In The Court of Appeals
OF MARYLAND

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Defendants-Appellants,

–against–

GITANJALI DEANE & LISA POLYAK; ALVIN WILLIAMS & NIGEL SIMON; TAKIA FOSKEY & JOANNE RABB; JODI KELBER-KAYE & STACEY KARGMAN-KAYE; DONNA MYERS & MARIA BARQUERO; JOHN LESTITIAN; CHARLES BLACKBURN & GLEN DEHN; STEVEN PALMER & RYAN KILLOUGH; PATRICK WOJAHN & DAVID KOLESAR; and MIKKOLE MOZELLE & PHELICIA KEBREAU,

Plaintiffs-Appellees.

BRIEF ADDRESSING PROPER APPLICATION OF MARYLAND'S RATIONAL REVIEW STANDARDS SUBMITTED BY *AMICI CURIAE* THE BAZELON CENTER FOR MENTAL HEALTH LAW, THE MARYLAND DISABILITY LAW CENTER, MARYLAND ADAPT, THE NATIONAL COUNCIL ON INDEPENDENT LIVING, THE NATIONAL MENTAL HEALTH ASSOCIATION, THE NATIONAL SENIOR CITIZENS LAW CENTER, AND PEOPLE FOR THE AMERICAN WAY

On Appeal from The Circuit Court for Baltimore City, Maryland,
Honorable M. Brooke Murdock, Judge

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INTERESTS OF AMICI

Amici are a diverse set of organizations that advocate in Maryland and nationally for the rights of people with disabilities, the aged, those struggling with poverty, and others who have faced irrational discrimination. They include: the Bazelon Center for Mental Health Law, the Maryland Disability Law Center, Maryland ADAPT, the National Council on Independent Living, the National Mental Health Association, the National Senior Citizens Law Center, and People for the American Way.[1]

All *amici* share a strong common interest in an issue potentially central to this case: the proper application of rational basis review to legislative classifications that single out one group of individuals for discriminatory treatment. While *amici* do not contend that the rational basis test is the appropriate standard of review in this case, they seek to ensure that should that standard be applied, it be applied correctly. This brief accordingly is offered to assist the Court should it determine to employ rational basis review to the challenged marriage restriction.

Even though rational review is deferential to legislative judgments, under the standards applied both by this Court and the U.S. Supreme Court it still at a minimum requires courts to determine whether the government's differential treatment of members of two groups on the basis of a particular characteristic rationally furthers a legitimate government purpose. While classifications along such lines as disability, age and income have not been deemed so suspect by the courts as to call for strict scrutiny,[2] when the government uses such characteristics to deny some individuals rights or benefits available to others the classification

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[1] *See* attached Appendix for descriptions of each *amicus* organization.

[2] *See Kirsch v. Prince George's County*, 331 Md. 89, 98-99 (1993); *Attorney General of Md. v. Waldron*, 289 Md. 683, 708-09 (1981). *See also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-46 (1985).

nonetheless must meet this basic equal protection requirement. When the difference in treatment does not itself advance a legitimate government purpose, it fails even rational basis review.

The government defendants urge this Court to abandon its vital, robust doctrine of rational basis review, which the Court has applied with especial vigor in contexts such as this where important personal interests are at stake and where a discrete group of individuals is burdened by the government. Indeed, defendants fail even to *acknowledge* that this Court, as well as the United States Supreme Court applying parallel federal standards, have established this requirement of fit between legislative classification and an independent and legitimate government purpose, and have done so to ensure that the government does not engage in arbitrary or biased discriminations against discrete groups.

Rather than submit to these governing rational review standards, defendants instead urge the Court to import into Maryland jurisprudence the faulty – and virtually toothless – brand of review recently espoused by some out-of-state courts in challenges under their state constitutions to laws denying same-sex couples access to civil marriage. These cases employ a version of rational basis review that conflicts with applicable Maryland case law, as well as Supreme Court jurisprudence. If adopted in Maryland, this watered-down version of judicial review will result in injustice in contexts in which the right to equal protection of individuals is at stake, including where the interests of those served by the *amici* organizations are being undermined. All too often in our history those with disabilities, the elderly, the impoverished and others singled out for discriminatory treatment have been denied rights based on irrational prejudice and unthinking stereotypes. This brief explains why defendants' efforts to strip rational review of force as a bulwark against arbitrary government discriminations should be rebuffed.

INTRODUCTION

In 1973 the Maryland legislature enacted Family Law § 2-201, limiting civil marriage in the State to unions of "a man and a woman." This statute was passed to ensure that lesbian and gay couples would be barred from civil marriage, an indisputably vital institution "at the center of family life in American society" that confers countless legal protections for spouses and any children they may have. *Deane & Polyak v. Conaway*, No. 24-C-04-005390, 2006 WL 148145, at *1 (Md. Cir. Ct. Jan. 20, 2006). *See also* Brief of Appellants ("App. Br.") at 27-28, 41.

Plaintiffs, lesbian and gay members of same-sex couples, argued in the circuit court that the marriage restriction is subject to – and fails – strict scrutiny because it violates their fundamental right to marry and discriminates against them on the bases of sex and sexual orientation without advancing a compelling government interest. Plaintiffs also argued that the restriction cannot satisfy even rational basis review because the legislative classification does not rationally further a legitimate government purpose. The circuit court agreed. 2006 WL 148145, at *6.

This brief is offered to assist the Court in the event the Court determines to apply rational basis review in this case. It focuses on the Maryland and U.S. Supreme Court precedents that guide how the rational basis test is framed and applied in cases where discrete groups of people have been singled out for denial of significant individual interests.

Section I of the brief reviews Maryland's vital rational review jurisprudence, which actively scrutinizes whether a legislative classification rationally advances a legitimate government objective, and does so most closely when important personal interests of distinct groups of Maryland residents are at stake. Section II addresses the corresponding rational review jurisprudence of the

United States Supreme Court, which also has been applied most carefully when a classification impinges on personal and family relationships, and particularly where an historically disfavored group has been singled out for unequal treatment. *See Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

Rather than rely on these Maryland and federal precedents, defendants ask the Court instead to apply an incorrect, diluted standard of review advanced in several recent marriage cases from other jurisdictions, including in *Hernandez v. Robles*, 7 N.Y.3d 338, __ N.E.2d __, 2006 N.Y. LEXIS 1836 (2006), and *Andersen v. King County*, 138 P.3d 963 (Wash. 2006). Section III analyzes how the prevailing opinions in those cases diverge from the settled equal protection jurisprudence of this Court and the U.S. Supreme Court. Applying a degree of deference that gives virtual *carte blanche* to arbitrary and discriminatory legislative classifications, these out-of-state decisions claim that a government interest in sheltering children "accidentally" conceived through heterosexual liaisons can justify restricting marriage only to heterosexual couples. But Maryland and federal rational review standards demand more: they require that the law's classification *excluding* same-sex couples and their families from the same benefits of marriage actually *advance* this purported government objective. Indeed, as Section III highlights, numerous Maryland and Supreme Court rational review precedents would have been decided very differently under the weakened standards that defendants advocate.

Finally, Section IV frames the questions the Court would need to address in order to engage in a rational basis review that is true to the dictates of Maryland precedents. *Amici* respectfully submit that should the Court decide to apply rational basis review in this case, these meaningful standards of review, not those urged by the defendants, should govern the Court's analysis of whether the marriage restriction violates equal protection.

I. Maryland's Rational Review Test Requires That Burdens Created By A Legislative Classification Rationally Advance A Legitimate Government Purpose And Is Applied Most Actively To Classifications Impinging On Important Interests Of Maryland Residents Or Disfavoring Discrete Groups of Individuals.

The guarantee of equal protection embodied in Article 24 of the Maryland Declaration of Rights requires that, at a minimum, a statutory classification rationally advance the government objective behind its enactment. *Verzi v. Baltimore County*, 333 Md. 411, 420 (1994). Although rational review is deferential to legislative determinations, this standard of review is far from the rubber-stamp of legislative judgments advocated by the defendants. It would be a serious misreading of this Court's precedents to conclude that rationality review is toothless, as defendants suggest. Instead, this Court has observed that "[w]e . . . have not hesitated to carefully examine a statute and declare it invalid if we cannot discern a rational basis for its enactment." *Id.* at 419.

Fundamental equal protection principles require that any challenged difference in legislative treatment of a discrete group meet two basic requirements: At minimum, first, "a legislative classification [must] rest upon some ground of difference having a fair and substantial relation to the object of the legislation," and, second, the object of the legislation must be a "legitimate" one. *Frankel v. Bd. of Regents of the Univ. of Md. Sys.*, 361 Md. 298, 315-17 (2000) (quotations omitted).

With respect to the first prong, it is not enough that the legislation promote some general benefit for some residents; instead, the legislation's exclusion of other residents from the government benefit must itself advance the government objective. It is the classification itself – the legislative judgment to place two groups on opposite sides of a line drawn by the government – that must be justified to survive even the most deferential form of equal protection scrutiny. In cases spanning back to the 1920s, this Court has not hesitated to declare

unconstitutional legislative distinctions that "create[] an arbitrary and irrational classification" in violation of this core principle of equal protection. *Frankel*, 361 Md. at 318. *See id.* at 315-16; *Mayor of Havre de Grace v. Johnson*, 143 Md. 601 (1923) (striking down residency restriction to operate car for hire).

Moreover, the Court uses special care when applying rational basis review to assess classifications that affect a significant personal interest, even if that interest is not deemed to be a fundamental right triggering strict scrutiny of laws that infringe upon it. "'The vitality of this State's equal protection doctrine is demonstrated by our decisions which, although applying the deferential standard embodied in the rational basis test, have nevertheless invalidated many legislative classifications which impinged on privileges cherished by our citizens.'" *Verzi*, 333 Md. at 419 (quoting *Attorney General of Md. v. Waldron*, 289 Md. 683, 715 (1981)). Personal interests that have been found weighty enough to warrant this more careful application of rational basis review have ranged from the pursuit of a chosen livelihood, *id.*; *Md. State Bd. of Barber Exam'rs v. Kuhn*, 270 Md. 496 (1973); to access to collective natural resources, *Bruce v. Dir., Dep't of Chesapeake Bay Affairs*, 261 Md. 585, 600 (1971); to access to higher education, *Frankel*, 361 Md. 298; *Kirsch*, 331 Md. 89 (1993); to the ability to find housing without regard to one's occupation or household configuration, *id.*

This Court likewise has demonstrated special sensitivity in applying the rational basis test when legislation has distributed benefits and burdens unequally among individual residents of the State. The Court has been "particularly distrustful of classifications" based on factors like "geography" that have been used to treat one group of State residents differently from the "remainder of the State." *Verzi*, 333 Md. at 423. *See, e.g.*, *Frankel*, 361 Md. 298 (examining rationality of law classifying students based on where their source of financial support resides); *Havre de Grace*, 143 Md. 601 (expressing skepticism towards exclusion of non-residents from plying trade within town). This enhanced care

has extended to classifications imposing "economic burdens" on some groups of individual Maryland residents over others. *Frankel*, 361 Md. at 315. In contexts such as these, the Court's review of whether the statutory classification itself actually advances the government's purported goals in a rational way has been most active.

With respect to the second prong of the rational review test – that the government objective for the classification be a *legitimate* one – this Court has looked beyond what the state has asserted as a legitimate object of the law to discern whether an underlying illegitimate motivation better explains the classification. When this is the case, the Court has not hesitated to strike down the classification as violating Article 24. *See, e.g.*, *Verzi*, 333 Md. at 427; *Havre de Grace*, 143 Md. at 608.

The present appeal implicates powerful personal and economic interests for Maryland's lesbian and gay residents, a distinct segment of the State specifically singled out for exclusion from the benefits of civil marriage. Indeed, in many cases where classifications have impacted interests markedly *less* significant than those at stake here – and for groups that have not been burdened by the kinds of historical civil rights challenges faced by lesbians and gay men – this Court has

attentively examined the fit between a law's classification and its objective in order to guard against arbitrary government discrimination.[3]

In such instances, the Court has engaged in a more searching application of the rational basis standard that looks for substantiation of a legitimate and rational reason for the *burden imposed by the challenged classification* – not merely re-framed improper purposes, speculation based on generalizations and stereotypes, or hypothesized valid government goals that remotely might be furthered by the classification. *See, e.g.*, *Verzi*, 333 Md. at 425-27; *Kirsch*, 331 Md. at 106-09; *Waldron*, 289 Md. at 717, 723-25; *Kuhn*, 270 Md. at 508-09. Another important consequence of Maryland's more searching form of rational basis review is that a challenged classification is more apt to be rejected if it is appreciably over- or under-inclusive. Significant over- or under-inclusivity has indicated, in the Court's view, that a classification may have been enacted arbitrarily or for illegitimate purposes. *See, e.g.*, *Frankel*, 361 Md. at 317; *Kirsch*, 331 Md. at 107-08; *Waldron*, 289 Md. at 724-25.

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[3] *See, e.g.*, *Verzi*, 333 Md. 411 (right of tow truck operators to do business across county lines); *Waldron*, 289 Md. 683 (right of pensioned retired judges to practice law for compensation). That lesbian and gay adults have faced severe and ongoing civil rights challenges has been well acknowledged by this Court and the U.S. Supreme Court. *See, e.g.*, *Boswell v. Boswell*, 352 Md. 204, 237 (1998) (cautioning lower courts not to allow "personal bias[,] stereotypical beliefs . . . [and] abstract presumptions" against lesbian and gay parents to influence custody and visitation determinations); *Lawrence*, 539 U.S. at 575 (striking down sodomy prohibitions that have contributed to "discrimination both in the public and in the private spheres" against gay people); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (striking down state constitutional amendment "born of animosity toward the class of persons affected" denying lesbian and gay residents legal protections from discrimination).

A. The Court's careful application of the rational basis test in cases challenging classifications that impinge on important personal interests or burden discrete groups of individuals demonstrates the meaningful review required in this case, if rational basis review is the standard applied.

The following analysis of relevant Maryland precedents illustrates how the principles summarized above have been applied in practice. These cases, discussed from most recent to most longstanding, demonstrate the meaningful rational review that has been a hallmark of Maryland's equal protection jurisprudence and that would govern if the rational basis test were to be applied in the present appeal.

Frankel

In *Frankel v. Board of Regents of the University of Maryland System*, 361 Md. 298 (2000), the Court applied what it referred to as the "'minimal' rational basis test" to a University of Maryland Board of Regents' policy that precluded students who resided within Maryland from receiving lower in-state tuition rates if they were financially dependent on a non-resident. 361 Md. at 315. The Court accepted as legitimate the asserted purpose of the policy – to allocate "the substantial benefit of lower tuition rates" to bona fide Maryland residents. *Id.* at 312, 317. But the Court's review did not stop at a determination that the goal of the policy was valid. The Court also considered whether the means used – drawing the line between those eligible and those ineligible for in-state tuition based on the residence of their source of support – actually advanced that goal.

The Board of Regents argued that financial dependency on out-of-state sources was a telling indicator that an individual might not be a bona fide Maryland resident, and hence justified the classification. *Id.* at 312. But the Court posited several "hypothetical situations" in which, in an individual case, the Board's generalization would *not* hold true, such as if a parent who was the financial support of a life-long resident Maryland student had moved out of state

following a divorce, or if the out-of-state grandparent of a Maryland resident was supporting the student through college. *Id.* at 317-18. The Court determined that "the Board's absolute preclusion of resident status for any student whose primary source of monetary support resides out-of-state has no 'fair and substantial relation to' the Board's and Policy's objective. On the contrary, many applications of the Policy will be inconsistent with the objective of providing a tuition benefit to bona fide Maryland residents." *Id.* at 317. Thus the classification's over-inclusivity – that in some applications the classification did not advance and even thwarted the government's purpose of subsidizing the higher education of Maryland residents – was an indication that the classification failed to advance the proffered state interest. As a result, the policy failed rational review and violated the State guarantee of equal protection.

Verzi

In *Verzi v. Baltimore County*, 333 Md. 411 (1994), the Court likewise carefully considered whether a classification disadvantaging some Maryland residents – in this case a provision allowing the police to call to an accident scene only tow truck operators with a place of business within the county – actually furthered a legitimate government purpose. The Court credited as legitimate the two purported government objectives of the law – decreasing traffic congestion and delays and protecting the public from fraud on the part of towers outside the administrative control of the county – but the Court was "not convinced that the classification . . . furthers those objectives." 333 Md. at 425. The Court refused to accept at face value the assertion that out-of-county towers will take longer to reach accidents, instead noting that "it is not difficult to envision numerous other situations in which an out-of-county tower will be substantially closer . . . to an accident scene than are in-county towers." *Id.* at 425-26. The Court thus rejected that proffered justification as "spurious." *Id.* at 426.

Examining the government's second claimed interest – ensuring county administrative control over towers operating within its borders – the Court observed that the county had other regulatory powers at its disposal for addressing problems with out-of-county towers, and noted that these operators were permitted to do business under other circumstances in the county, belying concerns about any risks they might pose. *Id.* at 426-27.

Because the restriction on out-of-county towers in *Verzi* was so disconnected from the legitimate government interests it purportedly served, the Court examined whether another, illegitimate, government motive might be at play: "Because we can find no rational basis for the distinction between in-county and out-of-county towers, we are led to the 'more reasonable and probable view . . . that [the classification] was intended to confer the monopoly of a profitable business upon residents of the town.'" *Id.* at 427 (quoting *Havre de Grace*, 143 Md. at 608). As a result, the Court struck down the law.

Kirsch

In *Kirsch v. Prince George's County*, 331 Md. 89 (1993), the Court was confronted with a zoning restriction prohibiting the rental of housing to groups of three or more students. This restriction classified who could rent in a community based on the person's occupation and the number of members in their household. *Id.* at 104. The Court framed its rational review inquiry thus: "The *crucial question* for this Court is whether the County *by adopting the ordinance's classification advances its objective* of clearing residential neighborhoods of noise, litter, and parking congestion within the command of the Equal Protection Clause . . . ." *Id.* at 106 (emphasis added). In the same vein as in *Frankel* and *Verzi*, the Court deemed it highly relevant that the ordinance was under-inclusive, in that the ordinance permitted other groups of unrelated individuals to rent in the area who similarly could cause parking congestion, noise and litter. *Id.* at 108-09. The Court concluded that drawing the line between who could and could not rent

based on their occupation is the "sort of arbitrary classification forbidden under our constitutions." *Id.* at 106.

Notably, the majority declined to follow the approach of the *Kirsch* dissent, which hypothesized "conceivable" justifications for the classification based on generalizations about students and their lifestyles, likely reactions of their "[i]ntolerant neighbors," and the potential downward spiral for once "quiet . . . residential neighborhoods." *Id.* at 110-11 (Chasanow, J., dissenting). While the dissent asserted that rational review requires crediting these sorts of "hypothetical justifications," *id.* at 111, the Court demanded more than speculative bases to sustain the legislative classification in such a context.

Waldron

Attorney General of Maryland v. Waldron, 289 Md. 683 (1981), in which the Court struck down a statute prohibiting a pensioned retired judge from practicing law for compensation, demonstrates the careful review required where a non-fundamental but still important individual interest has been denied to a discrete group. In that case, the Court concluded that the ability to pursue one's profession is not a fundamental right accorded the highest equal protection review, but nonetheless determined that "the right to pursue one's calling in life is a significant liberty interest entitled to some measure of constitutional preservation." *Id.* at 717, 722.[4] The Court explained that, "where vital personal interests (other than those impacted by wholly economic regulations) are substantially affected by a statutory classification, courts should not reach out and speculate as to the existence of possible justifications for the challenged enactment." *Id.* at 717.

The Court instead closely examined the claimed purposes served by the law and found that none was sufficiently served by the burden imposed on the affected class. The Court first rejected the claim that the classification reflected the

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[4] *Amici* do not contend that the right to marry is less than a fundamental right.

pension laws' purpose as "an income maintenance scheme." *Id.* at 723. It explained that "the structure of the judicial pension system itself belies the State's position, for no provision of the plan . . . reduces [the judge's] pension benefits if the retired judge receives income from other employment." *Id.*

The Court also rejected as a "post hoc rationalization" the argument that the law would result in savings to the State because it might cause some judges to forego their pensions in order to practice law. *Id.* at 724. "Undeniably, [the law] can save the State a bit of money, but we will not engage in tautological equal protection analysis by deducing purpose from result." *Id.*

Finally, the state interest in preventing the appearance of impropriety caused by former judges practicing before their colleagues on the bench, while a more plausible goal than the others propounded, nonetheless was found to be insufficiently furthered by the classification. The classification was "at once, both underinclusive and overinclusive" given that in some cases it would still permit judges to appear before colleagues, while in others it would foreclose areas of practice that never take a retired judge into the courtroom. *Id.* at 724-25.[5]

Kuhn

Maryland State Board of Barber Examiners v. Kuhn, 270 Md. 496 (1973), further demonstrates the Court's skepticism when presented with a legislative classification justified by the government on the basis of speculation and stereotype. *Kuhn* invalidated a statutory scheme permitting cosmetologists to

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[5] While *Waldron* frequently is cited among this Court's landmark rational review precedents, see, e.g., *Frankel*, 361 Md. at 315; *Verzi*, 333 Md. at 419, the case also has been characterized as applying a level of review approaching the heightened scrutiny that has evolved under federal Fourteenth Amendment jurisprudence to discriminations on such quasi-suspect bases as sex and legitimacy. *See, e.g., Murphy v. Edmonds*, 325 Md. 342, 357 (1992). However its standard of review is characterized, *Waldron* demonstrates the care the Maryland courts take in examining the rationality of classifications that significantly impinge on important personal interests.

provide services to female but not male customers. The government contended that the classification rationally advanced an interest in public safety, since cosmetologists were trained to provide services to women but not men. The Court nonetheless rejected arguments that "physiological differences between men and women" and "the hair of males and females," *id.* at 508, justified the classification. The Court explained that, "[m]anifestly, it cannot be seriously argued that if the object sought to be attained is the protection of the male public from inadequate training and inferior hygienic standards, the statute bears a real and substantial relation to that objective, when it is conceded that the very same services are rendered to female customers, for whom they are admittedly adequate." 270 Md. at 512.

Bruce

In *Bruce v. Director, Department of Chesapeake Bay Affairs*, 261 Md. 585 (1971), the Court struck down statutes requiring county residence to obtain a license to engage in commercial crabbing and oystering off the county's shores. This regulatory scheme restricted commercial watermen from crossing county lines to pursue their trade and effectively foreclosed residents of non-tidewater counties from engaging in the trade at all. The Court acknowledged that a State interest in conservation of crabs and oysters in Maryland waters was legitimate, *id.* at 602-03, but examined as well whether the residency restrictions actually advanced that interest. The Court concluded that restricting watermen "to earning their living in the county of their residence . . . bears no relation to the public interest or any realistic connection with conservation." *Id.* at 602-03. The Court again applied rational basis review with care because the restriction affected a right "to the enjoyment and use of natural resources" which all residents of the State "enjoy equally." *Id.* at 606.

Havre de Grace

Mayor of Havre de Grace v. Johnson, 143 Md. 601, 123 A. 65 (1923), an early example of the Court's careful rational review, rejected a city residency requirement to operate a car for hire because the requirement insufficiently advanced the government's purported objectives: "[W]e certainly cannot assume . . . that the operation of an automobile hiring business by a nonresident of Havre de Grace would, because of his nonresidence, constitute a greater peril to the health or welfare of that town than it would if operated by a resident." 123 A. at 67. Moreover, the restriction's over- and under-inclusivity invited the Court's suspicion that the city's stated objectives were an excuse for illegitimate government motives. *Id.* [6]

B. Defendants rely on inapposite cases involving more purely economic regulatory classifications imposing incidental burdens, where the Court's deference to legislative judgments is highest.

These precedents demonstrate that Maryland's equal protection rational review, though deferential, still demands careful analysis to determine whether the classification rationally advances the government interest it purportedly was designed to serve. This review is especially active when a classification prevents exercise of an important personal interest or disadvantages a discrete group of the State's residents.

Defendants entirely disregard these Maryland cases even though they are the precedents most closely analogous to the present appeal, should rational review be applied. Instead defendants rely on inapposite cases that reflect the

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[6] *See also Wheeler v. State*, 281 Md. 593 (1977) (prohibition on distribution of obscene matter by employees of some but not other enterprises failed rational review because selective burden it imposed bore no relation to legislative purpose of restricting distribution of pornography); *Dasch v. Jackson*, 170 Md. 251 (1936) (law licensing and regulating paper hangers who worked in Baltimore but not elsewhere in State failed rational review).

courts' reluctance to second-guess incremental legislative judgments involving more purely economic regulation,[7] especially in situations, unlike the present appeal, where the legislation incidentally regulates but does not entirely foreclose pursuit of some interest.[8] In pointing to these Maryland precedents, defendants attempt to frame this case as though it merely involves run-of-the-mill economic regulation, rather than vital personal interests for a discrete group of the State's residents who historically have faced serious civil rights challenges.

Significantly though, even in run-of-the-mill rational review cases where incremental measures are most likely to be upheld, this Court still has required that a rational and legitimate purpose be served by the line drawn by the legislature. Thus, for example, in *Whiting-Turner Contracting Co. v. Coupard*, 304 Md. 340 (1985), relied on by defendants, the Court upheld a statutory classification allowing a longer limitations period for suing a building contractor for

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[7] *See, e.g., Md. Aggregates Ass'n v. State*, 337 Md. 658, 672, 674-75 (1995) (upholding regulation of dewatering by surface mines but not other large appropriators of water given special threats posed by mines and greater governmental ability to regulate them); *Murphy*, 325 Md. at 362 (upholding statutory cap on damages awards that "represents the type of economic regulation which has regularly been reviewed under the traditional rational basis test by this Court and by the Supreme Court").

[8] *Compare Piscatelli v. Bd. of Liquor License Comm'rs*, 378 Md. 623, 645 (2003) (concluding that requirement that nightclubs close for several hours at two a.m. while restaurants were permitted to remain open rationally furthered government interest in ameliorating late night public disturbance caused by former but not latter establishments), *and Murphy*, 325 Md. at 369-70 (finding that statute capping jury awards for non-pecuniary injury at amount above common award levels furthered state interest in ensuring availability of reasonably priced liability insurance to compensate for injuries to members of public), *with Waldron*, 289 Md. at 717 (holding that challenged law "does not represent an economic regulation of lawyers; rather, it flatly denies one the right to engage in the practice of the profession for which he is otherwise qualified"). *See also Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 652 (1983) (noting that cases applying most searching rational review like "*Bruce* and others of its genre involved an absolute deprivation of a right or the outright discriminatory application of a law").

indemnification for personal injury than applied to suits against architects. The purpose of the statutory scheme was to balance the government's interests both in bringing repose to litigation and in promoting safe and cost-effective building improvements. *Id.* at 349-50. Noting that the statutory classification "dealing only with economic matters, need not be drawn so as to fit with precision the legitimate purposes animating it," *id.* at 357-58, the Court nevertheless required that the difference in treatment between the two groups rationally advance the legislative purpose. The Court concluded that because, unlike architects, building contractors are not subject to the quality control of training and licensing requirements and can limit personal liability through incorporation, it was reasonable for the legislature to determine that the longer limitations period for claims against them was needed to advance the legislative objectives. *Id.* at 354-55. Thus even the most deferential rational review under Maryland's Constitution requires that the classification and the burden it imposes rationally further some legitimate state purpose.

Amici respectfully submit that precedents such as *Frankel*, *Verzi*, *Kirsch* and *Waldron* apply most closely to the present case and should guide the Court's review of the challenged classification if the rational basis test is employed.

II. The Supreme Court Likewise Applies Rational Review To Strike Down Legislative Classifications That Do Not Advance A Legitimate And Independent Government Goal And Reviews With Special Care Those That Impinge On Important Personal Interests Or Disfavor A Discrete Group Of Individuals.

Cases from *Havre de Grace* through *Frankel* demonstrate Maryland's particularly well-developed jurisprudence requiring meaningful application of the rational basis test, especially in cases reviewing the rationality of infringements on interests of strong personal significance to a discrete set of State residents. As this Court repeatedly has emphasized, rational review under Maryland's equal protection guarantee stands independent of federal standards and, if anything, may

be *more* protective of the equality rights of Maryland residents. *See, e.g.*, *Frankel*, 361 Md. at 313. At the same time, the Court has looked for guidance to "persuasive" Supreme Court rational review precedents enforcing the federal equal protection guarantee. *Id.* These precedents set the floor, not the ceiling, for protections of individual rights in Maryland. *See Arizona v. Evans*, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution."). Indeed, many of this Court's landmark rational review decisions explicitly reference and incorporate similarly protective rational review standards from Supreme Court precedents. *See, e.g.*, *Kirsch*, 331 Md. at 98-105; *Waldron*, 289 Md. at 711-12. Because it may be helpful to establishing what, as a floor, is required under Maryland's Constitution, *amici* address the relevant Supreme Court precedents governing federal rational basis review.

A. Under "conventional and venerable" equal protection standards the Supreme Court requires at minimum that burdens created by a legislative classification bear a rational relationship to a legitimate and independent government interest.

Federal rational review standards include many principles already familiar from Maryland's jurisprudence. As in Maryland, "conventional and venerable" federal equal protection principles require the courts to consider the legitimacy and rationality of government justifications for disfavoring some persons, not simply whether the law generally serves the interests of those who are favored. *Romer v. Evans*, 517 U.S. 620, 635 (1996). The Fourteenth Amendment requires that the challenged difference in legislative treatment between two groups at minimum must (1) have a legitimate governmental purpose, and (2) rationally further that purpose. *Romer,* 517 U.S. at 633, 635. Under these principles, the Supreme Court focuses on whether the ends purportedly explaining the law's design are truly furthered by the exclusionary means employed. Thus a purported

state interest that is not logically furthered by the legislative classification or does not adequately explain why one group but not another was singled out for adverse treatment fails even the most deferential rational review. *See, e.g., id.* at 632 ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."); *Cleburne*, 473 U.S. at 446 (Equal protection will not permit "a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

The Supreme Court does not accept at face value that state interests generally served overall by a law suffice to explain its exclusionary structure. *See, e.g., Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 879-82 (1985). Instead, the requirement that the distinction drawn by the statutory scheme rationally further a legitimate state end is fundamental to the most basic mandate of equal protection – that the legislature not impose arbitrary or discriminatory burdens on one segment of the public. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633. Thus the legislative end must itself have substance independent of a desire simply to favor those benefited under the classification or to disfavor those denied the benefit.

In addition, no classification may be "drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633. Nor, under any standard of review, can the government justify discrimination against one group merely as a cost of *preferencing* another group of persons. *See Metro. Life*, 470 U.S. at 882 n.10. Distinctions that reflect disapproval of a minority or negative stereotypes about a group are illegitimate public purposes that also cannot sustain a legislative classification under *any* level of review. *Lawrence*,

539 U.S. at 580 (O'Connor, J., concurring); *see also Romer*, 517 U.S. at 633; *Cleburne*, 473 U.S. at 448-49.

As in Maryland's jurisprudence, run-of-the-mill "economic or tax legislation . . . scrutinized under rational basis review normally pass[es] constitutional muster, since 'the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.'" *Lawrence*, 539 U.S. at 579-80 (O'Connor, J., concurring) (quoting *Cleburne*, 473 U.S. at 440). Thus the Supreme Court's federal rationality review has been "especially deferential" towards classifications "made by complex tax laws," *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992); industry regulatory schemes, *e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); or large, complex social welfare programs involving distributions of limited funds, *e.g.*, *Dandridge v. Williams*, 397 U.S. 471 (1970).[9] In these subject matter areas the justification that the legislation brings some benefits as an incremental step often has rendered a classification rational enough to satisfy equal protection requirements. *See, e.g.*, *Beach Commc'ns*, 508 U.S. at 316; *Clover Leaf*, 449 U.S. at 466. Yet even a "one-step-at-a-time" approach requires some plausible rationale for the increment. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) (explanations offered "must find some footing in the realities of the subject addressed by the legislation"); *Beach Commc'ns*, 508 U.S. at 316-20; *Clover Leaf*, 449 U.S. at 461-66. "[E]ven in the ordinary equal protection case

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[9] As discussed in Section II.B. below, even in the social welfare context the Supreme Court has been much less deferential to legislative judgments where a classification has significant impact on personal relationships or where there is reason to infer that irrational prejudice or other illegitimate state purpose played a role in a law's enactment. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533, 537-38 (1973) (invalidating federal food stamp eligibility classification targeting "hippies"); *see also Plyler v. Doe*, 457 U.S. 202, 223 (1982) (state law withholding funds from school districts that enrolled children illegally admitted to the U.S. could not be "considered rational unless it further[ed] some substantial goal of the State").

calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause . . . ." *Romer*, 517 U.S. at 632.

Indeed, the Court has not hesitated to invalidate legislation even in the tax and business regulatory realm where a challenged classification cannot be seen to advance a legitimate state purpose. For example, in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), the Court struck down a New Mexico law granting a tax exemption to veterans residing in the state before May 8, 1976. The government argued that the classification furthered its interest in encouraging veterans to move to New Mexico. But the Court recognized the illogic of the classification as a means to advance this goal, since the law rewarded only those who had moved to New Mexico years before it was even enacted and therefore was unlikely to motivate veterans to move there now. *Id.* at 619-20.

The state's other proffered justification in *Hooper* – compensating "established" veterans in the state for their military service – likewise was found to be irrational. As the Supreme Court explained, "it is difficult to grasp how New Mexico residents serving in the military suffered more than residents of other States who served, so that the latter would not deserve the benefits a State bestows for national military service." *Id.* at 621. *See also Zobel v. Williams*, 457 U.S. 55 (1982) (striking down Alaska law granting preferences to long-time residents in distributions of state mineral income because this classification did not rationally advance state interests in promoting Alaska residency and prudently managing state funds).

In *Williams v. Vermont*, 472 U.S. 14 (1985), the Court invalidated an automobile tax registration scheme exempting from a state use tax those cars purchased either within Vermont or out-of-state by a Vermont resident. The statute was challenged by Vermont residents who had bought cars elsewhere prior

to moving to the state and thus were ineligible for the exemption. The state contended that the purpose of the tax, to raise revenue to maintain and improve the highways, was rationally furthered by taxing these Vermont car users. *Id.* at 17. The Court acknowledged that under rational basis scrutiny "legislative classifications are of course allowed some play in the joints," but concluded that the classification was "too imprecise" given that those excluded from the tax were no different in their use and need for upkeep of the state's roadways. *Id.* at 23, n.8. The Court reasoned that

> residence at the time of purchase is a wholly arbitrary basis on which to distinguish among present Vermont registrants . . . . Each is a Vermont resident, using a car in Vermont, with an equal obligation to pay for the maintenance and improvement of Vermont's roads. The purposes of the statute would be identically served, and with an identical burden, by taxing each. The distinction between them bears no relation to the statutory purpose.

Id. at 23-24.

Likewise, in *Metropolitan Life*, the Supreme Court emphasized that it is not enough for the government to have a general legitimate purpose in mind when it enacts a law; instead the "*burden [the classification] imposes*" also must "be rationally related to that purpose." 470 U.S. at 881 (emphasis added). The Court struck down a provision taxing domestic insurance companies at a lower rate than out-of-state companies operating within the state, rejecting as inadequate the government's general purpose of helping domestic industry. *Id.* at 879, 882. The Court explained: "If we accept the State's view here, then any discriminatory tax would be valid if the State could show it reasonably was intended to benefit domestic business. A discriminatory tax would stand or fall depending primarily on how a State framed its purpose – as benefiting one group or as harming another. This is a distinction without a difference . . . ." *Id.* at 882.

B. The Supreme Court applies rational basis review with particular care where important personal and family relationships or historically disfavored groups are affected.

The conventional, deferential rational basis standard under federal law embodies a separation of powers principle in which the judicial branch accords substantial leeway to the legislative branch to respond to the needs of the people. Rational review is applied with less deference to legislative enactments, however, when warranted to enforce the overriding guarantee the Constitution makes to each individual of equal protection of the laws.

Thus in cases where core civil liberties rather than tax schemes or industry regulation are at stake, the Supreme Court has applied more rigorously its examination of the fit between legislative means and ends. In two contexts the Court has applied federal rational basis review with most care: first, when a classification impinges on personal and family relationships and liberty interests that, even if not deemed "fundamental," are nonetheless important to the individual, and, second, when a classification is drawn to target an unpopular group, even without a finding that the class is "suspect." *See Lawrence*, 539 U.S. at 580 ("We have been most likely to apply rational basis review to hold a law unconstitutional . . . where . . . the challenged legislation inhibits personal relationships" or reflects "a desire to harm a politically unpopular group.") (O'Connor, J., concurring) (collecting cases).

The judicial presumption that legislative bodies will seek to pursue legitimate ends through rational means and that missteps will be corrected through the political process gives way if there is reason for concern that a discrete group may be the victim of majoritarian prejudice. It is, after all, only "absent some reason to infer antipathy" that the "Constitution presumes" that the "democratic process" will correct "improvident decisions . . . and that judicial intervention is generally unwarranted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). If there is "reason to infer antipathy," the Court will be less liable to assume that the

"democratic process" will rectify the legislative inequity and will play a less deferential role in order to protect the interests of the specially burdened group. "[W]e have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring).

Where there is reason to be concerned about the possible impact of prejudice against a discrete group, the Supreme Court's review has been most assertive, requiring *substantiation* that the differential treatment itself serves a valid purpose. In these cases the Court has not rested on speculative explanations of how the classification relates generally to a government interest. The Court instead has evaluated whether the burden on one group rationally furthers a legitimate interest based on real-world facts. *See, e.g.*, *Cleburne*, 473 U.S. at 446, 448-49. Likewise, in such circumstances the Court has been especially vigilant in requiring that the laws at issue be "grounded in a sufficient factual context for [a court] to ascertain some relation between the classification and the purpose it serve[s]." *Romer*, 517 U.S. at 632-33.

Another important corollary of the Supreme Court's closer rational review, similar to Maryland's, is that a challenged classification is more apt to be rejected if it is significantly over- or under-inclusive. *See, e.g.*, *Cleburne*, 473 U.S. at 449-50. In such cases concerns with the logic of a law's means reinforce doubt about the legitimacy of its ends. *See, e.g.*, *Moreno*, 413 U.S. at 533, 536-37.

Where impermissible state objectives appear to underlie a classification, the Supreme Court not only has rejected those interests, but also has reviewed any other proffered interests with particular care to ensure that improper motives were not, in fact, the overriding basis for the classification. *See, e.g.*, *Cleburne*, 473 U.S. at 448-50. In such cases, moreover, the Court has not itself attempted to conceive of some legitimate rational explanation for the classification beyond those advanced by the government, but instead has considered only any additional

government purposes actually put forward by the state. *See, e.g.*, *id.* at 449-50; *Moreno*, 413 U.S. at 534-38. To do otherwise would be to disregard the actual evidence of illegitimate government goals and make the judiciary complicit in their advancement.

These principles are exemplified by *Cleburne*, *Moreno* and *Romer*, in which the Court closely reviewed legislative classifications that operated to inhibit important personal interests or to discriminate against discrete disfavored groups.

Cleburne applied rational basis review to a city's denial of a special use permit to a group home for people with mental retardation, where other group facilities like hospitals, nursing homes, dormitories and fraternities were permitted in the community. The Court acknowledged that those with mental retardation "are indeed different from others not sharing their" disability and "in this respect they may be different from those who would occupy other facilities" permitted in the community. 473 U.S. at 448. But, crucially, the Court held that "*this difference is largely irrelevant unless the . . . home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses . . . would not.*" *Id.* (emphasis added). In such cases, a particular group cannot be excluded from participation in a government benefit – in *Cleburne* a zoning permit to live in the community, in the present case the ability to marry a spouse of the same sex – unless allowing them equal participation would "threaten" legitimate government interests. If the difference in treatment does not serve a government interest, the constitutional guarantee of equal protection is violated.

The *Cleburne* zoning provision failed this test. The Supreme Court first evaluated the city's argument that it was justified by the "negative attitude of the majority of property owners" towards institutions for those with mental disabilities. *Id.* at 448. The Court found this "justification" to be illegitimate: "[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable" in a legislative determination, "are not permissible bases for treating a

home for the mentally retarded differently" from other multiple dwellings. *Id.* at 448.

After pointing to evidence of such improper state goals, the Court closely examined other, facially legitimate, proffered interests. The state claimed that the restriction was justified as a means to address concerns about the safety of the group home's location on a flood plain, legal liability, potential over-crowding within the home, neighborhood noise and congestion, and fire hazards. *Id.* at 449-50. Refusing to accept these government interests at face value, the Court scrutinized whether the differential treatment of those with mental retardation rationally promoted the government interests. The Court concluded that it was "difficult to believe" that these government concerns justified singling out those with mental retardation for exclusion, since there was no basis to assume a group home for them would cause the feared problems any more than other congregate facilities that were permitted. *Id.* at 449. The classification was at once over- and under-inclusive, and so too "attenuated" from the "asserted goal," to be rational. *Id.* at 446. Nor did the Court attempt to hypothesize other conceivable rational bases for the classification beyond those offered by the government.

In another case invalidating a classification that impinged on personal relationships and reflected disapproval of an unpopular group, *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Supreme Court rejected a law that denied food stamps to households of unrelated persons. Legislative history, though scant, "indicate[d]" the measure was designed to exclude "hippies" and "hippie communes" from the program. *Id.* at 534. The Court rejected this "bare congressional desire to harm a politically unpopular group" as an illegitimate government interest. *Id.* at 534.

The Court went on to consider and dismiss arguments that the measure nevertheless should be sustained as serving an interest in preventing fraud because households of unrelated persons might be "'relatively unstable'" as well as more

likely to include individuals inclined to commit fraud. *Id.* at 535. The Court found these explanations not only "wholly unsubstantiated" but, in any event, insufficient to support a status-based ban on households otherwise eligible and in need of the benefits of the food stamp program. *Id.* Independent statutory provisions designed to address fraud "cast[] considerable doubt upon the proposition that [the restriction] could rationally have been intended to prevent those very same abuses." *Id.* at 536-37.

Most recently, in *Romer v. Evans*, the Supreme Court held that a Colorado constitutional amendment prohibiting any governmental measures that would protect lesbians and gay men from discrimination within the state could not satisfy even rational basis review.[10] 517 U.S. at 635. The government offered two rationales for the law: respecting the liberties of other citizens who have "personal or religious objections to homosexuality," and "conserving resources to fight discrimination against other groups." *Id.* The Court determined that the decision to classify based on sexual orientation was "so far removed from these particular justifications that we find it impossible to credit them." *Id.* Because the amendment bore no credible relationship to the state's proffered legitimate justifications, it gave rise to "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634. Moreover, it also defied the equal protection requirement that a classification serve "an independent and legitimate legislative end," rather than be drawn simply "for the purpose of disadvantaging the group burdened by the law." *Id.* at 633. "We must conclude that [the amendment] classifies homosexuals not to further a proper

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[10] *Romer* held that the Colorado amendment was not even "directed to any identifiable legitimate purpose or discrete objective" and accordingly could not satisfy even the most deferential rational basis standard. 517 U.S. at 635. The Supreme Court was not required to and did not address in *Romer* whether a higher level of constitutional scrutiny is appropriate for discrimination based on sexual orientation.

legislative end but to make them unequal to everyone else. This [a state] cannot do." *Id.* at 635.

III. The Recent Marriage Cases From Other Jurisdictions Relied On By Defendants Do Not Follow The Rational Review Standards Applied By This Court And The U.S. Supreme Court And Should Not Be Followed Here.

This Court and the U.S. Supreme Court apply a meaningful rational basis review to classifications that impinge on vital personal interests. If the rational basis test is applied here, close review is especially warranted given that the 1973 marriage law was enacted with the purpose of excluding lesbian and gay couples from access to civil marriage – singling out this historically disfavored group and denying them a right available to heterosexual couples.

Rather than meet the requirements of the rigorous rational review applied by this Court and the Supreme Court in analogous circumstances, defendants instead suggest that the Court import from non-Maryland cases a standard of review so deferential as to defy even "conventional and venerable" minimal rational review requirements. Defendants make heavy use of quotes from a handful of recent out-of-state marriage decisions to justify Maryland's legislated limitation on marriage to a man and a woman. *See* App. Br. 60-61. These cases all rely on essentially the same flawed reasoning: that restricting marriage to male-female couples purportedly "is rationally related to a legitimate government interest in providing for the offspring that may result from heterosexual intimacy, since 'no other relationship has the potential to create, without third party involvement, a child biologically related to both parents.'" *See* App. Br. 60 (quoting *Andersen*, 138 P.3d at 982). Even while acknowledging that many same-sex couples have children, defendants claim that it is rational to limit marriage to different-sex couples because only they can procreate "by accident." *See* App. Br. 61. They thus narrow the state's interest in civil marriage to offering a stable

environment for raising children born of unplanned heterosexual pregnancies. *See* App. Br. 61-62. [11]

The standards of rational basis review employed in the out-of-state cases defendants rely upon stray far from those that govern under Maryland and Supreme Court law. Indeed, it is telling that one of the precedents on which defendants most heavily rely is the Indiana intermediate appellate court decision in *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005), which employed that state's uniquely toothless constitutional jurisprudence to uphold a similar marriage restriction. Unlike Maryland, Indiana considers only whether "the disparate *treatment* accorded by the legislation" *relates to "inherent characteristics* which distinguish the unequally treated classes." *Id.* at 21 (emphasis added) (applying *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994)). Significantly, that state's jurisprudence requires no consideration of "the *purposes* of the legislation" or its burdens. *Morrison*, 821 N.E.2d at 22. The test could not be more lenient and is far afield from settled Maryland doctrine.

Indiana's idiosyncratic standard evolved under its state constitutional privileges and immunities guarantee, which is admittedly "less restrictive of legislative classification than the federal" equal protection guarantee. *Morrison*, 821 N.E.2d at 22 n.7 (quotations omitted). Indiana's standard does not permit consideration of whether the classification reflects intent to discriminate against a disfavored group or whether it suffers from even "*significant* under or

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[11] Defendants asserted before the circuit court several additional purported government interests in defense of the marriage restriction. *See* 2006 WL 148145, at *7-8. As it did with defendants' "accidental procreation" defense, the lower court concluded that these claimed government purposes cannot satisfy even the requirements of rational review. *Id.* Defendants have abandoned these other purported interests on appeal. Under this Court's standards of rational basis review, where "vital personal interests" are at stake it would be particularly inappropriate to "reach out and speculate as to the existence" of conjectural justifications that have been abandoned or not advanced by the government. *Waldron*, 289 Md. at 717.

overinclusiveness." *Id.* at 28 (emphasis added). Not surprisingly, this test "never resulted in a statute or ordinance being declared facially invalid" under the Indiana Constitution. *Id.* at 22, 28.

The decisions in *Hernandez* and *Andersen* adopted a similarly lenient brand of rational review to reach their results in the New York and Washington cases. Asserting that it would engage in only the most "highly indulgent" review of the classification, the *Hernandez* plurality paid a degree of deference that neither this Court nor the Supreme Court has given to legislative classifications involving far less significant liberty interests, and for groups not subject to historical disadvantage in the political process. 2006 N.Y. LEXIS 1836, at *20.

The same was true of the plurality opinion in *Andersen*. As Maryland did in Family Law § 2-201, the Washington legislature had enacted a statute limiting marriage to male-female couples for the express purpose of prohibiting marriages between lesbian or gay partners. *Andersen*, 138 P.3d at 968-70, 980-81. Despite the enactment's impact on vital personal interests and targeting of lesbian and gay residents for differential treatment, *id.*, the *Andersen* plurality determined that it need apply only the most "highly deferential standard" of review, *id.* at 983, one

far less searching than the rational review principles this Court employed in cases from *Havre de Grace* through *Frankel*.[12]

Hernandez's and *Andersen*'s "highly indulgent" approach to testing the constitutionality of the legislative classification, like *Morrison*'s, makes passage of the "test" a virtual *fait accompli* in any case in which it is put to use. At the outset

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[12] Defendants also rely heavily on two other out-of-state intermediate appellate court decisions, *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003), and *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. App. Div. 2005), *appeal pending*. An appeal from *Lewis* to the New Jersey Supreme Court has been argued and fully submitted and simply awaits decision. These cases applied particularly deferential standards of review and made the same errors in their articulation and application of rational review principles followed by the pluralities in *Hernandez* and *Andersen*, which are addressed in this brief.

On October 5, 2006, after defendants filed their opening brief in this Court, an intermediate appellate court panel in California upheld under that state's constitution the exclusion of same-sex couples from marriage, over a strong dissent. *See In re Marriage Cases*, ___Cal. Rptr. 3d___, 2006 WL 2838121 (Ct. App. Oct. 5, 2006). Appeal is being sought from that decision. The government defendants in the California case disavowed an "accidental procreation" rationale for that state's exclusion of same-sex couples from marriage, given California's public policy supporting equal rights and protections for the many California same-sex couples raising children. *See id.*, 2006 WL 2838121, at *35 n.33. The majority claimed that the legislature's desire to limit marriage to male-female couples, while providing same-sex couples other legal protections through California's domestic partnership laws, sufficed to sustain the marriage discrimination. *Id.* at *35. The government defendants in the present case have abandoned arguments that Maryland's marriage restriction can legitimately be justified based simply on a desire to perpetuate a tradition of excluding same-sex couples from civil marriage. Nor does Maryland offer its same-sex couples and their families legal protections coming close to those offered under California's domestic partnership laws. *See id.* at *9-10. The dissent in the California case pointed out that the marriage restriction fails rational review because it "singles out a defined group to completely exclude from a crucial social institution, without basis in any characteristic of the group that distinguishes it for any relevant purpose." *Id.* at *66 (Kline, J., dissenting).

For the reasons asserted above, *amici* respectfully submit that this Court should not abandon Maryland's longstanding robust standards of review in order to follow the faulty analysis of these out-of-state cases.

the plurality opinions in *Hernandez* and *Andersen* declined to ask the crucial equal protection question: whether the classification restricting same-sex couples from marrying *itself advances* legitimate government interests. They instead framed the issue as whether the government has a rational reason for conferring the benefits of marriage on different-sex couples and their offspring. *See, e.g.*, *Andersen*, 138 P.3d at 984 ("[T]he correct inquiry under rational basis review is whether allowing *opposite-sex couples* to marry furthers legitimate governmental interests.") (emphasis added).

The dissents in both cases honed in on the fundamental flaw underlying the pluralities' analyses. Chief Judge Kaye, writing for the *Hernandez* dissent, explained:

> Properly analyzed, equal protection requires that it be the legislated *distinction* that furthers a legitimate state interest, not the discriminatory law itself (*See, e.g.*, . . . *Romer v. Evans*, 517 U.S. 620, 633. . .). Were it otherwise, an irrational or invidious exclusion of a particular group would be permitted so long as there was an identifiable group that benefited from the challenged legislation. In other words, it is not enough that the State have a legitimate interest in recognizing or supporting opposite-sex marriages. The relevant question here is whether there exists a rational basis for *excluding* same-sex couples from marriage, and, in fact, whether the State's interests in recognizing or supporting opposite-sex marriages are rationally *furthered* by the exclusion.

Hernandez, 2006 N.Y. LEXIS 1836, at *77-78 (Kaye, C.J., dissenting).

The *Andersen* dissent likewise took sharp issue with the plurality's weakening of the standard normally applied under rational basis review:

> [Washington's marriage restriction] in *no way* affects the right of opposite-sex couples to marry – the *only* intent and effect of [the restriction] was to explicitly deny same-sex couples the right to marry. Therefore, the question we are called upon to ask and answer

> here, which the plurality fails to do, is how *excluding* committed same-sex couples from the rights of civil marriage furthers any of the interests that the State has put forth.

Andersen, 138 P.3d at 1018 (Fairhurst, J., dissenting).

In its own precedents this Court has framed the critical equal protection inquiry precisely as did the *dissents* – not the pluralities – in *Hernandez* and *Andersen*. For example, "the *crucial question* for this Court" in *Kirsch* was "whether the County *by adopting the ordinance's classification advances its objective*." *Kirsch*, 331 Md. at 106 (emphasis added). In *Verzi*, the restriction on out-of-county tow truck operators failed because the Court was "not convinced that the *classification . . . furthers [the government's] objectives*." *Verzi*, 333 Md. at 425 (emphasis added). The same is true for the most analogous federal cases. Thus in *Cleburne* the Supreme Court held that discriminating against those with mental retardation violates equal protection unless treating them equally "would threaten legitimate interests" of the government. 473 U.S. at 448. *See also Moreno*, 413 U.S. at 537 ("[T]he challenged classification simply does not operate so as *rationally to further* the prevention of fraud.") (emphasis added).

Had this Court applied the eviscerated standard urged by defendants in this case, *Kirsch* and *Verzi* would have had very different outcomes. In *Kirsch* it would not have mattered that excluding student groups from renting in Maryland communities did not itself advance a legitimate government interest. It would have sufficed that the government had legitimate reasons for permitting *other* types of households to rent in the State. Likewise in *Verzi* the restriction on out-of-county tow truck operators would have passed muster because the government had legitimate reasons for allowing other tow operators to be called to accident scenes. Similarly, had the Supreme Court in *Cleburne* employed defendants' preferred standard, *zoning out* a home for those with mental retardation would not

have been deemed irrational for the reason that *zoning in* other types of congregate housing in the community advanced legitimate government purposes.

Having mis-framed the core equal protection question, the *Hernandez* and *Andersen* pluralities went on to find that the government has an interest in benefiting children raised from heterosexual unions. *See Andersen*, 138 P.3d at 982; *Hernandez*, 2006 N.Y. LEXIS 1836, at *7. The opinions did not, of course, answer the "crucial question" – how that goal is advanced by excluding same-sex couples, many of whom raise children, from access to marriage. As the *Hernandez* dissent observed, "while encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the *exclusion* of gay men and lesbians from marriage in no way furthers this interest. There are enough marriage licenses to go around for everyone." *Id.* at *78.

In addition to applying the wrong test, the plurality opinions relied on a stream of conjecture about distinctions between the ways different-sex couples and lesbian and gay couples become parents that, in their view, rendered rational excluding same-sex couples and their children from the benefits of marriage. They reasoned that only heterosexuals "become parents as a result of accident or impulse," while lesbian and gay adults do so by planned "adoption or . . . technological marvels." *Hernandez*, 2006 N.Y. LEXIS 1836, at *7; *see also Andersen*, 138 P.3d at 963. They then hypothesized that the children of heterosexuals are thus at greater risk of being born into unstable settings than the children of unmarried lesbian and gay adults, and so it is more important that *their* parents be "offered an inducement – in the form of marriage and its attendant benefits – to . . . make a solemn, long-term commitment to each other." *Hernandez*, 2006 N.Y. LEXIS 1836, at *7; *see also Andersen*, 138 P.3d at 963.

These kinds of generalizations, reminiscent of speculative stereotypes about "physiological differences between men and women" rejected in *Kuhn*, 270 Md. at 508, and the likely behavior of college students and their "intolerant" neighbors

rejected in *Kirsch*, 331 Md. 89, would not pass muster under this Court's rational review. As the Court explained in *Waldron*, "where vital personal interests . . . are substantially affected by a statutory classification, courts should not reach out and speculate as to the existence of possible justifications" for the classification. 289 Md. at 717. *See generally Boswell*, 352 Md. at 237 (cautioning against resort to "personal bias[,] stereotypical beliefs . . . [and] abstract presumptions" about lesbian and gay parents in application of Maryland family law).

Indeed, when this Court *has* entertained speculative possibilities in these types of cases, it has been to determine how the suggested purpose for the classification *falls short* of advancing the government interest. *See, e.g.*, *Frankel*, 361 Md. at 317-18 (positing "hypothetical situations" in which the government's generalizations would *not* hold true); *Verzi*, 333 Md. at 425-26 (reasoning that "it is not difficult to envision numerous other situations in which" the government's assumptions would *not* bear out). In contrast to the cases relied on by defendants, this Court has rejected speculation and generalizations when offered to *prop up* classifications that do not advance a legitimate government interest. *See, e.g.*, *Kirsch*, 331 Md. 89.

Aside from the attenuated speculation on which it rests, the "procreation" argument succumbs to another significant shortcoming. Attendant to the requirement that the classification itself advance the government interest, rational review is not satisfied simply because it is possible to point to some distinction between those a classification burdens and those it benefits. Under Maryland and federal law, rational review requires the court to focus on those differences that bear a "fair and substantial" relationship to the government's purpose and to dismiss as irrelevant those that do not. *Frankel*, 361 Md. at 317. The distinction must itself be material to how the classification promotes the legislative end.

So for example, the cosmetologists in *Kuhn* had less training than barbers specific to styling men's hair, but this distinction did not warrant licensing only

barbers to serve male customers. *Kuhn*, 270 Md. at 508. In *Cleburne* those with mental retardation were acknowledged to be "indeed different from others" permitted to reside in group facilities, but "this difference is largely irrelevant unless the . . . home and those who would occupy it would threaten legitimate interests . . . in a way that other permitted uses . . . would not." *Cleburne*, 473 U.S. at 448. Distinctions among veterans based on when they had moved to the state in *Hooper* likewise did not further the stated goal of giving support to those who had suffered through national military service. 472 U.S. at 621. And in *Williams v. Vermont*, 472 U.S. 14 (1985), distinctions among "present Vermont" car owners based on where and when they originally had purchased their vehicles were irrelevant to the interest each now had in the upkeep of state roads. 472 U.S. at 23-24. These cases would have had far different outcomes if rational review turned merely on identifying superficial differences between those benefited and those burdened by a classification, rather than whether those differences actually warranted unequal treatment.

Under Maryland's rational review standards, variations in how couples may conceive their children or otherwise bring them into their families similarly should be carefully examined to determine whether they have any bearing in this case. Whether a child was conceived through an "accidental" heterosexual encounter or entered a family after care and planning by a different-sex *or* a same-sex couple does not alter the government's interest in encouraging that every child be raised in the most stable setting possible. Delineating which couples can and cannot rear their children in a marital setting based on their potential to conceive "by accident" appears no different than the kind of arbitrary legislative discrimination this Court has found to violate equal protection in the past. *See, e.g.*, *Kirsch*, 331 Md. at 106 (drawing line between who may and may not rent based on their occupation is the "sort of arbitrary classification forbidden under our constitutions"); *City of Baltimore v. Charles Ctr. Parking, Inc.*, 259 Md. 595, 602

(1970) (differences between billboards and painted signs did not supply rationale for banning only signs).

The out-of-state cases are further at odds with this Court's skepticism – at its height in contexts such as this – towards classifications that are significantly over- or under-inclusive. The *Andersen* and *Hernandez* pluralities acknowledged that the "accidental procreation" rationale suffers from both over- and under-inclusivity in that many couples marry with no intent or capacity to procreate and many couples with children cannot marry. In keeping with the "highly indulgent" review they employed, however, these courts disregarded the significant lack of fit between classification and purported rationale. *See Andersen*, 138 P.3d at 963; *Hernandez*, 2006 N.Y. LEXIS 1836, at *19-21.

Maryland requires a different analysis. Employing the same meaningful scrutiny this Court uses, the dissents in *Hernandez* and *Andersen* concluded that the over- and under-inclusivity of the marriage laws reflect more than a mere lack of "precision," to be tolerated in the ordinary rational review case. *See Whiting-Turner*, 304 Md. at 357-58. Instead, "the statutory classification here – which prohibits only same-sex couples, and no one else, from marrying – is so grossly underinclusive and overinclusive as to make the asserted rationale 'impossible to credit.'" *Hernandez*, 2006 N.Y. LEXIS 1836, at *78-79 (Kaye, C.J., dissenting) (quoting *Romer*, 517 U.S. at 635); *see Andersen*, 138 P.3d at 1018-19. For example, "[m]arriage is about much more than producing children, yet same-sex couples are excluded from the entire spectrum of protections that come with civil marriage – purportedly to encourage other people to procreate." *Hernandez*, 2006 N.Y. LEXIS 1836, at *81 (Kaye, C.J., dissenting). Moreover, "[p]lainly, the ability or desire to procreate is not a prerequisite for marriage. The elderly are permitted to marry, and many same-sex couples do indeed have children." *Id.* at *78. And while the state certainly has "a legitimate interest in the welfare of

children, . . . excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it." *Id.* at *82 (Kaye, C.J., dissenting).

Less extreme over- and under-inclusivity led to invalidation of the classifications challenged in such precedents as *Frankel*, 361 Md. at 317; *Kirsch*, 331 Md. at 108-09; *Waldron*, 289 Md. at 724-25; and *Cleburne*, 473 U.S. at 449-50. To accept the rationality of defendants' contention that concerns about "accidental procreation" justify excluding same-sex couples from marriage, the Court would have to overlook the inconsistencies and exceptions that riddle Maryland's legislative scheme governing marriage and family law.

IV. Rational Review, Properly Applied, Calls For Careful Examination Of The Marriage Restriction And Whether It Serves A Legitimate Government Purpose.

Family Law § 2-201 is no mundane piece of incremental economic regulation. The burdens it imposes are not "incidental" or broadly shared. If rational review principles are deemed even to govern here, they at minimum require the Court to take into account the important individual interests at stake for the historically disfavored group of Maryland residents the marriage exclusion targets. Maryland's meaningful standards of rational review do not permit the judicial rubber-stamp defendants advocate.

The crucial question posed by this appeal is whether excluding same-sex couples from marriage and its protections advances the government's efforts to channel heterosexual couples and their "accidentally" conceived children into marriage. Can excluding same-sex couples from marriage rationally be thought to influence heterosexual couples to have procreative sexual relations only within marriage? Is it rational for the State to be concerned with the children of these relationships at the expense of children parented by lesbian and gay couples and who themselves might have been "accidentally" conceived by two heterosexuals

and later adopted by same-sex couples? Moreover, how would allowing same-sex couples to marry threaten any legitimate government interest relating to marriage?

The Court should consider with care whether differences in the way children in the State have been conceived is a "fair and substantial" basis on which to grant access to marriage to *any* different-sex adult couple, without regard to childbearing capacity or intent, and deny it to *every* same-sex couple, even those in need of the important protections that civil marriage would bring their children. Is this statutory difference in treatment rationally and credibly related to the State's interest in the welfare of children, or is it an arbitrary basis on which to withhold protections from some children and their parents?

The Court should approach with skepticism stereotypes and generalizations offered to justify the marriage exclusion, and should consider hypothetical situations in which the government's generalizations will *not* hold true to test the rationality of the restriction. Maryland's jurisprudence further requires the Court to consider ways in which the statutory classification is significantly over- or under-inclusive. Can the government's contention that the purpose of civil marriage is to ameliorate the consequences of unintentional heterosexual procreation be credited, given the comprehensive reach of marriage laws well beyond parenting and child-related concerns, and the free access to marriage given to couples with no intention or ability to procreate? Conversely, is the classification fatally under-inclusive, given the many same-sex couples rearing children, whether adopted or conceived during the relationship, who are equally in need of protections flowing from marriage?

Is there reason to infer an illegitimate government interest, such as disapproval of lesbians and gay men, underlying the determination to exclude same-sex couples and their children from the protections of civil marriage? If so, such illegitimate government interests cannot be ignored; nor should the Court give them cover by hypothesizing other purported government interests abandoned

or not asserted by the government defendants. The Court should be particularly distrustful of the classification under such circumstances and evaluate whether other explanations offered for the law are pretextual. Without, at minimum, substantiation of a legitimate and rational reason for the burden imposed by the classification, one that is independent of and not merely a restatement of the desire to perpetuate the marriage restriction, the classification must be declared unconstitutional. If this Court deems that rational review is appropriate here, the Court should strongly resist the invitation to abandon its established rational basis jurisprudence simply because of the topic at hand.

CONCLUSION

Ultimately Family Law § 2-201 must answer to the dictates of Maryland's constitutional guarantee of equal protection. Over the decades, this Court has evolved vital standards of judicial review to ensure that no Maryland resident is subject to arbitrary or discriminatory treatment at the hands of the State. Legislative classifications that single out one group for special burdens or impinge on important individual interests must, at a minimum, advance legitimate government purposes and meet all the other requirements of the careful rational basis review applied by this Court in such cases. It is the Court's role to protect this State's residents when the legislature transgresses that line, just as the Court has done in many notable cases over the years. The rational review standards handed down by the Court have "provide[d] guidance and discipline for the legislature" as it determines what laws it may pass in keeping with bedrock values of equal protection. *Romer*, 517 U.S. at 632. These principles have been an important bulwark protecting those with disabilities, the elderly, the impoverished and others represented by *amici* from arbitrary and unfair government discrimination.

In contrast, the watered-down standards used by the pluralities in *Hernandez* and *Andersen* are wholly inconsistent with Maryland's strong principles of constitutional review. *Amici* respectfully submit that allowing such inadequate standards to govern in this case or future cases would disserve all who rely on this State's courts for meaningful review of legislative discriminations against them.

For the foregoing reasons, *amici* respectfully request that if the Court determines to apply rational basis review here, the Court follow this State's established principles of rational review rather than those advocated by defendants.

Respectfully submitted,

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

TEXT OF PERTINENT AUTHORITIES

Maryland Declaration of Rights

Article 24. Due process.

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Md. Code Ann., Family Law

§ 2-201. Marriages which are valid.

Only a marriage between a man and a woman is valid in this State.

APPENDIX

STATEMENTS OF INTEREST OF *AMICI*

The **Bazelon Center for Mental Health Law** is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, administrative and legislative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. Many of the Center's efforts to remedy disability-based discrimination involve constitutional challenges to the differential treatment of people with mental disabilities. Additionally, the constitutional standard for reviewing disability-based discrimination is significant for purposes of Congress's authority to enact portions of the Americans with Disabilities Act, a key civil rights law that is central to the Center's work.

Maryland ADAPT is the state chapter of the national organization ADAPT that promotes services in the community for people with disabilities. Maryland ADAPT has played a major role in addressing local and statewide issues of discrimination, inaccessibility and denial of civil rights. It focuses on ending unnecessary institutionalization for people with disabilities. Maryland ADAPT is concerned that people with disabilities in Maryland be accorded the full protections of meaningful standards of rational review.

The **Maryland Disability Law Center (MDLC)** advocates for the rights of individuals with disabilities in the State of Maryland. MDLC is a private, non-profit organization with the goal of providing people with disabilities the full rights and entitlements afforded to them by law. MDLC regularly represents individuals in Maryland who have been denied the constitutional guarantees of due process and equal protection on account of their disabilities. It joins this brief to urge the Court to follow meaningful principles of rational review.

The **National Senior Citizens Law Center (NSCLC)** has for some 35 years advocated nationwide to promote the independence and well-being of low-income elderly individuals and persons with disabilities. Through litigation, legislative and agency representation and assistance to attorneys and paralegals in legal aid programs, NSCLC works to protect the legal rights of these populations. Throughout its existence, NSCLC has litigated class actions on behalf of elderly individuals and persons with disabilities in suits that have included constitutional due process and equal protection claims. Because a heightened level of scrutiny generally has not been available to the elderly and persons with disabilities in cases challenging laws that disadvantage them, it is vital for our clients that rational review tests applied in state and federal courts be meaningful ones. NSCLC therefore joins this brief to urge that the Court uphold an effective, cogent rational basis test.

The **National Council on Independent Living (NCIL)** is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership is comprised of centers for independent living, independent living councils, people with disabilities and other disability rights organizations. As a membership organization, NCIL advances independent living and the rights of people with disabilities through consumer-driven advocacy. NCIL envisions a world in which people with disabilities are valued equally and participate fully.

The **National Mental Health Association (NMHA)** is the country's oldest and largest non-profit organization addressing all aspects of mental health and mental illness. With more than 320 affiliates nationwide, including many in the State of Maryland, NMHA works to improve the mental health of all Americans, especially the 54 million individuals with mental disorders, through advocacy, education, research and service. The NMHA joins this brief to help prevent weakened constitutional standards that would be insufficiently protective of the rights of those with mental disorders from being imported into Maryland law.

People For the American Way Foundation (PFAWF) is a nonpartisan citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, PFAWF now has more than 750,000 members and activists across the country, including in Maryland. PFAWF has been actively involved in efforts nationwide to combat discrimination and promote equal rights, including efforts to protect and advance the civil rights of gay men and lesbians. PFAWF regularly participates in civil rights litigation, and has supported litigation to secure the right of same-sex couples to marry. PFAWF joins this brief in order to help defend the judgment below and to urge the Court to apply the appropriate legal analysis to this case.

CERTIFICATE OF SERVICE

I, Leslie Hill, hereby certify that a copy of the foregoing Brief Addressing Proper Application of Maryland's Rational Review Standards Submitted by *Amici Curiae* The Bazelon Center for Mental Health Law, The Maryland Disability Law Center, Maryland ADAPT, The National Council on Independent Living, The National Mental Health Association, The National Senior Citizens Law Center, and People for the American Way, was served by first class U.S. Mail, postage prepaid, this 19th day of October 2006, to:

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