No. 10-16696

Oral Argument Scheduled for December 6, 2010

United States Court of Appeals for the Ninth Circuit

KRISTEN M. PERRY, *et al.*,
Plaintiffs-Appellees,

— v. —

ARNOLD SCHWARZENEGGER,
GOVERNOR OF THE STATE OF CALIFORNIA, *et al.*,
Defendants,

and

DENNIS HOLLINGSWORTH, *et al.*,
Defendants-Intervenors-Appellants

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, NO. 09-CV-2292 VRW,
THE HONORABLE JUDGE VAUGHN R. WALKER PRESIDING

BRIEF OF *AMICUS CURIAE*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
IN SUPPORT OF PLAINTIFFS-APPELLEES AND
AFFIRMANCE OF THE DISTRICT COURT JUDGMENT

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FRAP RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a tax-exempt nonprofit organization. *Amicus curiae* does not have any corporate parent. It does not have any stock; therefore, no publicly held company owns 10% or more of the stock of the *amicus curiae*.

STATEMENT REGARDING CONSENT TO FILE

The parties have filed blanket notices and letters of consent to the filing of *amicus curiae* briefs. Accordingly, *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc. files this brief pursuant to Fed. R. App. P. 29(a) with the consent of all parties to the case.

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INTEREST OF *AMICUS*

Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York. Although LDF is known primarily for litigating cases involving the civil rights of African Americans, LDF has fought for seven decades to enforce legal protections against discrimination and to secure the constitutional and civil rights of all Americans. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483 (1954). LDF has an extensive history of participation in efforts to eradicate barriers to the full and equal enjoyment of social and political rights, and has represented parties or participated as *amicus curiae* in numerous such cases across the nation, including *In re Marriage Cases*, 183 P.3d 384 (2008); *Hernandez v. Robles*, 855 N.E.2d 1 (2006); *Romer v. Evans*, 517 U.S. 620 (1996); and *Loving v. Virginia*, 388 U.S. 1 (1967), a case that has important bearing on the present litigation.

LDF has a strong interest in the fair application of the Fourteenth Amendment to the Constitution, which provides important protections for all Americans, and believes that its experience and knowledge will assist the Court in this case.

All parties have consented to the filing of this brief.

PRELIMINARY STATEMENT

Consistent with its opposition to all forms of discrimination, LDF submits that this Court should affirm the district court's ruling that California's discriminatory denial to gay men and lesbians of the fundamental right to marry violates the Equal Protection and Due Process[1] Clauses of the Fourteenth Amendment. Over 40 years ago, in *Loving v. Virginia*—a case in which LDF participated as *amicus*—the Supreme Court was confronted with the constitutionality of prohibitions on interracial marriage, which persisted in sixteen states nearly one hundred years after the Fourteenth Amendment was adopted in 1868. In a significant step forward in our nation's progress toward a "more perfect Union"—one that was the subject of bitter controversy, but now seems obvious—the Supreme Court tore down this lasting and notorious form of discrimination, holding that anti-miscegenation laws violate the Constitutional guarantees of Equal Protection and Due Process.

The basic Fourteenth Amendment principles addressed in *Loving* are not limited to race, but must be universally applied to any state action that denies a person the right to marry the person that he or she loves.

[1] Although we do not directly address the Due Process arguments implicated in this case, we adopt Plaintiffs' argument that, consistent with *Loving*, Proposition 8 violates the Due Process Clause. *See* Br. of Plaintiff-Appellees at 39-55.

Consequently, this Court should not uphold California's law barring persons of the same sex from marrying. Although the historical context and experiences with racial discrimination of African Americans and the experiences of gay men and lesbians who face discrimination due to their sexual orientation are distinct, the legal questions raised in *Loving* and the issues raised in this appeal are analogous in many ways. The state law at issue here, like the law struck down by the Supreme Court in *Loving*, marks certain individuals for second-class status on the basis of their identity and is therefore discriminatory. Moreover, the parallels between this case and *Loving* are evident in the rationales advanced by the proponents of Proposition 8, which bear a striking resemblance to those proffered by the Commonwealth of Virginia in its defense of the anti-miscegenation statute at issue in *Loving*. There, as here, the defendants argued that permitting an individual to exercise the right to marry the person of his or her choice would entail a fundamental redefinition of the institution of marriage itself. There, as here, the defenders of a clearly discriminatory law argued that the law was necessary to prevent harm to any children who would be raised in the unions they sought to prohibit, and cited purportedly scientific studies to support their claims.

The Supreme Court did not give credence to those arguments in *Loving*, recognizing them for what they were: unfounded, *post-hoc* rationalizations cloaked in a veneer of pseudo-science in order to justify discrimination. And in this case, the district court similarly found that "the purported state interests fit so poorly with Proposition 8 that they are irrational." *Perry v. Schwarzenegger*, No. C 09-2292 VRW (N.D. Cal. Aug. 4, 2010), slip op. at 133. Consistent with the Supreme Court's decision in *Loving*, this Court should affirm the district court's ruling and find that Proposition 8 is unconstitutional.

ARGUMENT

I. PROPOSITION 8 VIOLATES THE EQUAL PROTECTION CLAUSE

A. Neither the Fourteenth Amendment's Guarantee of Equal Protection, Nor the Holding of *Loving v. Virginia*, Is Limited to Race-Based Discrimination

Although the Fourteenth Amendment was ratified in the wake of the Civil War after a long struggle to eradicate slavery, the reach of the Fourteenth Amendment is not limited to discrimination on the basis of race. Throughout our nation's history, the Supreme Court has applied anti-discrimination principles first articulated in cases involving racial discrimination to prohibit discrimination on the basis of gender, age, disability, and, most pertinent here, sexual orientation. *See*, *e.g.*, *Lawrence v.*

Texas, 539 U.S. 558 (2003) (sexual orientation); *United States v. Virginia*, 518 U.S. 515 (1996) (gender); *Romer v. Evans*, 517 U.S. 620 (1996) (sexual orientation); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (disability); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (age); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (gender).

As the district court found, "[g]ays and lesbians have been victims of a long history of discrimination" in this country. Slip op. at FF 74.[2] Accordingly, the Fourteenth Amendment principles articulated and applied in a wide variety of contexts, and which define us as Americans, should now be clearly applied to end a continuing and pernicious form of state-sanctioned discrimination against gay and lesbian Americans whose claims for dignity before the law must no longer remain captive to cramped notions of equality. There is no reason to suggest that constitutional provisions prohibiting discrimination—even those that originally arose in the context of discrimination on the basis of race—should not fairly be applied to gay men and lesbians who are discriminated against by being denied the right to marry the person of their choice.

The Hollingsworth Defendant-Intervenors-Appellants (hereinafter, the "the Hollingsworth Appellants") and their *amici* seek to avoid the reach and

[2] Paragraph references to the District Court's Findings of Fact are cited herein as "Slip op. at FF __".

core teachings of our Fourteenth Amendment precedents. For example, the Hollingsworth Appellants' contention that *Loving* is a case that is solely about race is without merit. *See* Hollingsworth Appellants' Br. at 51, 66-67; Br. of *Amici Curiae* High Impact Leadership Coalition, *et al*. (hereinafter "HILC Br.") at 16-17. Rather, as *Loving* itself makes clear, "all the State's citizens" possess a fundamental right to marry. *Loving*, 388 U.S. at 12. Gay men and lesbians are no less entitled to the right to marry than are any other individuals in the United States.[3]

Indeed, in *Zablocki v. Redhail*, 434 U.S. 374 (1978), which involved the right to marry of so-called "deadbeat dads," the Court made clear that its holding in *Loving* was not limited to race. There, the Court described

[3] It is worth noting that, as the district court found, the right to marry is not tied to a person's ability to procreate with the person that an individual seeks to marry. *See* FF 21. Although, as *amici* note, the Lovings themselves had biological children, *see* HILC Br. at 13, there was *no* suggestion in the Supreme Court's decision in *Loving* that its holding rested on that particular fact. The outcome in *Loving* would not have been any different if the Lovings had no children, had no intention of raising children, or were infertile. Indeed, while raising children is undoubtedly an important feature of many marriages, the Supreme Court has made clear that marriage is not defined in procreative or child-rearing terms. Rather, the Court has explained that marriage is an "expression[] of emotional support and public commitment." *Turner v. Safely*, 482 U.S. 78, 95 (1987) (holding that incarcerated individuals have a right to marry); *cf. Lawrence*, 539 U.S. at 567 ("[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.").

Loving as the "leading decision of this Court on the right to marry," and observed:

> The Court's opinion could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. But the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry.

Id. at 383.

B. Proposition 8 Discriminates on the Basis of Sexual Orientation

Proposition 8 singles out gay men and lesbians for denial of the right to marry the person of their choice, solely because of their sexual orientation. This is clear from both the operation of Proposition 8, but also, as the trial court found, in its intent. *See* slip op. at FF 58, 67, 79-80. The Equal Protection Clause does not tolerate such discrimination.

1. The Discriminatory History of Racial Restrictions on Marriage Rights Is Instructive

Historically, the denial of the right to marry was a key component in the United States' racial caste system. "The idea that the freedom to marry is a symbol of American freedom has roots in the institution of slavery," as the denial to slaves of the right to marry was a significant limitation on their freedom and a crucial feature of their dehumanization. Aderson Bellegarde François, *To Go Into Battle with Space and Time: Emancipated Slave*

Marriage, Interracial Marriage, and Same-Sex Marriage, 13 J. of Gender, Race & Justice 105, 110-12 (2009). *See also* slip op. at FF 23. Prior to Emancipation, the right to marry was denied to slaves precisely to deny their equal humanity.

With Emancipation came the right to marry, but not across racial lines, because anti-miscegenation statutes remained in place. As Chief Justice Taney explained all-too clearly in his infamous decision in *Dred Scott v. Sandford*, anti-miscegenation statutes

> show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the persons who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

60 U.S. 393, 409 (1857). *See also* Hon. A. Leon Higginbotham, Jr., *Shades of Freedom* 44 (1996) ("Interracial marriages represented a potentially grave threat to the fledging institution of slavery. Had blacks and whites intermarried, the legal process would have been hard pressed to recognize the union while keeping blacks in slavery.").

Even after the adoption of the Fourteenth Amendment, anti-miscegenation statutes were upheld by the Supreme Court. In *Pace v. Alabama*, the Court held that such statutes were not discriminatory because they "appl[y] the same punishment to both offenders, the white and the black." 106 U.S. 583, 585 (1883). More than eighty years later, however, in *Loving*, the Court rejected that cramped, formalistic reasoning and recognized that anti-miscegenation statutes target individuals and deny them the right to marry strictly on the basis of their race. *See Loving*, 388 U.S. at 12 (holding that Virginia's anti-miscegenation statute "violate[d] the central meaning of the Equal Protection Clause"). Given the crucial role that anti-miscegenation laws had in maintaining our nation's racial caste system, *Loving* is "one of the major landmarks of the civil rights movement." Phyl Newbeck, *Virginia Hasn't Always Been for Lovers: Interracial Marriage and the Case of Richard and Mildred Loving* xii (2004); *cf.* John DeWitt Gregory & Joanna L. Grossman, *The Legacy of* Loving, 51 Howard L. J. 15, 52 (2007) ("Legalizing interracial marriage was an essential step toward racial equality.").

Significantly, the Supreme Court arrived at the conclusion that anti-miscegenation statutes are unconstitutional in spite of the fact that "when the Fourteenth Amendment was drawn up and ratified, the vast majority of its

supporters did not envision it as a bar to antimiscegenation laws…." Randall Kennedy, *Interracial Intimacies* 277 (2003).[4] The Court held that, regardless of the precise intentions of the framers of the Fourteenth Amendment with respect to interracial marriage, anti-miscegenation statutes were inconsistent with the "broader, organic purpose" of the Amendment, which was "to remove all legal distinctions among 'all persons born or naturalized in the United States.'" *Loving*, 388 U.S. at 9 (quoting *Brown*, 347 U.S. at 489 (1954).

As in *Loving*, the equality principles of the Fourteenth Amendment, rather than the longstanding nature of the legal restriction on marriage at issue, should guide the Court in this case.[5] *Cf. Harper v. Va. Bd. of*

[4] Indeed, as the Commonwealth of Virginia noted in its brief in *Loving*, the majority of States ratifying the Fourteenth Amendment had anti-miscegenation laws in place as recently as 1950. Br. for Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967), Civ. No. 395, 1967 WL 113931, at *4 (Mar. 20, 1967) (hereinafter "*Loving* Appellee's Brief").

[5] The Hollingsworth Appellants argue that the holding of *Loving* is inapplicable to same-sex marriage, given the Supreme Court's denial of *certiorari* in *Baker v. Nelson*, 409 U.S. 810 (1972), a same-sex marriage case decided five years after *Loving*. *See* Hollingsworth Appellants' Br. at 44. Yet, the Supreme Court's denial of *certiorari* in a challenge to Alabama's anti-miscegenation statute in *Jackson v. State*, 72 So. 2d 114, *cert. denied*, 348 U.S. 888 (1954), just six months after *Brown*, did not prevent the Court from applying the Equal Protection principles enunciated in *Brown* to strike down Virginia's anti-miscegenation law in *Loving*.

Elections, 383 U.S. 663, 669 (1966) ("[T]he Equal Protection Clause is not shackled to the political theory of a particular era").

2. Proposition 8 Targets Gay Men and Lesbians for Unequal Treatment

The Hollingsworth Appellants and their *amici* argue that gay men and lesbians are not entitled to the protections of the Equal Protection Clause because sexual orientation is a form of behavior rather than a characteristic or trait of an individual. *See* Hollingsworth Appellants' Br. at 74; HILC Br. at 17. Essentially, in the Hollingsworth Appellants' view, Proposition 8 is merely aimed at conduct (*i.e.*, marrying a person of the same sex), rather than status itself (*i.e.*, sexual orientation). The unspoken implication of the Hollingsworth Appellants' position is that Proposition 8 does not exclude Plaintiffs from the institution of marriage because Plaintiffs retain the option to marry a person of the opposite sex.

For gay men and lesbians, however, that is no option at all. The Hollingsworth Appellants' argument ignores both the district court's factual finding that sexual orientation is a "characteristic of the individual" and "fundamental to a person's identity," slip op. at FF 44, 46, as well as Ninth Circuit precedent holding that "[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them." *Hernandez-Montiel v. INS*, 225 F.3d 1084,

1093 (9th Cir. 2000). *Cf. Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring) ("[S]exual orientation is immutable for the purposes of equal protection doctrine. Although the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change.").

Thus, regardless of the appropriate standard of scrutiny in this case, this much is clear: Proposition 8 bars gay men and lesbians from the institution of marriage altogether, denying them a right that has "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12. *See also Turner*482 U.S. at 95 ("[T]he decision to marry is a fundamental right"); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (marriage is "an association for as noble a purpose as any involved in our prior decisions."); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (observing that marriage is "the most important relation in life").

Although not necessary to its determination that Proposition 8 violates the Equal Protection Clause by subjecting gay men and lesbians to unequal treatment, it is particularly noteworthy that the district court found that Proposition 8 was motivated by discriminatory animus: "Proposition 8 places the force of law behind stigmas against gays and lesbians," slip op. at FF 58; singles gay men and lesbians out for unequal treatment, *see* slip op. at FF 67; and was passed subsequent to a campaign relying on "stereotypes to show that same-sex relationships are inferior to opposite-sex relationships," slip op. at FF 80. Indeed, in much the same way that Virginia's anti-miscegenation statute was "passed during a period of extreme nativism which followed the end of the First World War," *Loving*, 388 U.S. at 6, Proposition 8 was passed as part of a campaign that "relied on fears" and "on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships." Slip op. at FF 79-80. In sum, the district court determined that support for Proposition 8 was

> premised on the belief that same-sex couples are simply not as good as opposite-sex couples…. Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate.

Slip op. at 132. Under the Equal Protection Clause, this sort of discriminatory intent cannot serve as a valid basis for legislation. *See Romer*, 517 U.S. at 632 (holding that legislation motivated by "animus toward the class it affects … lacks a rational relationship to legitimate state interests.").

3. The Hollingsworth Appellants' Argument that Proposition 8 is Not Discriminatory Follows the Same Rationale Rejected by *Loving*

At bottom, the Hollingsworth Appellants' argument that Proposition 8 merely regulates conduct, but does not target gays and lesbians on the basis of their sexual orientation, amounts to the startling claim that Proposition 8 is not discriminatory because it prohibits all individuals, regardless of sexual orientation, from marrying a person of the same sex. Of course, under their reasoning, anti-miscegenation statutes could just as easily have been understood as regulating conduct (marriage across racial lines), rather than status (race itself).

Their argument follows the discredited formalism of *Pace*, which held that an anti-miscegenation statute is not discriminatory because it prohibits all individuals, regardless of race, from marrying across racial lines. *See* 106 U.S. at 585. Indeed, the Commonwealth of Virginia took precisely the same position in *Loving*, arguing that "there is no discrimination [because the] law

forbidding marriages between whites and blacks operates alike on both races." *Loving* Appellee's Brief, 1967 WL 113931, at *17 (quoting Cong. Globe, 39th Cong., 1st Sess. 322 (1866). This "equal application" argument, of course, derived from similar reasoning in *Plessy v. Ferguson*, where the Supreme Court held that segregation was not discriminatory because it applied "equally" to individuals of all races:

> [w]e consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

163 U.S. 537, 551 (1896).

Loving, however, rejected the "notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Loving*, 388 U.S. at 8. Rather, the Supreme Court recognized that, despite its symmetrical application to members of different races, Virginia's anti-miscegenation statute, by definition, operated in a racially discriminatory manner because it "proscribe[d] generally accepted conduct if engaged in by members of different races." *Id.* at 11. *See also Romer*, 517 U.S. at 633 ("Equal protection of the laws is not achieved through indiscriminate imposition of

inequalities.") (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) and *Shelly v. Kraemer*, 334 U.S. 1 (1948)).

Just as surely as Virgnia's anti-miscegenation statute prohibited the Lovings from marrying each other because of their race, Proposition 8 prohibits a gay men or lesbian from marrying the person of his or her choice *on account* of sexual orientation.[6] And, by consigning same-sex couples to a separate legal status, arguments that Proposition 8 are not discriminatory amount to a familiar reiteration of the "separate equal" formalism of *Plessy*. "It is not within our constitutional tradition to enact laws … singling out a certain class of citizens for disfavored legal status." *Romer*, 517 U.S. at 633.

[6] For all individuals, marriage is meaningless if it does not entail the right to marry *the person of one's choice*, as the California Supreme Court explained in striking down its state's anti-miscegenation law 19 years before the Supreme Court decided *Loving*. *See Perez v. Sharp*, 198 P.2d 17, 21 (Cal. 1948) ("[T]he essence of the right to marry is freedom to join in marriage with the person of one's choice."); *cf. Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 958 (Mass. 2003) ("[T]he right to marry means little if it does not include the right to marry the person of one's choice"). For any individual, a restriction prohibiting him or her "from marrying the person of his choice," is tantamount to denial of marriage altogether, because "that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." *Perez*, 198 P.2d at 25.

II. THE SAME RATIONALES ADVANCED BY THE HOLLINGSWORTH APPELLANTS WERE ALSO ADVANCED BY THE COMMONWEALTH OF VIRGINIA IN DEFENSE OF ITS ANTI-MISCEGENATION STATUTE IN *LOVING*

The Hollingsworth Appellants cite two rationales that are purportedly advanced by Proposition 8: (1) that it furthers California's interest in "responsible procreation and childrearing," and (2) that it allows California to "proceed with caution" in adopting "changes to a vitally important social institution." Hollingsworth Appellants' Br. at 77, 93.

We adopt Plaintiffs' positions on these issues, *see* Br. of Plaintiff-Appellees at 76-96, and elaborate on two points. First, the district court considered these rationales (among others), and made factual findings that, based on the evidence presented at trial, "the purported state interests fit so poorly with Proposition 8 that they are irrational." Slip op. at 133

Second, and more pertinent to the arguments advanced in this brief, versions of these very rationales were advanced by proponents of anti-miscegenation statutes and expressly rejected by the Supreme Court in *Loving*. *See* 388 U.S. at 11 ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."). Each of the arguments advanced by Proposition 8 proponents is addressed and rejected below.

A. *Loving* Rejected Claims that Anti-Miscegenation Statutes Were Necessary for the Protection of Child Welfare

Historically, opponents of interracial marriage relied on the "misplaced, but often sincerely held" belief that such unions would be harmful to children. *See* François, *supra*, at 130-35.[7] Indeed, the belief that interracial couples would produce damaged children was one of the rationales relied on by the Virginia Supreme Court in upholding Virginia's anti-miscegenation statute in a decision 12 years before *Loving*: "[w]e are unable to read in the Fourteenth Amendment to the Constitution … any words or any intendment … which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens." *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955).

[7] The earliest challenges to anti-miscegenation statutes during the nineteenth century were denied by courts relying on irrational beliefs about the harm to children that would result from interracial marriages. *See, e.g.*, *State v. Jackson*, 80 Mo. 175, 179 (1883) ("It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites ...."); *Lonas v. State*, 50 Tenn. 287, 299 (1871) (interracial couples are "unfit to produce the human race in any of the types in which it was created."); *Scott v. Georgia*, 39 Ga. 321, 323 (1869) ("[A]malgamation of the races is ... unnatural," as biracial children are "generally sickly and effeminate, and ... inferior in physical development and strength, to the fullblood of either race").

Four years later, the Louisiana Supreme Court upheld its state's anti-miscegenation statute on the grounds that doing so was necessary to protect mixed race children from social disadvantages:

> the state … has an interest in maintaining the purity of the races and in preventing the propagation of half-breed children. Such children have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened, as has been said in another connection, with 'a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.'

State v. Brown, 108 So. 2d 233, 234 (La. 1959) (quoting *Brown*, 347 U.S. at 494).

In defending its anti-miscegenation statute before the Supreme Court in *Loving*, the Commonwealth of Virginia did not rely on the blatantly offensive rhetoric of the Virginia Supreme Court from *Naim*, but nevertheless cited purportedly scientific sources in arguing that prohibitions on interracial marriage were in the interest of children. These arguments took various forms, including: (1) pseudoscientific assertions that interracial children might be genetically disadvantaged, *Loving* Appellee's Brief, 1967 WL 113931, at *43 ("[T]he evidence is sufficient to call for immediate action against the intermarriage of widely distinct races…. [W]here two such races are in contact the inferior qualities are not bred out, but may be emphasized in the progeny…") (internal quotation marks and citations

omitted); (2) cultural arguments that only monoracial couples could provide a coherent cultural heritage necessary for a proper upbringing, *id.* at 44-45 ("[M]uch that is best in human existence is a matter of social inheritance, not of biological inheritance. Race crossings disturb social inheritance. That is one of its worst features.") (internal quotation marks and citations omitted); and (3) sociological claims that interracial marriages were more likely to end in divorce:

> When children enter the scene the difficulty is further complicated … Inasmuch as we have already noted the higher rate of divorce among the intermarried, it is not proper to ask, Shall we then add to the number of children who become the victims of their intermarried parents? If there is any possibility that this is likely to occur--and the evidence certainly points in that direction--it would seem that our obligation to children should tend to reduce the number of such marriages.

id. at 45, 47-48 (quoting John LaFarge, *The Race Question and the Negro* (1943); and Dr. Albert I. Gordon, *Intermarriage – Interfaith, Interracial, Interethnic* at 334-35 (1964)) (internal quotation marks omitted).[8]

These arguments about the purported harm to children from interracial marriages, once widely held notwithstanding the absence of support, are mirrored throughout the Hollingsworth Appellants' Brief, but with gay men and lesbians standing in place of interracial couples. Despite their

[8] Dr. Gordon's study was characterized at the time by one Harvard psychologist as the "definitive book on intermarriage." *See id.* at 47.

protestations that Proposition 8 merely advances the state's interest in "responsible procreation" amongst opposite-sex couples, *see* Hollingsworth Appellants' Brief at 86, the Hollingsworth Appellants' position is premised on the notion that gay and lesbian couples make for inferior parents. *See*, *e.g.*, *id.* at 80 ("children benefit when they are raised by the couple who brought them into this world in a stable family unit"); *id.* at 81 ("there is little doubt that children benefit from having a parent of each gender"); and *id.* at 89 ("the widely shared and deeply instinctive belief that children do best when raised by both their biological mother and their biological father [is rational]").

In the interracial marriage context, arguments that mono-racial couples made for better parents amounted to an "amalgam of superstition, mythology, ignorance and pseudo-scientific nonsense summoned up to support the theories of white supremacy and racial 'purity.'" Brief of *Amicus Curiae* NAACP Legal Defense & Educational Fund, *Loving v. Virginia*, 388 U.S. 1 (1967), Civ. No. 395, 1967 WL 113929, at *9-10. The Supreme Court rightly rejected these unfounded, *post-hoc* rationalizations for Virginia's clearly discriminatory marriage law. *Loving*, 388 U.S. at 11 ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."). This

Court should not credit the Hollingsworth Appellants' rehash of similarly unsupported and irrational arguments here.

B. Loving Rejected Arguments that Recognition of a Right to Marry Irrespective of Race Would Fundamentally Alter the Definition of Marriage

The Hollingsworth Appellants' arguments concerning the need for "caution" in dealing with social change are similarly unavailing. Of course, a generalized need for "caution" has never been recognized as a basis for discrimination. *Cf. Cooper v. Aaron*, 358 U.S. 1, 7 (1958) (Constitutional wrongs must be resolved by the "earliest practicable completion."); *City of Cleburne*, 473 U.S. at 448 ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable … are not permissible bases for" discrimination). Neither has the maintenance of tradition been credited as a rational justification for laws under Fourteenth Amendment analysis. *See Lawrence*, 539 U.S. at 579 ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

Appeals to tradition to preserve discriminatory exclusions from marriage are nothing new. Opponents of interracial marriage similarly argued that recognition of such unions would fundamentally alter the institution of marriage and the very fabric of society. In its 1955 decision

rejecting a challenge to Virginia's anti-miscegenation statute, the Virginia Supreme Court justified its decision on the grounds that the institution of marriage "may be maintained in accordance with established tradition and culture and in furtherance of the physical, moral and spiritual well-being of its citizens." *Naim*, 87 S.E.2d at 756.

Indeed, in *Loving* itself, the trial court reasoned that interracial marriage was aberrant and contrary to a proper understanding of the nature of marriage:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Loving, 388 U.S. at 3. And, before the Supreme Court, the Commonwealth of Virginia also appealed to tradition:

> The Virginia statutes here under attack reflects a policy which has obtained in this Commonwealth for over two centuries …. They have stood—compatibly—with the Fourteenth Amendment, though expressly attacked thereunder—since that Amendment was adopted.

Loving Appellee's Brief, 1967 WL 113931, at *52. As the district court in this case noted, sentiments such as these were broadly shared amongst proponents of anti-miscegenation laws. *See* slip op. at FF 24(b).

The echoes of the view that tradition alone can justify discriminatory

restrictions on marriage form the tenuous underpinning of the Hollingsworth Appellants' mantra that, because marriage has always been defined to exclude same-sex couples, the Fourteenth Amendment has no application here. *See, e.g.*, Hollingsworth Appellants' Br. at 59 ("[T]he understanding of marriage as a union of man and woman, uniquely involving the rearing of children born of their union, is age-old, universal, and enduring. No other purpose of marriage can plausibly explain the institution's existence, let alone its ubiquity.").

In *Loving*, however, the Supreme Court rejected the notion that long-held beliefs (including those of the framers of the Fourteenth Amendment) about the incompatibility of interracial relationships and a traditional understanding of marriage should be controlling. *See* 388 U.S. at 9-10. The *Loving* Court explicitly recognized that, as a historical matter, interracial marriage had long been prohibited in America, but it nevertheless struck down Virginia's anti-miscegenation law by properly focusing on the substance of the fundamental right at issue.

Thus, neither the widespread prevalence of anti-miscegenation statutes, nor the broad public support for such statutes prevented the Court from its vigorous embrace of the principles underlying the Fourteenth Amendment in *Loving*. The first statute in the United States expressly

prohibiting interracial marriage was enacted in the seventeenth century. *See* R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 Cal. L. Rev. 839, 870 (2008). Forty-two states have maintained, at one point in time, criminal prohibitions on interracial marriage. *See* David H. Fowler, *Northern Attitudes Towards Interracial Marriage* 336 (1987). Despite *amici*'s contention that "racial restrictions on marriage never were a universal, defining feature of marriage," HILC Br. at 2, "*[e]very state* whose black population reached or exceeded 5 percent of the total eventually drafted and enacted anti-miscegenation laws." Kennedy, *supra*, at 219 (citing Joseph Golden, *Patterns of Negro-White Intermarriage*, 19 Am. Soc. Rev. 144 (1954)) (emphasis added). And, at the time of *Loving*, sixteen states still maintained criminal prohibitions on interracial marriage. *See* 388 U.S. at 7 n.5. Nevertheless, the Court deemed this long history of prohibitions on interracial marriage irrelevant to its Equal Protection analysis, and issued its ruling undeterred by the fact that, at that point in history, only a single court—the Supreme Court of California[9]—had held that anti-miscegenation

[9] Indeed, the California Supreme Court struck down its state's anti-miscegenation statute in *Perez* at a time when the majority of states still had anti-miscegenation laws in place, and all of the courts to confront this question had ruled that there is no constitutional right to marry a person of another race. *See* Lenhardt, *supra*, at 857.

statutes violate the Fourteenth Amendment.[10]

Anti-miscegenation statutes also enjoyed widespread popular support throughout the vast majority of our nation's history. Nearly three in four Americans still opposed interracial marriage one year after *Loving* was decided. *See* Gallup, Most Americans Approve of Interracial Marriages, Aug. 16, 2007, *available at* http://www.gallup.com/poll/28417/most-americans-approve-interracial-marriages.aspx (stating that 73% of Americans opposed interracial marriage in 1968).[11] In spite of the widely-held nature of these views, "[n]either the *Perez* court nor the *Loving* Court was content to permit an unconstitutional situation to fester because the remedy might not reflect a broad social consensus." *Goodridge*, 798 N.E.2d at 958 n.16.

Though it is the Constitutional principles that must govern this case, we note that, today, same-sex marriage is opposed by fewer than half of Americans (48%), *see* Pew Forum on Religious and Public Life, *Support For Same-Sex Marriage Edges Upward*, Oct. 6, 2010, *available at*

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[10] In fact, in spite of *Loving*, South Carolina did not revoke its anti-miscegenation statute until 1998, and Alabama did not do so until 2000. *See* Kennedy, *supra*, at 279.

[11] As recently as 1994, fewer than half of Americans approved of such marriages. *See* Gallup, *supra.* And even when the state of Alabama finally repealed its anti-miscegenation law in the year 2000, 40% of the electorate voted to *retain* the prohibition. *See* Kennedy, *supra*, at 280.

http://pewforum.org/Gay-Marriage-and-Homosexuality/Support-For-Same-Sex-Marriage-Edges-Upward.aspx, and that opposition to interracial marriage did not fall to a similar level until the 1980's, nearly 15 years *after Loving*. *See* Gallup, *supra* (noting that 50% of Americans opposed interracial marriage as recently as 1983).

Despite concerns that interracial marriage would fundamentally alter the definition of marriage itself, the end of prohibitions on miscegenation has not fundamentally altered the nature of marriage as an institution. *See* slip op. at FF 33(d)-(f). This is because recognizing the right of another individual to marry the person of his or her choice has no effect on anyone else's marriage or on the institution as a whole. As the Supreme Judicial Court of Massachusetts recognized:

> Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.

Goodridge, 798 N.E.2d at 965.

It is true that the prevalence of laws expressly prohibiting interracial marriage has not remained constant throughout our nation's history.[12] But

[12] Of course, given that *every state* with a Black population exceeding 5% has had an anti-miscegenation statute at some point, *see* Kennedy, *supra*, at 219, whether some states had anti-miscegenation statutes at the founding

the same is also true with respect to express prohibitions on same-sex marriage. As the Hollingsworth Appellants themselves acknowledge, many States that have adopted Constitutional amendments expressly defining marriage as between a man and a woman only did so within the past 12 years. *See* Hollingsworth Appellants' Br. at 49. The fact that anti-miscegenation statutes had a varied history is no reason to treat laws banning same-sex marriage any differently. Some express prohibitions on same-sex marriage are older than others, just as some anti-miscegenation laws were older than others. Regardless, "history must yield to a more fully developed understanding of the invidious quality of the discrimination." *Goodridge*, 798 N.E.2d at 958.

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may have had more to do with demographic circumstances rather than an enlightened understanding of the right to marriage. And, in any event, the absence of an express prohibition on interracial marriage at any particular point in time in a given state does not demonstrate that such unions would have been recognized as valid marriages in that state. Indeed, in the same-sex marriage context, states that have lacked an express prohibition on same-sex marriages have not necessarily recognized same-sex unions. *See, e.g.*, *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) (holding that "marriage has always been considered as the union of a man and a woman," despite the fact that "Kentucky statutes do not specifically prohibit marriage between persons of the same sex").

CONCLUSION

Far from a case that is solely addressed to questions of race, *Loving* stands for the proposition that no one should be denied the right to marry the person that he or she loves solely because of *who* that person is. That fundamental principle of equality should guide the Court's decision in this case.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 25, 2010.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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