No. 10-16696

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,
v.
ARNOLD SCHWARZENEGGER, et al.
Defendants,
and
DENNIS HOLLINGSWORTH, et al.,
Defendant-Intervenors-Appellants.

Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 VRW (Honorable Vaughn R. Walker)

BRIEF OF AMICI CURIAE HIGH IMPACT LEADERSHIP COALITION, THE CENTER FOR URBAN RENEWAL AND EDUCATION, AND THE FREDERICK DOUGLASS FOUNDATION, INC., SUPPORTING THE DEFENDANTS AND THE DEFENDANT-INTERVENORS-APPELLANTS IN FAVOR OF REVERSAL

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Amicus **The Center for Urban Renewal and Education** (**CURE**) is a California corporation and states that it has no parent corporation, that it issues no stock, and that no publicly held corporation owns any stock of **CURE**.

Amicus **The High Impact Leadership Coalition** (**HILC**) is not a corporation but is a service of Oasis of Hope International, Inc., a Maryland corporation. Oasis of Hope International, Inc. is not a publicly held corporation, it issues no stock, and no publicly held corporation owns any stock in **HILC** or in Oasis of Hope International, Inc.

Amicus **The Frederick Douglass Foundation, Inc.** (**FDFI**) is a Maryland corporation, issues no stock and has no parent corporation. Therefore, no publicly held corporation owns any stock of **FDFI**.

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STATEMENT OF INTEREST OF AMICI CURIAE

Working predominantly through African-American pastors and laypersons, **The High Impact Leadership Coalition** (**HILC**) provides strategies to effect change in families, communities, states, and the nation. Founded in 2005 by Bishop Harry Jackson, Jr, pastor and author in the D.C. area, **HILC's** core values focus on families, wealth creation, education, and healthcare.

Founded in 1995 by its current president, Ms. Star Parker, **The Center for Urban Renewal and Education** (**CURE**), promotes traditional values, personal responsibility, limited government, and faith, all to address issues of race and poverty. **CURE** delivers its message both to political and thought leaders in Washington and to a national network of black pastors.

The **Frederick Douglass Foundation, Inc.** (**FDFI**) is a public policy and educational organization favoring limited government and the sanctity of the free market as the best tools to address the hardest problems facing our nation. **FDFI** consists of pro-active individuals committed to developing innovative approaches to today's problems with the help of elected officials, university scholars, and community activists.

These three non-profit Amici state their interest in this case arises out of a need to voice the view that the civil rights of parties to same-sex relationships

are *not* advanced by reliance on legal principles that otherwise have served to further the civil rights of African-Americans. These Amici believe the lower court's decision in *Perry v. Schwarzenegger*, No C 09-2292 VRW (N.D. Cal. Aug. 4, 2010), misconstrues and misapplies legal principles that have advanced African-American civil rights.

All parties have consented to the filing of this brief.

This brief does not necessarily reflect the views of the J. Reuben Clark Law School, Brigham Young University, Columbus School of Law, The Catholic University of America, or any of their sponsoring organizations.

Respectfully submitted this 23rd day of September 2010.

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SUMMARY OF ARGUMENT

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 in many States that never enacted antimiscegenation laws.

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 their mother and their father. Racial restrictions on marriage not only failed to serve this purpose, they affirmatively warred against it.

Unlike the opposite-sex requirement, racial restrictions on marriage implicated 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").

Thus, it is not surprising either that the Supreme Court in *Loving* held antimiscegenation laws violated the fundamental right to marry or 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.
IN AMERICAN LEGAL HISTORY, RACIALLY SEGREGATED MARRIAGE IS NOT COMPARABLE TO SEXUALLY INTEGRATED MARRIAGE: CONSTITUTIONAL LAW WRIT LARGE

The judgment of the district court in *Perry v. Schwarzenegger,* C 09-2292 VRW (N.D. Cal. Aug. 4, 2010), invalidating a state constitutional amendment denying same-sex marriage in California, and judicially mandating legalization of same-sex marriage in the state, is fundamentally at odds with *Loving v. Virginia,* 388 U.S. 1 (1967). Unlike the opposite-sex requisite for marriage, racial restrictions on marriage never were a universal, defining feature of marriage. 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—when 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 antimiscegenation laws. The same is true of several other subsequent States that never enacted such laws. Five of these original States (all but Rhode Island), plus the next one to join the Union (Vermont, in 1791), never enacted miscegenation laws. The same is true of several other subsequent States that never enacted such laws.[1]

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[1] Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of* Loving: *Reflections on the "*Loving *Analogy" for Same-Sex Marriage*, 51 How. L. J. 117, 165 (2007);

Other States abandoned such laws in the wake of the adoption of the Fourteenth Amendment, at least until Reconstruction gave way to the Jim Crow system of White Supremacy.[2] And by the time *Loving v. Virginia* was decided in 1967, antimiscegenation laws 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).[3] Only six had the

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Peter Wallenstein, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 253-54 (Appendix I) (Palgrave Macmillan 2002). That author acknowledges that his data differ in detail from others', but the historical picture is consistent.

[2] *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 (2006) (noting (1) that in 1874 Arkansas omitted its anti-miscegenation law from its revised civil code; (2) 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'. . ."; and (3) that in 1871 Mississippi omitted its anti-miscegenation law from its revised civil code); *id*. at 30 (noting that in 1868 the Louisiana legislature repealed the state's anti-miscegenation law); Wardle & Oliphant, *supra*, n. 1 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 . . .).

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

offensive provision in their constitution. No State in the Union had enacted such a law since 1913. Those race-based marriage laws were "designed to maintain White Supremacy," *id*. at 11, and, as the Court correctly held, they were an affront to the Fourteenth Amendment. "The clear and central purpose of the Fourteenth Amendment," the Court wrote in *Loving*, "was to eliminate all official state sources of invidious racial discrimination in the States." *Id*. at 10.

The history of marriage in the constitutions and laws in America clearly demonstrates that the American people, their elected representatives, and their legal charters flatly reject any assertion that *racially segregated* marriage (as in *Loving*) is somehow comparable to *sexually integrated* marriage of a man and a woman.[4] To begin, of the thirteen States that never had antimiscegenation laws, ten now protect man-woman marriage by positive law or interpretation of statute.[5] Four of the thirteen also protect man-woman marriage by constitutional

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[4] Wardle & Oliphant, *supra* n. 1; *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).

[5] Haw. Rev. Stat. § 572-3 (1999); Minnesota (1997); New Jersey (2006) (*e.g.*, N.J.S.A. §37:1-31.a); New Mexico (opinion letter from the attorney general, 2004 WL 2019901 (Feb. 20, 2004)); New York (*Hernandez v. Robles*, 7 N.Y.3d 338, 357, 821 N.Y.S.2d 770, 855 N.E.2d 1 (N.Y. 2006)); Pennsylvania (1996); Washington (1998); and Wisconsin see, *e.g.*, W.S.A. §765.01); *see also infra* note 4 (amendments in Alaska, Hawaii, Kansas and Wisconsin). *See Defense of Marriage Acts* Table at National Conference of State Legislatures, available at

amendment, which requires approval by at least a majority vote of the people of the State.[6]

Seven States once had antimiscegenation laws but repealed them before *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17 (Cal. 1948). Today, five of those states expressly protect the institution of man-woman marriage, using both statutes and constitutional amendments.[7]

Fourteen States repealed their antimiscegenation laws after *Perez* and before *Loving*. Today, *all of those States* protect man-woman marriage, most of them with *both* statutes and constitutional amendments.[8]

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http://www.ncsl.org/IssuesResearch/HumanServices/sameSexMarriage/tabid/16430/Default.aspx (last seen September 23, 2010). That table (col. 1) appears to be limited to States with a formal Defense of Marriage Act. Our list includes all States that protect marriage, whether with a formal DOMA or by common law. Therefore, we include New Jersey, New Mexico, New York, and Rhode Island.

[6] ALASKA CONST., art. I, § 25 (1998), HAW. CONST., art. I, §23 (1998) (structural), KAN. CONST., art. 15,§ 16 (2005), and WISC. CONST., art. XIII, § 13 (2006).

[7] Illinois (statute, 1996); Maine (statute, 1997; reaffirmed by vote of the people in 2009); Michigan (statute in 1996 and constitutional amendment in 2004); Ohio (statute and constitutional amendment in 2004), and Rhode Island (see *Chambers v. Ormiston*, 935A.2d 956, 962-65 (R.I. 2007)).

[8] 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); Maryland (statute 1973); Montana (statute 1997; amendment 2004); Nebraska (constitutional amendment 2000);

An additional sixteen States protect man-woman marriage expressly. Thirteen of those States have constitutional provisions *and* statutory provisions,[9] and three have statutory provisions only.[10] In sum, voters in ***all*** thirty-one States where the question of legalizing same-sex marriage has been put to the citizens (thirty involving proposed marriage amendments to state constitutions), have rejected same-sex marriage and declared that marriage is exclusively the union of a man and a woman. [11] (A similar pattern rejecting same-sex marriage exists globally.)[12]

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).

[9] 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); 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).

[10] Delaware (1996); North Carolina (1996); and West Virginia (2000).

[11] 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; adding the 2009 Maine "People's Veto" vote makes 31).

[12] Same-sex marriage is legal in only 11 of 192 sovereign nations; it is prohibited in the constitutions of at least 37. *Id.* at 367 (App. I).

In *Lawrence v. Texas*, 539 U.S. 558, 568 *et seq*. (2003), the Supreme Court reviewed the history of the relevant laws, but said, "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.

The American people, and 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%.[13] 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.

[13] DOMA Watch, *Marriage Amendment Summary,* available at http://www.domawatch.org/amendments/amendmentsummary.html (last seen September 23, 2010) (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. ____ (App. I) (forthcoming October 2010) (showing about 63%).

II.
THE GENDER-INTEGRATING DEFINITION OF MARRIAGE IS CLOSELY BOUND UP WITH THE INSTITUTION'S CORE PURPOSE OF INCREASING THE LIKELIHOOD THAT CHILDREN WILL BE BORN TO AND RAISED BY BOTH THEIR MOTHER AND THEIR 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,[14] 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.[15]

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

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[14] George W. Dent, Jr., *Straight Is Better: Why Law and Society May Legitimately Prefer Heterosexuality,* Case Research Paper Series in Legal Studies, Working Paper 2010-22 (July 2010) at 17, available at http://ssrn.com/abstract=1649574 (summarizing some gender differences).

[15] 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); *id.* at 5 (*quoting* Child Trends, "the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage").

Blackstone put it.[16] 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, the Supreme 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 v. Virginia,* 388 U.S. 1 (1967) is a classic example of that linkage, and the district court's invocation of *Loving* in support of judicially-mandated same-sex marriage is both ironic and futile.

In *Loving,* the 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. The 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).

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[16] I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *458.

Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), involved a challenge to a criminal sterilization act. The 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, 193, 195 (1964), was an appeal from a conviction for violation of state criminal interracial cohabitation law. The 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 the 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. The 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 Supreme Court decisions 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."[17]

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[17] Lynn D. Wardle, Loving v. Virginia *and The Constitutional Right to Marry,*

The very facts of *Loving* also 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 be a parent to his and Mildred's biological children in Virginia under cover of darkness because of Virginia's antimiscegenation law.[18] The Lovings treasured their children.[19] In no small part, the Lovings challenged the Virginia antimiscegenation law for the sake of their children. After their conviction for violating the Virginia antimiscegenation law, they were forced to move to the 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."[20] 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.

1790-1990, 41 HOW. L. J. 289, 338 (1998).

[18] 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).

[19] *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").

[20] *Id.* at 237.

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

Society 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,[21] and in furthering public health and child welfare.[22]

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[21] Sustainable economic development eventually requires an economy-sustaining birth rate. Ironically, few developed nations in the world today have a bare replacement birthrates (the U.S. is one—barely). One consequence of that is the "demographic winter" that is quickly descending upon Europe, which British historian Niall Ferguson calls "the greatest sustained reduction in European population since the Black Death of the 14th Century." George Weigel, THE CUBE AND THE CATHEDRAL 21 (2005), citing Niall Ferguson, *Eurabia?*, N.Y. Times Magazine, April 4, 2004. *See also* EUROPEAN BIRTH RATES REACH HISTORIC LOW IN PART BECAUSE OF RECENT FALL IN EASTERN EUROPE, Sept. 8, 2006, http://www.medicalnewstoday.com/medicalnews.php?newsid=51329 (last seen September 23, 2010).

[22] 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

> 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 frames of the children whom he is rearing may be as good as possible ...."[23]

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

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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 STD's, and less likely to be raised in poverty. Dept. of Health and Human Services, Administration for Families and Children, HEALTH MARRIAGE INITIATIVE, BENEFITS OF HEALTHY MARRIAGES FOR CHILDREN AND YOUTH, available at http://www.acf.hhs.gov/healthymarriage/about/mission.html (last seen September 23, 2010). *See also* Sarah McLanahan & Gary Sandefur, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 137 (1994).

[23] Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J. L. & PUB. POL'Y 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.").

society's recognition of its importance to them, their wider family, and society itself."[24]

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

"[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. at 192 (1964). In *Loving* the 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. The Court in *Loving* found that the Virginia antimiscegenation 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"—underscores the core

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

flaw of invidious racial discrimination in the Virginia statute.[25] *Loving* stands for the rejection of racial discrimination in marriage law (not for the judicial mandate of same-sex marriage). *See generally Bartlett v. Strickland*, 129 S. Ct. 1231, 1248 (U.S. 2009); *Parents Involved in Cty. Sch. v. Seattle Sch. Dist. 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."[26]

Race has nothing to do with either marriage or procreation. *Loving,* 388 U.S. at 11 ("There is patently no legitimate overriding purpose independent of invidious discrimination [for the antimiscegenation law]."); *see also McLaughlin,* 379 U.S. at 193 ("There is no suggestion that a white person and a

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

[26] 139 CONG. REC. 13, 520 (1993) (statement of Senator Baucus quoting Colin Power, Chairman, Joint Chiefs of Staff).

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."[27] That distinguishes *Loving* from the position of advocates of same-sex marriage who are trying to do a very extraordinary thing—to redefine the institution of marriage.[28]

V.
A KEY PURPOSE OF *LOVING* WAS TO LIBERATE MARRIAGE FROM CAPTURE BY PERSONS SEEKING TO REDEFINE MARRIAGE TO ADVANCE POLICIES EXTRANEOUS TO MARRIAGE

Racial Eugenicists in Virginia used antimiscegenation provisions to "capture" marriage, to enslave a social institution unrelated to racism and to put it into "forced labor" 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

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

[28] Wardle & Oliphant, *supra* at 147; *see also* Stephen Carter, *supra*.

the purpose of promoting an extraneous social policy. The Virginia antimiscegenation 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 antimiscegenation 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."[29]

The rationale of *Loving* does not support the adoption 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.

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[29] Wardle & Oliphant, *supra* note 1, 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. & 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); 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).

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. 388 U.S. at 11 (stating that 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.[30]

VI.
JUST FIVE YEARS AFTER DECIDING *LOVING* THE 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

The court below concluded that the California marriage amendment violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Then, inexplicably, the court failed to address—or even to cite—the one case that is directly on point and dispositive, *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).[31]

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[30]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).

[31] The Court below addressed *Baker v. Nelson* when, from the bench, it denied Proponents' motion for summary judgment (civil minute order; Doc. 226, 75-79).

The plaintiffs in *Baker v. Nelson* unsuccessfully raised exactly the same constitutional points as here, and on appeal the U.S. Supreme Court by dismissal for want of substantial question *held* that a State's refusal to allow same-sex "marriage" did not violate either the Due Process Clause or the Equal Protection Clause.

Under the rule of *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975), *the dismissal of an appeal for want of a substantial federal question is a decision on the merits.* The law of *Hicks v. Miranda* has some twists and turns, but it is still good law. In determining if a summary disposition for want of a substantial federal question is binding in a later proceeding, lower courts look to the jurisdictional statement to see precisely which constitutional questions were presented on appeal and decided by the Supreme Court. Summary action is binding with respect to those same questions.[32]

[32] ". . . Our summary dismissals are, of course, to be taken as rulings on the merits, *Hicks v. Miranda*, 422 U.S. 332, 343-345, in the sense that they rejected the 'specific challenges presented in the statement of jurisdiction' and left 'undisturbed the judgment appealed from.' *Mandel v. Bradley*, 432 U.S. 173, 176. They do not, however, have the same precedential value here [*i.e.*, in the U.S. Supreme Court] as does an opinion of this Court after briefing and oral argument on the merits." *Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 477 n. 20 (1979) (citations omitted); *see also* Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE 281 (BNA Books, 8th ed. 2002).

Indeed, this court, too, has followed the rule of *Hicks v. Miranda*, as, of course, it must. *See* footnote 2 in *Adams v. Howerton*, 673 F.2d 1036, 1039 (9th Cir. 1982). In *Wright v. Lane County District Court*, 647 F.2d 940 (9th Cir. 1981) (per curiam), this Court said,

> "The Supreme Court dismissed Hackin's appeal for lack of a substantial federal question. Summary dismissals for want of a substantial federal question are decisions on the merits that bind lower courts until subsequent decisions of the Supreme Court suggest otherwise. *Hicks v Miranda*, 422 U.S. 332, 334-45 (1975). See also *McCarthy v. Philadelphia Civil Service Comm'n*, 424 U.S. 645, 646 (1976) (precedential value of a dismissal for want of a substantial federal question extends beyond the facts of the particular case to all similar cases). [Therefore,] [t]he Oregon statute is not unconstitutional."

Id. at 941.[33]

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.

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[33] *See also* a U.S. Supreme Court case that arose in California, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981) ("Insofar as our holdings were pertinent, the California Supreme Court was quite right in relying on our summary decisions as authority for sustaining the San Diego ordinance against First Amendment attack. *Hicks v. Miranda, supra*.").

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 equal protection and 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 the Supreme 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) (in this case, Doc. No. 36-3). 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).

A few years later, the United States Court of Appeals for the Eighth Circuit acknowledged the binding authority of the Supreme Court's summary disposition when the *Baker* plaintiffs brought another lawsuit, this time seeking additional veterans' benefits. The litigants lost again. The Eighth Circuit said:

> "The District Court dismissed this action on the basis that *Baker v. Nelson, supra*, was dispositive of the issues raised therein. We agree. The Minnesota Supreme Court explicitly held that marriages between persons of the same sex are prohibited and that *the applicable Minnesota statute did not offend the First, Eighth, Ninth, or Fourteenth Amendments to the Constitution [of the United States]*. . . . In addition, the Supreme Court's dismissal of the appeal for want of a substantial federal question *constitutes an adjudication on the merits which is binding on the lower federal courts*. See *Hicks v. Miranda*, 422 U.S. 332, 343-345. The appellants have had their day in court on the issue of their right to marry under Minnesota law *and under the United States Constitution*. . . ."

McConnell v. Nooner, 547 F.2d 54, 55-56 (8th Cir. 1976) (per curiam) (citations omitted) (emphasis added).[34]

The same circuit addressed the issue again in another case alleging the right to a same-sex "marriage." In *Citizens for Equal Protection v. Bruning*, 455

[34] When the *Baker* litigants tried for a third time, they lost again—and on the same grounds. *McConnell v. United States*, 188 Fed. Appx. 540, 2006 WL 1995627 (8th Cir. 2006) (tax case).

F.3d 859, 870-71 (8th Cir. 2006), the Court said,

> "[S]ince the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution. Indeed, in *Baker v. Nelson* . . . the United States Supreme Court dismissed 'for want of a substantial federal question.' There is good reason for this restraint."[35]

Within this Circuit, a federal district court held: "If . . . state law governs, the Colorado state law which rejects a purported marriage between persons of the same sex does not violate the due process or the equal protection clause of the federal constitution. I think that holding is justified and supported by the Supreme Court's dismissal of the appeal in *Baker v. Nelson, supra*." *Adams v. Howerton*, 486 F.Supp. 1119, 1124 (C.D. Calif. 1980) (immigration case).

When that case was appealed, this Court did not reach the *Baker v. Nelson* question, but did acknowledge the case and its consequences under the rule of *Hicks v. Miranda*. *Adams v. Howerton*, 673 F.2d 1036, 1039 n. 2 (9th Cir. 1982). On the merits, this court said,

> "We need not, however, delineate the exact outer boundaries of this limited judicial review [in immigration cases]. We hold that Congress's decision to confer spouse status under [the Immigration and Nationality Act] only upon the parties to heterosexual marriage has a rational basis and therefore comports with the due

[35] *See also Morrison v. Sadler*, 821 N.E.2d 15, 19 (Ind. Ct. App. 2005) (*Baker v. Nelson* "is binding United States Supreme Court precedent indicating that state bans on same-sex marriage do not violate the United States Constitution").

> process clause and its equal protection requirements. There is no occasion to consider in this case whether some lesser [sic] standard of review should apply."

Id. at 1042.

Of course, if it can be shown that the U.S. Supreme Court has changed its mind, then the merits-decision in *Baker v. Nelson* is unavailing. The two cases that most frequently are mentioned are *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003).

It would be curious if *Romer* undermined the result in *Baker* since such words as "marriage," "husband," and "wife" do not appear in the opinion. *Romer* was *not* a case about the constitutionality of man-woman marriage. Neither was *Lawrence v. Texas*, which involved the constitutionality of a criminal sodomy statute. The *Lawrence* Court specifically noted the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," 539 U.S. at 578, and Justice O'Connor's concurring opinion was even more pointed. She said,

> "That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."

Id. at 585 (O'Connor, J., concurring).[36]

No Supreme Court case has supplanted or even modified the result in *Baker v. Nelson*.[37] That case remains conclusive on the subject of same-sex "marriage" under the U.S. Constitution. Insofar as any subsequent case raises the same issues—as this case does—the U.S. Supreme Court already has spoken, and lower courts are bound by its determination.

VII.
CONCLUSION: *LOVING* COMPELS REVERSAL

The invocation of *Loving* in the trial court opinion is just another example of "an illegitimate attempt to appropriate a valuable cultural icon for

[36] *See also Wilson v. Ake*, 354 F.Supp.2d 1298, 1304-05 (M.D. Fla. 2005) ("Although *Baker v. Nelson* is over 30 years old, the decision addressed the same issues presented in this action and this Court is bound to follow the Supreme Court's decision. . . . The Supreme Court's holding in *Lawrence* does not alter the dispositive effect of *Baker*.").

[37] *Adams, supra*, 673 F.2d at 1039, n. 2, does not signal that *Zablocki* somehow constitutes a "subsequent decision[] of the Supreme Court" suggesting either that any of the constitutional issues in *Baker* would be treated differently if the Court were faced with them in the post-*Baker* era or that *Zablocki* somehow answered one or more of those questions in a way different from how the Court's dismissal in *Baker* answered them. *Zablocki* continued the rationale expressed in *Loving,* when it noted that marriage is "fundamental to the very existence and survival of the race." *Zablocki,* 434 U.S. at 384. Same-sex attraction simply does not implicate either the existence or the survival of the race, nor does it further any state interest in any other of the core activities relating to marriage.

political purposes."[38] *Loving* provides no support for the lower court ruling mandating legalization of same-sex marriage. While citing *Loving,* the district court in *Perry v. Schwarzenegger* (N.D. Cal. Aug. 4, 2010) committed the same error repudiated by the Supreme Court in *Loving.* Neither *Loving* nor the Fourteenth Amendment is "a charter for restructuring the traditional institution of marriage by judicial legislation."[39] The decision of the court below should be reversed.

Respectfully submitted this 23rd day of September 2010.

s/ Lynn D. Wardle .
Counsel of Record for Amici

s/ Stephen Kent Ehat .
Counsel of Record for Amici

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[38] Wardle & Oliphant, *supra* at 120.

[39] *In the Matter of the Marriage of J.B. and H.B.*, ___ S.W.2d __, No. 05-09-01170-CV (Tex. Ct. App., 5th Dist., Aug. 31, 2010).

STATEMENT OF RELATED CASE

Pursuant to Ninth Circuit Rule 28-2.6, Amici **The High Impact Leadership Coalition** (**HILC**), **The Center for Urban Renewal and Education** (**CURE**) and **The Frederick Douglass Foundation, Inc.** (**FDFI**) certify that there is a related appeal pending in this court, *Perry, et al. v. Schwarzenegger, et al.*, No. 10-16751, which arises out of the same district court case as the present appeal.

Dated: September 23, 2010

s/ Lynn D. Wardle .
Counsel of Record for Amici

s/ Stephen Kent Ehat .
Counsel of Record for Amici

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Signature: s/ Stephen Kent Ehat

Attorney for: Amici Curiae **The High Impact Leadership Coalition** and **The Center for Urban Renewal and Education**

Date: September 23, 2010

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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s/ Stephen Kent Ehat .
Counsel of Record for Amici