IN THE COURT OF APPEALS OF MARYLAND

September Term, 2006

No. 44

FRANK M. CONAWAY, et al.,

Defendants-Appellants,

v.

GITANJALI DEANE & LISA POLYAK, et al.,

Plaintiffs-Appellees.

On Appeal from the Circuit Court for Baltimore City
(M. Brooke Murdock, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

PETITION AND BRIEF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

MISCELLANEOUS

Petition and Interest of *Amicus Curiae*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") hereby respectfully petitions this Court for permission to file a brief as *Amicus Curiae* in this matter in support of Appellees.

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 submit below, has important bearing on the present litigation.

LDF has an interest in the fair application of the Due Process, Equal Protection, and Equal Rights Clauses of the Maryland Constitution, which provide important protections to African Americans and to all Marylanders, and believes that its experience and knowledge will assist the Court in this case. LDF intends to raise the following issues: (i) to address the application of *Loving*, a case in which anti-miscegenation statutes were declared unconstitutional by the United States Supreme Court, to the question of whether it is permissible to deny civil marriage rights to same-sex couples; and (ii) to explain why the denial of civil marriage rights to same-sex couples constitutes gender discrimination under the logic of the Supreme Court in *Loving*.

Preliminary Statement

Consistent with its opposition to all forms of discrimination, LDF believes that this Court should not endorse the State of Maryland's discrimination against gay men and lesbians by denying their fundamental right to marry the person they love. Nearly 40 years ago, in *Loving* v. *Virginia*, the United States Supreme 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 Virginia and fifteen other states, interracial marriage was still a crime more than 100 years after the end of the Civil War. In a step forward—a step that at the time was the subject of bitter controversy, but now seems obvious—the Supreme Court tore down this lasting and notorious vestige of discrimination, holding that anti-miscegenation laws violate the Constitutional guarantees of both due process and equal protection. There is no reason for this Court to treat marriage between persons of the same sex any differently.

Although the historical experiences in this country of African Americans, on the one hand, and gay men and lesbians, on the other, are in many important ways quite different, the legal questions raised here and in *Loving* are analogous. The state law at issue here, like the law struck down

in *Loving*, 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 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. Moreover, the basic Fourteenth Amendment principles addressed in *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 Supreme Court precedent then and now.

Argument

I.

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

Appellees have argued that the State of Maryland'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 Maryland's Equal Rights Amendment. The court below agreed that because a man is permitted to marry a woman but a woman is not

permitted to marry a woman, Maryland law classifies on the basis of gender. The logic of the Supreme Court's decision in *Loving* v. *Virginia*, 388 U.S. 1 (1967), is instructive on the correctness of the ruling below. There, the 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.

Here, it is just as important to reject the argument that there is no discrimination on the basis of gender because Maryland law treats each gender equally. *See* Revised and Corrected Brief of Appellants, dated Sept. 21, 2006 ("State's Br.") at 22 ("Since the marriage law dispenses burdens and benefits equally to both men and women, plaintiffs' claim of sex discrimination must be rejected. . . ."). *See also Hernandez*, __ N.E.2d __, 2006 WL 1835429 (N.Y. 2006) ("By limiting marriage to opposite-sex couples, New York is not engaging in sex discrimination...Women and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex. This is not the kind of sham equality that the Supreme Court confronted in *Loving*...").

The State argues that the court below was "mistaken in accepting plaintiffs' argument analogizing their theory of sex discrimination to racial discrimination cases, such as *Loving* v. *Virginia*." (State's Br. At 22.). 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 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.

__ N.E.2d __, 2006 WL 1835429 (N.Y. 2006). Such assertions, however, ignore a central point about *Loving*.

The issue in the contexts of 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 a characteristic of the people who wish to marry. Under the regime in place prior to *Loving*, a white person could not marry a black person (because of her race), and

today, a woman cannot marry another woman (because of her gender). The *Loving* Court found the law at issue to be a classification 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 find, as did the court below, that Maryland's marriage law is a classification on the basis of gender. *See Deane & Polyak* v. *Conaway*, No. 24-C-04-005390, 2006 WL 148145, at *4 (Md. Cir. Ct. Jan. 20, 2006) ("Courts finding same-sex marriage bans constitutional declare their holdings consistent with *Loving*'s holding because of key factual and logical differences between the two cases. This Court is unpersuaded that sufficient differences exist to distinguish the cases.").

II.

THE FUNDAMENTAL RIGHT TO MARRY EXTENDS TO SAME-SEX COUPLES

The United States Supreme Court's decision in *Loving* demonstrates the fundamental nature of the due process right to marry. As explained more fully in Appellees' brief, *Loving* is central to this Court's consideration of whether gay men and lesbians are constitutionally entitled to the economic, social and dignitary benefits and protections that marriage provides. 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). Indeed, Maryland was the first state in the nation to prohibit interracial marriage by statute. *Id.* at 22-25. Furthermore, Maryland did not repeal its miscegenation statutes until 1967, while *Loving* was pending before the Supreme Court. *See* 1967 Md. Laws ch. 6, § 1. A mere ten years before *Loving*, a Gallup poll found that 96 percent of Americans opposed interracial marriage. Nicholas D. Kristof, *Marriage: Mix and Match*, N.Y. TIMES, Mar. 3, 2004, at A23.

Nevertheless, the Supreme Court 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, it is wrong to say that *Loving* is solely a race case. While it is undeniable that race was at the heart of the state law at issue in *Loving*, the Supreme Court did not rest its decision in *Loving* 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.

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 has expressly foreclosed efforts to limit *Loving* to the context of racial discrimination, and the State's attempts to do so here should be soundly rejected.

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); *Massachusetts Board 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* was not limited by the fact that the discrimination at the heart of the case was not race-based; indeed, the *Lawrence* Court gave expression to the Fourteenth Amendment's concern with discrimination based on 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.

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 and segregation 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." *Lawrence*, 539 U.S. 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: October 18, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of October, 2006, two copies of the foregoing Petition and Brief of *Amicus Curiae* NAACP Legal Defense and Educational Fund, Inc. was sent by Federal Express to:

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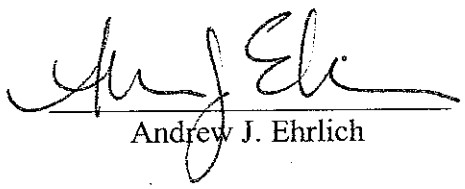

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