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ORIGIN

No. S 147999

In the Supreme Court of California

In Re: Marriage Cases

City and County of San Francisco v. State of California
California Court of Appeal, First Appellate District Case No. A110449
San Francisco County Superior Court Case No. CCC-04-429539
(Consolidated for Trial with)
San Francisco County Superior Court Case No. CGC-04-429548

Brief *Amici Curiae* of African-American Pastors in California in Support of Respondents

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In the Supreme Court of California

No. S 147999

IN RE: MARRIAGE CASES

BRIEF FOR *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS

Rev. Joshua Beckley, Senior Pastor
Ecclesia Christian Fellowship
San Diego

Dr. Timothy Winters, Pastor
Bayview Baptist Church
San Diego

Pastor Chuck Singleton
Loveland Church
Ontario

Dr. Raymond W. Turner, Senior Pastor
Temple Missionary Baptist Church
San Bernardino

INTEREST OF *AMICI CURIAE*

Your *Amici* are African-American citizens of California who serve as the Senior Pastors of four congregations. Our churches and ministries are located in San Diego, Ontario, and San Bernardino, and provide for the spiritual, physical, educational, and social service needs of over 25,000 men, women and children. Our sermons and outreach ministries affirm the sanctity of marriage, and each of us teaches that marriage is, and must remain exclusively, the union of one man and one woman.

We file this brief for a single purpose: to urge this Court – and each of its Honorable Justices – to reject the claim that laws defining "marriage" as a

relationship between one man and one woman are just as legally and morally repugnant as laws forbidding interracial marriage.

As African-American pastors who minister to the spiritual and temporal needs of their congregations and the communities in which they are located, each of us is well-acquainted personally and professionally with the evils of racial discrimination. As pastors and community leaders, each of us grapples on a daily basis with the human suffering caused by institutionalized racial discrimination, both past and present. We also understand, as few who do not work closely with the African-American community can, the profound and lasting damage wrought by a legal and social system that officially "regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute" that persons of African descent could be "bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it." *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393, 407 (1856). This brief will, we submit, provide guidance in the Court's deliberations concerning the analogy to race discrimination being argued by the Appellants in this case.

SUMMARY OF ARGUMENT

The laws overturned in *Loving v. Virginia*, 388 U.S. 1 (1967) and *Perez v. Lippold*, 32 Cal.2d 711, 32 Cal.2d 711, 728, 198 P.2d 17 (1948), were integral components of a system of social subordination and isolation that is unique in American history. Like the institution of chattel slavery from which they arose, anti-miscegenation laws were a symptom of an institutionalized social and legal culture that systematically denied the *humanity* of African-Americans. Not only did the law deny that "the class of persons who had been imported as

slaves, [or] their descendants, whether they had become free or not, were ... a part of the people," *Dred Scott*, *supra*, 60 U.S. at 407, the culture regarded persons of African descent to be members of an "unfortunate race" and "beings of an inferior order" who had no rights or legally protected interests of their own. *Id. Accord*, *Loving*, 388 U.S. at 4 ("Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period.")

Laws that define "marriage" as a male/female relationship are, by contrast, firmly rooted in the biology that defines human nature and reproduction. A sex-based definition of the marital relationship is certainly "rational" from a biological, psychological, developmental, and sociological point of view, and there is no reason, political or otherwise, for this Honorable Court to change it. Your *Amici* submit that if the concept of "marriage" is to retain any meaning at all, the Justices of this Court should reaffirm that understanding without equivocation.

In every instance where a court or legislature has departed from the ancient, honorable, and entirely rational "male-female" (or "complimentary") understanding of the marriage relationship, the most influential argument leading courts and legislatures to question this understanding on human rights grounds is the *Loving-Perez* analogy to race discrimination. Your *Amici* submit that the analogy to racial discrimination is not only false, it is destructive. The African-American community does not need one more reminder that many otherwise-educated people still do not understand why anti-miscegenation laws were wrong in the first place. Nor do they need another unwelcome reminder that state and local government officials sometimes do not seem to have a firm

grasp of the history that continues to shape the challenges that lie ahead for our communities.

Like the arguments that shaped the Supreme Court's rulings in *Dred Scott* and *Plessy v. Ferguson*, 163 U.S. 537 (1896), the *Loving-Pierce* analogy denies the relevance of human nature and biology. It is a "law office history" that expropriates the unique cultural and social history of African-Americans and uses it to support a political and social agenda concerning marriage and sexual relationships that is deeply offensive to, and rejected by, large majorities in the faith and civic communities served by your *Amici.*

To the extent that courts and legislatures have relied on *Loving* or *Perez* as the basis for an argument that marriage is a mere social construct that courts and legislatures are free to adjust whenever powerful political forces decide that it is time for a change, they are doubly wrong. Unlike chattel slavery and the culture it spawned in the United States, marriage not a "socially constructed" relationship rooted only in the law or in the social or religious conventions of the society in which it is recognized. Nor is it simply a "committed relationship" with a person of one's choice. The union of a man and a woman in marriage is, and always has been, the fundamental building block upon which families, communities, and entire societies are built.

There is no warrant in law for this Court to decree that the traditional understanding of marriage violates anyone's rights. Nor is there any warrant for the State to use the mechanisms of civil rights law to reshape social and religious attitudes about marriage. And finally, there no warrant in our California Constitution and laws for this Court to mandate that the citizens of

California participate in a vast social experiment, the implications of which are simply unknown.

ARGUMENT

I. *LOVING* AND PEREZ WERE "RACE" CASES

A. The Anti-Miscegenation Laws Invalidated in *Loving and Perez* Maintained a Key Incident of Slavery.

It is tempting, though historically and legally inaccurate, to read *Loving v. Virginia* and *Perez v. Lippold* as "Due Process" cases that affirm the "freedom to join in marriage with the person of one's choice." *Perez, supra*, 32 Cal.2d at 717, 198 P.2d at 21. Though *Perez* did include three instances in which this Court spoke of the liberty to marry the person of one's choice, it is clear from the facts of the case, and from the context in which the quotes appear, that the anti-miscegenation provisions of the Civil Code[1] did far more than "deprive[] individuals of access to an institution of fundamental legal, personal, and social significance" or unduly burden "the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare." *Goodridge v. Dept. of Public Health*, 440 Mass. 309, 328,

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[1] California's original anti-miscegenation statute was adopted in 1850. (Stats. 1850, ch. 140, p. 424). The statute at issue in *Perez*, Civil Code §60, adopted in 1872, also prohibited only marriages between white persons and Negros or mulattoes, but it was later amended twice: First, "to prohibit marriages between white persons and Mongolians" (Stats. 1901, p. 335), and subsequently to prohibit marriages between white persons and members of the Malay race. (Stats. 1933, p. 561.)" *Perez,* 32 Cal.2d at 712-713, 198 P.2d 17.

798 N.E.2d 941, 958 (2003). Anti-miscegenation laws were a "badge or incident" of slavery that could not have survived without the explicit affirmation by the courts of the fundamental premise of the *Dred Scott* decision: a denial that persons of African descent had *any rights at all*:

> [Negroes] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. *Dred Scott v. Sandford*, *supra*, 60 U.S. (19 How.) at 407.

The importance of this point to the present discussion cannot be over-stated. *Loving* invalidated a Virginia anti-miscegenation statute that was based not only in the traditional view expressed in *Scott*, but also in the pseudo-sciences of Social Darwinism and eugenics. *See* Emily Field Van Tassel, "Only the Law Would Rule Between Us": *Anti-Miscegenation, The Moral Economy of Dependency, and the Debate Over Rights After the Civil War*, 70 Chi.-Kent L. Rev. 873 (1995). Arguing that there was a "scientific" basis for observable physical, economic, and cultural differences among nationality groups, eugenics advocates urged Congress and the State legislatures to adopt legislation designed to protect Whites from "defective germ plasm." *See* Barbara L. Bernier, *Class, Race, and Poverty: Medical Technologies and Socio-Political Choices*, 11 Harv. Black Letter J. 115, 130 (1994) (*citing* Elaine Ellis, STERILIZATION: A MENACE TO THE NEGRO 155 (1937)). Though Virginia had banned interracial marriage and fornication as early as 1861, and enforced the ban against the white persons involved in such marriages by

banishing them from the Commonwealth, it responded to the eugenics "challenge" on March 20, 1924 by adopting "The Eugenical Sterilization Act," Act of March 20, 1924, ch. 394 1924 Va. Acts 569-70 and the "Virginia Racial Integrity Act." Act of March 20, 1924, ch. 371, 1924 Va. Acts 534. The law challenged in *Loving* was enacted as a part of that legislative effort.

The conclusion is inescapable: Neither *Perez* nor *Loving* can be characterized as anything *other than* "race cases." Nor can they be read as anything other than a reaffirmation of the biological and sociological underpinnings of marriage *as currently defined. Perez* and *Loving* are landmarks of equal justice under law racial integration precisely *because* they affirm that biological factors such as skin color that are completely irrelevant to the sexual relationship of a man and a woman. They are also landmarks because they reject explicitly eugenic basis of these laws. This Court should not permit "law office historians" to rewrite this history – and the California Constitution – by conflating the historical experiences of one community with the entirely different history and experience of another.

Your *Amici* submit that the First District Court of Appeal had it correct when it observed that:

> On the surface, the interracial marriage cases appear to provide compelling support for finding gays and lesbians have a fundamental right to marry their same-sex partners. However, upon closer inspection, the analogy is flawed. The central holdings of *Perez* and *Loving* are that laws prohibiting interracial marriage constitute invidious racial discrimination in violation of the equal protection clause. . . . To be sure, the cases also held anti-miscegenation laws

deprived the participants of their fundamental right to marriage, but this holding cannot be divorced from the laws' racially discriminatory context. . . ." In re Marriage Cases, 143 Cal.App.4th 873, 49 Cal. Rptr. 3d 675, 704 (Cal. App. 1st. Dist. 2006).

B. The *Loving-Perez* Analogy Does Not Withstand Analysis and has Rightly Been Rejected in the States.

Although the analogy to race has been accepted by the highest courts in Hawaii and Massachusetts, see *Baehr v. Lewin*, 74 Haw. 530, 569, 852 P.2d 44 (1993), *superseded by constitutional amendment; Goodridge v. Dept. of Public Health*, *supra*, 440 Mass. At 328 & n. 16, 798 N.E.2d at 958 & n. 16), and has persuaded a variety of individual judges, it has been firmly rejected by appellate courts in California, New York, New Jersey, Washington State, Vermont, Minnesota, Arizona, Indiana, Washington, D.C., and, most recently, by the Court of Appeals of Maryland. *See Conaway v. Deane*, -- Md. --, --- A.2d ----, 2007 WL 2702132 (Md., September 18, 2007). One of the best critiques of the analogy is found in the opinion of the New York Court of Appeals in *Hernandez v. Robles,* 855 N.E.2d 1, 8 (N.Y. 2006), which upheld the constitutionality of man-woman marriage while offering an excellent summary of the questions raised by *Perez* and *Loving*:

> [T]here are rational grounds on which the Legislature could choose to restrict marriage to couples of opposite sex. Plaintiffs have not persuaded us that this long-accepted restriction is a wholly irrational one, based solely on ignorance and prejudice against homosexuals. This is the question on which these cases turn. If we were convinced that the restriction plaintiffs attack were founded on nothing but

> prejudice – if we agreed with plaintiffs that it is comparable to the restriction in *Loving v. Virginia*, [citation omitted], a prohibition on inter-racial marriage that was plainly 'designed to maintain White Supremacy' (id. at 11) – we would hold it invalid, no matter how long its history. As the dissent points out, a long and shameful history of racism lay behind the kind of statute invalidated in *Loving*.

See also, *Conaway v. Deane*, *supra,* -- WL at * ("The [*Loving*] analogy to the present case is inapt."); *Andersen v. King County*, 138 P.3d 963, 989 ¶104 (Wash. 2006) (plurality op. of Madsen, J.) ("*Loving* is not analogous. In *Loving* the Court determined that the purpose of the anti-miscegenation statute was racial discrimination.").

Courts in New Jersey and Vermont drew the same conclusion. *Lewis v. Harris*, 908 A.2d 196, 210 (N.J., 2006) ("From the fact-specific background of that case [*Loving*], which dealt with intolerable racial distinctions..., we cannot find support for plaintiffs' claim that there is a fundamental right to same-sex marriage under our State Constitution."); *Baker v. State*, 744 A.2d 864, 880 (Vt. 1999) ("Although the concurring and dissenting opinion invokes ... *Loving v. Virginia*, the reliance is misplaced. There the high court had little difficulty in looking behind the superficial neutrality of Virginia's anti-miscegenation statute to hold that its real purpose was to maintain the pernicious doctrine of white supremacy.").

C. History Demonstrates that the Willingness of State and Federal Judiciaries to Disregard the Constitution and Laws Explicitly Forbidding Racial Discrimination was the Basis of the Virginia's Claim in *Loving* that History and Tradition Supported Its Law.

In *Goodridge,* the Supreme Judicial Court of Massachusetts held that "history must yield to a more fully developed understanding of the invidious quality of the discrimination." *Goodridge*, *supra*, 440 Mass. at 328 & n. 17, 798 N.E.2d at 958 & n. 17. Your *Amici* agree that both history and tradition must yield when the People or their representatives have spoken on a subject otherwise within their legislative competence, but we respectfully submit that the argument "from race" cannot support the proposition that a majority of any court can disregard the law when there are competing claims about the "invidiousness" of the male-female definition of marriage.

Anyone who is *really* acquainted with the history of racial discrimination in this country (or who bothers to read the cases on which the analogy is based) would (or should) know that both *Dred Scott*, and *Plessy v. Ferguson*, 163 U.S. 537 (1896) are based on a substantive due process concept of liberty that empowered the judiciary to nullify then-existing civil rights laws! *See* David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-1864*, 1983 DUKE L.J. 695, 735-36 nn.255-64 (1983) (noting that *Dred Scott* was the Court's first substantive due process case).

The State of Virginia did not argue in *Loving* that racial discrimination could be justified by history and social conventions because there is any support in the law for the proposition that they are, or should be, sacrosanct. It made the argument because the Supreme Court of the United States had consistently *accepted* the proposition that "a more fully developed understanding of the invidious quality of the discrimination" prohibited by the Thirteenth, Fourteenth, and Fifteenth Amendments and civil rights legislation

permitted racial discrimination even though the text of these laws expressly forbade it.

Had the Supreme Court of the United States simply applied the Constitution *as written*, and deferred in *Dred Scott* to Congressional power to define the requirements of citizenship in non-racial terms, there would be no occasion to comment on that decision here. Had the Court simply applied the Constitution and laws of the United States to the Jim Crow law validated in *Plessy*, history might have been very different for the African-American community.

But the Court in *Plessy* did not apply the law. It relied instead on its own, and in the words of *Goodridge*, "more fully developed understanding of the invidious quality of the discrimination" that occurs when people are divided by race.

> We 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. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes

> that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals.

Plessy v. Ferguson, 163 U.S. at 551, *aff'g*, *Ex parte Plessy*, 45 La. Ann. 80, 87-88, 11 So. 948 (1893) ("Even were it true that the statute is prompted by a prejudice on the part of one race to be thrown in such contact with the other, one would suppose that to be a sufficient reason why the pride and self-respect of the other race should equally prompt it to avoid such contact, if it could be done without the sacrifice of equal accommodations.").

If, in fact, there is any lesson to be learned from the race cases, it is that African-Americans have suffered greatly whenever judges take it upon themselves to ignore the laws they are sworn to uphold. The People of California have considered, and rejected, the claim that reserving the status of "marriage" to male-female couples is "invidious." They have also considered, and accepted, the proposition that same-sex couples should have access to the same benefits enjoyed by married couples. There is nothing in the Constitution or laws of this state or in those of the United States that requires, or even permits, this court to redefine marriage.

II. CALIFORNIA AND OTHER STATES HAVE REJECTED ANTI-MISCEGENATION LAWS, BUT EMBRACED MARRIAGE, THUS DEMONSTRATING A NATIONAL CONSENSUS THAT NEITHER EQUAL PROTECTION, DUE PROCESS, NOR PRIVACY REQUIRE THAT SAME-SEX UNIONS BE CHARACTERIZED AS "MARRIAGES"

Table 3 divides the States into four categories according to whether they ever had anti-miscegenation laws.

- 13 States never had such laws;
- 7 States repealed their laws before *Perez*;
- 14 States repealed their laws between *Perez* and *Loving*; and
- 16 States still had anti-miscegenation laws when the U.S. Supreme Court decided *Loving* in 1967.

The last State to enact an anti-miscegenation law was Wyoming in 1913, but by 1967 anti-miscegenation laws had been abandoned everywhere except the South and no State had enacted such a law for over 50 years. This Court decided *Perez* some 20 years earlier than *Loving*, and its decision may very well have helped encourage the thirteen (13) States (14 minus California) that repealed their laws between 1948 and 1967.

That situation contrasts sharply with the eagerness of the American People to protect marriage. The trend began shortly after a decision of the Hawaii Supreme Court, *Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993), *superseded by constitutional amendment,* and in the space of a decade, a large majority of the States moved vigorously to protect marriage by statute and constitutional amendment.

The contrasts between these two realities: abandoning racism after *Perez* and reaffirming the male-female character of marriage after *Baehr* are shown in the following Table.

(*Please turn to facing page*)

Table 1: **Americans Reject Racism and Embrace Marriage: Anti-Miscegenation and Marriage Laws in the States**
(alphabetical by category of anti-miscegenation law)

Category I: **Never had an Anti-Miscegenation Law**[2]

Anti-Miscegenation Laws *(year repealed)*	**Constitutional Amendment** *(year ratified)*	**Marriage Statute** *(year enacted)*	**Other and Notes**
Alaska	1998	1996	
Connecticut		2005	marriage plus civil unions[3]
Hawaii	1998	1998	separation of powers[4]
Iowa		1998[5]	
Kansas	2005	1996	
Minnesota		1997	
New Hampshire		1987	

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[2] Some of the States in Category I had race-based laws when they were colonies or territories, but not as States. Others never had any laws making race relevant to marriage or sexual relations.

[3] Connecticut has enacted same-sex civil unions with the same "benefits, protections, and responsibilities" as marriage, but marriage is still defined "as the union of one man and one woman." C.G.S.A. §46b-38nn.

[4] Hawaii's amendment, enacted after *Baehr, supra,* reaffirms legislative power to define marriage.

[5] On August 30, 2007, an Iowa trial court struck down the Iowa marriage statute on both due process and equal protection grounds. *Varnum v. Brien*, Iowa Dist. Ct. Polk Co., Case No. CV 5965 (decided Aug. 30, 2007). The court stayed its opinion pending appeal.

Category I: **Never had an Anti-Miscegenation Law**[2]

Anti-Miscegenation Laws (*year repealed*)	**Constitutional Amendment** (*year ratified*)	**Marriage Statute** (*year enacted*)	**Other and Notes**
New Jersey		2006	marriage plus civil unions[6]
New Mexico		Y	Attorney general's opinion[7]
New York		Y	*Hernandez v. Robles*[8]

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[6] In New Jersey, "Civil union couples shall have all of the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage." N.J.S.A. §37:1-31.a (eff. Feb. 19, 2007). The legislature acted after the Supreme Court held that same-sex couples must be given the same rights and obligations as married couples. *Lewis v. Harris*, 908 A.2d 196 (2006).

[7] The Opinion of the Attorney General of New Mexico, 2004 WL 2019901 (Feb. 20, 2004) holds that "New Mexico statutes, as they currently exist, contemplate that marriage will be between a man and a woman." In support of that conclusion she cited N.M.S.A. 1978, §40-1-18; §§40-2-1 – 40-2-9; §§40-3-1 – 40-3-17; and N.M.R.A., Rule 11-505(B).

[8] *Hernandez v. Robles*, 7 N.Y.3d 338, 821 N.Y.S.2d 770, 855 N.E.2d 1 (N.Y. 2006): held that New York's statutes restrict marriage to the union of a man and woman, and that the restriction is constitutional. The Court said at 7 N.Y.3d at 357, "All the parties to these cases now acknowledge, implicitly or explicitly, that the Domestic Relations Law limits marriage to opposite-sex couples. . . . Articles 2 and 3 of the Domestic Relations Law, which govern marriage, nowhere say in so many words that only people of different sexes may marry each other, but that was the universal understanding when articles 2 and 3 were adopted in 1909, an understanding reflected in several statutes. [Then citing and quoting Domestic Relations Law §12, §15(1)(a), §5, and §50.]" (Two paragraphs combined in this quotation.).

Category I: **Never had an Anti-Miscegenation Law**[7]

Anti-Miscegenation Laws (*year repealed*)	**Constitutional Amendment** (*year ratified*)	**Marriage Statute** (*year enacted*)	**Other and Notes**
Pennsylvania		1996	
Vermont		1999	Marriage plus civil unions[9]
Washington		1998	
Wisconsin	2006	Y	e.g., W.S.A. §765.01

Category II: Repealed Anti-Miscegenation Laws Before *Perez* (1948)

Anti-Miscegenation Laws (*year repealed*)	**Constitutional Amendment** (*year ratified*)	**Marriage Statute** (*year enacted*)	**Other and Notes**
Massachusetts(1843)		Y, but	acts held

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[9] Vermont has a statutory man-woman definition of marriage that was added in 1999, 15 V.S.A. §8 (2007) ("Marriage is the legally recognized union of one man and one woman."). Vermont also now has civil unions, which were one of the options that Vermont's high court gave the legislature in *Baker v. State,* 744 A.2d 864 (Vt. 1999). The civil unions act contains the same definition of marriage as the prior statute, 15 V.S.A. §1201(4).

[10] In *Goodridge v. Dept. Public Health*, 798 N.E.2d 941, 953 (Mass. 2003), the Supreme Judicial Court of Massachusetts agreed that the State's statutes did not allow for same-sex marriage: "We interpret statutes to carry out the Legislature's intent, determined by the words of a statute interpreted according to 'the ordinary and approved usage of the language.' The everyday meaning of 'marriage' is '[t]he legal union of a man and woman as husband and wife,' and the plaintiffs do not argue that the term 'marriage' has ever had a different meaning under Massachusetts law. This definition of marriage, as both the department and the Superior Court judge point out, derives from the common

Category II: Repealed Anti-Miscegenation Laws Before *Perez* (1948)

Anti-Miscegenation Laws (*year repealed*)	**Constitutional Amendment** (*year ratified*)	**Marriage Statute** (*year enacted*)	**Other and Notes**
			unconstitutional[10] [h]
Michigan (1883)	2004	1996	
Ohio (1887)	2004	2004	
Rhode Island (1881)		Y	See note[11] [i]

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law. . . . The only reasonable explanation is that the Legislature did not intend that same-sex couples be licensed to marry. We conclude, as did the judge, that [the relevant section of the code] may not be construed to permit same-sex couples to marry." (Two paragraphs combined; citations omitted.)

[11] The statutes of Rhode Island seem clearly to forbid same-sex "marriage." For example, the licensure statute refers to the "female party" and the "male party." R.I.G.L. 1956, §15-2-1. "Both the bride and groom shall subscribe to the truth of the data in the application." R.I.G.L. §15.-2-7. See especially, Title 15, chapter 1, "Persons Eligible to Marry." In a letter dated Feb. 20, 2007, however, Attorney General of Rhode Island opined that Rhode Island university officials should recognize same-sex "marriages" performed in Massachusetts. A closely related issue (jurisdiction to divorce a same-sex marriage contracted by two Rhode Islanders in Massachusetts) is now before the Rhode Island Supreme Court. *Chambers v. Ormiston*, 916 A.2d 758 (R.I. 2007) (preliminary order). See also, *Cote-Whitacre v. Dept. of Public* Health, 844 N.E.2d 623 (Mass. 2006), and 2006 WL 3208758 (Mass. Super. 2006) (on remand from SJC) (Massachusetts courts' views on whether same-sex couples who are residents of Rhode Island can "marry" in Massachusetts).

Category III:

Repealed Anti-Miscegenation Laws Between *Perez* (1948) and *Loving*(1967)

Anti-Miscegenation Laws (*year repealed*)	**Constitutional Amendment** (*year ratified*)	**Marriage Statute** (*year enacted*)	**Other and Notes**
Arizona (1962)		1996	
California (1948)		2000[12] *j*	
Colorado (1957)	2006	2000	
Idaho (1959)	2006	1996	
Indiana (1965)		1997	
Maryland (1967)		1973[13]	
Montana (1953)	2004	1997	
Nebraska (1963)	2000		

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[12] California's statute is a "super-statute" enacted by the people in a referendum on March 7, 2000. The "California Defense of Marriage Act" reads, "Only a marriage between a man and a woman is valid or recognized in California." West's Ann. Cal. Fam. Code §308.5.

[13] It appears that, in 1973, Maryland was the first State to enact a man-woman marriage law in response to an attempt by persons of the same sex to "marry." Md. Code, Family Law, §2-201 ("Only a marriage between a man and a woman is valid in this State.") (added 1973; historical note giving 1984 is showing a recodification). The act was upheld in *Deane v. Conaway*, , -- Md. --, --- A.2d ----, 2007 WL 2702132 (Md., September 18, 2007). Most other States were prompted more than two decades later by court decisions in Hawaii and Massachusetts.

Category III:
Repealed Anti-Miscegenation Laws Between *Perez* (1948) and *Loving*(1967)

Anti-Miscegenation Laws (*year repealed*)	**Constitutional Amendment** (*year ratified*)	**Marriage Statute** (*year enacted*)	**Other and Notes**
Nevada (1959)	2000		
North Dakota (1955)	2004	1997	
Oregon (1951)	2004		
South Dakota (1957)	2006	1996	
Utah (1963)	2004	1995	
Wyoming (1965)[14]		1869?	W.S. 1977, §20-1-101

III. ACCEPTANCE OF THE ANALOGY TO RACIAL DISCRIMINATION WOULD PUT THE FREEDOM OF YOUR *AMICI* TO PREACH AND BEAR WITNESS TO THE GOSPEL AT RISK.

The analogy to racial discrimination is a powerful rhetorical device. Like a punch to the gut, it demands attention. Used properly, it calls upon those to whom it is addressed to stop, to remember, and then to consider carefully the means by which any decision-maker – a court, legislature, administrator, voter, employer, teacher, or landowner – chooses to implement a policy or decision that is based on an inherently irrational view of the nature of the human person. *Cf.,* Michael J. Bamshad & Steve E. Olson, "Does Race Exist?", *Scientific*

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[14] With its enactment in 1913, Wyoming was the last State to pass an anti-miscegenation law. It is not clear when the Wyoming Legislature added the precise language contained in §1 ("Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential."). There was a reference to the "male party" in a statute adopted in 1931, and to "husband and wife" in 1915. See In re *Roberts' Estate*, 58 Wyo. 438, 133 P.2d 492 (1943).

American, 289:78-85 (December, 2003) (exploring the connection between "common definitions of race" and "the genetic constitution of populations around the world in an effort to probe the link between ancestry and patterns of disease.").

In the present case, however, the analogy to race discrimination is not presented as an invitation to closer examination of the reasons and evidence that support the contention that traditional definition of marriage is good for men, women, and children. It is presented as a conversation-stopper with respect to the question discussed in this brief: *i.e.* whether the definition of marriage as a male-female institution should be classified by the State of California as the functional equivalent of racism, and is designed to put those who argue the case for the traditional definition of marriage at a constitutionally-based disadvantage.

Your *Amici* submit that the implicit (but rather obvious) "moral" point of the argument is to lay the legal foundation for a far more extensive project: a gradual redefinition of social morality. If accepted by a majority of this Court, the analogy to race discrimination will be used as a tool to "reform" other community institutions, most notably churches, religious institutions, schools, and ministries like those of your *Amici* whose religious teachings on traditional marriage and the morality of sexual relationships outside marriage are Bible-based.

> Narratives will help judges root legal understanding of Queers in reality rather than heterosexist fiction. As a result, while the evolution of a Queer narrative may be slow, *convincing courts to listen will eventually become a self-sustaining task because the judicial narrative will both reflect and construct social reality.* ... Defending desire means facing the widespread sense of sexual proscription that emanates from many organized religions and, even

> more broadly, the prudish mythology that surrounds them. (footnote omitted) Queer sex must be deshamed and the danger associated with it must be defanged so that in the law and elsewhere Queerness is not just tolerated but celebrated.

Laurie Rose Kepros, *Queer Theory: Weed or Seed in the Garden of Legal Theory*? 9 LAW & SEXUALITY 279, 296-297 (1999-2000) (emphasis added). *See also See, e.g.,* Gregory M. Herek, "Beyond "Homophobia": Thinking About Sexual Prejudice and Stigma in the Twenty-First Century," 1 *Sexuality Research & Social Policy*, 6, 12 (National Sexuality Research Center, April 2004) ("Within a framework of ethnic group politics, in contrast, homophobia is best understood as a rejection of members of an outgroup (similar to racism and anti-semitism.") available at: http://nsrc.sfsu.edu/Resource/v1n2_Herek.pdf (last accessed 9/22/2007); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of 'Sex,' 'Gender,' and 'Sexual Orientation' in Euro-American Law and Society*, 83 CAL. L. REV. 1, 347, 368 (1995) (noting that "...the nation's formal commitment to end sex and gender discrimination under Title VII and equal protection jurisprudence simply cannot be fulfilled until sexual orientation is incorporated into a holistic and contextual analyses of sex/gender discrimination under existing anti-discrimination laws."); Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. Det. Mercy L. Rev. 189, (1999) (arguing that constitutionally-based claims for religious exemptions should "be decided by a balancing of the specific interests related to self-realization that are reflected in the facts of that case").

This is no idle concern. In *Smith and Chymyshyn v. Knights of Columbus* 2005 BCHRT 544 (British Columbia Human Rights Tribunal, 2005),[15] the British Columbia Human Rights Tribunal held that a local Council of the Knights of Columbus and its Grand Knight were guilty of discrimination on the basis of sexual orientation because they refused to permit a same-sex "wedding" reception to be held in the parish hall of Our Lady of the Assumption Church in Port Coquitlam, British Columbia. Though the Commission held that "because of their core religious belief" the Knights could "refuse to give access to the hall to the complainants," they were found guilty nonetheless and both were enjoined from "committing the same or similar" violations in the future. Notwithstanding the protections to which they were entitled under Section 2(a) of the Canadian Charter of Rights and Freedoms, they were ordered to pay the complainants' expenses, plus interest, *and* $1,000 to each of the two women for "injury to their dignity, feelings, and self-respect." *Smith & Chymyshyn v. Knights of Columbus*, 2005 BCHRT 544, at *41 (Nov. 29, 2005). Similar enforcement action has already been taken against the Methodist Church in New Jersey. *See* Wayne Parry, "NJ Strips Ocean Grove of Tax break in Gay Unions Flap," Associated Press, September 17, 2007, available at: http://www.philly.com/philly/wires/ap/news/state/new_jersey/20070917_ap_njstripsoceangroveoftaxbreakingayunionsflap.html (last accessed 9/21/2007).

IV. CONCLUSION

Laws defining "marriage" as a relationship between one man and one woman are based upon a sound understanding of the nature of the human

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[15] Available online at http://www.bchrt.bc.ca/decisions/2005/pdf/Smith_and_Chymyshyn_v__Knights_of_Columbus_and_others_2005_BCHRT_544.pdf (last accessed 9/21/2007).

person and on the collective judgment of the People of the State of California expressed at the ballot box. To hold that the male-female definition of marriage is just as legally and morally repugnant as laws forbidding interracial marriage is unsupported by the law, the facts, the long and tortured history of institutionalized racial discrimination in this country, and by common sense. Your *Amici* respectfully submit that this Court should reject the analogy to race.

Respectfully submitted,

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