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.	*	

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PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants fail to appreciate that the fundamental right to marry extends to people in lesbian and gay relationships, that the exclusion of same-sex couples from marriage discriminates based on sex, and that sexual orientation is a suspect classification – and, therefore, that the exclusion of same-sex couples from marriage is subject to strict scrutiny. Defendants also fail to appreciate that the exclusion of same-sex couples from marriage fails even rational basis review. Md. Code Ann., Fam. Law § 2-201 lacks a constitutionally sufficient justification and is therefore unconstitutional.

ARGUMENT

I. THE JUDICIAL BRANCH HAS AN ESSENTIAL ROLE IN ENSURING EQUALITY AND LIBERTY FOR DISFAVORED CLASSES

Under the Maryland Constitution, the essential role of the judicial branch is to serve as a check on the legislative and executive branches by ensuring that they do not transgress constitutional limitations on governmental action. 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."). Thus, "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803).

Defendants' plea that the exclusion of same-sex couples from marriage "not be the subject of judicial action" but rather "be determined by the legislature," Defs.' Mem. of Law at 9, asks the Court to be unfaithful to its constitutional duties. The judicial branch has an essential role in ensuring equality and liberty for disfavored classes where social policy is concerned. See Pls.' Mem. of Law at 70-72.

II. THERE ARE NO EXCEPTIONS TO THE GUARANTEES OF EQUALITY AFFORDED BY THE DECLARATION OF RIGHTS

A. There Are No Exceptions to the Guarantee of Equality Afforded by Article 46 of the Declaration of Rights

The canons of constitutional construction confirm that there are no exceptions to the guarantee of equality afforded by Article 46 of the Declaration of Rights.

The Court of Appeals recently reiterated that, in construing a constitutional provision, the meaning of the text is the primary inquiry: "[T]o ascertain the meaning of a constitutional provision or rule of procedure we first look to the normal, plain meaning of the language." Davis v. Slater, 383 Md. 599, 604, 861 A.2d 78 (2004) (citations omitted); see also Brown v. Brown, 287 Md. 273, 278, 412 A.2d 396 (1980) ("[The] intent [of the framers] is first sought from the terminology used in the provision, with each word being given its ordinary and popularly understood meaning.") (citations omitted); Cohen v. Governor, 255 Md. 5, 16, 255 A.2d 320 (1969) ("[The] intention [of the framers] is primarily discovered by considering the words used by the draftsmen, and these words are deemed to have been used in their ordinarily and generally accepted meaning."). The text is assigned its plain meaning. See Andrews v. Governor, 294 Md. 285, 290, 449 A.2d 1144 (1982) ("[A constitutional provision], unlike the Acts of our legislature, owes its whole force and authority to its ratification by the people, and they judged of it by the meaning apparent on its face.") (quotation omitted); Norris v. Mayor and City Council, 172 Md. 667, 192 A. 531, 535 (1937) ("Since Constitutions are the basic and organic law, and are meant to be known and understood by all the people, the words used should be given the meaning which would be given to them in common and ordinary usage by the average man in interpreting them in relation to every day affairs.").

If the meaning of the text is clear, the inquiry ends. See Davis, 383 Md. at 604-05 ("If [the] language is clear and unambiguous, we need not look beyond the provision's terms to inform our analysis."); Brown, 287 Md. at 278 ("[I]f the words are not ambiguous, the inquiry is terminated, for the Court is not at liberty to search beyond the Constitution itself where the intention of the framers is clearly demonstrated by the phraseology utilized.") (citation omitted); Norris, 192 A. at 535 ("[I]t is axiomatic that where the language of a Constitution is clear and unambiguous, there can be no resort to construction to attribute to the founders a purpose or intent not manifest in its letter.") (citation omitted).

Here, "[t]he words of the E.R.A. are clear and unambiguous; they say without equivocation that 'Equality of rights under the law shall not be abridged or denied because of sex.' This language mandating equality of rights can only mean that sex is not a factor." Rand v. Rand, 280 Md. 508, 511-12, 374 A.2d 900 (1977) (citation omitted). Significantly, the text of Article 46 does not allow for any exception. Thus, the Court of Appeals has held that "the Maryland E.R.A. *absolutely* forbids the determination of . . . 'rights,' as may be accorded by law, solely on the basis of one's sex, i.e., sex is an impermissible factor in making *any* such determination." Giffin v. Crane, 351 Md. 133, 149, 716 A.2d 1029 (1998) (citation omitted) (emphases added).

Notwithstanding the clarity of the text of Article 46, Defendants seek to rely on legislative history. As their own exhibits make clear, however, "there is no legislative history expressing the intention of the drafters of the Maryland Amendment." Defs.' Ex. 5 at 5; see also id. ("[I]t is not possible at this time to surmise how the Maryland Amendment will be interpreted"). Thus, Defendants rely solely on legislative history

concerning the proposed federal Equal Rights Amendment. Such reliance is misplaced. As their own exhibits make clear, "Maryland courts are not, of course, bound by the interpretation of the federal Amendment." Id.; see also id. at 3 ("It is not possible now to predict how the [federal] Amendment will be interpreted or precisely what impact it will have."). Moreover, it is a fundamental tenet of our federalist system that the scope of protection afforded by state constitutional provisions is distinct from that afforded by their federal analogs. See Attorney General v. Waldron, 289 Md. 683, 714-15, 426 A.2d 929 (1981); 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). Thus, legislative history concerning the proposed federal Equal Rights Amendment is unpersuasive.

In sum, Defendants' radical proposition that there are exceptions to the equality guarantee afforded by Article 46 is indefensible.

B. There Are No Exceptions to the Guarantee of Equality Afforded by Article 24 of the Declaration of Rights

Since the framing of the Maryland Constitution in 1776, Marylanders have enjoyed the expansive protections guaranteed by Article 24 (then Article 21) of the Declaration of Rights. Defendants advocate a significant diminution of such protections by advancing the radical proposition that the application of Article 24 cannot yield any result at odds with the state of affairs in 1776.

Defendants' theory is analytically flawed because the proper inquiry is not what the framers of the Maryland Constitution understood marriage in particular (or any other matter subject to Article 24) to mean. Rather, it is what they understood equality in principle to mean. The historical record does not support the proposition that the framers of the Maryland Constitution intended Article 24 to be a limited and static mandate of equality. Indeed, the enduring check on the tyranny of the majority over any disfavored class in any context is the *sine qua non* of any constitutional guarantee of equal protection. Article 24 would be meaningless if it guaranteed Marylanders nothing more than the "equality" that existed at the time of the framing of the Maryland Constitution – an "equality" that tolerated pervasive bias based on race, sex, alienage, illegitimacy, and numerous other considerations that have since been repudiated. Cf. Lawrence v. Texas, 539 U.S. 558, 579 (2003) ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

More fundamentally, Defendants' theory is inconsistent with the text, context, and binding judicial interpretation of Article 24. The text of Article 24 reads in its entirety as follows: "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." By its own terms, Article 24 does not limit its own application to the "equality" that existed in 1776. Nor does it exempt marriage (or any other matter subject to Article 24) from its purview. This expansive reading is only reinforced when Article 24 is placed in context with the other articles of the Declaration of Rights. See, e.g., Md. Const. Decl. Rts. art. 1 ("[A]ll Government of right . . . [is] instituted solely for the good of the

whole."). And it is reflected in the interpretation of Article 24 by Maryland courts throughout the past 250 years. See, e.g., Murphy v. Edmonds, 325 Md. 342, 356-57, 601 A.2d 102 (1992) (all forms of discrimination, including discrimination based on race, sex, alienage, and illegitimacy, are subject to some level of review under Article 24). Indeed, it is inconceivable that, if, for example, the State were to re-enact an anti-miscegenation law, there would be no recourse under Article 24 because the framers of the Maryland Constitution tolerated, even sanctioned, such discrimination.

In the end, Defendants' theory proves far too much. It would implicate much more than the exclusion of same-sex couples from marriage by turning back the clock to 1776 for all disfavored classes in all contexts.[1] It would also implicate much more than Article 24 by turning back the clock to 1776 for all of the original provisions of the Maryland Constitution. Throughout the past 250 years, Maryland courts have necessarily rejected the extremely cramped view of the Maryland Constitution that Defendants urge this Court to adopt.[2]

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[1] For this reason, the fact that Md. Const. art. III, § 43 protects the property of a wife from the debts of her husband is not limiting. If the constitutional guarantee of equal protection were limited by the social conventions indirectly referenced by the framers of the Maryland Constitution, then not only would the exclusion of same-sex couples from marriage be outside of the scope of protection, but also the unequal treatment of married women, aside from matters of property, prior to enactment of Article 46. Cf. Deems v. Western Md. Ry. Co., 247 Md. 95, A.2d (1967) (pre-Article 46 case recognizing that disparity between married men and married women with respect to right to sue for loss of consortium implicated constitutional guarantee of equal protection).

[2] Defendants' alternative theory – that the framers of the Maryland Constitution intended to grant the legislative branch sole authority over marriage-related matters – simply cannot be reconciled with the long history of judicial review of such matters in Maryland. See, e.g., Giffin v. Crane, 351 Md. 133, 716 A.2d 1029 (1998) (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); Hofmann v. Hofmann, 50 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).

III. BAKER V. NELSON AND ITS PROGENY ARE NOT PERSUASIVE AUTHORITY

Defendants rely heavily on Baker v. Nelson, 191 N.W.2d 185 (Minn.), appeal dismissed, 409 U.S. 810 (1971), and its progeny throughout their arguments. Baker and its progeny, however, are not persuasive authority.

At the time of Baker, the United States Supreme Court had no discretion to decline to accept jurisdiction over certain types of appeals. See Hicks v. Miranda, 422 U.S. 332, 344 (1975). It therefore routinely and summarily dismissed such appeals "for want of a substantial federal question," as it did in Baker. "[T]he precedential effect of a summary affirmance can extend no farther than the precise issues presented and necessarily decided by those actions." Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 182 (1979) (quotation omitted); see also In re Kandu, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004) ("[S]ummary dispositions are to be narrowly interpreted and are of limited precedential value.") (quotation omitted). Of particular significance to this case, "[s]ummary actions . . . should not be understood as breaking new ground but as *applying principles established by prior decisions* to the particular facts involved." Mandel v. Bradley, 432 U.S. 173, 176 (1977) (emphasis added). This is wholly consistent with the principle that continued reliance on a summary dismissal for want of a substantial federal question is unwarranted where there have been "extensive intervening doctrinal developments." Jones v. Bates, 127 F.3d 839, 851 n.13 (9th Cir. 1997); see also Hicks, 422 U.S. at 344 (reliance on a summary dismissal is unwarranted "when doctrinal developments indicate otherwise") (quotation omitted).

Intervening case law of the United States Supreme Court has altered the legal landscape so drastically that Baker now has little, if any, precedential value. Perhaps

most significantly, since the summary dismissal in Baker, the Court has expressly held that sex discrimination is subject to heightened scrutiny. Compare Frontiero v. Richardson, 411 U.S. 677, 682 (1973) ("[C]lassifications based upon sex . . . [are] subject to close judicial scrutiny."), with Reed v. Reed, 404 U.S. 71, 76 (1971) ("The question presented by this case . . . is whether a difference in . . . sex . . . bears a rational relationship to a state objective that is sought to be advanced."). This is significant because Baker expressly acknowledged that the exclusion of marriage is a form of sex discrimination, Baker, 191 N.W.2d at 187 (characterizing the exclusion as "a marital restriction . . . based upon the fundamental difference in sex"), yet subjected the exclusion to rational basis review, id. ("There is no irrational or invidious discrimination."). The sea change in the treatment of sex classifications under the Fourteenth Amendment to the United States Constitution means that Baker and its progeny have no remaining precedential value.

Moreover, since 1972, the equality jurisprudence of the United States Supreme Court with respect to sexual orientation has been revolutionized. The Court has held that the exclusion of lesbian and gay people from legal protections that are available to heterosexual people can violate the right to equal protection. Romer v. Evans, 517 U.S. 620, 634-35 (1996). The Court has further held that that lesbian and gay people are protected by the right to privacy to the same extent as heterosexual people. Lawrence, 539 U.S. at 574; see also Kandu, 315 B.R. at 138 ("The Supreme Court's approach to the constitutional analysis of same-sex conduct . . . at least arguably appears to have shifted. This is particularly apparent in light of the Supreme Court's decision in Lawrence.")

(citation omitted). In light of such case law, continued reliance on Baker and its progeny is no longer warranted.

Finally, since 1972, the Court has continued to extend the right to marry to disfavored classes. Turner v. Safley, 482 U.S. 78 (1987) (extending the right to marry to prisoners); Zablocki v. Redhail, 434 U.S. 374 (1978) (extending the right to marry to "deadbeat" parents). Thus, it is no longer credible to assert that the exclusion of same-sex couples from marriage poses no substantial federal question.

For all of these reasons, Baker and its progeny are not persuasive authority.

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

A. The Exclusion of Same-Sex Couples from Marriage Burdens the Exercise of the Fundamental Right to Marry

The exclusion of same-sex couples from marriage is subject to strict scrutiny under Article 24 of the Declaration of Rights because it significantly and disparately burdens the exercise of the fundamental right to marry. Defendants concede that governmental action that significantly or disparately burdens the exercise of the fundamental right to marry is subject to strict scrutiny. They contest only whether the fundamental right to marry extends to people in lesbian and gay relationships.

The exclusion of same-sex couples from marriage burdens the fundamental right to marry, an existing fundamental right that courts have long recognized. See Massage Parlors, Inc. v. Mayor and City Council, 284 Md. 490, 496, 398 A.2d 52 (1979); Turner, 482 U.S. at 95-96; Zablocki, 434 U.S. at 383; Boddie v. Connecticut, 401 U.S. 371, 376 (1971); Loving v. Virginia, 388 U.S. 1, 12 (1967); see also In re Coordination Proceeding, No. 4365, 2005 WL 583129, at *10-*11 (Cal. Super. Ct. Mar. 14, 2005)

(appeal pending) (holding that the fundamental 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 v. Washington, No. 04-2-00614-4, 2004 WL 1985215, at *12-*13 (Wash. Super. Ct. Sept. 7, 2004) (appeal pending) (same); Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *5-*7 (Wash. Super. Ct. Aug. 4, 2004) (appeal pending) (same). Defendants misconstrue Plaintiffs' argument as seeking the recognition of a new fundamental right, as opposed to the extension of an existing fundamental right. In determining whether a liberty interest rises to the level of a fundamental right, the United States Supreme Court has repeatedly demonstrated that proper inquiry is *what* has historically been enjoyed, not *who* has historically enjoyed it. Otherwise, the fundamental right would extend only to those people who historically enjoyed it.[3] Thus, the fundamental right at issue in this case is the fundamental right to marry, not the fundamental right of same-sex couples to marry. See Pls.' Mem. of Law at 39-42.

In sum, the exclusion of same-sex couples from marriage is subject to strict scrutiny because the fundamental right to marry extends to people in lesbian and gay relationships.

B. The Exclusion of Same-Sex Couples from Marriage Discriminates Based on Sex

The exclusion of same-sex couples from marriage is also subject to strict scrutiny under Article 46 of the Declaration of Rights because it discriminates based on sex, a

[3] Whether there is a constitutionally sufficient justification for continuing to deny the fundamental right to marry to categories of people whose unions have not been historically recognized is a separate inquiry.

suspect classification. Defendants contest only whether the exclusion of same-sex couples from marriage discriminates based on sex.

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 its very terms, 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," makes sex – i.e., whether people are men or women – a factor in the enjoyment and the determination of the right to marry. See Pls.' Mem. of Law at 45.

Loving supports the conclusion that the exclusion of same-sex couples from marriage discriminates based on sex. See Pls.' Mem. of Law at 45-50. Indeed, the case law cited by Defendants in support of their assertion to the contrary only serves to reinforce this conclusion. Baker expressly acknowledges that the exclusion of same-sex couples from marriage discriminates based on sex. Baker, 191 N.W.2d at 187. Moreover, neither Zablocki nor Lawrence addresses whether the exclusion of same-sex couples from marriage discriminates based on sex. Defendants may avail themselves only of the flawed reasoning set forth in the holding of Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974), and the dicta of Baker v. Vermont, 744 A.2d 864 (Vt. 1999). Compare Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) (holding that the exclusion of same-sex couples does not discriminate based on sex), with Baehr v. Lewin, 852 P.2d 44, 60, 68 (Haw. 1993) (holding that the exclusion of same-sex couples discriminates based on sex); Coordination Proceeding, 2005 WL 583129, at *9 (same); 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) (same); Brause v. Bureau of Vital Statistics,

No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) (same).

In sum, the exclusion of same-sex couples from marriage is subject to strict scrutiny because it discriminates based on sex.

C. The Exclusion of Same-Sex Couples from Marriage Discriminates Based on Sexual Orientation

The exclusion of same-sex couples from marriage is also subject to strict scrutiny under Article 24 of the Declaration of Rights because it discriminates based on sexual orientation, another suspect classification. Defendants contest only whether sexual orientation is a suspect classification subject to strict scrutiny.

Lesbian and gay people meet the definition of a suspect class set forth under Maryland case law because they have "experienced a history of purposeful unequal treatment" and, alternatively, because they have "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." Attorney General v. Waldron, 289 Md. 683, 705, 426 A.2d 929 (1981) (quotation omitted); see Pls.' Mem. of Law at 51-57; see also Tanner v. Oregon Health Scis. Univ., 971 P.2d 435, 447 (Or. Ct. App. 1998) (holding that sexual orientation is a suspect classification); Castle, 2004 WL 1985215, at *11 (same). Tellingly, Defendants do not contest whether lesbian and gay people meet the definition of a suspect class set forth under Maryland case law.

Moreover, the federal case law cited by Defendants is analytically flawed and otherwise unpersuasive. First, because the scope of the Maryland equal protection guarantee is distinct from that of the federal equal protection guarantee, the federal case law cited by Defendants is not limiting. See Waldron, 289 Md. at 714-15; Maryland

Green Party, 377 Md. at 157; Dua, 370 Md. at 621-22; Frankel, 361 Md. at 313; Verzi, 333 Md. at 417; Kirsch, 331 Md. at 97.

Second, the federal case law cited by Defendants erroneously relies on Bowers v. Hardwick, 478 U.S. 186 (1986), for the proposition that the fundamental right to sexual intimacy does not extend to people in lesbian and gay relationships. Bowers has been wholly repudiated. The United States Supreme Court has held not only that Bowers "is not correct today" but indeed that it "was not correct when it was decided."[4] Lawrence, 539 U.S. at 578.

Third, the federal case law cited by Defendants erroneously relies on Romer for the proposition that the United States Supreme Court has addressed whether sexual

[4] Thus, Thomasson v. Percy, 80 F.3d 915, 928 (4th Cir. 1996), is unpersuasive because it relies on Steffan v. Perry, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994), which in turn relies on Bowers: "[I]f the government can criminalize homosexual conduct, a group that is defined by reference to that conduct cannot constitute a 'suspect class.'" Steffan, 41 F.3d at 684 n.3 (citation omitted). Likewise, Lofton v. Secretary of the Dep't of Children and Fam. Servs., 358 F.3d 804, 818 & n.6 (11th Cir. 2004), is unpersuasive because it relies on federal case law that in turn relies on Bowers. See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 292-93 (6th Cir. 1997) ("[U]nder Bowers . . . and its progeny, homosexuals [do] not constitute either a 'suspect class' or a 'quasi-suspect class' because the conduct which define[s] them as homosexuals [is] constitutionally proscribable.") (citation and footnote omitted); Holmes v. California Army Nat'l Guard, 124 F.3d 1126, 1132 (9th Cir. 1997) (relying on progeny of Bowers); Richenberg v. Perry, 97 F.3d 256, 260 & n.5 (7th Cir. 1996) (relying on Bowers and its progeny); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) ("[A]lthough the Court in [Bowers] analyzed the constitutionality of the sodomy statute on a due process rather than equal protection basis, by the [Bowers] majority holding that the Constitution confers no fundamental right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes.") (citations and footnote omitted); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.") (footnote omitted); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After [Bowers] it cannot be logically asserted that discrimination against homosexuals is constitutionally infirm."). The remaining federal case law on which Lofton relies is also unpersuasive. Town of Ball v. Rapides Parish Police Jury, 746 F.2d 1049 (5th Cir. 1984), does not address whether sexual orientation is a suspect classification. Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984), also does not address whether sexual orientation is a suspect classification; rather, it addresses whether sexual orientation discrimination is a form of sex discrimination.

orientation is a suspect classification. In Romer, the Court did not address whether sexual orientation is a suspect classification. See Tobias B. Wolff, Principled Silence, 106 Yale L.J. 247, 252 (1996). The Court did not do so because, "if [a law] cannot pass even the minimum rationality test," as in Romer, "our inquiry ends." Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1984). Thus, the federal case law cited by Defendants is unpersuasive. See Lofton, 358 F.3d at 818 & n.6 (relying on Holmes, 124 F.3d at 1132, and Richenberg, 97 F.3d at 260 n.5, both of which in turn rely on Romer); Veney v. Wyche, 293 F.3d 726, 732 (4th Cir. 2002) (relying on Romer). Indeed, the case law cited by Defendants reinforces the prudential rule articulated in Hooper. See Able v. United States, 155 F.3d 628, 632 (2d. Cir. 1998) ("We need not decide [the] question [whether sexual orientation is a suspect classification]."); Goodridge v. Department of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) ("Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny.").

In sum, the exclusion of same-sex couples from marriage is subject to strict scrutiny because lesbian and gay people meet the definition of a suspect class set forth under Maryland case law.

V. THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE FAILS EVEN RATIONAL BASIS REVIEW

The exclusion of same-sex couples from marriage does not even rationally further a legitimate governmental interest. Plaintiffs respectfully refer the Court to Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment for a full explication. See Pls.' Mem. of Law at 61-78.

Defendants expand their proffered governmental interest in ensuring uniform discrimination within marriage to encompass federal law – specifically, the so-called Defense of Marriage Act – in addition to other state law. The proffered governmental interest in ensuring uniform discrimination within marriage, however, is no more legitimate where federal law, as opposed to other state law, is concerned. See Pls.' Mem. of Law at 68-70. Moreover, Defendants' assertion that state law cannot operate independently from federal law is simply not true, even where joint federal-state programs are concerned. For example, Medicaid is a program administered by the state government and funded jointly by the state government and the federal government. See 42 U.S.C. § 1396a. Although state constitutional considerations do not govern the federal government's share of Medicaid expenditures, they do govern the state government's share. See, e.g., Simat Corp. v. Arizona Health Care Cost Containment Sys., 56 P.3d 28 (Ariz. 2002) (state constitution requires state government to pay its share of Medicaid expenditures for abortion services even though federal law prohibits federal government from paying its share); Alaska v. Planned Parenthood of Alaska, Inc., 28 P.3d 904 (Alaska 2001) (same); New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998) (same); Women of Minn. v. Gomez, 542 N.W.2d 17 (Minn. 1995) (same); Women's Health Ctr. of W. Va., Inc. v. Panepinto, 446 S.E.2d 658 (W. Va. 1993) (same); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982) (same); Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981) (same); Moe v. Secretary of Admin. and Fin., 417 N.E.2d 387 (Mass. 1981) (same). Thus, Defendants' expansion of their proffered governmental interest in ensuring uniform discrimination within marriage to encompass federal law does not change the analysis.

There is also no merit in Defendants' argument that, because opposite-sex couples and their children benefit from marriage, it does not matter whether same-sex couples and their children would also benefit from marriage, because rational basis review tolerates the imprecision that results from line-drawing between classes. The fallacy in Defendants' reasoning is that rational basis review does not tolerate the imprecision that results from *arbitrary* line-drawing between classes. For example, in determining who may marry, the State may draw a line between people over 17 years of age and people under 18 years of age because the State has a non-arbitrary reason for drawing such a line: people under 18 years of age do not possess a level of maturity that warrants an unfettered right to marry. Thus, it does not matter whether exceptionally mature people under 18 years of age and their children would also benefit from marriage. Rational basis review tolerates such imprecision. In contrast, in determining who may marry, the State may not draw a line between right-handed people and left-handed people because the State does not have a non-arbitrary reason for drawing such a line. Thus, it does not matter that right-handed people and their children benefit from marriage. Rational basis review does not tolerate such arbitrariness.

Md. Code Ann., Fam. Law § 2-201 is unconstitutional because the State does not have a non-arbitrary reason for drawing a line between opposite-sex couples and same-sex couples. While there is a difference between opposite-sex couples and same-sex couples – just as, by definition, there is a difference between any two classes – there is no *relevant* difference between opposite-sex couples and same-sex couples that explains why the State discriminates between them. It is immaterial that some opposite-sex couples can bring children into their families through "traditional" procreation but all

same-sex couples can bring children into their families only through other means (e.g., donor insemination, adoption). Indeed, Defendants do not dispute that, except for the ability of their parents to marry, the State treats children of same-sex couples and children of opposite-sex couples equally. Rational basis review does not tolerate the undisputed arbitrary treatment between same-sex couples and opposite-sex couples. See Pls.' Mem. of Law at 72-74.

Defendants cite law review articles – as opposed to the social science – to suggest that, in contradiction of its own laws and practices, the State could rationally think that lesbian and gay parents are less fit than heterosexual parents.[5] Plaintiffs have introduced into the record a declaration executed by a child welfare expert attesting to the fact that the social science and the child welfare community are monolithic in their conclusion that lesbian and gay parents are just as fit as heterosexual parents and, therefore, that the State could not rationally think that lesbian and gay parents are less fit than heterosexual parents. See Stacey Decl. ¶¶ 7-14. The Court, however, need not reach the truth of the declaration because it can resolve the issue in Plaintiffs' favor as a matter of law.[6] See Pls.' Mem. of Law at 74-77.

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[5] Notably, Defendants' assertion that "traditional marriage create[s] the best environment into which offspring may be born," Defs.' Mem. of Law at 43 (quotation omitted), echoes the assertion that was made – and rejected – in support of the exclusion of interracial couples from marriage. See Perez, 198 P.2d at 22 ("Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full blood of either race.") (quotation omitted).

[6] Should the Court conclude that it cannot resolve the issue in Plaintiffs' favor as a matter of law, the declaration, if undisputed by Defendants, would provide a factual basis for a grant of summary judgment for Plaintiffs. If disputed by Defendants by way of contrary record evidence, the declaration would simply create a genuine dispute of material fact that would preclude a grant of summary judgment for Defendants and necessitate a trial.

Notwithstanding Defendants' assertions to the contrary, the exclusion of same-sex couples from marriage does not even rationally further a legitimate governmental interest.

VI. BECAUSE PLAINTIFFS MAY NOT MARRY, THEY AND THEIR CHILDREN SUFFER SIGNIFICANT INJURY

Contrary to Defendants' assertion that there are "significant statutory enactments that address many of the effects flowing from the non-marital status of plaintiffs," Defs.' Mem. of Law at 45, Plaintiffs 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. See Pls.' Mem. of Law at 7-20; see also App. to Pls.' Mem. of Law. Defendants cite only eleven examples in support of their assertion. Of their eleven examples, only two – workers' compensation death benefits and disclosure of medical records – support their assertion that same-sex couples and their children enjoy protections equal to those that married couples and their children enjoy under state law. Defendants' remaining examples serve only to illustrate the disparity between same-sex couples and their children and married couples and their children under state law.

Even where there are alternative mechanisms by which same-sex couples, within narrow limits, may attempt to protect themselves and their children as if they were married couples, such mechanisms are often more expensive and cumbersome, see Kelber-Kaye Decl. ¶ 11; Wojahn Decl. ¶ 11; Williams Decl. ¶ 11; Blackburn Decl. ¶ 12, and, more importantly, do not afford safeguards equal to those that marriage affords. For example, although same-sex couples may attempt to protect themselves and their children in times of illness and death by executing health care proxies and wills, they, unlike married couples, do not enjoy the overriding safeguard of marriage which affords

protection even where there are no health care proxies or wills or where health care proxies or wills are deemed invalid. See Md. Code Ann., Health-Gen. § 5-605(a)(2)(ii) (spousal priority in authority to make health care decisions); Md. Code Ann., Est. & Trusts § 3-102 (spousal priority in intestate succession); see also Kelber-Kaye Decl. ¶¶ 10-11, 13 (Kelber-Kaye and Kargman-Kaye were denied hospital visitation and medical decisionmaking rights despite the fact that they have executed health care proxies); Lestitian Decl. ¶¶ 10, 13 (Lestitian was denied inheritance rights despite the fact that his deceased partner executed a will).

Similarly, although state retirees in same-sex relationships may designate their partners as their beneficiaries for limited purposes under the state pension plan, they, unlike married state retirees, do not enjoy the safeguard of marriage where their designations are deemed invalid or where they fail to designate their partners as their beneficiaries. See Md. Code Ann., State Pers. & Pens. § 21-406(b)(2)(ii) (where a state retiree fails to designate a beneficiary, payment is to be made to his or her estate); see also Mozelle Decl. ¶ 14 (Mozelle does not enjoy automatic recognition by Kebreau's public pension plan). And, although same-sex couples can enter into contractual agreements governing division of property should their relationships terminate, they, unlike married couples, do not enjoy the safeguard of divorce where their contractual agreements are deemed invalid or where they fail to enter into contractual agreements. See Md. Code Ann., Fam. Law §§ 7-101 to 7-107 (divorce provisions); see also Ayers Decl. ¶ 4 ("Where the parties separate, the inability of same-sex couples to marry frequently has convoluted and harmful consequences for one or both parties, and their

children, both with respect to division of property and, more importantly, as to custody, visitation and support of children.").

Moreover, in many situations, there are no alternative mechanisms by which same-sex couples may attempt to protect themselves and their children as if they were married couples. For example, people in marital relationships enjoy greater protection from domestic violence. See Md. Code Ann., Fam. Law § 4-501(l)(1) (affording protection from a current or former spouse regardless of whether he or she is or was a cohabitant or is a co-parent). And only married couples can own property as tenants by the entirety. See McManus v. Summers, 290 Md. 408, 412, 430 A.2d 80 (1981) (tenancy by the entirety is reserved for spouses); see also Kelber-Kaye Decl. ¶ 17; Wojahn Decl. ¶ 11.

Disparities between lesbian and gay couples and their children and married couples and their children exist even in the context of adoption. Although lesbian and gay adoptive co-parents enjoy rights and responsibilities equal to those of married adoptive co-parents, lesbian and gay adoptive co-parents must endure a more expensive and cumbersome process that delays the establishment of legal relationships between their children and themselves. Lesbian and gay adoptive co-parents, unlike married adoptive co-parents, are not entitled to joint adoption. See Md. Code Ann., Fam. Law. § 5-315(a) (spousal entitlement to joint adoption); see also Williams Decl. ¶ 10. And second-parent adoption is more expensive and cumbersome than step-parent adoption. See Ayers Decl. ¶ 12.

In sum, Plaintiffs and their children are denied hundreds of important protections that are afforded to married couples and their children by state law.[7]

CONCLUSION

For the reasons set forth above, as well as those set forth in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, Plaintiffs respectfully request that the Court deny Defendants' Motion for Summary Judgment and grant Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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[7] Defendants' remaining examples – hate crimes protections and civil rights protections – do not address whether same-sex couples and their children enjoy protections equal to those that married couples and their children enjoy under state law.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of July, 2005, copies of the foregoing Opposition were mailed via first class mail, postage prepaid, to:

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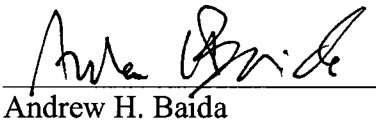

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