

## Nos. 12-17668, 12-16995, and 12-16998

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### United States Court of Appeals for the Ninth Circuit

BEVERLY SEVCIK, *et al.*, *Plaintiffs-Appellants*,

— v. —

BRIAN SANDOVAL, *et al.*, *Defendants-Appellees*,

and

COALITION FOR THE PROTECTION OF MARRIAGE, *Intervenor-Defendant-Appellee*.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA, NO. 2:12-cv-00578-RCJ-PAL,  
THE HONORABLE ROBERT C. JONES PRESIDING

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NATASHA N. JACKSON, *et al.*, *Plaintiffs-Appellants*,

— v. —

NEIL S. ABERCROMBIE, GOVERNOR, STATE OF HAWAII, *Defendant-Appellant*,

LORETTA J. FUDDY, DIRECTOR, DEPARTMENT OF HEALTH, STATE OF HAWAII, *Defendant-Appellee*,

and

HAWAII FAMILY FORUM, *Intervenor-Defendant-Appellee*.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII, NO. 1:11-cv-00734-ACK-KSC,  
THE HONORABLE ALAN C. KAY, SR., PRESIDING

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#### **BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT JUDGMENTS**

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**FRAP RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

*Amicus curiae* NAACP Legal Defense and Educational Fund, Inc. is a tax-exempt nonprofit organization. *Amicus curiae* does not have any corporate parent. It does not have any stock; therefore, no publicly held company owns 10% or more of the stock of the *amicus curiae*.

**STATEMENT REGARDING CONSENT TO FILE**

The parties have filed blanket notices and letters of consent to the filing of *amicus curiae* briefs. Accordingly, *amicus curiae* NAACP Legal Defense and Educational Fund, Inc. files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties to both cases.

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit legal organization that, for more than seven decades, has fought to enforce the guarantees of the United States Constitution against discrimination. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 339 (1938). Since its inception, LDF has worked to eradicate barriers to the full and equal enjoyment of social and political rights, including those arising in the context of partner or spousal relationships. *See, e.g., McLaughlin v. Florida*, 379 U.S. 184 (1964). Thus, LDF has participated as *amicus curiae* in cases across the nation that affect the rights of gay people, including *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); and *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

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<sup>1</sup> Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of all parties.

Consistent with its opposition to all forms of discrimination, LDF has a strong interest in the fair application of the Fourteenth Amendment to the United States Constitution, which provides important protections for all Americans, and submits that its experience and knowledge will assist the Court in this case.

### **PRELIMINARY STATEMENT**

Over 40 years ago, in *Loving v. Virginia*, 388 U.S. 1 (1967) – a case in which LDF participated as *amicus curiae* – the Supreme Court was called upon to consider the constitutionality of prohibitions against marriage for interracial couples. At that time – nearly one hundred years after the Fourteenth Amendment was adopted in 1868 – sixteen states prohibited marriage between individuals of different races. With its decision in *Loving*, however, the Court struck down this lasting and notorious form of discrimination by holding that anti-miscegenation laws violate the constitutional guarantees of Equal Protection and Due Process.

The basic Fourteenth Amendment principles addressed in *Loving* are not limited to race. To the contrary, they govern any state action that denies two consenting adults – including those of the same sex – the right to marry. While the nature of discrimination against lesbians and gay men differs fundamentally from the *de jure* racial segregation at issue in *Loving*, the legal issues addressed by *Loving* are analogous to the legal issues raised in these appeals.

Furthermore, the rationales advanced by Defendants-Appellees in support of the state laws prohibiting marriage for same-sex couples bear a striking resemblance to those proffered by Virginia in defense of the anti-miscegenation statute at issue in *Loving*. There, as here, the defendants relied on purportedly scientific studies to argue that the state law was necessary to prevent harm to any children who would be raised in the unions they sought to prohibit. There, as here, the defenders of the facially discriminatory state law argued that permitting an individual to exercise the right to marry the person of his or her choice would break from history and tradition, entailing a fundamental redefinition of the institution of marriage itself. The Supreme Court rejected those arguments in *Loving*, recognizing that they merely advanced the very “discrimination which it was the object of the Fourteenth Amendment to eliminate.” 388 U.S. at 11.

Given the similarities between this case and *Loving*, this Court should reverse the District Courts’ rulings and hold that Nevada and Hawaii’s denial of the fundamental right to marry to same-sex adult couples violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.<sup>2</sup>

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<sup>2</sup> LDF adopts Plaintiffs-Appellants’ argument that, consistent with *Loving*, Nevada and Hawaii’s prohibitions against marriage for same-sex couples violate the constitutional guarantee of due process. *See* Br. of Sevcik Plaintiff-Appellants (Doc. 20-3) at 30-48.

## ARGUMENT

### I. NEVADA AND HAWAII'S PROHIBITIONS AGAINST MARRIAGE FOR SAME-SEX COUPLES VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

#### A. Neither the Fourteenth Amendment's Guarantee of Equal Protection, nor the Holding of *Loving v. Virginia*, Is Limited to Race-Based Discrimination.

Although the Fourteenth Amendment was ratified in the wake of the Civil War after a long struggle to eradicate slavery, its reach is not limited to racial discrimination. Over time, the Supreme Court made clear that, although the Fourteenth Amendment's anti-discrimination principles were first articulated in cases involving racial discrimination, they are also applicable to governmental classifications that categorically exclude individuals from equal participation in our country's social and political community based solely on their status as members of certain groups. The Court has held that the determination of whether the Fourteenth Amendment governs a particular governmental classification should involve consideration of such factors as whether it was predicated upon "social stereotypes," *Craig v. Boren*, 429 U.S. 190, 202 n.14 (1976), and/or whether it "create[s] or perpetuate[s] the legal, social, and economic inferiority" of a group that has been subjected to sustained discrimination, *United States v. Virginia (VMI)*, 518 U.S. 515, 534 (1996). Relying on this analysis, the Court has held that the Fourteenth Amendment protects against governmental classifications which

discriminate based not only on race, but also on such factors as national origin, sexual orientation, and sex.<sup>3</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (sexual orientation); *VMI*, 518 U.S. 515 (sex); *Romer v. Evans*, 517 U.S. 620 (1996) (sexual orientation); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (sex); *Oyama v. California*, 332 U.S. 633 (1948) (national origin). This interpretation of the Fourteenth Amendment's Equal Protection Clause has been a critical component of our nation's ongoing effort to eliminate entrenched discrimination. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 Harv. L. Rev. 1470, 1547 (2004) (“[C]oncerns about group subordination are at the heart of the modern equal protection tradition . . . .”); cf. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a

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<sup>3</sup> The term “sex” has been used to “refer[] to an individual’s distinguishing biological or anatomical characteristics, whereas the term ‘gender’ refers to an individual’s sexual identity, or socially-constructed characteristics.” See *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (discussing the distinction between the terms “sex” and “gender,” but concluding that, for purposes of Title VII and other federal statutes, the terms “have become interchangeable”); see also Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination “Because of . . . [Perceived] Sex,”* 34 N.Y.U. Rev. L. & Soc. Change 55, 58 n.4 (2010) (questioning the distinction between sex and gender because “sex is socially constructed (or, more specifically, medically constructed) just as gender is socially constructed”).



society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain.”).

A faithful application of these principles to lesbians and gay men reveals that equal protection applies to laws which burden them as a group. This is because, by virtually any measure, lesbians and gay men have been subjected to the kind of systemic discrimination that the Supreme Court has contemplated would trigger Fourteenth Amendment protection. *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *see also Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) (“It is easy to conclude that homosexuals have suffered a history of discrimination. . . . Ninety years of discrimination is entirely sufficient . . .”), *aff’d on alternative grounds*, 133 S. Ct. 2675 (2013). And the state laws at issue here plainly burden lesbians and gay men as a class, because they ban lesbian and gay couples from marrying and, thus, “relegate[e] . . . homosexual legal unions to a lesser status.” *See* Sevcik ER 15. Accordingly, equal protection principles govern analyses of the constitutionality of laws that deny the right to be married to lesbian and gay couples who “aspire to occupy the same status and dignity as that of a man and woman in lawful marriage.” *See Windsor*, 133 S. Ct. at 2689.

Similarly, the *Loving* decision is not solely about race. In the course of declaring anti-miscegenation statutes unconstitutional, *Loving* made clear that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness” and that “all the State’s citizens” possess a fundamental right to marry. 388 U.S. at 12; *see also id.* (“Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.” (internal quotation marks omitted)). And later, in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court reiterated the fact that *Loving* did not just condemn racially biased restrictions on marriage but, instead, recognized a fundamental right to marry. In *Zablocki*, which involved the right to marry of so-called “deadbeat dads,” the Supreme Court explained that in *Loving*, its

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. Thus, *Loving* is plainly applicable to laws that seek to deny same-sex couples the right to marry.

The District Court in *Jackson* held that *Loving*’s decision linked the right to marry to a couple’s ability to procreate. *See Jackson* CR117:64-65. The court was wrong. Although the Lovings happened to have biological children, there was not

a single reference to that fact in the Supreme Court’s opinion, let alone a suggestion that the Court’s decision rested in any part on the Lovings’ intention or ability to procreate. And other decisions by the Supreme Court have made clear that the right to marriage is not dependent on the capacity for procreation but is, instead, an “expression[] of emotional support and public commitment.” *Turner v. Safly*, 482 U.S. 78, 95 (1987) (holding that incarcerated persons have the right to marry); *see also Windsor*, 133 S. Ct. at 2689 (same-sex couples seek the right to marry to “affirm their commitment to one another before their children, their family, their friends, and their community . . . and so live in pride in themselves and their union”).<sup>4</sup>

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<sup>4</sup> Defendants-Appellees claim that the Supreme Court’s summary dismissal, “for want of a substantial federal question,” of a challenge to a decision of the Minnesota Supreme Court – finding that the denial of a marriage license to a gay couple did not violate the Fourteenth Amendment – somehow compels the same result here. *See, e.g.*, Glover Mot. for Summ. J. at 10-15, *Sevcik v. Sandoval*, No. 12-0578 (D. Nev. Sept. 10, 2012), ECF No. 74 [hereinafter “Glover Mot.”]. They are wrong. In *Loving*, the Court struck down Virginia’s anti-miscegenation law based on the Equal Protection principles enunciated in *Brown v. Board of Education*, 347 U.S. 483 (1954), notwithstanding the fact that it had previously denied *certiorari* to a similar challenge to Alabama’s anti-miscegenation statute in *Jackson v. State*, 72 So. 2d 114 (Ala.), *cert. denied*, 348 U.S. 888 (1954). Likewise, courts today are not precluded from relying on *Loving* to strike down laws that deny same-sex couples the fundamental right to marry even though the Court previously issued a summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), and declined the opportunity in 1972 to apply the principles announced in *Loving* to the prohibition against marriage for same-sex couples. *See Windsor*, 699 F.3d at 178-79.

Nevada and Hawaii's schemes, like any other that demeans and denigrates an entire class of people, cannot be reconciled with the Fourteenth Amendment and *Loving*.

**B. The Discriminatory History of Racial Restrictions on the Right to Marry Illustrates How Exclusion from Marriage Perpetuates and Enforces a Caste System in Violation of Equal Protection Principles.**

The state laws at issue here were explicitly fashioned to ensure that lesbian and gay couples would not be afforded the same status and benefits as heterosexual married couples. In other words, the express purpose of the prohibitions against marriage for same-sex couples was to create and perpetuate a social hierarchy that disadvantages gay people based on their sexual orientation. Because, historically, slaves and, later, interracial couples were also denied the right to marry, that history is instructive as to how the denial of that right to marry operates to perpetuate and enforce a caste system, which is contrary to the core purpose of equal protection.

“The idea that the freedom to marry is a symbol of American freedom has roots in the institution of slavery,” because the denial of the slaves’ right to marry was a significant limitation on their freedom and a crucial feature of their dehumanization. Aderson Bellegarde François, *To Go into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage*, 13 J. Gender Race & Just. 105, 110-12 (2009).

With Emancipation came the right to marry, but not across racial lines because anti-miscegenation statutes remained in place.<sup>5</sup> As Chief Justice Taney explained in his infamous *Dred Scott v. Sandford* decision, anti-miscegenation statutes

show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

60 U.S. 393, 409 (1857); see also Hon. A. Leon Higginbotham, Jr., *Shades of Freedom* 44 (1996) (“Interracial marriages represented a potentially grave threat to the fledgling institution of slavery. Had blacks and whites intermarried, the legal process would have been hard pressed to recognize the union while keeping blacks in slavery.”). Even after the adoption of the Fourteenth Amendment, anti-miscegenation statutes were upheld by the Supreme Court. This is perhaps unsurprising, given that “when the Fourteenth Amendment was drawn up and ratified, the vast majority of its supporters did not envision it as a bar to

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<sup>5</sup> The first statute in the United States expressly prohibiting marriage for interracial couples was enacted in the seventeenth century. See R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 Calif. L. Rev. 839, 870 (2008).

antimiscegenation laws.” Randall Kennedy, *Interracial Intimacies* 277 (2003). Indeed, racial restrictions on marriage were so prevalent as to constitute a near universal and defining feature of marriage: “Every state whose black population reached or exceeded 5 percent of the total eventually drafted and enacted anti-miscegenation laws.” *Id.* at 219 (emphasis added) (citing Joseph Golden, *Patterns of Negro-White Intermarriage*, 19 Am. Soc. Rev. 144 (1954)). Ultimately, forty-two states maintained, at one point in time, criminal prohibitions against marriage for interracial couples. See David H. Fowler, *Northern Attitudes Towards Interracial Marriage: Legislation and Public Opinion in the Middle Atlantic and the States of the Old Northwest 1780-1930* 336 (1987).

Although, in 1883, the Supreme Court held that anti-miscegenation statutes were not discriminatory because they “appl[y] the same punishment to both offenders, the white and the black,” *Pace v. Alabama*, 106 U.S. 583, 585 (1883), the *Loving* Court rejected this cramped, formalistic reasoning and recognized that such laws target individuals and deny them the right to marry strictly on the basis of their race. See 388 U.S. at 12. Given the crucial role that anti-miscegenation laws played in maintaining our nation’s racial caste system, *Loving* is “one of the major landmarks of the civil rights movement.” Phyl Newbeck, *Virginia Hasn’t Always Been for Lovers: Interracial Marriage Bans and the Case of Richard and Mildred Loving* xii (2004); cf. John DeWitt Gregory & Joanna L. Grossman, *The*

*Legacy of Loving*, 51 How. L.J. 15, 52 (2007) (“Legalizing interracial marriage was an essential step toward racial equality.”).

Like early laws that were designed to oppress African Americans, Nevada and Hawaii’s denial of the right to marry to lesbian and gay couples consigns them by law to an unequal and inferior status as a group by denying them “a dignity and status of immense import”: the status of state-sanctioned marriage. *See Windsor*, 133 S. Ct. at 2692. This exclusion – which is premised on stereotypes regarding the fitness of lesbian and gay partnerships and moral condemnation of gay people more generally – is both stigmatizing and demeaning, and it perpetuates the historical discrimination that lesbian and gay people have long suffered as a group. Just as the Court in *Loving* struck down Virginia’s degrading and oppressive anti-miscegenation law, this Court should reject Nevada and Hawaii’s prohibitions against marriage for same-sex couples.

**C. Nevada and Hawaii’s Prohibitions Against Marriage for Same-Sex Couples Discriminate on the Basis of Sexual Orientation and Sex in Violation of the Equal Protection Clause.**

There is no serious dispute that Nevada and Hawaii single out lesbians and gay men for denial of the right to marry the person of their choice because of their sexual orientation. That the laws discriminate on the basis of sexual orientation is plain from both the operation of those laws – that they prohibit lesbian and gay couples but not different-sex couples from marrying – and in their “intent . . . to

prevent homosexuals from marrying” and thus to “relegate[e] . . . homosexual legal unions to a lesser status.” *See* Sevcik ER 15. As *Loving* made clear, the Equal Protection Clause prohibits classifications that perpetuate a system of hierarchy based on the characteristic according to which the classification is drawn, *see* Siegel, *supra*, at 1504 (citing *Loving*, 388 U.S. at 11), here, sexual orientation.

The fact that that these laws are “gender-neutral on [their] face” and “do[] not treat males and females differently as a class,” Jackson CR117:72,<sup>6</sup> does not undermine the conclusion that they violate the Equal Protection Clause. Indeed, as previously noted, *Loving* explicitly 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.” 388 U.S. at 8.

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<sup>6</sup> This “equal application” argument – like the one set forth in *Pace*, where the Court reasoned that anti-miscegenation laws were not discriminatory because they punish both white and black offenders equally – derives from the flawed reasoning in *Plessy v. Ferguson*, which held that segregation was not discriminatory because it applied “equally” to individuals of all races:

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

163 U.S. 537, 551 (1896).



Indeed, in *Loving*, Virginia argued that its anti-miscegenation law was not discriminatory because the “law forbidding marriages between whites and blacks operates alike on both races.” Br. for Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967), Civ. No. 395, 1967 WL 113931, at \*17 (Mar. 20, 1967) (quoting Cong. Globe, 39th Cong., 1st Sess. 322 (1866)) [hereinafter “*Loving* Appellee’s Brief”]. However, the Supreme Court recognized that despite its symmetrical application to members of different races, Virginia’s law operated in a racially discriminatory manner because it “proscribe[d] generally accepted conduct if engaged in by members of different races.” *Loving*, 388 U.S. at 11; *see also Romer*, 517 U.S. at 633 (“Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.” (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950); *Shelley v. Kraemer*, 334 U.S. 1 (1948))).

For the same reason that it was rejected in *Loving*, the contention that there is no sex discrimination in the instant cases because Hawaii (and Nevada) law treat men and women equally must also be rejected in these appeals. The *Loving* Court found that Virginia’s anti-miscegenation law classified – and discriminated against – persons on the basis of race because the question of whether a marriage was legal turned on the races of the adults seeking to exercise their right to marry (*i.e.*, only same-race marriages were permitted). Nevada and Hawaii’s laws similarly classify – and discriminate against – persons on the basis of sex because the question of

whether a marriage is legal turns on the sex of the adults seeking to exercise their right to marry (*i.e.*, only different-sex marriages are permitted).<sup>7</sup> Both circumstances violate the Equal Protection Clause.

## II. THE RATIONALES ADVANCED BY DEFENDANTS-APPELLEES WERE ALSO ADVANCED BY VIRGINIA IN DEFENSE OF ITS ANTI-MISCEGENATION STATUTE IN *LOVING*.

Nevada and Hawaii have proffered a variety of justifications for their prohibitions against marriage for same-sex couples including: (1) that such prohibitions further the state's interest in "responsible procreation and optimal parenting," Sandoval Mot. for Summ. J. at 13 & n.8, *Sevcik v. Sandoval*, No. 12-0578 (D. Nev. Sept. 10, 2012), ECF No. 85; Coal. for the Protection of Marriage Mot. for Summ. J. at 21-22, *Sevcik v. Sandoval*, No. 12-0578 (D. Nev. Sept. 10, 2012), ECF No. 72 [hereinafter "Coal. Mot."]; and (2) that they allow the states to "cautiously experiment[] with social change" before altering "a social institution of ancient origin." Jackson CR117:116. LDF adopts Plaintiffs-Appellants' positions on these two issues, *see* Br. of Sevcik Plaintiff-Appellants

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<sup>7</sup> The *Sevcik* Court erroneously rejected *Loving*'s instruction on this point, reasoning that equal protection principles applicable to sex classifications do not apply to Nevada's prohibition against marriage for same-sex couples because the law is not "inten[ded] to maintain any notion of male or female superiority, but rather, at most, of heterosexual superiority or 'heteronormativity.'" *Sevcik* ER 15. This reasoning leads to a perverse result: *Loving* does not apply because the law is intended to discriminate against lesbians and gay men but, absent *Loving*'s instruction, the Court finds no discrimination against lesbians and gay men.

(Doc. 20-3) at 66-70, 72-84, and writes separately to emphasize the fact that versions of these very same arguments were advanced by proponents of anti-miscegenation statutes and expressly rejected by the Supreme Court in *Loving*. See 388 U.S. at 11.

**A. *Loving* Rejected Claims that Anti-Miscegenation Statutes Were Necessary to Protect Children.**

Historically, opponents of interracial marriage relied on the “misplaced, but often sincerely held” belief that such unions would be harmful to children.<sup>8</sup> See François, *supra*, at 130-35. Indeed, the belief that interracial couples would produce damaged children was one of the rationales proffered by the Virginia Supreme Court in upholding Virginia’s anti-miscegenation statute in a decision twelve years before *Loving*: “We are unable to read in the Fourteenth Amendment to the Constitution . . . any words or any intendment . . . which denies the power of

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<sup>8</sup> Nineteenth century challenges to anti-miscegenation statutes were also denied by the courts on the basis of irrational beliefs about the harm to children that would result from interracial marriages. See, e.g., *State v. Jackson*, 80 Mo. 175, 179 (1883) (“It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites . . . .”); *Lonas v. State*, 50 Tenn. 287, 299 (1871) (interracial couples are “unfit to produce the human race in any of the types in which it was created”); *Scott v. Georgia*, 39 Ga. 321, 323 (1869) (“[A]lmgamation of the races is . . . unnatural” because biracial children are “generally sickly and effeminate, and . . . inferior in physical development and strength, to the fullblood of either race.”).

the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens.” *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955).

Four years later, the Louisiana Supreme Court upheld its state’s anti-miscegenation statute on the grounds that doing so was necessary to protect mixed race children from social disadvantages:

[T]he state . . . has an interest in maintaining the purity of the races and in preventing the propagation of half-breed children. Such children have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened, as has been said in another connection, with ‘a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.’

*State v. Brown*, 108 So. 2d 233, 234 (La. 1959) (quoting *Brown*, 347 U.S. at 494).

In defending its anti-miscegenation statute before the Supreme Court in *Loving*, Virginia did not rely on the blatantly offensive rhetoric of the Virginia Supreme Court in *Naim*, but it nevertheless cited purportedly scientific sources for its contention that prohibitions against marriage for interracial couples were in the interest of children. These arguments took various forms, including: (1) pseudoscientific assertions that interracial children might be genetically disadvantaged, *Loving Appellee’s Brief*, 1967 WL 113931, at \*43 (“[T]he evidence is sufficient to call for immediate action against the intermarriage of widely distinct races. . . . [W]here two such races are in contact the inferior qualities are not bred out, but may be emphasized in the progeny . . . .” (internal quotation marks omitted)); (2) cultural arguments that only monoracial couples

could provide a coherent cultural heritage necessary for a proper upbringing, *id.* at \*44-45 (“[M]uch that is best in human existence is a matter of social inheritance, not of biological inheritance. Race crossings disturb social inheritance. That is one of its worst features.” (internal quotation marks and citations omitted)); and (3) sociological claims that marriages of interracial couples were more likely to end in divorce:

When children enter the scene the difficulty is further complicated . . . . Inasmuch as we have already noted the higher rate of divorce among the intermarried, it is not proper to ask, Shall we then add to the number of children who become the victims of their intermarried parents? If there is any possibility that this is likely to occur – and the evidence certainly points in that direction – it would seem that our obligation to children should tend to reduce the number of such marriages.

*Id.* at \*45, \*47-48 (internal quotation marks omitted) (quoting John LaFarge, *The Race Question and the Negro* (1943); Dr. Albert I. Gordon, *Intermarriage – Interfaith, Interracial, Interethnic* 334-35 (1964)).<sup>9</sup> These arguments, however, amounted to an “amalgam of superstition, mythology, ignorance and pseudo-scientific nonsense summoned up to support the theories of white supremacy and racial ‘purity.’” Br. of *Amicus Curiae* NAACP Legal Defense & Educ. Fund, *Loving v. Virginia*, 388 U.S. 1, Civ. No. 395, 1967 WL 113929, at \*9-10 (Feb. 20, 1967). Thus, the Supreme Court recognized these arguments for what they were

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<sup>9</sup> Dr. Gordon’s study was characterized at the time by one Harvard psychologist as the “definitive book on intermarriage.” See *Loving Appellee’s* Brief, 1967 WL 11391, at \*47.

and rejected them as unfounded, post-hoc rationalizations for Virginia's discriminatory marriage law. *Loving*, 388 U.S. at 11 (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.”).

These discredited arguments about the purported harm to children of interracial couples have been re-raised by Defendants-Appellees in their attempt to defend bans on marriage for same-sex couples. Despite claims that prohibitions against marriage for same-sex couples merely “encourag[e] the stability of relationships that have the ability to procreate naturally,” Jackson CR117:101, Defendants-Appellants’ position is premised on the notion that lesbian and gay couples make for inferior parents. *See, e.g., id.* at CR117:104 (Defendant-Intervenor Hawaii Family Forum argued that “children do best when raised by their two biological parents” and “benefit from having a parent of each sex”); Coal. Mot. at 18 (Nevada’s prohibition against marriage for same-sex couples “protects bionormativity in the construction of parenthood”); *id.* at 21 (“The intact, biological, married family remains the gold standard for family life in the United States, insofar as children are most likely to thrive . . . .” (emphasis and internal quotation marks omitted)); *cf. Windsor*, 133 S. Ct. at 2693 (noting that the federal Defense of Marriage Act was intended to express “moral disapproval of homosexuality”). These arguments are as misplaced today as they were in 1967.

*See* Sevcik ER 508-09 (affidavit of Michael Lamb, Ph.D., stating that based on more than 50 peer-reviewed empirical reports and 100 academic articles, “the scientific community has reached consensus that parental sexual orientation does not affect adjustment”); *see also* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980-81 (N.D. Cal. 2010) (accepting as “beyond serious debate in the field of developmental psychology” expert testimony that “[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful, and well-adjusted”); *see also id.* at 963 (citing position statement of American Psychiatric Association that marriage benefits children of same-sex couples). This Court should not credit the rehash of similarly unsupported and irrational arguments here.

**B. *Loving* Rejected the Notion that History and Tradition Alone Can Justify Discrimination.**

Defendants-Appellees’ appeal to history and tradition to justify their discriminatory exclusions of same-sex adult couples from the right to marriage are nothing new. *See, e.g.,* Coal. Mot. at 2 (“Since pre-history, nearly all human societies have had and nurtured a social institution of marriage constituted by a core meaning of ‘the union of a man and a woman.’”). In 1955, the Virginia Supreme Court rejected a challenge to its anti-miscegenation statute on the grounds that the institution of marriage “may be maintained in accordance with established tradition and culture and in furtherance of the physical, moral and spiritual

well-being of its citizens.” *Naim*, 87 S.E.2d at 756. And, in *Loving* itself, the trial court reasoned that marriage for interracial couples was aberrant and contrary to a proper understanding of the nature of marriage:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

388 U.S. at 3. And, when before the Supreme Court, Virginia again appealed to tradition:

The Virginia statutes here under attach reflects a policy which has obtained in this Commonwealth for over two centuries . . . . They have stood – compatibly – with the Fourteenth Amendment, though expressly attacked thereunder – since that Amendment was adopted.

*Loving* Appellee’s Brief, 1967 WL 113931, at \*52. Sentiments such as these were broadly shared amongst proponents of anti-miscegenation laws. *Perry*, 704 F. Supp. 2d at 957.

In *Loving*, however, the Supreme Court rejected the notion that long-held beliefs (including those held by the framers of the Fourteenth Amendment) about the incompatibility of interracial relationships and a traditional understanding of marriage should be controlling. *See* 388 U.S. at 9-10. And, significantly, the Supreme Court declared anti-miscegenation statutes unconstitutional in spite of the fact that the majority of states ratifying the Fourteenth Amendment had such laws



in place as recently as 1950. *Loving* Appellee’s Brief, 1967 WL 113931, at \*4.<sup>10</sup> The *Loving* Court held that, regardless of the precise intentions of the framers of the Fourteenth Amendment with respect to interracial marriage, anti-miscegenation statutes were inconsistent with the “broader, organic purpose” of the Amendment, which was “to remove all legal distinctions among ‘all persons born or naturalized in the United States.’” 388 U.S. at 9 (quoting *Brown*, 347 U.S. at 489). The Court deemed this long history of prohibitions against marriage for interracial couples to be irrelevant to its equal protection analysis and was undeterred by the fact that, in 1967, only a single court – the Supreme Court of California<sup>11</sup> – had held that anti-miscegenation statutes violate the Fourteenth Amendment.<sup>12</sup>

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<sup>10</sup> Although it is true that a minority of states maintained anti-miscegenation laws when *Loving* was decided, it does not follow that, as Defendants-Appellees contend, striking down the state laws at issue here would subvert the federalist, democratic process. *See, e.g.*, Glover Mot. at 11 & n.9. Contrary to the notion that invalidating Nevada and Hawaii’s prohibitions against marriage for same-sex couples would overstep the role of the courts, equal protection law locates *in the judiciary* a special responsibility of prodding society to reexamine assumptions that are rooted in animus, bigotry, and social stereotypes that, in turn, entrench social caste. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). While all branches of government have a role to play in ensuring the equal protection of the laws, the judicial branch is best situated to safeguard historically subordinated groups, including lesbians and gay men, whom the majoritarian political processes are often unwilling or unable to protect against constitutional violations. *Nixon v. Condon*, 286 U.S. 73, 89 (1932) (“[Equal protection] lays a duty upon the court to level by its judgment these barriers . . .”).

<sup>11</sup>Indeed, the California Supreme Court struck down its state’s anti-miscegenation statute in *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), at a time when a majority of states still had anti-miscegenation statutes in place, and all of

The Court was equally undeterred by the fact that anti-miscegenation statutes enjoyed widespread popular support throughout the vast majority of our nation's history, as demonstrated by the fact that nearly three in four Americans still opposed marriage for interracial couples one year after *Loving* was decided. See Gallup, *Most Americans Approve of Interracial Marriages*, Aug. 16, 2007 [hereinafter "Gallup, Americans Approve"], available at <http://www.gallup.com/poll/28417/most-americans-approve-interracial-marriages.aspx> (noting that 73% of Americans opposed marriage for interracial couples in 1968).<sup>13</sup> Despite widespread disapproval of marriage for interracial couples, "[n]either the *Perez* court nor the *Loving* Court was content to permit an unconstitutional situation to fester because the remedy might not reflect a broad

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the courts to confront the question had ruled that there was no constitutional right to marry a person of another race. See Lenhardt, *supra*, at 857.

<sup>12</sup> In fact, notwithstanding the decision in *Loving*, South Carolina did not revoke its anti-miscegenation statute until 1998, and Alabama did not do so until 2000. See Kennedy, *supra*, at 279.

<sup>13</sup> As recently as 1994, less than one-half of Americans approved of marriages between interracial couples. See Gallup, *Americans Approve*, *supra*. And, when Alabama finally repealed its anti-miscegenation law in 2000, 40% of the state's electorate voted to *retain* the prohibition against marriage for interracial couples. See Kennedy, *supra*, at 280.

social consensus.” *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 958 n.16 (Mass. 2003).<sup>14</sup>

And, even beyond the context of *Loving*, the Court has refused to credit the maintenance of tradition as a rational justification that might satisfy the equal protection analysis under the Fourteenth Amendment. *See Lawrence*, 539 U.S. at 579 (“As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”); *see also Windsor*, 133 S. Ct. at 2689, 2692-93 (“The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion. . . . [This] reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.”).<sup>15</sup>

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<sup>14</sup> Though constitutional principles, not public opinion polls, govern this case, today, more than one-half of Americans would vote in favor of legalizing marriage for same-sex couples in all 50 states, *see Gallup, In U.S., 52% Back Law to Legalize Gay Marriage in 50 States*, July 29, 2013 [hereinafter *Gallup, 52% Back Law*], available at <http://www.gallup.com/poll/163730/back-law-legalize-gay-marriage-states.aspx>, a level of support that marriage for interracial couples did not achieve until the mid-1990s, *see Gallup, Americans Approve*, roughly thirty years *after Loving*.

<sup>15</sup> Arguments concerning the need for “caution” in dealing with social change, *see, e.g.*, Glover Mot. at 22; Jackson CR117:114-119, are similarly unavailing. The Supreme Court has never recognized a generalized need for “caution” as a basis for discrimination. *Cf. Cooper v. Aaron*, 358 U.S. 1, 7 (1958)

Notwithstanding the Court's repeated rejection of these arguments, Defendants-Appellees now contend that Nevada and Hawaii's bans on marriage for same-sex couples are constitutional because marriage for same-sex couples runs contrary to "the preservation of the heritage of traditional marriage as it has existed over centuries of Western civilization." *See, e.g.*, Glover Mot. at 22. They are wrong. Neither the widespread prevalence of anti-miscegenation statutes, nor the broad public support for such statutes, prevented the Court from vigorously enforcing the principles underlying the Fourteenth Amendment in *Loving*. Express prohibitions against marriage for same-sex couples have a more recent, but no less pernicious, history: "[S]ince 1990 anti-gay marriage statutes or constitutional amendments have been passed by 41 states," although a handful have now been repealed. *See Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 327 (D. Conn. 2012); *see also* Jackson CR117:21-24. And while a majority of Americans now oppose such prohibitions, fully 43% continue to support excluding same-sex couples from lawful marriage. Gallup, 52% Back Law, *supra*. Here, as in *Loving*, the equality principles of the Fourteenth Amendment, rather than the longstanding or widespread nature of the legal restriction on marriage at issue,

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(constitutional wrongs must be resolved at the "earliest practicable" time); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . are not permissible bases for [discrimination] . . .").

should guide the Court. *Cf. Heller v. Doe ex rel. Doe*, 509 U.S. 312, 326 (1993) (“Ancient lineage of a legal concept does not give it immunity from attack for lacking [the requisite constitutional] basis.”); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669 (1966) (“[T]he Equal Protection Clause is not shackled to the political theory of a particular era.”).

Despite concerns that marriage by interracial couples would fundamentally alter the definition of marriage itself, the end of prohibitions against miscegenation has not fundamentally altered the nature of marriage as an institution. This is because recognizing the right of consenting adults to marry one another has no effect on any individual marriage or on the institution of marriage as a whole. *See Goodridge*, 798 N.E.2d at 965 (“Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.”).

## CONCLUSION

*Loving v. Virginia* dictates the conclusion that consenting adults should not be denied the right to marry solely because of their sexual orientation or sex. For this reason, as well as those outlined by Plaintiffs-Appellants, the Court should reverse the judgments of the District Courts.

October 25, 2013

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**CERTIFICATE OF SERVICE**

I hereby certify that 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 on October 25, 2013. I certify that all participants in both cases are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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