GITANJALI DEANE & LISA POLYAK;
ALVIN WILLIAMS & NIGEL SIMON;
TAKIA FOSKEY & JOANNE RABB;
JODI KELBER-KAYE &
STACY 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

v.

FRANK CONAWAY, in his official capacity as Baltimore City Circuit Court Clerk;
ROSALYN PUGH, in her official capacity as Prince George's County Circuit Court Clerk;
EVELYN ARNOLD, in her official capacity as St. Mary's County Circuit Court Clerk;
DENNIS WEAVER, in his official capacity as Washington County Circuit Court Clerk; and
MICHAEL BAKER, in his official capacity as Dorchester County Circuit Court Clerk,

Defendants

IN THE
CIRCUIT COURT
FOR
BALTIMORE CITY, PART 30

Case No.: 24-C-04-005390

* * * * * * * * * * * * *

ORDER

Upon consideration of Plaintiffs' Motion for Summary Judgment, Defendants' Motion for Summary Judgment, argument and the relevant pleadings, for the reasons stated in the accompanying Memorandum, it is this 20 day of January, 2006, by the Circuit Court for Baltimore City, Part 30, hereby

ORDERED that:

1. Plaintiffs Motion for Summary Judgment is GRANTED; and

2. Defendants' Motion for Summary Judgment is DENIED; and

3. Judgment is entered in favor of Plaintiffs and against Defendants on all counts, with costs to be paid by Defendants; and

4. Pursuant to Md. Rule 2-632, enforcement of the Order is STAYED pending appeal.

M. Brooke Murdock
Judge
The Judges Signature appears on the original document only

M. BROOKE MURDOCK
Judge

cc: Andrew Baida, Esq. ✓
Margaret Nolan, Esq.

GITANJALI DEANE & LISA POLYAK;
ALVIN WILLIAMS & NIGEL SIMON;
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* * * * * * * * * * * * *

MEMORANDUM

The case at bar is about marriage–an institution that has been the subject of many challenges over the last 50 years and that remains at the center of family life in American society. Plaintiffs argue that Maryland's statutory prohibition of same-sex marriage is inconsistent with Maryland's equal rights and due process constitutional amendments,

and they ask this Court to declare the prohibition invalid. After much study and serious reflection, this Court holds that Maryland's statutory prohibition against same-sex marriage cannot withstand this constitutional challenge. Family Law § 2-201 violates Article 46 of the Maryland Declaration of Rights because it discriminates, based on gender against a suspect class; and is not narrowly tailored to serve any compelling governmental interests.

In June 1972, the Clerk of the Circuit Court for Baltimore City submitted a question to Maryland's Attorney General regarding the legality of the denial of marriage licenses to same sex couples. The Attorney General, in reply, stated that the prohibition of same sex marriages was implicit in Maryland's statutory code and common law decisions. *See* 57 Md. Op. Att'y Gen. 71 (1972).

A few months later, in November 1972, Maryland voters ratified Article 46 of Maryland's Declaration of Rights. Commonly referred to as Maryland's Equal Rights Amendment ("ERA"), this constitutional provision states that the "equality of rights under the law shall not be abridged or denied because of sex." Shortly thereafter, during the 1973 legislative session, the General Assembly passed Senate Bill 122, a same-sex marriage prohibition, which is now codified at § 2-201 of the Family Law Article. The statute reads, "Only a marriage between a man and a woman is valid in this State."

Plaintiffs in the present case are nine couples and one individual. Plaintiffs concede that the "Maryland statutory code does not permit marriages of lesbian and gay couples"; but they argue that the statute is unconstitutional. Their Complaint further suggests that the plaintiffs are "representative" of the "thousands of lesbian and gay families throughout

Maryland" who suffer legal, financial, and emotional harm as a result of the same-sex prohibition. The legal benefits from which unmarried couples are excluded include, *inter alia*, the right to bring wrongful death actions under the Courts and Judicial Proceedings Article §§ 3-901 through 3-904 (2002), survivorship actions under §4-202 of the Family Law Article (1999); and surviving spouse's intestate succession rights under the Estates and Trusts Article §3-102 (2001).

All nine couples allege that, but for their sexual identities, they would be permitted to marry their partner under Maryland law.[1] They allege that they applied for marriage licenses in Circuit Court clerks' offices across the state including Dorchester County Circuit Court, Washington County Circuit Court, St. Mary's County Circuit Court, Prince George's County Circuit Court and Baltimore City's Circuit Court.[2] According to the Complaint , the applications were denied for the sole reason that Plaintiffs are same-sex couples.

The Clerks contend that the denials were proper because the undisputed historical understanding of marriage in Maryland, the Maryland Constitution and the laws enacted under state constitutional authority dictate that a civil contract of marriage can only be created between a man and a woman.

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[1]The individual plaintiff alleges that he would like to marry at some point in the future.

[2] This Memorandum refers to Defendants from the various named jurisdictions as "the Clerks."

I. PROCEDURAL HISTORY

A Complaint for Declaratory and Injunctive relief was filed by Gitanjali Deane and Lisa Polyak; Alvin Williams and Nigel Simon; Takia Foskey and Joanne Rabb; Jodi Kelber-kaye and Stacy Kargman-kaye; Donna Myers & Maria Barquero; John Lestitian; Charles Blackburn & Glen Dehn; Steven Palmer & Ryan Killough; Patrick Wojahn & David Kolesar; Mikkole Mozelle & Phelicia Kebreau on July 7, 2004. Defendants Frank Conaway, in His Official Capacity as Baltimore City Circuit Court Clerk; Rosalyn Pugh, in Her Official Capacity as Prince George's County Circuit Court Clerk; Evelyn Arnold, in Her Official Capacity as St. Mary's County Circuit Court Clerk; Dennis Weaver, in His Official Capacity as Washington County Circuit Court Clerk; and Michael Baker, in His Official Capacity as Dorchester County Circuit Court Clerk filed an Answer on September 7, 2004.

The Court Clerk for Anne Arundel County, Robert Duckworth filed a Motion to Intervene on July 27, 2005, alleging that his personal interests would be affected by the law suit and requested that he be permitted to participate as an individual with his own attorney. All parties opposed the Motion. [3] All Motions to intervene were denied, the Court having determined that the interventions would unduly delay and prejudice the adjudication of the rights of the original parties. The Hon. Robert P. Duckworth filed an appeal with the Court of Special Appeals on November 21, 2005. The Court of Appeals, on its own motion, issued a writ of certiorari on December l7, 2005. The judgment of the

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[3] Certain Members of the General Assembly, and a citizen, Toni Marie Davis also filed Motions to Intervene, which were opposed by Plaintiffs and Defendants.

Circuit Court for Baltimore City was affirmed on March 11, 2005.

On June 14, 2005, the Clerks filed a Motion for Summary Judgment, alleging that there was no genuine dispute of any material fact and that they were entitled to judgment as a matter of law. Plaintiffs also filed a Motion for Summary Judgment on June 14, 2005, agreeing that there was no genuine dispute of material fact but maintaining that as a matter of law, they were entitled to judgment. Motions for Leave to participate as Amici Curiae were granted to the Public Justice Center, the National Association of Social Workers, Citizens for Traditional Families, the Alliance Defense Fund, First and Franklin Street Presbyterian Church, 25 Religious Organizations and 48 Religious Leaders. Argument was heard on August 30, 2005.

II. FACTUAL HISTORY

All parties agree that Plaintiffs are gay or lesbian couples who wish to marry, including one surviving same-sex partner. Plaintiffs were denied marriage licenses by Circuit Court clerks in the five identified jurisdictions because they are same-sex couples. According to the Complaint, Plaintiffs seek marriage licenses for the societal and governmental protections that are afforded heterosexual married couples. Defendants maintain that Family Law §2-201 prohibits same sex marriages.

III. DISCUSSION

Plaintiffs concede that Family Law §2-201 prohibits same sex marriages, but argue that 1.) the same-sex marriage prohibition constitutes unjustified discrimination based on gender, in violation of Article 46 of Maryland's Declaration of Rights; 2.) the same-sex marriage prohibition constitutes unjustified discrimination based on sexual orientation, in

violation of the equal protection component of Article 24 of Maryland's Declaration of Rights; 3.) the same-sex marriage prohibition constitutes an unjustified, disparate deprivation of plaintiffs' fundamental right to marry, in violation of the equal protection component of Article 24 of Maryland's Declaration of Rights; and 4.) the same-sex marriage prohibition constitutes an unjustified deprivation of Plaintiffs' fundamental right to marry in violation of the due process component of Article 24 of the Maryland's Declaration of Rights.

After carefully considering Plaintiffs' various arguments, this Court finds that Family Law §2-201 constitutes unjustified discrimination based on gender, in violation of Article 46 of Maryland's Declaration of Rights.[4] The mere creation of a sex-based classification triggers application of the Equal Rights Amendment, under which distinctions drawn based on sex are suspect and subject to strict scrutiny. Because this Court does not find that §2-201 is narrowly tailored to serve any compelling governmental interests, this Court must conclude that the statutory ban on same-sex marriage is unconstitutional.

A. Family Law §2-201 facially discriminates on the basis of gender

Family Law §2-201 specifically bars an individual from marrying a member of the same sex. The relative genders of the two individuals are facts that lie at the very center of the matter; those whose genders are the same as their intended spouses may not marry, but those whose genders are different from their intended spouses may. This Court, therefore,

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[4]This Court's conclusion that Family Law §2-201 imposes a sex-based discrimination renders unnecessary a decision as to Plaintiffs' other three constitutional claims.

concludes that §2-201 discriminates based on gender. The Court finds unpersuasive the arguments of Defendants and others that statutory prohibitions on same-sex marriage do not create gender-based classifications because each prohibition applies equally to both sexes.[5] These arguments are illogical and inaccurate. The equal application theory must be rejected because the theory has already been addressed and rejected in Maryland. *Burning Tree Club, Inc. v. Bainum (Burning Tree I)* 305 Md. 53, 501 A.2d 817 (1985); *Giffin v. Crane*, 351 Md. 133, 716 A.2d 1029 (1998). Proponents of the equal application theory argue that prohibiting same-sex marriage does not constitute gender discrimination because all men and all women are equally precluded from marrying someone of their own sex; neither gender has greater or lesser rights than the other. *See Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999); *Singer v. Hara*, 11 Wash. App. 247, 253, 522 P.2d 1187, 1191-92 (1974); Paul Benjamin Linton, *Same-Sex Marriage Under State Equal Rights Amendments*, 46 St. Louis U.L.J. 909, 925-29 (2002). According to this theory, no gender classification exists and a state's Equal Rights Amendment is not implicated. Thus, a state need not show that compelling interests support its discrimination.

Proponents of the equal application theory distinguish statutory bans on same-sex marriage from the now defunct anti-miscegenation statutes prohibiting marriage between interracial couples. In *Loving v. Virginia*, 388 U.S. 1, 8-9, 87 S. Ct. 1817, 1822 (1967), where the Supreme Court struck down Virginia's anti-miscegenation statute, Virginia advanced an equal application theory to defend the statute prohibiting interracial marriage.

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[5] Often referred to as the "equal application theory."

See, *Baehr v. Lewin*, 74 Haw. 530, 565, 852 P.2d 44, 61-64 (1993); Stephen Clark, *Same-Sex But Unequal: Reformulating the Miscegenation Analogy*, 34 Ruters L. J. 107 (2002). Virginia argued that the statute did not create impermissible racial classifications because the statute affected both blacks and whites equally. However, the Supreme Court struck down the statute, finding that the State did not meet its heavy burden of justifying the racial classification. Courts finding same-sex marriage bans constitutional declare their holdings consistent with *Loving's* holding because of key factual and logical differences between the two cases. This Court is unpersuaded that sufficient differences exist to distinguish the cases.

In *Singer v. Hara*, 11 Wash.App. 247, 252, 522 P.2d 1187, 1191-92 (1974), the Washington Court of Appeals denied that a statutory same-sex marriage ban in fact created a gender classification.[6] In *Singer*, the court held that same-sex partners are not prohibited from marrying because of their genders, but due to the definition of marriage–ie, the relationship the couple wishes to enter would not be a marriage.[7] *Id.* In distinguishing *Loving*, the court reasoned that striking down the statutory same-sex prohibition would require a change in "the basic definition of marriage as the legal union of one man and one woman," whereas permitting interracial couples to marry did not. *Id.*

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[6]The equal application theory was not disturbed in Washington's subsequent same-sex marriage case, *Anderson v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *8 (Wash. Super. Aug. 4, 2004).

[7]As the Supreme Court of Hawaii noted in *Baehr*, 74 Haw. at 567, 852 P.2d at 62 n.23, the anti-miscegenation statutes *automatically voided* an interracial marriage without the necessity of any judicial involvement–another similarity between interracial marriages and same-sex marriages.

This reasoning is unpersuasive. It makes little sense for the Washington court to deny that the same-sex prohibition created a gender-based classification; and, then to state that the "operative distinction" between *Loving* and the same-sex marriage case is the legal union of a man with a woman. *Id.* at 1191. *Singer* states that same-sex couples are barred from marriage not due to their genders, but owing to a definition of marriage that necessitates an opposite-sex couple. Despite the court's insistence that no gender classification exists, the relative genders of a same-sex couple are the very crux of the matter. Certainly, in *Singer*–it was the couples' gender that placed them outside the definition of marriage. It, therefore, seems logically impossible to resolve the issue of whether an individual plaintiff and his/her partner fall within the definition of marriage without examining their relative genders.

The Supreme Court of Vermont similarly found that a statutory ban on same-sex marriage did not create a gender-based classification. *Baker v. State of Vermont*, 170 Vt. 194, 744 A.2d 864 (1999). Using the equal application theory, the court found that the statute treated men and women equally and was, therefore, facially gender-neutral. *Id.* at 880 n.13. The court further reasoned that a facially neutral statute will not be found discriminatory unless there is evidence of a discriminatory purpose behind it.[8] Unlike *Loving*, where the Supreme Court found evidence of a "pernicious doctrine of white supremacy," the Supreme Court of Vermont found there was insufficient evidence of a

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[8]*Baker* distinguished *Loving* by pointing to the "superficial neutrality" of the anti-miscegenation statutes in *Loving* and the Supreme Court's finding that there was, in fact, evidence of a discriminatory purpose in *Loving* that could not withstand scrutiny. *Baker*, 170 Vt. at 215, 744 A.2d at 880 n.13.

discriminatory purpose behind the statutory ban on same-sex marriage. The court thus rejected the argument that the statutory prohibition of same-sex marriage constituted sex discrimination, although it did declare the statute unconstitutional on other grounds.[9]

This Court finds that the equal application theory fails as a matter of law because it is inherently illogical as a matter of fact. It is inaccurate and overly abstract to describe §2-201 as equally prohibiting men and women from marrying members of their own sex. Section 2-201 bars a man from marrying a male partner when a woman would enjoy the right to marry that same male partner. As compared to the woman, the man is disadvantaged solely because of his sex. In the opinion of the Court, Family Law §2-201 discriminates on its face based on gender.

Rejection of the equal application theory finds support in case law suggesting that Maryland has already rejected this theory in favor of the view that a statute operating on one gender–though the statute may not specify which gender– draws a gender-based distinction. In *Burning Tree Club, Inc., v. Bainum,* 305 Md. 53, 501 A.2d 817 (1985) (*Burning Tree I*), the Court struck down what Judge Rodowsky termed in his concurring opinion a "unique creature–an unconstitutionally discriminatory anti-discrimination law." *Id.* at 88. In that case, Plaintiffs challenged an "open spaces" tax law extending property tax benefits to an all-male country club. The tax law prohibited recipient clubs from

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[9]Vermont considered "civil unions" to be a constitutionally adequate alternative to same-sex marriage. See *Baker,* 170 Vt. at 225, 744 A.2d at 886-87. Without disparaging the value of unions created in those jurisdictions, this Court concludes that such "separate but equal" remedy is not a remedy at all. Further, Plaintiffs make clear in their brief that they are not requesting this type of relief.