NO. 12-144

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL., *Petitioners*,

v.

KRISTIN M. PERRY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* THE COALITION OF AFRICAN AMERICAN PASTORS USA, THE CENTER FOR URBAN RENEWAL AND EDUCATION, THE FREDERICK DOUGLASS FOUNDATION, INC., AND NUMEROUS LAW PROFESSORS IN SUPPORT OF PETITIONERS AND SUPPORTING REVERSAL

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QUESTIONS PRESENTED

12-144—*Hollingsworth, et al. v. Perry, et al.*

1. Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.

2. Whether petitioners have standing under Article III, §2 of the Constitution in this case.

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INTEREST OF THE *AMICI CURIAE*[1]

The Coalition of African American Pastors USA (CAAP) is a grass-roots movement of tens of thousands of African-American Christians and clergy who believe in traditional family values such as, protecting the lives of the unborn and defending the sacred institution of marriage. CAAP encourages Christian people of all races and backgrounds everywhere to make a stand for their beliefs and convictions.

Founded in 1995 by its current president, Ms. Star Parker, The Center for Urban Renewal and Education (CURE), promotes personal responsibility and limited government as bases for addressing issues of race and poverty. CURE delivers its message to leaders in politics and social thought in Washington and to a national network of black pastors.

The Frederick Douglass Foundation, Inc. (FDFI), a public policy and educational organization, favors limited government and the free market as the best tools to address the hardest problems facing our nation. FDFI consists of individuals who seek to develop innovative solutions to today's problems with the help

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[1] Pursuant to this Court's rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Further, pursuant to Rule 37.6, these *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief.

of elected officials, university scholars, and community activists.

Amici law professors are: Stephen T. Black, Visiting Professor of Law, Texas Tech University School of Law; Ligia M. De Jesus, Associate Professor of Law, Ave Maria School of Law; Robert J. Delahunty, Associate Professor of Law, University of St. Thomas School of Law (Minneapolis); Scott FitzGibbon, Professor of Law, Boston College Law School; Lynne Marie Kohm, Professor and John Brown McCarty Professor of Family Law, Regent University School of Law; Raymond B. Marcin, Professor of Law Emeritus, Columbus School of Law, The Catholic University of America; Stephen L. Mikochik, Professor Emeritus, Temple University School of Law; Richard S. Myers, Professor of Law, Ave Maria School of Law; and Lynn D. Wardle, J. Reuben Clark Law School, Brigham Young University.[2]

The three non-profit *amici* and the nine *amici* law professors all state that their interest in these cases arises out of the importance of establishing the conclusion that this Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967)—which established principles that have successfully served to further and protect the civil rights of African-Americans—does not support, let alone require, the legalization of same-sex marriage or justify the invalidation of state laws

[2] Institutional affiliations are provided for purposes of identification only. The amici speak for themselves not their universities.

(including state constitutional provisions) that define marriage as the union of one man and one woman. The civil rights of parties to same-sex relationships and of married parties are not advanced by the misuse of the legal principles enunciated in this Court's decision in *Loving* to mandate legalization of same-sex marriage. These *amici* believe the Ninth Circuit's decision in *Perry v. Brown*, 671 F. 3d 1052 (9th Cir. 2012) misconstrues the principles of the *Loving* decision, mischaracterizes *Loving*'s attention to the history of marriage laws in the several States, and improperly misapplies to the same-sex marriage controversy principles that *Loving* advanced to protect the civil rights of African-Americans.

INTRODUCTORY STATEMENT

This Court's landmark decision in *Loving v. Virginia* compels the Court to reverse the Ninth Circuit's decision striking down Section 7.5 of the Declaration of Rights of the California Constitution ("Proposition 8"), a decision which, regrettably, misapplied and misconstrued the great *Loving* precedent. The purpose of this brief is to reaffirm both the historical and legal context and integrity of *Loving* and to reaffirm the true meaning of that decision within the modern-day context of efforts to legalize same-sex marriage. We ask the Court to reject the efforts of opponents of Proposition 8 to misapply and misconstrue this Court's *Loving* decision.

From our perspective as *amici* organizations of African-Americans serving African-American pastors and laypersons, and as *amici* law professors, we well understand not only what this Court in its *Loving* opinion clearly *understood* but also what this Court *did* in *Loving* when it *reaffirmed* the fundamental right of persons of different races to marry.

In this present case, both the district court and the Ninth Circuit Court of Appeals, together with those submitting briefs against Proposition 8, uniformly make passing reference to *Loving* but gloss over the historical and legal underpinnings of that decision as articulated and understood by this Court.

The ruling in *Loving* was *not* revolutionary the way striking down the traditional male-female definition of marriage would be in the present case. Indeed, like same-sex marriage which the lower court decisions impose upon California, the anti-miscegenation statutes in Virginia were *at war* with the *core purposes* of marriage—especially the fostering of responsible procreation and child rearing by biological parents—because those Virginia statutes prevented children from being raised in the optimal setting: a family headed by married biological parents.

Historically, anti-miscegenation laws like those in Virginia were *never* universal, were *never* understood as *definitional* though they were understood to be *restrictive*, and were in fact a *minority* position in the United States even at the time of *Loving*. In contrast,

the lower courts in this case imposed a redefinition of marriage that has been rejected in more than 80% of the States.

This Court in *Loving* liberated marriage from misuse by lawmakers who had appropriated marriage to advance social policies extraneous to marriage (racism, specifically, in that case). Unlike the ruling of the Ninth Circuit, the dual-gender requirement in marriage law serves the core purposes of marriage and not extraneous social policies but furthers the basic policies and functions of marriage.

SUMMARY OF ARGUMENT

Interracial marriage and same-sex marriage are polar opposites in terms of the state interests involved. They must be analyzed differently under the Equal Protection Clause of the Fourteenth Amendment. The marriage law invalidated by this Court in *Loving* and the marriage law invalidated by the Ninth Circuit and by the district court in *Perry* below are utterly divergent from one another.

In *Loving* this Court invalidated a Virginia marriage law that was "designed to maintain" the "odious" principle of "White Supremacy," 388 U.S. 1, 11 (1967). In contrast, in *Perry*, the Ninth Circuit and district court invalidated a California marriage law that was designed to protect the socially beneficial principle that male-female unions uniquely provide, *inter alia*, the most promising and protective

environment for marital relations, including the expression of safe sexual relations, responsible procreation, and optimal child rearing. Male-female marriage alone (unlike anti-miscegenation rules especially) links those three critical social interests.

In *Loving* this Court invalidated the *racially segregationist* anti-miscegenation law of Virginia that forbade racially integrated marriages; in *Perry* the Ninth Circuit and district court opinions invalidated the *gender integrationist* California marriage law that reserves the legal status of marriage to gender-integrating male-female unions. Whereas in *Loving* this Court protected the "legitimate . . . purpose" the state has for promoting and recognizing marriage (protecting it by excluding the irrelevant element of race), in the lower-court decisions in *Perry* the courts *undermined* the legitimate state purposes of promoting responsible procreation and of linking child rearing with marriage. These purposes go to the very heart of marriage.

The anti-miscegenation law invalidated in *Loving* was about restricting *who* could enter into marriage; this Court's invalidation of that law did not alter or redefine the institution of marriage. On the other hand, the law invalidated in *Perry* is about *what* marriage *is* and *means*.[3] The opinions of the courts below judicially imposed on the citizens of California a revolutionary

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[3] *See* Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?* 34 HARV J. L. & PUB. POL'Y 245, 249 (2011).

redefinition of marriage.

Unlike the opposite-sex requirement, racial restrictions on marriage implicate the Fourteenth Amendment's core concern with eliminating racial discrimination. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States").

In *Loving* this Court vindicated the nation's commitment to the core principles of the Fourteenth Amendment—that all races are equal before the law and that the government may not distinguish between citizens on the basis of race, principles that hundreds of thousands of Americans died to establish. On the other hand, the principles introduced in *Perry* by the Ninth Circuit and by the district court—that same-sex unions and male-female unions must be treated the same—are not supported by the text of the Fourteenth Amendment, cannot be reconciled with its history and purposes, and have been rejected rather than accepted by national consensus.[4]

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[4] The equivalence of same-sex unions and male-female unions for marriage has been rejected (and constitutionally prohibited) by voters in 31 states. Lynn D. Wardle, *Involuntary Imports:* Williams, Lutwak, *the Defense of Marriage Act, Federalism, and "Thick" and "Thin" Conceptions of Marriage*, 81 FORDHAM L. REV. 771, 825 (App) (2012).) It has been narrowly approved in three states: Maine, Maryland and Washington. (Voters in a fourth state, Minnesota, rejected by a small margin, a proposed

The anti-interracial principle embodied in the anti-miscegenation law invalidated in *Loving* had been rejected at the time of that decision by more than two-thirds of the states, whereas over eighty percent of the states today endorse the principle that marriage is the union of a man and a woman, and nearly two-thirds of the states have recently reiterated that principle by adopting state marriage amendments barring same-sex marriage.

In short, in *Loving* this Court rejected a state law prohibiting interracial marriage and held that it was constitutionally illegitimate under the Fourteenth Amendment, while in *Perry*, the Ninth Circuit Court of Appeals and the United States district court erroneously conflated race and sexual orientation for purposes of constitutional review of marriage regulations, and erroneously held that there is no constitutionally "legitimate reason" for a state law forbidding same-sex marriage. *Perry*, 671 F.3d at 1063.

The opposite-sex requirement for marriage is closely bound to the institution's core purpose of increasing the likelihood children will be born to and raised by both

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amendment to the state constitution that would have prohibited same-sex marriage. By statute Minnesota continues to forbid and continues to refuse recognition to same-sex marriage. Minn. Stat. § 517.01. That may be one reason why some voters did not see the need for the constitutional amendment. *See* Same-Sex Marriage in Minnesota, Minnesota Legislative Reference Library, Nov. 2012, available at http://www.leg.state.mn.us/lrl/issues/issues.aspx?issue=gay (last seen January 18, 2013)).

mother and father. Racial restrictions on marriage not only failed to serve this purpose, they actually conflicted with it.

The social impact of the Ninth Circuit decision mandating legalization of same-sex marriage would be revolutionary. Four-fifths of all states today reject same-sex marriage and within the past fifteen years thirty-one states have adopted constitutional provisions protecting marriage as the union of a man and a woman. Unlike the opposite-sex requirement for marriage, racial restrictions on marriage have never been a universal, defining feature of marriage. When the constitution was adopted, interracial marriages were legal at common law in six of the thirteen original States, and even at the height of racism, many states never enacted anti-miscegenation laws. Imposing on marriage a new *definition* that rejects the majority view of marriage as the union of a man and a woman would be quite different from *Loving*'s having refused to allow the imposition on marriage of a minority view that marriage somehow allowed for racial restrictions.

Thus, it is not surprising that the Supreme Court in *Loving* unanimously held that anti-miscegenation laws violated the fundamental right to marry and that only a few years later in *Baker v. Nelson*, 409 U.S. 810 (1972), the Court unanimously and summarily rejected the claim that the opposite-sex definition of marriage violated that right.

ARGUMENT

I.

UNLIKE THE OPPOSITE-SEX DEFINITION OF MARRIAGE, RACIAL RESTRICTIONS ON MARRIAGE IMPLICATED THE FOURTEENTH AMENDMENT'S CORE CONCERN WITH ELIMINATING RACIAL DISCRIMINATION

The decision of a divided panel of the Ninth Circuit Court of Appeals in *Perry v. Brown*, 671 F. 3d 1052 (9th Cir. 2012), invalidating a provision of the Constitution of the State of California and mandating the legalization of same-sex marriage in that state, is fundamentally at odds with this Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967).

"[T]he historical fact [is] that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). In *Loving* this Court reiterated: "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." 388 U.S. at 10. In *Loving* this Court concluded that the Virginia anti-miscegenation law was "designed to maintain White Supremacy." 388 U.S. at 11. Such racially discriminatory purpose triggers strict scrutiny, even if the law appears to be facially neutral. *See Washington v. Davis*, 426 U.S. 229, 241-242 (1976). "The striking reference

[in *Loving*] to White Supremacy—by a unanimous Court, capitalizing both words, and speaking in these terms for the only time in the nation's history,"[5] underscores the centrality of the *Loving* Court's concern about racial discrimination. *Loving* stands for the rejection of racial discrimination in marriage law (not for the judicial mandate of same-sex marriage). *See generally Bartlett v. Strick-land*, 556 U.S. 1, 23-24 (2009); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 545 U.S. 162, 170 (2005); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Race is not the same as same-sex attraction. As General Colin Powell explained in testimony to Congress concerning gays in the military: "Skin color is a benign, non-behavioral characteristic; sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument."[6]

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[5] *See* Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 17-18 (1994).

[6] 139 CONG. REC. 13, 520 (1993) (statement of Senator Baucus, quoting Colin Powell, Chairman, Joint Chiefs of Staff). Secretary Powell now "has no problem with" same-sex marriage. Laura E. Davis, *Colin Powell Expresses Support for Gay Marriage,* available at http://abcnews.go.com/Politics/OTUS/colin-powell-expresses-support-gay-marriage/story?id=16416112 (seen January 18, 2013).

Race is not fundamental to either marriage or procreation. *See Loving*, 388 U.S. at 11 ("There is patently no legitimate overriding purpose independent of invidious discrimination [for the anti-miscegenation law]."); *see also McLaughlin, supra*, 379 U.S. at 193 ("There is no suggestion that a white person and a Negro are any more likely habitually . . . than the white or the Negro couple . . . to engage in illicit intercourse . . . .")

This fundamental distinction lies at the heart of the point that Yale Law Professor Stephen L. Carter made on the thirtieth anniversary of *Loving*. He wrote: "One of the beauties of *Loving v. Virginia* was precisely that it was very easy to see how these were people trying to do a very *ordinary* thing, and got in trouble for it."[7] That distinguishes Loving from the position of advocates of same-sex marriage who are trying to do a very *extra*ordinary thing—to redefine the institution of marriage.[8]

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[7] Stephen L. Carter, *"Defending" Marriage: A Modest Proposal*, 41 HOW. L. J. 215, 227 (1997) (emphasis added).

[8] Lynn D. Wardle & Lincoln C. Oliphant, In Praise of Loving: *Reflections on the* "Loving *Analogy*" *for Same-Sex Marriage*, 51 HOW. L. J. 117, 147 (2007). *See also* Stephen Carter, *supra* note 7.

II.

IN AMERICAN LEGAL HISTORY, RACIALLY SEGREGATED MARRIAGE IS NOT COMPARABLE TO SEXUALLY INTEGRATED MARRIAGE: CONSTITUTIONAL LAW WRIT LARGE

The effect of the decisions below mandating a redefinition of marriage to include same-sex couples would be revolutionary and dramatically different from the effect of the decision in *Loving*. Unlike the opposite-sex requisite for marriage, racial restrictions on marriage never were a universal, defining feature of marriage.

For example, interracial marriage was legal at common law, and in six of the thirteen original States—Connecticut, New Hampshire, New Jersey, New York, Pennsylvania, and Rhode Island—at the time the U.S. Constitution was adopted. Five of these original States (all but Rhode Island), plus the next one to join the Union (Vermont, in 1791), never enacted anti-miscegenation laws. The same is true of several of the States subsequently admitted to the Union.[9]

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[9] Wardle & Oliphant, *supra* note 8, at 165. *See also* Peter Wallenstein, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 253-54 (Appendix I) (2002). Wallenstein acknowledges his data differ in detail from others', but the historical picture is consistent.

Some States which did have anti-miscegenation statutes abandoned them in the wake of the adoption of the Fourteenth Amendment.[10] By the time *Loving* was decided in 1967, anti-miscegenation provisions were rapidly disappearing from state constitutions and statutes and remained in force in only sixteen states (all in a single region of the country). *See* 388 U.S. 1, 6 n. 5 (1967).[11]

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[10] *See Hart v. Hoss & Elder*, 26 La. Ann. 90 (1874) (holding that the Civil Rights Act of 1866 invalidated anti-miscegenation law); *Burns v. State*, 48 Ala. 195, 198-199 (1872) (holding that the Fourteenth Amendment invalidated anti-miscegenation law); Charles Frank Robinson, DANGEROUS LIAISONS 29-30 (2006) (noting that in 1874 Arkansas omitted its anti-miscegenation law from its revised civil code; that in 1868 "South Carolina implicitly abrogated its intermarriage law by adopting a constitutional provision that 'distinctions on account of race or color in any case whatever, shall be prohibited, and all class of citizens shall enjoy all common, public, legal and political privileges'. . ."; that in 1871 Mississippi omitted its anti-miscegenation law from its revised civil code; and that in 1868 the Louisiana legislature repealed that state's anti-miscegenation law); Wardle & Oliphant, *supra* n. 8, at 180 (noting that the Illinois legislature repealed its anti-miscegenation law in 1874); Peter Wallenstein, *Law and the Boundaries of Place and Race in Interracial Marriage: Interstate Comity, Racial Identity, and Miscegenation Laws in North Carolina, South Carolina, and Virginia, 1860s- 1960s*, 32 AKRON L. REV. 557, 558 & 561 (1999) (noting that after 1868 South Carolina had a "temporary tolerance of interracial marriage" … that "attracted interracial couples from a … neighboring state … ").

[11] As this Court explained in *Loving*, fourteen States had repealed their bans on interracial marriage in the fifteen years leading up to the *Loving* decision. *Id.*

The history of marriage in the constitutions and laws in America clearly demonstrates that the American people flatly reject any assertion that *racially segregated* marriage is somehow comparable to *sexually integrated* marriage of a man and a woman.[12] Of the thirteen states that have never adopted anti-miscegenation laws, at least nine now protect man-woman marriage by statute.[13] Four of the thirteen also protect man-woman marriage by voter-approved constitutional amendment.[14]

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[12] Wardle & Oliphant, *supra* n. 8; *see also* Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1 (1996); Robert A. Destro *Introduction, 1998 Symposium: Law and the Politics of Marriage:* Loving v. Virginia *After 30 Years*, 47 CATH. U. L. REV. 1207, 1220 (1998).

[13] *See, e.g.,* HAW. REV. STAT. § 572-3 (1999); Minnesota (1997); New Jersey Stat. Ann. §37:1-31.a (2006); New Mexico (opinion letter from the attorney general, 2004 WL 2019901 (Feb. 20, 2004)); Pennsylvania (1996); Washington (1998); Wisc. Stat. Ann. §765.01). *See also infra* note 14 citing provisions of Georgia, North Carolina, South Carolina, and Virginia constitutions. *See* Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws at National Con-ference of State Legislatures, available at http://www .ncsl.org/ IssuesResearch/HumanServices/sameSex Marriage/tabid/16430/ Default.aspx (last seen January 18, 2013) (presenting a summary that appears to be limited to states with a formal defense of marriage act; the list presented in this brief is not so limited.

[14] GEORGIA CONST., art. I, § IV (2004), NORTH CAROLINA CONST., art. 14, § 6 (2012); SOUTH CAROLINA CONST., art. XVII, § 15 (2006); and VIRGINIA. CONST., art. I, § 15-A (2006).

Seven States once had anti-miscegenation laws but repealed them before *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17 (Cal. 1948). Today, most of those states expressly protect the institution of man-woman marriage, using statutes or constitutional amendments or both.[15]

Fourteen States repealed their anti-miscegenation laws after *Perez* and before *Loving*. Today, thirteen of those States protect man-woman marriage, most of them with both statutes and constitutional amendments.[16]

An additional sixteen states protect man-woman marriage expressly. Fourteen of those States have

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[15] *See* Illinois (statute, 1996); Michigan (statute in 1996 and constitutional amendment in 2004); Ohio (statute and constitutional amendment in 2004), and Rhode Island. *See Chambers v. Ormiston*, 935 A.2d 956, 962-65 (R.I. 2007)(interpreting the term "marriage" in R.I. G.L. 1956 § 8-10-3(a) as not including the relationship of a same-sex couple).

[16] Arizona (statute 1996; constitutional amendment 1998); California (super-statute, enacted by the people in 2000: "Only marriage between a man and a woman is valid or recognized in California"), and CALIF. CONST. art. I. §7.5 (aka "Prop 8"); Colorado (statute 2000; amendment 2006); Idaho (statute 1996; amendment 2006); Indiana (statute 1997); Montana (statute 1997; amendment 2004); Nebraska (constitutional amendment 2000); Nevada (constitutional amendment 2000); North Dakota (statute 1997; amendment 2004); Oregon (constitutional amendment 2004); South Dakota (statute 1996; amendment 2006); Utah (statute 1995; amendment 2004); and Wyoming (statute 1957).

constitutional provisions and statutory provisions,[17] and two have statutory provisions only.[18] Voters in thirty-one of the thirty-four States where the question of legalizing same-sex marriage has been put to the citizens have unequivocally rejected same-sex marriage and declared that marriage is exclusively the union of a man and a woman.[19]

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[17] Alabama (statute 1998; constitutional amendment 2006); Arkansas (statute 1997; amendment 2004); Florida (statute 1997; amendment 2008); Georgia (statute 1996; amendment 2004); Kentucky (statute 1998; amendment 2004); Louisiana (statute 199; amendment 2004); Mississippi (statute 1997; amendment 2004); Missouri (statute 1996; amendment 2004); North Carolina (statute 1996, constitutional amendment 2012); Oklahoma (statute 1996; amendment 2004); South Carolina (statute 1996; amendment 2006); Tennessee (statute 1996; amendment 2006); Texas (statute 2003; amendment 2005); and Virginia (statute 1997; amendment 2006).

[18] Delaware (1996) and West Virginia (2000).

[19] Lynn D. Wardle, *Marriage and Religious Liberty: Comparative Law Problems and Conflict of Laws Solutions*, 12 J. L. & FAM. STUDS. 315, 367 (2010) (App. II) (listing 30 states where voters approved marriage amendments). One reaches the total of 31 by adding North Carolina, which adopted a state marriage amendment in May of 2012. Note, however, that in November of 2012 voters in Maine, Maryland and Washington approved the legalization of same-sex marriage and voters in Minnesota rejected a proposed state marriage amendment defining marriage as a gender-integrating union (though same-sex marriage was not approved and is still statutorily prohibited there). *See* Cheryl Wetzstein, Maryland, Maine backs gay marriage in breakthrough votes, Wash. Times, Nov. 6, 2012, available at http://www.washingtontimes.com/news/2012/nov/6/gay-marriage-backers-seek-

The American people in most states, including the people of California, have rushed to defend the institution of sexually integrated, male-female marriage. The cumulative vote to ban same-sex marriage nationwide is well over 60%.[20] Of the twenty-eight States "voting blue" in the 2008 presidential election, twenty-three protect male-female marriage. Any claim that they are motivated by animus is merely a slander on the American people. This broad movement to protect conjugal marriage helps identify the contours of equal protection, liberty, privacy, and due process in marriage law.

A similar pattern of rejecting same-sex marriage exists globally; only ten[21] of 193 sovereign nations have legalized same-sex marriage and another 17 (or 16) have created marriage-equivalent civil unions for same-sex couples; while nearly twice as many nations (at least 46) have constitutional provisions that appear

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breakthrough-four-states/ (last seen January 18, 2012). *See generally* Lynn D. Wardle, *Involuntary Imports: supra* note 4, at 825 (App).

[20] Alliance Alert, Marriage Amendment Vote Percentages: State by State, available at http://www.alliancealert.org/2011/08/24/ marr iage-amendment-vote-percentages-state-by-state/ (last seen January 9, 2013) (showing over 66% vote in favor). *Compare* Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, 993 (App. I) (2010) (showing about 63%).

[21] Or eleven, if South African "Civil Unions" are deemed "marriages."

to define marriage as the union of a man and a woman.)[22] The Constitutional Council of France has refused to impose same-sex marriage in France, holding that "the difference of situation between couples of the same sex and those composed of a man and a woman can justify a difference in treatment with regard to the rules regarding the right to a family."[23]

In *Lawrence v. Texas*, 539 U.S. 558, 568 et seq. (2003), this Court reviewed the history of the relevant laws and stated, "In all events we think that our laws and traditions in the past half century are of most relevance." *Id.* at 571-72. Let that same standard now be applied to the dual-gender marriage laws of California (and nearly all other states), which indeed are ancient and venerable, and also fresh, vigorous, and comprehensive.

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[22] *See* Lynn D. Wardle, *Involuntary Imports: supra* note 4, at 825 (App). *See further* Cheryl Wetzstein, *Maryland, Maine back gay marriage in breakthrough votes*, Wash. Times, Nov. 6, 2012, available at http://www.washingtontimes.com/news/ 2012/nov/6/ gay-marriage-backers-seek-breakthrough-four-states/ (seen January 11, 2012).

[23] *Mrs Corinne C. et al.* Decision No. 2010-92 QPC, French Constitutional Council, January 28, 2011, ¶ 9 (available at http://www.conseil-constitutionnel.fr/decision/2011/2010-92-qpc/ decision-n-2010-92-qpc-du-28-janvier-2011.52612.html

III.

THE GENDER-INTEGRATING DEFINITION OF MARRIAGE IS CLOSELY BOUND UP WITH THE INSTITUTION'S CORE PURPOSE OF INCREASING THE LIKELIHOOD THAT EACH CHILD WILL BE BORN TO AND RAISED BY BOTH THE MOTHER AND THE FATHER IN A STABLE, ENDURING FAMILY UNIT

The definition of marriage as the union of man and woman is essential to the core social purposes of marriage. Because men and women differ in significant ways relevant to the social purposes of marriage,[24] the integration of their complementary differences creates a unique relationship of unique value to society. This sexually integrated, complementary institution furthers social functions that are essential to the welfare of the family, the state, and its citizens, and particularly makes critical contributions to child welfare.[25]

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[24] George W. Dent, Jr., *Straight Is Better: Why Law and Society May Legitimately Prefer Heterosexuality*, TEX. REV. L. & POLITICS (2010) at 17, available at http://ssrn.com/ abstract=1649574 (last seen January 18, 2013), summarizing some gender differences.

[25] A. Dean Byrd, *Conjugal Marriage Fosters Healthy Human and Societal Development*, in WHAT'S THE HARM? 3, 5-9 (Lynn D. Wardle ed. 2008) (research shows that mothers and fathers have different, complementary parenting skills, each contributing in different ways to healthy child development). *See* Kristin Anderson Moore, Susan M. Jekielek & Carol Emig, "Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?" 6 Child Trends Research Brief (June, 2002), available at

Three of the important public purposes of marriage —to protect and promote the social interests in safe sex, responsible procreation, and optimal child rearing —are closely linked in our laws and social policies, just as they are closely linked in life. They are linked by human nature—"the ties of nature" as Blackstone put it.[26] Human nature, however, is imperfect, and those ties are imperfect ties, which is why society attempts to reinforce them through marriage law.

Both textually and structurally, this Court's precedent repeatedly and clearly links marriage with gender-integration, and especially to society's interest in the institution that fosters responsible sexuality, procreation, and child rearing. *Loving* concerned a law which obstructed a classic example of the sort of relationship which sustains that linkage. Invocation of *Loving* to attempt to justify judicially-mandated

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http://www.childtrends.org/files/marriagerb602.pdf (last seen January 16, 2013) ("the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage"). For other sources, *see* Lynn D. Wardle, *Intergenerational Justice, Extended Redefined Families, and the Challenge of the Statist Paradigm*, 3 Int'l. J. Juris. Fam. (forthcoming, 2013), draft available at http://www.law2.byu.edu/iasjf/documents/Dr_1204 13_Continuity_Discontinuity_Extended_Families.pdf (last seen Jan-uary 18, 2013).

[26] I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *458. *See also In re G Children* (FC) [2006] UKHL 43 at ¶¶ 33-35 (discussing benefits of genetic and gestational parenthood).

same-sex marriage would be both ironic and futile.

In *Loving*, this Court cited four prior Supreme Court decisions dealing with or discussing marriage, and all of them noted or involved some aspect of the role of marriage in furthering state interests in responsible sexuality, procreation or child rearing:

Meyer v. Nebraska, 262 U.S. 390, 399 (1923) involved an appeal of the conviction of a private parochial school teacher, acting as the educational agent of the parents, for teaching in the German language. This Court declared that the "liberty" protected by the Fourteenth Amendment includes "the right of the individual . . . *to marry, establish a home and bring up children* . . . ." (emphasis added).

Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), involved a challenge to a criminal sterilization act. This Court declared: "*Marriage and procreation are fundamental to the very existence and survival of the race*" (emphasis added).

McLaughlin v. Florida, 379 U.S. 184 (1964), was an appeal from a conviction for violation of a state's criminal interracial cohabitation law. This Court noted: "[W]e see no reason to quarrel with the State's characterization of this statute, dealing as it does with *illicit extramarital and premarital promiscuity*" (emphasis added). Florida invoked its law against interracial marriage, arguing that just as it was presumably constitutional, so also was the challenged

law against interracial cohabitation constitutional. But this Court rejected that analogy "without reaching the question of the validity of the State's prohibition against interracial marriage or the soundness of the arguments rooted in the history of the Amendment," *id.*, because race-neutral laws prohibiting cohabitation adequately "*protect the integrity of the marriage laws* of the State."

Finally, *Maynard v. Hill*, 125 U.S. 190, 205 (1880) involved a claim to homestead land by the *children of a marriage* that had been dissolved *ex parte* by legislative act of the territorial legislature during pendency of homestead settlement and claim, while the unsuspecting wife and children had been left in a distant state. This Court described "[m]arriage, as creating *the most important relation in life, as having more to do with the morals and civilization of a people than any other institution* . . . ." Moreover, it declared that marriage "is an institution, in the maintenance of which in its purity the public is deeply interested, for *it is the foundation of the family and of society*, without which there would be neither civilization nor progress." *Id.* at 209-210 (all emphases added).

Numerous other decisions by this Court link protection of marriage to its role as the institutional regulator of, and environment for, the safest male-female sexual intimacy, procreation and child rearing. *See Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, concurring) ("The entire fabric of the Constitution and the purposes that clearly underlie its

specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."); *Loving*, 388 U.S. at 12 ("Marriage is . . . fundamental to our very existence and survival."); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) ("As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society."); *id.* at 389-90 (Black, J., dissenting) ("The institution of marriage is of peculiar importance to the people of the States. It is within the States that they live and vote and rear their children. . . ."); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (the constitutional right of privacy "has some extension to activities relating to marriage . . . [i.e.,] procreation, . . . contraception, child rearing . . . ."); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. . . . Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection.") *See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (linking as fundament rights protected by "privacy" "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing"); *Carey v. Populations Services International*, 431 U.S. 678, 685

(1977) (constitutionally protected "decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education . . . .'"). Indeed, in all of the Supreme Court decisions about constitutional marriage, "the right to marry is directly linked with responsible procreation and child rearing."[27]

The very facts of *Loving* underscore the connection of marriage to procreation and child rearing. Richard and Mildred Loving had three children; yet Richard could only visit his wife and act as a parent to his and Mildred's biological children in Virginia under cover of darkness because of Virginia's anti-miscegenation law.[28] The Lovings treasured their children.[29] In no small part, the Lovings challenged the Virginia anti-miscegenation law for the sake of their children. After their conviction for violating the Virginia anti-miscegenation law, they were forced to move to the

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[27] Lynn D. Wardle, Loving v. Virginia *and The Constitutional Right to Marry*, 1790-1990, 41 HOW. L. J. 289, 338 (1998).

[28] Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of* Loving v. Virginia, 41 HOW. L.J. 229, 229-30 (1998).

[29] *Id.* at 243 ("The first thing that one notices upon entering Mildred Loving's home are the pictures of her children and grandchildren that adorn her walls"); *id.* at 244 ("She is proud of her children and is delighted that they all live close by").

District of Columbia, but as a family from rural Virginia, they were never happy there. As Mildred Loving said: "I wanted my children to grow up in the country, where they could run and play, and where I wouldn't worry about them so much."[30] So to overturn the law that prevented her family from living together in rural Virginia, she wrote a letter to U.S. Attorney General Robert Kennedy, whose office referred it to the ACLU, which referred it to two young Virginia lawyers, Bernard S. Cohen and Philip J. Hirschkop, who filed the case that became legal history.

In stark contrast to the impact of *Loving*, the decisions below legalizing same-sex marriage diminish the well-being of children generally.[31] Of course, same-sex couples are incapable of procreation. Conferring the status of marriage on same-sex couples will send a clear social and legal message further disconnecting marriage from child rearing.

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[30] *Id.* at 237.

[31] The impact upon children of being raised in various family environments is highly controversial and sharply contested, for obvious reasons. Those social science disputes should be debated by those skilled in the disciplines and the policy issues should be decided by the elected representatives of the people in the legislatures. Those matters are neither before the Court now nor appropriate for judicial resolution.

IV.

THE DUAL-GENDER REQUIREMENT FOR MARRIAGE SUBSTANTIALLY ADVANCES THE STATE'S INTEREST IN LINKING RESPONSIBLE PROCREATION, ADVANTAGEOUS CHILDBIRTH AND OPTIMAL CHILD REARING

Unlike in *Loving,* where there was *no* justification for Virginia's anti-miscegenation laws, here there are *very compelling* justifications for male-female marriage. Unlike Virginia's racist and irrelevant-to-marriage attempted justifications for the anti-miscegenation law invalidated in *Loving*, California has profound, real, justifiable, and justified interests in protecting and preserving dual-gender marriage. Society generally has a compelling interest in preserving the institution that best advances the social interests in responsible procreation and that connects procreation to responsible child rearing. Gender-integrating marriage best promotes state interests in linking responsible procreation with child rearing, in connecting parents to offspring, in perpetuating the human race and survival of the species, and in furthering public health and child welfare.

Children raised by their married mother and father are at lowest risk of a host of social pathologies, from abuse to neglect, from sexual exploitation to educational failure. Compared to children raised in homes without married parents, children raised by married parents in low-conflict marriages are more

likely to attend college, more likely to succeed academically, physically healthier, and emotionally healthier. On the other hand, they are less likely to attempt or commit suicide, less likely to demonstrate behavioral problems in school, less likely to be a victim of physical or sexual abuse, less likely to abuse drugs or alcohol, less likely to commit delinquent acts, less likely to divorce when they get married, less likely to become pregnant as a teenager, or to impregnate someone, less likely to be sexually active as teenagers, less likely to contract STDs, and less likely to be raised in poverty.[32]

Gender-integrating marriage promotes childbirth and thus the perpetuation of the species. This is a matter of special concern at present, since few developed nations in the world today have replacement birthrates (the U.S. is one—barely—and its birthrate has recently been falling). In Europe, a "demographic winter" is quickly descending: a phenomenon which British historian Niall Ferguson calls "the greatest sustained reduction in European population since the

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[32] Dept. of Health and Human Services, Administration for Families and Children, HEALTHY MARRIAGE INITIATIVE, BENEFITS OF HEALTHY MARRIAGES FOR CHILDREN AND YOUTH, available at http://archive.acf.hhs.gov/healthymarriage/benefits/index.html (last seen January 18, 2013). *See also* Sarah McLanahan & Gary Sandefur, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 137 (1994).

Black Death of the 14th Century."[33]

> Indeed, implicit in the very word matrimony is the idea that a man and a woman unite in legal marriage, in matrimonium ducere, so that they may have children. Plato proposed that "marriage laws [be] first laid down" and that "a penalty of fines and dishonor" be imposed upon all who did not marry by certain ages because "intercourse and partnership between married spouses [is] the original cause of childbirths." Likewise, Aristotle recommended that marriage regulations would be the first type of legislation "[s]ince the legislator should begin by considering how the

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[33] Niall Ferguson, "Eurabia?", N.Y. Times Magazine, April 4, 2004, available at http://www.nytimes.com/2004/04/04/magazine/04WWLN .html (seen December 26, 2012). The Organization for Economic Cooperation and Development reports that none of the nations of Europe can maintain their population (necessary for economic sustainability) through births, that only France, (with a birth rate of 1.8) has the possibility to do so; and that the fall in fertility in Eastern Europe has been precipitous. EUROPEAN BIRTH RATES REACH HISTORIC LOWIN PART BECAUSE OF RECENT FALL IN EASTERN EUROPE, Sept. 8, 2006, ¶1, available at http://www.medicalnewstoday.com/releases/51329.php (seen July 19, 2012). In fifteen European nations the rate of fertility is 1.3 or below, and a birthrate of 1.4 or 1.5 means that the population will decrease by one-third each generation; in some European nations births are down to about one-half the replacement level (of 2.1 births per couple). *Id. See further* George Weigel, THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA AND POLITICS WITHOUT GOD 21 (2005).

> frames of the children whom he is rearing may be as good as possible ...."[34]

Marriage between mother and father strengthens the bond of parents to their offspring. "Same-sex marriage puts in jeopardy the rights of children to know and experience their genetic heritage in their lives and withdraws society's recognition of its importance to them, their wider family, and society itself."[35]

V.

A KEY PURPOSE OF LOVING WAS TO DISENTANGLE MARRIAGE FROM BEING RESTRAINTS IMPOSED BY PERSONS PURSUING POLICIES EXTRANEOUS TO MARRIAGE

When *Loving* was decided, only six states had anti-miscegenation provisions in their constitutions and no state in the Union had enacted such a law since 1913.

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[34] Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J. L. & PUB. POLICY 771, 784-5 (2001). *Id.* at 785 ("Procreation is the social interest underlying Rousseau's declaration that: 'Marriage ... being a civil contract, has civil consequences without which it would be impossible for society itself to subsist.' Locke agreed, and linked 'the increase of Mankind, and the continuation of the Species in the highest perfection,' with 'the security of the Marriage Bed, as necessary thereunto.'").

[35] Dent, *supra* note 24 at p. 11 (quoting Professor Margaret Somerville).

Those race-based marriage laws were "designed to maintain White Supremacy," *id.* at 11, and, as this Court held, they were an affront to the Fourteenth Amendment. "The clear and central purpose of the Fourteenth Amendment," this Court wrote in *Loving*, "was to eliminate all official state sources of invidious racial discrimination in the States." *Id.* at 10.

Racial eugenicists in Virginia used anti-miscegenation provisions to commandeer marriage, to enslave that social institution—one otherwise unrelated to racism—and to put it into "forced labor" in order to promote the social reform ideology and policy goals of White Supremacy. *See Loving*, 388 U.S. at 6, 11. White Supremacists redefined marriage (as it had been known at common law and globally for millennia) for the purpose of promoting an extraneous social policy. The Virginia anti-miscegenation law struck down by the Court in *Loving* was part of a set of laws designed to prevent procreation of mixed race children. The spread of anti-miscegenation laws

> coincided with the growth and spread of Darwinian theories of evolution, including the related eugenic notion that different races manifested different levels of evolutionary development, creating a natural order or hierarchy of the races. Thus, Eugenics purported to provide a "scientific" basis for racial and social hierarchy, and influenced immigration law, sterilization law, as well as marriage law.

> In fact, the Virginia antimiscegenation law that was invalidated in *Loving* was passed in 1924 as part of a comprehensive scheme of eugenic regulation that also included the involuntary sterilization law that was upheld in *Buck v. Bell* [274 U.S. 200 (1927)] by Justice Holmes' infamous dictum that "three generations of imbeciles is enough."[36]

The rationale of *Loving* does not support the judicial imposition of a new definition of marriage to include same-sex relationships because recognition of those relationships as marriages advances social policies extraneous to and different from the core purposes of marriage.

Loving can be distinguished from the current dispute over same-sex marriage. Laws against miscegenation were designed to segregate the races, reinforcing the socially disadvantaged position of African-Americans. *Loving*, 388 U.S. at 11 (stating that

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[36] Wardle & Oliphant, *supra* note 8, at 165, citing, *inter alia*, Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POLICY 1 (1996); Robert A. Destro *Introduction, 1998 Symposium: Law and the Politics of Marriage:* Loving v. Virginia *After 30 Years*, 47 CATH. U. L. REV. 1207, 1220 (1998); Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to* Loving v. Virginia, 21 U.C. DAVIS L. REV. 421, 423-24, 432-36 (1988); Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 843-59 (1986). *See further* Note, *Regulating Eugenics*, 121 HARV. L. REV. 1578, 1579-82 (2008).

laws were "designed to maintain White Supremacy"). By contrast, the traditional definition of marriage calls for mixing of the genders—integration not segregation —and therefore cannot be understood as an attempt to disadvantage either gender.[37]

VI.

JUST FIVE YEARS AFTER DECIDING *LOVING* THIS COURT IN *BAKER V. NELSON* REJECTED THE CLAIM THAT STATE LAW ALLOWING ONLY DUAL-GENDER MARRIAGE VIOLATED LOVING; *BAKER* IS GOOD LAW, BINDING PRECEDENT AND OUGHT TO BE FOLLOWED

This Court was unanimous when it decided *Loving* in 1967 and it was similarly unanimous when it dismissed *Baker*'s claim of same-sex marriage in the 1972 case of *Baker v. Nelson*, 409 U.S. 810 (1972), dismissing for want of a substantial federal question the appeal in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). The constitutional principles that led this Court to strike down Virginia's anti-miscegenation laws in *Loving*—the primary one being the Fourteenth Amendment's ban on racial discrimination—are not at work in this present case.

The Ninth Circuit's attempt to brush aside this Court's decision in *Baker v. Nelson* is transparently

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[37] Randy Beck, *The City of God and the Cities of Men: A Response to Jason Carter*, 41 GA. L. REV. 113, 148 n. 154 (2006).

unjustifiable. The central issue in the present case, as identified by this Court in granting certiorari is "[w]hether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman." The court below purported to sidestep this central issue, stating that "we do not address the question of the constitutionality of a state's ban on same-sex marriage." Based on that evasive maneuver, it asserted that "the Supreme Court's summary dismissal of *Baker v. Nelson*, 409 U.S. 810, 93 S. Ct. 37, 34 l. Ed. 2d 65 (1972) (mem.), is not pertinent here." To the contrary, it was pertinent then, and it is pertinent now.

Baker v. Nelson started when two men in Minnesota tried to obtain a marriage license and were rejected by a court clerk. The clerk believed that same-sex "marriage" was not possible in Minnesota. The men filed suit in state court seeking to compel the clerk to issue the license. The trial court quashed the writ, and an appeal followed.

The State Supreme Court rejected the claim that Minnesota statutes authorized same-sex marriage, *Baker*, 191 N.W.2d 185, 185-86 (Minn. 1971), and it also rejected both the federal equal protection and federal due process claims, *id.* at 186-87. It renounced any analogy to *Loving v. Virginia*, because "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental

difference in sex." *Id.* at 187.

The couple then appealed to this Court. Their jurisdictional statement raised three constitutional issues:

> 1. Whether appellee's [Minnesota's] refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
>
> 2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
>
> 3. Whether the appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Appellants' Jurisdictional Statement at 3 (filed Feb. 11, 1971), *Baker v. Nelson*, 409 U.S. 810 (No. 71-1027). That jurisdictional statement cited *Loving v. Virginia* eight times in just nine pages of constitutional argument.

These arguments were summarily rejected by the Supreme Court when, on October 10, 1972, it ordered

"[t]he appeal dismissed for want of a substantial federal question." *Baker v. Nelson*, 409 U.S. 810 (1972).

No Supreme Court case has supplanted or even modified the result in *Baker v. Nelson*. That case remains conclusive on the subject of same-sex "marriage" under the U.S. Constitution.[38] Insofar as any subsequent case raises the same issues—as this case does—this Court, the Supreme Court of the United States, already has spoken, and at least the lower courts are bound by its determination.

Although the Ninth Circuit attempts to interpose the "doctrinal developments" exception to the other-

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[38] Anumber of lower-court decisions analyze the precedential effect of *Baker*. *See, e.g., Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305 (court saw no "reason to believe that the [*Baker*] holding is invalid today"); *Gill v. Office of Personnel Management,* 682 F. 3d 1 (1st Cir. 2012) (Baker "is precedent binding on us" and "limit[s] the arguments to ones that do not presume or rest on a constitutional right to same- sex marriage."); *Jackson v. Abercrombie,* 2012 U.S. Dist. LEXIS 111376, *44-*55 (U.S. Dist. Haw., Aug. 8, 2012)(*Baker* "necessarily decided that a state law defining marriage as a union between a man and woman does not violate the Equal Protection Clause"; "[t]he issue did not merely 'lurk in the record,' but was directly before the Supreme Court"; "*Baker* is the last word from the Supreme Court regarding the constitutionality of a state law limiting marriage to opposite-sex couples and thus remains binding on this Court"); *Sevcik v. Sandoval,* 2012 U.S. Dist. LEXIS 169643, *15-*20 (U.S.Dist. Nevada, Nov. 26, 2012)("*Baker* controls the present case, unless the specific challenge presented in this case was not decided by the Minnesota Supreme Court"). *But see Windsor v. United States,* 699 F. 3d 169, 176 & 178-179 (2d Cir., 2012) ("Windsor's suit is not foreclosed by *Baker*").

wise applicable precedential effect of this Court's *Baker* decision, it thus clearly confuses *doctrinal* developments with attempted *definitional* tinkering with what a marriage is. As shown in earlier sections of this brief, no *doctrines* regarding the institution of marriage have been changed since *Baker*; rather, only attempts to expand the *definition* of marriage beyond its breaking point have been introduced (mostly in the courts, and mostly having been rejected by the people and their elected representatives).

VII.

THE NINTH CIRCUIT MISREADS *LOVING*'S REFERENCE TO HISTORY AND TRADITION

The Ninth Circuit cites to *Loving* in a passage where the Ninth Circuit claims it was "left to consider" why the people of California "might have enacted a constitutional amendment that takes away from gays and lesbians the right to use the designation of 'marriage.'" The Ninth Circuit characterized *Loving* as having noted "the historical pedigree of bans on interracial marriage but not even considering tradition as a possible justification for Virginia's law." *Perry v. Brown*, 671 F. 3d at 1092-1093. Such a reading of *Loving* is mistaken and manifests a misunderstanding of this Court's consideration of the history surrounding the anti-miscegenation statutes struck down by *Loving*. In *Loving* this Court had no need to "consider[] tradition as a possible justification for Virginia's law"

because *no such tradition existed.*[39] The *Loving* Court addressed itself to "the *present* statutory scheme," which it said "dated from the adoption of the Racial Integrity Act of 1924." 388 U.S. at 6.

Loving's concern with history and tradition focused on Virginia's heritage of allowing the individual the maximum freedom possible in making personal decisions to marry (not to redefine what marriage meant) and in the face of *that* history addressed Virginia's then-current *post-1924* laws *as they existed in 1967* (as well as those of other states). The Court used phrases and sentences like the following:

- "Virginia is *now* one of 16 States which prohibit and punish marriages on the basis of racial classifications."

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[39] In footnote 6 of this Court's *Loving* decision, the Court cites Wadlington, "*The* Loving *Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*," 52 VA.L.REV. 1189 (1966) as a place "[f]or a historical discussion of Virginia's miscegenation statutes." *See Loving*, 388 U.S. at 6, n. 6. Wadlington states:

> Virginia's present broad prohibition against racial intermarriage can hardly wrap itself in the mantle of history: *it is less than a half-century old.* It must also be recognized that Virginia's miscegenation law runs counter to the state's deeply cherished heritage of allowing the individual the maximum freedom possible in making his personal decisions.

Wadlington, *supra* at 1223 (emphasis added).

- "The *present* statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War."

- *"These* statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment."

- "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in *these statutes*, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."

- "[W]e find the racial classifications in *these statutes* repugnant to the Fourteenth Amendment."

Loving, supra, 388 U.S. at 6, 12 (all emphases added). The Ninth Circuit thus misreads *Loving*.

Although the Ninth Circuit characterized *Loving* as having noted "the historical pedigree of bans on interracial marriage but not even considering tradition as a possible justification for Virginia's law" *(Perry v. Brown*, 671 F. 3d at 1092-1093), what *Loving* actually did in reviewing history was to recognize the ongoing repeal of the few remaining anti-miscegenation laws and in concept confirm that their repeal was consistent

with and indeed dictated by Fourteenth Amendment principles.

CONCLUSION

The invocation of *Loving* in support of same-sex marriage is just another example of "an illegitimate attempt to appropriate a valuable cultural icon for political purposes." *Loving* provides no support for mandating the legalization of same-sex marriage. Neither *Loving* nor the Fourteenth Amendment is a license for judicial restructuring of the traditional institution of marriage. The decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted this 25th day of January 2013.

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