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

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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

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

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.

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

> 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.

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

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.

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**
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 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.

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

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).

No. S 147999

In the Supreme Court of California

In re: Marriage Cases

Application of African-American Pastors to File Brief *Amici Curiae* in support of Respondents

To the Honorable Chief Justice of California:

Pursuant to Rules 8.200(c) and 8.360(f), the following *Amici Curiae* petition for leave to file their brief in support of Respondents in this appeal:

Rev. Joshua Beckley
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Dr. Timothy Winters, Pastor
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Pastor Chuck Singleton
Loveland Church
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Dr. Raymond W. Turner
Senior Pastor
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San Bernardino, CA 92411

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.

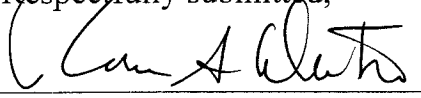
We file this brief for a single purpose: to urge this Court – and each of its Honorable Justices – to reject the claim that laws defining "marriage" as a relationship between one man and one woman are just as legally and morally repugnant as laws forbidding interracial marriage.

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.

Copies of this motion and of the brief have been served on the parties and other *amici* of whom your petitioners have knowledge as set out in the attached proof of service.

I certify that the attached brief contains 5,592 words, including footnotes.

Respectfully submitted,



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Case Name: *In re Marriage Cases*
Case No: S147999

PROOF OF SERVICE
BY MAIL

I hereby declare:

I am a citizen of the United States and employed in Washington, D.C.; I am over the age of eighteen years, and not a party to the within action; my business address is The Columbus School of Law, The Catholic University of America, 3600 John McCormack Road, N.E., Washington, D.C. 20064. On September 24, 2007, I served the within documents:

APPLICATION OF AFRICAN-AMERICAN PASTORS TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS; BRIEF *AMICI CURIAE* OF AFRICAN-AMERICAN PASTORS IN CALIFORNIA IN SUPPORT OF RESPONDENTS; AND CERTIFICATION OF SERVICE

DATED SEPTEMBER 24, 2007

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepared, in the United States mail at Washington, D.C. addressed as set forth below:

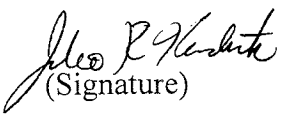
SEE ATTACHED SERVICE LIST

I am readily familiar with the Law School's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepared in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 24, 2007, at Washington, D.C.

Julie Kendrick
(Type or Print Name)


(Signature)

SERVICE LIST FOR CONSOLIDATED *MARRIAGE CASES*, CALIFORNIA SUPREME COURT CASE NO. S147999
JCCP No. 4365[1]

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

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1. These cases were consolidated by the Court of Appeal in an order dated December 1, 2005.

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Tyler, et al. v. State of California
California Court of Appeal, First Appellate District Case No. A 110450
Los Angeles County Superior Court Case No. BS088506

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Woo, et al. v. Lockyer
California Court of Appeal, First Appellate District Case No. Al 10451
San Francisco County Superior Court Case No. CGC 04-504038

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Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco
California Court of Appeal, First Appellate District Case No. A1 10651
San Francisco County Superior Court Case No. CGC-04-503943
consolidated with
Campaign for California Families v. Newsom
California Court of Appeal, First Appellate District Case No. A[10652
San Francisco County Superior Court Case No. CGC-04-428794

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Clinton, et al. v. State of California, et al.
California Court of Appeal, First Appellate District Case No. A110463
San Francisco County Superior Court Case No. CGC-04-429548

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In re Marriage Cases
CALIFORNIA SUPREME COURT CASE NO. S147999
JCCP No. 4365
Amicus Curiae

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