
**IN THE COURT OF APPEALS
OF MARYLAND**

FRANK CONAWAY, *et al.*,

Defendants-Appellants,

v.

GITANJALI DEANE, *et al.*,

Plaintiffs-Appellees.

NO. 44, SEPTEMBER TERM, 2006

No. 44

(No. 2499, Sept. Term 2005, Court of Special Appeals)

**On appeal from the Circuit Court for Baltimore City, Part 30,
Case No. 24-C-04-005390 (M. Brooke Murdock, Judge)**

**BRIEF *AMICI CURIAE* OF JAMES Q. WILSON, ET AL.,
LEGAL AND FAMILY SCHOLARS,
IN SUPPORT OF DEFENDANTS-APPELLANTS**

**Joshua K. Baker, Esq.
Institute for Marriage and Public Policy
PO Box 1231
Manassas, VA 20108
(202) 216-9430**

OF COUNSEL

**Charles J. Jannace, III
Charles J. Jannace, III, P.C.
231 E. Main Street
Salisbury, MD 21801
(410) 341-3939**

**ATTORNEY FOR AMICI CURIAE
James Q. Wilson, et al., Legal and Family
Scholars**

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT.....	3
I. MARRIAGE HAS A UNIQUE AND INDISPENSABLE SOCIAL PURPOSE: CREATING FAMILY UNIONS WHERE CHILDREN CAN BE KNOWN AND LOVED BY THEIR OWN MOTHER AND FATHER.	3
<i>A. Rulings both in Maryland and in sister states clearly establish that procreation is one of the key state purposes in marriage.....</i>	<i>3</i>
<i>B. The state interest in marriage known as “procreation” does not consist of encouraging reproduction in any and all circumstances, but rather encouraging reproduction in family unions where children will be raised and loved by their own mothers and fathers.</i>	<i>7</i>
<i>C. Virtually every known human society also links marriage with procreation and paternity.</i>	<i>10</i>
II. THE STATE’S DECLARED INTEREST IN MARRIAGE IS NOT ONLY LEGITIMATE, IT IS COMPELLING.	15
<i>A. Society needs babies.....</i>	<i>15</i>
<i>B. Sex between men and women still makes babies.</i>	<i>17</i>
<i>C. Children need mothers and fathers.....</i>	<i>18</i>
III. MARRIAGE AS THE UNION OF HUSBAND AND WIFE IS RATIONALLY RELATED TO FURTHERING PROCREATION (INCLUDING UNITING CHILDREN TO THEIR MOTHERS AND FATHERS).....	25
<i>A. Remaking marriage to include same-sex unions risks severing the link between marriage and procreation.</i>	<i>25</i>

IV. MARRIAGE IS NOT GENDER DISCRIMINATION.....29

**V. THE COURT BELOW FAILED TO GIVE PROPER
DEFERENCE TO THE RATIONALITY OF THE MARYLAND
LEGISLATURE.....30**

CONCLUSION31

TABLE OF AUTHORITIES

CASES

<i>Adams v. Howerton</i> , 486 F. Supp. 1119 (C.D. Cal. 1980), <i>aff'd</i> 673 F.2d 1036 (9th Cir. 1982).....	6, 17
<i>Andersen v. King County</i> , Nos. 75934-1, 75956-12006 Wash. LEXIS 598 (July 26, 2006).....	12, 13
<i>Baker v. Baker</i> , 13 Cal. 87 (1859).....	4
<i>Baker v. Nelson</i> , 191 N.W.2d 185 (Minn. 1971), <i>appeal dismissed for want of a substantial federal question</i> , 409 U.S. 810 (1972).....	5
<i>Citizens for Equal Prot. v. Bruning</i> , No. 05-2604, 2006 U.S. App. LEXIS 17723 (8th Cir. July 14, 2006).....	12, 13
<i>Davis v. Davis</i> , 106 A. 644, 645 (N.J. Ch. Div. 1919).....	4
<i>Dean v. District of Columbia</i> , 653 A.2d 307 (D.C. 1995).....	6, 14
<i>Fleegle v. Fleegle</i> , 136 Md. 630 (1920).....	4
<i>Gard v. Gard</i> , 169 N.W. 908 (Mich. 1918).....	5
<i>Goodridge v. Dept. of Publ. Health</i> , 798 N.E.2d 941 (Mass. 2003).....	12, 24
<i>Grover v. Zook</i> , 87 P.638 (Wash. 1906).....	5
<i>Hernandez v. Robles</i> , Nos. 86-89, 2006 N.Y. Slip Op. 05239, 2006 N.Y. Lexis 1836 (July 6, 2006).....	12, 13

<i>Heup v. Heup</i> , 172 N.W.2d 334 (Wis. 1969).....	5
<i>In re Kandu</i> , 315 B.R. 123 (Bankr. W.D. Wash. 2004).....	14
<i>Landwehr v. Barbas</i> , 241 A.D. 769 (2d Dept. 1934)	4
<i>Laudo v. Laudo</i> , 188 A.D. 699 (1st Dept. 1919)	6
<i>Lewis v. Harris</i> , 875 A.2d 259, 269 at n.2 (N.J. App. 2005)	13
<i>Lyon v. Barney</i> , 132 Ill. App. 45 (1907)	5
<i>Morrison v. Sadler</i> , 821 N.E.2d 15 (Ind. App. 2005).....	14
<i>Poe v. Gerstein</i> , 517 F.2d 787 (5th Cir. 1975)	5
<i>Ruckle v. Ruckle</i> , 141 Md. 207 (1922)	4
<i>Singer v. Hara</i> , 522 P.2d 1187 (Wash. App. 1974)	5
<i>Skinner v. Oklahoma</i> , 316 U.S. 535 (1942).....	4
<i>Standhardt v. Superior Court</i> , 77 P.3d 451 (Ariz. App. Div., 2003)	14
<i>Stegienko v. Stegienko</i> , 295 N.W. 252 (Mich. 1940).....	5
<i>Turney v. Avery</i> , 113 A. 710 (N.J. Ch. 1921).....	6
<i>Wendel v. Wendel</i> , 30 A.D. 447 (2d Dept. 1898)	5

<i>Wilkinson v. Kitzinger</i> , [2006] EWHC 2022 (Fam.), Case No. FD05D04600 (July 31, 2006)	14
<i>Wilson v. Ake</i> , 354 F. Supp. 2d 1298 (M.D. Fla. 2005).....	14
<i>Zoglio v. Zoglio</i> , 157 A.2d 627 (D.C. App. 1960)	5

OTHER AUTHORITIES

Alan C. Acock & David H. Demo, <i>Family Diversity and Well-Being</i> (1994).....	21
Andrew J. Cherlin et al., <i>Parental Divorce in Childhood and Demographic Outcomes in Young Adulthood</i> , 32 DEMOGRAPHY 299 (1995).....	20
Andrew J. Cherlin et al., <i>Effects of Parental Divorce on Mental Health Throughout the Life Course</i> , 63 AMERICAN SOCIOLOGICAL REV. 239 (1998).....	19
C.D. Siegel et al., <i>Mortality from Intentional and Unintentional Injury Among Infants of Young Mothers in Colorado, 1982 to 1992</i> , 150(10) ARCHIVES OF PEDIATRIC AND ADOLESCENT MEDICINE 1077 (1996).....	20
Catherine E. Ross & John Mirowsky, <i>Parental Divorce, Life-Course Disruption, and Adult Depression</i> , 61(4) JOURNAL OF MARRIAGE AND THE FAMILY 1034 (1999).....	20
Chris Coughlin & Samuel Vuchinich, <i>Family Experience in Preadolescence and the Development of Male Delinquency</i> , 58(2) JOURNAL OF MARRIAGE AND THE FAMILY 491 (1996)	20
Cynthia C. Harper & Sara S McLanahan, <i>Father Absence and Youth Incarceration</i> , 14(3) J. Res. On Adolescence 369 (2004)	18, 21

Cynthia Harper & Sara McLanahan, <i>Father Absence and Youth Incarceration</i> , paper presented at the annual meeting of the American Sociological Association (August 1998)	20
D. Wayne Osgood & Jeff M. Chambers, <i>Social disorganization outside the metropolis: an analysis of rural youth violence</i> , 38 <i>Criminology</i> 81 (2000).....	21
David F. Greenberg, <i>The Construction of Homosexuality</i> (University of Chicago Press) (1988)	11
David Lester, <i>Domestic Integration and Suicide in 21 Nations, 1950-1985</i> , XXXV INT’L J. OF COMPARATIVE SOCIOLOGY 131 (1994).....	19
David M. Cutler et al., <i>Explaining the Rise in Youth Suicide</i> , National Bureau of Economic Research Working Paper 7713 (2000)	19
Dean Lillard & Jennifer Gerner, <i>Getting to the Ivy League</i> , 70(6) <i>JOURNAL OF HIGHER EDUCATION</i> 206 (1996).....	20
Diana Baumrind, <i>Commentary on Sexual Orientation: Research and Social Policy Implications</i> , 31(1) <i>DEVELOPMENTAL PSYCHOLOGY</i> 130 (1995).....	24
Don Browning & Elizabeth Marquardt, <i>A Marriage Made in History?</i> , N.Y. Times, March 9, 2004, at A25.....	26
Douglas W. Kmiec, <i>The Procreative Argument for Proscribing Same-Sex Marriage</i> , 32 <i>Hastings Const. L.Q.</i> 653 (2004).....	27
E. Mavis Hetherington & John Kelly, <i>For Better or For Worse: Divorce Reconsidered</i> (2002)	19, 20
E.J. Graff, "Retying the Knot," in <i>Same-Sex Marriage: Pro and Con: A Reader</i> 134 (Andrew Sullivan ed., 1st ed., Vintage Books 1997)	27

Elaine Sorensen & Chava Zibman, <i>To What Extent Do Children Benefit from Child Support?</i> The Urban Institute, January 2000.....	18
George P. Murdock, <i>Social Structure</i> (1949).....	11
George Thomas & Michael P. Farrell, <i>The Effects of Single-Mother Families and Nonresident Fathers on Delinquency and Substance Abuse</i> , 58(4) JOURNAL OF MARRIAGE AND THE FAMILY 884 (1996).....	20
Gregory R. Johnson et al., <i>Suicide Among Adolescents and Young Adults: A Cross- National Comparison of 34 Countries</i> , 30 SUICIDE AND LIFE- THREATENING BEHAVIOR 74 (2000).....	19
Hans-Peter Kohler et al., <i>The Emergence of Lowest-Low Fertility in Europe During the 1990's</i> , 28(4) POPULATION AND DEVELOPMENT REV. 641 (2002).....	15
Helen Fisher, <i>Anatomy of Love: A Natural History of Mating, Marriage and Why We Stray</i> (1992).....	11
I. Sawhill, "Families at Risk," in <i>Setting National Priorities</i> (H.H. Aaron and R.D. Reischauer, eds.) 97-135 (1999).....	19
J. Abma et al., <i>Fertility, Family Planning, and Women's Health: New Data from the 1995 National Survey of Family Growth</i> , 23(19) Vital Health Stat. 28 (National Center for Health Statistics) (1997).....	17
J.A. Gaudino, Jr. et al., <i>No Fathers' Names: A Risk Factor for Infant Mortality in the State of Georgia</i> , 48 SOCIAL SCIENCE AND MEDICINE 253 (1999).....	19
J.E. Schwartz et al., <i>Childhood Sociodemographic and Psychosocial Factors as Predictors of Mortality Across the Life-Span</i> , 85 AMERICAN JOURNAL OF PUBLIC HEALTH 1237 (1995).....	20

Joan S. Tucker et al., <i>Parental Divorce: Effects on Individual Behavior and Longevity</i> , 73(2) JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 381 (1997).....	20
John C. Caldwell & Thomas Schindlmayr, <i>Explanation of the Fertility Crisis in Modern Societies: A Search for Commonalities</i> , 57(3) POPULATION STUDIES 241 (2003).....	15, 16
John Witte, Jr., <i>Propter Honoris Respectum: The Goods and Goals of Marriage</i> , 76 Notre Dame L. Rev. 1019 (2001).....	9
Joseph Chamie, "Low Fertility: Can Governments Make a Difference?", paper presented at the Annual Meeting of the Population Association of America, Boston Massachusetts, April 2, 2004.	16
Judith Stacey, <i>Gay and Lesbian Families: Queer Like Us</i> , in <i>All Our Families: New Policies for a New Century</i> 117 (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman eds., Oxford U. Press 1998).....	28
Kingsley Davis (ed.), <i>Contemporary Marriage: Comparative Perspectives on a Changing Institution</i> 5 (New York: Russell Sage Foundation) (1985).....	10
Kristin Anderson Moore, et al., "Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?" <i>Child Trends Research Brief</i> , June 2002	19
Laurence Drew Borten, <i>Sex, Procreation, and the State Interest in Marriage</i> , 102 Colum. L. Rev. 1089, 1109 (2002).....	5, 7
Lynn D. Wardle, <i>Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation</i> , 24 Harv. J.L. & Publ. Pol'y 771 (2001).....	26

Margo Wilson & Martin Daly, <i>Marital Cooperation and Conflict</i> , in <i>Evolutionary Psychology, Public Policy and Personal Decisions</i> 197 (Charles Crawford & Catherine Salmon eds., Lawrence Erlbaum Assoc. 2004)	11
Marilyn Coleman et al., <i>Reinvestigating Remarriage: Another Decade of Progress</i> , 62 J. Marriage & Fam. 1288 (2000)	23
Mark R. Rank & Thomas A. Hirschl, <i>The Economic Risk of Childhood in America: Estimating the Probability of Poverty Across the Formative Years</i> , 61 J. MARRIAGE AND THE FAMILY 1058 (1999).....	19
Mary Ann Glendon, <i>For Better or for Worse?</i> , Wall St. J., Feb. 25, 2004, at A14.....	26
McLanahan et al., Unwed Fathers and Fragile Families, Center for Research on Child Wellbeing, Working Paper #98-12 (March 1998).....	18
Musonius Rufus, Fragment 13A, <i>What Is the Chief End of Marriage?</i> , translated in Musonius Rufus: The Roman Socrates 89 (Cora E. Lutz ed. & trans., 1947)	9
Nicholas Zill et al., <i>Long-term effects of parental divorce on parent-child relationships, adjustment, and achievement in young adulthood</i> . 7 J. Fam. Psychol. 91 (1993)	22
Nock Aff. ¶ 3, <i>Halpern v. Attorney General of Canada</i> , Case No. 684/00 (Ont. Sup. Ct. of Justice)	23
Norval T. Glenn, <i>With this Ring: A National Survey on Marriage in America</i> 30 (National Fatherhood Initiative: Gaithersburg, MD) (2005).....	9
Olle Lundberg, <i>The Impact of Childhood Living Conditions on Illness and Mortality in Adulthood</i> , 36 SOCIAL SCIENCE AND MEDICINE 1047 (1993)	19

Patrick Festy, "Looking for European Demography, Desperately?" Paper presented at the Expert Group Meeting on Policy Responses to Population Ageing and Population Decline in New York October 16-18, 2000, Population Division, Department of Economic and Social Affairs, United Nations (2000).....	16
Paul R. Amato & Alan Booth, <i>A Generation at Risk</i> (1997); Nicholas Zill, et al., <i>Long-Term Effects of Parental Divorce on Parent-Child Relationships, Adjustment, and Achievement in Young Adulthood</i> , 7(1) JOURNAL OF FAMILY PSYCHOLOGY 91 (1993)	21
Paul R. Amato, <i>Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis</i> , 15 J. OF FAMILY PSYCHOLOGY 355 (2001).....	19, 20
Population Division of the Department of Economic and Social Affairs, United Nations Secretariat, <i>World Population Prospects: The 2002 Revision. Highlights (New York: United Nations) (February 26, 2003)</i>	15
Population Division, Department of Economic and Social Affairs, United Nations Secretariat, "Partnership and Reproductive Behavior in Low-Fertility Countries," <i>Population Newsletter</i> 74 (December 2002).....	16
Robert Lerner & Althea K. Nagai, <i>No Basis: What the Studies Don't Tell Us About Same-Sex Parenting</i> 6 (2001).....	24
Ronald Angel & Jacqueline Worobey, <i>Single Motherhood and Children's Health</i> , 29 J. OF HEALTH AND SOCIAL BEHAVIOR 38 (1988).....	19
Ronald L. Simons et al., <i>Explaining the Higher Incidence of Adjustment Problems Among Children of Divorce Compared with Those in Two- Parent Families</i> , 61 J. MARRIAGE AND THE FAMILY 1020 (1999).....	19

Ross L. Matsueda & Karen Heimer, <i>Race, Family Structure and Delinquency: A Test of Differential Association and Social Control Theories</i> , 52 AMERICAN SOCIOLOGICAL REVIEW 171 (1987).....	20
Sara McLanahan & Gary Sandefur, <i>Growing Up with a Single Parent: What Helps, What Hurts</i> (Cambridge, MA: Harvard University Press) (1994)	20, 22
Sara McLanahan, <i>Family, State, and Child Well-Being</i> , 26 ANNUAL REV. OF SOCIOLOGY 703 (2000).....	19
Stephen Demuth & Susan L. Brown, <i>Family structure, family processes, and adolescent delinquency: the significance of parental absence versus parental gender</i> , 41 J. Res. Crime & Delinquency 58 (2004).....	23
<i>The Marriage Movement: A Statement of Principles</i> (New York: Institute for American Values) (2000).....	8
Thomas L. Hanson et al., <i>Double jeopardy: parental conflict and stepfamily outcomes for children</i> , 58 J. Marriage & Fam. 141 (1996)	22
Timothy J. Biblarz & Gregg Gottainer, <i>Family Structure and Children's Success: A Comparison of Widowed and Divorced Single-Mother Families</i> , 62(2) J. OF MARRIAGE AND THE FAMILY 533 (2000)	20
Trude Bennett & Paula Braveman, <i>Maternal Marital Status as a Risk Factor for Infant Mortality</i> , 26(6) FAMILY PLANNING PERSPECTIVES 252 (1994).....	20
Trude Bennett, <i>Marital Status and Infant Health Outcomes</i> , 35(9) SOCIAL SCIENCE AND MEDICINE 1179 (1992).....	20
Valerie E. Lee et al., <i>Family structure and its effect on behavioral and emotional problems in young adolescents</i> , 4 J. Res. on Adolescence 405 (1994).....	22

Valerie King, <i>Variations in the Consequences of Nonresident Father Involvement for Children’s Well-Being</i> , 56 <i>J. Marriage & Fam.</i> 963 (1994).....	18
Wendy D. Manning & Kathleen A. Lamb, <i>Adolescent well-being in cohabiting, married, and single- parent families</i> , 65 <i>J. Marriage & Fam.</i> 876 (2003).....	22
Wendy D. Manning & Pamela J. Smock, <i>New Families and Non-Resident Father-Child Visitation</i> , 78(1) <i>SOCIAL FORCES</i> , 87 (Sept. 1999).....	18
William H. Jeynes, <i>Effects of remarriage following divorce on the academic achievement of children</i> , 28 <i>J. Youth & Adolescence</i> 385 (1999).....	22
William H. Jeynes, <i>The Effects of Several of the Most Common Family Structures on the Academic Achievement of Eighth Graders</i> , 30(1/2) <i>MARRIAGE AND FAMILY REV.</i> 73 (2000)	20
William Meezan & Jonathan Rauch, <i>Gay Marriage, Same-Sex Parenting and America’s Children</i> , 15(2) <i>Future of Children</i> 97 (Fall 2005).....	24
William N. Eskridge, Jr., <i>The Case for Same Sex Marriage: From Sexual Liberty to Civilized Commitment</i> (Free Press 1996)	27
William S. Aquilino, <i>Impact of Childhood Family Disruption on Young Adults’ Relationships with Parents</i> , 56 <i>JOURNAL OF MARRIAGE AND THE FAMILY</i> 295 (1994).....	21
Zeng-Yin Cheng & Howard B. Kaplan, <i>Explaining the Impact of Family Structure During Adolescence on Adult Educational Attainment</i> , 7(2) <i>APPLIED BEHAVIORAL AND SCIENCE REVIEW</i> 23 (1999).....	20

INTEREST OF AMICI

Amici Curiae include **James Q. Wilson**, Emeritus Professor, University of California, Los Angeles; **Douglas Allen**, Burnaby Mountain Professor of Economics, Simon Fraser University; **Hadley Arkes**, Edward N. Ney Professor of Jurisprudence and American Institutions, Amherst College; **David Blankenhorn**, Founder and President, Institute for American Values and Co-founder, National Fatherhood Initiative; **Steven G. Calabresi**, George C. Dix Professor of Constitutional Law, Northwestern University School of Law; **Lloyd Cohen**, Professor of Law, George Mason University School of Law; **Robert P. George**, McCormick Professor of Jurisprudence, Princeton University; **Bernard E. Jacob**, Alexander M. Bickel Distinguished Professor of Communications Law, Hofstra Law School; **Leon Kass**, University of Chicago; **Douglas W. Kmiec**, Caruso Family Chair and Professor of Constitutional Law, Pepperdine University School of Law; **Daniel H. Lowenstein**, Professor of Law, UCLA School of Law, **Grant Nelson**, Professor of Law, UCLA School of Law; **Stephen B. Presser**, Raoul Berger Professor of Legal History, Northwestern University School of Law; **Katherine Shaw Spaht**, Jules F. and Frances L. Landry Professor of Law, Louisiana State University Law Center. We are an interdisciplinary group of legal and family scholars with an interest in the role of marriage in law and society.

From both a legal and historical perspective, we seek the opportunity to demonstrate that managing procreation is the government's primary interest in recognizing and regulating the marital relationship. In litigation such as this, a proper understanding of the state's interest in regulating marriage is essential to any determination of whether classifications in the law are sufficiently related to those purposes to survive constitutional scrutiny.

SUMMARY OF ARGUMENT

Marriage has a unique and indispensable social purpose: creating families in which children will be known and loved by their own mother and father. Courts and scholars have often called this purpose “procreation,” but the state interest so dubbed has never meant encouraging reproduction in any and all circumstances, but rather encouraging men and women to make and raise their babies together.

Virtually every known human society has recognized the need for a public institution to regulate the procreative consequences of sexual attraction between men and women, both because reproduction is a necessary task, and because the alternative to some form of successful social regulation is fatherless children who suffer serious harms themselves and pose substantial burdens and dangers to society.

The scientific evidence strongly suggests the prime way marriage benefits children is not by bestowing a set of legal benefits (transferable to other family forms) but by increasing the likelihood that children will be born to and raised by their own mother and father. The vast majority of children born to a married couple begin life with their own mother and father committed to jointly caring for them. Only a minority of children in other kinds of sexual unions do so. Marriage serves many individual needs, but this is its most unique and irreplaceable *social* function: encouraging men and women to procreate responsibly. As a matter of historical record, marriage is not rooted in animus towards gay and lesbians, but is a classification that responds to real and enduring human realities: only opposite-sex unions can both create the next generation and connect those children to the mother and father who made them.

We do not have good scientific data on how the average child raised by same-sex couples fares. But we do know that when the connection between marriage and procreation weakens, many children suffer, and so do the

communities faced with higher rates of poverty, crime, juvenile delinquency, welfare dependency, child abuse, unwed teen motherhood, infant mortality, mental illness, high school dropouts and other education failures.

Same-sex marriage would strip from the law of Maryland the one feature of marriage that has been virtually universal throughout human history. It puts law and government in the position of educating the next generation that: (1) Any two committed adults are just as good as a mother and father, when it comes to raising kids; and/or (2) Marriage has little or nothing to do with children; it is primarily about adult needs for intimacy. Such a dramatic shift in the legal meaning of marriage is likely to have real social consequences. Even mild interference with the ability of marriage to perform its critical public function will result in real harm to many children. If the damage turns out to be sufficiently deep and enduring, as we judge likely, the future of American society would be put at risk.

The classification used by the state of Maryland (sexual union of male and female) is clearly rationally related to a state purpose (procreation and paternity) that is not only legitimate but compelling. Given the compelling nature of the interests at stake, and the enormous costs to children and society of being wrong, the decision to assume the grave risks of remaking marriage properly belongs with the people of Maryland and their elected representatives in the legislature, and not the courts.

ARGUMENT

I. MARRIAGE HAS A UNIQUE AND INDISPENSABLE SOCIAL PURPOSE: CREATING FAMILY UNIONS WHERE CHILDREN CAN BE KNOWN AND LOVED BY THEIR OWN MOTHER AND FATHER.

A. Rulings both in Maryland and in sister states clearly establish that procreation is one of the key state purposes in marriage.

Common law has long held that procreation is one of the key state interests in regulating and promoting the marital relationship. This Court articulated the centrality of procreation to the state's interest in regulating marriage in *Ruckle v. Ruckle*, 141 Md. 207 (1922):

In our age and country marriage is encouraged for the propagation of the race and the nurture and education of children in a home, as well as the prevention of licentiousness; and the State has no active interest in preserving a marriage where these ends and purposes are defeated.

Id. at 214 (quoting *Fleegle v. Fleegle*, 136 Md. 630, 634-35 (1920)).

Nor is Maryland alone in this view. Other states and the United States Supreme Court have similarly repeatedly declared that a key state interest in marriage is procreation.

In *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), the Supreme Court noted a connection between marriage and procreation, observing, "Marriage and procreation are fundamental to the very existence and survival of the race."

A New Jersey court writes: "Procreation, if not the sole, is at least an important, reason for the existence of the marriage relation." *Davis v. Davis*, 106 A. 644, 645 (N.J. Ch. Div. 1919). The California Supreme Court agreed, holding that "the first purpose of matrimony, by the laws of nature and society, is procreation." *Baker v. Baker*, 13 Cal. 87, 103 (1859). A New York court spoke directly to the legal justification for laws regulating the marriage relationship: "In the eyes of our law, marriage is a civil contract; its justification is procreation to preserve the family and the State." *Landwehr v. Barbas*, 241 A.D. 769, 769 (2d Dept. 1934).

Numerous other courts from across the country have articulated the same understanding of the purpose of the law of marriage.¹ *See, e.g., Poe v. Gerstein*, 517 F.2d 787, 796 (5th Cir. 1975) (“[P]rocreation of offspring could be considered one of the major purposes of marriage. . . .”); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. App. 1974) (“[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.”); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 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.”); *Heup v. Heup*, 172 N.W.2d 334, 336 (Wis. 1969) (“Having children is a primary purpose of marriage.”); *Zoglio v. Zoglio*, 157 A.2d 627, 628 (D.C. App. 1960) (“One of the primary purposes of matrimony is procreation.”); *Stegienko v. Stegienko*, 295 N.W. 252, 254 (Mich. 1940) (stating that “procreation of children is one of the important ends of matrimony”); *Gard v. Gard*, 169 N.W. 908, 912 (Mich. 1918) (“It has been said in many of the cases cited that one of the great purposes of marriage is procreation.”); *Lyon v. Barney*, 132 Ill. App. 45, 50 (1907) (“[T]he procreating of the human species is regarded, at least theoretically, as the primary purpose of marriage”); *Grover v. Zook*, 87 P.638, 639 (Wash. 1906) (“One of the most important functions of wedlock is the procreation of children.”); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff’d* 673 F.2d 1036 (9th

¹ Courts throughout the United States clearly and repeatedly asserted procreation as a key state interest in marriage, even though, throughout this period, sterility or age was never a bar to marriage (although impotence was). *See* Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage*, 102 Colum. L. Rev. 1089, 1109 (2002). (“No state permits annulment or divorce on the basis of infertility per se. Courts have, not surprisingly rejected claims that ‘impotence’ encompasses those who have the capacity to copulate but are infertile.”). As an 1898 New York court put it, “[I]t has never been suggested that a woman who has undergone [menopause] is incapable of entering the marriage state.” *Wendel v. Wendel*, 52 N.Y.S. 72, 30 A.D. 447, 449 (N.Y. App Div., 2d Dept. 1898).

Cir. 1982) (observing that a “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) (Ferren, J., concurring and dissenting) (finding that this “central purpose . . . provides the kind of rational basis . . . permitting limitation of marriage to heterosexual couples”); *Laudo v. Laudo*, 188 A.D. 699, 701 (N.Y. App. Div. 1919) (“The great end of matrimony is not the comfort and convenience of the immediate parties, though these are necessarily embarked in it, but the procreation of a progeny. . . . [T]he paramount purposes of the marriage [are] – the procreation and protection of legitimate children, the institution of families, and the creation of natural relations among mankind.”).

A New Jersey court waxed lyrical on this point: “Lord Penzance has observed that the procreation of children is one of the ends of marriage. I do not hesitate to say that it is the most important object of matrimony, for without it the human race itself would perish from the earth.” *Turney v. Avery*, 113 A. 710, 710 (N.J. Ch. 1921) (citations omitted).

Under the rational relation test, courts must ask three questions: What is the state purpose in establishing marriage? Is this purpose legitimate? And is the classification used by the state rationally related to this state purpose?²

These cases help to answer the first inquiry of the rational relation test: What is the purpose of marriage law? Why does the state classify these kinds of sexual unions differently from other sexual unions, or other interpersonal unions generally? Throughout the United States, courts have understood procreation to be one of the key purposes of marriage.

² The court below held that the marriage law was subject to strict scrutiny as sex discrimination. For reasons discussed in Section IV, *infra*, we believe the court below erred in the test applied, and that the proper test is the rational basis analysis.

None of these cases dispositively settles the question before us today: whether the law's requirement that marriage consist of one husband and one wife is rationally related to the state's interest in procreation. But the Court's current analysis must begin by recognizing that for many generations past, in cases far removed from any possible animus towards gays and lesbians, courts in the United States have consistently recognized that one of the key purposes of marriage law is procreation.

B. The state interest in marriage known as "procreation" does not consist of encouraging reproduction in any and all circumstances, but rather encouraging reproduction in family unions where children will be raised and loved by their own mothers and fathers.

What do these various courts mean by asserting that one key purpose of marriage is procreation? Surely not that, in any literal sense, *only* a husband and wife can make a baby. Human beings (and American courts) have long known that marriage is not technically required for procreation, that sexual acts outside of marriage can and frequently do produce children.

Instead, the relationship between marriage and procreation has long been understood by courts and society to be about two related things: procreation and paternity, or creating children who are raised by their own mothers and fathers in the same family union. As one commentator notes, "This concern with illegitimacy was rarely spelled out, but discerning it clarifies why courts were so concerned with sex within marriage and renders logical the traditional belief that marriage is intimately connected with procreation even as it does not always result in procreation." Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage*, 102 Colum. L. Rev. 1089, 1114-15 (2002).

Marriage simultaneously encourages procreation in the ideal context and reduces the number of men and women at risk of producing children outside of wedlock, where children in fatherless households would suffer disadvantages and

hardships themselves, and at the same time impose financial hardships and social costs on third parties and society.³ The fact that men and women can and do procreate outside of marriage is not evidence that marriage is not really about procreation. To the contrary, this is the very problem that, in this and every known human society, marriage as a social institution, and a special legal status, attempts to address.

We are not arguing that procreation is the only justification for marriage. For all its long history, marriage in the Western tradition has been understood to integrate several important *and related* purposes. The essentials of this Western synthesis appear as far back as 30 A.D. in the writing of Musonius Rufus, a Roman Stoic:

The husband and wife . . . should come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them, and nothing peculiar or private to one or the other, not even their own bodies. The birth of a human being which results from such a union is to be sure something marvelous, but it is not yet enough for the relation of husband and wife, inasmuch as quite apart from marriage it could result from any other sexual union, just as in the case of animals.

³ “Divorce and unwed childbearing create substantial public costs paid by taxpayers. Higher rates of crime, drug abuse, education failure, chronic illness, child abuse, domestic violence, and poverty among both adults and children bring with them higher taxpayer costs in diverse forms: more welfare expenditure; increased remedial and special education expenses; higher day-care subsidies; additional child-support collection costs; a range of increased direct court administration costs incurred in regulating post-divorce or unwed families; higher foster care and child protection services; increased Medicaid and Medicare costs; increasingly expensive and harsh crime-control measures to compensate for formerly private regulation of adolescent and young-adult behaviors; and many other similar costs. While no study has yet attempted precisely to measure these sweeping and diverse taxpayer costs stemming from the decline of marriage, current research suggests that these costs are likely to be quite extensive.” *The Marriage Movement: A Statement of Principles* (New York: Institute for American Values) (2000).

Musonius Rufus, Fragment 13A, What Is the Chief End of Marriage?, translated in Musonius Rufus: The Roman Socrates 89 (Cora E. Lutz ed. & trans., 1947).

American jurists were drawing on an older common law tradition that had roots in long-standing philosophical discourse that understood the word “procreation” to refer to more than the mere physical generation of children’s bodies.

Procreation, however, means more than just conceiving children. It also means rearing and educating them for spiritual and temporal living—a common Stoic sentiment. The good of procreation cannot be achieved in this fuller sense simply through the licit union of husband and wife in sexual intercourse. It also requires maintenance of a faithful, stable, and permanent union of husband and wife for the sake of their children.

John Witte, Jr., *Propter Honoris Respectum: The Goods and Goals of Marriage*, 76 Notre Dame L. Rev. 1019, 1035 (2001).

Despite the weakening of our marriage culture, this historic cultural synthesis, which views marriage as a loving sexual union that has as a core purpose encouraging men and women to make and rear the next generation together, continues to hold. A 2005 nationally representative poll of American marriage attitudes (supervised by University of Texas sociologist Norval T. Glenn) asked Americans whether the most important good of marriage was “the happiness and well-being of the married individuals” or “children who are well-adjusted and who will become good citizens.” Only 13 percent of Americans said the happiness of adults was the most important purpose of marriage; 74 percent insisted that both are equally important. Norval T. Glenn, *With this Ring: A National Survey on Marriage in America* 30 (National Fatherhood Initiative: Gaithersburg, MD) (2005).

The highly visible, widely publicized presence of same-sex couples affirmed by law as married is bound to make sustaining this double vision of

marital purposes more difficult. Older married couples, and married couples without children are all part of the natural life-cycle of marriage. We have several thousand years of history to reassure us that their presence in the mix of married couples does not fundamentally change the public perception of marriage as integrally orientated towards the good of procreation (including mutual parenting by mothers and fathers). But when the union of two men or two women is affirmed as a marriage, when older conjugal views of marriage are stigmatized by the court as discriminatory and bigoted, something visibly significant will have changed in our legal and public perception of what marriage is for.

C. Virtually every known human society also links marriage with procreation and paternity.

Marriage is a virtually universal human institution. Although marriage traditions vary greatly, marriage is everywhere recognizably related to furthering the goals of procreation and paternity. “The unique trait of what is commonly called marriage is social recognition and approval . . . of a couple’s engaging in sexual intercourse and bearing and rearing offspring.” Kingsley Davis (ed.), *Contemporary Marriage: Comparative Perspectives on a Changing Institution* 5 (New York: Russell Sage Foundation) (1985).

Professors Margo Wilson and Martin Daly write:

Marriage is a universal social institution, albeit with myriad variations in social and cultural details. A review of the cross-cultural diversity in marital arrangements reveals certain common themes: some degree of mutual obligation between husband and wife, a right of sexual access (often but not necessarily exclusive), an expectation that the relationships will persist (although not necessarily for a lifetime), some cooperative investment in offspring, and some sort of recognition of the status of the couple’s children. The marital alliance is fundamentally a reproductive alliance.

Margo Wilson & Martin Daly, *Marital Cooperation and Conflict*, in *Evolutionary Psychology, Public Policy and Personal Decisions* 197, 203 (Charles Crawford & Catherine Salmon eds., Lawrence Erlbaum Assoc. 2004).⁴

Even societies that have encouraged and affirmed same-gender sexual relations in some contexts did not typically define these relations as marriages.⁵ Even these societies recognized the need for a distinctive institution dedicated to managing sexual attraction between men and women in the interests of securing procreation and paternity.

In this sense, and as a matter of historical record, marriage is clearly not rooted in animus towards gay and lesbian people or their relationships. It has its own historic dignity and purpose, rooted in real and significant human realities.

We do not raise the cross-cultural norm of male-female marriage to argue that “tradition” requires the current definition of marriage, but for a different reason: to point out that not only the State of Maryland, and not only other states, and not only the United States have expressly connected marriage with “procreation and paternity,” but that the vast bulk of humanity has made the same connection, over and over again, in widely different cultural, religious, economic and geographic contexts. The claim that this link between marriage as a male-female sexual bond and procreation is today so irrational that no sane or well-

⁴ See also, Helen Fisher, *Anatomy of Love: A Natural History of Mating, Marriage and Why We Stray* 65-66 (1992); George P. Murdock, *Social Structure* (1949).

⁵ For example, “Transgenerational homosexual relations have been studied most thoroughly in New Guinea and parts of island Melanesia, where, in a number of cultures, they are a part of boys’ initiation rites, and are thus fully institutionalized. . . . After leaving his mother’s hut at age twelve to thirteen to take up residence in the men’s house, Marind-Anim boy enters into a homosexual relationship with his mother’s brother, who belongs to a different lineage from his own. The relationship endures for roughly seven years, until the boy marries.” David F. Greenberg, *The Construction of Homosexuality* 27-28 (University of Chicago Press) (1988).

intentioned legislator could ever entertain it and that therefore the state's declared interest in procreation is *merely a pretext* for other, more invidious and undeclared motives is difficult to credit. As the New York Court of Appeals recently held in *Hernandez v. Robles*, "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." *Hernandez v. Robles*, Nos. 86-89, 2006 N.Y. Slip Op. 05239, 2006 N.Y. LEXIS 1836 at *11 (July 6, 2006).

Moreover, the *Goodridge* decision finding no rational relation between marriage and procreation is a notable exception in American law. *Goodridge v. Dept. of Publ. Health*, 798 N.E.2d 941 (Mass. 2003). At least nine other state and federal courts within the last ten years have ruled there is a rational relation between the states' definition of marriage and procreation, including decisions from the New York Court of Appeals, Washington Supreme Court, and the U.S. Court of Appeals for the 8th Circuit in July of this year. *Hernandez v. Robles*, Nos. 86-89, 2006 N.Y. Slip Op. 05239, 2006 N.Y. LEXIS 1836 (July 6, 2006); *Andersen v. King County*, Nos. 75934-1, 75956-1, 2006 Wash. LEXIS 598 (July 26, 2006); *Citizens for Equal Prot. v. Bruning*, No. 05-2604, 2006 U.S. App. LEXIS 17723 (8th Cir. July 14, 2006). As the New York court clearly articulated:

[T]he 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. . . . 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.

Hernandez v. Robles, Nos. 86-89, 2006 N.Y. Slip Op. 05239, 2006 N.Y. LEXIS 1836 at *6 (July 6, 2006).

The Washington Supreme Court came to the same conclusion: “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.” *Andersen v. King County*, Nos. 75934-1, 75956-1, 2006 Wash. LEXIS 598 at *67 (July 26, 2006). The 8th Circuit agreed: “We hold that § 29 and other laws limiting the state-recognized institution of marriage to heterosexual couples are rationally related to legitimate state interests and therefore do not violate the Constitution of the United States.” *Citizens for Equal Prot. v. Bruning*, No. 05-2604, 2006 U.S. App. LEXIS 17723 (8th Cir. July 14, 2006). The court held that the Nebraska amendment defining marriage as the union of a man and a woman was related to the state's interest in “steering procreation into marriage,” through “laws [that] encourage procreation to take place within the socially recognized unit that is best situated for raising children.” *Id.*

Last year, appellate courts in New Jersey and Indiana also accepted this rationale as a rational basis for classifying marriage as the union of husband and wife. In *Lewis v. Harris*, the New Jersey Appellate Division wrote: “We . . . note that the historical and prevailing contemporary conception of marriage as solely a union between a single man and a single woman is based partly on society's view that this institution plays an essential role in propagating the species and child rearing.” *Lewis v. Harris*, 875 A.2d 259, 269 at n.2 (N.J. App. 2005). The Indiana Court of Appeals explained the connection using a “responsible procreation” analysis: “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.” *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. App. 2005).⁶

A British court recently echoed this analysis as well, noting that marriage is not rooted in animus, but rather serves longstanding public purposes:

It is apparent that the majority of people, or at least of governments, not only in England but Europe-wide, regard marriage as an age-old institution, valued and valuable, respectable and respected, as a means not only of encouraging monogamy but also the procreation of children and their development and nurture in a family unit (or “nuclear family”) in which both maternal and paternal influences are available in respect of their nurture and upbringing.

The belief that this form of relationship is the one which best encourages stability in a well regulated society is not a disreputable or outmoded notion based upon ideas of exclusivity, marginalisation, disapproval or discrimination against homosexuals. . . .

Wilkinson v. Kitzinger, [2006] EWHC 2022 (Fam.), ¶¶ 118-19, Case No. FD05D04600 (July 31, 2006) (available at <http://www.bailii.org/ew/cases/EWHC/Fam/2006/2022.rtf>).

If these diverse, disinterested judges (including, over just the past three years since *Goodridge*, the New York Court of Appeals, the Washington Supreme

⁶ See also, *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (“[T]his court . . . is bound by the Eleventh Circuit’s holding that encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest.... DOMA is rationally related to this interest.”); *In re Kandu*, 315 B.R. 123, 146 (Bankr. W.D. Wash. 2004) (“Authority exists [*sic*] 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.”); *Standhardt v. Superior Court*, 77 P.3d 451, 463-64 (Ariz. App. Div. 1, 2003) (review denied 2004 Ariz. LEXIS 62, May 25, 2004) (“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.”); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (“[I]t appears that the Supreme Court has seen marriage as having a traditional principal purpose: to regulate and legitimize the procreation of children”).

Court, appellate courts in New Jersey and Indiana, and the 8th Circuit Court of Appeals) can still see a rational relation between managing procreation and the state's definition of marriage as the union of husband and wife, *then so too could the people of Maryland*. The spirit if not the letter of comity forbids attributing irrationality or malice to so many sister jurisdictions.

II. THE STATE'S DECLARED INTEREST IN MARRIAGE IS NOT ONLY LEGITIMATE, IT IS COMPELLING.

The second prong of the rational basis test is to determine whether or not a state's interest is "legitimate." Some have argued that the conditions of modern life, from reproductive technologies to contraceptive rights, to greater numbers of single-parent families, have rendered this state interest in marriage (procreation and paternity) obsolete. But social science evidence supports the conclusion that the state's ongoing interest in marriage is not only legitimate, it is compelling.

A. Society needs babies

First, any civilization needs new members (*i.e.*, babies) to survive. Yet a large majority of modern democracies are now experiencing very low birthrates, causing increasingly urgent concern among scientific experts about the social, economic, and political consequences. The European Union's total fertility rate from 1995 to 2000, for example, was only 1.42 children per woman, sufficiently below the 2.1 replacement level that demographers label this "very low fertility."⁷ In 2004, a U.N. demographer warned:

⁷ John C. Caldwell and Thomas Schindlmayr, *Explanation of the Fertility Crisis in Modern Societies: A Search for Commonalities*, 57(3) *Population Studies* 241, 241 (2003). "Lowest low fertility" is often defined as a total fertility rate of 1.3 or less. Hans-Peter Kohler, et al., *The Emergence of Lowest-Low Fertility in Europe During the 1990's*, 28(4) *Population & Development Rev.* 641, 641 (2002); Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, *World Population Prospects: The 2002 Revision. Highlights* 4 (Table 2) (New York: United Nations) (February 26, 2003). North

A growing number of countries view their low birth rates with the resulting population decline and ageing to be a serious crisis, jeopardizing the basic foundations of the nation and threatening its survival. Economic growth and vitality, defense, and pensions and health care for the elderly, for example, are all areas of major concern.

Joseph Chamie, “Low Fertility: Can Governments Make a Difference?”, paper presented at the Annual Meeting of the Population Association of America, Boston Massachusetts, April 2, 2004.

There is no agreement on the causes of low fertility, which are likely to be complex.⁸ But the move away from preferences for marriage, as well as a decline in the extent to which marriage is seen as a childbearing institution, play a clear role:

Low fertility can also be linked to the movement away from marriage, which many western European countries have experienced for the recent decades. Of course, marriage is no longer a precondition for childbearing in most of these populations, but it remains true that married couples have a higher fertility than non-married people, even those who live in a “marriage-like” cohabitation.⁹

America, by contrast has near-replacement level fertility at 2.01 children per woman. *Id.*

⁸ For a discussion of theories (and an introduction to the literature on causes of low-fertility), see John C. Caldwell and Thomas Schindlmayr, *Explanation of the Fertility Crisis in Modern Societies: A Search for Commonalities*, 57(3) *Population Studies* 241 (2003).

⁹ Patrick Festy, “Looking for European Demography, Desperately?” Paper presented at the Expert Group Meeting on Policy Responses to Population Ageing and Population Decline in New York October 16-18, 2000, Population Division, Department of Economic and Social Affairs, United Nations at 3 (2000). See also Population Division, Department of Economic and Social Affairs, United Nations Secretariat, “Partnership and Reproductive Behavior in Low-Fertility Countries,” *Population Newsletter* 74 (December 2002).

A state interest that if not met jeopardizes “the basic foundation of the nation” and “threatens its survival” certainly must be deemed not only legitimate, but compelling.¹⁰

B. Sex between men and women still makes babies.

Second, despite legal contraception, numerous studies have shown that unintended pregnancy remains a common, not rare, consequence of male-female sexual relationships. Nationally, three-fourths of births to unmarried couples were unintended by at least one of the parents.¹¹ By their late thirties, 60 percent of American women have had at least one unintended pregnancy.¹² Almost 4 in 10 women aged 40-44 have had at least one unplanned birth.¹³

The existence of contraceptives thus does not eliminate the state’s interest in preferring voluntary marital sexual unions between men and women to other kinds of sexual unions. The vast majority of children born to a married couple will have a mother and a father already committed to caring for them. Most children conceived in sexual unions outside of marriage (and all children of same-sex

¹⁰ See *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff’d* 673 F.2d 1036 (9th Cir. 1982) (observing that a “state has a compelling interest in encouraging and fostering procreation of the race.”).

¹¹ J. Abma, et al., *Fertility, Family Planning, and Women’s Health: New Data from the 1995 National Survey of Family Growth*, 23(19) Vital Health Stat. 28 (Table 17) (National Center for Health Statistics) (1997) (70.4 percent of births to married women were intended by both parents, compared to just 28 percent of births to unmarried mothers.).

¹² *Id.* at 28 (Table 3) (finding 60.0% of women aged 35-39 had had at least one unintended pregnancy).

¹³ *Id.* at 28 (Table 3) (finding 38.1% of women aged 40-44 had had at least one unplanned birth).

unions) will not.¹⁴ National survey data show that children born outside of marriage have relatively little contact with their fathers.¹⁵

C. Children need mothers and fathers.

Scientific evidence also affirms that, the state has a legitimate (indeed compelling) interest in increasing the likelihood that children will be raised by their mothers and their fathers. Child Trends (a leading and respected child research organization) sums up the current social science consensus on the most common family structures:

Research clearly demonstrates that family structure matters for children, and the family structure that helps the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried

¹⁴ Studies show that 2 out of 3 children born out of wedlock have nonresident fathers at birth. This percentage climbs as children grow older (though some couples eventually marry). See, e.g., McLanahan, et al., *Unwed Fathers and Fragile Families*, Center for Research on Child Wellbeing, Working Paper #98-12 (March 1998) at 7. An Urban Institute policy brief explains the impact: “Parents who do not live with their children are unlikely to be highly involved in their children’s lives.” Elaine Sorensen & Chava Zibman, *To What Extent Do Children Benefit from Child Support?* The Urban Institute, January 2000, at 8. According to the National Survey of America’s Families, one in three (34%) children with a nonresident parent saw that parent on a weekly basis in 1997. Another 38 percent saw their nonresident parent at least once during the year, though not on a weekly basis. Fully 28 percent of children with a nonresident parent had *no* contact with that parent during the course of the year. *Id.* Another review of several national surveys found that, by their mothers’ estimates, roughly 40% of children with nonresident fathers saw their father once a month, while nearly the same number did not see their father at all in a given year. Wendy D. Manning & Pamela J. Smock, *New Families and Non-Resident Father-Child Visitation*, 78(1) *Social Forces*, 87, 89 (Sept. 1999). See also Valerie King, *Variations in the Consequences of Nonresident Father Involvement for Children’s Well-Being*, 56 *J. Marriage & Fam.* 963 (1994) (finding half of children with nonresident fathers see their fathers only once a year, if at all, while just 21 percent see their fathers on a weekly basis).

¹⁵ Cynthia C. Harper and Sara S McLanahan, *Father Absence and Youth Incarceration*, 14(3) *J. Res. On Adolescence* 369, 390 (2004).

mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents.¹⁶

The risks to children when mothers and fathers do not get and stay married include: poverty,¹⁷ suicide,¹⁸ mental illness,¹⁹ physical illness,²⁰ infant mortality,²¹

¹⁶ Kristin Anderson Moore, et al., “Marriage from a Child’s Perspective: How Does Family Structure Affect Children and What Can We Do About It?” *Child Trends Research Brief*, June 2002, at 1. This research brief on family structure does not compare outcomes for children raised by same-sex couples to children in other types of families.

¹⁷ Sara McLanahan, *Family, State, and Child Well-Being*, 26 Annual Rev. of Sociology 703 (2000); I. Sawhill, “Families at Risk,” in *Setting National Priorities* (H.H. Aaron and R.D. Reischauer, eds.) 97-135 (1999); Mark R. Rank and Thomas A. Hirschl, *The Economic Risk of Childhood in America: Estimating the Probability of Poverty Across the Formative Years*, 61 J. Marriage & Fam. 1058 (1999).

¹⁸ Gregory R. Johnson, et al., *Suicide Among Adolescents and Young Adults: A Cross-National Comparison of 34 Countries*, 30 Suicide & Life-Threatening Behavior 74 (2000); David Lester, *Domestic Integration and Suicide in 21 Nations, 1950-1985*, XXXV Int’l J. of Comparative Sociology 131 (1994); David M. Cutler, et al., *Explaining the Rise in Youth Suicide*, National Bureau of Economic Research Working Paper 7713 (2000).

¹⁹ E. Mavis Hetherington and John Kelly, *For Better or For Worse: Divorce Reconsidered* (2002); Paul R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis*, 15 J. of Fam. Psychol. 355 (2001); Ronald L. Simons, et al., *Explaining the Higher Incidence of Adjustment Problems Among Children of Divorce Compared with Those in Two-Parent Families*, 61 J. Marriage & Fam. 1020 (1999); Andrew J. Cherlin, et al., *Effects of Parental Divorce on Mental Health Throughout the Life Course*, 63 Am. Soc. Rev. 239 (1998).

²⁰ Ronald Angel and Jacqueline Worobey, *Single Motherhood and Children’s Health*, 29 J. Health & Soc. Behav. 38 (1988); Olle Lundberg, *The Impact of Childhood Living Conditions on Illness and Mortality in Adulthood*, 36 Soc. Sci. & Med. 1047 (1993).

²¹ J.A. Gaudino, Jr., et al., *No Fathers’ Names: A Risk Factor for Infant Mortality in the State of Georgia*, 48 Soc. Sci. & Med. 253 (1999); C.D. Siegel, et al., *Mortality from Intentional and Unintentional Injury Among Infants of Young Mothers in Colorado, 1982 to 1992*, 150(10) Archives of Pediatric & Adolescent

lower educational attainment,²² juvenile delinquency and conduct disorder,²³ adult criminality,²⁴ early unwed parenthood,²⁵ lower life expectancy,²⁶ and less warm and close relations with both mothers and fathers.²⁷

Med. 1077 (1996); Trude Bennett and Paula Braveman, *Maternal Marital Status as a Risk Factor for Infant Mortality*, 26(6) *Fam. Planning Perspectives* 252 (1994); Trude Bennett, *Marital Status and Infant Health Outcomes*, 35(9) *Soc. Sci. & Med.* 1179 (1992).

²² See, e.g., Paul R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis*, 15(3) *J. Fam. Psychol.* 355 (2001); William H. Jeynes, *The Effects of Several of the Most Common Family Structures on the Academic Achievement of Eighth Graders*, 30(1/2) *Marriage & Fam. Rev.* 73 (2000); Sara McLanahan and Gary Sandefur, *Growing Up with a Single Parent: What Helps, What Hurts* (Cambridge, MA: Harvard University Press) (1994); Timothy J. Biblarz and Gregg Gottainer, *Family Structure and Children's Success: A Comparison of Widowed and Divorced Single-Mother Families*, 62(2) *J. Marriage & Fam.* 533 (2000); Zeng-Yin Cheng and Howard B. Kaplan, *Explaining the Impact of Family Structure During Adolescence on Adult Educational Attainment*, 7(2) *Applied Behav. & Sci. Rev.* 23 (1999); Dean Lillard and Jennifer Gerner, *Getting to the Ivy League*, 70(6) *J. Higher Educ.* 206 (1996).

²³ Ross L. Matsueda and Karen Heimer, *Race, Family Structure and Delinquency: A Test of Differential Association and Social Control Theories*, 52 *Am. Soc. Rev.* 171 (1987); Chris Coughlin and Samuel Vuchinich, *Family Experience in Preadolescence and the Development of Male Delinquency*, 58(2) *J. Marriage & Fam.* 491 (1996); George Thomas and Michael P. Farrell, *The Effects of Single-Mother Families and Nonresident Fathers on Delinquency and Substance Abuse*, 58(4) *J. Marriage & Fam.* 884 (1996).

²⁴ Cynthia Harper and Sara McLanahan, *Father Absence and Youth Incarceration*, paper presented at the annual meeting of the American Sociological Association (August 1998).

²⁵ E. Mavis Hetherington and John Kelly, *For Better or For Worse: Divorce Reconsidered* (2002); Catherine E. Ross and John Mirowsky, *Parental Divorce, Life-Course Disruption, and Adult Depression*, 61(4) *J. Marriage & Fam.* 1034 (1999); Andrew J. Cherlin et al., *Parental Divorce in Childhood and Demographic Outcomes in Young Adulthood*, 32 *Demography* 299 (1995).

²⁶ J.E. Schwartz, et al., *Childhood Sociodemographic and Psychosocial Factors as Predictors of Mortality Across the Life-Span*, 85 *Am. J. Pub. Health* 1237 (1995); Joan S. Tucker. et al., *Parental Divorce: Effects on Individual Behavior and Longevity*, 73(2) *J. Personality & Soc. Psychol.* 381 (1997).

Consider, for example, just one of the increased risks children face when mothers and fathers do not get and stay married: criminal and delinquent behavior. An impressive number of social science studies confirm that individual children are more likely to engage in criminal conduct when raised in fatherless households. For example, a 2000 study that looked at crime in rural counties in four states concluded, “[A]n increase of 13% in female-headed households would produce a doubling of the offense rate. . . .” D. Wayne Osgood and Jeff M. Chambers, *Social disorganization outside the metropolis: an analysis of rural youth violence*, 38 *Criminology* 81, 103 (2000).

A study that analyzed a database following 6403 males from their teens to their early thirties concluded that after controlling for race, income and family background, boys who were raised outside of intact marriages were 2 to 3 times more likely to commit a crime that leads to incarceration. The authors conclude: “The results . . . show that, controlling for income and all other factors, youths in father-absent families (mother only, mother-stepfather, and relatives/other) still had significantly higher odds of incarceration than those from other-father families. . . . Youth who never had a father in the household had the highest incarceration odds.” Cynthia C. Harper and Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14(3) *J. Res. On Adolescence* 369, 385-86 (2004).

The benefits of marriage for children described by this social science literature do not appear to be direct legal incidents of marriage, of the kind that the state can therefore transfer to other family forms. Children living with remarried

²⁷ Alan C. Acock and David H. Demo, *Family Diversity and Well-Being* (1994); Paul R. Amato and Alan Booth, *A Generation at Risk* (1997); Nicholas Zill, et al., *Long-Term Effects of Parental Divorce on Parent-Child Relationships, Adjustment, and Achievement in Young Adulthood*, 7(1) *J. Fam. Psychol.* 91 (1993); E. Mavis Hetherington and John Kelly, *For Better or For Worse: Divorce Reconsidered* (2002); William S. Aquilino, *Impact of Childhood Family Disruption on Young Adults’ Relationships with Parents*, 56 *J. Marriage & Fam.* 295 (1994).

parents for example, appear to do no better than children with single mothers, on average.²⁸ A review of the last decade's research published in the Journal of

²⁸ See also, "Research does not generally support the idea that remarriage is better for children than living with a single mother." William J. Doherty, et al., *Why Marriage Matters: 21 Conclusions from the Social Sciences* 5 (New York City: Institute for American Values) (2002); Sara McLanahan and Gary Sandefur, *Growing Up With a Single Parent: What Helps, What Hurts* (Cambridge, MA: Harvard University Press) (1994) ("In general, compared with children living with both their parents, young people from disrupted families are more likely to drop out of high school, and young women from one-parent families are more likely to become teen mothers, irrespective of the conditions under which they began to live with single mothers and irrespective of whether their mothers remarry or experience subsequent disruptions."); Nicholas Zill, et al., *Long-term effects of parental divorce on parent-child relationships, adjustment, and achievement in young adulthood*. 7 J. Fam. Psychol. 91 (1993) ("[T]here is no clear evidence that remarriage has a protective or ameliorative effect against the negative consequences of family discord and disruption") (99); Valerie E. Lee, et al., *Family structure and its effect on behavioral and emotional problems in young adolescents*, 4 J. Res. on Adolescence 405, 429 (1994) ("Another finding we wish to highlight is the fact that eighth graders are at least as likely to experience problems as a result of living in households occupied by stepfamilies as in single-parent households."); Thomas L. Hanson, et al., *Double jeopardy: parental conflict and stepfamily outcomes for children*, 58 J. Marriage & Fam. 141, 146 (1996) ("[F]or the most part, children in stepfather households and children in single-mother households score similarly on the measures of academic performance and psychological adjustment."); William H. Jeynes, *Effects of remarriage following divorce on the academic achievement of children*, 28 J. Youth & Adolescence 385, 390 (1999) ("These findings do not support the assumption held by many educators that children of divorce from reconstituted homes are better off academically than children of divorce from single-parent homes. Remarriage following divorce *does not* positively affect academic achievement and may actually have a negative effect on academic achievement.") (emphasis in original); Wendy D. Manning & Kathleen A. Lamb, *Adolescent well-being in cohabiting, married, and single-parent families*, 65 J. Marriage & Fam. 876, 890 (2003) ("Adolescents in married, two-biological-parent families generally fare better than children in any of the family types examined here, including single-mother, cohabiting stepfather, and married stepfather families. The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents"); Stephen Demuth & Susan L. Brown, *Family structure, family processes, and adolescent delinquency: the significance of parental absence versus parental gender*, 41 J. Res. Crime & Delinquency 58,

Marriage and Family in 2000 concluded “[M]ost researchers reported that stepchildren were similar to children living with single mothers on the preponderance of outcome measures and that stepchildren generally were at greater risk for problems than were children living with both of their parents.” Marilyn Coleman, et al., *Reinvestigating Remarriage: Another Decade of Progress*, 62 J. Marriage & Fam. 1288, 1292 (2000).

Existing scientific data thus suggests that the law of marriage protects children primarily to the extent it increases the likelihood that children will be born to and raised by their own mother and father in a reasonably harmonious union. By the same token, the data suggest that anything that weakens marriage, or that even indirectly encourages people to have children outside of such unions (e.g., by suggesting that married mother/father homes have no special importance for children, because only love – and not family structure – matters for children), will place many children at risk.

Meanwhile, relatively little is known from a scientific standpoint about how children fare raised by same-sex couples from birth, compared to other family structures. For example, after reviewing several hundred studies for the Attorney General of Canada, University of Virginia sociologist Steve Nock concluded:

Through this analysis I draw my conclusions that 1) all of the articles I reviewed contained at least one fatal flaw of design or execution; and 2) not a single one of those studies was conducted according to generally accepted standards of scientific research.

Nock Aff. ¶ 3, *Halpern v. Attorney General of Canada*, Case No. 684/00 (Ont. Sup. Ct. of Justice), available at http://marriagelaw.cua.edu/Law/cases/Canada/ontario/halpern/aff_nock.pdf (last visited July 18, 2006).

71 (2004) (“[A]dolescents living in single-mother, single-father, and stepfamilies report significantly higher delinquency than those in two-biological-parent married families. These differences remain significant even after controlling for child and parent characteristics.”).

Other scholars have noted similar concerns.²⁹ Perhaps the most recent review of social science evidence on same-sex parenting appeared in the Fall 2005 issue of *The Future of Children*, a peer-reviewed journal published jointly by Princeton University and the Brookings Institution. The two gay scholars (both of whom favor same-sex marriage) note that because of limitations in this body of research, “What the evidence does not provide, because of the methodological difficulties we outlined, is much knowledge about whether those studied are typical or atypical of the general population of children raised by gay and lesbian couples. We do not know how the *normative* child in a same-sex family compares with other children.” William Meezan and Jonathan Rauch, *Gay Marriage, Same-Sex Parenting and America’s Children*, 15(2) *Future of Children* 97, 104 (Fall 2005).

As the *Goodridge* dissent points out:

[A]ttempts 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. . . . 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 . . . wish to see the proof before making a fundamental alteration to that institution.

Goodridge v. Dept. of Publ. Health, 798 N.E.2d 941, 979-80 (Mass. 2003) (Sosman, J., dissenting).

²⁹ See, e.g., Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31(1) *Developmental Psychol.* 130 (1995). Another review, prepared by Robert Lerner and Althea Nagai in 2001, looked at forty-nine separate parenting studies before concluding that “the methods used in these studies are so flawed that the studies prove nothing.” Robert Lerner & Althea K. Nagai, *No Basis: What the Studies Don’t Tell Us About Same-Sex Parenting* 6 (2001).

III. MARRIAGE AS THE UNION OF HUSBAND AND WIFE IS RATIONALLY RELATED TO FURTHERING PROCREATION (INCLUDING UNITING CHILDREN TO THEIR MOTHERS AND FATHERS)

The final question this court must consider under the rational basis test is whether the classification used in marriage (sexual unions of husband and wife) is rationally related to the state interests identified above. Yes. The vast majority of children born into a marital sexual union begin life with a mother and father committed to their care. Very few children in other kinds of sexual unions (and no children in same-sex unions) do so.

Even marital unions of husband and wife that do not produce children further the state's interest in procreation and paternity, because every man who is attracted to a woman is at risk of entering alternative sexual unions that may produce out-of-wedlock births. Only by first committing to an exclusive, faithful, enduring sexual, financial and emotional union can men and women attracted to the opposite sex ensure that any children they conceive will be protected by and connected to both their mother and father.

Redefining marriage as something other than the union of husband and wife undermines the State's legitimate interests in marriage.

A. Remaking marriage to include same-sex unions risks severing the link between marriage and procreation.

First, redefining marriage to include same-sex couples severs the relationship between marriage and procreation in (first) law and (then) society. As University of Chicago Professor Don Browning and Elizabeth Marquardt conclude, "Same-sex marriage changes the purpose of marriage law. It no longer will serve, in concert with other aspects of society, to direct sexual and parental behavior to achieve a complex synthesis of goods. It will function instead to

extend marriage privileges to a particular group of sexual partners.” Don Browning & Elizabeth Marquardt, *A Marriage Made in History?*, N.Y. Times, March 9, 2004, at A25. Similarly, Harvard Law Professor Mary Ann Glendon suggests that “[s]ame-sex marriage will constitute a public, official endorsement of the following extraordinary claims made by the Massachusetts judges in the *Goodridge* case: that marriage is mainly an arrangement for the benefit of adults; that children do not need both a mother and a father; and that alternative family forms are just as good as a husband and wife raising kids together.” Mary Ann Glendon, *For Better or for Worse?*, Wall St. J., Feb. 25, 2004, at A14.

Another legal scholar spells out potential consequences of severing the link between marriage and procreation:

Legalizing same-sex marriage would weaken the nexus between procreation and parenting. The already ambiguous role and meaning of parenthood would be made even more ambiguous. . . . The further separation of procreation from marriage implicit in legalization of same-sex marriage would send a cultural message of parental disconnection from family duties that could further diminish the level of responsibility of absent parents.

Lynn D. Wardle, *Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J.L. & Publ. Pol’y 771, 798 (2001).

Bu it is not just *opponents* of gay marriage who argue that gay marriage severs the link between marriage, procreation and family structure; many *proponents* of same-sex marriage see (and applaud) the same link.³⁰

³⁰ As Professor Douglas Kmiec notes, some advocates of same-sex marriage contend that there never has been any link between marriage and procreation, or that such a link no longer exists today. Criticizing such claims, Kmiec writes: “In truth, the advocates of same-sex marriage cannot genuinely mean that procreation has not been, in fact, linked with marriage. Rather, what same-sex partisans actually mean is that they would prefer procreation not to be associated with the marital estate. . . . Sexual reproduction for the human species is not merely one of

For example, same-sex marriage activist E.J. Graff argues that “[i]f same-sex marriage becomes legal, that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers.” E.J. Graff, “Retying the Knot,” in *Same-Sex Marriage: Pro and Con: A Reader* 134, 136 (Andrew Sullivan ed., 1st ed., Vintage Books 1997). Another leading scholarly advocate for same-sex marriage, Professor William Eskridge, argued that the link between marriage and procreation has already been severed: “[I]n today’s society the importance of marriage is relational not procreational.” William N. Eskridge, Jr., *The Case for Same Sex Marriage: From Sexual Liberty to Civilized Commitment* 11 (Free Press 1996). Andrew Sullivan makes a similar argument, suggesting that “[f]rom being a means to bringing up children, [marriage] has become primarily a way in which two adults affirm their emotional commitment to one another.” Andrew Sullivan, “Introduction,” in *Same-Sex Marriage: Pro and Con: A Reader*, n. 82, at xix (Andrew Sullivan ed., 1st ed., Vintage Books 1997).

Judith Stacey, sociology professor at New York University, approvingly suggests that redefining marriage to include same-sex unions will promote changes in “the meaning, practice and politics of family life in the United States.”

Legitimizing gay and lesbian marriages would promote a democratic, pluralist expansion of the meaning, practice, and politics of family life in the United States, helping to supplant the destructive sanctity of The Family with respect for diverse and vibrant families. . . . If we begin to value the meaning and quality of intimate bonds over their customary forms, people might devise marriage and kinship patterns to serve diverse needs. . . . Two friends might decide to “marry” without basing their bond on erotic or romantic attachment. . . . Or, more radical still, perhaps some might dare to question the dyadic limitations of Western marriage and seek some of the benefits of extended family life through small group marriages

several equally attractive ways to bring forth a child, it is the assumed way. It is no coincidence that those with religious beliefs that correspond most strongly with a traditional understanding of marriage as linked to procreation do, indeed, have the most children.” Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 *Hastings Const. L.Q.* 653, 660 (2004).

arranged to share resources, nurturance, and labor. After all, if it is true that “The Two-Parent Family is Better” than a single-parent family, as family-values crusaders proclaim, might not three-, four-, or more-parent families be better yet, as many utopian communards have long believed?

Judith Stacey, *Gay and Lesbian Families: Queer Like Us*, in *All Our Families: New Policies for a New Century* 117, 128-29 (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman eds., Oxford U. Press 1998).

A New Jersey Appellate court expressed the same insight, if in less celebratory terms:

The same form of constitutional attack that plaintiffs mount against statutes limiting the institution of marriage to members of the opposite sex also could be made against statutes prohibiting polygamy. Persons who desire to enter into polygamous marriages undoubtedly view such marriages, just as plaintiffs view same-sex marriages, as “compelling and definitive expressions of love and commitment” among the parties to the union. Indeed, there is arguably a stronger foundation for challenging statutes prohibiting polygamy than statutes limiting marriage to members of the opposite sex “because, unlike gay marriage, [polygamy] has been and still is condoned by many religions and societies.”

Lewis v. Harris, 875 A.2d 259, 270 (N.J. App. 2005) (internal citations omitted).

These kinds of consequences will not happen all at once. They will affect behavior by gradually displacing an older understanding of marriage with the new unisex model of interpersonal commitment, only dimly if at all related to children or family structure. To the extent the court establishes same-sex marriage as a civil right, the traditional conjugal/procreative view of marriage will be branded as discriminatory, and (like racism) be subjected to social disapproval and indirect legal pressure. Under these circumstances, fewer people – perhaps very few indeed – in the public square will be willing to say that marriage is about

procreation and paternity, or that marriage matters because children need mothers and fathers.³¹

IV. MARRIAGE IS NOT GENDER DISCRIMINATION

We pause here to note that the above analysis is also relevant to the trial court's conclusion that marriage constitutes gender discrimination. Memorandum at 6, *Deane v. Conaway*, Md. Cir. Ct. Baltimore City, Case No. 24-C-04-005390 (Jan. 20, 2006) (hereinafter, "Tr. Memo."). Unlike laws banning interracial marriage (which segregated two races so that one race could oppress the other), marriage as a classification integrates the sexes. Marriage is a mixed-sex institution. The state is no more obligated, on the grounds of gender equality, to create same-sex marriages than it is required, in the name of gender equality, to provide single-sex universities, in addition to mixed-sex ones, to men or women who want one.

Moreover, unlike bans on interracial marriage (which were formally equal but practically intended to sustain segregation), Maryland marriage law treats men and women equally not only formally but substantially furthers gender equality in fact. The very purpose of marriage, as we have described it above, is to create substantially greater equality of parenting between men and women (getting fathers as well as mothers for children) and thus reducing the likelihood that women as a class will unfairly bear the high and gendered costs of childbearing disproportionately. Women are naturally connected to their children by the process

³¹ This is not to deny the significance of marriage as also the embodiment of one distinct form of intimate friendship. It is just that, by definition, an "intimate" friendship is a private good. The state's interest in marriage is necessarily and appropriately focused on the institution's capability to contribute to the public good – and, as argued, that is directly linked to the responsible procreative potential that marriage between a man and woman represents. In this public sense, the intimacy value of marriage is subordinate to its procreative potential and the former cannot soundly be given emphasis to the exclusion or detriment of the latter.

of gestation and birth. Fathers by contrast are not even necessarily nearby when the baby is born. Marriage thus attempts to create a substantially greater equality in the distribution of parenting burdens between men and women than nature alone sustains.

In this way, the state's definition of marriage as the union of male and female substantively furthers gender equality rather than diminishing it.

V. THE COURT BELOW FAILED TO GIVE PROPER DEFERENCE TO THE RATIONALITY OF THE MARYLAND LEGISLATURE.

The trial court could find no rational connection between the classification of marriage as the union of husband and wife and “the state interest in the rearing of biological children by married, opposite-sex parents.” The trial court concluded that the legislators of Maryland had exceeded the bounds of “rational speculation,” relying instead on “unsupported generalizations” insufficient to provide a rational basis for the law. Tr. Memo. at 16-17.

But the court's analysis was incomplete. As we discuss above, it is not irrational speculation or unsupported generalization to believe that children do best when known and loved by their own mother and father. Much scientific evidence supports the common sense conclusion that harmonious unions of mothers and fathers created and sustained by marriage are important for children and communities.

The trial court held that “to support §2-201, the Legislature would have to have concluded that children raised by opposite-sex married couples are better-off than children raised by same-sex married couples.” *Id.* at 16. The court appears to be sharing the error in reasoning noted by the New York high court: “Plaintiffs seem to assume that they have demonstrated the irrationality of the view that opposite-sex marriages offer advantages to children by showing there is no scientific evidence to support it. Even assuming no such evidence exists, this

reasoning is flawed. In the absence of conclusive scientific evidence, the Legislature could rationally proceed on the common-sense premise that children will do best with a mother and father in the home. (*See Goodridge*, 798 N.E.2d at 979-980 [Sosman, J., dissenting].) And a legislature proceeding on that premise could rationally decide to offer a special inducement, the legal recognition of marriage, to encourage the formation of opposite-sex households.” *Hernandez v. Robles*, Nos. 86-89, 2006 N.Y. Slip Op. 05239, 2006 N.Y. LEXIS 1836 at *9 (July 6, 2006).

The trial judge here is making an essentially legislative judgment. In her view, changing the legal definition of marriage from a union of husband and wife to the union of any two persons would have no negative effect on marriage’s capacity to regulate procreation and paternity. Many thoughtful observers share this view. But others, equally rational and well-intentioned, disagree. The judge is entitled to her opinion but not to impose it on the entire state of Maryland. Both critics and proponents of gay marriage have seen good reason to believe that redefining marriage will have far-reaching social consequences. Evaluating those consequences, weighing the relative risk and reward of redefining marriage, is the task of the legislative branch and not the judiciary.

CONCLUSION

According to the best scientific data, the important benefit of marriage for children is this: The vast majority of children born to a married couple begin life with their own mother and father, together, committed to caring for them. At the same time, marriage points to the social necessity of generativity: of bringing together men and women to make the next generation happen, and of discouraging the impulsive creation of children in fatherless homes where they and their communities will be harmed.

The state interests advanced by marriage are not only legitimate, they are compelling. No same-sex couple furthers these interests. Every opposite-sex marriage does so – in the important sense that men attracted to women who live up to their marriage commitments will no longer be at risk of producing fatherless children across multiple households.

Can marriage be redefined to include same-sex couples, without threatening these compelling interests? Because no complex human society has had same-sex marriage for more than a few years, the answer cannot be known with certainty at this time, using the tools of social science.

What we do know is this: Same-sex marriage would strip from the law of Maryland the one feature of marriage that has been virtually universal throughout human history. It puts law and government in the position of educating the next generation that (1) Any two committed adults are just as good as a mother and father, when it comes to raising kids and/or (2) Marriage has little or nothing to do with bringing forth children; it is primarily a state endorsement of adult needs for intimacy. That is not a claim for equality; that is an essentially political argument for a dramatic shift in the public meaning of marriage.

We, of course, are not blind to the fragility and instability of modern marriage, but that is hardly an argument for a redefinition that will only contribute further toward the weakening of this vital social institution. The current high rates of family fragmentation and fatherlessness make this a particularly poor time for social experiments that would further divert marriage from its core public purposes. Moreover, because the potential dangers stem from alterations in the shared public meanings of marriage, these negative consequences will not be visible at once, and will be extremely difficult if not impossible to later reverse. Deconstructing a social institution is much easier than constructing one.

Given the compelling nature of what is at risk, and the enormous costs to children and society of being wrong, neither federal nor state law can reasonably

be understood to command the assumption of those high costs. What's more, any decision to assume the potentially enormous risks of remaking marriage properly belongs with the people of Maryland and their elected representatives, and not the courts.

This Court should reverse the judgment below.

DATED: _____, 2006.

Respectfully submitted,

CHARLES J. JANNACE, III
Charles J. Jannace, III, P.C.
231 E. Main Street
Salisbury, MD 21801
(410) 341-3939

Joshua K. Baker
Institute for Marriage and Public Policy
PO Box 1231
Manassas, VA 20108
(202) 216-9430

Of Counsel