Case Nos. 13-4178, 14-5003, 14-5006

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

DEREK KITCHEN, individually, *et al.*,

Plaintiffs-Appellees,

—v.—

GARY R. HERBERT, in his official capacity as Governor of Utah, *et al.*,

Defendants-Appellants.

MARY BISHOP, *et al.*,

Plaintiffs-Appellees,

—and—

SUSAN G. BARTON, *et al.*,

Plaintiffs-Appellees/Cross-Appellants,

—v.—

SALLY HOWE SMITH, in her official capacity as Court Clerk for Tulsa County, State of Oklahoma,

Defendant-Appellant/Cross-Appellee.

Case No. 13-4178: Appealed from a Decision of the United States District Court for the District of Utah · Civil Case No. 2:13-CV-00217-RJS · Honorable Robert J. Shelby
Case Nos. 14-5003 and 14-5006: Appealed from a Decision of the United States District Court for the Northern District of Oklahoma · Civil Case No. 04-CV-848-TCK-TLW · Honorable Terence C. Kern

BRIEF OF *AMICI CURIAE* HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC IN SUPPORT OF PLAINTIFFS-APPELLEES AND PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

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STATEMENT OF INTEREST

As one of the oldest among historically black colleges and universities, Howard University School of Law has long placed the defense of human rights, equality and dignity at the heart of its educational practice.[1] In these appeals, this Court faces the question of whether marriage rights should be available to same-sex couples on the same terms as to opposite-sex couples. In seeking to answer the question, the Court likely will confront—directly or indirectly—the argument that the struggle for equal rights for same-sex couples does not constitutionally or morally equate with the fight for racial equality. Amicus curiae respectfully submits this brief on behalf of plaintiffs-appellees in both cases as a corrective to the flawed distinction too often drawn between equal rights for racial minorities and equal rights for same-sex couples.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. The parties have consented to amicus briefs.

SUMMARY OF ARGUMENT

Marriage is a symbol of civil freedom, a marker of social equality, a badge of full citizenship, and a social resource of irreplaceable value. Yet this fundamental expression of human dignity has been misused historically as a political sieve for separating individuals into a preferred class, to which society grants a broad complement of legal rights and privileges, and a lesser class, to which it accords less than a full measure of equality. Such was the case when slaves prior to Reconstruction and interracial couples in the days of segregation were denied full marriage equality. Today, while there is no longer any serious claim that marriage rights should be denied on the basis of race, opponents of marriage equality have attacked same-sex couples, using precisely the same flawed arguments that once were used to justify racial slavery and apartheid. American society certainly has evolved beyond the time when anyone would seriously claim that race-based marriage equality threatens the moral fabric of our civilization, is contrary to nature, or is harmful to children. But just because opponents of marriage equality continue to use these arguments in arguing against extending marriage rights to same-sex couples does not make them any more valid when applied in this context. Indeed, this Court should handily reject these stale arguments and affirm that the principles under which marriage became blind to race apply equally to marriages between two people of the same sex.

ARGUMENT

I. MARRIAGE IS A SYMBOL OF CIVIL FREEDOM, A MARKER OF SOCIAL EQUALITY, AND A BADGE OF FULL CITIZENSHIP

In the United States, as elsewhere, the institution of marriage has evolved from an expression of love and companionship, to a "legal gateway [of]… protections, responsibilities, and benefits." Evan Wolfson, *Why Marriage Matters: America, Equality, and Gay People's Right to Marry*, 4 (2004).[2] Both as a private commitment and as a public declaration, marriage is "a social resource of irreplaceable value to those to whom it is offered: it enables two people together to create value in their lives that they could not create if that institution had never existed." Ronald Dworkin, *Three Questions for America*, N.Y. Rev. Books, 9/21/6, at 24, 30. The social status, public approval, and economic benefits that marriage confers, render the institution not just a personal act that the law sanctions, but also a symbol of civil freedom, a marker of social equality, and a badge of full citizenship. *See* Angela P. Harris, *Loving Before and After the Law*, 76 Fordham L. Rev. 2821, 2830 (2008).

Apart from the present struggle to accord marriage rights to same-sex couples, perhaps no clearer evidence exists of the link between marriage rights and social equality than the denial of marriage rights to slaves before the Civil War and

[2] *See also* William Hohengarten, *Same-Sex Marriage and the Right of Privacy*, 103 Yale L.J. 1495, 1499, 1501-05 (1994).

to interracial couples during the Jim Crow era.[3] In the antebellum period, no Southern state granted legal recognition to a marriage between two slaves, in part, because recognition of slave marriages would not have conformed to the widely held view of slaves as childlike, immoral, and incapable of love, sexual fidelity, or even lasting affection. *See* E.J. Graff, *What is Marriage For?: The Strange Social History of Our Most Intimate Institution*, 17 (1999). In words that eerily echo those of modern opponents of same-sex marriage, Thomas Jefferson himself once maintained that marriage equality should not be accorded to slaves because "love seems with them to be more an eager desire, than a tender delicate mixture of sentiment and sensation." Thomas Jefferson, *Notes on the State of Virginia* (1787), reprinted in *The Portable Thomas Jefferson* 187 (1977).

Later, in the Jim Crow era, the denial of marriage rights to interracial couples served as one of the most potent symbols of the less-than-equal status of African-Americans. As recently as 1967, sixteen states still had anti-miscegenation statutes on their books; the last such statute was not officially repealed until 2000. *See* Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law—An American History* (2002). Notably, opponents of interracial marriage justified criminal prohibitions against such unions by pointing

[3] *See e.g.*, *Green v. State*, 58 Ala. 190, 197 (1877); *State v. Gibson*, 36 Ind. 389, 403-05 (1871); Thomas Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America*, 242-43 (1858) (Negro Univs. Press 1968).

to the purported detrimental effect of interracial births and parentage, the supposed destruction of society if people marry between the races, and the so-called natural law rationale for keeping the races separate.

While public debate and opposition over interracial unions has become a shameful relic of this country's history, these same arguments unfortunately have been resurrected and are now being cited by opponents of marriage equality for same-sex couples. Without acknowledging the racial provenance of these discredited arguments, opponents of marriage equality have attacked same-sex couples as a threat to American society, American families, heterosexual marriage, and children. None of these statements is remotely true.

II. LIKE MARRIAGE FOR SAME-SEX COUPLES TODAY, INTERRACIAL MARRIAGE ONCE WAS WIDELY CONSIDERED A THREAT TO SOCIAL ORDER AND THE INSTITUTIONS OF MARRIAGE AND FAMILY

Like the argument presently cited by opponents of same-sex marriage, past opposition to interracial marriage regarded interracial marriage as a threat to social order, the institution of marriage, and family. *See* Renee Romano, *Race Mixing: Black-White Marriage in Postwar America*, 45-46 (2003). Indeed, the chief argument articulated in opposition to same-sex marriage has been carbon-copied from the opponents of interracial marriage: namely, the assertion that extending marriage rights to same-sex couples poses a risk to the institution of marriage

itself, which is an important tool for transmitting social values and maintaining social order.

In the context of the opposition to interracial marriage, the social order argument relied on "the underlying assumption . . . that the union of a man and woman of different races did not fit the concept of marriage." James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U.L. REV. 93, 114 (1993). Then, as now, traditionalists defended marriage as the fundamental building block of American society and feared the purported evil of extending marriage equality to those long denied its benefits. One court explained that it is through marriage that "the homes of a people are created," that these homes "are the true officinæ gentium—the nurseries of States," and that interracial marriages would "introduce into their most intimate relations, elements so heterogeneous that they must naturally cause discord, shame, disruption of family circles and estrangement of kindred." *Green*, 58 Ala. at 194.

At the heart of the opposition to interracial marriage was the perceived need to maintain social order and preserve American families by sanctifying racial purity. In his classic work, *An American Dilemma*, social philosopher Gunnar Myrdal pointed out that "[t]he ban on intermarriage . . . is the most pervasive form of segregation, and the concern about 'race purity' is, in a sense, basic . . . . No excuse for other forms of social segregation and discrimination is so potent as the

one that sociable relations on an equal basis between members of the two races may possibly lead to intermarriage." Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*, 606 (1944). Proponents of anti-miscegenation believed that mixing the races would lead to social chaos by weakening white blood, and by extension, white society. *See* Romano, *Black-White Marriage*, at 47. Thus, insofar as a good and orderly society meant a white society, the "abominable mixture and spurious issue" resulting from intermarriage would befoul the very fabric of American society. *See* Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law — An American History* (2002).

In the wake of the Supreme Court's 1967 landmark decision in *Loving v. Virginia*, Dr. Martin Luther King, Jr. stated that, "the banning of interracial marriages from the beginning grew out of racism and the doctrine of white supremacy." Chester Higgins, *Mixed Marriage Ruling Brings Mixed Reaction in Dixieland*, JET, June 29, 1967, at 24. This white supremacist ideology was evident in assertions by seemingly rational ordinary citizens that mixed-race individuals threatened society by virtue of their multi-racial identity. As a reader noted in a letter to the editor of the Independent, the "negro brute" who rapes white women is "nearly always a mulatto . . . with enough white blood in him to replace native humility and cowardice with Caucasian audacity." *See* George Fredrickson, *The Black Image in the White Mind: The Debate on Afro-American Character and*

Destiny, 1817-1914, 277 (1987). The general premise behind such bigoted statements was that, while black people were perceived to be meek and cowardly, interracial couples would breed mixed-race children who would perform activities that one would only engage in from the audacity of being "White."

Just as interracial marriage once did not fit the ideal conception of marriage because it introduced racial "impurity" into the sacred institution, opponents of same-sex unions often argue that such unions purportedly represent a threat to the institution itself as they would introduce a form of pollution to marriage. Specifically, to so-called marriage traditionalists, "gay marriage threatens monogamy because homosexual couples . . . tend to see monogamy as nonessential, even to the most loyal and committed relationships." Stanley Kurtz, *The Libertarian Question: Incest, Homosexuality, and Adultery*, Nat. Rev. Online (Apr. 30, 2003, 9:35 AM), http://www.nationalreview.com/articles/206752/libertarian-question/stanley-kurtz.

Echoing the argument levied against interracial marriage, opponents of same-sex marriage now point to marriage and the family as the main social device to transmit values and beliefs across generations and argue that value transmission can only be successfully accomplished in two-parent, mixed-gender households.[4]

[4] *See Less Faith in Judicial Credit: Are Federal and State Defense of Marriage Initiatives Vulnerable to Judicial Activism?: Hearing Before the Subcomm. on the Constitution, Civil Rights and Prop. Rights of the S. Comm. on the*

But just as it was in the context of race, this social order argument is merely a form of pervasive, insidious discrimination and a baseless stereotype, camouflaged as a functional basis to promote social order.

Modern American society recognizes that interracial marriage causes no harm to the American society, nor does it threaten to undermine the institution of marriage. Regardless of views by individual communities on interracial marriage, it is widely acknowledged and accepted that an individual's decision to marry outside of his or her race is a personal decision entitled to civil recognition. Setting aside the discredited arguments used against interracial marriage, there can be no credible evidence that allowing couples of the same sex to marry would threaten either American society or the institution of marriage itself.

III. LIKE SAME-SEX COUPLES TODAY, INTERRACIAL COUPLES WERE ONCE CONDEMNED AS UNNATURAL AND PATHOLOGICAL

The second parallel between past opposition to interracial marriage and present day opposition to same-sex marriage is the long discredited notion that such relationships are not "natural" because they are: (1) purely sexual,

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Judiciary, 109th Cong. 68 (2005) (statement of Lynn Wardle, BYU Professor of Law) ("[M]arriage is the great prize. It is the primary mediating structure through which values are transmitted to society in general and to the rising generation, in particular.").

(2) symptoms of psychological pathology, (3) contrary to biology, and (4) contrary to God's plan. Just as this notion failed with respect to race, it too fails here.

A. Interracial Relationships Were Once Framed as Purely Sexual, Just as Same-Sex Relationships are Framed Today.

The demeaning, sexualized rhetoric used to oppose interracial marriage is now being recycled by opponents of same-sex marriage. Yet, here again, these arguments are completely unfounded as a basis to deny same-sex couples the right to marry.

Historically, "laws that made mixed-race marriage illegal were part of a package that also criminalized sexual relations between unwed individuals across racial lines . . . . In essence, 'interracial marriage' was a symbol or code word for sexual activity between black men and white women." Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 Harv.C.R.-C.L.Rev. 255, 257-58 (2002). To justify expansion and reinstatement of miscegenation laws, legislators, policymakers, and judges "began to define and label all interracial relationships, even longstanding, deeply committed ones, as illicit sex rather than marriage." Herbert Brown, *History Doesn't Repeat Itself, but it Does Rhyme— Same-Sex Marriage: Is the African-American Community the Oppressor This Time*?, 34 S.U.L.Rev. 169, 173 (2007). According to this narrative, "[b]lack men were sexualized as having large sexual libidos; black women were assumed to be promiscuous." Ross, *Sexualization*, at

287 n.129. There was no recognition of intimacy, romantic love, or commitment among sexual minorities. Ross, *Sexualization*, at 255-57.[5]

The sexualization of black men became particularly acute at the conclusion of the Civil War. The imagery of this "predatory sexuality" attributed to the justification of segregation in nearly every aspect of life. For example, Judge Thomas N. Norwood, a prominent southern jurist and congressperson, described in his speech, "Address on the Negro", the animalistic imagery of black men and women stalking whites in the street. He stated, "[i]llicit miscegenation thrives and the proof stalks abroad in breeches and petticoats along our streets and highways." Thomas Norwood, *Address on the Negro*, 26 (Braid & Hutton 1907). Race and sex became inextricably entangled because "[t]he abolition of slavery opened a door in the mind of every Southerner: a nightmarish vision of an inevitable overthrow of sexual taboos between black and white." Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 How. L. J. 1 (1996).

Today, the rhetoric used by opponents of same-sex marriage is rife with sexualization. Marriage traditionalists portray gays and lesbians as promiscuous, fundamentally controlled by their sexual desires, and always more interested in

[5] *See*, e.g., Amicus Brief of the American Center for Law & Justice Northeast, at 32-33, *In re Marriage Cases*, A110651 (Cal.Ct.App. 2005), *available at* http://www.courts.ca.gov/documents/Amer_Ctr_Law_Justice_Amicus_Curiae_Brief.pdf (referring to gay males' "promiscuity").

their own sexual gratification. *See, e.g.*, Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parenting*, 1998 U. Ill. L. Rev. 253, 257 (challenging Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. 833).

Although the sexualization of same-sex couples is sometimes blunt, it is usually achieved by using subtle code words. For example, same-sex couples who wish to be married are described as succumbing to their "adult needs" and "sexual preferences." Oppositely, male-female sexuality is phrased as the responsible choice, implying that homosexuality is by definition, irresponsible. Illustrating the use of subtle code words, the Coalition of African American Pastors claim that "male-female unions uniquely provide . . . the most promising and protective environment for marital relations, including the expression of safe sexual relations and responsible procreation." Amicus Brief of Coalition of African American Pastors at 5-6, *Hollingsworth v. Perry*, 133 S.Ct. 786 (2012). By marking male-female sexuality as unique, safe, and responsible, the Coalition implies without stating explicitly, that same-sex sexuality (and marriage) is unsafe and irresponsible.

In sum, "[t]he similarity between opposition to mixed-race and same-sex couples lies not only in the laws used to discourage those relationships, but also in the arguments offered to support such laws." Ross, *Sexualization*, at 263. The

denial of marriage rights to same-sex couples supports the sexualization of gay and lesbian intimacy because it "affect[s] the nature of the sexuality, [by] making it secret, closeted and sinful." *Id.* at 260.

B. Pseudoscientific Arguments Were Used to Support Anti-Miscegenation Laws and are Currently Being Used to Deny Same-Sex Couples the Right to Marry

Opponents of interracial marriage frequently relied on pseudo-scientific theories, such as eugenics,[6] to justify their beliefs. Eugenicists asserted that miscegenation would produce offspring inferior to either parent and "bring the better down to the level of the lower." Keith Sealing, *Blood Will Tell: Scientific Racism and Legal Prohibitions Against Miscegenation*, 5 Mich. J.Race & L. 559, 565 (2000); *see also* André Pichot, *The Pure Society: From Darwin to Hitler*, 303 (David Fernbach trans., Verso 2009) (2001). Relying upon pseudoscience such as phrenology, eugenicists assigned a biological origin to the social and economic divisions between whites and blacks. They then used their findings to argue that the dichotomy between the purportedly superior whites and inferior blacks was so biologically entrenched, that the only way to maintain a civil society was to implement rigid boundaries between the races. See Julie Nokov, *Racial*

[6] Used here, the term "eugenics" refers to the school of thought that "the study of the agencies under social control that may improve or impair the racial qualities of future generations either physically or mentally." *Preface* to *A Decade of Progress in Eugenics: Scientific Papers of the Third International Congress of Eugenics*, at iv (1934).

Constructions: The Legal Regulation of Miscegenation in Alabama, 1890-1934, 20 Law & Hist.Rev. 225, 244-50 (2002). At the heart of the eugenicists' attack on anti-miscegenation was the belief in a strict racial hierarchy and fear that failure to abide by such hierarchy would lead to racial and social degeneration. See, e.g., W.A. Plecker, *Virginia's Effort to Preserve Racial Integrity*, *in A Decade of Progress in Eugenics: Scientific Papers of the Third International Congress of Eugenics* (1934).

Inevitably, the legal community came to reflect and adopt the eugenics position. In 1854, the California Supreme Court referred to Chinese individuals as "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point." *People v. Hall*, 4 Cal. 399, 405 (1854) (holding that the testimony of Chinese witnesses was inadmissible against a white defendant in a murder trial). Nearly 100 years later, when California's Supreme Court concluded that the State's anti-miscegenation laws violated the Equal Protection Clause, one justice dissented, relying on a variety of eugenicist research. He stated that "the free mixing of all the races could in fact only lower the general level" and that "the crossing of distinct races is biologically undesirable and should be discouraged." *Perez v. Sharp*, 198 P.2d 17, 44-45 (Cal. 1948) (en banc) (Shenk, J., dissenting). Further, Madison Grant, a prominent lawyer during the early 1900s, used eugenics to argue that interracial

marriage amounted to "race suicide", and insisted that "[t]he laws against miscegenation must be greatly extended if the higher races are to be maintained." Madison Grant, *The Passing of the Great Race: or, The Racial Basis of European History*, 56 (1916). By 1934, largely owing to these pseudoscientific beliefs, twenty-nine of the forty-eight states prohibited marriage between white and black Americans. Plecker, *supra*, at 106.

In addition to eugenics, questionable social science claims were used to support arguments opposing interracial relationships in the same way that such research is now being used against same-sex couples. As late as the 1980s, some psychologists asserted that people choose to intermarry because of a "deep seated psychological sickness" or a willingness to "defy the prevalent cultural prejudice of society," "the lure of the exotic," to repudiate their background, and because of "neurotic self-hate or self-degradation." *See generally* Ernest Porterfield, *Black-American Intermarriage in the United States*, 5 Marriage & Fam. Rev. 17, 22 (1982). Other social scientists theorized that interracial coupling resulted from "more conscious ulterior motives [such as] (a) sexual curiosity, preoccupation or revenge; (b) the desire for social or economic mobility; and (c) exhibitionism."[7]

[7] Jeannette Davidson, *Theories about Black-White Interracial Marriage: A Clinical Perspective*, 20 J. Multicultural Counseling & Dev. 150, 150 (1992).

Racial eugenics and social science claims about the pathology of interracial attraction have been universally discredited,[8] but the misapplication of scientific methods has continued in the debate on same-sex marriage. *See* Brad Harub et al, *This Is the Way God Made Me: A Scientific Examination of Homosexuality and the Gay Gene, available at* http://www.trueorigin.org/gaygene01.asp. Just as in the context of race, the use of pseudoscience to persecute sexual minorities has a long history. Scientists in the late nineteenth and early twentieth centuries theorized that homosexuality was linked to heritable physical and endocrinal abnormalities. *See* Nancy Ordover, *American Eugenics: Race, Queer Anatomy, and the Science of Nationalism*, 94-95 (2003). Writing on the heritability of homosexuality and other "sexual perversions," nineteenth-century physician and researcher, G. Frank Lydston, argued that "[t]he child of vice has with it, in many instances, the germ of vicious impulse, and no purifying influence can save it from following its own inherent inclinations," which should be interpreted to reflect the belief that gays and lesbians were immutably defective both socially and physically. *Id.* at 75. To cure the purported affliction, Lydston and his colleagues recommended surgical procedures, such as castration, and prescribed medicines, such as opium. *Id*. at 76. Others cast for legal solutions that, in addition to deterring the "crime" of

[8] For a history of the development and failure of eugenics as a scientific field, *see* Jonathan Marks, *Human Biodiversity: Genes, Race, and History*, 89-95, 150-51 (1995).

homosexuality, would "remov[e] the causes that lead to it . . . ." *Id.* at 78 (quotation omitted).

The legal community contributed to the enforcement of these unscientific beliefs, as it once did to support anti-miscegenation laws. The most widespread examples were the sterilization statutes enacted by thirty states between 1907 and 1932. *Id.* The judicial systems in these states administered this inhumane punishment based on the belief that the "treatment" was both deterrent and remedial. *Id.* In *Davis v. Walton*, 276 P.2d 921, 923 (Utah 1929), the appellant, an inmate facing sterilization for engaging in same-sex activity with another inmate, challenged the validity of the law under the state constitution. Although the court concluded that the evidence was insufficient to find that the appellant's activity was "habitual" as required by the statute, it upheld the law because, in that court's opinion, the statute was therapeutic and not penal. *Id.* at 924. Put otherwise, the *Davis* court determined that individuals such as the appellant in that case were in need of medical help, and surgical castration was a valid part of their "proper care." *Id.*

Although theories that homosexuality is a mental illness have been long discredited in the mainstream medical community, opponents of same-sex marriage continue to use pseudoscientific arguments to deny sexual minorities the right to marry. *See, e.g.*, Wardle, *Homosexual Parenting*, at 852-57. Among other

things, opponents attempt to challenge the scientific methods of certain psychological studies by drawing conclusions that differ from the researchers and often reference studies that have been discredited by the psychological community.[9] Like the attacks on interracial couples, by using faulty science to frame homosexuality as an "illness," opponents of marriage equality erroneously suggest that there is a legitimate scientific justification for stigmatizing same-sex couples and denying them the right to marry.

Characterizing interracial relationships as having origins in and leading to physical and psychological pathology lent credence to the idea that such unions should be criminalized, or at the very least, not given the same legal status as intra-racial unions. Likewise, opponents of same-sex marriage have used and continue to apply faulty scientific "proof" to legitimize the belief that marriage equality would negatively impact society. Such arguments have no validity and, just as

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[9] *See generally* Susan J. Becker, *Many are Chilled, but Few are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 Am. U. J. Gender Soc. Pol'y & L. 177, 233-42 (2006) (examining opponents' psychological studies and finding social scientists and psychologists have universally rejected such studies); Josephine Ross, *Riddle for Our Times: The Continued Refusal to Apply the Miscegenation Analogy to Same-Sex Marriage*, 54 Rutgers L. Rev. 999, 1003-06 (2002) (examining a psychological study cited by the government in opposition to marriage equality and finding that the government misrepresented the study).

they have been rejected in the context of race, they should not be relied upon to deny same-sex couples the rights enjoyed by their heterosexual counterparts.

C. Judeo-Christian Theological Interpretations Often Have Been Invoked to Challenge Marriage for Both Interracial and Same-Sex Couples

As is the case with same-sex marriage, the Bible served as a primary source in the debate against interracial marriage. For example, anti-miscegenationists argued that the Bible directly addressed the mixing of the races in Leviticus 19:19: "You shall not let your livestock breed with another kind. You shall not sow your field with mixed seed. Nor shall a garment of mixed linen and wool come upon you." James Graham Cook, *The Segregationists*, 214 (1962). In 1867, a white supremacist clergyman wrote, "A man can not commit so great an offense against his race, against the country, against his God, in any other way, as to give his daughter in marriage to a negro—a beast—or to take one of their females for his wife." Ariel [Buckner H. Payne], *The Negro: What Is His Ethnological Status*?, 48 (1867), reprinted in John David Smith, *The "Ariel" Controversy: Religion and "The Negro Problem"*, 48 (1993).

To justify reinstatement and expansion of miscegenation laws, legislators, policymakers, and judges declared interracial marriage unnatural and contrary to God's will. One court explained, "the natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is

as clearly divine as that which imparted to them different natures." *Gibson*, 36 Ind. at 404. Another court declared that interracial marriages are "not only unnatural, but also productive of deplorable results . . . . They are productive of evil, and evil only, without any corresponding good." *Wolfe v. Georgia Ry. & Elec. Co.*, 58 S.E. 899, 902-03 (Ga. Ct. App. 1907). Notably, the trial judge in *Loving*, Judge Leon Bazile of the Circuit Court of Caroline County, Virginia, articulated what is perhaps the most famous religious explanation in support of anti-miscegenation laws:

> 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.

Loving, 388 U.S. at 3 (citing reasoning of the trial court).

Despite the fact that it was improper at the time, and remains so today, to rely on religious doctrine as a basis for public policy, opponents of same-sex marriage are currently citing (their own) Biblical interpretations to suggest that homosexuality is unnatural because it is against God's will. Like their anti-miscegenationist counterparts, opponents of marriage equality almost always attempt to clothe their arguments in literal and selective interpretations of the Bible, often quoting Leviticus 18:22 — "You shall not lie with a male as with a woman; it is an abomination."

Focus on the Family, one of the most vocal organizations opposing both marriage and civil unions between same-sex couples, argues that "[m]arriage is the first institution ordained by God and served from the beginning as the foundation for the continuation of the human race."[10] Referencing Adam and Eve, "God's destruction of the city of Sodom for alleged homosexual depravity, . . . [and] Leviticus, opponents of marriage by same-sex couples assert that those who engage in homosexual sexual activity are sinners, [and] marriage should be constrained to Biblical description of marriage as between a man and a woman."[11] Becker, *Many are Chilled*, at 220. Even without referencing specific religious scripture, in a Supreme Court amicus brief submitted by Catholics for the Common Good in *Hollingsworth v. Perry* they expressed that "2,000 years' worth of teachings on marriage, family, sexuality, morality and other matters related to the truth about human beings" are not inclined to change.[12]

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[10] Focus on the Family's Position Statement on Same-Sex Marriage and Civil Unions, CitizenLink (Feb. 25, 2014, 9:00 PM), *available at* http://www.citizenlink.com/2010/06/focus-on-the-familys-position-statement-on-same-sex-marriage-and-civil-unions/.

[11] *See also* Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons* (Feb. 26, 2014, 9:01 PM), *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html.

[12] Amicus Brief of Catholics for the Common Good, *Hollingsworth v. Perry*, 133 S.Ct. 786 (2012) (No. 12-144).

In sum, none of the arguments regarding the "naturalness" of same-sex relationships are sufficient to deny same-sex couples the right to marry. While opponents of equality marriage erroneously suggest that there is a legitimate scientific and religious justification for stigmatizing same-sex couples and denying them the right to marry, sadly, they refuse to acknowledge that same-sex relationships can indeed be based on commitment and love, thus reaffirming and entrenching the sexualized stereotypes of sexual minorities. This Court should reject any such arguments made by the opponents of marriage equality here.

IV. LIKE SAME-SEX PARENTING TODAY, INTERRACIAL PARENTING ONCE WAS CONSIDERED DAMAGING TO THE DEVELOPMENT AND PSYCHOLOGICAL HEALTH OF CHILDREN

Procreation and a couple's ability to raise healthy, productive children is also a prominent argument against marriage for same-sex couples; this mirrors the similarly meritless arguments that were argued by opponents of interracial marriage.[13] See *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995); Romano, *Black-White Marriage*, at 80.

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[13] *See* Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 Harv. C.R.-C.L. L. Rev. 81, 85 (2011) ("As others have noted, the same-sex marriage cases were not the first ones in which parties relied on alleged harms to children to support the denial of marriage to a class of people; states made similar claims in cases challenging anti-miscegenation statutes."); see also Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 Fordham L. Rev. 2733, 2751 (2008).

Historically, there were two strains to the "harm to children" argument with respect to interracial marriage: first, that mixed-race children were somehow defective or otherwise abnormal,[14] and second, that society would ostracize mixed-race children, resulting in psychological damage.

A. Interracial Marriage was Once Considered Harmful to Child Development, just as Same-Sex marriage is Considered to be Today

At the heart of the anti-miscegenationist argument that mixed-race coupling produced damaged children was the misplaced fear that these children would somehow suffer from an abnormal development due to their being raised in a home that did not quite look like the rest of America. Barbara Kopytoff & A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia,* 77 Geo. L. J. 1967, 2005-06 (1989) (describing white Virginians' discomfort with mixed-race individuals because they "did not fit into the whites' vision of the natural order of things"). Specifically, many white Americans believed that biracial individuals were "a degenerate race because they had 'White blood' which made them ambitious and power hungry combined with

[14] Rebecca Schatschneider, *On Shifting Sand: The Perils of Grounding the Case for Same-Sex Marriage in the Context of Antimiscegenation*, 14 Temp. Pol. & Civ.Rts. L.Rev. 285, 300 (2004) ("Ironically, the state's objection to interracial marriage was generally that such couples might procreate, while its complaint about same-sex couples is that (without assistance) they cannot. In either case, the state has fretted about the moral and physical desirability of children born to such unions.").

'Black blood' which made them animalistic and savage." *See* David Pilgrim, Professor of Sociology, Ferris State University, The Tragic Mulatto Myth (2000), http://www.ferris.edu/jimcrow/mulatto.

For example, in *Scott v. State*, 39 Ga. 321, 323 (1869), a black woman appealed her conviction for the crime of cohabitating with a white man. In rejecting her defense that she had married the man in another state, Georgia's Supreme Court reasoned: "The amalgamation of the races is . . . always productive of deplorable results. Our daily observation shows us that the offspring of these unnatural connections are generally sickly[,] effeminate, and . . . inferior in physical development and strength, to the fullblood of either race." *Id*.

Today, opponents of same-sex marriage make similar arguments that children of same-sex couples will grow up defective. For example, opponents to same-sex marriage have held the belief that children raised in a same-sex household cannot develop "normally" without the presence of a mother and father. See *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006). Additionally, opponents to same-sex marriage also insist that children of such unions are at risk for developing "homosexual interests and behaviors." Family Research Council, *Homosexual Parent Study: Summary of Findings* (Feb. 24, 2014, 10:03AM), http://www.frc.org/issuebrief/homosexual-parent-study-summary-of-findings. These fears seem to imply that the development of children in same-sex

households is somehow flawed and unnatural compared to children raised in heterosexual households.

B. Children of Interracial Marriages Were Once Thought to be in Danger of Psychological Trauma, Just as Children of Same-Sex Couples Today

Anti-miscegenationists also focused on the psychological stress resulting from the supposed lack of racial identity. *See* Romano, *Black-White Marriage*, at 136, 220. A common belief existed that "it was better for a child to be reared in a [pure blood] institution, no matter how bad, than to be adopted into a family of a different race, no matter how good." Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, and Adoption*, 12 (2003). This logic supported the policy of race matching, where mixed-race children were assigned a racial identity—usually black—and then parents of that race raised them. *See id.* at 367. As a result, children born out of wedlock from a white woman and a black man were often put up for adoption, so that a family appropriate to the child's assigned color would raise him or her. *Id*. at 368-70. In cases where the parents had been married, courts often awarded custody to the parent whose skin tone more closely resembled the child's, even if that parent was otherwise unfit or even abusive. *Id.* at 372-75.

A common expression of the psychological harm incurred by mixed-race children is the "tragic mulatto." *See* Bridget Smith, *Race as Fiction: How Film*

and Literacy Fictions of 'Mulatto' Identity Have Both Fostered and Challenged Social and Legal Fictions of Race in America, 16 Seton Hall J.Sports & Ent.L. 44, 64, 112-14 (2006). The archetypical "tragic mulatto" was a "beautiful, Christian, near-white heroine trapped between racial worlds and locked out of domestic harmony because of [her] 'one drop' of 'black blood.'" Suzanne Bost, *Fluidity Without Postmodernism: Michelle Cliff and the "Tragic Mulatta" Tradition*, 32 Afr.Am.Rev. 673, 675 (1998). Often the discovery of the character's biracial identity—or, more to the point, non-white identity—led to violence, fatal illness, or suicide. Nancy Bentley, *White Slaves: The Mulatto Hero in Antebellum Fiction*, 65 Am. Literature 501, 505 (1993); Debra Rosenthal, *The White Blackbird: Miscegenation, Genre, and the Tragic Mulatta in Howells, Harper, and the "Babes of Romance*," 56 Nineteenth-Century Literature 495, 499 (2002).

Today, opponents of marriage equality suggest that children will be subject to social condemnation, exclusion, and will become angry, rebellious, and perhaps suicidal because their families are different. *See* Wardle, *Homosexual Parenting*, at 854, 856 n.115. They maintain that these children face the double-barreled risk of developing "homosexual interests and behaviors," which in turn heightens the

chances that such children will face mental illness, a tendency for criminal behavior, and suicide. *Id*. at 852-54.[15]

As in they did in the racial context, some marriage traditionalists argue that children are always best raised by heterosexual married couples because these children are "less likely to be on illegal drugs, less likely to be retained in a grade, less likely to drop out of school, less likely to commit suicide, less likely to be in poverty, less likely to become juvenile delinquents, and for the girls, less likely to become teen mothers." James C. Dobson, *Eleven Arguments Against Same-Sex Marriage* (Feb. 26, 2014, 7:01 PM), http://www.ccctucson.org/PDF/Eleven%20Arguments%20against%20Same-Sex%20Marriage.pdf. By contrast, in Mr. Dobson's view, children of same-sex families "are caught in a perpetual coming and going" because, "homosexuals are rarely monogamous, often having as many as three hundred or more partners in a lifetime." *Id.*

[15] In the watershed case of *Baehr v. Miike*, experts for the State claimed that children raised by same-sex parents were at risk of economic hardship, poor academic performance, behavioral problems and for girls, a higher risk of having a child out of wedlock. When pressed about the evidence to support these risks, however, the State conceded that: "[s]ame-sex couples have the same capability as different-sex couples to manifest the qualities conducive to good parenting" and that lesbian and gay people are capable of raising healthy children. Joslin, at 86 (citing *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 at *5, *7 (Haw. Cir. Ct. Dec. 3, 1996) *aff*'d, 87 Haw. 34, 950 P.2d 1234 (1997)).

The notion that gay parents are a threat to their own children or unfit to be parents in general has even been given some credence in the courts.[16] In *Roe v. Roe*, a custody case where a divorced father was engaged in a homosexual relationship, "[t]he court also expressed concern as to 'what happens when the child turns twelve or thirteen, for example, when she begins dating or wants to have slumber parties, how does she explain [the] conduct [of her parents].'" 324 S.E.2d 691, 693 (Va. 1985). The court ultimately concluded, "the father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law. . . . The father's unfitness is manifested by his willingness to impose this burden upon her in exchange for his own gratification." *Id.* at 694.[17] Similarly, in *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, the Eleventh Circuit found a ban on same-sex couples adopting constitutional because "it is rational for Florida to conclude that it is in the best interests of adoptive children, many of whom come from troubled and

[16] *See also J.L.P. v. D.J.P.*, 643 S.W. 2d 865, 867, 869 (Mo. Ct. App. 1982) (fear of child molestation); *S. v. S.*, 608 S.W. 2d 64, 66 (Ky. Ct. App. 1980) (children might develop homosexual preferences).

[17] *See also N.K.M. v. L.E.M.*, 606 S.W. 2d 179 (Mo. Ct. App. 1980) (psychological harm).

unstable backgrounds, to be placed in a home anchored by both a father and a mother."[18] 358 F.3d 804, 820 (11th Cir. 2004).[19]

Opponents of mixed-race marriages, like opponents of marriage between members of the same sex, appeal to the public's understandable concern for the welfare of children. However, in doing so, both rely on antiquated stereotypes. In the case of anti-miscegenation, opponents sought to limit marriage in order to prevent procreation among the group in question. With respect to same-sex

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[18] Notably, same-sex couples are allowed to adopt in all but [three] states. Mary Bonauto, *Ending Marriage Discrimination: A Work in Progress*, 40 Suffolk U. L. Rev. 813 (2007). Since Bonauto's article was published, the state of Florida chose not to appeal the decision of a Court granting parental rights to a gay father. Florida had previously been the only state to explicitly foreclose same-sex parents from adopting. *See Fla. Dept. of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 61 A.L.R. 6th 621 (Fla. 3d DCA 2010); Manuel Ramos, *McCollum: No appeal to keep Fla. gay adoption ban*, Orlando Sentinel, 10/22/2010, *available at* <http://articles.orlandosentinel.com/2010-10-22/news/os-gay-adoption-bill-mccollum-20101022_1_gay-adoption-ban-martin-gill-equality-florid> (visited 2/19/13).

[19] Despite the use of such invidiously prejudiced rhetoric, the medical establishment increasingly has modified its positions to be more inclusive, and states are following suit in changing laws governing family relations. For example, in 2004, the American Psychological Association adopted a policy statement that lesbians and gay men are not *per se* less likely to be good parents than parents who identify as heterosexual. American Psychological Association, *Sexual Orientation, Parents & Children*, July 2004. Similarly, the American Academy of Pediatrics issued a policy statement favoring second-parent adoption by same-sex parents. *Coparent or Second-Parent Adoption by Same-Sex Parents*, Pediatrics, Vol. 109, No. 2 at 339-340, Feb. 2002.

marriage, opponents limit marriage in order to promote the notion of procreation as the exclusive privilege of the heterosexual population.

CONCLUSION

There is nothing new in the arguments against same-sex couples having the freedom to marry. However much opponents of marriage for same-sex couples may insist "*this time it is different*," there remains an appalling familiarity to the refrain that allowing same-sex couples the same human dignity as everyone else will threaten social order, degrade individuals, and harm children. Just as they do now, some marriage traditionalists claimed with all sincerity and unwavering conviction that, if African-Americans were accorded full human dignity, our society, our morality, and our faith would come to grief and lay in ruins. Quite obviously, that has not happened. Nor will these premonitions come to pass if this Court joins the growing national consensus in declaring that same-sex couples cannot be denied the right to marry.

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CERTIFICATE OF COUNSEL

I, David S. Flugman, hereby certify that:

1. I am a member of the bar of this court;

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it brief contains 6,942 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

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6. All required privacy redactions have been made per Local Appellate Rule 25.5.

7. On this date, seven (7) hard copies of the Brief for Amicus Curiae Howard University School of Law Civil Rights Clinic were sent to the Clerk's Office. Pursuant to Local Appellate Rule 31.5, I caused the Brief for Amicus Curiae Howard University School of Law Civil Rights Clinic to be served on counsel for all parties via the Notice of Docket Activity generated by the Court's electronic filing system (*i.e.*, CM/ECF).

Dated: March 4, 2014
New York, New York

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