

No. 02499

Maryland Court of Special Appeals

Frank Conaway, *et al.*, Defendants-Appellants

vs.

Gitanjali Deane, *et al.*, Plaintiffs-Appellees

No. 02499

September Term, 2005

**Appeal from the Circuit Court for Baltimore City
(Honorable M. Brooke Murdock, Judge)**

**PETITION AND BRIEF *AMICUS CURIAE*
OF THE KNIGHTS OF COLUMBUS
IN SUPPORT OF DEFENDANTS-APPELLANTS**

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PETITION AND INTEREST OF THE *AMICUS CURIAE*

The Knights of Columbus hereby petitions this Honorable Court for permission to file a brief as *Amicus Curiae* in No. 02499.

The Knights seek *amicus* status in this case to represent the interests of a religious organization that is not a church. The Knights is a tax-exempt, men's social welfare organization with members and property in Maryland; and an organization that has a strong interest in preserving conjugal marriage in Maryland and elsewhere. The Knights also have special expertise concerning the practical impact of "irrationality" argument on which the court below relied. Our experience in a recent British Columbia case, *Smith & Chymyshyn v. Knights of Columbus*, 2005 BCHRT 544, described in greater detail below, demonstrates that the Circuit Court's opinion will have both far-reaching, and bizarre consequences for churches and religious organizations throughout Maryland.

The Knights of Columbus is the largest, Catholic, lay service organization in the world, with some 1.7 million members in more than 12,000 councils throughout the world, including the Maryland State Council. It is a men's organization, organized in 1882 to render financial aid to members and their families, particularly including the sick, disabled, and needy. In addition to its original purposes, today it offers social and intellectual fellowship to members and their families through educational, charitable, religious, social welfare, war relief, and public relief projects. For the year ending December 31, 2005 alone, the Knights have provided over \$135.7 million in charitable giving and service at all levels, including millions of dollars and thousands of service hours for victims of Hurricane Katrina.

Both the Supreme Council and local councils have participated as *amicus curiae* in numerous constitutional cases in federal and state courts.

The Knights have special interest and expertise in this case because of a complaint that was lodged against a local council in Vancouver, British Columbia

that refused to allow a church hall owned by the Catholic Archdiocese of Vancouver and managed by the local council to be used to celebrate a same-sex “wedding.” *Smith and Chymyshyn v. Knights of Columbus* 2005 BCHRT 544 (British Columbia Human Rights Tribunal, 2005).¹

The facility involved in *Smith and Chymyshyn* is the parish hall of Our Lady of the Assumption Church in Port Coquitlam, British Columbia. The Archdiocese of Vancouver owns the land, the parish is responsible for major site projects, and the Knights operate the hall, which is rented to the public when it is not needed by the Church or the Knights.

The case arose when a contract was signed between the Knights and two women who wanted to hold an event. Some three weeks after the contract was signed, the Knights learned that the event was to be a reception following a same-sex “wedding.” Because same-sex “marriages” are contrary to the teaching of the Church, the women were told that the event could not be held in the hall.

The Knights offered to help Ms. Smith and Ms. Chymyshyn find another hall, and to reimburse them for the printing and mailing of new invitations. When they asked to be compensated for having to obtain another (more expensive) hall, the Knights agreed to that, too. They nonetheless took the dispute to the British Columbia Human Rights Tribunal alleging discrimination on the basis of sexual orientation.

Following a hearing, the Tribunal held that “because of their core religious belief” the Knights could “refuse to give access to the hall to the complainants.” That sounds like a victory for religious liberty, but in language echoing the “irrationality rationale” of the Circuit Court below, the Tribunal was only just beginning.

¹ The decision of the British Columbia Human Rights Tribunal is available online at http://www.bchrt.bc.ca/decisions/2005/pdf/Smith_and_Chymyshyn_v_Knights_of_Columbus_and_others_2005_BCHRT_544.pdf.

The Tribunal also held that the local Council and its Grand Knight were guilty of discrimination on the basis of sexual orientation, and both were enjoined from “committing the same or similar” violations. Notwithstanding the protections to which they were entitled under Section 2(a) of the Canadian Charter of Rights and Freedoms, they were ordered to pay the complainants’ expenses, plus interest, *and* \$1,000 to each of the two women for “injury to their dignity, feelings, and self-respect.” *Smith & Chymyshyn v. Knights of Columbus*, 2005 BCHRT 544, at *41 (Nov. 29, 2005).

The Knights are thankful that the British Columbia Human Rights Tribunal recognized that religious freedom is protected by the Canadian *Charter of Rights and Freedoms*, but its victory was costly, and the Human Rights Tribunal’s reasoning is as legally problematic as the Circuit Court’s below. In Canada, religious believers can now be fined \$1,000 for each exercise of their constitutional rights because others are of the view that the traditional definition of marriage as the union of one man and one woman is “irrational.”

If accepted by this court in whole or even in part, the Circuit Court’s “irrationality rationale” will have precisely the same intended effect. It will rewrite the Constitution and laws of the State of Maryland, and put the rights and good names of religious organizations like the Knights at risk.

SUMMARY OF ARGUMENT

Six months *after* the “Equal Rights Amendment” was ratified, Maryland enacted the Marriage Act, which reads, “Only a marriage between a man and a woman is valid in this State.” The Court below has now held that this commonplace definition of marriage is completely irrational. So irrational, in fact, that no legislative assembly could possibly conclude otherwise. The Court said (at *8), “[T]he facts necessarily assumed by the Legislature to support [the marriage law] exceed rational speculation.”

The Circuit Court could not conceive of a constitutionally sufficient reason for the State to define and prefer marriage, and its reasoning *would not permit* 150 elected representatives and state officials to think of one either. The considered opinions of the members of the General Assembly, who passed the Marriage Act, and the Governor, who signed it, were simply not relevant. Neither was the entire history of the human race.

Marriage is more than just a creation of a legislature; it predates the creation of the state. Marriage requires a man and a woman in the same way that a hydrogen atom requires an electron and a proton.

It is perfectly integrated by sex. An identical number of men and women get married each year, side-by-side, hand-in-hand. The mechanism of marriage is perfectly balanced. No man may become a husband unless a woman becomes a wife at the same moment.

Marriage unites a man and a woman in a sexually complementary union. Only a man and a woman can make a baby, and both state and society have compelling interests recognized by all courts in helping ensure that babies are born to women who are married to their fathers.

Marriage encourages men to share the burdens of child rearing and binds fathers to their children. Marriage provides the optimal setting in which mothers and fathers can raise their own boys and girls to enter a world that consists exclusively of men and women.

There is a vast diversity among Maryland's families. Such diversity does *not* reduce – indeed it *enhances* – the State's compelling interest in defining, protecting, and strengthening the optimal setting in which husband-fathers and wife-mothers make and raise their own children. Striving to promote this optimal family arrangement does disparage other arrangements. It recognizes reality.

Marriage works imperfectly. There are numerous failures, but it is the best system humankind has been able to devise. "Minimum rationality" does not require perfection.

Article 46 of Maryland’s Declaration of Rights (E.R.A.) requires that “equality of rights under the law” be neither “abridged” nor “denied” “because of sex.” E.R.A. does not use the word “discrimination,” or any of its variants, perhaps because the verb “to discriminate” comes from a Latin root that means to separate or to distinguish one thing from another. The rule that sex-based distinctions narrowly tailored to serve a compelling State interest reflects the common-sense understanding of the People of Maryland that sex-based differences in policy or practice are sometimes necessary to effectuate the intent of the amendment.

There is not the slightest evidence that E.R.A. was intended to deconstruct marriage. No man or woman is excluded from marriage if he or she desires to do what marriage *is*. Plaintiffs can marry if they wish, but they must – like everyone else – find a spouse of the opposite sex. At least one of the plaintiffs has a son from a former marriage, Complaint ¶114. Thus, to the extent that this case requires judicial analysis under Article 46, it should be approached and decided like *Evans v. Wilson*, 382 Md. App. 614, 642 n.7, 856 A.2d 679, 696 n.7 (2003), a paternity case which was ignored by the Court below, where the Court of Appeals said,

This case is not about gender classifications; it is about the State’s interests in preserving family unity and the best interests of the child. The State has a strong interest in protecting the integrity of the marital family unit and in promoting family harmony.

The Court below also failed to apply (or even to cite) *Brooks v. State*, 24 Md. App. 334, 330 A.2d 670 (1975) and *Massage Parlors, Inc. v. Mayor and City Council of Baltimore*, 284 Md. 490, 398 A.2d 52 (1979). The Court’s neglect is lamentable because these three cases show how the Court of Appeals has interpreted Article 46 in cases involving family solidarity (*Evans*), unique physical characteristics (*Brooks*), and health, welfare, and morals (*Massage Parlors*). All of these factors are present in this case.

This lawsuit was brought under Maryland law, but the Circuit Court relied heavily on U.S. Supreme Court precedent. Unfortunately, it omitted the one case that is directly on point and conclusive on the federal constitutional issue, *Baker v. Nelson*, 191 N.W.2d 185 (Minn.1972), *dismissed for want of a substantial federal question*, 409 U.S. 810 (1972) (mem). The U.S. Supreme Court *has already held* that neither the Equal Protection Clause nor the Due Process Clause of the fourteenth amendment, nor the privacy guarantees of the ninth and fourteenth amendments require a State to recognize same-sex “marriage.”

If Maryland courts are going to begin applying the law of the decision below, then the University of Maryland women’s basketball team will have to surrender its N.C.A.A. championship trophy. The team is segregated by sex and the trophy was won in a segregated tournament. The fact that the men have their own team and tournament will be no defense against what the Court below kept calling the “equal application theory.”

We doubt that Maryland law has reached the point where sex-segregated basketball teams can pass a compelling state-interest test, but *sex-integrated* marriages cannot. Terps basketball is important, but it is not as important as the one social institution recognized as necessary for the perpetuation of the human race and the healthy development of its children.

Marriage is fully integrated and nondiscriminatory. The decision of the Court below should be reversed.

ARGUMENT

Maryland *always* has defined marriage as the conjugal union of a man and a woman.² It is misleading to say, as some do, that the case now pending is about a law that has been in effect for “just 33 years.” To the contrary, this case is about a law that has been in effect for as long as there have been men, women, and babies in Maryland. It was *codified* 33 years ago.

The Circuit Court said conjugal marriage is “irrational,” but that judgment is contrary to:

- the intentions and continuing practices of the People of Maryland;
- the constitutional law of Maryland as interpreted by its Courts;
- the statutory laws of Maryland as enacted by the General Assembly;
- the laws and regulations of Maryland as signed by the Governor;
- the interpretations of the State’s Attorney General;
- the constitutional law of the United States;
- the statutory law of the United States;
- the laws and practices of 49 of the 50 States of the Union; and
- the history of the human race in every corner of the globe.

All of these authorities have either defined and protected conjugal marriage, or rejected the idea of equality which the Court below endorsed, or both.

² In June 1972, nearly a year before the marriage statute was enacted, Maryland’s Attorney General issued an opinion that said, “It is clear that the law in this State only contemplates and authorizes a ‘marriage’ between a man and a woman.” 57 Md. Op. Atty Gen. 71 (1972). He cited statutory authority (references to “widower,” “widow,” and “husband and wife”) and Maryland cases from 1951 (marriage is between a “husband” and a “wife”) and 1828 (marriage is between a “man” and a “woman”). He also pointed out that a valid marriage in Maryland requires that “the parties be capable . . . of normal sexual intercourse.”

I. THE DECISION BELOW IS CONTRARY TO THE PEOPLE'S INTENTIONS FOR E.R.A., AS THOSE INTENTIONS ARE MANIFEST THROUGH THE OFFICIAL ACTS OF THEIR ELECTED OFFICIALS

The government of this State originates “from the People” who have, “at all times, the inalienable right to alter, reform or abolish” it “in such manner as they may deem expedient.” Declaration of Rights, Art. 1. It was the People who added the “Equal Rights Amendment” to the Maryland Constitution, and it is their intentions that must prevail in this case.

We have yet to see any evidence whatsoever that the People of Maryland intended E.R.A. to deconstruct marriage. Indeed, the history of the Marriage Act and the continuing practices of the People of Maryland show that marriage and other practices which the lower Court’s decision would prohibit are entirely compatible with the People’s understanding of E.R.A.

A. The Interrelated Histories of E.R.A. and the Marriage Act Attest that the Two Laws Are, and Were Intended To Be, Completely Harmonious

The Marriage Act was passed and signed six months *after* E.R.A. was ratified by most of the *same* legislators who put E.R.A. on the ballot. The elected officials who wrote and passed *both* measures thought the Marriage Act was entirely consistent with ERA.

In the spring of 1972, E.R.A. was approved for placement on the ballot. On November 7, 1972 it was ratified by the people. The Marriage Act was passed and signed in May of 1973. Acts 1973, ch. 213 §1. The Marriage Act passed the Senate by vote of 37-to-1, and the House of Delegates by vote of 112-to-1.

A year later, this Court cited the Marriage Act and said, “Maryland does not recognize a marriage between persons of the same sex.” *Jennings v. Jennings*, 20 Md. App. 369, 374 n. 7, 315 A.2d 816, 820 n. 7 (Md. Ct. Special App. 1974) , *cert. denied*, 271 Md. 738. (*dicta*, in common-law marriage case)

The Court below recited much of this history, *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct., January 20, 2006) at *1, but failed

to confront its implications. The ruling of the Court below requires us to believe that, in the six months between November 1972 and May 1973, the People of Maryland, the General Assembly, and the Governor either had forgotten E.R.A., did not understand it – or that the Marriage Act “was enacted out of prejudice or animus toward Maryland’s homosexual population.”³ None of these options is plausible.

The law-making branches enacted the Marriage Act *again* in 1984 when Maryland’s family laws were re-codified. Laws 1984, ch. 296, §2. By then, E.R.A. had then been in the Constitution for more than a decade.

The Governor, Senators, and Delegates are sworn with the same oath that binds Judges. Article I, §9 requires “[e]very person elected, or appointed, to any office of profit or trust” to first swear (or affirm) that he or she “will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof. . . .” When they enacted and then re-enacted the Marriage Act, the Governor and the General Assembly believed it to be both constitutional and wise. Democratic decision-making is more than just a majority in action. It is the best way we know to ascertain society’s best judgment:

What is demanded by the democratic form of government is not submission to the will of the majority because that will is numerically superior but rather submission to the reasoned judgment of the majority. We are obligated to submit to the decision of the majority, not because that decision represents a numerically superior will, but because it represents the best judgment of society with respect to a particular matter at a particular time. It is founded not upon the principle that the will of the many should prevail over the will of the

³ The Court below wrote that it had “found that there is no . . . legitimate state interest rationally served by preventing same-sex marriage [so it] need not engage in speculation as to whether §2-201 was enacted out of prejudice or animus toward Maryland’s homosexual population.” *Deane v. Conaway* *9 (two sentences combined).

few but rather upon the principle that the judgment of the many is likely to be superior to the judgment of the few. . . .

John H. Hallowell, *The Moral Foundation of Democracy* 120-21 (Univ. of Chicago Press, 1954).

B. The Interpretation of E.R.A. in the Circuit Court is Inconsistent with the Settled Interpretation of Numerous Maryland Statutes and Regulations

Numerous provisions of Maryland law distinguish between the sexes without denying or abridging rights “because of sex.” The existence of such laws, and the operation of state and society under them, shows that the People of Maryland and their law-makers believe such laws are compatible with E.R.A. Here are some examples:

- Sex education classes may be taught separately to boys and girls, COMAR 13A.04.18.03.B(2) & (3).
- In eldercare facilities, “all occupants of any bedroom shall be of the same sex, except in the case of a two-bed room occupied only by husband and wife,” COMAR 10.07.02.28.B(10).
- Maryland may create State debt for the benefit of a women’s college, 65 Md. Op. Atty. Gen. 103 (Mar. 25, 1980). Offsetting the unequivocal language of E.R.A. was “the important, undeniably public purpose served” by the college, and the “strong presumption of constitutionality accorded all legislation.” *Id.* at nn. 5 & 6. Goucher College has since begun admitting men, but we are told the Women’s College at the College of Notre Dame in Baltimore is still one of about 65 all-women’s colleges in the country.
- Health maintenance organizations may charge men and women different rates if the differences are actuarially justified, COMAR 31.12.02.08.
- Men and women may be treated differently under insurance laws, *e.g.*, Insurance §16-308, §27-208, §27-212, §27-501 (b)(2), & § 5-304(b)(2)(ii). An attempt to eliminate sex-based differences in insurance rates failed in *Insurance Comm’r of Maryland v. Equitable Life Assurance Society*, 339 Md. 596, 664 A.2d 862 (1995), but not on constitutional

grounds. The fact that sex-based insurance laws remain on the books is evidence that such statutes can be accommodated under the mandate of Article 46.

- Tax-Property §7-202, exempts from property taxes the real estate of fraternal and sororal organizations, and men's and women's clubs.
- Maryland may build homeless shelters for the exclusive use of women, 65 Md. Op. Atty. Gen. 108 (May 22, 1980); Laws 1980, Ch. 851.

1. State-Sponsored Sports

Maryland separates the sexes in state-sponsored sports. The University of Maryland women's basketball team won the national championship, but that team and their tournament are segregated by sex. If the principles that the Court below applied in this case were to be applied to basketball, the Maryland Women's Basketball Team would be declared unconstitutional because men are excluded from it solely because of their sex. Under the law of the Court below, it would be no defense that the men have their own team.

In high school athletics, the Maryland rule, COMAR §13A.06.03.04.A, allows "overall equal opportunity" between the sexes, a legal concept which the Court below spurned. Maryland has *separate* boys and girls' teams in golf, soccer, basketball, lacrosse, tennis, track and field, and other sports. Field hockey and volleyball teams are for girls only.

Even after the *Burning Tree* cases, the Attorney General opined that a country club with a tax exemption could host a golf tournament featuring only male players or only female players, such as a PGA or LPGA event. 74 Md. Op. Atty. Gen. 48, 1989 WL 503633 at *3 n. 5 (Op. No. 89-038, Sept. 29, 1989).

2. Privacy and Segregation

Maryland's public accommodations laws may *not* be "construed to prevent the State of Maryland [or any government] from providing separate facilities for males and females in government-owned or government-operated public

institutions,” Article 49B §7(a)(2). This law allows distinctions between the sexes but not discrimination “because of sex.”

Maryland recognizes that sex discrimination is not identical to race discrimination. For example, a defining characteristic of state-sponsored, Jim Crow racism was segregated restrooms for blacks and whites. See, e.g., *Lee v. State*, 164 Md. 550, 616, 165 A. 614, 615-16 (1933). Separate restrooms for the sexes, on the other hand, are entirely lawful and desirable. In fact, separation may be *required* by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, *et seq.* . *Lynch v. Freeman*, 617 F.2d 380 (6th Cir. 1987); see also, *DeClue v. Central Illinois Light Co.*, 223 F.3d 434 (7th Cir. 2000).

It is often said that E.R.A. incorporates an unstated exception for privacy. If so, that exception only underscores the fact that separating the sexes can be entirely different from separating the races. There is no privacy exception when it comes to separating the races.

In *Arey v. Robinson*, 819 F. Supp. 478 (D. Md. 1992), a male inmate’s constitutional right to privacy was held to be violated by the “design and operation” of bathroom facilities that allowed female guards to observe males showering and using toilet facilities. The Attorney General has opined that, notwithstanding the public accommodations statute that prohibits discrimination on the basis of sex, female electrologists subject to the law may decline to provide “intimate personal services to men.” 81 Md. Op. Atty. Gen. 62, 67, 1996 WL 143367 (Op. No. 96-012, Mar. 8, 1996). If these cases had involved persons of different races rather than persons of different sexes, the results would have been different.

3. Separating the Sexes in the Workplace

Maryland law provides that some jobs may be held by men but not women, or by women but not men. This is the “bona fide occupational qualification” or “business necessity” exception. Although E.R.A. contains no explicit exceptions, the statutes provide that sex may be taken into account:

- for public school teachers when “a certain sex is reasonably necessary because of the nature of the employment,” Education §6-104;
- for the State’s regular employees and contract employees, “a personnel action may be taken with regard to . . . sex . . . to the extent that. . . sex. . . is required by law or is a bona fide occupational qualification,” State Personnel and Pensions §2-302 & State Personnel and Pensions §13-203; and
- for employees in the private sector where sex is a “bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise,” Art. 49B, §16(g)(1).

An actor’s sex is usually given as the classic example of a BFOQ, but the cases usually involve health-care workers, prison guards, and supervisors in youth facilities.

II. WHAT E.R.A. MEANS: THE EXAMPLE OF MARYLAND’S RAPE LAWS

Maryland’s rape statute, which may be unique among the 50 States, makes “vaginal intercourse” an essential element of the crime. That key term is *not* “gender neutral.” Indeed, it hard to think of a phrase that more clearly distinguishes between the sexes. In Maryland, only a man can commit rape, and only a woman can be a victim of rape. Criminal Law §3-303 & §3-304.

The statute defines “vaginal intercourse” as “genital copulation, whether or not semen is emitted.” Criminal Law §3-301(g). This Court recently said, “vaginal intercourse” is “the penetration of the penis into the vagina.” *Collins v. State*, 164 Md. App. 582, 611, 884 A.2d 181, 198 (Md. App. 2005).

This sexually distinct definition of rape was *consciously retained* by the General Assembly after the Equal Rights Amendment had been enacted, and after influential E.R.A. advocates claimed that the definition was contrary to Article 46. Those advocates lost their argument in both the General Assembly *and* the courts.

After E.R.A. was ratified, the Governor appointed a commission to study its implementation, and the commission recommended abolishing Maryland's sex-specific rape law. Governor's Comm'n to Study Implementation of the Equal Rights Amendment, *[Final] Report to the Governor* 11-14 & Appendix C at "Rape" (cover letter dated July 1, 1978) (call no. KFM 1611/.7/.A847). However, two other commissions were at work at the same time, the Criminal Law Commission and the Special Committee on Rape and Related Offenses, and they opposed neutralizing the rape law. *Id.* 13-14.

The E.R.A. Commission did persuade the Senate to pass a "gender neutral" rape bill, but the House refused to go along. In the end, penalties for rape and other, related sexual crimes were equalized (the penalties for rape in the first degree, Criminal Law §3-303, are identical to those for sexual offense in the first degree, Criminal Law §3-305), but the substantive part of the crimes remains different. Only a man can commit "rape," and only a woman can suffer it; but a "sexual offense" can be committed by either a man or a woman upon either a man or a woman.

The E.R.A. Commission explained that opposition to its "gender neutral" proposal came from those who believed

it was absurd to prohibit forcible sex with male victims by female perpetrators because it was physically impossible," [and]

that "non-consensual oral and anal sex was qualitatively different from non-consensual vaginal sex. Different legislators and Special Committee members had different conceptions as to what was the worst thing that could be forced upon a person.

Governor's Comm'n to Study Implementation of the Equal Rights Amendment, *[Final] Report to the Governor* 11-14 & Appendix C at "Rape" (cover letter dated July 1, 1978) (call no. KFM 1611/.7/.A847) at 13.

We see, therefore, that there are *rational reasons* for Maryland's distinctive rape statutes, and when the Criminal Law sections were recodified in 2002, the Legislature retained them.

This Court concurred in that reasoning when it upheld the constitutionality of the rape law in the *Brooks* case, which was a constitutional challenge based on E.R.A.

That only females may be raped is nothing short of a physiological reality, and it is equally clear that the object of the statute is to protect them from that eventuality. . . .

In our view, protection of females from rape is both a legitimate and essential legislative objective. Since only males can perpetrate that crime as principals in the first degree, the limitation of culpability to males constitutes a rational classification directly related to the objective of the criminal penalty. ‘Normally, a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts.’ *United States v. Maryland S.S. Ins. Corp.*, 400 U.S. 4, 6 [1970]. . . .

Brooks v. State, 24 Md. App. 334, 338, 330 A.2d 670, 673 (1975), *cert. denied* 275 Md. 746.

The *Brooks* court applied a deferential judicial test *because* the statute involved unique physical characteristics. Marriage involves exactly the same (albeit consensual and loving) sexual coupling. Just as in *Brooks*, the correct test is a rational-basis test that recognizes common knowledge, not the strict scrutiny or “complete irrationality” tests that were used by the Circuit Court.

Conjugal relations in marriage are not rape, nor are they anything like it, but both are sexual acts that involve “vaginal intercourse” between a man and a woman. This being so, an understanding of Maryland’s sex-specific rape statute, and the of the *Brooks* case that upheld it, would have been most helpful to a correct disposition of the case now pending.⁴

⁴ The incest statutes are similar to the rape statutes, and the same arguments apply. Family Law §2-202 specifies 17 relatives whom a man cannot marry, and another 17 whom a woman cannot marry. These prohibitions are not “sex neutral.” For example, “A man may not marry his grandmother,” and “A woman may not marry her grandfather,” §2-202(b)(1)(i) & -(b)(2)(i).

III. THE DECISION BELOW IS CONTRARY TO THE CONSTITUTIONAL LAW OF MARYLAND AS INTERPRETED BY THE MARYLAND COURTS

A. The “Equal Application Theory” Is Not Relevant, Even If It Exists

The State argued in the Circuit Court that Maryland’s marriage statute does not discriminate “because of sex” because it applies equally to all men and all women, neither sex having greater or lesser rights than the other. That argument is perfectly respectable and sound, but the court pejoratively described the argument the “equal application theory,” *Deane v. Conaway* at *3, a term that is taken from the United States Supreme Court’s opinion in *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967).

In *Loving*, the Commonwealth of Virginia argued that its laws against interracial marriage were not *unconstitutionally* discriminatory because they applied equally to all races. The Circuit Court said that the “equal application theory” “must be rejected because [it] has already been addressed and rejected in Maryland.” *Deane v. Conaway* at *3. This is a curious thing to say, however, because no Maryland court has ever used the term “equal application theory,” and that includes the two courts on which the Circuit Court specifically relied, *Burning Tree I* and *Giffin v. Crane*. Those courts did not use the term. More importantly, neither rejected the argument.

Footnote 5 of the opinion below says that the idea of applying a statute equally, without discrimination, to men and women is “[o]ften referred to as the

The relevant criminal provisions are found at Criminal Law §3-323 which makes it a felony to have “vaginal intercourse with anyone whom the person may not marry” under Family Law §2-202.

Section 2-202 was amended just four years ago, Acts 2002, ch. 424, and the relevant language was retained even though the legislature removed another provision (permitting the punishment of banishment) that was of dubious constitutionality. No one thought to suggest that sex-specific incest laws might be unconstitutional under E.R.A.

‘equal application theory.’” We do not know who “refers” to this theory “often,” but a search of the cases demonstrates that American courts are *not* among them.

In addition to the case now under appeal, the phrase “equal application theory” has been used in only two judicial opinions your *amicus* could find. The earliest was, as noted, *Loving v. Virginia*, which the Circuit Court mistakenly believes has some relevance to the case now pending.⁵ The other was an unpublished opinion by a Pennsylvania trial court, *Appeal of Pittsburgh Press Co.*, 1971 WL 2675, at n. 13 (Pa. Ct. Common Pl. 1971).⁶

The “equal application theory” is a strawman with a racist ancestry. It is an insult to the good faith of the People of Maryland to argue that it has anything to do with either marriage or the E.R.A.

⁵ In *Lewis v. Harris*, 378 N.J. Super. 168, 198-199, 875 A.2d 259, 277 (N.J. Super. A.D.) (Parrillo, J. concurring) (parts of four paragraphs combined), the New Jersey Appellate Division observed:

. . . Anti-miscegenation laws simply may not be equated with laws reserving marriage to opposite-sex couples. Marriage has an inherent nature, and race is not intrinsic to that status. . . . In contradistinction, a core feature of marriage is its binary, opposite-sex nature. . . . The legal nature of marriage cannot be totally malleable lest the durability and viability of this fundamental social institution be seriously compromised, if not entirely destabilized. . . . Nothing before the court compels us to remove the ‘deep logic’ of gender as a necessary component of marriage, or to recognize, on equal footing, any adult relationship characterized merely by interdependence, mutuality, intimacy, and endurance. . . .

See also Robert A. Destro, *Law and the Politics of Marriage: Loving v. Virginia After 30 Years – Introduction to the Symposium*, 47 CATH. U. LAW REV. 1207 (1998).

⁶ The *Pittsburgh Press* case went all the way to the United States Supreme Court, but the Supreme Court did not use the phrase in its majority opinion or any of its four dissenting opinions even though the case involved sex discrimination. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Rights*, 413 U.S. 376 (1973).

B. Controlling Maryland Case Law Was Ignored

The Court below focused on *Burning Tree I* and *Giffin v. Crane*, but *ignored entirely* the key cases of *Evans v. Wilson*, 382 Md. 614, 856 A.2d 679 (2003), *Massage Parlors, Inc. v. Mayor and City Council of Baltimore*, 284 Md. 490, 398 A.2d 52 (1979), and *Brooks v. State*, 24 Md. App. 334, 330 A.2d 670 (1975) (*Brooks* is discussed above).

Evans v. Wilson is especially important because it was decided after the *Burning Tree* cases and *Giffin v. Crane*. In *Evans*, the lone dissenter argued strongly that Maryland's statutory scheme regarding establishment of paternity violated E.R.A. because it set a higher standard for males than for females, 382 Md. at 651-53, 856 A.2d at 701-03 (Raker, J., dissenting). The majority responded by saying:

The dissent suggests that our interpretation of the Estates & Trusts Article [§1-206 & §1-208] and Family Law Article [§5-1001 - §5-1048] runs afoul the Equal Rights Amendment. . . . Specifically, the dissent argues that requiring courts to consider the 'best interests' standard in situations like the case before us places a greater burden on the 'male biological parent' than on the 'female biological parent.' The dissent's reliance on the E.R.A. is misplaced.

The dissent misrepresents the nature of the interests at issue. This case is not about gender classifications; it is about the State's interests in preserving family unity and the best interests of the child. The State has a strong interest in protecting the integrity of the marital family unit and in promoting family harmony. Related to this is the State's longstanding policy in favor of protecting the best interests of the child.
...

382 Md. at 642 n. 7, 856 A.2d at 696, n. 7 (citations omitted).

This point alone should be sufficient to dispose of the case now pending. This Court may simply hold that Article 46 is not relevant to this case because every man and every woman is treated equally and identically under the Marriage Act. It would then be appropriate to quote from footnote 7 in *Evans* (above).

The third key case ignored by the Court is *Massage Parlors*, in which the City of Baltimore had enacted an ordinance that made it unlawful for a “massage establishment” to “provide treatment at the same time to persons of the opposite sex in the same room or quarters.” The Court of Appeals upheld the ordinance, even though it used a sex-based classification to determine who could receive treatment at the same time and in the same room. The Court did not find any sex discrimination. 284 Md. 493-96, 398 A.2d 55-56.

None of these three key cases were cited in the decision below, even though they involved family solidarity (*Evans*), unique physical characteristics (*Brooks*), and health, welfare, and morals (*Massage Parlors*). All of these factors are present in this case.

C. The Burning Tree Statutes Are Completely Different From the Marriage Act

The two primary cases involving E.R.A. and the Burning Tree Club are *Burning Tree Club v. Bainum*, 305 Md. 53, 501 A.2d 817 (1985) (*Burning Tree I*), and *State v. Burning Tree Club*, 315 Md. 254, 554 A.2d 366, *cert. denied* 493 U.S. 816 (1989) (*Burning Tree II*). The Circuit Court did not cite the *Burning Tree II*, even though its result and reasoning are more clear-cut than *Burning Tree I*.

In *Burning Tree I*, the Court of Appeals struck down the “primary purpose” provision of the statute, and in *Burning Tree II* the Court struck down the “periodic discrimination” provision.

As can be seen from the comparison between the two statutes involved in the *Burning Tree* cases and the Marriage Act (see Table 1, below), the Marriage Act is entirely different from the other two enactments. Both were intended to carve out *exceptions* to an otherwise comprehensive anti-discrimination law. The Marriage Act, on the other hand, has nothing to do with discrimination. It defines the marriage *relationship*, and does not rest on the reasoning rejected in *Burning Tree*.

Table 1. Statutes Being Challenged as Unconstitutional

Burning Tree I	Burning Tree II	This Case
The provisions of this section with respect to discrimination in sex shall not apply to any club whose facilities are operated with the primary purpose . . . to serve or benefit members of a particular sex. . . .” Art. 81 §19(e)(4), as amended by Ch. 870, Acts 1974.	If the country club excludes certain sexes on specific days or at specific times on the basis of sex, the country club does not discriminate under subsection (a) of this section.” Art. 81 §19(e)(4), as amended by Ch. 870, Acts 1974, and further amended by Ch. 334, Acts 1986.	“Only a marriage between a man and a woman is valid in this State.” Family Law §2-201.

Table 1 shows that the terms used – “discrimination in sex,” “shall not apply,” “particular sex,” “excludes certain sexes,” and “does not discriminate” – were used in the *Burning Tree* statutes to *limit* the protection afforded to men and women under the E.R.A. The Marriage Act, by contrast, applies equally. When it is read in conjunction with other Maryland laws, it is intended to integrate and equalize the relationship between men and women. The *Burning Tree* cases simply do not apply.

D. Understanding Giffin v. Crane

Giffin v. Crane, 351 Md. 133, 716 A.2d 1029 (1998), is the second case upon which the Circuit court rested its pejorative point about the “equal application theory.” Since that theory does not appear in *Giffin v. Crane*, or in any other Maryland case we could find, we doubt that *Giffin* would have been invoked at all except that the Court below was persuaded by an analogy that was used in a dissenting and concurring opinion in *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999), the Vermont civil unions case. *Deane v. Conaway* *6, text at n. 11.

The Circuit Court appears to have concluded that *Giffin v. Crane* stands for the proposition that the sex of the parent may *never* be taken into account in a child custody case. We submit that such is *not* the holding of *Giffin*.

Giffin was decided by a vote of 4-to-3. The dissenting opinion addressed the point directly: “I do not understand the majority to hold that consideration of gender is always inappropriate in a custody case.” 351 Md. at 156, 716 A.2d at 1040 (McAuliffe, J., dissenting). It is, of course, possible that the dissent might have misunderstood the majority’s opinion, but the majority opinion makes the same point.

The court in *McAndrew v. McAndrew*, 39 Md. App. 1, 382 A.2d 1081 (1978), stated, ‘This is not to suggest that the best interests of the child may not require a consideration of the biological . . . differences between the parents . . . to the extent that they bear upon their ability to provide the care needed by the child at the time.’ *Id.* at 8, 382 A.2d at 1083. The biology of a parent, however, is not synonymous with the sex of the parent.

Giffin v. Crane, 351 Md. at 152 n. 8, 716 A.2d at 1039 n. 8.

It appears that the last sentence of footnote 8 anticipated a transsexual case that came along five years later, *In the Matter of Heilig*, 372 Md. 692, 816 A.2d 68 (2003), but that is not relevant here. The majority in *Giffin* affirmed the proposition that “biological differences between parents” may be relevant in child custody proceedings, and, with perhaps a few rare exceptions, that means male-female biological differences.⁷

⁷ Maryland courts often use the words “sex” and “gender” interchangeably, but this practice can lead to confusion. There are two sexes, but some “gender theorists” say the number of “genders” is still in flux, but may run from a few to (honestly) hundreds. A. Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* 107-114 (Basic Books, 2000).

In *Heilig*, *supra*, 372 Md. at 697-698, 699 n.4, 816 A.2d at 71 & n. 4 (footnote 3 omitted), this Court observed that

One of the dominant themes of transsexualism . . . is the belief that sex/gender is not, in all instances, a binary concept – all male or all female.”

[n. 4] In the context before us, the terms ‘sex’ and ‘gender’ are not necessarily synonymous for all purposes, and, indeed, the perceived distinction between

What is clear is that Maryland’s courts continue to consider maleness and femaleness to be a factor that relates to the best interest of the *children* in custody cases. For example, in the post-*Giffin* cases of *Braun v. Headley*, 131 Md. App. 588, 611, 750 A.2d 624, 636 (2000), *cert. denied*, 359 Md. 669, 777 A.2d 1139 (2000), *cert. denied*, 531 U.S. 1191 (2001), and *Barton v. Hirshberg*, 137 Md. App. 1, 25, 767 A.2d 874, 887 (2001), the “age, health, and sex of the child” were used as factors in placing the child with a custodial parent. E.R.A. contains no express exception for minors, but maleness and femaleness continue to be used to determine the “best interests of the child.”

Similarly, Maryland’s foster care system requires a consideration of a child’s sex. For example, COMAR §07.02.25.14.B(11) requires an annual review of foster homes that must include identifying “necessary or desirable change[s] in age, sex, or number of children to be placed in the home.”

IV. THE SUPREME COURT OF THE UNITED STATES DOES NOT BELIEVE THAT MARRIAGE IS IRRATIONAL OR UNCONSTITUTIONAL

A. Baker v. Nelson (1972)

The case now pending is not a Federal lawsuit, but the Court below relied on several decisions of the United States Supreme Court. It did not, however, cite the one decision of that Court that is controlling as to Federal law. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *dismissed for want of a substantial federal question*, 409 U.S. 810 (Mem. 1972). At the time *Baker* was decided, the U.S. Supreme Court had mandatory appellate jurisdiction over cases brought on direct

them, to some extent, lie at the core of transsexualism. The term ‘sex’ is often used to denote anatomical or biological sex, whereas ‘gender’ refers to a person’s psychosexual individuality or identity. . . .

The Court continued its point by observing that it was going to use the words “sex” and “gender” interchangeably “without implying anything of substance.” Maryland’s E.R.A., however, speaks of sex, not gender, and sex is, indeed, a “binary concept.” There are two, and only two, sexes.

appeal, and an appeal that was dismissed for want of a substantial federal question *was a decision on the merits*. *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975).⁸

In determining if a summary disposition for want of a substantial federal question is binding in a later proceeding, lower courts look to the jurisdictional statement to see precisely which constitutional questions were presented on appeal. Summary action is binding only with respect to those same questions. In *Baker v. Nelson*, the following three questions were appealed:

1. Whether appellee's [Minnesota's] refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
3. Whether the appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Appellants' Jurisdictional Statement at 3 (filed Feb. 11, 1971), *Baker v. Nelson*, 409 U.S. 810 (No. 71-1027).

Insofar as any subsequent case raises these questions, the United States Supreme Court has already spoken. Lower courts are bound by that decision.

There have, of course, been important doctrinal developments since *Baker v. Nelson*,⁹ but none of the subsequent Supreme Court cases raised or decided the questions that were answered in *Baker*, and the overwhelming weight of authority

⁸ The rule of *Hicks v. Miranda* has some twists and turns – and plenty of nuance – but it is still good law and binding on lower courts. Stern, Gressman, Shapiro, & Geller, *SUPREME COURT PRACTICE* 281 (8th ed. 2002). See also, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981) (plurality op.).

⁹ The two most frequently mentioned by the other side are *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996).

holds that the Supreme Court’s summary disposition still is binding on lower courts.¹⁰

B. The Supreme Court’s Marriage Cases

With the exception of *Loving v. Virginia*, which was cited below for the law on race discrimination, rather than the law on marriage, the Circuit Court below did not cite *any* of the Supreme Court’s *marriage* cases. All of these cases demonstrate that marriage unites men and women and their procreative capacities.

In *Turner v. Safley*, 482 U.S. 78, 96 (1987), the Court said that “most marriages are formed in the expectation that they ultimately will be fully consummated,” and that marriage can “legitima[e] children born out of wedlock.”

In *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978), the Court said, “if appellee’s right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.”

In *Loving v. Virginia*, 388 U.S. 1, 12 (1967), the Court observed that “Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). The Court below used the *Loving* case often, but never quoted this sentence, which is intelligible only if marriage is between a man and a woman. Only a man and a

¹⁰ See especially, *McConnell v. Nooner*, 547 F.2d 54, 55-6 (8th Cir. 1976) (per curiam); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1304-05 (M.D. Fla. 2205); *Adams v. Howerton*, 486 F.Supp. 1119, 1124 (C.D. Cal. 1980); *Hernandez v. Robles*, 26 A.D.3d 98, 115, 805 N.Y.S.2d 354, 368-69 (2005); *Morrison v. Sadler*, 821 N.E.2d 15, 20 (Indiana App. 2005); *Langan v. St. Vincent’s Hospital of New York*, 802 N.Y.S.2d 476, -- (N.Y. App. 2005); *In the Matter of Cooper*, 187 A.D.2d 128, 134, 592 N.Y.S. 797, -- (N.Y. App. 1993). See also, *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 503-04 (Cal. 2004) (Kennard, J., concurring and dissenting). But see, *In re Kandu*, 315 Bankruptcy Rptr. 123 (Bkrcty, W.D. Wash. 2004).

woman have the capacity to make the babies who are “fundamental to our very existence and survival.”

V. CONGRESS AND THE PRESIDENT BELIEVE THAT MARRIAGE IS RATIONAL, CONSTITUTIONAL, AND WISE

The Court below did not cite the one federal statute that bears directly on this case, The Defense of Marriage Act (DOMA), 1 U.S.C. §7, Pub. L. 104-199 (1996). For purposes of federal law, it provides:

[T]he word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”

Though DOMA does not apply in this case, and thus the constitutionality of DOMA was not before the court below, the Circuit Court did implicitly consider the rational basis of all laws that, like DOMA and the Marriage Act, define marriage as the relationship between one man and one woman.

DOMA passed the U.S. House of Representatives by a vote of 342-to-67, and the U.S. Senate by a vote on 85-to-14. Every Representative from Maryland voted for it, Democrats and Republicans, conservatives and liberals. (Bartlett, Cardin, Cummings, Ehrlich, Gilchrest, Hoyer, Morella, and Wynn) Both Maryland Senators voted for it. (Sarbanes and Mikulski) President Clinton signed it. These officials did not regard DOMA as irrational.

The printed report explains why DOMA was thought to be necessary and wise. H. Rpt. No. 104-664, 104th Cong., 2d Sess. (1996). The House Report says that DOMA rests upon the federal government’s interests in responsible procreation, responsible child-rearing, preserving scarce resource, protecting sovereignty and democracy (this rationale goes primarily to a part of DOMA not quoted here, 28 U.S.C. §1738C), and morality. *Id.* at 12-18.

VI. LAW-MAKERS IN 49 OF THE 50 STATES BELIEVE MARRIAGE IS RATIONAL, CONSTITUTIONAL, AND WISE

There is some disagreement about the number of States that define or protect marriage. The number “45” is often used, but a report from the Congressional Research Service shows that 49 of the 50 States have laws (including judicial decisions) that either define conjugal marriage or refuse to recognize same-sex “marriage” or both. Congressional Research Service Report for Congress, No. RL31994, updated April 7, 2004, *reprinted at* “Legal Threats to Traditional Marriage: Implications for Public Policy,” Hearings before the Subcommittee on the Constitution of the Comm. on the Judiciary, U.S. House of Representatives, Serial No. 76, 108th Cong., 2d Sess. 79-82 (2004). In any event, it is clear that a vast majority of Americans and their elected officials do not regard as “irrational” the concept of marriage as a relationship between one man and one woman.

VII. SOME COMPELLING STATE INTERESTS IN MARRIAGE

There are numerous reasons for preferring and protecting marriage, but in this section we touch on just five:

A. Unity, Sexual Complementarity, and Bridge-Building

First, marriage unites the two sexes in a formal, hopefully stable, sexual relationship. This fact alone is sufficient to justify a legislature in preferring marriage and defining it exclusively as the union of a man and a woman.

A legislature – even a legislature operating under an Equal Rights Amendment – need not be blind to the fact that the human race comprises men and women, and that marriage unites them uniquely. A state is entitled to prefer the union of a *male/husband* and a *female/wife* over other kinds of pairs, particularly because the male-female pair is the only one that can reproduce the species.

There may be many ways in which males and females differ and complement each other,¹¹ but consider just the differences in their sexuality.

“A large body of scientific research” has shown four important differences in the sexuality of men and women. First, “men show greater sexual desire than do women.” Second, “women place greater emphasis on committed relationship[s].” Third, “aggression is more strongly linked to sexuality for men than for women.” Fourth, “women’s sexuality tends to be more . . . capable of change over time.” These differences “are pervasive, affecting thoughts and feelings as well as behavior, and they characterize not only heterosexuals but lesbians and gay men as well. . . .”

L. Peplau, “Human Sexuality: How Do Men and Women Differ?” 12(2) *Current Directions in Psychological Science* 37 (April 2003) (quoting from abstract).¹²

When it comes to commitment and sexuality, men tend to occupy the North Rim while women tend to occupy the South Rim, and there is a deep chasm

¹¹ See, e.g., L. Sax, *Why Gender Matters: What Parents and Teachers Need to Know About the Emerging Science of Sex Differences* (Doubleday, 2005), ; M. Legato, *Why Men Never Remember and Women Never Forget* (Rodale 2005) (Dr. Legato is founder and director of the Partnership for Gender Specific Medicine at Columbia University); Melissa Hines, *Brain Gender* (Oxford Univ. Press, 2004),; S. Rhoads, *Taking Sex Differences Seriously* (Encounter Books, 2004), ; T. Wizemann & M. Pardue (eds.), *Exploring the Biological Contributions to Human Health: Does Sex Matter?* (National Academy Press, 2001); David Geary, *Male, Female: The Evolution of Human Sex Differences* (American Psychological Assoc. 1998); E. Maccoby, *The Two Sexes: Growing Up Apart, Coming Together* (Belknap Press, 1998); and Blum, Deborah, *Sex on the Brain: The Biological Differences Between Men and Women* (Viking Press, 1997).

¹² See also, D. Schmitt *et al.*, “Universal Sex Differences in the Desire for Sexual Variety: Tests from 52 Nations, 6 Continents, and 13 Islands,” 85(1) *Jn. of Personality & Social Psychology* 85 (July 2003); T. Greitemeyer, “Receptivity to Sexual Offers as a Function of Sex, Socioeconomic Status, Physical Attractiveness, and Intimacy of the Offer,” 12(3) *Personal Relationships* 373 (Sept. 2005); and M. Oliver & J. Hyde, “Gender Differences in Sexuality: A Meta-Analysis,” 114(1) *Psychological Bulletin* 29 (July 1993) (showing large difference between the sexes in attitudes toward casual sex).

between. In one study, 75 percent of men but zero percent of women were willing to entertain a sexual offer from an attractive stranger of the opposite sex.¹³

B. Equality and Burden-Sharing

Second, marriage is an attempt to bring greater equity to family burdens which fall exclusively (child-bearing) or heavily (child-rearing) on women. Nature has decreed that a sexual act between a man and a woman can make a baby (a sexual act between persons of the same sex cannot make a baby), but the requisites of nature do not fall equally upon the two sexes.

Among humans, many males invest heavily as parents through the teaching of crucial social skills, by emotional nurturing children through difficult times, and by generally investing resources and prestige in their children. Nevertheless, human males typically invest considerably less in active parenting effort than females do across all known cultures. In addition, men incur much lower levels of obligatory or ‘minimum’ parental investment in offspring than women do. That is, men are not obligated to invest as much as women do to produce viable progeny.

Women are obligated, for example, to incur the costs of internal fertilization, placentation [sic], and gestation in order to reproduce. The minimum physiological obligations of men are considerably less — requiring only the contribution of sperm. Furthermore, all female mammals, including ancestral women, carried the obligatory investment burdens associated with lactation. Lactation can last several years in human foraging environments, years during which it is harder for women to reproduce and invest in additional offspring than it is for men.

D. Schmitt, *et al.*, “Universal Sex Differences in the Desire for Sexual Variety: Tests from 52 Nations, 6 Continents, and 13 Islands,” 85(1) *Journal of Personality & Social Psychology* 85, (under subheading, “How Does Parental Investment Theory Apply to Humans?”) (July 2003) (numerous citations omitted).

¹³ D. Buss, *Evolution of Desire* at 73 (Basic Books 1994), citing R. Clark & E. Hatfield, “Gender Differences in Receptivity to Sexual Offers,” 2 *Jn. Psychol. & Human Sexuality* 39, 50 (1989). See also, D. Buss, “Evolution and Human Mating,” 18 *Harv. Jn. L. & Pub. Policy* 537 (1995).

C. Stability and Bonding, Especially With Fathers

Third, marriage helps bind children to *both* of their parents.¹⁴ It also helps bind fathers to their own children. There is not a child-welfare agency in the United States that is not deeply concerned about fatherlessness.

- The Maryland Vital Statistics Administration (VSA) reports that in Maryland in 2004, 35.7 percent of all births were to unmarried mothers.
- The 2000 U.S. census showed that in Maryland there were almost 268,000 children living in homes with their mother but no father. This represents 19.8 percent of all children living in households.

The preferences and entitlements of marriage are designed, in part, to make marriage attractive to men who father children – and there is no dispute that these children desperately need their fathers. *See generally*, K. Pruett, M.D., *Fatherneed: Why Father Care Is as Essential as Mother Care for Your Child* (The Free Press, 2000).

¹⁴ See the thought-provoking article, J. David Velleman, “Family History” in 34(3) *Philosophical Papers* 357, 371 (Nov. 2005):

The reason for resorting to donated gametes in many cases, of course, is the desire of an adult to have a biologically related child, despite lacking a partner with whom he or she can conceive. . . . Yet whereas the parent will be just as fully related to the child as any mother or father, the child will know only half of its biological parentage. Surely, we don’t believe that parents are entitled to make themselves slightly better off in some fundamental dimension by impoverishing their children in the same dimension. Why, then, should they be entitled to enlarge their own circle of consanguinity by creating children whose circle will be broken in half?

D. Training, Educating, Civilizing

Fourth, marriage is the optimal place for rearing children.¹⁵ Of course, children can (and do) thrive in many sorts of environments, but a state is entitled to conclude that a girl thrives best in a family with both a mother and a father, and that a boy thrives best in a family with both a father and a mother. This is the preferred way for a girl to become a woman and a boy to become a man, and for both to enter and engage a world made up of (chromosomal) XX-humans and (chromosomal) XY-humans. A state has a compelling interest in protecting this optimal environment.

The claim that conjugal marriage is the best place for rearing children is regarded as either wrong or unproven by some critics who seem to believe that social science studies involving a hundred or so subjects tell us more about life than life itself. However, much of the data on same-sex parenting are tentative, incomplete, narrow, tendentious, or just plain bad. The Marriage Law Project, which participated in the writing of this brief, has published an analysis of the studies on same-sex parenting. The authors reviewed 49 studies on same-sex parenting and concluded that “the methods used in these studies are so flawed that the studies prove nothing.” R. Lerner, Ph.D. & A. Nagai, Ph.D., *No Basis: What the Studies Don’t Tell Us About Same-Sex Parenting* (MLP, 2001).

Justice Sosman’s opinion in the Massachusetts marriage case described the research situation accurately when he said:

[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

¹⁵ See especially, D. Byrd, Ph.D., “Gender Complementarity and Child-Rearing: Where Tradition and Science Agree,” 6 *Jn. Law & Family Studies* 213, 227-28 (2004) (“The research is clear: mothers and fathers are essential for optimal child-rearing. Gender complementarity affords children the opportunity to thrive in the best possible environment. Other family forms are not equally as helpful or healthful for children. Substantial research demonstrates the negative effects of father hunger. One can only surmise the consequences of mother hunger.”).

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 Public Health, 798 N.E.2d 941, 979-80 (Mass. 2003) (Sosman, J., dissenting).

On the political uses of social science, see generally, R. Wright, Ph.D., & N. Cummings, Ph.D. (eds.), *Destructive Trends in Mental Health: The Well Intentioned Path to Harm* (Routledge, 2005).

E. Tradition and Morals

Fifth, marriage is traditional.¹⁶ We are aware that tradition has fallen into disrepute in some quarters, and we know what the Court below had to say about it, *Deane v. Conaway* at *9. Nevertheless, we are unwilling to count it as naught.

Tradition is the wisdom of the species. It is not, as some apparently think, a collection of bad habits left over from previous generations. Some traditions may be outmoded or even immoral (marriage is not one of them), but we should refuse to treat our forebears as if they were no more than bigots and simpletons.

The Twentieth Century was the bloodiest in the history of the planet, and its greatest villains were socialist utopians of one sort or another, R.J. Rummel, *Death by Government* (Transaction, 1994). We submit that all of us should be most humble in asserting moral superiority over those who have gone before.

In Chapter 4 of *Orthodoxy*, G.K. Chesterton observed that:

Tradition means giving a vote to the most obscure of all classes, our ancestors. It is the democracy of the dead. Tradition refuses to submit

¹⁶ The term “morals” appears in some 175 sections of the Maryland Code, and in three sections of the Constitution, Maryland Declaration of Rights, Art. 36 (“the laws of morality”), Md. Const., Art. 3, §61 (“pubic safety, health or morals”); and Md. Const., Art. 15, §2 (“moral turpitude”).

to the small and arrogant oligarchy of those who merely happen to be walking about. All democrats object to men being disqualified by the accident of birth; tradition objects to their being disqualified by the accident of death. Democracy tells us not to neglect a good man's opinion, even if he is our groom; tradition asks us not to neglect a good man's opinion, even if he is our father.

The institution of marriage has been ratified by thousands of generations in every corner of the globe. It ought not to be discarded on the junk heap of history because a handful of plaintiffs have a new theory of family life and human sexuality. Democratic decision-making, which takes into account the traditions and morals of a people, has proven to be one of the surest bulwarks against the kind of utopian schemes that have proven so dreadfully destructive.

There is, of course, a vast diversity among Maryland's families. There are unmarried households, married couples who do not have children, single parents, divorced and widowed parents, foster families, adopted children and adopting families, intergenerational households, and so on. Such diversity does *not* reduce – indeed it *enhances* – the State's compelling interest in defining, protecting, and strengthening conjugal marriage. Striving to promote the optimal family arrangement is not disparaging to other arrangements.

Governments rely on marriage to bind fathers and mothers and children together. The system works imperfectly and there are numerous failures, but that hardly means it is irrational. To the contrary, it is the best system humankind has been able to devise, and it ought to be strengthened rather than abandoned. See generally, R. George, Ph.D. & J. Elshtain, Ph.D. (eds.), *The Meaning of Marriage: family, state, market, and morals* (Spence, 2006).

CONCLUSION

The Court below erred and should be reversed.

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As required by Rule 8-504(a)(8), *Amicus* states that this brief was written in 13-point Times New Roman font. Neither the kerning nor the horizontal scaling was modified. *See* Rule 8-112(c).

Proof of Service

Two (2) copies of the foregoing Amicus Curiae brief of the Knights of Columbus were served by mail on June 29, 2006 addressed as follows:

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