification is subject to strict scrutiny. Such

statutes will be upheld under the equal protection guarantees only if it is shown that they are suitably tailored to serve a compelling state interest.") (quotation and citations omitted) (emphasis added); Waldron, 289 Md. at 706 ("[W]hen a statute creates a distinction based upon clearly 'suspect' criteria, *or* when that enactment infringes upon personal rights or interests deemed to be 'fundamental,' then the legislative product must withstand a rigorous, 'strict scrutiny.' Laws which are subject to this demanding review violate the equal protection clause unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest.") (quotation omitted) (emphasis added); Massage Parlors, Inc. v. Mayor and City Council, 284 Md. 490, 496, 398 A.2d 52 (1979) ("When the statute or ordinance restricts a fundamental right, (such as the right to privacy, right to vote, or the right to marry) *or* creates an inherently suspect classification (such as race, nationality or alienage), courts employ the strict scrutiny test requiring the state to establish that the classification is necessary to promote a compelling state interest.") (emphasis added). Thus, under equal protection jurisprudence, governmental action that disparately burdens the exercise of a fundamental right must further a compelling governmental interest in a narrowly tailored manner.

Either way, Md. Code Ann., Fam. Law § 2-201 is subject to strict scrutiny under fundamental rights jurisprudence.

#### 2. The fundamental right to marry extends to people in lesbian and gay relationships

The longstanding recognition of the right to marry as a fundamental right reflects the extraordinary respect historically afforded to personal autonomy. The United States Supreme Court has used the strongest language possible to describe the importance and the breadth of the right to autonomy: "At the heart of liberty is the right to define one's

own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 851 (1992); see also Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct."). At the core of the right to autonomy are personal decisions made by adults about child-rearing, child-bearing, intimate association, sexual intimacy, and, of particular relevance to this case, marriage.[5] See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003) (sexual intimacy); Turner v. Safley, 482 U.S. 78 (1987) (marriage); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (intimate association); Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Roe v. Wade, 410 U.S. 113 (1973) (child-bearing); Stanley v. Illinois, 405 U.S. 645 (1972) (child-rearing); Eisenstadt v. Baird, 405 U.S. 438 (1972) (sexual intimacy); Boddie v. Connecticut, 401 U.S. 371 (1971) (marriage); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (sexual intimacy); see also, e.g., Wolinski, 115 Md. App. at 297 n.6 (noting that Maryland Constitution similarly recognizes right to autonomy); id. at 302 ("[T]he rights may properly be regarded as part of a person's autonomy – the right to participate in the control of important parts of one's destiny through one's own choices.") (quotation omitted).

[5] Significantly, the United States Supreme Court has made clear that the contours of the right to autonomy are not static: "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." Lawrence, 539 U.S. at 579; see also id. at 572 (finding "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" and noting that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry") (quotation omitted). Indeed, the contours of the right to marry have shifted greatly over time. See Statement of Facts § V, supra.

"History and tradition are the starting point . . . of the substantive due process inquiry." Lawrence, 539 U.S. at 572. Like other fundamental rights, the right to marry is plainly a right "which [is], objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed." Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (quotations omitted). Indeed, the United States Supreme Court has long recognized that the right to marry rests at the core of individual liberty, and that the decision to marry is one of the most significant decisions that a person can make. See, e.g., Turner, 482 at 95-96; Zablocki, 434 U.S. at 383; Boddie, 401 U.S. at 376; Loving, 388 U.S. at 12; Griswold, 381 U.S. at 486; Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Maynard v. Hill, 125 U.S. 190, 211-12 (1888); see also, e.g., Massage Parlors, 284 Md. at 496 (recognizing right to marry as fundamental right). Thus, in Zablocki, the Court was able to trace a line of cases from 1888 to 1977 to support its assertion that "the right to marry is of fundamental importance for *all* individuals." Zablocki, 434 U.S. at 384 (emphasis added).

The fundamental right to marry extends to people in lesbian and gay relationships because the proper inquiry is *what* has historically been enjoyed (e.g., the right to marry), not *who* has historically enjoyed it (e.g., people in heterosexual relationships). In other words, fundamental rights jurisprudence is concerned with the right itself, not the class who enjoys it. If it were otherwise, a class who was historically denied the right would always be denied the right, as illustrated below. See Lawrence, 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected

by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.").

In striking down a prohibition on the use of contraceptives by married couples, Griswold relied on history to conclude that there exists a right to sexual privacy. Griswold, 381 U.S. at 486 ("We deal with a right of privacy older than the Bill of Rights."). In striking down a prohibition on the distribution of contraceptives to unmarried couples, Eisenstadt did not rely on history to conclude that unmarried couples, like married couples, enjoy the right to sexual privacy. Indeed, such a conclusion would have been inconsistent with history. Instead, it concluded that, if history establishes that the right to sexual privacy exists, then it exists for all couples, whether married or unmarried. Eisenstadt, 405 U.S. at 453 ("[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the married and the unmarried alike."); see also Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (right to sexual privacy extended to minors notwithstanding history); cf. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (right to child-rearing extended to unmarried parents notwithstanding fact that "[t]he status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage").

Although Bowers v. Hardwick, 478 U.S. 186 (1986), suggested an exception to this principle where lesbian and gay people are concerned, Lawrence wholly repudiated Bowers, not only overruling it, but indeed holding that "[it] was not correct when it was decided." Lawrence, 539 U.S. at 578. Placing itself squarely in the line of cases following Griswold, Lawrence confirmed that lesbian and gay people "may seek

autonomy for [purposes such as sexual intimacy], just as heterosexual persons do." Id. at 574.

The case law concerning the fundamental right to marry similarly exemplifies the principle that, where a right exists, it may not be arbitrarily limited to those who historically enjoyed it. Indeed, Loving, Boddie, Zablocki, and Turner would have been decided differently if the right to marry were limited to those who historically enjoyed it.

Historically, the right to marry did not extend to people in interracial relationships. See Peter Wallenstein, Tell the Court I Love My Wife: Race, Marriage, and Law – An American History, at 253-54 (2002) (anti-miscegenation laws persisted in most colonial and post-colonial states for three centuries). Just nineteen years before Loving, at least thirty states prohibited interracial marriage, at least six by constitutional provision. See id. at 159-60. Yet Loving held that the right to marry extends to different-race couples, just as it extends to same-race couples. Loving, 488 U.S. at 12.

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

Similarly, in Turner, the Court would not have reached the conclusion that the government may not prohibit a prisoner from marrying if "the right to marry" had been recast as "the right of prisoners to marry." Turner, 484 U.S. at 95-97.

As a matter of historical fact, the right to marry extended to none of these circumstances. Nevertheless, the right to marry was ultimately extended to all of them, making clear that the right may not be arbitrarily limited to those who historically enjoyed it. Consistent with the understanding that "the essence of the right to marry is freedom to join in marriage with the person of one's choice," Perez v. Lippold, 198 P.2d 17, 21 (Cal. 1948), and "the right to marry means little if it does not include the right to marry the person of one's choice," Goodridge, 798 N.E.2d at 958, a number of courts have concluded that the right to marry extends to people in lesbian and gay relationships. See Coordination Proceeding, 2005 WL 583129, at *10-*11 (holding, in the course of striking down an exclusion of same-sex couples from marriage, that the right to marry extends to people in lesbian and gay relationships); Hernandez v. Robles, 794 N.Y.S.2d 579, 595-96, 601-03 (N.Y. Sup. Ct. 2005) (appeal pending) (same); Castle, 2004 WL 1985215, at *12-*13 (same); Andersen, 2004 WL 1738447, at *5-*7 (same); cf. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *4-*6 (Alaska Super. Ct. Feb. 27, 1998) (holding that right to choose life partner extends to people in lesbian and gay relationships); see also Goodridge, 798 N.E.2d at 961 n.23 ("[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been."); Baehr v. Lewin, 852 P.2d 44, 61 (Haw. 1993) ("[The proposition that] the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special

relationship between a man and a woman . . . . [is] circular and unpersuasive") (quotation omitted).

### 3. The exclusion of same-sex couples from marriage significantly and disparately burdens the exercise of the fundamental right to marry

The exclusion of same-sex couples from marriage significantly burdens the exercise of the fundamental right to marry – it is not a mere burden; it is an absolute deprivation. See Wolinski, 115 Md. App. at 304 ("[W]e apply 'strict judicial scrutiny' . . . when legislation may be said to have 'deprived' . . . the free exercise of some such fundamental right or liberty.") (quotation omitted). Moreover, the exclusion of same-sex couples from marriage disparately burdens the exercise of the fundamental right to marry – opposite-sex couples can marry; same-sex couples cannot. See Prince George's County Health Dep't v. Briscoe, 79 Md. App. 325, 337, 556 A.2d 752 (1989) ("[I]t must be ascertained whether the difference in treatment . . . impinges upon a fundamental right, in which case strict judicial scrutiny must be applied."). Either way, the exclusion of same-sex couples from marriage constitutes a burden on the fundamental right to marry that is subject to strict scrutiny.

## B. The Exclusion of Same-Sex Couples from Marriage Is Subject to Strict Scrutiny Because It Discriminates Based on Sex, a Suspect Classification

### 1. Discrimination based on sex is subject to strict scrutiny under Article 46 of the Declaration of Rights

Md. Code Ann., Fam. Law § 2-201 is also subject to strict scrutiny because it discriminates based on sex. It is well-established that, "[i]n Maryland, because of the Equal Rights Amendment to the Maryland Constitution (Article 46 of the Maryland Declaration of Rights), classifications based on gender are suspect and subject to strict

scrutiny." Tyler v. State, 330 Md. 261, 266, 623 A.2d 648 (1993) (quotation omitted); see also Md. Cont. Decl. Rts. art. 46 ("Equality of rights under the law shall not be abridged or denied because of sex.").

In subjecting sex-based discrimination to strict scrutiny under Article 46, the Court of Appeals has embraced the hallmarks of traditional strict scrutiny. First, "the burden of justifying [sex-based] classifications falls upon the State." State v. Burning Tree Club, Inc., 315 Md. 254, 295, 554 A.2d 366 (1989) (Burning Tree III); see also Insurance Comm'r v. Equitable Life Assurance Soc'y, 339 Md. 596, 623, 664 A.2d 862 (1995) ("[T]hose defending [sex-based] classifications hav[e] the burden of justifying them.") (citation omitted). Second, "the level of scrutiny to which [sex-based] classifications are subject is at least the same scrutiny as racial classifications." Burning Tree III, 315 Md. at 295 (quotation omitted). Thus, Md. Code Ann., Fam. Law § 2-201 "will be upheld . . . only if it is shown that [it] . . . serve[s] a compelling state interest," Murphy v. Edmonds, 325 Md. 342, 356, 601 A.2d 102 (1992) (quotation and citations omitted); see also id. at 357 n.7, and that it is "narrowly tailored and precisely limited to achieving those legitimate ends," Burning Tree III, 315 Md. at 296.

### 2. The exclusion of same-sex couples from marriage constitutes discrimination based on sex

Following "legislative passage and approval by the people of Article 46 of the Declaration of Rights, any ancient deprivation of rights based upon sex would contravene the basic law of this State." Boblitz v. Boblitz, 296 Md. 242, 274-75, 462 A.2d 506 (1983); see also Rand, 280 Md. 508 at 515-16 ("The adoption of the E.R.A. in this state was intended to, and did, drastically alter traditional views of the validity of sex-based classifications."). Md. Code Ann., Fam. Law § 2-201 is subject to strict scrutiny because,

under Article 46, "sex is not, and cannot be, a factor in the enjoyment or the determination of legal rights." Giffin, 351 Md. at 148 (citation omitted).

By permitting opposite-sex couples but not same-sex couples to marry, Md. Code Ann., Fam. Law § 2-201 makes sex is a factor in the enjoyment and the determination of the right to marry. A man who seeks to marry a woman can marry, but a woman who seeks to marry a woman cannot. Similarly, a woman who seeks to marry a man can marry, but a man who seeks to marry a man cannot. In other words, whether a person can marry turns on the sex of the person whom he or she seeks to marry. Thus, by definition, the exclusion of same-sex couples from marriage constitutes sex-based discrimination.

The exclusion of same-sex couples from marriage constitutes sex-based discrimination even though it applies equally to men and women. In McLaughlin v. Florida, 379 U.S. 184 (1964), the Court held that a penalty on interracial cohabitation was a form of race-based discrimination even though "each member of the interracial couple [was] subject to the same penalty." Id. at 188. In striking down the "racial classification," id. at 192, the Court expressly overruled Pace v. Alabama, 106 U.S. 583 (1883), which reasoned that an enhanced penalty on adultery or fornication by an interracial couple did not constitute race-based discrimination because "all who committed it, white and Negro, were treated alike." McLaughlin, 379 U.S. at 189 (footnote omitted). In Loving v. Virginia, 388 U.S. 1 (1967), the Court similarly held that a penalty on interracial marriage was a form of race-based discrimination even though "[the] miscegenation statutes punish[ed] equally both the white and the Negro participants in an interracial marriage." Id. at 8; see also id. at 11 ("There can be no

question but that [the] miscegenation statutes rest solely upon distinctions drawn according to race."). The Court flatly "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." Id. at 8.

Both McLaughlin and Loving reflect the fundamental principle that constitutional rights are individual rights, not class rights. Acknowledging this fundamental principle in the course of holding that racially discriminatory restrictive covenants are judicially unenforceable, the United States Supreme Court in Shelley v. Kraemer, 334 U.S. 1 (1948), rejected the argument that, "since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected." Id. at 21. Recognizing that "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual" and "are personal rights," the Court concluded that "[i]t is . . . no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." Id. at 22.

Similarly, in the course of becoming the first court in the nation to strike down an anti-miscegenation statute, the California Supreme Court in Perez v. Lippold, 198 P.2d 17 (Cal. 1948), rejected the argument that the statute "does not discriminate against any racial group, since it applies alike to all persons whether Caucasian, Negro, or members

of any other race." Id. at 20. The Court concluded that "[t]he decisive question . . . is not whether different races, each considered as a group, are equally treated." Id. It did so because "[t]he equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals" and, therefore, "[t]he right to marry is the right of individuals, not of racial groups." Id. at 20 (citations omitted).

Thus, courts have long recognized that "indiscriminate imposition of inequalities" is a form of discrimination. Shelley, 334 U.S. at 22. So long as a statute discriminates against an individual based on a given characteristic, it is of no moment if the statute does not also discriminate against the class defined by the given characteristic.[6]

The Court of Appeals not only has recognized the fundamental principle that constitutional rights are individual rights, not class rights, but indeed has extended its application to the context of sex-based discrimination. In Burning Tree Club, Inc. v. Bainum, 305 Md. 53, 501 A.2d 817 (1985) (Burning Tree II), the Court ruled that Article 46 was violated by a statutory exemption of country clubs "whose facilities [were] operated with the primary purpose . . . to serve or benefit members of a particular sex"

[6] Under Article 46, "the level of scrutiny to which [sex-based] classifications are subject is at least the same scrutiny as racial classifications." Burning Tree III, 315 Md. at 295 (quotation omitted). Nonetheless, Defendants may attempt to argue that the reasoning in McLaughlin, Loving, Shelley, and Perez is inapposite to this case because the proffered justification for the race-based discrimination in McLaughlin, Loving, Shelley, and Perez involved notions of white supremacy. See, e.g., Loving, 388 U.S. at 7 ("[T]he State's [proffered] purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride.'"). Such an argument improperly conflates two analytically distinct questions. Whether the discrimination at issue in this case constitutes a form of sex-based discrimination does not turn on whether its proffered justification involves notions of male supremacy. In other words, the nature of the discrimination at issue in this case and the nature of its proffered justification are two analytically distinct questions. Thus, it is instructive in this case that, regardless of its proffered justification, the discrimination at issue in McLaughlin, Loving, Shelley, and Perez constituted a form of race-based discrimination.

from a statutory prohibition on sex-based discrimination on which preferential tax treatment for country clubs was otherwise predicated. Id. at 57 (emphasis omitted).

In rejecting Chief Judge Murphy's minority viewpoint that the statutory exemption did not discriminate based on sex because it applied equally to men and women, id. at 70-71 (Murphy, C.J.), Judge Rodowsky, in his controlling opinion,[7] observed that "[i]t is not an answer . . . to say that . . . the program is neutral with respect to sex, in the sense that an all female or an all male country club is eligible to participate." Id. at 87 (Rodowsky, J., concurring in the judgment). Recognizing that "[t]he ostensible prohibition against sex discrimination applies to each individual country club," Judge Rodowsky concluded that "[t]he universe of consideration for the particular problem created by this anti-discrimination law is any participating country club, in and of itself." Id.

Fearing that "the effectiveness of the Equal Rights Amendment to the Maryland Constitution would be substantially impaired" "if the views set forth in . . . Chief Judge Murphy's opinion were in the future to be adopted by a majority of [the] Court," Judge Eldridge took pains to buttress Judge Rodowsky's explanation:

> While it is true that many of our prior cases have involved government action directly imposing a burden or conferring a benefit entirely upon either males or females, we have never held that the E.R.A. is narrowly limited to such situations. On the contrary, we have viewed the E.R.A. more broadly, in accordance with its language and purpose . . . . [T]he language of the E.R.A. is unambiguous and . . . this language mandating equality of rights can only mean that sex is not a factor.

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

Id. at 88, 95 (Eldridge, J., concurring in part, dissenting in part) (quotation and emphasis omitted). Accordingly, Burning Tree II makes clear that, in this case, it is of no moment that the exclusion of same-sex couples from marriage applies equally to men and women. It is enough that sex is a factor in the enjoyment and the determination of the right to marry.

A number of courts have reached the conclusion that the exclusion of same-sex couples from marriage constitutes sex-based discrimination. In Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), the Hawaii Supreme Court concluded that the exclusion of same-sex couples from marriage discriminates "on the basis of the applicants' sex," reasoning that "[s]ubstitution of 'sex' for 'race' and article I, section 5 for the fourteenth amendment [in Loving] yields the precise case before us together with the conclusion that we have reached." Id. at 60, 68. In Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998), the court reached the same conclusion:

> That [an exclusion of same-sex couples from marriage] is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious.

Id. at *6; see also Coordination Proceeding, 2005 WL 583129, at *9 ("To say that all men and all women are treated the same in that each may not marry someone of the same gender misses the point. The marriage laws establish classifications (same gender vs. opposite gender) and discriminate based on those gender-based classifications."); cf. Li v. Oregon, No. 0403-03057, 2004 WL 1258167, at * 6 (Or. Cir. Ct. Apr. 20, 2004), rev'd on other grounds, 110 P.3d 91 (Or. 2005) ("A woman is denied the benefits because her

domestic partner is a woman; had her domestic partner been a man, then benefits would be available to them. A man, likewise, is denied benefits because his domestic partner is a man; had his domestic partner been a woman, then benefits would be available as well . . . . Thus, the effect of [the exclusion of same-sex couples from marriage] is to . . . classify on the basis of gender.").

In sum, Md. Code Ann., Fam. Law § 2-201 is subject to strict scrutiny because it constitutes sex-based discrimination.

### C. The Exclusion of Same-Sex Couples from Marriage Is Subject to Strict Scrutiny Because It Discriminates Based on Sexual Orientation, a Suspect Classification

#### 1. Discrimination based on sexual orientation is subject to strict scrutiny under Article 24 of the Declaration of Rights

Md. Code Ann., Fam. Law § 2-201 is also subject to strict scrutiny because it discriminates based on sexual orientation. As discussed below, lesbian and gay people constitute a suspect class as "a category of people who have experienced a history of purposeful unequal treatment *or* been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[8] Waldron, 289 Md. at 705 (quotation omitted) (emphasis added).

"[W]hen a statute creates a distinction based upon clearly 'suspect' criteria . . . then the legislative product must withstand a rigorous, 'strict scrutiny.'" Id. at 705-06.

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[8] The Court need not address whether lesbian and gay people constitute a suspect class if it concludes that the exclusion of same-sex couples from marriage fails any level of scrutiny, as discussed in section II below. See Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1984) (declining to address whether classification at issue was subject to strict scrutiny because, "if the statutory scheme cannot pass even the minimum rationality test, our inquiry ends"). Similarly, the Court need not address whether lesbian and gay people constitute a suspect class if it concludes that the exclusion of same-sex couples from marriage is subject to strict scrutiny for the reasons discussed in section I.A. or I.B. above.

In subjecting suspect classifications to strict scrutiny under Article 24, the Court of Appeals has again embraced the hallmarks of traditional strict scrutiny: "Laws which are subject to this demanding review violate the equal protection clause unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest."[9] Id. at 706 (quotation omitted). Because lesbian and gay people constitute a suspect class, Md. Code Ann., Fam. Law § 2-201 is subject to such rigorous scrutiny.

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

Lesbian and gay people have experienced and continue to experience systemic discrimination on account of their sexual orientation. This historical pattern of prejudice directed against a disfavored class has so often proven to be invidious that it must be viewed with a high degree of suspicion.

Lesbian and gay people have suffered broad-based prejudice in the past and continue to suffer such prejudice today. The manifestations of such animus have changed over time, but its existence has remained constant. At the turn of the past century, the medical establishment "embraced the 'degeneracy' theory of homosexuality . . . . [which] emphasized the depravity of the condition." Patricia A. Cain, Litigating for Lesbian and Gay Rights: A Legal History, 79 Va. L. Rev. 1551, 1555 (1993) (footnote omitted). The post-World War I era was marked by repression and censorship of sexual orientation-related expression. Id. at 1557. During the McCarthy era, lesbian and gay people were grouped with Communists as security risks, resulting in a Presidential executive order calling for the purge of such "sex perverts" from government service. Id. at 1565-66.

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[9] In addition, Maryland case law recognizes an intermediate level of scrutiny applicable to "quasi-suspect classification[s]" which "impact upon sensitive, although not necessarily suspect criteria." Id. at 711 & n.16 (quotations omitted).

Throughout the 1950s and 1960s, police commonly raided gay bars and arrested patrons as a form of harassment. Id. at 1564-65. Until 1990, lesbian and gay immigrants were precluded from entering the United States, first as "psychopaths," then as "sexual deviants." See Tracey Rich, Sexual Orientation Discrimination in the Wake of Bowers v. Hardwick, 22 Ga. L. Rev. 773, 773 n.4 (1988). And, until 2003, the legal consequences of sodomy laws "were sufficiently severe to make lesbians and gay men think of themselves as criminals just for being who they were." Cain, supra at 1564; see also Lawrence v. Texas, 539 U.S. 558 (2003) (striking down a law that criminalized same-sex sodomy).

Today, many lesbian and gay people continue to hide their sexual orientation – from their families, their friends, their neighbors, their places of employment, and their houses of worship – for fear of rejection or harassment. Those who choose not to do so often find themselves the targets of discrimination on account of their sexual orientation. In one recent survey, three out of four respondents reported experiencing such discrimination, with one out of three respondents experiencing physical violence. Kaiser Family Found., Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation, at 3-4 (Nov. 12, 2001) (www.kff.org/kaiserpolls/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13874). Such results are consistent with the findings of the United States Surgeon General:

> [O]ur culture often stigmatizes homosexual behavior, identity and relationships. These anti-homosexual attitudes are associated with psychological distress for homosexual persons and may have a negative impact on mental health, including a greater incidence of depression and suicide, lower self-acceptance and a greater likelihood of hiding sexual orientation . . . . In their extreme form, these negative attitudes lead to

> antigay violence. Averaged over two dozen studies, 80 percent of gay men and lesbians had experienced verbal or physical harassment on the basis of their orientation, 45 percent had been threatened with violence, and 17 percent had experienced a physical attack.

United States Dep't of Health and Human Servs., The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior, at 4 (July 9, 2001) (www.surgeongeneral.gov/library/sexualhealth/call.htm) (citations omitted). Indeed, lesbian and gay people remain among the leading targets of hate crimes. See Federal Bureau of Investigation, Hate Crime Statistics, at 9 (2002) (www.fbi.gov/ucr/hatecrime2002.pdf) (1,244 of the 7,462 hate crimes reported in 2002 – sixteen percent of all reported hate crimes – were motivated by sexual orientation bias).

A similar history of discrimination has been experienced by lesbian and gay people in Maryland. This fact has been recognized – even documented – by the State itself. See, e.g., Maryland Comm'n on Human Relations, Annual Report, at 11 (2002) (www.mchr.state.md.us/annrep2002.pdf) (documenting 66 reported hate crimes on the basis of sexual orientation, constituting nine percent of all reported hate crimes, in 2002); Maryland Comm'n on Human Relations, Annual Report, at 9 (2001) (www.mchr.state.md.us/annrep%202001.pdf) ("The report compared the disposition of home purchase loan applications filed by co-applicants of the same gender with the disposition of applications filed by co-applicants of the opposite gender . . . . and found that the same-gender group was consistently denied a greater percentage of applications for conventional loans, particularly when the lender was a bank or thrift institution."); Maryland Gen. Assembly, Operating Budget Analysis Document, at 9-10 (2001) (http://mlis.state.md.us/2001rs/budget_docs/All/Operating/

D00L00_-_Maryland_Commission_on_Human_Relations.pdf) ("The Interim Report of the Special Commission to Study Sexual Orientation Discrimination in Maryland . . . . reported that the public hearings produced numerous testimonials of discrimination against Maryland citizens based upon their sexual orientation. Some testimony detailed incidents of threats and violence, as well as indifference from authorities investigating such incidents. Some involved wrongful dismissal from employment and some, eviction from, and denial of housing. Testimony was also heard from citizens with objections to certain sexual orientations who had concerns about having to employ or rent to people with such orientations."); Maryland Comm'n on Human Relations, Press Release (Apr. 13, 2001) (www.mchr.state.md.us) ("As testimony at public hearings and before Senate and House Committees confirmed, discrimination based on sexual orientation has been a harsh reality for many gays, lesbians and bisexuals who live, work in, and visit Maryland."); Maryland Comm'n on Human Relations, Annual Report, at 3 (2000) (www.mchr.state.md.us/annrep2000.pdf) ("[Housing] discrimination based on . . . sexual orientation was widely reported."); Special Comm'n to Study Sexual Orientation Discrimination in Md., Interim Report Transmittal Mem., at 1-2 (2000) ("[I]ndividuals whose sexual orientation differs from the presumed majority . . . . pay taxes, participate in our democracy and add to the richness of our culture. Yet, the Commission was disturbed to find that they are regularly victimized on the basis of who they are rather than on what they do."); see also Pls.' Decls. (attesting to the fact that Plaintiffs have experienced and continue to experience discrimination on account of their sexual orientation in many contexts).

In sum, there exists a pattern of prejudice directed against lesbian and gay people that has proven to be extraordinarily pernicious.

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

Discrimination based on sexual orientation is also highly suspicious because sexual orientation bears no relation to capacity to participate in or contribute to society. It has proven to be an irrelevant consideration in almost every context in which the government acts, from law enforcement[10] to public education[11] to public employment[12] to custody and visitation disputes.[13] Such discrimination must be closely scrutinized to ensure that it is not invidious.

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

> Homosexuals have suffered from the extreme fear and hatred of the heterosexual majority. They have at various times been viewed as psychotic, immoral, and generally repulsive. As a result of these characterizations, homosexuals have been deprived of many opportunities

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

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

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

[13] See, e.g., Boswell v. Boswell, 118 Md. App. 1, 701 A.2d 1153 (1997).

> open to heterosexuals. This deprivation is rarely based on any lack of capability but is instead usually based on the majority's perception of homosexuality as contrary to nature and morality.

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

The evidence dispelling odious myths that persist about homosexuality is overwhelming. With respect to the notion that lesbian and gay people are mentally ill, "[a]ll major professional mental health organizations have gone on record to affirm that homosexuality is *not* a mental disorder." American Psychiatric Ass'n, supra at 1 (emphasis in original). Moreover, all such organizations, as well as the United States Surgeon General, have emphatically rejected the suggestion that lesbian and gay people can or should change their sexual orientation. Id. at 2 ("There is no published scientific evidence supporting the efficacy of 'reparative therapy' as a treatment to change one's sexual orientation."); id. at 4 (noting that the American Psychological Association, the National Association of Social Workers, and the American Academy of Pediatrics agree); United States Dep't of Health and Human Servs., supra at 4 ("Sexual orientation is usually determined at adolescence, if not earlier, and there is no valid scientific evidence that sexual orientation can be changed.") (citations omitted); see also Pls.' Decls. (attesting to the fact that Plaintiffs do not believe that they can change their sexual orientation).

Many stereotypes about lesbian and gay people brand them as threats to child welfare. Yet "[n]umerous studies have shown that the children of gay parents are as likely to be healthy and well-adjusted as children raised in heterosexual households. Children raised in gay or lesbian households do not show any greater incidence of homosexuality or gender identity issues than other children." American Psychiatric

Ass'n, supra at 3; see also Stacey Decl. ¶¶ 7-14 (Ex. 12). Furthermore, there is simply no correlation between homosexuality and child molestation. See Carole Jenny, et al., Are Children at Risk of Sexual Abuse by Homosexuals?, 94 Pediatrics 44 (1994) (finding that less than one percent of child molesters are gay); see also John Boswell, Christianity, Social Tolerance and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century (1980) (noting that, historically, baseless accusations of child molestation have been leveled against various disfavored minorities vulnerable to such propaganda).

The notion that lesbian and gay people favor sexual promiscuity over committed, family-centered relationships similarly lacks any empirical support. Like their heterosexual counterparts, most lesbian and gay people desire stable relationships. Indeed, one recent survey showed that 74% of lesbian and gay people would marry if they could. Kaiser Family Found., supra at 4; see also American Psychological Ass'n, supra at 1 ("The concept of sexual orientation refers to more than sexual behavior. It includes feelings as well as identity."); Pls'. Decls. (attesting to the fact that Plaintiffs have formed lifelong partnerships).

Thus, lesbian and gay people have been disadvantaged, not on account of their capacity to participate in or contribute to society, but rather on account of insidious untruths about their sexual orientation.[14]

* * *

[14] This proposition is no less true in this case. Sexual orientation does not inform whether a couple and their children need or deserve the protections that come with marriage. A lesbian or gay couple is just as likely as a heterosexual couple to benefit from – and their relationship is just as likely to be strengthened by – the tangible and intangible protections of marriage. See Pls.' Decls. (attesting to the fact that Plaintiffs and their children have suffered and continue to suffer injury because they are denied the tangible and intangible protections of marriage).

Both because lesbian and gay people have experienced a history of purposeful unequal treatment and because they have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities, a number of courts have reached the conclusion that lesbian and gay people constitute a suspect class. As the Oregon Court of Appeals held in Tanner v. Oregon Health Scis. Univ., 971 P.2d 435 (Or. Ct. App. 1998):

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

Id. at 447; see also Castle, 2004 WL 1985215, at *11 (holding, in the course of striking down an exclusion of same-sex couples from marriage, that sexual orientation is a suspect classification); Children's Hosp. and Med. Ctr. v. Bonta, 18 Cal. Rptr. 2d 629, 650 (Cal. Ct. App. 2002) (listing sexual orientation as a suspect classification); Watkins v. United States Army, 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J., concurring) (concluding that lesbian and gay people constitute a suspect class). This Court should hold likewise.[15]

[15] The United States Supreme Court has not addressed whether lesbian and gay people constitute a suspect class. Although some lower federal courts have concluded that lesbian and gay people do not constitute a suspect class, they have relied directly or indirectly on Bowers, a case that the United States Supreme Court has wholly repudiated. See Lawrence, 539 U.S. at 578 ("Bowers was not correct when it was decided, and it is not correct today."). In the alternative, these courts have mistakenly relied on Romer v. Evans, 517 U.S. 620 (1996), a case that did not address whether the classification at issue was subject to strict scrutiny because it failed any level of scrutiny. See Hooper, 472 U.S. at 618.

### 2. The exclusion of same-sex couples from marriage constitutes discrimination based on sexual orientation

By permitting opposite-sex couples but not same-sex couples to marry, Md. Code Ann., Fam. Law § 2-201 discriminates based on sexual orientation. Whether a couple can marry turns on whether the couple is an opposite-sex couple or a same-sex couple. In other words, whether a couple can marry turns on the essential distinction between a heterosexual couple and a lesbian or gay couple. Indeed, Md. Code Ann., Fam. Law § 2-201 was enacted in 1973 in response to the submissions of applications for marriage licenses to county clerks by lesbian and gay couples. See Clerks of Court – Marriage Licenses; Not to Be Issued to Members of the Same Sex, 57 Md. Op. Att'y Gen. 71 (1972).

The exclusion of same-sex couples from marriage constitutes sexual orientation-based discrimination even though a lesbian or gay person can marry a person of the opposite sex and a heterosexual person cannot marry a person of the same sex. In Lawrence, in which the United States Supreme Court struck down a law prohibiting "deviate sexual intercourse with another individual of the same sex," Lawrence, 539 U.S. at 563 (quotation omitted), the State of Texas argued that, because the law, by its own terms, prohibited sexual intimacy between "same-sex" couples instead of "lesbian and gay" couples, it did not discriminate based on sexual orientation. Lawrence v. Texas, No. 09-102, 2003 WL 470184, at *34 (Feb. 17, 2003) (Resp.'s Br.) ("Under the facially neutral conduct prohibitions of section 21.06, everyone in Texas is foreclosed from having deviate sexual intercourse with another person of the same sex."). The majority opinion implicitly rejected this argument by acknowledging throughout its analysis that

the law discriminated against lesbian and gay people. Justice O'Connor's concurring opinion explained the underlying reasoning:

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

Lawrence, 539 U.S. at 583 (O'Connor, J, concurring).

Like the law at issue in Lawrence, Md. Code Ann., Fam. Law § 2-201 discriminates against lesbian and gay people based on their sexual orientation. Just as a law that criminalizes the sexual intimacy of same-sex couples criminalizes the sexual intimacy of lesbian and gay couples, a law that prohibits marriage by same-sex couples prohibits marriage by lesbian and gay couples. See Goodridge, 798 N.E.2d at 958 (recognizing, in the course of striking down an exclusion of same-sex couples from marriage, that discrimination between same-sex and opposite-sex couples is a form of sexual orientation discrimination); Hernandez, 794 N.Y.S.2d at 604 (same); Castle, 2004 WL 1985215, at *13 (same); see also Snetsinger v. Montana Univ. Sys., 104 P.3d 445, 451-52 (Mont. 2005) (recognizing, in the course of striking down an exclusion of same-sex couples from domestic partner public employment benefits, that discrimination between same-sex and opposite-sex couples is a form of sexual orientation discrimination); cf. Peppin v. Woodside Delicatessen, 67 Md. App. 39, 46, 506 A.2d 263 (1986) (concluding that a discount for patrons wearing skirts or gowns discriminated against men, notwithstanding its recognition of the fact that men can wear skirts or gowns).

In sum, Md. Code Ann., Fam. Law § 2-201 is subject to strict scrutiny because it constitutes sexual orientation-based discrimination.

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

### A. At a Minimum, the Exclusion of Same-Sex Couples from Marriage Must Have a Fair and Substantial Relation to a Legitimate Governmental Interest Under Article 24 of the Declaration of Rights

Md. Code Ann., Fam. Law § 2-201 is unconstitutional because it cannot survive regardless of the level of scrutiny to which it is subject. Observing that, "[e]ven under the 'minimal' rational basis test, this Court has not hesitated to strike down discriminatory [law] that lacked any reasonable justification," the Court of Appeals has recognized that "[t]he vitality of this State's equal protection doctrine is demonstrated by our decisions which, although applying the deferential standard embodied in the rational basis test, have nevertheless invalidated many legislative classifications which impinged on privileges cherished by our citizens." Frankel, 361 Md. at 315 (quotations omitted). The Court has repeatedly demonstrated its willingness to strike down laws under rational basis review when they, like Md. Code Ann., Fam. Law § 2-201, do not have a constitutionally sufficient justification. See e.g., Frankel v. Board of Regents of Univ. of Md. Sys., 361 Md. 298, 761 A.2d 324 (2000) (striking down, under rational basis review, tuition policy discriminating against certain in-state residents); Verzi v. Baltimore County, 333 Md. 411, 635 A.2d 967 (1994) (striking down, under rational basis review, ordinance discriminating against out-of-county tow truck operators); Kirsch v. Prince George's County, 331 Md. 89, 626 A.2d 372 (1993) (striking down, under rational basis review, zoning ordinance discriminating against university student tenants); Attorney General v. Waldron, 289 Md. 683, 426 A.2d 929 (1981) (striking down, under rational

basis review, statute discriminating against retired judge practitioners); Bruce v. Director, Dep't of Chesapeake Bay Affairs, 261 Md. 585, 276 A.2d 200 (1971) (striking down, under rational basis review, statute discriminating against out-of-county crabbers and oystermen); Maryland Coal & Realty Co. v. Bureau of Mines, 193 Md. 627, 69 A.2d 471 (1949) (striking down, under rational basis review, mining statute discriminating against non-exempt counties); Dasch v. Jackson, 170 Md. 251, 183 A. 534 (1936) (striking down, under rational basis review, statute discriminating against paper hangers).

The case law makes clear that, at a minimum, "a legislative classification [must] rest upon some ground of difference having a fair and substantial relation to the object of the legislation," and that the object of the legislation must be a "legitimate" one. Frankel, 361 Md. at 315, 317 (quotations omitted); cf. Lawrence, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause. We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where . . . the challenged legislation inhibits personal relationships."). Md. Code Ann., Fam. Law § 2-201 is unconstitutional because the exclusion of same-sex couples from marriage does not have a fair and substantial relation to a legitimate governmental interest.[16]

### B. The Proffered Governmental Interest in Discrimination for Its Own Sake Is Not a Legitimate Governmental Interest

Defendants have proffered the following justifications for the exclusion of same-sex couples from marriage: "promoting and preserving societal values," "promoting and preserving the institution of marriage as historically understood to include a man and a

[16] *A fortiori*, the exclusion of same-sex couples from marriage fails strict scrutiny.

woman," "promoting the traditional family as the basic unit of a free society," and "preserving uniformity among the States with respect to the definition of marriage." Defs.' Answer to Pls.' Interrogatory at 2-3. None is a legitimate governmental interest because each is a form of discrimination for its own sake.

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

Md. Code Ann., Fam. Law § 2-201 is not justified by the proffered governmental interest in "promoting and preserving societal values," which is tantamount to an interest in expressing moral disapproval of lesbian and gay people for its own sake. Expressing moral disapproval of lesbian and gay people for its own sake is not a legitimate governmental interest. It is simply another way of saying, "we discriminate against lesbian and gay people because we want to discriminate against lesbian and gay people." It is therefore inherently and patently arbitrary and irrational.

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

The United States Supreme Court has made clear that this principle equally applies where a law is intended to express moral disapproval of a class. As Justice O'Connor recently explained:

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

Lawrence, 539 U.S. at 582-83 (O'Connor, J., concurring) (quotation and citations omitted).

Recognizing that, "[n]ecessarily, there are limits to the valid exercise of the police power of the State," the Court of Appeals has recognized this same principle, observing that, "[o]therwise, the State Legislature would have unbounded power and the Fourteenth Amendment would be ineffective, for then it would be enough to say that any piece of legislation was enacted for the purpose of conserving the . . . morals . . . of the people." Davis v. State, 183 Md. 385, 396-97, 37 A.2d 880 (1944) (citation omitted). Thus, the Court has held that, "[i]f . . . a statute designed for the promotion of . . . morals . . . has no real or substantial relation to those objects, . . . it is the duty of the court to adjudge accordingly, and thereby give effect to the Constitution." Id. at 397 (citation omitted).

The United States Supreme Court has also made clear that this principle equally applies where a law is intended simply to accommodate the discriminatory attitudes of the general public. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448

(1985) ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . , are not permissible bases for [governmental discrimination]."); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). Furthermore, the Court has made clear that this principle equally applies where a law discriminates against lesbian and gay people. Lawrence, 539 U.S. at 578; Romer, 517 U.S. at 635.

Md. Code Ann., Fam. Law § 2-201 contravenes this principle because it was enacted in 1973 in response to the submissions of applications for marriage licenses to county clerks by lesbian and gay couples. See Clerks of Court – Marriage Licenses; Not to Be Issued to Members of the Same Sex, 57 Md. Op. Att'y Gen. 71 (1972). In other words, it was enacted with the purpose of disadvantaging lesbian and gay people. This "desire to harm" lesbian and gay people is not a legitimate governmental interest. Even if Md. Code Ann., Fam. Law § 2-201 was intended simply to accommodate the discriminatory attitudes of the general public, the analysis remains the same.

Moreover, the State's own laws undermine its claim that it has an actual interest in expressing moral disapproval of lesbian and gay people. As set forth fully in the Statement of Facts § VII, supra, the State's own laws expressly prohibit sexual orientation discrimination in numerous and diverse contexts, including employment, housing, public accommodations, and education. Because the State's purported interest in expressing moral disapproval of lesbian and gay people is belied by the State's own laws, it is "impossible to credit." Romer, 517 U.S. at 635.

In sum, the proffered governmental interest in expressing moral disapproval of lesbian and gay people for its own sake does not justify the exclusion of same-sex couples from marriage. See Goodridge, 798 N.E.2d at 967 (rejecting proffered interest in expressing community consensus that homosexuality is immoral); Baker v. Vermont, 744 A.2d 864, 885-86 (1999) (rejecting proffered interest in maintaining official intolerance of intimate same-sex relationships); Andersen, 2004 WL 1738447, at *8 (rejecting proffered interest in morality).

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

Nor is Md. Code Ann., Fam. Law § 2-201 justified by the proffered governmental interests in "promoting and preserving the institution of marriage as historically understood to include a man and a woman" and "promoting the traditional family as the basic unit of a free society." Maintaining traditional discrimination within marriage for its own sake is not a legitimate governmental interest. It is simply another variation on the same theme – "we discriminate within marriage because we have always discriminated within marriage" – and is therefore inherently and patently arbitrary and irrational.

Blind adherence to traditional discrimination is by definition arbitrary and irrational. See Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (noting that fact that, "[t]raditionally, [discrimination against women] was rationalized by an attitude of 'romantic paternalism'" did not change fact that such discrimination "in practical effect, put women, not on a pedestal, but in a cage."); Eubanks v. Louisiana, 356 U.S. 584, 588 (1958) ("[L]ocal tradition cannot justify failure to comply with the constitutional mandate requiring equal protection of the laws."); Perez, 198 P.2d at 27 ("Certainly the fact alone

that . . . discrimination has been sanctioned by the state for many years does not supply justification."); see also Schroeder v. Broadfoot, 142 Md. App. 569, 585, 790 A.2d 773 (2002) (noting that, notwithstanding tradition of giving children their fathers' surnames, constitutional considerations preclude courts from blindly adhering to such tradition). A discriminatory classification and its justification may not be one and the same. See Goodridge, 798 N.E.2d at 961 n.23 ("[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been."); Baehr, 852 P.2d at 61 ("[The proposition that] the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman . . . . [is] circular and unpersuasive") (quotation omitted). Rather, the justification must be independent of the fact that the State has created a discriminatory classification to explain *why* the State has done so. Absent such a justification, the discriminatory classification is "a classification for its own sake, something the Equal Protection Clause does not permit." Romer, 517 U.S. at 635. Thus, the proffered governmental interest is not a legitimate governmental interest because, no matter how historically entrenched a discriminatory practice may be, the entrenchment does not justify the practice, even under rational basis review.

Moreover, the State's own history confirms that it does not have an actual interest in maintaining traditional discrimination within marriage. See Cott Decl. ¶¶ 5-48. As set forth fully in the Statement of Facts § V, supra, the State's own history has seen the redress of exclusions, restrictions, and inequalities within marriage, including race-, class-, religion-, and sex-based ones. The State may not selectively assert an interest in tradition only where lesbian and gay people are concerned. Where "the disadvantage

imposed is born of animosity toward the class of persons affected," such class-based animus is constitutionally impermissible. Romer, 517 U.S. at 634.

In sum, the proffered governmental interest in maintaining traditional discrimination for its own sake does not justify the exclusion of same-sex couples from marriage. See Goodridge, 798 N.E.2d at 965 (rejecting proffered interest in preventing trivialization or destruction of marriage); Baker, 744 A.2d at 884 (rejecting proffered interest in protecting marriage from destabilizing changes); Coordination Proceeding, 2005 WL 583129, at *3-*4 (rejecting proffered interest in traditional understanding of marriage); Hernandez, 794 N.Y.S.2d at 597-99 (rejecting proffered interest in tradition); Castle, 2004 WL 1985215, at *14 (rejecting proffered interest in historical commitment to marriage); Andersen, 2004 WL 1738447, at *8 (rejecting proffered interest in tradition).

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

Nor is Md. Code Ann., Fam. Law § 2-201 justified by the proffered governmental interest in "preserving uniformity among the States with respect to the definition of marriage." Ensuring uniform discrimination within marriage for its own sake is not a legitimate governmental interest. It is simply yet another variation on the same theme – "we discriminate within marriage because others discriminate within marriage" – that is inherently and patently arbitrary and irrational.

Blind adherence to the discrimination of others is also by definition arbitrary and irrational. See Cleburne, 473 U.S. at 448 (1985); Palmore, 466 U.S. at 429. The analysis remains the same even where the discrimination of "others" is the discrimination of other states. Indeed, it is inconceivable that Maryland's constitution would tolerate an

otherwise unconstitutional law simply because another state has a comparable law – a law that would be unconstitutional if it were Maryland's law. Whatever the protections that other states' constitutions guarantee to their citizens, such protections do not determine the protections that Maryland's constitution guarantees to its citizens. See Goodridge, 798 N.E.2d at 967 ("We would not presume to dictate how another State should respond to today's decision. But neither should considerations of comity prevent us from according Massachusetts residents that full measure of protection available under the Massachusetts Constitution.").

Moreover, given the wide divergence among state marriage laws, it is impossible to ensure uniform discrimination within marriage. See, e.g., In re Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (holding that the State of Massachusetts must permit same-sex couples to marry). Furthermore, our federalist system has a well-developed mechanism – comity law – to account for such divergence among state marriage laws. See, e.g., Henderson v. Henderson, 199 Md. 449, 87 A.2d 403 (1952). Because comity law addresses the proffered concern over uniformity, the proffered concern over uniformity does not justify the exclusion of same-sex couples from marriage. See Moreno, 413 U.S. at 536-37 ("The existence of [laws already addressing the proffered concerns] necessarily casts considerable doubt upon the proposition that the [classification] could rationally have been intended to prevent those very same [concerns].") (citations omitted).

In addition, the State's own laws undermine its claim that it has an actual interest in ensuring uniform discrimination within marriage. As set forth fully in the Statement of Facts § VI, supra, the State's own marriage laws have diverged and continue to diverge

from the majority of other states' marriage laws in many contexts, including consanguinity, age, and other conditions of marriage, as well as residency and other conditions of divorce. As the Vermont Supreme Court held in Baker v. Vermont, 744 A.2d 864 (1999):

> The State's argument that [its] marriage laws serve a substantial government interest in maintaining uniformity with other jurisdictions cannot be reconciled with [its] recognition of unions . . . not uniformly sanctioned in other states . . . . [T]he State's claim that [its] marriage laws were adopted because the Legislature sought to conform to those of the other forty-nine states is . . . refuted by . . . relevant legislative choices which demonstrate that uniformity with other jurisdictions has not been a government purpose.

Id. at 885.

In sum, the proffered governmental interest in ensuring uniform discrimination for its own sake does not justify the exclusion of same-sex couples from marriage. See Goodridge, 798 N.E.2d at 967 (rejecting proffered interest in avoiding interstate conflict); Baker, 744 A.2d at 885 (rejecting proffered interest in maintaining uniformity with marriage laws in other states); Hernandez, 794 N.Y.S.2d at 599-600 (rejecting proffered interest in ensuring consistency with laws of other jurisdictions).

### C. The Proffered Governmental Interest in Legislative Hegemony Is Not a Legitimate Governmental Interest

Md. Code Ann., Fam. Law § 2-201 is also not justified by the proffered governmental interests in "protecting state sovereignty and democratic self-governance" and "exercising and preserving the Legislature's authority to determine and define the nature of contractual relationships licensed by the State," which are tantamount to an interest in legislative hegemony. Defs.' Answer to Pls.' Interrogatory at 2. Disregarding

the very framework of government established by the Maryland Constitution is not a legitimate governmental interest.

In effect, Defendants assert that the judicial branch has no role in ensuring equality and liberty for disfavored classes; rather, they assert that equality and liberty for disfavored classes may be ensured only through majoritarian processes. In other words, they assert that, where disfavored classes experience discrimination at the hands of their own government, they must wait until times change to the point that they are no longer disfavored before they may seek judicial recourse – recourse for which they will no longer have any need. Their assertion disregards the most basic concepts of law and government. See Davis, 183 Md. at 396-97 ("Necessarily, there are limits to the valid exercise of the police power of the State.").

The very purpose of Articles 24 and 46 is to ensure that disfavored classes may seek judicial recourse where majoritarian processes fail to ensure equality and liberty. And, under the Maryland Constitution, the very role of the judicial branch is to serve as a check on the other branches of government. See Md. Const. Decl. Rts. art. 8 ("That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."); see also Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Indeed, it is where majoritarian processes fail to ensure equality and liberty for disfavored classes that the judicial branch performs one of its most important functions. As Judge Cathell recently stated:

> It is always easiest to decline to address controversial issues. It is, perhaps, the safest thing to do, even for courts. But the avoiding of such

> issues is best left to the political processes of the other branches of government. It is our branch of government, the judiciary, under the express and implied doctrine of the separation of powers, to which the toughest and most difficult decisions are delegated. It is our primary role to ensure that the fundamental constitutional rights, which are reserved to the people, are protected. One of the most important roles of the judiciary is to see that the laws equally protect all people.

Frase v. Barnhart, 379 Md. 100, 130-31, 840 A.2d 114 (2003) (Cathell, J., concurring). Thus, the judicial branch has an essential role in ensuring equality and liberty for disfavored classes. If it were otherwise, legislative hegemony would justify discrimination under rational basis review in every instance.

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

### D. The Exclusion of Same-Sex Couples from Marriage Does Not Have a Fair and Substantial Relation to the Proffered Governmental Interests in Child-Bearing and Child-Rearing

The exclusion of same-sex couples from marriage does not have a fair and substantial relation to the proffered governmental interest in "encouraging procreation and child-rearing within the stable environment traditionally associated with marriage." Defs.' Answer to Pls.' Interrogatory at 2.

#### 1. The exclusion of same-sex couples from marriage does not have a fair and substantial relation to the proffered governmental interest in child-bearing

The exclusion of same-sex couples from marriage does not rationally further any state interest in "traditional" procreation. Heterosexual couples will continue to bring children into their families via "traditional" procreation regardless of whether lesbian and

gay couples are permitted to marry. See Hooper, 472 U.S. at 622 (striking down a statute under rational basis review because it "[was] not written to require any connection between [the classification] and [the proffered state interest].").

Moreover, even under rational basis review, a proffered justification must have some basis in reality. See Heller v. Doe ex rel. Doe, 509 U.S. 312, 321 (1993) ("[E]ven the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation."). The reality is that the State's interest in marriage is not to encourage children to be brought into families through "traditional" procreation. Indeed, state law requires neither the ability nor the desire to bring a child into one's life through "traditional" procreation as a condition of marriage. See Md. Code Ann., Fam. Law tit. 2l; see also Goodridge, 798 N.E.2d at 961 ("[I]t is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.").

Rather, the reality is that the State's interest in marriage is to support couples and their children (if any), whether or not their children were brought into their families through "traditional" procreation. State law treats children who are brought into their families through "traditional" procreation and children who are brought into families through other means (e.g., donor insemination, adoption) equally (except for the ability of their parents to marry). Ayers Decl. ¶ 7; see also Md. Code Ann., Est. & Trusts § 1-206(b) (donor insemination); Md. Code Ann., Fam. Law § 5-308(b)(1) (adoption). Thus, any distinction between lesbian and gay couples and heterosexual couples – both of

whom bring children into their families[17] – that is predicated on the means through which children are brought into their families is arbitrary and irrational.

Furthermore, where a classification is "so discontinuous with the reasons offered for it," those reasons become "impossible to credit." Romer, 517 U.S. at 632, 635. The exclusion of lesbian and gay couples from marriage deprives them of the full range of protections that come with marriage, only a small subset of which involves procreation. See Statement of Facts § IV, supra; Appendix, infra. In light of the considerable discontinuity between the exclusion of same-sex couples from marriage and any state interest in procreation, it is impossible to credit any state interest in procreation as the reason for the exclusion of same-sex couples from marriage.

Because the exclusion of same-sex couples from marriage does not rationally further any state interest in procreation, the proffered governmental interest in child-bearing does not justify the exclusion of same-sex couples from marriage. See Goodridge, 798 N.E.2d at 961-62 (rejecting proffered interest in procreation); Baker, 744 A.2d at 884 (same); Coordination Proceeding, 2005 WL 583129, at *6-*8 (same); Castle, 2004 WL 1985215, at *14-*16 (same); Andersen, 2004 WL 1738447, at *9-*10 (same).

**2. The exclusion of same-sex couples from marriage does not have a fair and substantial relation to the proffered governmental interest in child-rearing**

The exclusion of same-sex couples from marriage does not rationally further – and, indeed, undermines – the state interest in child welfare. Even if it were true that

[17] Ayers Decl. ¶ 6; Deane Decl. ¶ 12 (donor insemination); Kelber-Kaye Decl. ¶¶ 8, 12 (same); Mozelle Decl. ¶¶ 8, 11 (same); Williams Decl. ¶ 10 (adoption).

heterosexual parents are more fit than lesbian and gay parents – which it is not[18] – the exclusion of lesbian and gay couples from marriage neither increases the number of children raised by heterosexual parents nor decreases the number of children raised by lesbian and gay parents. See Hooper, 472 U.S. at 622.

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

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

Goodridge, 798 N.E.2d at 964 (quotation and footnote omitted). Thus, the exclusion of lesbian and gay couples from marriage inhibits, rather than advances, the state interest in child welfare. By denying the children of lesbian and gay parents the myriad protections that only marriage can afford, the State is contravening its own interest in child welfare. This is especially incongruous in light of the fact that, in many cases, the State establishes the legal relationships between such children and their parents by allowing for adoption by one or both parents. The State's objective is to further the stability and security within a household that inevitably flows from marriage. By seeking the right to marry, Plaintiffs' objective is no different.

[18] The social science research and the child welfare community are monolithic in their conclusion that lesbian and gay parents are as fit as heterosexual parents. See Stacey Decl.¶¶ 7-14.

Furthermore, the State's own laws and practices confirm that it does not have an actual interest in favoring heterosexual parents over lesbian and gay parents. See Ayers Decl. ¶ 7; see also Heller, 509 U.S. at 321. In resolving custody and visitation disputes, state courts disregard the sexual orientation of each parent. Ayers Decl. ¶ 8; see also Boswell v. Boswell, 352 Md. 204, 721 A.2d 662 (1998). Moreover, state courts routinely grant adoptions to lesbian and gay people. Ayers Decl. ¶ 9; Williams Decl. ¶ 10. Indeed, adoption agencies "may not deny an individual's application to be an adoptive parent because . . . [o]f the applicant's . . . sexual orientation" and "may not delay or deny the placement of a child for adoption on the basis of the prospective adoptive parent's . . . sexual orientation." Md. Regs. Code tit. 7 §§ 05.03.09(A)(2), 05.03.15(C)(2). Furthermore, state courts routinely grant second-parent adoptions to same-sex partners. Ayers Decl. ¶ 9; Williams Decl. ¶ 10; Deane Decl. ¶ 13; Kelber-Kaye Decl. ¶¶ 9, 15; Mozelle Decl. ¶ 9; see also Office of the Attorney General of Maryland, Letter to Delegate Sharon Grosfeld (June 9, 2000) (concluding that Maryland courts may grant second-parent adoptions to same-sex partners). In addition, the Maryland Department of Health and Mental Hygiene routinely issues birth certificates recognizing same-sex partners as co-parents. Ayers Decl. ¶ 16; Williams Decl. ¶ 10; Deane Decl. ¶ 13; Kelber-Kaye Decl. ¶ 15. Because the State's purported interest in favoring heterosexual parents over lesbian and gay parents is belied by the State's own laws and practices, it is "impossible to credit." Romer, 517 U.S. at 635.

Because the exclusion of same-sex couples from marriage does not rationally further – and, indeed, undermines – the state interest in child welfare and because the State does not have an actual interest in favoring heterosexual parents over lesbian and

gay parents, the proffered governmental interest in child-rearing does not justify the exclusion of same-sex couples from marriage. See Goodridge, 798 N.E.2d at 962-64 (rejecting proffered interest in child-rearing); Baker, 744 A.2d at 884 (same); Castle, 2004 WL 1985215, at *14-*16 (same); Andersen, 2004 WL 1738447, at *9-*10 (same).

### E. The Exclusion of Same-Sex Couples from Marriage Does Not Have a Fair and Substantial Relation to the Proffered Governmental Interest in Cost Savings

The exclusion of same-sex couples from marriage also does not have a fair and substantial relation to the proffered governmental interest in "preserving scarce government resources." Defs.' Answer to Pls.' Interrogatory at 2.

Even if it were true that the exclusion of same-sex couples from marriage achieves cost savings – which it is not[19] – the United States Supreme Court has long held that a state interest in cost savings for its own sake is not a permissible justification for discrimination:

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

Shapiro v. Thompson, 394 U.S. 618, 633 (1969); see also Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974). If it were otherwise, cost savings would justify discrimination under rational basis review in almost every instance, because discrimination almost always achieves cost savings. Because there are an infinite number of ways in which a classification could be drawn, almost all of which would achieve cost savings, there must be an independent justification for the choice of one line over the

[19] The exclusion of same-sex couples from marriage does not achieve cost savings. See Badgett Decl. ¶¶ 53-55.

others. Otherwise, an arbitrarily drawn classification would almost always survive scrutiny under rational basis review. This is why the proper inquiry is not whether a classification furthers a state interest in cost savings, but rather whether it does so in a non-arbitrary manner.

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

* * *

Whatever social good results when a couple makes a commitment of the highest order to each other, e.g., a stable household, it is realizable whether the couple is a lesbian or gay couple or a heterosexual couple. Thus, it is arbitrary and irrational to allow heterosexual couples to make such a commitment to each other but not to allow lesbian and gay couples to do the same. The exclusion of lesbian and gay couples from marriage is nothing more than discrimination for its own sake, something that has long been recognized as anathema in constitutional jurisprudence. Thus, the exclusion of lesbian and gay couples from marriage fails any level of scrutiny under Article 24 of the Declaration of Rights.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for summary judgment.

Respectfully submitted,

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