

**IN THE
COURT OF APPEALS OF MARYLAND**

September Term, 2006

No. 44

FRANK CONAWAY, et. al.

Appellants

v.

GITANJALI DEANE, et. al.

Appellees

APPEAL FROM THE CIRCUIT COURT FOR
BALTIMORE CITY, PART 30
(Honorable M. Brooke Murdock)

BRIEF OF AMICI CURIAE ASSOCIATION OF MARYLAND FAMILIES
AND LIBERTY COUNSEL IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI CURIAE

The Association of Maryland Families (“AMF”) is a nonprofit corporation with headquarters in Annapolis, Maryland. AMF serves as a voice for the family throughout Maryland and seeks to provide families with resources that strengthen marriage and promote strong parenting skills. AMF has developed a significant body of information regarding the importance of marriage to all aspects of life and society. AMF is committed to protecting the traditional definition of marriage as the union of one man and one woman, as stated in Family Law §2-201. AMF respectfully submits this Amicus Curiae Brief to provide the Court with critical information regarding the vital role that marriage has played and will continue to play in society.

Liberty Counsel is a civil liberties organization that educates people on issues relating to traditional family values and defends traditional family values, including marriage, across the United States. Liberty Counsel has successfully defended state and federal DOMAs, and is presently involved in constitutional challenges to the traditional definition of marriage in several jurisdictions. Liberty Counsel provided amicus curiae briefs in *Hernandez v. Robles*, 2006 WL 1835429 (N.Y. 2006), and *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), cited below, and represented parties in challenges to marriage laws in California and New York. Liberty Counsel is committed to upholding the traditional definition of marriage as between one man and one woman and to ensuring that the fundamental definition of marriage is not undermined. Liberty Counsel has developed a

substantial body of information related to the definition of marriage, and believes that information will assist this Court in evaluating the constitutional claims raised by Plaintiffs.

SUMMARY OF ARGUMENT

Only a marriage between a man and a woman is valid in the State of Maryland. Family Law §2-201. While that statement should be axiomatic, in fact it and similar statements in other states have become controversial as homosexuals have challenged them as unfairly denying same-sex couples the right to marry. With the exception of four justices on the Massachusetts Supreme Judicial Court (*Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003)), every appellate court that has considered challenges similar to those raised by Plaintiffs here have upheld the long-standing definition of marriage as the union of one man and one woman. As these courts have stated, defining marriage as the union of one man and one woman is not a sex-based classification born of animosity toward homosexuals, but is a long-standing recognition and protection of an institution that is foundational to society.

As the Supreme Court established decades ago, marriage, *i.e.*, the union of one man and one woman, is a fundamental right. *See Maynard v. Hill*, 125 U.S. 190 (1888). That fundamental right is not, as Plaintiffs claim, a standard-less right to marry whomsoever one chooses, but the right for one man and one woman to create a legal union without undue interference from the state. Cases such as *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down anti-miscegenation laws, or *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck

down criminal sodomy laws, have not affected the constitutionality of the traditional definition of marriage. Plaintiffs claim that cases such as *Loving* and *Lawrence* somehow transformed Family Law §2-201 from a valid statement of existing law into unconstitutional deprivation of rights. However, the Supreme Court and state and federal appellate courts have specifically rejected comparisons between the laws struck down in *Loving* and *Lawrence* and the traditional definition of marriage. As recently as July 26, 2006 the Washington Supreme Court rejected a *Loving*-based challenge to that state's Defense of Marriage Act, finding that the act did not violate the equal rights amendment or equal protection. The New York Court of Appeals and Eighth Circuit Court of Appeals made similar rulings in July, joining courts in Indiana, Arizona, Minnesota, Kentucky, Florida and the District of Columbia in upholding the traditional definition of marriage against constitutional challenges similar to those raised by Plaintiffs here.

Despite this overwhelming authority and with no convincing evidence to the contrary, the trial court found that Family Law §2-201 violated Maryland's Equal Rights Amendment and equal protection provisions. Calling most of the above-cited authorities "unpersuasive," the trial court concluded that there was no legitimate state interest served by defining marriage as the union of one man and one woman. In so doing, the trial court not only ignored years of judicial precedent, but also decades of evidence that defining marriage as the union of one man and one woman furthers the state's interest in preserving and protecting an institution that forms the very foundation of society. The trial court offered no justification

and there is no justification for redefining the institution of marriage.

This Court should follow the lead of other state appellate courts and refuse to usurp the role of the Legislature and the will of the people by redefining marriage. Maryland Family Law §2-201 does not violate the Equal Rights Amendment, equal protection, nor any other constitutional provision. The trial court’s decision to the contrary must be overturned.

LEGAL ARGUMENT

I. MARYLAND FAMILY LAW §2-201 DOES NOT DISCRIMINATE BASED UPON SEX IN VIOLATION OF MARYLAND’S EQUAL RIGHTS AMENDMENT.

From the outset, the trial court made clear that its decision in this case was a foregone conclusion. Beginning with the second sentence of its decision, the trial court described Family Law §2-201 as a “same-sex marriage prohibition” instead of what it is – codification of the longstanding definition of marriage as the union of one man and one woman. In so doing, the trial court left no doubt that it would conclude that “Family Law §2-201 discriminates on its face based on gender” and that there is no “legitimate state interest rationally served by *preventing same-sex marriage*.”(Memorandum Opinion, p. 19) (emphasis added). Eschewing decisions in other state courts and this Court’s interpretation of Article 46 of the Declaration of Rights, the trial court concluded that defining marriage as the union of one man and one woman somehow contravenes the idea that “Equality of rights under the law shall not be abridged or denied because of sex.” Md. Const., Declaration of Rights, art. 46 (1981).

Faced with a similar challenge, the Washington Supreme Court ruled that the state's Defense of Marriage Act ("DOMA"), which defined marriage solely as the union of one man and one woman, does not violate Washington's equal rights amendment. *Andersen v. King County*, 138 P.3d 963 (Wash. 2006). In its decision dated July 26, 2006, the Washington court found that "Men and women are treated identically under DOMA; neither may marry a person of the same sex. DOMA therefore does not make any 'classification by sex,' and it does not discriminate on account of sex." *Id.* at 988. The Washington court explained that the basic principle behind the E.R.A. is that both sexes be treated equally under the law. *Id.* at 989.

Laws which render benefits to one sex could in most cases be retained, and extended to everyone. Laws which restrict and deny rights to one sex would be eliminated. Thus, the ERA was described as preventing favoritism of or discrimination against sex-based classes. DOMA does not draw any classifications based on sex. It does not render benefits to just one sex, nor does it restrict or deny rights of one sex.

Id. The Washington court also rejected the plaintiffs' claim that the United States Supreme Court's decision overturning anti-miscegenation laws, *Loving v. Virginia*, 388 U.S. 1 (1967), supported plaintiffs' allegation that Washington's DOMA violated Washington's E.R.A.. Plaintiffs here raised a similar challenge to Family Law §2-201. The trial court accepted the Plaintiffs' reasoning that since Virginia's anti-miscegenation law treated blacks and whites equally but was struck down, then Maryland's marriage law which treats men and women equally can be struck down. The Washington Supreme Court rejected the same argument raised by plaintiffs in that case.

Loving is not analogous. In *Loving* the Court determined that the purpose of the antimiscegenation statute was racial discrimination, “and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.” *Loving*, 388 U.S. at 9. The Court also said that the Lovings’ fundamental freedom of choice to marry may “not be restricted by invidious racial discriminations.” *Loving*, 388 U.S. at 12. If plaintiffs’ case were truly analogous to *Loving*, we would first have to find that DOMA discriminates on the basis of sex and then conclude that the right to marriage is violated because of the restriction due to sex discrimination.

138 P.3d at 989. The Washington plaintiffs claimed that “DOMA is embedded in sexism just as much as anti-miscegenation laws were based on racism. Plaintiffs urge that keeping marriage as an exclusively heterosexual institution is based on gender-role stereotypes and exclusion of those who do not conform to them.” *Id.* The court disagreed.

First, there is nothing in DOMA that speaks to gender stereotyping within marriage. Such stereotyping as it exists does so apart from DOMA. Second, plaintiffs fail to show that gay and lesbian persons are excluded from marriage on account of or in order to perpetuate gender stereotyping.

Id.

Other courts have similarly rejected claims that *Loving* supports a finding that statutes defining marriage as the union of one man and one woman discriminate on the basis of sex. In a decision issued on July 6, 2006, the New York Court of Appeals upheld New York’s marriage statutes by rejecting a claim that defining marriage as the union of one man and one woman was analogous to the invidious discrimination found in anti-miscegenation laws.

Hernandez v. Robles, 2006 WL 1835429 (N.Y. 2006).

If we were convinced that the restriction plaintiffs attack were founded on nothing but prejudice – if we agreed with the plaintiffs that it is comparable to

the restriction in *Loving v. Virginia* (388 U.S. 1 [1967]), a prohibition on interracial marriage that was plainly “designed to maintain White Supremacy” (*id.* at 11) – we would hold it invalid, no matter how long its history. As the dissent points out, a long and shameful history of racism lay behind the kind of statute invalidated in *Loving*. But the historical background of *Loving* is different from the history underlying this case. Racism has been recognized for centuries – at first by a few people, and later by many more – as a revolting moral evil. This country fought a civil war to eliminate racism’s worst manifestation, slavery, and passed three constitutional amendments to eliminate that curse and its vestiges. *Loving* was part of the civil rights revolution of the 1950’s and 1960’s, the triumph of a cause for which many heroes and many ordinary people had struggled since our nation began.

Id. The history behind the traditional definition of marriage, however, “is of a different kind.”

Id.

The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude.

Id. Similarly, the Minnesota Supreme Court held that the statute invalidated in *Loving* was not analogous to the state marriage law. *Baker v. Nelson*, 291 Minn. 310, 314 (1971), *appeal dismissed for want of substantial federal question*, 409 U.S. 810 (1972). “Virginia’s antimiscegenation statute, prohibiting interracial marriages, was invalidated solely on the grounds of its patent racial discrimination.” 291 Minn. at 314. “*Loving* does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in common sense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference

in sex.” *Id.*

The Vermont Supreme Court agreed that it is a mistake to rely upon *Loving* to invalidate state marriage laws. *Baker v. State*, 170 Vt. 194, 215 n.13 (1999). In *Loving*, “the high court had little difficulty in looking behind the superficial neutrality of Virginia’s anti-miscegenation statute to hold that its real purpose was to maintain the pernicious doctrine of white supremacy.” *Id.*

Our colleague argues, by analogy, that the effect, if not the purpose, of the exclusion of same-sex partners from the marriage laws is to maintain certain male and female stereotypes to the detriment of both. To support the claim, she cites a number of antiquated statutes that denied married women a variety of freedoms, including the right to enter into contracts and hold property.

The test to evaluate whether a facially gender-neutral statute discriminates on the basis of sex is whether the law “can be traced to a discriminatory purpose.” [*Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. [256] at 272, 99 S.Ct. 2282 [(1979)]]. The evidence does not demonstrate such a purpose. It is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion. That evidence is not before us.

Id. Therefore, the Vermont marriage laws do not discriminate on the basis of sex because they “do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex.” *Id.*

The same is true for Maryland’s Family Law §2-201. As this Court said in *Burning Tree Club, Inc. v. Bainum*, 501 A.2d 817, 825 (Md. 1985): “The cases construing equal rights amendments share a common thread; they generally invalidate governmental action which

imposes a burden on one sex but not the other, or grants a benefit to one but not the other.” Before “the protection afforded by the E.R.A. is triggered, there must be a denial or abridgement of equal rights under the law as between men and women.” *Id.* “Absent such a denial or abridgement, the provisions of the E.R.A. simply have no application.” *Id.* Family Law §2-201 does not impose a burden upon women but not upon men or vice versa, nor does it grant or deny a benefit to men but not to women. Under Family Law §2-201 neither men nor women may marry a person of the same sex. Since the prohibition applies equally to both sexes, the E.R.A. simply does not apply.

This is all the more apparent in light of this Court’s description of the purpose behind equal rights amendments in general and Maryland’s E.R.A. in particular. “That equal rights amendments to state constitutions were prompted by a long history of denial of equal rights for women is well recognized.” *Id.* at 822. “The subordinate status of women in our society has for all too many years been firmly entrenched in our legal system, with women being excluded by law from various rights, obligations or responsibilities.” *Id.* Defining marriage as the union of one man and one woman does not exclude either sex from a right or benefit available to the other. A man can marry a woman and a woman can marry a man. A man cannot marry a man and a woman cannot marry a woman. Neither sex can marry more than one person.

The trial court acknowledged that courts have universally rejected the analogy between anti-miscegenation laws and the traditional definition of marriage, but dismissed

those decisions as “unpersuasive.” The trial court similarly disregarded the facial neutrality of Family Law §2-201 in favor of its own re-interpretation of the statute. In neither case did the trial court offer any authority for its position. In fact, the prevailing authority both from this Court and from other state courts is that defining marriage as the union of one man and one woman does not implicate the Equal Rights Amendment.

II. MARYLAND FAMILY LAW § 2-201 DOES NOT VIOLATE EQUAL PROTECTION UNDER THE MARYLAND CONSTITUTION.

While Maryland’s Declaration of Rights does not contain a *per se* equal protection clause, this Court has long recognized that the concept of equal protection is embodied in the due process provision of Article 24. *Kane v. Board of Appeals*, 887 A.2d 1060, 1076 (Md. 2005). “While the Equal Protection Clause of the Fourteenth Amendment and the equal protection guarantee embodied in Article 24 of the Maryland Declaration of Rights are obviously independent and capable of divergent application, we have consistently taken the position that the Maryland equal protection principle applies ‘in like manner and to the same extent as’ the Equal Protection Clause of the Fourteenth Amendment.” *Murphy v. Edmonds*, 601 A.2d 102,108 (Md. 1992)(citing *Attorney General v. Waldron*, 426 A.2d 929, 941 (Md. 1981)). Therefore, “United States Supreme Court opinions concerning the Equal Protection Clause of the Fourteenth Amendment ‘are practically direct authorities’ with regard to Article 24 of the Declaration of Rights.” *Murphy*, 601 A.2d at 108. Consequently, even when plaintiffs base their equal protection challenges solely on the Maryland Constitution, this Court considers “their argument in light of cases applying the Equal Protection Clause of the

Fourteenth Amendment as well as cases applying Article 24 of the Maryland Declaration of Rights.” *Id.*

When analyzing equal protection challenges, the United States Supreme Court first determines whether the challenged provision targets a suspect class or burdens a fundamental right. *Heller v. Doe*, 509 U.S. 312, 319 (1993). If so, then the Court applies heightened or strict scrutiny to determine whether the provisions violate equal protection. *Id.* If not, then the Court applies the rational basis test and will uphold the legislative classification so long as it bears a rational relation to some legitimate governmental purpose. *Id.* at 320. Courts which have analyzed equal protection challenges of marriage statutes have consistently held that defining marriage as the union of one man and one woman neither targets a suspect class nor burdens a fundamental right.

As the Eighth Circuit said in *Citizens for Equal Protection v. Bruning*, “[i]n the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution.”⁴⁵⁵ F.3d 859, 870 (8th Cir. 2006) (emphasis added). The trial court’s finding to the contrary with regard to Family Law §2-201 is without merit.

A. Family Law §2-201 Does Not Discriminate Against a Suspect Class.

“[T]he Supreme Court has never ruled that sexual orientation is a suspect

classification for equal protection purposes.” *Citizens for Equal Protection*, 455 F.3d at 865. Similarly, all of the federal courts of appeal that have considered the issue have held that homosexuals are not a suspect class.¹ In addition, even the two state courts that held that homosexuals had a right to either civil unions or marriage did not find that they constituted a suspect class. *See Baker v. State*, 170 Vt. 194 (1999) (under the state constitution's common benefits clause, plaintiffs seeking same-sex marriage are entitled to benefits and obligations like those accompanying marriage); *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003) (finding that denying marriage to same-sex couples violates equal protection under the rational basis test).

Referencing and following these precedents, the Washington Supreme Court agreed that homosexuals do not constitute a suspect class. *Andersen v. King County*, 138 P.3d 963, 974 (Wash. 2006). The court explained, “[t]o qualify as a suspect class for purposes of an equal protection analysis, the class must have suffered a history of discrimination, have as the characteristic defining the class an obvious, immutable trait that frequently bears no relation to ability to perform or contribute to society, and show that it is a minority or

¹ *See Lofton v. Sec’y of Dep’t. of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir.1997); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.1996); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir.1994); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir.1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir.1989); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049 (5th Cir.1984); *Rich v. Sec’y of the Army*, 735 F.2d 1220 (10th Cir.1984); *Able v. United States*, 155 F.3d 628 (2d Cir.1998); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir.1996).

politically powerless class.” *Id.* “Race, alienage, and national origin are examples of suspect classifications.” *Id.* The Washington court said that “[t]here is no dispute that gay and lesbian persons have been discriminated against in the past,” it found that there was no evidence that homosexuality was an immutable characteristic or that homosexuals are politically powerless. *Id.* at 974-975. The court found that the *Andersen* plaintiffs did not make a positive showing of immutability, but instead focused on “the lack of any relation between homosexuality and ability to perform or contribute to society.” *Id.* at 974. Finally, regarding what it termed the “powerlessness prong,” the Washington court noted that the legislature had recently amended state anti-discrimination laws to prohibit discrimination on the basis of sexual orientation, that several statute and municipal codes provide benefits to same-sex couples and that a number of homosexual candidates were elected to national, state, and local offices in 2004. *Id.* This “enactment of provisions providing increased protections to gay and lesbian individuals in Washington shows that as a class gay and lesbian persons are not powerless but, instead, exercise increasing political power.” *Id.* at 974-975. “We conclude that plaintiffs have not established that they satisfy the third prong of the suspect classification test.” *Id.* at 975.

1. Homosexuality is not an immutable characteristic.

The Washington Supreme Court’s finding that there was no evidence that homosexuality is an immutable characteristic is in keeping with Supreme Court precedent and with conclusions reached by scientists and social scientists. The Supreme Court has

consistently identified as immutable characteristics such things as race, sex, or ethnic background, as well as “height or blindness.” *See Holland v. Illinois*, 493 U.S. 474, 496 (1990); *Lockhart v. McCree*, 476 U.S. 162, 175 (1986). In *Frontiero v. Richardson*, 411 U.S. 677, 686 (1986), the Supreme Court specifically said that “sexual orientation,” unlike sex or race is not “an immutable characteristic determined solely by the accident of birth.” The Ninth Circuit Court of Appeals similarly held that “[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage” *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990).

Sex and race are readily identifiable physical characteristics that clearly set one person apart from another. By contrast, sexual orientation has no readily identifiable physical characteristics, but is a status determined as much by perception as by changeable sexual preferences. Although scientists have studied homosexuality for many years, there is “still no universally accepted definition [of homosexuality] among clinicians and behavioral scientists.”²

Dr. Jeffrey Satinover, M.D., a leading psychiatrist who counsels homosexuals, also rejects the immutability claim. He explains that: “We will see later the falsity of activists’ repeated assertions that homosexuality is immutable. They seek to create the impression that

² See William Byne, *The Biological Evidence Challenged*, 270 SCI. AM., May 1994 50-55.

science has settled these questions, but it most certainly has not. Instead, the changes that have occurred in both public and professional opinion have resulted from politics, pressure, and public relations.”³ Medical studies publicized as “proof” of a genetic component are either methodologically unsound or misreported as to their significance. For example, in 1993, Columbia University psychiatry professors Drs. William Byne and Bruce Parsons examined the most prominent “gay gene” studies on brain structure and on identical twins. Their results were published in the Archives of General Psychiatry. They found numerous methodological flaws in all of the studies, concluding that:

There is no evidence at present to substantiate a biological theory. . . . [T]he appeal of current biological explanations for sexual orientation may derive more from dissatisfaction with the present status of psychological explanations than from a substantiating body of experimental data.⁴

Scientists such as Simon LeVay, who have attempted to find a genetic link to homosexuality, have been unable to do so. Although same-sex marriage advocates often point to Mr. LeVay's study as evidence of a genetic link, Mr. LeVay himself stated that, “I did not prove that homosexuality is genetic, or find a genetic cause for being gay. I didn't show that gay men

Jeffrey Satinover, M.D., *HOMOSEXUALITY AND THE POLITICS OF TRUTH* at p.38 (Grand Rapids, Michigan: Hamewith Books, Baker Books, 1996); *See also* Robert Knight, *Born or Bred? Science Does Not Support the Claim that Homosexuality is Genetic* (Washington, D.C.: Concerned Women for America, March 2004).

⁴ William Byne and Bruce Parsons, *Human Sexual Orientation: The Biological Theories Reappraised*, 50 ARCHIVES OF GENERAL PSYCHIATRY, 228-239 (March 1993).

are born that way, the most common mistake people make in interpreting my work.”⁵

Similarly, geneticist Dean Hammer, who was quoted as claiming to have found a gene that formed the basis for homosexuality, refuted that claim and stated that:

The pedigree study failed to produce what we originally hoped to find: simple Medelian inheritance. In fact, we never found a single family in which homosexuality was distributed in the obvious sort of pattern that Mendel observed in his pea plants. . . . We knew also that genes were only part of the answer. We assumed the environment also played a role in sexual orientation, as it does in most of not all behaviors.⁶

The “twin studies” by J. Michael Bailey and Richard C. Pillard compared male identical twins, fraternal twins, non-twin brothers and adopted brothers. Messrs. Bailey and Pillard reported a coordinance rate among homosexuality for identical twins at 52 percent, for fraternal twins at 22 percent, for non-biological brothers at 9 percent and adopted brothers at 11 percent.⁷ More refined studies have shown that where one twin is homosexual, only 10 percent of the time the other twin is homosexual.⁸ Since identical twins have identical genes, if homosexuality were a biological condition, then if one identical twin were homosexual, his brother would be 100 percent of the time, not 52 percent or 10 percent as

⁵ A. Dean Byrd, Stony Olsen, *Homosexuality: Innate and Immutable?*, 14 REGENT U. L. REV. 383, 388 (2001-2002).

⁶ Dean Hammer, *THE SCIENCE OF DESIRE* 82 (New York, New York: Simon & Schuster, 1994).

⁷ Byrd and Olsen, *Homosexuality: Innate and Immutable?*, at 388-390.

⁸ Neil Whitehead, *What is the Genetic Contribution to Homosexuality?*, NARTH BULLETIN 22 (December 1999).

the twins studies showed.⁹ In short, there is no scientific evidence that homosexuality is genetic.¹⁰

Further evidence of the fact that homosexuality cannot be considered “immutable” is present in a growing body of academic literature explaining that one’s sexual preference is fluid and ever-changing. For example, Naomi Mezey claims that “sexual orientation” is “not fixed, but change[s] over time,” and that the categories of homosexual and heterosexual “are rhetorical . . . because of a disjuncture between the concepts of homosexual and heterosexual and the sexual acts they claim to signify.”¹¹ Andrew Sullivan states that for purposes of discrimination laws, race is different than sexual orientation because sexual orientation can be hidden and is a complex “mixture of identity and behavior.”¹² Since “sexual orientation” is so fluid and has not been proven to be genetically linked, it is wholly unlike race or sex, and cannot be categorized as an “immutable” characteristic.

Therefore, science substantiates the Washington Supreme Court, U.S. Supreme Court and other courts’ findings that homosexuality is not “immutable” for purposes of constitutional analysis.

⁹ See Whitehead, *The Importance of Twin Studies*, NARTH BULLETIN 26 (April 2001).

¹⁰ See Bronski, *Blinded by Science*, THE ADVOCATE 64 (February 1, 2000).

¹¹ Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classifications Based on Acts*, 10 BERKELEY WOMEN’S L.J.98-109 (1995).

¹² Andrew Sullivan, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 151-54 (1995).

2. *Sexual orientation is not a suspect class because there is no evidence of historic prejudice.*

While the Washington Supreme Court found evidence of historic discrimination against homosexuals, an examination of their history in light of constitutional principles demonstrates that homosexuals have not suffered the kind of historic prejudice that is a prerequisite to finding that a group is a suspect class. As the Supreme Court explained, as well as consisting of an “immutable characteristic,” a “suspect class” must also be reflective of invidious social or political prejudices. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973). Suspect classifications require close judicial scrutiny because they have frequently been recognized as “discrete and insular minorities who are relatively powerless to protect their interests in the political process.” *Id.* Lines drawn on the basis of race, nationality, alienage or sex “are frequently the reflection of historic prejudices rather than legislative rationality.” *Id.* None of these attributes are apparent in the denial of marriage to same-sex couples. Historical evidence of social, economic and political prejudice of racial minorities was omnipresent in the early years of the nation, as reflected in the adoption of three constitutional amendments (including equal protection under the Fourteenth Amendment) to remedy past discrimination. Similarly, evidence of historic political, economic and social prejudice against women led to adoption of the Nineteenth Amendment. In both cases, the subject classes were powerless to protect their interests in the political process because they were disenfranchised, and constitutional amendments were necessary to remedy the discrimination. There is no such history for homosexuals, who are and always

have been granted full rights of citizenship.

3. *Homosexuals are not politically powerless.*

Similarly, there is no evidence that homosexuals have suffered the kind of economic prejudice that plagued racial minorities and women. Before passage of the Civil Rights Act of 1964, people of color and women were excluded from the economic marketplace and suffered severe economic disadvantage as a direct result of employment discrimination.¹³ By contrast, information from the Simmons Market Research Bureau and U.S. Census data reveal that the average homosexual household had higher annual income than the national average.¹⁴ Indeed, in his dissent in *Romer v. Evans*, Supreme Court Justice Antonin Scalia noted that “[B]ecause those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities,...have high disposal income...and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide.” *Romer v. Evans*, 517 U.S. 620, 645-46 (1996) (Scalia, J., dissenting).

Far from being a “discrete and insular” minority relatively powerless to protect their interests, homosexuals are a powerful political force who enjoy greater economic prosperity

¹³ See Donohue and Heckman, *Continuous versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON LIT. 1603-43 (1991) and Nelson and Bridges, *Paternalism and Politics in a University Pay System*, in LEGALIZING GENDER EQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMAN IN THE UNITED STATES (New York: Cambridge University Press, 1999).

¹⁴ *Wall Street Journal*, July 18, 1991, at B-1.

than similarly situated heterosexuals and who have not faced the historic political and economic disadvantages faced by those who have been deemed “suspect classes” for equal protection purposes.

The New York Court of Appeals agreed that sexual orientation is not a suspect classification in the context of marriage and family regulations. *Hernandez v. Robles*, 2006 WL 1835429 (N.Y. 2006). Furthermore, the *Hernandez* court found that New York’s statute defining marriage as the union of one man and one woman does not create a classification based on sexual orientation. *Id.*

In this respect, the Domestic Relations Law is facially neutral: individuals who seek marriage licenses are not queried concerning their sexual orientation and are not precluded from marrying if they are not heterosexual. Regardless of sexual orientation, any person can marry a person of the opposite sex. Certainly, the marriage laws create a classification that distinguishes between opposite-sex and same-sex couples and this has a disparate impact on gays and lesbians. However, a claim that a facially-neutral statute enacted without an invidious discriminatory intent has a disparate impact on a class (even a suspect class, such as one defined by race) is insufficient to establish an equal protection violation.

Id. The same is true with regard to Family Law §2-201. The mere fact that defining marriage as the union of one man and one woman might affect homosexuals differently than it does heterosexuals does not mean that it is a violation of equal protection.

B. Family Law § 2-201 Does Not Deprive Plaintiffs of a Fundamental Right.

As the *Hernandez* court recently found in relation to a similar challenge brought against New York’s marriage law, the proper identification of Plaintiffs’ claim is one seeking

the right to same-sex marriage, not the fundamental right to marry. *See Hernandez v. Robles*, 2006 WL 1835429 (N.Y. 2006)(characterizing the right being sought as the right to marry someone of the same sex instead of the broader right to marry). Properly characterized, it is clear in this case, as it was clear in *Hernandez*, that there is no fundamental right at stake. *See id.*

The United States Supreme Court characterizes fundamental rights as those “which are, 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 they were sacrificed.’” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Supreme Court has admonished courts to “‘exercise the utmost care’ in conferring fundamental-right status on a newly asserted interest lest we transform the liberty protected by due process into judicial policy preferences rather than principles born of public debate and legislative action.” *Id.* at 720.

Utilizing the Supreme Court’s analysis in *Glucksberg*, the *Hernandez* court clarified that the right sought by plaintiffs was not the fundamental right to marry, but the right to marry a person of the same sex. “While many U.S. Supreme Court decisions recognize marriage as a fundamental right protected under the Due Process Clause, all of these cases understood the marriage right as involving a union of one woman and one man (*see e.g. Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942)).”

Hernandez, 2006 WL 1835429 (Grafano, J., concurring). “[T]o ignore the meaning ascribed to the right to marry in these cases and substitute another meaning in its place is to redefine the right in question and to tear the resulting new right away from the very roots that caused the U.S. Supreme Court and this Court to recognize marriage as a fundamental right in the first place.” *Id.* With these principles in mind, the *Hernandez* court found “the right to marry someone of the same sex . . . is not ‘deeply rooted’; it has not even been asserted until relatively recent times.” *Id.* The *Hernandez* court rejected the plaintiffs’ attempt to analogize their case to *Lawrence v. Texas*, 539 U.S. 558 (2003), which overturned Texas’ law criminalizing sodomy. “Plaintiffs do not, as the petitioners in *Lawrence* did, seek protection against state intrusion on intimate, private activity. They seek from the courts access to a State-conferred benefit that the Legislature has rationally limited to opposite-sex couples.” *Id.* “We conclude that, by defining marriage as it has, the New York Legislature has not restricted the exercise of a fundamental right.” *Id.*

Washington’s Supreme Court similarly found no fundamental right to same-sex marriage based upon the principles set forth in *Glucksberg. Andersen v. King County*, 138 P.3d 963. 979 (Wash. 2006). “The vast majority of states historically and traditionally have contemplated marriage only as opposite-sex marriage, and the majority of states, including Washington, have recently reaffirmed this understanding and tradition.” *Id.* “Federal decisions have found the fundamental right to marry at issue only where opposite-sex marriage was involved. *Loving, Zablocki*, and *Skinner* tie the right to procreation and survival

of the race.” *Id.* Even cases that did not specifically link marriage to procreation, such as *Turner v. Safley*, 482 U.S. 78 (1987), did not change the fact that the fundamental right to marriage is anchored in the tradition of marriage as the union of one man and one woman. *Id.* “Plaintiffs have not established that at this time the fundamental right to marry includes the right to marry a person of the same sex.” *Id.* The court noted that several statutes and municipal codes have been enacted which provide protection to homosexuals. *Id.* “That some laws provide such protections show change is occurring in our society, but community standards at this time do not show a societal commitment to inclusion of same-sex marriage as part of the fundamental right to marry.” *Id.* The Washington court further noted that there is no authority supporting a right to same-sex marriage. *Id.*

With the lone exception of four justices on the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003), the traditional definition of marriage has been consistently upheld by state appellate and supreme courts, as well as the United States Supreme Court. Even the Vermont Supreme Court recognized that “marriage” must remain between one man and one woman when it held that the Vermont Constitution required that same-sex couples be afforded the same benefits, but did not require the state to issue marriage licenses to same-sex couples. *Baker v. State*, 170 Vt. 194 (1999). “The evidence demonstrates a clear legislative assumption that marriage under our statutory scheme consists of a union between a man and a woman.” *Id.* at 204.

The Arizona Court of Appeals similarly explained that “[a]lthough same-sex

relationships are more open and have garnered greater social acceptance in recent years, same-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty.” *Standhardt v. Superior Court*, 77 P.3d 451, 459 (Ariz. Ct. App. 2004). While “a homosexual person’s choice of life partner is an intimate and important decision . . . not all important decisions sounding in personal autonomy are protected fundamental rights. . . . The history of the law’s treatment of marriage as an institution involving one man and one woman, together with recent, explicit reaffirmations of that view, lead invariably to the conclusion that the right to enter a same-sex marriage is not a fundamental liberty interest protected by due process.” *Id.* at 459-60 (“same-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty”); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (same-sex marriage is not a fundamental right); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind 2005) (Indiana Constitution does not require judicial recognition of same-sex marriage); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (finding no constitutional sanction or protection of the right of marriage between persons of the same sex); *Baker v. Nelson*, 291 Minn. 310 (Minn. 1971) (marriage has always been a union of a man and a woman).

The states’ recognition of marriage as the union of one man and one woman follows from the United States Supreme Court’s characterization of the right of marriage as fundamental in *Skinner v. Oklahoma*, 316 U.S. 535 (1942). In *Skinner*, the petitioner

challenged an Oklahoma statute that allowed the state to sterilize habitual criminals without their consent. While the Court held that the legislation ran afoul of the equal protection clause, the Court focused on the fundamental right to marry. The Court explained that marriage was “fundamental to the very existence and survival of the race.” *Id.* at 541. At the time it was decided, as now, marriage was clearly defined as the union of one man and one woman. Thus, finding that the relationship between married persons (a man and a woman) was fundamental to the very existence and survival of the race, the Court struck down the statute on equal protection grounds. *Id.* at 543. More than fifty years earlier, the Supreme Court explained that marriage is “the foundation of the family and of society, without which there would be neither civilization nor progress.” *Maynard v. Hill*, 125 U.S. 190 (1888). The references by the Court to marriage as necessary for the existence and survival of civilization can only refer to the fact that only the relationship between a man and a woman can naturally, without any outside assistance, produce a child. Without such procreation, civilization would indeed cease to exist.

Maryland’s Family Law § 2-201 similarly acknowledges that the fundamental nature of marriage is the union of one man and one woman as the relationship which ensures the continuation and progress of society. As was true in New York, Washington and Nebraska, nothing advanced by these Plaintiffs requires a change in that definition.

C. Since Maryland Family Law § 2-201 Does Not Discriminate Against a Suspect Class Nor Deprive Plaintiffs of a Fundamental Right, it Is Subject to Rational Basis Review, Which it Easily Satisfies.

Since Family Law §2-201 neither targets a suspect class nor burdens a fundamental right, it is subject to rational basis review. Under both the federal and state constitutions, rational basis review applies to claims based on sexual orientation. *Heller v. Doe*, 509 U.S. 312, 319 (1993); *Massage Parlors, Inc. v. Mayor of Baltimore*, 398 A.2d 52, 56 (Md. 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. Otherwise courts ordinarily apply the rational basis test (sometimes labelled the fair and substantial relationship test) which requires that a statutory classification bear a rational relation to or rest upon some ground of difference having a fair and substantial relation to a legitimate state objective.

Massage Parlors, Inc. 398 A.2d at 56. In *Kane v. Board of Appeals*, 887 A.2d 1060,1076 (Md. 2005), this Court explained the principle behind rational basis review:

The constitutional need for equal protection does not shackle the legislature. It has the widest discretion in classifying those who are to be regulated and taxed. Only if the grouping is without any reasonable basis, and so entirely arbitrary, is it forbidden. Abstract symmetry or mathematical nicety are not requisites. The selection need not depend on scientific or marked differences in things or persons or their relations. If any state of facts reasonably can be conceived that would sustain a classification, the existence of that state of facts as a basis for the passage of the law must be assumed. The burden is on him who assails a classification to show that it does not rest on any reasonable basis.

Therefore, the issue in this case is not whether the Legislature's rationale for defining

marriage as the union of one man and one woman is persuasive to the Court, nor whether the Legislature's rationale can be proven. Rather, the only question is whether the rationale satisfies a minimal threshold of rationality. As the Washington Bankruptcy Court explained in rejecting a constitutional challenge to the federal Defense of Marriage Act ("DOMA"):

The test is not whether Congress' rationale for enacting DOMA is persuasive, but whether it satisfies a minimal threshold of rationality. The review afforded under this rational basis standard is very deferential to the legislature, and does not permit this Court to interject or substitute its own personal views of DOMA or same-sex marriage. . . . [T]he creation of new and unique rights is more properly reserved for the people through the legislative process. . . . This Court's personal view that children raised by same-sex couples enjoy benefits possibly different, but equal, to those raised by opposite-sex couples, is not relevant to the Court's ultimate decision. It is within the province of Congress, not the courts, to weigh the evidence and legislate on such issues, unless it can be established that the legislation is not rationally related to a legitimate governmental end. . . . [T]his Court cannot say that DOMA's limitation of marriage to one man and one woman is not wholly irrelevant to the achievement of the government's interest.

In re Kandu, 315 B.R. 123, 145 (Bankr.W.D. Wash. 2004). Justice O'Connor echoed these sentiments in her concurring opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003). Justice O'Connor wrote that the Court's decision

[D]oes not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail rational basis review. Texas cannot assert any legitimate state interest here, such as national security or **preserving the traditional institution of marriage**. Unlike the moral disapproval of same-sex relations – the asserted state interest in this case – **other reasons exist to promote the institution of marriage** beyond mere moral disapproval of an excluded group.

Lawrence, 539 U.S. 585 (2003) (O'Connor, J, concurring) (emphasis added).

When Family Law §2-201 is reviewed in light of these principles, it is clear that

Plaintiffs have not and cannot meet their burden of demonstrating that defining marriage as the union of one man and one woman violates equal protection.

1. The marriage laws further the state's legitimate interest in fostering procreation.

As Defendants argued below, promotion of the traditional family unit and encouraging procreation and child-rearing within that traditional unit are legitimate governmental interests served by Family Code §2-201. The Legislature could rationally conclude that a family comprised of a man and a woman provides the optimal environment for procreation and child-rearing so that the state's interests in promoting stable families and protecting the best interests of children are best served by defining marriage as the union of one man and one woman. Other courts that have addressed the issue, and decades of experience, have found such conclusions easily meet the rational relationship test.

When faced with challenges similar to those raised by Plaintiffs in this case, the Washington Supreme Court held that “[u]nder the highly deferential rational basis inquiry, encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples.”

Andersen v. King County, 138 P.3d 963, 982 (Wash. 2006).

[A]s *Skinner* [*v. Oklahoma*, 316 U.S. 535 (1942)] , *Loving* [*v. Virginia*, 388 U.S. 1 (1967)], and *Zablocki* [*v. Redhail*, 434 U.S. 374 (1978)] indicate, marriage is traditionally linked to procreation and survival of the human race. Heterosexual couples are the only couples who can produce biological offspring of the couple. And the link between opposite-sex marriage and procreation is not defeated by the fact that the law allows opposite-sex marriage regardless of a couple's willingness or ability to procreate. The facts

that all opposite-sex couples do not have children and that single-sex couples raise children and have children with third party assistance or through adoption do not mean that limiting marriage to opposite-sex couples lacks a rational basis. Such over- or under-inclusiveness does not defeat finding a rational basis.

Andersen, 138 P.3d at 982-983. “[T]he legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a ‘traditional’ nuclear family where children tend to thrive.” *Id.* at 983. “We conclude that limiting marriage to opposite-sex couples furthers the State's interests in procreation and encouraging families with a mother and father and children biologically related to both.” *Id.* at 985.

Similarly, Judge Graffeo of the New York Court of Appeals noted that:

The binary nature of marriage—its inclusion of one woman and one man—reflects the biological fact that human procreation cannot be accomplished without the genetic contribution of both a male and a female. Marriage creates a supportive environment for procreation to occur and the resulting offspring to be nurtured. Although plaintiffs suggest that the connection between procreation and marriage has become anachronistic because of scientific advances in assisted reproduction technology, the fact remains that the vast majority of children are conceived naturally through sexual contact between a woman and a man.

Hernandez v. Robles, 2006 WL 1835429 (N.Y. 2006) (Graffeo, J. concurring).

Similarly, the Eighth Circuit agreed with the State of Nebraska that “the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in ‘steering procreation into marriage.’” *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th

Cir. 2006). The court noted that the state could rationally find that “[b]y affording legal recognition and a basket of rights and benefits to married heterosexual couples, such laws ‘encourage procreation to take place within the socially recognized unit that is best situated for raising children.’”*Id.* “Whatever our personal views regarding this political and sociological debate, we cannot conclude that the State’s justification ‘lacks a rational relationship to legitimate state interests.’”*Id.* at 867-868.

Indiana’s Court of Appeals similarly found that “the legislative classification of extending marriage benefits to opposite-sex couples but not same-sex couples is reasonably related to a clearly identifiable, inherent characteristic that distinguishes the two classes: the ability or inability to procreate by ‘natural’ means.” *Morrison v. Sadler*, 821 N.E. 2d 15, 25 (Ind. Ct. App. 2005).

What does the difference between “natural” reproduction on the one hand and assisted reproduction and adoption on the other mean for constitutional purposes? It means that it impacts the State of Indiana’s clear interest in seeing that children are raised in stable environments. Those persons who have invested the significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the “protections” of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place.

By contrast, procreation by “natural” reproduction may occur without any thought for the future. The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from “casual” intercourse. Second, even where an opposite-sex couple enters into a marriage with no intention of having children, “accidents” do happen, or persons often change their minds about wanting to have children. The institution of marriage not only encourages

opposite-sex couples to form a relatively stable environment for the “natural” procreation of children in the first place, but it also encourages them to stay together and raise a child or children together if there is a “change in plans.”

Id. The Indiana court explained that the state’s interest is not necessarily to encourage and promote “natural procreation” at the expense of other forms of becoming parents. *Id.* Instead, the state’s interest in defining marriage as the union of one man and one woman “encourages opposite-sex couples who, by definition, are the only type of couples that can reproduce on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e. a child, to procreate responsibly.” *Id.* “The institution of opposite-sex marriage both encourages such couples to enter into a stable relationship before having children and to remain in such a relationship if children arrive during the marriage unexpectedly.” *Id.* Redefining marriage to include same-sex couples “would not further this interest in heterosexual ‘responsible procreation.’” *Id.* Consequently, Indiana’s law defining marriage as the union of one man and one woman satisfies the rational relationship test. *Id.*

The Arizona Court of Appeals similarly found that the institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. *Standhardt v. Superior Court*, 77 P.3d 451, 463 (Ariz. Ct. App. 2003). The *Standhardt* court rejected plaintiffs’ arguments that defining marriage as the union of one man and one woman is not rationally related to the state’s interest in fostering responsible procreation because opposite-sex couples are not required to procreate in order to marry.

Allowing all opposite-sex couples to enter marriage under Arizona law, regardless of their willingness or ability to procreate, does not defeat the reasonableness of the link between opposite-sex marriage, procreation, and child-rearing. First, if the State excluded opposite-sex couples from marriage based on their intention or ability to procreate, the State would have to inquire about that subject before issuing a license, thereby implicating constitutionally rooted privacy concerns. Second, in light of medical advances affecting sterility, the ability to adopt, and the fact that intentionally childless couples may eventually choose to have a child or have an unplanned pregnancy, the State would have a difficult, if not impossible, task in identifying couples who will never bear and/or raise children. Third, because opposite-sex couples have a fundamental right to marry, *Loving [v. Virginia]*, 388 U.S. at 12, 87 S.Ct. 1817, excluding such couples from marriage could only be justified by a compelling state interest, narrowly tailored to achieve that interest, *Glucksberg[v. Washington]*, 521 U.S. at 721, 117 S.Ct. 2258, which is not readily apparent. For these reasons, the State's decision to permit all qualified opposite-sex couples to marry does not defeat the reasonableness of the link between opposite-sex marriage, procreation, and child-rearing.

Id. at 462. The *Standhardt* court also rejected the argument that linking marriage and procreation is not reasonable because same-sex couples also raise children who would benefit from the stability provided by marriage. *Id.*

Likewise, although some same-sex couples also raise children, exclusion of these couples from the marriage relationship does not defeat the reasonableness of the link between opposite-sex marriage, procreation, and child-rearing. Indisputably, the only sexual relationship capable of producing children is one between a man and a woman. The State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children. Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships.

Id. at 462-463. “We hold that the State has a legitimate interest in encouraging procreation

and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest.” *Id.* at 463-464.

Numerous other courts have also recognized that the state purpose of furthering procreation where both parents are present to raise the child is at least rational, if not compelling. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (DOMA is rationally related to the state’s interest in encouraging the raising of children in homes consisting of a married mother and father); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff’d*, 673 F.2d 1036 (9th Cir. 1982) (“The state has a compelling interest in encouraging and fostering procreation of the race.”); *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. 1995) (finding that this “central purpose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples”); *Baker v. Nelson*, 291 Minn. 310 (1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972) (“The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis”). The United States Supreme Court has also supported this justification, describing two “important governmental objectives” which reinforce the link between marriage and procreation. The first interest articulated by the Supreme Court in *Nguyen v. I.N.S.*, 533 U.S. 53 (2001), is the role of marriage in “assuring that a biological parent child relationship exists.” With the legal presumption of paternity under both California and federal law, together with the marital expectations of monogamy and fidelity, marriage provides a basis

for the legal and factual assumption that a married man is the father of his wife's child. Extending the definition of marriage to include same-sex couples would not only fail to advance this “important governmental interest,” but would actively undermine the signaling function of marriage with respect to any real connection between marriage and biological parenting. *Reno v. Flores*, 507 U.S. 292, 310 (1993). Secondly, the Supreme Court focused on a “demonstrated opportunity to develop a relationship that consists of real, everyday ties providing a connection between child and citizen parent.” *Nguyen*, 533 U.S. at 54. As the Supreme Court noted, the connection between mother and child is inherent in birth, but the connection between father and child is more tenuous. More than any other relationship, marriage connects fathers to their children, both in a legal sense and also in terms of the “real, everyday ties” that give meaning to parent-child relationships.

Conversely, children raised by same-sex couples are denied the opportunity to develop “real, everyday ties” with at least one of their biological parents. In this way, same-sex marriages “generally do not advance the social interest in responsible procreation; rather, they impair the integrity of the institution that has best been able to further the social interests in responsible procreation.”¹⁵

Indisputably, the only sexual relationship capable of producing children is one between a man and a woman. In his dissent in *Goodridge v. Department of Public Health*,

¹⁵ Lynn D. Wardle, *Multiply and Replenish: Considering Same-sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 797 (2001).

798 N.E. 2d 941 (Mass. 2003), Justice Cordy explained that the Legislature could rationally conclude that:

So long as marriage is limited to opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor; that if they are to procreate, then society has endorsed the institution of marriage as the environment for it and for the subsequent rearing of their children; and that benefits are available explicitly to create a supportive and conducive atmosphere for those purposes. If society proceeds similarly to recognize marriages between same-sex couples who cannot procreate, it could be perceived as an abandonment of this claim, and might result in the mistaken view that civil marriage has little to do with procreation: just as the potential of procreation would not be necessary for a marriage to be valid, marriage would not be necessary for optimal procreation and child rearing to occur. In essence, the Legislature could conclude that the consequence of such a policy shift would be a diminution in society's ability to steer the acts of procreation and child rearing into their most optimal setting

798 N.E.2d at 1003 (Cordy, J. dissenting).

The Maryland Legislature, like the legislatures discussed above, could conclude that defining marriage as the union of one man and one woman is rationally related to its interest in fostering responsible procreation and stable family life for children. Under the rational basis test Family Law § 2-201 is presumed to be constitutional. *See Massage Parlors, Inc. v. Mayor of Baltimore* 398 A.2d 52, 56 (Md., 1979). “Thus, if any state of facts can adequately be advanced that would justify the classification, the existence of those facts will be assumed by the court to be the basis of the classifications in order to uphold the legislation.” *Id.* This Court should therefore assume that defining marriage as the union of one man and one woman is justified by the state's interest in fostering responsible

procreation and promoting family stability and uphold Family Law §2-201.

2. *The marriage laws are rationally related to the state's interest in promoting the welfare of children.*

This Court can make a similar finding with relation to the state's interest in promoting the welfare of children. The New York Court of Appeals discussed in detail how defining marriage as the union of one man and one woman is rationally related to the state's interest in promoting the welfare of children.

First, the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement-in the form of marriage and its attendant benefits-to opposite-sex couples who make a solemn, long-term commitment to each other. The Legislature could find that this rationale for marriage does not apply with comparable force to same-sex couples. These couples can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse. The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more. This is one reason why the Legislature could rationally offer the benefits of marriage to opposite-sex couples only.

There is a second reason: The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general

rule-some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes-but the Legislature could find that the general rule will usually hold.

Hernandez v. Robles, 2006 WL 1835429 (N.Y. 2006).

Even the Massachusetts Supreme Judicial Court agreed that marriage is central to the welfare of the community and that “marital children reap a measure of family stability and economic security based on their parents’ legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children.” *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941, 956 - 957 (Mass. 2003). In his dissent, Justice Cordy expounded upon this aspect of marriage:

The marital family is also the foremost setting for the education and socialization of children. Children learn about the world and their place in it primarily from those who raise them, and those children eventually grow up to exert some influence, great or small, positive or negative, on society. The institution of marriage encourages parents to remain committed to each other and to their children as they grow, thereby encouraging a stable venue for the education and socialization of children.[citations omitted].More macroscopically, construction of a family through marriage also formalizes the bonds between people in an ordered and institutional manner, thereby facilitating a foundation of interconnectedness and interdependency on which more intricate stabilizing social structures might be built.

Id. at 996 (Cordy, J. dissenting). “It is difficult to imagine a State purpose more important and legitimate than ensuring, promoting, and supporting an optimal social structure within which to bear and raise children. At the very least, the marriage statute continues to serve this important State purpose.” *Id.* at 997. Justice Cordy noted that under rational basis review, the court is required to make deferential assumptions about the Legislature’s decision-making.

We must assume that the Legislature (1) might conclude that the institution of civil marriage has successfully and continually provided this structure over several centuries (2) might consider and credit studies that document negative consequences that too often follow children either born outside of marriage or raised in households lacking either a father or a mother figure, and scholarly commentary contending that children and families develop best when mothers and fathers are partners in their parenting ; and (3) would be familiar with many recent studies that variously support the proposition that children raised in intact families headed by same-sex couples fare as well on many measures as children raised in similar families headed by opposite-sex couples; support the proposition that children of same-sex couples fare worse on some measures; or reveal notable differences between the two groups of children that warrant further study.

Id. at 998-999. The Legislature “might consider and credit studies that document negative consequences that too often follow children either born outside of marriage or raised in households lacking either a father or a mother figure, and scholarly commentary contending that children and families develop best when mothers and fathers are partners in their parenting.”*Id.* at 999.

Taking all of this available information into account, the Legislature could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children, and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm.

Id. at 999-1000.

Among the research alluded to by Justice Cordy are studies which have found that defining marriage as the union of one man and one woman maintains boundaries that foster

the social, physical and emotional development of children.¹⁶ Studies have also consistently shown that children of married couples are more likely to do well in school than do children of same-sex couples, thus furthering the state's interests in helping children become desirable future citizens and in decreasing the need for public assistance.¹⁷ “Married couples seem to offer the best environment for a child's social and educational development.”¹⁸ In addition, one study indicated that “[s]ame-gender sexual orientation is significantly associated with each of the suicidality measures” gauged in the study.¹⁹ Specifically, “gay, lesbian, and bisexual young people are at increased risk of mental health problems, with these associations being particularly evident for measures of suicidal behavior and multiple disorder[s].”²⁰ Studies have also shown that children raised by same-sex couples are more likely to be promiscuous and become homosexual themselves.²¹ It is not necessary that legislators, the parties or the court agree with the studies in order to satisfy the rational basis

¹⁶ See J. Nicolosi, *A PARENTS’ GUIDE TO PREVENTING HOMOSEXUALITY* 22 (Downers Grove, Ill.: InterVarsity Press 2002).

¹⁷ See Sarantakos, *Children in Three Contexts: Family, Education and Social Development*, *CHILDREN AUSTRALIA* 29 (1996).

¹⁸ See *id.*

¹⁹ Fergusson, Horwood, and Beautrais, *Is Sexual Orientation Related to Mental Health Problems and Suicidality in Young People?*, 56 *ARCHIVES OF GEN. PSYCHIATRY* 876 (Oct. 1999).

²⁰ See *id.*

²¹ See Riggs, *Coparent or Second-Parent Adoptions by Same-Sex Couples* (Letter to the Editor), 109 *PEDIATRICS* 1193-1194 (June 2002).

test. It is sufficient to show that these and similar studies could provide the Legislature with a rational basis to decide that the state's interest in providing for the best interests of the child is best served by maintaining marriage as the union of one man and one woman instead of creating a new definition that could sanction an environment that might place them at greater risk of losing a parent or having a parent become mentally incapacitated.

3. *Marriage is distinct from other personal relationships, uniquely contributing to the continuing well-being of men and women, of children, and of society and the state.*

Defining marriage as the union of one man and one woman is also justifiable in light of the distinctive characteristics of the institution. Virtually every known human society has some form of marriage.²² While the structure of marriage in a particular culture varies considerably, it always has something to do with creating a public (not private) sexual union between a man and woman so that socially-valued children have both a mother and a father, and so that society has the next generation it needs. Every society finds some way to regulate these relationships, to channel the sexual and reproductive energies of men and women attracted to the opposite sex into the kind of sexual union where (a) childbearing is acceptable because (b) children and society's interests are protected.

The law presumes that a marriage will produce children, regulating and affording benefits on the basis of that presumption. That childbearing opportunities inherent in the

²² See Lynne Marie Kohm, *The Homosexual "Union": Should Gay and Lesbian Partnerships Be Granted the Same Status as Marriage?*, 22 J. CONTEMP. L. 51 (1996).

male/female marital union are occasionally unrealized (i.e., exceptions to the general pattern) does nothing to undermine the basis for the rule of recognition of the special status of traditional marriage. By affirming a particular kind of relationship as the social ideal, the state attempts to both discourage unmarried childbearing and to encourage sufficient childbearing within marriage to reproduce the population. Courts and legal scholars agree that the link between marriage, procreation and child-rearing remains an important governmental interest today.²³ It is thus reasonable for, and indeed incumbent upon, government to urge men and women in a sexual relationship to accept both the recognition and regulation of marriage. One scholar stated, “Society has compelling interests in protecting the social institution that has best furthered social interests in procreation, in maintaining the clear social identity of that institution, and in preserving the linkage that institution forges among sex, procreation, and child rearing.”²⁴ The dissenting justices in *Goodridge* echoed this theme. “Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized.” *Goodridge*, 798 N.E.2d at 995 (Cordy, J., dissenting)..

Marriage is a key social institution, intimately involved with how committed we as a society are to two key ideas: that children need mothers and fathers and that marriage is the

²³ Wardle, “*Multiply and Replenish*” at 771-814.

²⁴ *Id.* at 784.

main way that we create stable, loving mother-father families for children. To date, researchers know very little about the outcomes of children raised in unisex households, justifying (if not strongly urging) cautious, incremental steps in the legal recognition and sanction of such households.²⁵ Social scientists have begun to note significant limitations in the body of research supporting such claims.²⁶ Three of the *Goodridge* court's seven members addressed concerns about the lack of such evidence.

Conspicuously absent from the court's opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results. Notwithstanding our belief that gender and sexual orientation of parents should not matter to the success of the child rearing venture, studies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples. . . . Even in the absence of bias or political agenda behind the various studies of children raised by same-sex couples, the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. Gay and lesbian couples living together openly, and official recognition of them as their children's sole parents, comprise a very recent phenomenon, and the recency of that phenomenon has not yet permitted any study of how those children fare as adults and at best minimal study of how they fare during their adolescent years. The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes? Our belief that children raised by same-sex couples should fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief. The Legislature is not required to share that belief but may, as the creator of the institution of civil marriage, wish to see the proof before making a fundamental alteration to that institution.

²⁵ *Id.* at 796.

²⁶ *Id.*

Id. at 979-80 (Sosman, J., dissenting).

Marriage is not just a legal construct; it is socially and culturally a child-rearing institution, the place where having children and creating families is actually encouraged, rather than merely tolerated. If the Court were to endorse same-sex marriage, then it would be making a powerful statement: “we no longer believe children deserve a mother and a father.” The message that will be conveyed is the role of father and mother is fungible, with neither serving a distinctive function in the family. State promotion of this idea would affect people who are currently married or who have been raised in a particular culture of marriage and would have a dramatic effect on the next generation's attitudes toward marriage, childbearing, and the importance of mothers and fathers. If young people are led to believe that two mothers are the same as a mother and a father, for example, they might conclude that fathers are wholly irrelevant. This will denigrate the role of fathers in the family and discourage young men from assuming the responsibilities of fatherhood. A decision redefining marriage to include same-sex couples would place adult interest in sexual liberty above the State's interest in legally recognizing and protecting a particular family dynamic for the benefit of children and society.

Marriage is separated from other kinds of relationships by law and government as well as society because it is not merely a private, individual good, but a public, common good. Even people who do not marry depend upon a healthy marriage culture in order to carry society into the next generation. While many courts continue to articulate this public

understanding of the reasons for state involvement in marriage, *see, e.g., Hernandez v. Robles*, 2006 WL 1835429 (N.Y. 2006), *Andersen v. King County*, 138 P.3d 963 (Wash. 2006), *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), *Morrison v. Sadler*, 821 N.E.2d 15 (Ind 2005), *Standhardt v. Super. Ct. of Arizona*, 77 P.3d 451 (Ariz. Ct. App. 2003); those, like Plaintiffs, who want to redefine marriage to include same-sex couples, articulate a private conception of marriage as an individual right to (a) express certain emotions or values and (b) acquire certain legal benefits. These two competing visions of the purposes of marriage lead the law in dramatically opposing directions.

Under the private purpose view of marriage espoused by Plaintiffs, marriage has a legal form but no specific content. Each person has the right to express socially his or her own preferred inner vision of family, sexuality and intimacy, on an equal basis. There is no reason, therefore, to withhold these benefits from any combination of people who wish to claim them on behalf of themselves or (especially) their dependents. From this perspective, marriage would no longer be a social institution regulated by law in order to support important public objectives, but would be reduced to an emotionally laden ceremony which confers various legal benefits. One family scholar encapsulated the issue:

There are many problems with this vision of marriage and its relationship to law. It reduces marriage to a creature of the state. By emphasizing the rights of adults, it intrinsically devalues the interest of children and the community in marriage. By reducing marriage to an individual right, it undermines the very norms of commitment it rhetorically upholds. It logically calls into question the notion of family law itself. If the purpose of marriage and family law is to affirm neutrally the multiplicity of adult emotional choices, because individual declarations of intimacy are sacred matters in which the state has no

right to interfere, then the question becomes: why do we have laws about marriage at all? ²⁷

Marriage, is not merely a civil right or a private commitment as Plaintiffs maintain, but is a social institution. Marriage exists as a public legal act and not merely a private romantic declaration or religious rite. While marriage systems differ, marriage across societies is a “publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce.”²⁸

If the courts should choose to create same-sex “marriage,” then they would deprive the Legislature of its authority to make the significant policy decision of preferring and offering benefits only to those who choose marriage over other forms of intimate relationships. Many intimate relationships (both same-sex and opposite-sex) might be socially valued, yet not given the legal recognition that is given to married couples consisting of one man and one woman. If Plaintiffs want the court to redefine marriage, then they must construct a theory of marriage that would entitle same-sex couples to legal recognition and justify excluding other intimate and dependent relationships. Plaintiffs have not and cannot do so. Absent such a theory, Plaintiffs’ argument becomes not an argument for same-sex “marriage,” but an argument for the abolition of marriage as a legal status and the extension

²⁷ Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 231 (2004).

²⁸ William J. Doherty, *et al.*, WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES 8-9 (New York, Institute for American Values 2002).

of its benefits to all intimate and dependent relations.²⁹

The difficulty of the task is apparent in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 954 (Mass. 2003), where the majority could do nothing more than state that marriage is about “encouraging stable relationships over transient ones,” “identif[ying] individuals,” “provid[ing] for the orderly distribution of property,” “ensur[ing] that children and adults are cared for and supported whenever possible from private rather than public funds,” and “track[ing] important epidemiological and demographic data.” Such interests do not form a principled basis for recognizing “marriage” consisting of two opposite-sex or same-sex persons without simultaneously providing a basis for the legality of consensual polygamy and endogamy.

The *Goodridge* court’s failure to articulate a legitimate legal basis for redefining marriage is one of several reasons why this Court should refuse to follow the lead of the *Goodridge* majority, as the trial court did, and instead adopt the analysis of Justice Cordy’s dissenting opinion. First, the *Goodridge* court literally turned the rational basis test on its head – rather than presuming, as it must, that the statute was valid and requiring that plaintiffs disprove any conceivable legitimate basis, the court shifted the burden to the state. Even then, the court summarily dismissed each of the bases articulated by the state. Justice Cordy’s dissent properly concludes that given the uncertainty of long term effects on

²⁹ Nancy D. Polikoff, *Conference on Marriage, Families, and Democracy: Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 201-202 (2003).

children, families, and society, the Legislature can rationally conclude not to permit same-sex couples to marry. Finally, although the *Goodridge* court redefined marriage to include same-sex couples, this Court should follow the lead of the other courts that have addressed the issue and concluded that there is no constitutional violation in defining marriage as the union of one man and one woman – leaving it up to the Legislature to determine whether to redefine marriage. As the New York Court of Appeals said in *Hernandez*, “any expansion of the traditional definition of marriage should come from the Legislature.” 2006 WL 1835429. “We do not predict what people will think generations from now, but we believe the present generation should have a chance to decide the issue through its elected representatives.” *Id.* Similarly, the Washington Supreme Court said that its conclusion that Washington’s DOMA was constitutional should not be “read as casting doubt on the right of the legislature or the people to broaden the marriage act or provide other forms of civil union if that is their will.” *Andersen*, 138 P.3d at 991 (Alexander, C.J., concurring).

In sum, the Maryland Legislature could have rationally concluded that marriage is society’s way of recognizing that the sexual union of a man and a woman is unique, and that government needs to regulate this union for the benefit of society and its children, or that despite the personal fulfillment of intimate adult relationships, marriage laws are not primarily about adult needs for approbation and support, but about the well-being of children and society. In either case, the marriage laws are rationally related to a legitimate state interest.

CONCLUSION

Family Law §2-201 does not discriminate on the basis of sex in violation of the Equal Rights Amendment, target a suspect class or violate a fundamental right. Therefore, the statute defining marriage as the union of one man and one woman is subject to a rational basis analysis, which it easily satisfies.

For these reasons, this Court should overturn the trial court's decision which declared that Family Law §2-201 is unconstitutional.

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