

In the Court of Special Appeals of Maryland

September Term 2005

No. 2499

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;
Michael Baker, in his official capacity as Dorchester County Circuit Court Clerk,

Defendants-Appellants,

vs.

Gitanjali Deane and Lisa Polyak; Alvin Williams and Nigel Simon;
Takia Foskey and Joanne Rabb; Jodi Kelber-Kaye and Stacey Kargman-Kaye;
Donna Myers and Maria Barquero; John Lestitian; Charles Blackburn and Glen Dehn;
Steven Palmer and Ryan Killough; Patrick Wojahn and David Kolesar;
Mikkole Mozelle and Phelicia Kebreau,

Plaintiffs-Appellees.

On Appeal from the Circuit Court for Baltimore City
M. Brooke Murdock, Judge

BRIEF *AMICUS CURIAE* OF THE MARYLAND CATHOLIC CONFERENCE
IN SUPPORT OF DEFENDANTS-APPELLANTS

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Statement of the Interest of the *Amicus*

The Maryland Catholic Conference (the Conference) has been organized by the Roman Catholic Bishops of Maryland as the institution by which the Bishops speak cooperatively and collegially in the field of public affairs. The Conference promotes the social teaching of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, criminal justice and the economy. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and to the people of Maryland.

Whether the courts should mandate recognition of same-sex marriage presents an issue of profound importance to the Catholic Church and the citizens of Maryland. Consistent with the Judeo-Christian moral heritage upon which Western Civilization is based and the longstanding tradition of Western law, the Conference affirms the understanding that marriage, as a natural and social institution, is reserved for opposite-sex couples in which they may procreate and raise children. The lower court's judgment directly threatens that understanding. For the reasons set forth in this brief, and for those set forth in the brief of the defendants-appellants, that judgment cannot be sustained upon a proper interpretation of the Maryland Constitution and should be reversed.

Statement of the Case

Plaintiffs, nine same-sex couples and the surviving partner of a same-sex relationship, brought an action against defendants, five circuit court clerks, seeking declaratory and injunctive relief against enforcement of the Maryland statute reserving marriage to opposite-sex couples. MD. CODE ANN., FAM. LAW § 2-201 (2004). The parties filed cross-motions for summary judgment. On January 20, 2006, the circuit court granted plaintiffs' motion for summary judgment and denied defendant's cross-motion for summary judgment. The court stayed enforcement of its judgment order pending appeal.

Statement of the Questions Presented

Amicus shall address two questions in this brief:

Whether Maryland's reservation of marriage to opposite-sex couples constitutes impermissible sex discrimination in violation of the Maryland equal rights amendment.

Whether Maryland's reservation of marriage to opposite-sex couples is rationally related to any legitimate state purpose.

Statement of the Facts

Amicus generally adopts the Statement of the Facts of the defendants-appellants.

ARGUMENT

I.

MARYLAND’S RESERVATION OF MARRIAGE TO OPPOSITE-SEX COUPLES DOES NOT DISCRIMINATE ON THE BASIS OF SEX IN VIOLATION OF THE EQUAL RIGHTS AMENDMENT.

The circuit court held that Maryland’s reservation of marriage to opposite-sex couples, *see* MD. CODE ANN., FAM. LAW § 2-201 (2004) (“Only a marriage between a man and a woman is valid in this State”), is unconstitutional because it unjustifiably discriminates on the basis of sex in violation of the state equal rights amendment. *See* Mem. Op. at 2, 6-7, 10, 19, citing MD. CONST. DECLARATION OF RIGHTS, art. 46 (2003). This holding cannot be reconciled with the plain language of the equal rights amendment, the history of its adoption, the understanding of the people who voted for it, its construction by the legislative and executive branches of government or its interpretation by the judiciary. Accordingly, the judgment of the circuit court should be reversed.

The principles for the proper disposition of this appeal are well established. “The prime consideration in construing a constitutional provision is to determine and give effect to the intent of the framers and of the people who adopted it.” 5 MD. LAW ENCYCLOPEDIA Const. Law § 7 (West 2001), citing *Fish Market v. GAA*, 337 Md. 1, 8-9 (1994). *See also Kadan v. Board of Supervisors of Elections of Baltimore County*, 273 Md. 406, 413 (1974) (the “polestar” of constitutional construction is to give effect “to the intent of the framers of the organic law and of the people adopting it”) (citation and internal quotation marks omitted). That intent “is first sought from the terminology used in the provision, with each word being given its ordinary and popularly understood meaning, . . .” *Brown v. Brown*, 287 Md. 273, 278 (1980) (citations omitted). If the words used 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.” *Id.*, citing *Reed v. McKeldin*, 207 Md. 553, 560-61 (1955). If, however, “an examination of the language . . . demonstrates ambiguity

or uncertainty, we look elsewhere to learn the provision’s meaning, keeping in mind the necessity of ascertaining the purpose sought to be accomplished by enactment of the provision.” *Id.*¹ That inquiry may take into account “the prior state of the law, the previous and contemporary history of the people, the circumstances attending the adoption of the organic law, as well as broad considerations of expediency.” *Reed, supra*, 207 Md. at 561. The object of such inquiry is “to ascertain the reason which induced the framers to enact the provision in dispute and the purpose sought to be accomplished thereby, in order to construe the whole instrument in such way as to effect that purpose.” *Id.* In all circumstances, “the goal of our examination is always to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision, be it statutory, constitutional or part of the [r]ules.” *Davis v. Slater*, 383 Md. 594, 605 (2004).

The Language of the Amendment

The equal rights amendment provides, “Equality of rights under the law shall not be abridged or denied because of sex.” MD. CONST. DECLARATION OF RIGHTS, art. 46 (2003). Section 2-201 of the Family Code cannot be said to “abridge” or “deny” “equality of rights under the law” “because of sex.” Section 2-201 is gender neutral. Both men and women may marry members of the opposite sex; neither may marry anyone of the same sex. The classification is not between men and women, but between *opposite-sex* couples and *same-sex* couples.

The difficulty with the circuit court’s holding that § 2-201 discriminates on the

¹ Resort to extrinsic sources is appropriate not only when the *language* of a particular constitutional provision is in question, but also when the *effect* of that provision on a given matter is in question. *See Luppino v. Gray*, 336 Md. 194, 204 n. 8 (1994) (“[w]hen the language of the pertinent constitutional provision, *or its effect*, is ambiguous or uncertain, external interpretative aids may be consulted in order to ascertain the meaning or purpose the provision was intended to accomplish or achieve”) (emphasis added). Thus, even if the *language* of the equal rights amendment is clear, any uncertainty as to its *effect*, with respect to the question of same-sex marriage, may be resolved by consulting extrinsic sources.

basis of sex, as the Vermont Supreme Court has noted, is that “the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and woman equally from marrying a person of the same sex.” *Baker v. State*, 744 A.2d 864, 880 n. 13 (Vt. 1999). “[T]here is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct.” *Id.*² Other courts are in accord in rejecting the claim that “defining marriage as the union of one man and one woman discriminates on the basis of sex.” *Id.* citing *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974).³ As Justice Cordy noted in his

² The Vermont Supreme Court’s decision requiring the State to recognize either marriage or its legal equivalent (civil unions) between members of the same sex was based upon a provision in the Vermont Constitution (the “Common Benefits Clause,” VT. CONST. ch. I, art. 7 (2003)) for which there is no analog in the Maryland Constitution.

³ See also *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1983); *Dean v. District of Columbia*, 653 A.2d 307, 363 n. 2 (D.C. App. 1995) (“[t]he marriage statute applies equally to men and women”); *Samuels v. New York State Dep’t of Health*, 811 N.Y.S.2d 136, 143 (N.Y. App. Div. 2006) (same), *appeal pending* (New York Court of Appeals); *Hernandez v. Robles*, 805 N.Y.S.2d 354, 370 (N.Y. App. Div. 2005) (Catterson, J., concurring) (same), *appeal pending* (New York Court of Appeals). In rejecting federal constitutional challenges to the Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2005), 28 U.S.C. § 1738C (Supp. 2005), three federal courts have also concluded that reserving marriage to opposite-sex couples does not discriminate on the basis of sex. See *Wilson v. Ake*, 354 F.Supp.2d 1298, 1307-08 (M.D. Fla. 2005) (“DOMA does not discriminate on the basis of sex because it treats women and men equally”); *Smelt v. County of Orange*, 374 F.Supp.2d 861, 877 (C.D. Cal. 2005) (same), *aff’d in part, vacated in part and remanded with directions to dismiss for lack of standing*, ___ F.3d ___, No. 05-56040 (9th Cir. May 5, 2006); *In re Kandou*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2005) (“DOMA . . . does not single out men or women as a discrete class for unequal treatment”). In *Kandou*, the bankruptcy court agreed with the Government that “DOMA does not discriminate on the basis of sex because (1) on its face, it makes no detrimental classification that disadvantages either men or women; (2) it cannot be traced to a purpose to discriminate against either men or women; and (3) it does not reflect either the baggage of sexual stereotypes or stigmatization of women.” *Id.* at 142.

dissent in *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 991 (Mass. 2003) (Cordy, J., dissenting), the marriage statute “does not subject men to different treatment from women; each is equally prohibited from the same conduct.”⁴

Relying upon *Loving v. Virginia*, 388 U.S. 1 (1967), the circuit court determined that the “equal application” of the marriage statute to men and women does not preserve it from constitutional challenge. *See* Mem. Op. at 7-8. The *Loving* analogy is unconvincing at several levels. First, *Loving* dealt with race, not sex. The two characteristics are not fungible for purposes of constitutional analysis. To take but one example, although it is clear that no public high school or college could field sports teams segregated by *race*, they *may* field teams segregated by *sex* (at least where equal opportunities are afforded males and females on separate teams) without running afoul of either the Equal Protection Clause of the Fourteenth Amendment or a state equal rights amendment.⁵ Second, anti-miscegenation statutes were intended to keep persons of

⁴ Justice Cordy was addressing an *alternative* argument raised by plaintiffs but not reached by the majority in their opinion invalidating the Commonwealth’s marriage statute, to wit, whether the statute violated the state equal rights amendment. In support of its opinion, the circuit court cited the Hawaii Supreme Court’s decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). *See* Mem. Op. at 8 & n. 7. In *Baehr*, a plurality of the Hawaii Supreme Court held that a law reserving marriage to members of the opposite sex constitutes sex-based discrimination, subject to a heightened standard of judicial review. *See Baehr*, 852 P.2d at 59-63. In reference to the court’s sex discrimination holding, a noted constitutional scholar has described *Baehr* as “an affront to both law and language that well deserves its place on the list of worst decisions.” Bernard Schwartz, *A BOOK OF LEGAL LISTS* at 182 (Oxford University Press 1997). “The *Baehr* decision is so contrary to both established law and common sense that one is almost speechless before this patent *reductio ad absurdum* of equal protection jurisprudence.” *Id.* at 183.

⁵ In *Attorney General v. Massachusetts Interscholastic Athletic Ass’n, Inc.*, 393 N.E.2d 284 (Mass. 1979), the Massachusetts Supreme Judicial Court held that an athletic association rule, which provided that no boy could play on a girl’s team, although a girl could play on a boy’s team if that sport was not offered for girls, violated the state equal rights amendment. The court minimized the impact of its decision, however, stating: “It can be expected that the present decision will make little practical difference in the traditional conduct of interscholastic athletic competition, for that will proceed in the

different races *separate*; marriage statutes, on the other hand, are intended to bring persons of the *opposite* sex *together*. Statutes that mandated *segregation* of the *races* with respect to marriage cannot be compared, in any relevant sense, to statutes that promote *integration* of the *sexes* in marriage,⁶ as one jurist has noted recently.⁷

great majority of instances on a basis of ‘separate but equal’ teams whose validity is assumed here.” *Id.* at 296. See also *O’Connor v. Board of Education of School District No. 23*, 645 F.2d 578, 582 (7th Cir. 1981) (in dissolving a preliminary injunction directing a school board to permit a junior high school girl to try out for the boys’ basketball team, the Seventh Circuit commented that it was “highly unlikely” that the plaintiff could demonstrate that the school board’s policy of “separate but equal” sports programs for boys and girls violated either the Equal Protection Clause or the equal rights provision of the Illinois Constitution); cf. *Darrin v. Gould*, 540 P.2d 882, 893 (Wash. 1975) (striking down rule against girls playing on high school football team, but suggesting that result might have been different if the school had fielded both boys’ and girls’ teams).

⁶ This distinction, *integration* as opposed to *segregation*, also distinguishes the two Court of Appeals decisions the circuit court relied upon in its decision, both of which involved gender-based *segregation*. See Mem. Op. at 7, 10-13, citing *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53 (1985), and *Giffin v. Crane*, 351 Md. 133 (1998). *Burning Tree Club* struck down a state statute that granted preferential tax assessments to private country clubs that agreed to preserve open spaces from development and exempted from the anti-discrimination provisions of the statute country clubs whose facilities were operated with the primary purpose of serving or benefitting members of a particular sex. That one country club might discriminate against women, while another discriminated against men, did not affect the fact that *both* clubs were engaged in discrimination by segregating their facilities, albeit in different ways. *Giffin* held that a court deciding custody issues could not follow a blanket rule that, in the absence of evidence of unfitness, it would award custody of a minor child to the parent of the same gender. Such a rule, like the statutory exemption struck down in *Burning Tree Club*, segregated the sexes, placing girls with their mothers and boys with their fathers. Unlike the facts in *Burning Tree Club* and *Giffin*, § 2-201 does not *segregate* the sexes, it *integrates* them into the institution of marriage.

⁷ “The *Loving* analogy is inapt on purely logical grounds.” *Hernandez*, see n. 3, *supra*, 805 N.Y.S.2d at 370 (Catterson, J., concurring). “The statutes struck down in *Loving* . . . prohibited marriages between members of *different* races, not between members of the *same* race. The equivalent, in the area of sex, of an anti-miscegenation statute would not be a statute prohibiting *same*-sex marriages, but one prohibiting *opposite*-sex marriages, an absurdity which no State has ever contemplated. The

Third, unlike the history of the anti-miscegenation statutes struck down in *Loving*, which clearly stigmatized blacks as inferior to whites,⁸ neither the circuit court nor plaintiffs have identified anything in the history of Maryland’s present or former marriage statutes suggesting that they were “intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender.” *Lawrence v. State*, 41 S.W.3d 349, 358 (Tex. App. 2001, writ ref’d) (*en banc*), rev’d on other grounds, *Lawrence v. Texas*, 539 U.S. 558 (2003).⁹ “In light of the discriminatory intent with which they were enacted, anti-

equivalent, in the area of race, of a statute prohibiting same-sex marriage, would be a statute that prohibited marriage between members of the *same* race. Laws banning marriages between members of the same race would be unconstitutional, not because they would ‘segregate the races and perpetuate the notion that blacks are inferior to white,’ *Lawrence v. State*, 41 S.W.2d at 357, but because there could be no possible rational basis prohibiting members of the same race from marrying.” *Id.* at 370-371. Laws against same-sex marriage, however, are supported by multiple reasons. See Argument II, *infra*.

⁸ The statutes challenged in *Loving* did not prohibit all interracial marriages, but only marriages between “white persons” and “non-white persons.” *Loving*, 388 U.S. at 11 & n. 11. Interracial marriages between “non-whites,” *e.g.*, blacks and Asians, were not banned. Noting that “Virginia prohibits only interracial marriages involving white persons,” the Court determined that “the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.” *Id.* That “justification,” the Court concluded, was patently inadequate: “We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” *Id.* at 11-12.

⁹ “By contrast, here there is no evidence that limiting marriage to opposite-sex couples was motivated by sexism in general or a desire to disadvantage men or women in particular. Moreover, no one has identified any harm, burden, disadvantage, or advantage accruing to either gender as a consequence of the . . . marriage statute.” *Goodridge*, *supra*, 798 N.E.2d at 992 (Cordy, J., dissenting). As in *Goodridge*, which was decided on other grounds, plaintiffs have presented *no* evidence that in reserving marriage to opposite-sex couples, the legislature was “motivated by sexism in general or a desire to disadvantage men or women in particular.” Nor have they identified “any harm, burden, disadvantage, or advantage accruing to either gender as a consequence” of § 2-201.

miscegenation laws could not be legally justified by the fact that they applied equally to whites and blacks. By way of contrast, there is *no* evidence that laws reserving marriage to opposite-sex couples were enacted with an intent to discriminate against either men or women. Accordingly, such laws cannot be equated in a facile manner with anti-miscegenation laws.” *Hernandez, supra*, n. 3, 805 N.Y.S.2d at 370 (Catterson, J., concurring). The reservation of marriage to opposite-sex couples cannot be said to “abridge” or “deny” “equality of rights” “because of sex” in violation of the plain language of the equal rights amendment.

Any doubt that the language of the equal rights amendment was not intended to affect the General Assembly’s continuing authority to reserve marriage to opposite-sex couples is dispelled by a review of the public understanding of the amendment at the time it was under consideration in the fall of 1972, legislative and executive construction of the amendment following its adoption and judicial interpretation of the amendment over the past thirty-four years.¹⁰

Contemporaneous Public Understanding of the Amendment

The understanding of the electorate that approved the Maryland Constitution (or an amendment thereto) may be considered in interpreting the Constitution (or amendment). *See Bandel v. Isaac*, 13 Md. 202, 223 (1858) (“[i]n construing a Constitution, we must take into consideration the circumstances which attended its adoption, and what appears to have been the understanding of those who endorsed it with their approbation”); *see also Kadan v. Board of Supervisors, supra*, 273 Md. at 413 (the “polestar” of constitutional construction is to give effect “to the intent of the framers of the organic law *and of the people adopting it*”) (emphasis added). Remarkably, neither the plaintiffs in

¹⁰ “If the terms of a constitutional provision are not entirely free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption, because in construing a constitutional provision, its general scope and object should be considered.” *Kadan v. Board of Supervisors, supra*, 273 Md. at 414 (citation and internal quotation marks omitted).

their trial memoranda nor the circuit court in its opinion made any attempt to ascertain what the *public* understood to be the purpose and effect of the state equal rights amendment, or to examine any source materials that might be relevant to such an inquiry. Review of those materials, however, undermines any notion that the equal rights amendment would require the State to recognize same-sex marriages.

At the time the state equal rights amendment was being considered by the people it was generally understood that its approval would have a “far reaching impact on court decisions in the area of family and domestic relations laws dealing with such matters as child custody, alimony and paternity cases,” and would “require repeal of a wide variety of state statutes that now make some distinction between the sexes, which would no longer be constitutional.” Douglas Watson, “Maryland Voters to Decide on Constitutional Changes,” *Washington Post*, Oct. 23, 1972, B-4.¹¹ Nevertheless, the pre-amendment statutes implicitly reserving marriage to opposite-sex couples were never considered to be among those that would be affected by adoption of the equal rights amendment.¹²

¹¹ Watson’s article, indeed its very phrasing, was based in large measure on the official “Summary and Explanation” of the “Constitutional Questions and Statewide Referendum submitted to the Voters of Maryland on November 7, 1972,” at 8-9, prepared by the Maryland Department of Legislative Services and published on September 10, 1972. See also “18 Referendum Issues Confront Voters,” *The News American*, Oct. 24, 1972, A-4 (same); *The Frederick News*, Nov. 3, 1972, A-4 (editorial); Louis Azreal, “Women’s Rights vs. Fatti Maschi,” *The News American*, Oct. 27, 1972, 7-B. In her widely syndicated column, entitled “The State of Things,” Maryland writer Val Hymes warned that “[Q]uestion 3 [the equal rights amendment] may open a Pandora’s box of controversy and confusion in labor unions . . . divorce laws [and] alimony.” “Sex Symbols on the Ballot,” *The Aegis*, Oct. 19, 1972, B-1, B-15; *The Catonsville Times*, Oct. 19, 1972, 1-B; *The Community Times*, Oct. 19, 1972, 4-A; *The Dorchester News*, Oct. 18, 1972, 4-B; *Essex Times & Eastern Beacon*, Oct. 19, 1972, 1-B; *The Federalsburg Times*, Oct. 18, 1972, 6-A; *The Frederick News*, Oct. 18, 1972, A-6; *The Marylander & Herald*, Oct. 19, 1972, 2-A; *Prince George’s Post*, Oct. 19, 1972, p. 4. All of the newspapers cited in this brief are available in microfilm at the Enoch Pratt Free Library in Baltimore.

¹² Although § 2-201 (formerly codified as art. 62, § 1 (1979 Repl. Vol.)), was not enacted until 1973, shortly after the state equal rights amendment was adopted, there is no question that Maryland law prohibited same-sex marriages at the time the amendment was

At the request of the Maryland Commission on the Status of Women, the Maryland Attorney General's Office prepared a report on the possible impact on state law of adoption of either the state or federal equal rights amendment. The report, attached as Exhibit 5 to the Memorandum in Support of Defendants' Motion for Summary Judgment (hereinafter Defendants' Memorandum), prepared by Eleanor M. Carey, Legal Assistant, Office of the Attorney General, was published by the Maryland Commission on the Status of Women on September 19, 1972, less than two months before the state equal rights amendment was approved by the voters. The report was intended to be a comprehensive and exhaustive compilation of state statutes and rules "which *in any way* distinguish among individuals on the basis of sex, as well as those which appear to distinguish against or impose restrictions upon women." Report at 1 (emphasis in original). Although the report identified more than 200 separate statutes and rules which could be affected by adoption of either the state or federal equal rights amendment, *none* of the state statutes implicitly reserving marriage to opposite-sex couples was listed. The absence of any reference to these statutes in the report provides compelling evidence that the electorate had no reason to believe that the reservation of marriage to opposite-sex couples would be affected by adoption of the state equal rights amendment.¹³ That

being considered. See *57 Opinions of the Attorney General* 71 (1972), citing, *inter alia*, art. 62, § 4 (1972 Repl. Vol.) (statute regulating issuance and form of marriage license referring to "widower" and "widow"); MD. CODE ANN. art. 16, § 24 (1966 Repl. Vol.) (referring to "husband" and "wife" in statute governing divorce *a vinculo*). See also MD. CODE ANN. art. 62, §§ 1-3 (1972 Repl. Vol.) (prohibiting marriage of persons of the opposite sex who were related within certain degrees of consanguinity or affinity); art. 62, § 9 (statute governing marriage of minors referring to "male" and "female").

¹³ The report was mentioned, directly or indirectly, in several newspaper stories published before the vote on the equal rights amendment. See, e.g., "Sexism in the Statutes," *Washington Post*, Oct. 30, 1972, A-20 (noting Attorney General's identification of 227 "sexist clauses and concepts in the Maryland Codes"); Barry C. Rascovar, "Feminists find few foes of ballot question," *The Baltimore Sun*, Oct. 31, 1972, C-7 & C-24 (same); "Record Vote Expected," *Bethesda-Chevy Chase Tribune*, Nov. 3, 1972, p. 12 (same); Barbara Gold, "When women are 'equal,' what then?," *The Baltimore Sun*,

conclusion is reinforced by comments of Eleanor Carey, the author of the report, which appeared in *The Baltimore Sun* on October 15, 1972, barely three weeks before the referendum on the amendment. Ms. Carey said that she had gone through the entire Maryland Code to find out “where there is discrimination on the basis of sex and to pick out those statutes which might be offensive to the ERA.” Barbara Gold, “When women are ‘equal,’ what then?,” *The Baltimore Sun*, Oct. 15, 1972, C-1. As previously noted, the laws reserving marriage to opposite-sex couples were not among those listed in the report. Asked about the possible impact of the equal rights amendment on “single sex marriages,” Ms. Carey responded, “Statutes which prohibit single sex marriages would not be offensive to the ERA. As long as all women were prohibited from marrying other women, and all men were prohibited from marrying other men, then the statute is O.K.” *Id.* at C-6. That, of course, is precisely what § 2-201 prohibits.

Many newspaper editorials, columns, articles and letters to the editor discussing the equal rights amendment noted the myriad of ways in which women have not been treated equally with men in law and society, and emphasized that the intent of the amendment was to eradicate this inequality of treatment so that men and women would stand on an equal footing, at least with respect to the law,¹⁴ if not in social attitudes.

Oct. 15, 1972, C-1, C-6; “Burch Comments on Effect of Equal Rights Amendment,” *The Columbia Times*, Nov. 2, 1972, 3-A.

¹⁴ See *The Aegis*, Oct. 19, 1972, B-1 (the equal rights amendment “would seek to correct any inequities in state law which forbid[] a woman from enjoying the same rights under those laws as a man”) (editorial endorsement); *Anne Arundel Times*, Nov. 2, 1972, p. 2 (“our state’s laws should apply equally to man and wom[a]n”) (quoting the Maryland League of Women Voters in editorial endorsing the equal rights amendment); *The Arbutus Times*, Nov. 2, 1972, 2-A (the equal rights amendment “provides in effect, that because both men and women are human beings, they deserve equal rights under the law”) (editorial endorsement); *The Catonsville Times*, Nov. 2, 1972, 1-B (same editorial); *The Columbia Times*, Nov. 2, 1972, 4-A (same editorial); *Essex Times & Eastern Beacon*, Nov. 2, 1972, 1-B (same editorial); Barbara Gold, “When women are ‘equal,’ what then?,” *The Baltimore Sun*, Oct. 15, 1972, C-1 (“[s]ex . . . will no longer be a permissible factor in determining the legal rights and responsibilities of women or of men”)

The unmistakable import of these editorials, columns, articles and letters was that the equal rights amendment was concerned with relations *between* the sexes, not with relations between members of the *same* sex. Although some *opponents* of the equal rights amendment may have raised the specter of same-sex marriage in an effort to defeat

(identifying a number of statutes that discriminate on the basis of sex which would have to be modified or repealed); Barry C. Rascovar, "Feminists find few foes of ballot question," *The Baltimore Sun*, Oct. 31, 1972, C-7, C-24 (Bebe Bailey, head of Citizens Coalition for the Equal Rights Amendment, acknowledged that the equal rights amendment "would mean that many state laws dealing with divorce, marriage, alimony and property rights would have to be revised *so as not to favor one sex*") (emphasis added); *The Baltimore Evening Sun*, Oct. 26, 1972 A-18 (under equal rights amendment, "equality of standing before the law shall not be abridged or denied to either sex") (editorial endorsement); *The Frederick News*, Nov. 3, 1972, A-4 (equal rights amendment "would eliminate the denial of rights because of sex") (editorial endorsement); *The News American*, Oct. 24, 1972, 8-A (although equal rights amendment "is often referred to as a 'women's rights' measure, . . . it also would assure men that they could not be discriminated against because of their sex"); *Maryland Independent*, Nov. 2, 1972, A-2 ("Question number three [the equal rights amendment] deals with equal rights for women," but also for men, asking "Why should a man have to pay alimony when the woman is able bodied and no children are involved[?]," and "Why should one person be penalized or rewarded just because of their [*sic*] sex?") (editorial endorsement); letter to the editor, Helen Elizabeth Brown, *The News American* (Nov. 4, 1972, 6-A) ("Maryland needs her own protection against unjust laws" that discriminate against women). The Maryland League of Women Voters stated that the state equal rights amendment would "require equality of rights under the law to both sexes," as a result of which "a wide variety of Maryland statutes would have to be revised to eliminate discrimination on the basis of sex." "Voters' Guide," *The Baltimore Sun*, Oct. 22, 1972, p. 25. The Montgomery County Commission for Women voted unanimously to support passage of the equal rights amendment, declaring that "the Equal Rights Amendment will eliminate discrimination before the law, extend to all citizens, men and women alike, equal protection of the law, and will guarantee to all citizens equal rights and responsibilities in preserving our way of life." "Ballot Question 3. ERA," *Bethesda-Chevy Chase Tribune*, Nov. 3, 1972, p. 11. The Howard County NAACP endorsed the equal rights amendment because it was "oppose[d] to all forms of discrimination." "County NAACP Endorses Equal Rights, Sex Bills," *The Columbia Times*, Oct. 26, 1972, 6-A. In her syndicated column, "The State of Things," *see* n. 11, *supra*, Val Hymes said that under the equal rights amendment, "Women will be able to challenge in the courts virtually every form of discrimination where, in the past, only certain areas were covered."

the amendment,¹⁵ none of its *proponents* said or even intimated that the amendment would require recognition of same-sex marriage. When there is public disagreement regarding the impact of a constitutional amendment, it is the views of those who

¹⁵ Presumably, *proponents* of the equal rights amendment would not have denied the claim that the amendment would require recognition of same-sex marriage unless at least some *opponents* of the amendment had first raised that issue as a reason for its rejection. Nevertheless, although there was some individual and organizational opposition to the state equal rights amendment (*e.g.*, Happiness of Womanhood, Committee for the Status of Woman, League of Housewives and the Voters Interest League, *see* Barry C. Rascovar, “Feminists find few foes of ballot question,” *Baltimore Sun*, Oct. 31, 1972, C-24), as well as a few editorials and letters to the editor that recommended that the amendment be rejected, with one possible exception noted below, none of this opposition, to the extent it was reflected in newspaper coverage, even hinted that the amendment would have any bearing on the issue of same-sex marriage. *See The Harford Democrat-Upper Bay Citizen*, Nov. 1, 1972, A-6 (advising a vote against the equal rights amendment because it might eliminate some of the legal protections women have enjoyed); *The Marylander & Herald*, Oct. 26, 1972, 2-A (“Opposed to any blanket form of Women[’s Lib”); Ollie v. Clifford, “Women’s Lib and Equal Rights,” *Labor Herald*, Oct. 27, 1972, p. 1 (urging rejection of the state equal rights amendment based on arguments that had been raised against the federal equal rights amendment relating to conscription and combat); letter to the editor, Barbara M. Morris, “Ladies, Beware,” *The Baltimore Sun*, Oct. 20, 1972, A-18 (“A vote against Question 3 on election day is a vote against radical, revolutionary ‘women’s liberation’”); letter to the editor, Maud-Ellen Zimmerman, Chairman, Voters Interest League, “Vote Against Question Three,” *The News American*, Nov. 3, 1972, 6-B (identifying a variety of laws and legal doctrines protecting or favoring women that would be affected by adoption of the equal rights amendment). In presenting arguments against the equal rights amendment, John C. (Rufus) Webb, Jr., a member of the Citizens Advisory Committee to Montgomery County Public Schools for Family Life and Human Development, urged rejection of the amendment because its intent was not clear and could result in “serious cultural risks.” “Ballot Question 3. Equal Rights Amendment,” *Bethesda-Chevy Chase Tribune*, Nov. 3, 1972, p. 11 (presenting opposing views). Webb commented that the wording of the amendment “does not spell out for the courts whether the intent of the Legislature is to equalize relations between the sexes, or to equalize normal with abnormal sexual relations [referring to laws prohibiting “sexual deviance” and homosexuality].” *Id.* Arguably, Webb’s letter implied that the equal rights amendment could affect Maryland’s reservation of marriage to opposite-sex couples. This, of course, represented the view of an *opponent*, not a *proponent*, of the amendment.

supported a measure, not those who *opposed* it, that should be considered, where resort to such extrinsic evidence is otherwise appropriate.¹⁶

Consistent with the official “Summary and Explanation” of the ballot questions prepared by the State Department of Legislative Reference for the voters of Maryland, *see* n. 11, *supra*, which noted that “[t]he language in the Maryland [equal rights] amendment is almost identical to the newly proposed [equal rights] amendment to the Constitution of the United States,” advocates of the state ERA, including newspapers that endorsed the amendment, frequently commented that it contained the same operative language as the proposed federal ERA,¹⁷ thereby implying that it would have the same effect.¹⁸ That

¹⁶ *See Legislature of the State of California v. Eu*, 816 P.2d 1309, 1315 (1991) (“ballot measure opponents frequently overstate the adverse effects of the challenged measure, and their ‘fears and doubts’ are not highly authoritative in construing the measure”).

¹⁷ The federal equal rights amendment, approved by Congress on March 22, 1972, (but never ratified by the requisite number of States), provided:

“Section 1. Equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex.

“Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

“Section 3. This Amendment shall take effect two years after the date of ratification.” H.J. Res. 208, 92nd Cong. 2nd Sess. (March 22, 1972).

¹⁸ The Maryland League of Women Voters stated that the state equal rights amendment “[w]ould put [the] exact wor[d]ing of [the] amendment to [the] Federal Constitution into the Maryland State Constitution,” *The Carroll County Times*, Nov. 2, 1972, 12-A, and urged a favorable vote on the state amendment because it would “reaffirm Maryland’s ratification of the Equal Rights Amendment to the U.S. Constitution.” *Anne Arundel Times*, Nov. 2, 1972, p. 2 (quoting League of Women Voters in editorial endorsing the state equal rights amendment). *See also The Baltimore Sun*, Oct. 28, 1972, A-20 (endorsing the state equal rights amendment, which “is in accord with a proposed amendment to the federal [c]onstitution”); Barbara Gold, “When women are ‘equal,’ what then?,” *The Baltimore Sun*, Oct. 15, 1972, C-1 (commenting that the proposed state and federal equal rights amendments are “essentially alike” and their wording is “almost exactly the same”); *The Baltimore Evening Sun*, Oct. 26, 1972, A-18 (endorsing the state equal rights amendment, which “is worded almost identically to the

implication was made explicit by Attorney General Burch in the report his office prepared for the Maryland Commission on the Status of Women.¹⁹ The state amendment was still necessary, its supporters explained, because, first, the federal amendment might not be ratified by the requisite number of States and, second, even if it were, it would not take effect for two years after its ratification, whereas the state amendment would take effect immediately upon its proclamation by the Governor following a favorable vote of the

proposed 27th Amendment to the United States Constitution [the federal equal rights amendment]”); *The Frederick News*, Nov. 3, 1972, A-4 (endorsing the state equal rights amendment, the language of which “is almost identical to the newly proposed amendment to the Constitution of the United States”); *Maryland Independent*, Oct. 12, 1972, A-1 (same); *The News American*, Oct. 24, 1972, 8-A (same); *Washington Post*, Oct. 23, 1972, B-4 (editorial endorsing the state amendment, which “would, at the least, place the state Constitution in agreement with the U.S. Constitution [if the federal equal rights amendment were ratified] in assuring equal rights for men and women”). In a letter to the editor published in *The News American*, Nov. 4, 1972, 6-A, Helen Elizabeth Brown urged ratification of both the state and federal equal rights amendments. Ms. Brown questioned the utility of addressing individual instances of discrimination on a case by case basis (“Specific bills for specific ills”) because “what Congress and state legislatures giveth, they can also taketh away.” *Id.*

¹⁹ In the report she prepared on behalf of Attorney General Burch for the Maryland Commission on the Status of Women, Eleanor Carey commented “it is not possible at this time to surmise how the Maryland Amendment will be interpreted” because “there is no “legislative history expressing the intention of the drafters of the Maryland Amendment.” Report at 5. Nevertheless, Ms. Carey noted that “[t]he substantive language of the Maryland Amendment closely resembles its federal counterpart,” and, in light of the similarity of language used, “Maryland courts may find the federal legislative history instructive and perhaps persuasive” in interpreting the state amendment. *Id.* This conclusion was noted in the press. See “Burch Comments on Effect of Equal Rights Amendment,” *The Columbia Times*, Nov. 2, 1972, 3-A (Burch “suggested that since the language of both amendments is so similar, Maryland courts may find the federal legislative history instructive and perhaps persuasive”). In an article that appeared less than one week before the election, Ms. Carey appeared to equate the state and federal equal rights amendments in terms of their impact on state law. See “Equal Rights Opponents Blasted by Law Student,” *The News American*, Nov. 2, 1972, 4-B (Ms. Carey was a law student at the time she prepared the report for the Attorney General’s Office).

people.²⁰ It was recognized, however, *before* the state equal rights amendment was submitted to the voters by the General Assembly, that the federal equal rights amendment would *not* mandate recognition of same-sex marriage by the States.²¹ Accordingly, neither would the state equal rights amendment.

The state equal rights amendment, which passed by an overwhelming margin,²² generated negligible organized opposition,²³ and was generally viewed as

²⁰ Barbara Gold, “When women are ‘equal,’ what then?,” *The Baltimore Sun*, Oct. 15, 1972, C-1 (noting that the federal amendment “will not go into effect until two years after ratification,” whereas the state amendment “would go into effect immediately after passage”); *The Baltimore Evening Sun*, Oct. 26, 1972, A-18 (suggesting that it would be better to revise state laws under the state equal rights amendment “than later on under federal compulsion”); *The News American*, Oct. 24, 1972, 8-A (endorsing the proposed state equal rights amendment while noting that “the federal amendment won’t take effect until three-fourths of the states have ratified it”); *Washington Post*, Oct. 30, 1972, A-20 (noting that, unlike the state amendment, which would take effect at once, the federal equal rights amendment “is not quite so imminent, since it would become effective two years after its ratification by 38 states”). In a letter to the editor published in *The News American*, Nov. 4, 1972, 6-A, Helen Elizabeth Brown urged ratification of both the state and federal equal rights amendments, adding that until the federal equal rights amendment was ratified, “Maryland needs her own protection against unjust laws.” *Id.* Finally, in a column that appeared in many Maryland papers, *see* n. 11, *supra*, Val Hymes observed that the state equal rights amendment would “fill the gap” until the federal equal rights amendment was ratified and took effect two years thereafter.

²¹ *See* 118 Cong. Rec. 9331 (March 21, 1972) (the federal equal rights amendment would not affect the authority of the States to prohibit same-sex marriages so long as the prohibition applied to both men and women) (remarks of Senator Bayh); Report of the Maryland Commission on the Status of Women, Sep. 19, 1972, at 4 (reporting Senator Bayh’s statement that the equal rights amendment would “permit states to invalidate single sex marriages . . . so long as such laws are applicable to members of both sexes”); “Burch Comments on Effect of Equal Rights Amendment,” *The Columbia Times*, Nov. 2, 1972, at 3-A (reporting finding in report to the Commission on the Status of Women).

²² *See The Baltimore Sun*, Nov. 8, 1972, A-11 (reporting that Question 3 – the equal rights amendment – had passed by more than a 2-1 margin).

²³ One week before the election, a writer for *The Baltimore Sun* reported that “[t]he women’s liberation movement, which has run into entrenched male opposition in many of

“noncontroversial.” “A Miscellany of Ballot Questions,” *The Baltimore Sun*, Oct. 28, 1972, A-20 (editorial). Needless to say, had the public believed that the equal rights amendment would require recognition of same-sex marriage in Maryland, the opposition would not have been negligible and the amendment would not have been regarded as “noncontroversial.” In sum, there is nothing in the history of the adoption of the state equal rights amendment, from its proposal by the legislature in the spring of 1972, until its approval by the electorate in the fall of that year, which would have given the public any reason to believe that the amendment would result in same-sex marriage by court decree. Moreover, there *was* evidence before the voters that the equal rights amendment would *not* require recognition of same-sex marriage. The only conclusion that can be drawn from a review of this history that the state equal rights amendment does *not* affect the authority of the State to reserve marriage to opposite-sex couples.

Contemporaneous Legislative Construction of the Amendment

The Maryland General Assembly’s contemporaneous construction of the equal rights amendment, as reflected in legislation, is another source that may be consulted, where otherwise appropriate, and is entitled to “great consideration.” *County Comm’rs for Montgomery County v. Supervisors of Elections of Montgomery County*, 192 Md. 196, 210 (1948), citing *Humphreys v. Walls*, 169 Md. 292, 299 (1935). It is an “accepted rule” of constitutional interpretation that “a contemporaneous construction of a provision of the

its campaigns, apparently has found the going surprisingly easy in its quest to ensure equal rights to both sexes under the Maryland Constitution.” Barry C. Rascovar, “Feminists find few foes of ballot question,” *The Baltimore Sun*, Oct. 31, 1972, C-24. According to Bebe Bailey, Citizens Coalition for the Equal Rights Amendment, “We’re going to have to fight to get the vote out [referring to voter apathy], but we’ve found no political opposition.” *Id.* In an editorial appearing the next day, *The Baltimore Sun* noted that only two of the eighteen state ballot questions “appear to have stimulated substantial disputes,” one creating a state lottery, the other establishing a state scholarship fund for needy children attending non-public schools. “Two Contested Issues on State Ballots,” *The Baltimore Sun*, Nov. 1, 1972, A-14. The equal rights amendment (Question 3 on the ballot) was not one of them.

State Constitution by the Legislature, which has been acquiesced in for a long period of time and uniformly followed, furnishes a strong presumption that the provision was correctly interpreted and is a valuable aid in determining the intention of the framers.” *Pressman v. D’Alessandro*, 211 Md. 50, 59-60 (1955), citing *Trustees of the Catholic Cathedral Church of Baltimore v. Manning*, 72 Md. 116, 130 (1890), *Humphreys v. Walls*, *supra*, 169 Md. at 299, and *Johns Hopkins University v. Williams*, 199 Md. 382, 386-87 (1951).²⁴ “That rule,” the Court of Appeals explained in *Pressman*, “is based on the theory that the interpretation placed upon the Constitution by the contemporaries of the framers is entitled to respectful consideration, inasmuch as they had the best opportunities for learning the intention of its framers and the understanding of the people who ratified the Constitution.” 211 Md. at 60. “[T]he rule of contemporaneous construction,” however, “cannot enlarge, restrict, or contradict the plain language of the Constitution.” *Id.* See also *Johnson v. Duke*, 180 Md. 434, 442 (1941) (same).²⁵

The Court of Appeals has frequently relied upon the legislature’s contemporaneous construction of a particular provision of the constitution in interpreting that provision. In

²⁴ See also *Norris v Mayor and City Council of Baltimore*, 172 Md. 667, 676 (1937) (“[i]n aid of an inquiry into the true meaning of the language used, weight may also be given to long continued contemporaneous construction by officials charged with administration of the government, and especially by the Legislature”) (emphasis added). As Chief Justice Marshall stated in *Cohens v. Virginia*, 6 Wheat. 264, 418 (1821), “Great weight has always been attached, and very rightly attached, to contemporaneous exposition.”

²⁵ In refusing to apply the rule of contemporary construction in *Pressman*, the Court of Appeals noted that the language of the constitutional provision in question was “plain and definite,” and that an act passed nearly *forty years* after the constitution was adopted could not be regarded as a “contemporaneous construction.” *Id.* Unlike the facts in *Pressman*, the legislature’s construction of the equal rights amendment, with respect to the issue of same-sex marriage, was virtually contemporaneous with its adoption (see the discussion in the text, *infra*), and confirms that the amendment was not intended to have any effect on the issue of same-sex marriage. Contemporaneous legislative construction of the equal rights amendment thus does *not* “enlarge, restrict or contradict” the “plain language” of the amendment.

Levin v. Hewes, 118 Md. 624 (1912), the court considered a challenge to a 1912 act authorizing the Governor to make appointments of justices of the peace for the City of Baltimore. The act was alleged to have violated art. IV, § 42, of the 1867 Maryland Constitution,²⁶ because it purported to allow the Governor to appoint justices of the peace at large, not just for individual wards. The Court of Appeals rejected this attack on the act, noting that only three years after the constitution was adopted and continuing without challenge for forty-two years, the General Assembly enacted legislation authorizing the Governor to appoint justices at large for the City of Baltimore: “ ‘A contemporaneous construction placed upon a particular provision of the organic law by the legislative department of the government, acquiesced in and acted upon without ever having been questioned, followed continuously and uniformly from an early period down . . . furnishes a very strong presumption that the intention [of the framers] is rightly interpreted.’ ” *Id.*, quoting *Trustees of the Catholic Cathedral Church of Baltimore, supra*, 72 Md. at 130.²⁷

²⁶ “That the Governor . . . shall appoint such number of Justices of the Peace . . . for the several . . . Wards of the City of Baltimore, as are now, or may hereafter be prescribed by Law.” MD. CONST. art. IV, § 42 (1963 Repl.Vol.) (repealed).

²⁷ See also *Wyatt v. State Roads Comm’n*, 175 Md. 258, 264 (1938) (relying upon the longstanding practice of the legislature distinguishing between legislative days and calendar days in interpreting the requirement set forth in art. III, § 27, that a bill be read “on three different days of the session in each House, unless two-thirds of the members elected to the House where such bill is pending determine by yeas and nays”); *Trustees of the Catholic Cathedral Church of Baltimore, supra*, 72 Md. at 130-31 (relying upon the history of legislative acts confirming the validity of land titles transferring property to religious bodies in interpreting a former provision of the constitution placing restrictions on the acquisition of land by religious sects, orders and denominations); *Johns Hopkins University, supra*, 199 Md. at 399-400 (relying upon the State’s longstanding practice of issuing bonds and giving the proceeds derived therefrom to non-profit, privately owned and operated educational institutions in interpreting the prohibition expressed in art. III, § 34, on the extension of the credit of the State to “any individual association or corporation”); *Norris, supra*, 172 Md. at 678-79 (holding that the use of voting machines did not violate the requirement of art. I, § 1, that “[a]ll elections shall be by ballot,” where the word “ballot” did not have a definite and fixed meaning and connotation, but had undergone significant historical evolution).

Here, *less than five months after the equal rights amendment was adopted*,²⁸ the legislature made *explicit* that which always had been *implicit* in the marriage laws of the State, to wit, that only opposite-sex couples may marry, by passing SB 122 by overwhelming margins.²⁹ Thirty-three of the thirty-four senators and ninety-four of the ninety-five delegates who voted *on* both the equal rights amendment in 1972 and SB 122 in 1973 voted *in favor of* both propositions. The understanding of these legislators, who had placed the equal rights amendment on the ballot, that the amendment did *not* affect their authority to reserve marriage to opposite-sex couples, as reflected by their passage of SB 122 only five months after the equal rights amendment was approved on November 7, 1972, cannot be dismissed or disregarded by this Court.

The legislature's understanding of the equal rights amendment, with respect to the issue of same-sex marriage, did not end with passage of the 1973 act, however. In 1975, the House Judiciary Committee rejected a petition to repeal SB 122 and enact legislation allowing same-sex marriage, stating that "any change in the existing law that would permit a marriage between persons other than a man and a woman, would be contrary to public policy." Legislative Council of Maryland, REPORT TO THE GENERAL ASSEMBLY OF 1975[:] PROPOSED BILLS at 457-58. Once again, the legislature (acting through the Legislative Council) found no incompatibility between the equal rights amendment and reserving marriage to opposite-sex couples. Finally, only last year, the legislature passed

²⁸ The House of Delegates voted to submit the state equal rights amendment (HB 687) to the electorate by a vote of 120-1. *See* Journal of Proceedings of the House of Delegates 1281-82 (March 22, 1972). The Senate concurred by a vote of 39-0. *See* Journal of Proceedings of the Senate 1899 (April 1, 1972). It strains credulity to believe that in 1972 the Maryland General Assembly would have agreed to place the equal rights amendment on the ballot at all, much less by unanimous or near unanimous votes, if the Senators and Delegates had known that it would be interpreted to require recognition of same-sex marriage.

²⁹ SB 122 was approved by a vote of 37-1 in the Senate, *see* Senate Journal of Proceedings 273 (Jan. 24, 1973), and by a vote of 112-1 in the House of Delegates, *see* House of Delegates Journal of Proceedings 2743 (April 6, 1973).

a bill (vetoed by the Governor) that would have established “life partnerships” in the State of Maryland for certain specified purposes, but also provided, “That this Act may not be construed in any way that conflicts with the public policy of the State that recognizes a valid marriage to be only a marriage between a man and a woman.” SB 796, § 3.

For more than thirty-two years, from April 1973, when SB 122, the subject of this litigation, was passed, until April 2005, when SB 796 was passed (before being vetoed), the Maryland Legislature has understood that the equal rights amendment does not affect, and was not intended to affect, the authority of the legislature to reserve marriage to opposite-sex couples. That continuous and consistent construction of the amendment by the legislature, a construction which was not challenged until last year, must be given its due weight by this Court.

Contemporaneous Executive Construction of the Amendment

In interpreting a provision of the state constitution, the courts may consider, where appropriate, not only the legislature’s contemporaneous construction of a constitutional provision, but also the executive’s. *See Norris v Mayor and City Council of Baltimore*, n. 24, *supra*, 172 Md. at 676 (“[i]n aid of an inquiry into the true meaning of the language used, weight may also be given to long continued contemporaneous construction by officials charged with administration of the government”) (emphasis added); *Johns Hopkins University*, *supra*, 199 Md. at 399 (relying upon “a number of very definite and positive legislative and executive interpretations” in construing art. III, § 34, of the Maryland Constitution). In addition to the evidence of the legislature’s construction of the equal rights amendment is the evidence of the construction placed on the amendment by executive branch officials.

Pursuant to the adoption of the equal rights amendment, a commission was formed under the authority of the Governor’s Office to study implementation of the amendment. The commission submitted its final report on July 1, 1978, to Acting Governor Blair Lee, III. *See* “Report to the Governor,” Governor’s Commission to Study Implementation of the Equal Rights Amendment (July 1, 1978). Part IV of the report described

implementation of the amendment, describing statutory reforms adopted between 1974 and 1978, and identifying some still needed, in four broad areas, including domestic law. The statute reserving marriage to opposite-sex couples (then codified as art. 62, § 1) was not listed as one that needed to be amended to bring it into compliance with the equal rights amendment. *See* Report at 15-33. Part V and Appendix E of the report dealt with recommendations for future legislative action. Once again, art. 62, § 1, was not listed. At no point did the Governor’s Commission recommend any changes to the law reserving marriage to opposite-sex couples. *See also* Defendants’ Memorandum, Exhibit 9, “Application of the Maryland Equal Rights Amendment,” Governor’s Commission to Study Implementation of the Equal Rights Amendment (June 1978).

In 1982, the Maryland Commission for Women (formerly the Maryland Commission on the Status of Women) issued a retrospective report, in pamphlet form, on the impact of the state equal rights amendment. *See* “The Maryland ERA[:] A Ten Year History,” Maryland Commission for Women (1982), attached as Exhibit 11 to Defendants’ Memorandum. After reviewing developments in the law since the amendment had been adopted, the report discussed areas of law that are not affected by the state equal rights amendment. The Commission noted that, “In general, the state ERA does not interfere in . . . areas of privacy, abortion, homosexual relationships or family matters.” Report, p. 11. Turning specifically to the issue of same-sex marriage, the Commission stated that “the state ERA is . . . not concerned with the relationship of two persons of the same sex. Indeed, courts in several states have held that state ERAs do not permit homosexual marriage.” *Id.*³⁰

Finally, on March 14, 1979, the Attorney General responded to an inquiry from Delegate Joan B. Pitkin “on whether the proposed [federal] Equal Rights Amendment . . . would repeal State laws banning homosexual marriages.” Letter of Advice, March 14,

³⁰ The Commission reiterated this in its 1984 report. *See* “The Maryland ERA,” p. 12, Maryland Commission for Women (1984).

1979, p. 1. In his reply, the Attorney General also addressed “the question of whether the State ERA would affect such a ban.” *Id.* After a brief analysis of the relevant legal principles, the opinion concluded that “under the State ERA or under the federal ERA, if it is adopted, Article 62, § 1, will continue to prohibit homosexual marriages in Maryland.” *Id.*, p. 2.

The contemporaneous construction of the state equal rights amendment by two executive commissions and the Attorney General, like the contemporaneous construction by the legislature, confirms that the amendment was not intended to have and does not have any affect on the authority of the State of Maryland to prohibit same-sex marriages.

Judicial Interpretation of the Amendment

The judicial interpretation of the equal rights amendment confirms that the reservation of marriage to opposite-sex couples does not implicate any rights protected by the amendment. In *Giffin v. Crane*, see n. 6, *supra*, the Court of Appeals reviewed the adoption and interpretation of the equal rights amendment and concluded:

The basic principle of the Maryland Equal Rights Amendment . . . is that sex is not a permissible factor in determining the legal rights of women, or men, so that the treatment of any person by the law may not be based upon the circumstances that such person is of one sex or the other, *Burning Tree Club v. Bainum*, 305 Md. 53, 64, 501 A.2d 817, 822 (Murphy, C.J.), citing [Brown, Emerson, Falk and Friedman, *The Equal Rights Amendment: Constitutional Basis for Equal Rights for Women*,] 80 Yale L.J. 871, 889 (1971); *that amendment generally invalidates governmental action which imposes a burden on, or grants a benefit to, one sex but not the other one.* *Id.* at 70, 501 A.2d at 825 (Murphy, C.J.)

351 Md. at 148-49 (emphasis added). Section 2-201, however, does not “impose[] a burden on, or grant[] a benefit to, one sex but not the other one,” because men and women are treated exactly the same – both may marry someone of the opposite-sex, neither may marry anyone of the same sex.

In Maryland, impermissible sex discrimination has been found *only* with respect to statutes, ordinances, common law doctrines and other practices that discriminated (or

authorized discrimination) against one sex in favor of the other, whether on an individual or class basis.³¹ Laws and practices that affect men and women equally are not subject to challenge under the equal rights amendment.³² In *Cannon v. Cannon*, 384 Md. 537, 570-71 (2005), for example, the Court of Appeals held that the equal rights amendment is of

³¹ See *Coleman v. State*, 37 Md. App. 322, 324 (1977) (declaring unconstitutional a law “which [made] it a crime for a husband to fail to support his wife and a crime for a husband to desert his wife, but which [did] not create reciprocal crimes for the wife who deserts or fails to support her husband”); *Kline v. Ansell*, 287 Md. 585, 592-93 (1980) (abolishing common law action for criminal conversation, which was available only to a husband and was based on his wife’s adultery); see also *Doe v. Doe*, 358 Md. 113, 121 (2000) (noting abolition of cause of action); *Rand v. Rand*, 280 Md. 508, 516-17 (1977) (holding that, in light of the equal rights amendment, “the parental obligation for child support is not primarily an obligation of the father,” as at common law, “but is one to be shared by both parents . . . in accordance with their respective financial resources”); *Condore v. Prince George’s County*, 289 Md. 516, 520 (1980) (abolishing common law doctrine of necessaries under which “the husband had a legal duty to supply his wife with necessaries suitable to their station in life, but the wife had no corresponding obligation to support her husband, or supply him with necessaries, even if she had the financial means to do so”); *Hofmann v. Hofmann*, 50 Md. App. 240, 244 (1981) (equal rights amendment modified common law rule authorizing awards of alimony only to wives, not husbands, and “allowed courts of equity to award alimony to husbands as well as wives”) (*dicta*); *Bell v. Bell*, 38 Md. App. 10, 14 (1977) (holding that the presumption of male dominance in post-marital agreement analysis was an invalid classification based on gender), *cert. denied*, 282 Md. 729 (1978); *Tidler v. Tidler*, 50 Md. App. 1, 10 (1981) (under equal rights amendment, attorney fees could be awarded to either the husband or wife in a divorce action); *Schroeder v. Broadfoot*, 142 Md. App. 569, 585-86 (2002) (where parents cannot agree upon a child’s last name, “[a] legal presumption that would operate to create a default circumstance in which . . . the child’s best interests are deemed to be served by giving him his father’s surname, is a gender-based and gender-biased preference that . . . would violate the Maryland Equal Rights Amendment”); *Tyler v. Tyler*, 330 Md. 261, 266 (1993) (“the State may not use preemptory challenges to exclude potential jurors because of their gender”) (deciding case on the basis of articles 24 and 46 of the Declaration of Rights).

³² Neither the preferential tax assessment statute struck down in *Burning Tree Club*, nor the divorce court’s policy to award custody of children to the parent of the same sex invalidated in *Giffin*, treated the sexes equally. Both resulted in discrimination based on *segregation* of the sexes, see n. 6, *supra*, a result precisely the opposite of § 2-201, which *integrates* the sexes.

“no moment” in the analysis of antenuptial agreements because, as a matter of law, *both* parties “are required to make mutual disclosures prior to entering the antenuptial agreement.” And in *Bozman v. Bozman*, 376 Md. 461 (2003), the Court of Appeals abrogated the last remaining vestiges of the interspousal immunity doctrine (intentional torts not involving outrageous behavior) on public policy grounds, *see id.*, 376 Md. at 468-97, without in any way suggesting that the doctrine violated the equal rights amendment, notwithstanding the fact that the Court of Special Appeals had intimated that retention of the doctrine was not consistent with the amendment. *See Bozman v. Bozman*, 146 Md. App. 183, 195 & n. 7 (2002). In completing the process of abrogating the doctrine, the Court of Appeals did not dispute the respondent’s argument that the doctrine did not run afoul of the equal rights amendment because it “ ‘applies equally to husband and wife.’ ” 376 Md. at 461 (quoting respondent’s brief).³³

The circuit court’s holding that § 2-201 of the Family Code impermissibly discriminates on the basis of sex in violation of art. 46 of the Declaration of Rights cannot be reconciled with the plain language of the equal rights amendment, the history of its adoption, the understanding of the people who voted for it, its construction by the legislative and executive branches of government or its interpretation by the judiciary. Section § 2-201 does not discriminate on the basis of sex (or any other suspect or quasi-suspect basis) and does not infringe upon the exercise of the fundamental right to marry.

II.

MARYLAND’S RESERVATION OF MARRIAGE TO OPPOSITE-SEX COUPLES IS RATIONALLY RELATED TO MULTIPLE, LEGITIMATE STATE PURPOSES.

Where, as here, a statute neither infringes upon the exercise of a fundamental constitutional right nor classifies on the basis of a suspect (or quasi-suspect) personal

³³ *But cf. Boblitz v. Boblitz*, 296 Md. 242, 275 (1983) (abrogating doctrine with respect to negligent torts on public policy grounds, but adding that “any ancient deprivation of rights based upon sex would contravene the basic law of this State”) (citing art. 46).

characteristic, it is subject to the rational basis standard of review. Under this standard, a legislative classification “enjoys a strong presumption of constitutionality [and] can be invalidated only if the classification is without any reasonable basis and is purely arbitrary.” *Whiting-Turner Contract Co. v. Coupard*, 304 Md. 340, 352 (1985). A classification “having some reasonable basis need not be made with mathematical nicety and may result in some inequality.” *Id.* More importantly, “If any state of facts reasonably can be conceived that would sustain the classification, the existence of that state of facts at the time the law was enacted must be assumed.” *Id.*³⁴

The classification in § 2-201 (between opposite-sex couples and same-sex couples) is supported by several legitimate state interests. In addition to “preserving the traditional institution of marriage,” *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O’Connor, J., concurring in the judgment), “reserving marriage to opposite-sex couples is reasonably related to the State’s interests in ensuring a stable legal and societal framework in which children are procreated and raised, and providing the benefits of dual-gender parenting for the children so procreated.” *Hernandez v. Robles*, n. 3, *supra*, 805 N.Y.S.2d at 374 (Catterson, J., concurring). The legitimacy of these interests cannot be gainsaid. “Moreover, it is evident that same-sex couples cannot procreate by themselves^[35] or

³⁴ The circuit court dismissed the reasons offered by defendants in support of the law as being based on “broad *unsupported* assumptions,” not “reasonable legislative speculation,” Mem. Op. at 17 (emphasis added), without explaining the difference between an assumption that need not be supported (by evidence) and “reasonable . . . speculation.” As this argument demonstrates, however, those reasons are entirely plausible and defensible.

³⁵ See *Singer v. Hara*, *supra*, 522 P.2d at 1195 (“marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race” and “no same-sex couple offers the possibility of the birth of children by their union”); *Dean v. District of Columbia*, n. 3, *supra*, 653 A.2d at 337 (finding that this “central purpose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples”); *Smelt v. County of Orange*, n. 3, *supra*, 374 F.Supp.2d at 880 (“[b]ecause procreation is necessary to perpetuate humankind, encouraging the optimal union for procreation is a legitimate government interest”);

provide dual-gender parenting.^[36]” *Id.*

The reasonableness of the connection between opposite-sex marriage and procreation and childrearing is not affected by the fact that “state law requires neither the ability nor the desire to bring a child into one’s life through ‘traditional’ procreation as a condition of marriage.” Plaintiffs’ Memorandum of Law in Support of Plaintiffs’ Motion for Summary Judgment (hereinafter Plaintiffs’ Memorandum) at 73:

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. [Citations omitted]. 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

Standhardt v. Superior Court, 77 P.3d 451, 463 (Az. Ct. App. 2003), *review denied*, 2004 LEXIS 62 (May 25, 2004): “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 . . . 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.”

³⁶ See *Lofton v. Kearney*, 157 F.Supp.1372, 1383 (S.D. Fla. 2001) (“a child’s best interest is to be raised in a home stabilized by marriage, in a family consisting of both a mother and a father”), *aff’d sub nom. Lofton v. Secretary of the Dep’t of Children & Family Services*, 358 F.3d 804, 819 (11th Cir. 2004) (legislature may reasonably assume that “children benefit from the presence of both a mother and a father in the home”), *cert. denied*, 125 S.Ct. 869 (2005). See also *Wilson v. Ake*, n. 3, *supra*, 354 F.Supp.2d at 1309 (“encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest”) (following *Lofton*); *Smelt v. County of Orange*, n. 3, *supra*, 374 F.Supp.2d at 880 (“[e]ncouraging the optimal union for rearing children by both biological parents is . . . a legitimate purpose of government”); *In re Kandou*, n. 3, *supra*, 315 B.R. at 146 (recognizing authority “that the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern”).

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 [citation omitted], excluding such couples from marriage could only be justified by a compelling state interest, narrowly tailored to achieve that interest [citation omitted], which is not readily apparent.

Standhardt, n. 35, *supra*, 77 P.3d at 462.³⁷ The reservation of marriage to opposite-sex couples “is based upon the state’s recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children,” even though “married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married.” *Singer v. Hara*, *supra*, 522 P.2d at 1195. “The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union.” *Id.* Thus, “[a]lthough . . . married persons are not required to have children or even to engage in sexual relations, marriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the union of one man and one woman.” *Id.* at 1197.³⁸

And the reasonableness of the relationship between opposite-sex marriage and

³⁷ See also *Adams v. Howerton*, 486 F.Supp. 1119, 1124-25 (C.D. Cal. 1980) (recognizing that government inquiry about couples’ procreation plans or requiring sterility tests before issuing marriage licenses would “raise serious constitutional questions”), *aff’d*, 673 F.2d 1036 (9th Cir. 1981), *cert. denied*, 458 U.S. 1111 (1982); *In re Kandu*, n. 3, *supra*, 315 B.R. at 147 (same).

³⁸ See *Morrison v. Sadler*, 821 N.E.2d 15, 27 (Ind. Ct. App. 2005) (“There was a rational basis for the legislature to draw the line between opposite-sex couples, who as a generic group are biologically capable of reproducing, and same-sex couples, who are not”); *Baker v. Nelson*, *supra*, 191 N.W.2d at 187 (same); *Dean v. District of Columbia*, *supra*, n. 3, 653 A.2d at 363 n. 5 (following *Baker*).

procreation and childrearing is not undermined by plaintiffs' observation that some same-sex couples have children (through artificial insemination or adoption) and raise them together (through second-parent adoptions). *See* Plaintiffs' Memorandum at 73-74 & n.17. This observation "does not recognize the key difference between how most opposite-sex couples become parents, through sexual intercourse, and how all same-sex couples must become parents, through adoption and assisted reproduction." *Morrison v. Sadler*, n. 38, *supra*, 821 N.E.2d at 24.³⁹

Becoming a parent using "artificial" reproduction methods is frequently costly and time-consuming. Adopting children is much the same. Those persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning. "Natural" procreation, on the other hand, may occur only between opposite-sex couples and with no foresight or planning. All that is required is one instance of sexual intercourse with a man for a woman to become pregnant.

Id. (footnote omitted). What is the constitutional significance between "natural" reproduction on the one hand and assisted reproduction and adoption on the other?

It means that it impacts the State[‘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 reproductive 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.

³⁹ As the Indiana Court of Appeals noted, "It is possible, and indeed likely frequently happens, that a same-sex couple may raise a child or children that one or both members had earlier as a result of an opposite-sex relationship." *Id.* at 24 n. 9. But in challenging the reasonableness of the relationship between the State's interest in providing a structure for the procreation of children and the reservation of marriage to opposite-sex couples, plaintiffs here, as the plaintiffs in *Morrison*, have focused on "same-sex couples who have children by assisted reproduction and adoption." *Id.* *Amicus* also focuses "on the inability of a same-sex couple to have a child together within the confines of their intimate relationship." *Morrison*, 821 N.E.2d at 24 n. 9.

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. at 24-25 (footnotes omitted).

The State’s interest in supporting opposite-sex marriage is not necessarily “to encourage and promote ‘natural’ procreation across the board and at the expense of other forms of becoming parents, such as by adoption and assisted reproduction; rather, it 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.* at 25. In *Morrison*, the State “identified the protection of *unintended* children resulting from heterosexual intercourse as one of the key interests in opposite-sex marriage.” *Id.* The court of appeals agreed:

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. The recognition of same-sex marriage would not further this interest in heterosexual “responsible procreation.” Therefore, 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.

Id. (footnote omitted).⁴⁰ See also *Goodridge*, *supra*, 798 N.E.2d at 995-96 (Cordy, J., dissenting) (same).

The reservation of marriage to opposite-sex couples is also rationally related to the State's interest in providing the benefits of dual-gender parenting.

Taking all . . . available information into account, the Legislature could rationally conclude that a family environment with married opposite-sex partners 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 proven itself beyond reasonable scientific dispute as to be as optimal as the biologically based marriage norm.

Goodridge, 798 N.E.2d at 999-1000 (Cordy, J., dissenting).⁴¹

⁴⁰ See *id.* at 26: "Members of a same-sex couple who wish to have a child . . . have . . . demonstrated their commitment to child-rearing by virtue of the difficulty of obtaining a child through adoption or assisted reproduction, without the State necessarily having to encourage that commitment through the institution of marriage. Conversely, the 'casual' intimate acts of a same-sex couple will never result in a child, but those of an opposite-sex couple can and frequently do." For that reason, recent studies purporting to show that "same-sex couples are at least as successful at raising children as opposite-sex couples . . . are irrelevant to the question of whether the [state] [c]onstitution requires that same-sex couples be allowed to marry." *Id.*

⁴¹ Contrary to plaintiffs' suggestion, see Plaintiffs' Memorandum at 75 n. 18, there is no consensus of opinion or evidence on the impact of same-sex parenting upon children. In addition to Justice Cordy's dissent in *Goodridge*, see 798 N.E.2d at 998-999 & nn. 22-28, see *Lofton v. Secretary of Dep't of Children & Family Services*, n. 36, *supra*, 358 F.3d at 824-26 & nn. 24-26, and *Morrison v. Sadler*, n. 38, *supra*, 821 N.E.2d at 26 ("it is quintessentially a task for the legislature to consider the weight to be assigned to these various studies, especially in light of the existence of some criticism of them and the relative novelty of the same-sex family structure, in deciding whether civil marriage should be extended to same-sex couples"). See also *Samuels v. New York State Dep't of Health*, n. 3, 811 N.Y.S.2d at 146 ("the Legislature is the better forum for sorting through this type of conflicting data on an important social issue:"); *Smelt v. County of Orange*, n. 3, *supra*, 374 F.Supp.2d at 880 (upholding the constitutionality of the federal Defense of Marriage Act) (it is for Congress, not the courts, "to weigh the evidence").

In light of the foregoing considerations, the legislature could assume that “a recognition of same-sex marriages will increase the number of children experiencing this alternative,” and “conceivably conclude that declining to recognize same-sex marriages remains prudent until empirical questions about its impact on the upbringing of children are resolved.” *Goodridge*, 798 N.E.2d at 1000 (Cordy, J., dissenting).

Amicus recognizes that Maryland law allows homosexuals to adopt, individually and as second-parents. *See* Plaintiffs’ Memorandum at 76. Nevertheless, in reserving marriage to opposite-sex couples, the legislature reasonably may have believed that the ideal of dual-gender parenting should be preserved whenever possible.

The fact that the Commonwealth currently allows same-sex couples to adopt . . . does not affect the rationality of this conclusion. The eligibility of a child for adoption presupposes that at least one of the child’s biological parents is unable or unwilling, for some reason, to participate in raising the child. In that sense, society has “lost” the optimal setting in which to raise that child—it is simply not available. In these circumstances, the principal and overriding consideration is the “best interests of the child,” considering his or her unique circumstances and the options that are available for that child. The objective is an individualized determination of the best environment for a particular child, where the normative social structure—a home with both the child’s biological father and mother—is not an option. That such a focused determination may lead to the approval of a same-sex couple’s adoption of a child does not mean that it would be irrational for a legislator, in fashioning statutory laws that cannot make such individualized determinations, to conclude generally that being raised by a same-sex couple has not yet been shown to be the absolute equivalent of being raised by one’s married biological parents.

Id. at 1000.

Both the circuit court and plaintiffs fundamentally mischaracterized the issue to be decided on rational basis review of the State’s reservation of marriage to opposite-sex couples. The issue is *not* whether there is a connection between “the prevention of same-sex marriages and an increase or decrease in the number of heterosexual marriages or of children born to those unions,” *Mem. Op.* at 15; whether “[h]eterosexual couples will continue to bring children into their families via ‘traditional’ procreation [if] lesbian and

gay couples are permitted to marry,” Plaintiffs’ Memorandum at 72-73; whether “the exclusion of same-sex couples from marriage . . . further[s] any state interest in procreation,” *id.* at 74; whether “the exclusion of lesbian and gay couples from marriage . . . increases the number of children raised by heterosexual parents or decreases the number of children raised by lesbian and gay parents,” *id.* at 75; or whether “permitting lesbian and gay couples to marry would . . . diminish the welfare of the children of heterosexual couples,” *id.* Rather, the issue is “whether the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does, including the interest in marital procreation. If it would not, then limiting the institution of marriage to opposite-sex couples is rational and acceptable under [the] [state] [c]onstitution.” *Morrison*, 821 N.E.2d at 23.⁴² As the foregoing analysis shows, recognition of same-sex marriage would *not* promote the State’s interest in marital procreation, particularly *unintended* procreation from heterosexual intercourse, nor would it promote the State’s interest in dual-gender parenting. Accordingly, there were legitimate reasons for the Maryland General Assembly to reserve marriage to opposite-sex couples in enacting § 2-201 of the Family Code. The circuit court’s judgment to the contrary should be reversed.⁴³

⁴² Contrary to the implication of the circuit court’s opinion, *see* Mem. Op. at 15-17, “there is no requirement in rational basis equal protection analysis that the government interest be furthered by both those included in the statutory classification and by those excluded from it.” *Hernandez*, 805 N.Y.S.2d at 361. *See also Standhardt v. Superior Court*, n. 36, 77 P.3d at 463: “Petitioners lastly argue that the State’s limitation of marriage to opposite-sex unions is not reasonably related to its interests in procreation, because excluding same-sex couples to marry would not inhibit opposite-sex couples from procreating. We agree with Petitioners that allowing same-sex couples to marry would not inhibit opposite-sex couples from procreating. But the reasonableness of the State’s position is not dependent on the contrary conclusion. Rather, . . . the State does not have the same interest in sanctioning marriages between couples who are incapable of procreating as it does with opposite-sex couples.”

⁴³ With respect to issues not discussed herein, *amicus* generally adopts the brief of defendants-appellants.

CONCLUSION

For the foregoing reasons, as well as those set forth in the brief of defendants-appellants, *amicus curiae*, the Maryland Catholic Conference, respectfully requests that this Honorable Court reverse the judgment of the Circuit Court for Baltimore City.

Respectfully submitted,

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Pursuant to Md. Rule 8-504(a)(8), this brief has been prepared in proportionally spaced type: Times New Roman, 13 point.

Certificate of Service

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