Case No. S147999

IN THE SUPREME COURT
OF
THE STATE OF CALIFORNIA

IN RE MARRIAGE CASES

JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4365

AFTER A DECISION OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION THREE

NOS. A110449, A110450, A110451, A110463, A110651, A110652

SAN FRANCISCO SUPERIOR COURT
NOS. JCCP4365, 429539, 429548, 504038
LOS ANGELES SUPERIOR COURT NO. BC088506

HONORABLE RICHARD A. KRAMER, JUDGE

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND INC. IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION

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Application to File an *Amicus Curiae* Brief in Support of Respondents Challenging Marriage Exclusion and Statement of Interest of *Amicus Curiae*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York. The Supreme Court of the State of New York, Appellate Division, First Department approved LDF's certificate of incorporation on March 15, 1940, authorizing the organization to serve as a legal aid society. Although LDF is known primarily for its involvement in cases involving the civil rights of African Americans, LDF has been committed since its founding to enforcing legal protections against discrimination and to securing the constitutional and civil rights of all Americans. LDF has an extensive history of participation in efforts to eradicate barriers to the full and equal enjoyment of social and political rights and has represented parties or participated as *amicus curiae* in numerous such cases across the nation, including *Romer* v. *Evans*, 517 U.S. 620 (1996), and *Loving* v. *Virginia*, 388 U.S. 1 (1967), a case that, as we explain below, has important bearing on the present litigation.

LDF has an interest in the fair application of the Due Process and Equal Protection Clauses of the California Constitution, which provide

important protections to African Americans and to all Californians, and believes that its experience and knowledge will assist the Court in this case.

Summary of Argument

Consistent with its opposition to all forms of discrimination, LDF believes that this Court should not endorse the State of California's discrimination against lesbians and gay men by denying their fundamental right to marry the person they love. Nearly 60 years ago, in *Perez* v. *Sharp*, 32 Cal. 2d 711 (1948), this Court was faced with a state law imposing significant restrictions on an individual's right to marry the person of his or her choice. In an historic step forward—a step that at the time was the subject of bitter controversy, but now seems obvious—this Court struck down this lasting and notorious vestige of discrimination, holding that anti-miscegenation laws violate the Constitutional guarantees of both Due Process and Equal Protection. This Court was the first state high court in the Nation to reach such a conclusion, and it did so almost twenty years before the United States Supreme Court followed its lead in *Loving* v. *Virginia*, 388 U.S. 1, 6 n.5 (1967). There is no reason for this Court to treat marriage between persons of the same sex any differently than it treated interracial marriages in *Perez*.

Although the historical experiences in this country of African Americans, on the one hand, and lesbians and gay men, on the other, are in many important ways quite different, the legal questions raised here are analogous to those raised in *Perez* and *Loving*. The state law at issue here, like the laws struck down in those cases, restricts an individual's right to marry the person of his or her choice. We respectfully submit that the decision below must be affirmed if this Court follows the reasoning in its *Perez* decision, as well as that of the United States Supreme Court's decision in *Loving*.

Significantly, the Supreme Court decided *Loving* on *both* Due Process *and* Equal Protection grounds, even though either ground would have sufficed to reverse the Virginia court. This Court, too, in *Perez* made clear that the restrictions on marriage imposed by the California anti-miscegenation statutes impermissibly burdened both Equal Protection and Due Process rights. The basic constitutional principles addressed in *Perez* and *Loving* are not and should not be limited to race, but can and should be universally applied to any State effort to deny people the right to marry the person they love. Any

argument to the contrary is fundamentally inconsistent with the precedents of this Court and the Supreme Court.

Argument

I.

CALIFORNIA'S PROHIBITION ON MARRIAGE FOR SAME-SEX COUPLES DISCRIMINATES ON THE BASIS OF GENDER

Respondents have argued that the State of California's family laws classify individuals on the basis of gender by permitting two individuals of the opposite sex, but not two individuals of the same sex, to marry in violation of California's Equal Protection Clause. The trial court below agreed that because a man is permitted to marry a woman but a woman is not permitted to marry a woman, California law classifies on the basis of gender:

> The idea that California's marriage law does not discriminate upon gender is incorrect. If a person, male or female, wishes to marry, then he or she may do so as long as the intended spouse is of a different gender. It is the gender of the intended spouse that is the sole determining factor. To say that all men and all women are treated the same in that each may not marry someone of the same gender misses the point. The marriage laws establish classifications (same gender vs. opposite gender) and discriminate based on those gender-based classifications. As such, for the purpose of

> an equal protection analysis, the legislative scheme creates a gender based classification.

(Opn. at 17.) The Court of Appeal majority rejected this conclusion. (Opn. at 33-34.)

This Court's decision in *Perez* v. *Sharp*, 32 Cal. 2d 711 (1948), and the United States Supreme Court's decision in *Loving* v. *Virginia*, 388 U.S. 1 (1967), are both instructive and support the rationale of the trial court and not the Court of Appeal's ruling below. In *Perez,* this Court rejected the argument that the challenged anti-miscegenation statute was not discriminatory because it applied equally to both whites and non-whites. The Court held that "[t]he decisive question . . . is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups." *Perez*, 32 Cal. 2d at 716. This Court found it to be of no significance to the constitutional analysis that all non-white people were treated equally in that they were prohibited from marrying whites, and vice-versa. The United States Supreme Court in *Loving* reached the same result. The *Loving* Court rejected the "notion that the mere 'equal application' of a statute

containing racial classification is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discrimination." *Id.* at 8.[1]

Here, it is just as important to reject the conclusion, reached by the Court of Appeal, that there is no discrimination on the basis of gender because California law treats each gender equally. The Court of Appeal misunderstood both *Loving* and *Perez* when it concluded that "The laws treat men and women exactly the same, in that neither are permitted to marry a person of the same gender. We fail to see how a law that merely mentions gender can be labeled 'discriminatory' when it does not disadvantage either group." (Opn. at 34.)

The issue in the contexts of both interracial marriage and marriage for same-sex couples is whether the persons who wish to marry are permitted—or not permitted—to exercise the right to marry based on characteristics of those persons. Under the regime in place

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[1] Remarkably, the Court of Appeal concluded that *Perez* and *Loving* diverged on this point. (Opn. at 36.) As the language quoted above makes clear, this Court in *Perez* quite specifically held that the anti-miscegenation statutes did not pass constitutional muster simply

prior to *Perez* and *Loving*, a white person could not marry a black person (because of their race), and today, a woman cannot marry another woman (because of their gender). The *Perez* and *Loving* courts found the law at issue to classify on the basis of race because whether a person could marry turned on the races of the people who would marry; similarly, this Court should hold, as did the trial court below, that California's marriage law classifies on the basis of gender.

The State argues that the judgment below should be affirmed because the California marriage laws do not classify on the basis of gender, and that the reasoning of racial discrimination cases like *Perez* and *Loving* is inapplicable here. Similarly, in the New York Court of Appeals' plurality decision in *Hernandez* v. *Robles*, Judge Robert S. Smith observed that:

> [T]he historical background of *Loving* is different from the history underlying this case. Racism has been recognized for centuries—at first by a few people, and later by many more—as a revolting moral evil. This country fought a civil war to eliminate racism's worst manifestation, slavery, and passed three constitutional amendments to

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because all whites and all non-whites were treated the same under their provisions.

> eliminate that curse and its vestiges. *Loving* was part of the civil rights revolution of the 1950's and 1960's, the triumph of a cause for which many heroes and many ordinary people had struggled since our nation began.

855 N.E.2d 338, 361 (N.Y. 2006). Such assertions, however, offer a cramped interpretation of the *Loving* decision, one at odds with the Supreme Court's own jurisprudence.

Although the *Loving* decision was clear, in later cases involving the right to marry, the Supreme Court emphasized that *Loving*'s holding was not based merely on race. In *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), which involved the right to marry of so-called "deadbeat dads," the Court called *Loving* the "leading decision of this Court on the right to marry," and observed:

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

Id. at 383. Indeed, the Court explicitly stated that "[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of

fundamental importance for all individuals." *Id.* at 384. Thus, the Supreme Court itself foreclosed efforts to limit *Loving* to the context of racial discrimination.

Similarly, this Court in *Perez* stressed that its decision was rooted in significant part on the fundamental nature of the right to marry, and was not simply a result of the fact that the restriction at issue was based on race. The *Perez* Court concluded that marriage "is something more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means." 32 Cal. 2d at 714. The *Perez* Court held not only that the California anti-miscegenation statute was an unlawful race-based classification, but also that it was an improper constraint on the fundamental right to marry guaranteed by the Due Process Clause because it was void for vagueness. 32 Cal. 2d at 727 ("Even if a state could restrict the right to marry upon the basis of race alone, [the challenged statutes] are too vague and uncertain to constitute a valid regulation. A certain precision is essential in a statute regulating a fundamental right.").

The reasoning of *Perez* and *Loving* thus provide compelling support for LDF's view that this Court should reverse the judgment below.

II.

THE FUNDAMENTAL RIGHT TO MARRY EXTENDS TO SAME-SEX COUPLES

The United States Supreme Court's decision in *Loving* and this Court's decision in *Perez* demonstrate the fundamental nature of the due process right to marry. As explained more fully in Respondents' brief, *Loving* and *Perez* are central to this Court's consideration of whether gay men and lesbians constitutionally can be excluded from the right to marry. (Resp. Br. at 45-50.)

At the time of this Court's pioneering decision in *Perez*, some twenty years before *Loving*, 38 of 48 states banned interracial marriage, six by constitutional provision. Peter Wallenstein, *Tell The Court I Love My Wife: Race, Marriage, and Law - An American History* 159-60 (2002). The overwhelming weight of authority in favor of anti-miscegenation laws was of no moment to this Court, which in *Perez* became the first state high court in the nation to strike down such laws.

And, in 1968, some 73% of Americans still opposed interracial marriage. Joseph Carroll, *Most Americans Approve of Interracial Marriages*, Aug. 16, 2007, available at www.galluppoll.com (last visited Sept. 23, 2007). The Supreme Court nevertheless unanimously held in *Loving* that Virginia's anti-miscegenation law violated both the Equal Protection and Due Process Clauses of the U.S. Constitution. *Loving*, 388 U.S. at 12. The Court held first that the Virginia law "violates the central meaning of the Equal Protection Clause" because it "proscribe[d] generally accepted conduct if engaged in by members of different races." *Id.* at 11. The Court then held—on a separate and independent basis—that the Virginia anti-miscegenation statute "also deprive[s] the Lovings of liberty without due process of law in violation of the Due Process Clause" because "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* at 12.

The *Loving* Court explicitly recognized that, as a historical matter, interracial marriage had long been prohibited in America, but nevertheless struck down the Virginia anti-

miscegenation law by properly focusing on the *substance* of the fundamental right at issue. Simply put, *Loving* was not solely a race case. While race was undeniably at the heart of the state law at issue in *Loving*, *Loving* did not rest solely on Equal Protection grounds. Rather, the Court's decision also rested on the separate and independent Due Process ground that all citizens have a fundamental right to marry the person of their choosing. The Court found that the "freedom to marry or not marry[] a person of another race resides with the individual and cannot be infringed by the State." *Loving*, 388 U.S. at 12. Accordingly, Virginia's anti-miscegenation law deprived the plaintiffs of "liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." *Id.*

In so holding, the Supreme Court explained that the right to marry enjoys significant protection under the Due Process Clause. The Fourteenth Amendment broadly guarantees that: "No state . . . shall deprive any person of life, liberty or property without due process of law." Even before *Loving* the Court recognized that the Fourteenth Amendment:

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. *Nebraska*, 262 U.S. 390, 399 (1923). Those rights are rights that apply to all, irrespective of race. For this reason, the *Loving* Court applied its holding that the "right to marry is of fundamental importance for all individuals" to "all the State's citizens." *Loving*, 388 U.S. at 12.

Appropriately, the Supreme Court's due process analysis on the right to marry does not turn on whatever historical discrimination may have barred access to that fundamental right. Although the Fourteenth Amendment was ratified in the wake of the Civil War, after a long struggle to eradicate the abomination of slavery, the reach of the Fourteenth Amendment is certainly not limited to discrimination on the basis of race. Throughout this nation's history, the Supreme Court has applied anti-discrimination

principles first articulated in cases involving racial discrimination to other cases of discrimination on the basis of gender, age, and disability, as well as sexual orientation. *See, e.g.*, *Lawrence* v. *Texas*, 539 U.S. 558 (2003) (sexual orientation); *United States* v. *Virginia*, 518 U.S. 515 (1996) (gender); *Romer* v. *Evans*, 517 U.S. 620 (1996) (sexual orientation); *Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985) (disability); *Mass. Bd. of Retirement* v. *Murgia*, 427 U.S. 307 (1976) (age); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (gender).

For this reason, the Supreme Court's Due Process holding in *Lawrence* v. *Texas* properly relied on the Due Process Clause to invalidate the challenged state law, even though that state law did not discriminate on the basis of race. *Lawrence* explained its holding in part by invoking the need to protect lesbians and gay men from forms of discrimination based on their sexual orientation: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." 539 U.S. at 575. The Supreme Court there continued: "As

the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id.* at 579.

This Court's decision in *Perez* is analogous. The *Perez* Court was unconcerned with the substantial historical pedigree of the anti-miscegenation statutes that were challenged there. With great vision, this Court held that, "Certainly, the fact alone that the discrimination has been sanctioned by the state for many years does not supply such justification." 32 Cal. 2d at 727. *Perez*, just like *Loving*, is not simply a race case. In *Perez*, this Court anticipated *Loving* by some twenty years and focused—as did the *Loving* Court—on the *substance* of the right at issue. In examining the restrictions imposed by the challenged California statutes, the *Perez* Court held:

> A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains.

32 Cal. 2d at 725.

It is undeniable that the experience of African Americans differs in many important ways from that of gay men and lesbians;

among other things, the legacy of slavery in our society is profound. But the differences in the historical experiences of discrimination facing these groups is not reason to suggest that constitutional provisions prohibiting discrimination—even those that arose in the context of discrimination on the basis of race—should not fairly be applied to gay men and lesbians who are discriminated against by being denied the right to marry the person of their choice.

Conclusion

As the Supreme Court stated in *Lawrence* v. *Texas*, "persons in every generation can invoke [the Fourteenth Amendment's] principles in their own search for greater freedom." 539 U.S. at 579. The right of same-sex couples to marry is a "greater freedom" that should be afforded constitutional protection, notwithstanding the Fourteenth Amendment's initial and continuing concern regarding issues of race.

Dated: September 25, 2007

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Certificate of Compliance

I hereby certify that this brief *Amicus Curiae* has been prepared using proportionately spaced 13-point Times New Roman font. In reliance on the word count feature of the Microsoft Word for Windows software used to prepare this brief. I further certify that the total number of words of this brief is 3,123 words, exclusive of those materials not required to be counted.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on September 26, 2007.

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND INC. IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION

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Court of Appeal No. A110449

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Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco
San Francisco Superior Court Case No., CPF-04-503943
Court of Appeal Case No. A110651

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