Supreme Court No. 75934-1

SUPREME COURT
OF THE STATE OF WASHINGTON

HEATHER ANDERSEN and LESLIE CHRISTIAN, et al., Respondents,

v.

KING COUNTY, et al., Appellants

Appeal from the Superior Court of King County
The Honorable William L. Downing

CELIA CASTLE and BRENDA BAUER et al., Respondents,

v.

STATE OF WASHINGTON, Appellant.

Appeal from the Superior Court of Thurston County
The Honorable Richard D. Hicks

AMICI CURIAE BRIEF OF LOREN MILLER BAR ASSOCIATION, LATINA/O BAR ASSOCIATION OF WASHINGTON, SOUTH ASIAN BAR ASSOCIATION OF WASHINGTON, ASIAN BAR ASSOCIATION OF WASHINGTON, HATE FREE ZONE OF WASHINGTON, AND CIVIC AND COMMUNITY LEADERS

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I. INTRODUCTION

This Nation's history is filled with examples of discrimination and bigotry that were once commonplace and acceptable, but are resoundingly rejected today. Other types of discrimination continue, such as the issue now before this Court: the prohibition on civil marriage between same-sex couples. The prohibition on marriage between individuals of the same sex is rationalized today based on its long-standing history and supposed equal application to men and women.

But for centuries, these very rationalizations were used to justify the prohibition of interracial marriage—a prohibition that today is correctly considered clearly unconstitutional. Thus, in any analysis of today's restrictions on the right to marry for same-sex couples, we must be mindful of this Nation's history of discriminating against couples of different races. At the core of both prohibitions lies the violation of an individual's right to marry. The State, King County and Intervenors (the "State")[1] acknowledge this history, but their accounts are incomplete and inaccurate. Amici file this brief to correct the record and provide a historical overview that will inform the arguments presented in this case.

This Brief provides a detailed historical background of the prohibition on interracial marriage in the United States and an analysis of judicial opinions that ultimately recognized the prohibition as an unconstitutional violation of an individual's fundamental right to marry.

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[1] Amici will refer to the Appellants collectively as the "State" unless a distinction is warranted.

Viewed against this background, Amici respectfully request that this Court hold that the prohibition on civil marriage between same-sex couples is also unconstitutional.

II. STATEMENT OF INTEREST OF AMICI

Amici are a coalition of leading bar associations and civil rights groups devoted to seeking equality and protecting the rights of all people, regardless of race, national origin, sex, disability, religion or sexual orientation.[2] These organizations were granted amici status in the King County litigation below. Amici also include a number of civic and community leaders who are engaged in working to protect and expand civil rights for residents of Washington State, including persons of color.

III. HISTORICAL BACKGROUND

A. This Nation Prohibited Interracial Marriage for More Than 300 Years.

The prohibition of interracial marriage is deeply rooted in our Nation's history and tradition. Statutes prohibiting interracial marriage were enforced in American colonies and states for more than three centuries. *See* Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law—An American History* 253-54 (2002). The first anti-miscegenation law was enacted in Maryland in 1664. *See id.* Virginia followed suit soon after. Rachel F. Moran, *Interracial Intimacy* 19 (2001).

Interracial marriage was so far outside of the realm of traditional marriage in colonial America that Virginia amended its anti-miscegenation

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[2] Detailed amici statements of interest are attached to this brief as Appendix A.

law in 1691 to banish from the community any White person who married a "negro," "mulatto," or Indian. Wallenstein, *supra*, at 15-16. Couched in "the language of hysteria rather than legalese," the avowed purpose of Virginia's 1691 law was to prevent "that abominable mixture and spurious issue" of Whites with Blacks or Indians. *Id.*

Although the first American anti-miscegenation laws were found in the Chesapeake Bay colonies, they quickly spread throughout the country. Massachusetts enacted an anti-miscegenation law in 1705. Carter G. Woodson, *The Beginnings of Miscegenation of the Whites and Blacks, in Interracialism: Black-White Intermarriage in American History, Literature, and Law* 42, 49 (Werner Sollors ed., 2000). Pennsylvania passed its anti-miscegenation law in 1725, and Delaware enacted a similar law in 1726. Charles Frank Robinson II, *Dangerous Liaisons: Sex and Love in the Segregated South* 4 (2003).

By the time of the Civil War, laws prohibiting interracial marriage covered most of the South and much of the Midwest, and they were beginning to appear in Western states. *See* David H. Fowler, *Northern Attitudes Toward Interracial Marriage: Legislation and Public Opinion in the Middle Atlantic and the States of the Old Northwest 1780-1930,* 214-19 (1987). Such laws were necessary, proponents argued, to uphold the law of nature: "Hybridism is heinous. Impurity of races is against the law of nature. Mulattoes are monsters. The law of nature is the law of God. The same law which forbids consanguineous amalgamation forbids ethnical amalgamation. Both are incestuous. Amalgamation is incest."

Henry Hughes, *Treatise on Sociology* 31 (1860), *quoted in* Randall Kennedy, *Interracial Intimacies* 140 (2003).

During Reconstruction, southern Democrats adopted the term "miscegenation" and insisted on the necessity of preserving the sanctity of marriage by banning interracial marriage.[3] *See* Moran, *supra*, at 26. A few southern states repealed their anti-miscegenation laws during Reconstruction, but societal pressure to spurn interracial relationships remained steadfast. *Id.* at 27. When White southern Democrats regained control of their state legislatures post-Reconstruction, they promptly reinstated anti-miscegenation laws. *See id.*

Challenges to such laws were repeatedly thwarted by courts, which upheld the laws on the basis of their long-standing tradition, "equal" application to the races, and the "logic" of prohibiting interracial marriage. For example, in 1878 the Supreme Court of Appeals of Virginia stated:

> The public policy of this state, in preventing the intercommingling of the races by refusing to legitimate marriages between them has been illustrated by its legislature for more than a century. . . . The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization . . . all require that they should be kept distinct and separate, and that connections and alliances so

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[3] The term "miscegenation" was first used in an anonymous propaganda pamphlet printed in New York City in 1863. The term was coined from two Latin words meaning "to mix" and "race." The pamphlet advocated the "interbreeding" of the White and Black races so that they would become indistinguishably mixed, claiming this was the goal of the Republican Party. The pamphlet was later discovered to be an attempt by Democrats to discredit Republicans. *See, e.g.,* Wikipedia: The Free Encyclopedia, *Miscegenation, at* http://en.wikipedia.org/wiki/Miscegenation (last visited Jan. 31, 2005); *The Miscegenation Hoax, at* http://www.museumof hoaxes.com/miscegenation.html (last visited Jan. 31, 2005).

> unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.

Kinney v. Commonwealth, 71 Va. 858, 869 (1878).

Despite the proliferation of anti-miscegenation laws, opponents of interracial marriage feared that state laws were insufficient to protect the sanctity of marriage. In December 1912, Representative Seaborn Roddenberry of Georgia proposed an amendment to the United States Constitution stating, "Intermarriage between Negroes or persons of color and Caucasians . . . is forever prohibited." 49 CONG. REC. 503 (1912). Leaders from around the country denounced interracial marriage, which Governor John Dix of New York called "a blot on our civilization" and Governor William Mann of Virginia called "a desecration of one of our sacred rites." *See* Robinson, *supra*, at 79.

B. Marriage Prohibitions Extended to Numerous Racial Groups.

Although the first anti-miscegenation laws targeted Whites and Blacks, many states expanded their application to other racial groups. *See* Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth Century America, in Interracialism* 183 (1996). Twelve states prohibited marriage between Whites and Native Americans. *Id.* As Chinese and Japanese began to immigrate to the United States in substantial numbers during the middle-to late 1800s, states with substantial populations of Chinese and Japanese responded by enacting anti-miscegenation laws prohibiting marriage between Whites and "Mongolians." Moran, *supra*, at 28.

As new "nonwhite" immigrant communities formed, states amended their anti-miscegenation laws to prevent marriages between Whites and these immigrants. *Id.* at 32. In 1862, Oregon passed its first anti-miscegenation law. *See* 1862 Or. Laws § 63-102. In 1866, Oregon amended the statute to prohibit marriage between "any white person, male or female" and "any negro, Chinese, or any person having one fourth or more negro, Chinese, or kanaka [Native Hawaiian] blood, or any person having more than one half Indian blood." *See* 1866 Or. Laws § 23-1010.

In 1850, California enacted a law prohibiting marriages between "white persons" and "negroes or mulattoes." Leti Volpp, *American Mestizo: Filipinos and Anti-Miscegenation Laws in California, in Mixed Race America and the Law* 86 (Kevin R. Johnson ed., 2003). Then, in 1878, California amended its constitution to restrict the intermarriage of Whites and Chinese. *See* Moran, *supra*, at 31. Shortly thereafter, the California Legislature amended the Civil Code to ban the union of "a white person with a negro, mulatto, or Mongolian." *Id.* Later, it amended the law to include "members of the Malay race" as well. *See id.*

The breadth of anti-miscegenation laws varied from state to state, reflecting the racial populations of the states. Kennedy, *supra*, at 220. All told, thirty-eight states had anti-miscegenation laws in effect at one time or another.[4] *See* Wallenstein, *supra*, at 159-160. By the end of World War II, thirty states still had such statutes. *See id.*

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[4] The territory of Washington had an anti-miscegenation law but repealed it prior to statehood. *See* Wallenstein, *supra*, at 253-54.

These laws were considered constitutional until 1967, when the Supreme Court struck down such discrimination as an unconstitutional interference with an individual's fundamental right to marry.

C. Anti-Miscegenation Laws Enjoyed Vast Popular Support.

Bans on interracial marriage reflected the prevailing public sentiment of the time. In 1958, a Gallup Poll indicated that 96% of all Americans opposed interracial marriage. *See* Nicholas Kristof, *Marriage: Mix and Match*, NY Times, Mar. 3, 2004, at A27. In 1972—five years after the Supreme Court declared bans on interracial marriage unconstitutional—a Gallup Poll reported that 75% of all White Americans still opposed interracial marriage. *See* Charlotte Astor, *Gallup Poll: Progress in Black/White Relations, But Race is Still an Issue*, *available at* http://usinfo.state.gov/journals/itsv/0897/ijse/gallup.htm (last visited Oct. 30, 2004). In 2000, Alabama became the last state to repeal its anti-miscegenation law, with 40% of its electorate voting to *keep* the prohibition on the books. TheFreeDictionary.com, *Miscegenation*, *at* http://www.encyclopedia.thefreedictionary.com/ miscegenation (last visited Feb. 4, 2005).

IV. ARGUMENT

Amici urge this Court to keep in mind the history described above in determining whether Washington's prohibition on marriages between individuals of the same sex violates the Washington State Constitution. The State seeks to deny same-sex couples the right to enter into civil marriages by defining the right too narrowly and by suggesting that the

existence of such a right must become more popularly accepted before it can exist. Like the defenders of prohibitions on interracial marriage, the State also claims that denying same-sex couples the right to enter into civil marriage is not discriminatory because it is "equally" applied. The Court should reject these narrow and misleading arguments.

A. The Fundamental Right to Be Free From Unwarranted Governmental Intrusion in Decisions to Marry Cannot Be Defined Away or Depend Upon Popular Opinion.

All parties to this case agree that the right to marry is a constitutionally protected fundamental right. The reason that individuals have a fundamental right to be free from unwarranted governmental intrusion in decisions involving marriage is that the decision to marry is fundamentally personal and private in nature. *See Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) ("We deal with a right of privacy older than the Bill of Rights"). Marriage is among those matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment." *Planned Parenthood v. Casey*, 505 U.S. 833, 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

Although the parties agree that there is a fundamental right to marry, they disagree about the meaning of the right. Respondents and Amici view the right as the right of one individual to enter into a marriage with another individual of his or her choice. The State asserts that the right at issue is limited to the right to enter into a marriage with a member

of the opposite sex. They claim that Respondents are seeking a new right to "same-sex marriage" that has never before existed. This narrow interpretation of the right to marry finds no support in constitutional jurisprudence and is inconsistent with decisions striking down anti-miscegenation statutes.

In support of its claim, the State makes three different, but overlapping, points. First, it claims that courts must always define fundamental rights as narrowly as possible. Second, it claims that a right is fundamental only insofar as it has been exercised and protected throughout our Nation's history. Third, it claims that a right is fundamental only if its exercise is generally accepted in our society. Amici respond to each point in turn.

1. Fundamental rights should not be defined narrowly to incorporate the challenged governmental restriction.

The State argues that fundamental rights must be defined narrowly, framing the issue in this case as "whether there is a fundamental right to same-sex marriage." This view contradicts a long line of constitutional law and, in particular, cases involving anti-miscegenation statutes.

Challenges to claimed violations of fundamental rights require a two-step analysis: (1) Does the statute at issue restrict or burden the exercise of a fundamental right? If so, (2) is the restriction or burden narrowly tailored to serve a compelling government interest? *See, e.g.*, *State v. Farmer*, 116 Wn.2d 414, 429, 805 P.2d 200, 208 (1991); *Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S. Ct. 673, 54 L. Ed. 2d 618

(1978). Here, the State tries to avoid this analytical framework by incorporating the challenged restriction into the definition of the right.

A review of cases in which the Supreme Court has found government intrusion on fundamental rights in violation of the Fourteenth Amendment's Due Process Clause reveals that, in determining the existence of a fundamental right, the Court considers the broad nature of the right at issue rather than the very specific governmental restriction being challenged. For example, in *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), and in *Pierce v. Society of Sisters of Holy Names*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), the Court considered whether parents had a right to be free from unwarranted governmental intrusion in decisions about how to educate their children. The Court did not frame the issue as whether there was a fundamental right for children to learn the German language or whether there was a fundamental right to attend a private school. In *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), the Court considered whether there was a fundamental right to be free from unwarranted governmental intrusion in decisions about whether to have offspring, not whether a convicted criminal had the fundamental right to bear children. In *Zablocki v. Redhail*, 434 U.S. at 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978), and *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 65 (1987), the Court considered whether there was a fundamental right to be free from unwarranted governmental intrusion in decisions to marry, not whether deadbeat dads or prison inmates in

particular had a fundamental right to marry. Most recently, in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), the Court considered whether there is a fundamental right to be free from unwarranted governmental intrusion into matters of private, consensual sexual conduct, not whether there is a fundamental right to engage in homosexual sodomy.

The Supreme Court's rejection of anti-miscegenation statutes brings the fallacy of the State's argument sharply into focus. In *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), the Supreme Court did not ask whether there was a fundamental right to enter into an interracial marriage. Instead, the Court asked more generally whether there was a right to be free from unwarranted governmental interference in decisions regarding marriage. Having answered that question affirmatively, the Court considered whether the prohibition on interracial marriage was narrowly tailored to serve a compelling state interest and, of course, concluded it was not.

Significantly, the Supreme Court has since emphasized the broad basis of its decision in *Loving*.[5] The Court has explained that its decision in *Loving* "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

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[5] Notably, this Court recently characterized *Loving* as recognizing peoples' "ability to marry the person of their choosing." *Bremerton v. Widell*, 146 Wn.2d 561, 580, 51 P.3d 733 (2002).

the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry." *Zablocki*, 434 U.S. at 383 (internal citation omitted). The California Supreme Court took a similarly broad perspective when it struck down an anti-miscegenation statute almost twenty years before *Loving*. Justice Traynor wrote:

> [Marriage] is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means.
>
> . . .
>
> Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry.

Perez v. Lippold, 198 P.2d 17, 19 (Cal. 1948).

2. The State's, County's, and Intervenors' focus on the historical recognition of the right to marry is overly narrow.

The State argues that fundamental rights must be deeply grounded in our nation's history and, therefore, the right to marry must be narrowly viewed to include only opposite-sex marriages. Again, this argument is contrary to constitutional jurisprudence and decisions striking down anti-miscegenation statutes.

While the determination of a fundamental right looks to history and the ordered concept of liberty, the State can cite no Washington case that requires tying the definition of a fundamental right to the state's traditions as of 1889. Similarly, the United States Supreme Court has

never held that it will solely rely on history when formulating fundamental rights. In *Casey*, 505 U.S. at 847-48, the Supreme Court stated:

> [S]uch a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause . . . .

Thus, the Supreme Court's analysis of fundamental rights is grounded in our nation's historical tradition of protecting uniquely personal and intimate decisions from unjustified government intrusion, not in the history of a specific act or decision. "If the question whether a particular act or choice is protected as a fundamental right were answered only with reference to the past, liberty would be a prisoner of history." Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 Harv. L. Rev. 2684, 2689 (2004).

> Clearly, the right to choose one's life partner is quintessentially the kind of decision which our culture recognizes as personal and important. . . . The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions.

Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *4 (Alaska Super. Ct. Feb. 27, 1998).

Again, the history of interracial marriages exemplifies the fallacy of the State's argument: It was once argued that there is no fundamental

right to marry someone of a different race because such marriages had a long history of being prohibited. *See, e.g., Lonas v. State*, 50 Tenn. (3 Heisk.) 287, 1871 WL 3597 (1871); *In re Takahashi's Estate*, 129 P.2d 217, 200 (Mont. 1942); *Perez*, 198 P.2d at 38 (Shenk, J., dissenting) (arguing that the prohibition of interracial marriage had a long history and 29 states continued to have such laws). In 1948, when the California Supreme Court struck down California's anti-miscegenation statute, Justice Carter acknowledged that "[t]he freedom to marry the person of one's choice has not always existed" but nonetheless concluded that the right was fundamental and that anti-miscegenation statutes impermissibly violated that right.[6] *Perez*, 198 P.2d at 30-31 (Carter, J., concurring).

The State attempts to distinguish the anti-miscegenation cases, arguing that the prohibition on interracial marriage was not known at common law, and that anti-miscegenation laws abrogated the common law in furtherance of invidious discrimination. *See, e.g.*, King County's Br. at 20-21. This argument is problematic on both legal and historical grounds. In *Loving*, the Supreme Court recognized an individual's fundamental right to be free from governmental intrusion in marriage not because interracial marriage was permitted at common law, but because the Constitution required it. Likewise, in *Perez*, the California Supreme

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[6] As a New York court recently stated when holding the prohibition of marriage for same-sex couples to be unconstitutional: "The challenges to laws banning whites and non-whites from marriage demonstrate that the fundamental right to marry the person of one's choice may not be denied based on longstanding and deeply held traditional beliefs about appropriate marital partners." *Hernandez v. Robles*, No. 103434/2004 (N.Y. Sup. Ct. filed Feb. 4, 2004).

Court recognized each individual's fundamental right "to join in marriage with the person of one's choice," despite the many historical restrictions placed on the exercise of that right. 198 P.2d at 21.

Additionally, as shown in Part III above, until 1967, this Nation had a long and deep-seated history of prohibiting interracial marriages. Although those prohibitions were not necessarily universal, they were found everywhere demographics created a genuine risk that such marriages might occur. *See, e.g., Frasher v. State*, 3 Tex. Ct. App. 263, 1877 WL 8620, at *8 (1877) ("most of the states in which the negro forms an element of any note have enacted laws inhibiting intermarriage between the white and black races"). The statutes were routinely defended as having "been in effect in this country since before our national independence." *Perez*, 198 P.2d at 35 (Shenk, J. dissenting). Indeed, anti-miscegenation laws were the most deeply embedded form of legal race discrimination in our nation's history—lasting over three centuries. Peggy Pascoe, *Why the Ugly Rhetoric Against Gay Marriage is Familiar to This Historian of Miscegenation* (2004).

3. The popularity of existing laws is irrelevant.

The State also argues that there is no right to marry someone of the same sex because prohibitions on such marriages are nearly universal in the United States. According to this theory, anti-miscegenation statutes should have remained constitutional as long as they remained popular. Indeed, the State, County and Intervenors go so far as to argue that the Supreme Court's decision in *Loving* turned on the fact that, by 1967, anti-

miscegenation statutes no longer retained popular approval. State's Br. at 27; Intervenors' Br. at 25; King County's Br. at 21. The argument is both historically and legally wrong.

As an initial matter, the sheer popularity of laws does not determine their constitutionality. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 577-78, 123 S. Ct. 2472, 2483, 156 L. Ed. 2d 508 (2003) ("'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,'" quoting Justice Stevens' dissent in *Bowers v. Hardwick*, 478 U.S. 186, 216, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), and adopting its reasoning).

Moreover, as documented in Part III above, prohibitions on interracial marriages were once commonplace. When those statutes were challenged, states relied upon their popularity and acceptance to defend them. *E.g.*, *In re Paquet's Estate*, 200 P. 911, 913 (Or. 1921) (miscegenation statutes "have been universally upheld as a proper exercise of the power of each state to control its own citizens") (internal quotation marks and citation omitted); *Kirby v. Kirby*, 206 P. 405, 406 (Ariz. 1922); *In re Monks' Estate*, 120 P.2d 167, 173 (Cal. Ct. App. 1941). Prohibitions on interracial marriage remained commonplace at the time those prohibitions were invalidated. When the California Supreme Court struck down an anti-miscegenation statute in 1948, thirty states had similar statutes. When the Supreme Court struck down anti-miscegenation statutes in *Loving*, sixteen states still had similar statutes, and 75% of

White Americans still opposed interracial marriage. *See* Astor, *supra*. Contrary to the Intervenors' claim, these decisions did not occur at a time when "[a] public consensus had been reached that such laws were no longer permissible." Intervenors' Br. at 42. In fact, just five years ago, 40% of Alabama's electorate voted to keep Alabama's anti-miscegenation law on the books. TheFreeDictionary.com, *supra*.

More importantly, prohibitions on interracial marriage did not become unconstitutional because they were found in fewer states; the laws were always contrary to constitutional principles. *Perez*, 198 P.2d at 32 ("the statutes now before us never were constitutional") (Carter, J., concurring). The fact that only sixteen states had such laws in 1967 may have made the Supreme Court's decision in *Loving* less controversial, but the Court's long-overdue decision was not based on the number of states having anti-miscegenation laws at the time.

Like the prohibitions on interracial marriage, prohibitions on the right of same-sex couples to enter into civil marriage cannot withstand serious constitutional scrutiny based on mere repetition of the claim that there is no fundamental right to "same-sex marriage" or because many states and members of the public continue to support such prohibitions.

B. Like Laws Against Interracial Marriage, Prohibitions on Marriage Between Individuals of the Same Sex Discriminate Even if "Applied Equally."

In addition to burdening a fundamental right, prohibitions on marriages between individuals of the same sex are discriminatory. The State argues that the prohibition does not discriminate because it applies

equally to men and women. King County's Br. at 49; Intervenors' Br. at 48. Claims of "equal treatment" were also made to justify prohibitions on interracial marriage. An examination of those claims and the cases that ultimately rejected those "justifications" should inform this case.

Defenders of anti-miscegenation statutes repeatedly argued that the statutes did not discriminate because they applied equally to both Black and White people. In 1871, the Supreme Court of Tennessee agreed:

> [The prohibition] was not then aimed especially against the blacks. . . . They have the same right to make and enforce contracts with whites that whites have with them, but no rights as to the white race which the white race is denied as to the black. The same rights to contract with each other that the white have with each other; the same to contract with the whites that the whites have with blacks. . . .

Lonas, 1871 WL at *6. In 1877, the Alabama Supreme Court relied upon a similar rationale:

> [I]t is for the peace and happiness of the black race, as well as of the white, that such laws should exist. And surely there can not be any tyranny or injustice in requiring both alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare that He has made the two races distinct.

Green v. State, 58 Ala. 190, 1877 WL 1291, at *4 (1877). In an echo of the State's argument here, in 1883, the Missouri Supreme Court held that "[t]he act in question is not open to the objection that it discriminates against the colored race, because it equally forbids white persons from intermarrying with negroes, and prescribes the same punishment for violations of its provisions by white as by colored persons . . . ."

State v. Jackson, 80 Mo. 175, 1883 WL 9519, at *2 (1883). Likewise, in 1921, the Supreme Court of Oregon upheld a ban on marriages between Native Americans and Whites, stating simply that "the statute does not discriminate. It applies alike to all persons. . . ." *In re Paquet's Estate*, 200 P. at 913. And, in 1942, the Supreme Court of Colorado stated: "There is here no question of race discrimination. The statute applies to both white and black." *Jackson v. City & County of Denver*, 124 P.2d 240, 241 (Colo. 1942).

In 1948, the California Supreme Court finally rejected this unthinking mantra, explaining the fallacy of "equal application":

> It has been said that a statute such as section 60 does not discriminate against any racial group, since it applies alike to all persons whether Caucasian, Negro, or members of any other race. The decisive question, however, 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.* The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals.

Perez, 198 P.2d at 20 (emphasis added) (citation omitted). Thus, the proper analysis of the issue focuses on the individual. Because a Black individual was not permitted to marry an individual whom a White individual could marry, the anti-miscegenation statute was found to discriminate on the basis of race. Likewise, the statute discriminated on the basis of race because a White individual could not marry an individual whom a Black individual could marry.

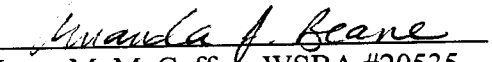
Almost twenty years later, the United States Supreme Court reached the same conclusion: "[W]e reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription. . . ." *Loving*, 388 U.S. at 8; *see also McLaughlin v. Florida*, 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964) ("Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation"). For the same reason, the State's, King County's, and Intervenors' simplistic "equal application" argument must fail.

V. CONCLUSION

For the reasons set forth above, Amici join in respectfully requesting that this Court affirm the trial courts' decisions striking down prohibitions barring same-sex couples from entering into civil marriage.

DATED: February 3, 2005.

PERKINS COIE LLP

By 

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Attorneys for Amici

APPENDIX A

The Loren Miller Bar Association ("LMBA") is an affiliate member of the National Bar Association whose purpose is the advancement of the social and economic well-being of its largely African-American membership; improving relations between the legal profession and the community at large; promoting understanding, goodwill and cooperation among lawyers and the interests of the legal profession; aiding in reforms for the economic and social welfare of all people in a manner consistent with the principles of a free democratic society; and improving the educational, social and economic status of the African-American community to eliminate discrimination. The LMBA strives for equality and access to justice for all.

Latina/o Bar Association of Washington ("LBAW"): Latinos have historically suffered from discrimination. Discrimination severely affects and limits Latinos' socioeconomic status, which ultimately affects the "pursuit of happiness" to which all people of this state are entitled. Where discrimination exists, Latinos turn to courts for redress. In light of this suffering and in light of their pursuit of justice by law, the LBAW advocates and voices the following sentiments: Discriminating against a people, at any level, is unjust.

The legal redress same-sex partners seek parallel LBAW's quest to promote the lawful repression of discrimination so that all people may pursue their happiness. Laws segregating persons into categories to ultimately deprive them of the rights afforded others are inherently unjust.

What was first articulated in 1963, holds true today, ". . . injustice anywhere, is a threat to justice everywhere." Letter from Martin Luther King, Reverend, Birmingham Jail, April 16, 1963. In the interest of seeing discrimination abrogated, LBAW joins in submission of this brief as amicus to the court.

The Asian Bar Association of Washington ("ABAW") is a professional association of Asian Pacific American (APA) attorneys, judges, law professors and law students, which advocates for the legal needs and interests for the APA community. Through its network of committees, the ABAW monitors legislative developments and judicial appointments, rates judicial candidates, advocates for equal opportunity, and builds coalitions with other organizations within the legal profession and in the community at large on issues of interest to our constituency. Although the ABAW's purpose is to serve the APA community, as a minority community organization, the ABAW stands for general principles of fairness and equal justice as applied to all people. The ABAW, therefore, is opposed to discrimination on the basis of race, ethnicity, national origin, religion, disability, gender, or sexual orientation, regardless of whether it is specifically directed toward the APA community.

South Asian Bar Association of Washington ("SABAW") seeks to represent and advance the interests of its constituent members, mostly South Asian and South Asian-American attorneys. The South Asian community has historically been, and continues to be, discriminated

against, to the detriment of the principles of equality and fairness which are the bedrock on which this state and this nation rest. SABAW opposes discrimination in all its forms, whether based on race, gender, ethnicity, national origin, or sexual orientation. SABAW also recognizes that allowing discrimination against one minority group opens the door to discrimination against all minority groups. Because SABAW has a strong interest in the unbiased application of principles of justice to all, SABAW respectfully joins in this submission as amicus curiae.

Hate Free Zone of Washington exists to uphold the fundamental principles of democracy and justice. We support and mobilize immigrant communities and allies to advocate for equality, dignity and respect. Our work integrates four critical areas that, when combined, become the catalyst for systemic change: political advocacy, direct support, community mobilization, and education. Hate Free Zone joins in the submission of this amici brief because doing so is consistent with our mission of promoting justice and equality for all people.

The civic and community leaders who have joined this brief are engaged in working to protect and expand civil rights for residents of the State of Washington, including persons of color, and include:

- Former Washington State Representative **Dawn Mason**
- Former Washington State Representative **Kip Tokuda**
- Former Seattle Mayor **Norm Rice** and **Dr. Constance Rice**
- King County Council Member **Larry Gossett**
- Seattle City Councilmember **David Della**

- Seattle City Councilmember **Richard J. McIver**
- **Russ Aoki**, Aoki Sakamoto Grant LLP
- **Juan Jose Bocanegra**
- **Rita Brogan**
- **Adrienne Caver-Hill**
- **Darlene Flynn**
- **Guadalupe Gamboa**
- **Jeffrey Grant**, Aoki Sakamoto Grant LLP
- **Paula Harris-White**
- **Naomi Ishisaka**
- **Robert Jeffrey Jr.**
- **Charles Jones**
- **Regina J. Jones, J.D.**
- University of Washington School of Law **Dean W.H. "Joe" Knight, Jr.**
- **Roberto Maestas**
- Professor **Lawrence Mosqueda**
- **Rogelio Riojas**
- **Sharon A. Sakamoto**, Aoki Sakamoto Grant LLP
- **Dustin Washington**
- **Ruth Woo**