No. 10-16696

Oral Argument December 6, 2010

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,
Plaintiffs and Appellees,
v.

ARNOLD SCHWARZENEGGER, et al.,
Defendants.

On Appeal from the United States District Court
Northern District of California No. 09-CV-2292-VRW
The Honorable Vaughn R. Walker

BRIEF OF AMICI CURIAE HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC and AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN SUPPORT OF APPELLEES TO AFFIRM THE JUDGMENT

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RULES

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. Today, this Court faces the question of whether marriage should be equally available to same-sex couples as to opposite-sex couples. In seeking to answer the question, the Court will inevitably 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 against racial subordination. Amicus curiae respectfully submits this brief as a corrective to the flawed distinction too often drawn between equal rights for racial minorities and equal rights for all human beings.[1]

Americans United is a national, nonsectarian public-interest organization based in Washington, D.C., with a twofold mission: To advance free-exercise rights of individuals and religious communities to worship as they see fit; and to preserve the separation of church and state as a vital component of democratic government. Americans United has over 120,000 members and supporters. Since its founding in 1947, Americans United has participated as a party, counsel, or amicus curiae in many of the leading church-state cases decided by the U.S. Supreme Court, this Court, and other federal and state courts nationwide.

[1] The parties have consented to amicus briefs. (DktEntries-16-18.)

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 also been misused 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. We are now long past 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. Therefore, the onus should be on opponents of marriage equality to demonstrate how arguments that time and experience have so thoroughly rejected in the context of race should now be dug up, dusted off, and given any consideration, much less credibility, in the context of marriage for same-sex couples.

I.

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

In America, as elsewhere, marriage is not just an expression of love and companionship, but also the "legal gateway to a vast array 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, 9/21/06, at 24, 30. The social status, public approval, and economic benefits 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. 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 to interracial couples during the Jim Crow era.[3]

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

[3] *See e.g.,* Thomas Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America* 242-43 (1858) (Negro Univs.Press 1968).

In the antebellum period, no Southern state granted legal recognition to 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 marriage for same-sex couples, no less than Thomas Jefferson 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). At the conclusion of the Civil War and during Reconstruction, marriage remained at the center of the debate for equal citizenship rights for the newly freed slaves. Using words that might have been spoken by advocates of marriage for same-sex couples, a black corporal explained to his troops, in emphasizing the importance of an 1866 Virginia statute legalizing marriage for blacks, that "[t]he Marriage Covenant is at the foundation of all our rights." *See* Laura Edwards, *"The Marriage Covenant is at the Foundation of all our Rights": The Politics of Slave Marriages in North Carolina after Emancipation*, 14 Law & Hist.Rev. 81, 101 (1996).

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). Opponents of interracial marriage justified criminal prohibitions against such unions by pointing 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 over interracial unions has generally died since the *Loving v. Virginia* decision in 1967 (388 U.S. 1), today the opposition to marriage for same-sex couples relies on arguments strikingly similar to those raised in opposition to interracial marriage. 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 and heterosexual marriage, as an affront to the laws of God and nature, and as a menace to their children.

II.

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

One similarity between past opposition to interracial marriage and present opposition to marriage for same-sex couples is that interracial unions used to be regarded, as same-sex unions are now perceived, as threats to social order and to the institutions of marriage and family. *See* Renee Romano, *Race Mixing: Black-White Marriage in Postwar America* 45-46 (2003). Using baseless and invidious stereotypes that depict gays and lesbians as hyper-sexualized and amoral, opponents of marriage for same-sex couples make two distinct, though related, arguments that: (1) extending marriage rights to same-sex couples risks weakening one of our most important tools for transmitting social values and maintaining social order; and (2) marriage for same-sex couples will have the effect of deinstitutionalizing the institution itself, thus stripping marriage of all intrinsic worth.[4] These flawed arguments parallel those used by opponents of miscegenation in startling ways.

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[4] *See generally* David Blankenhorn, *The Future of Marriage* 167 (2007) (contending that marriage can remain, and become even more, our society's most pro-child institution, or can be redefined as merely a private committed relationship, and also equating marriage for same-sex couples with deinstitutionalization). Blankenhorn testified as an expert to these same concepts below. The district court found, however, that he "lacks the qualifications to offer

The legal ban against and social opposition to interracial marriage 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 v. State*, 58 Ala. 190, 194 (1877).

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*, the 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

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opinion testimony and ... failed to provide cogent testimony in support of proponent's factual assertions." (1-ER-72.)

may possibly lead to intermarriage." Myrdal*, An American Dilemma: The Negro Problem and Modern Democracy* 606 (1944). Anti-miscegenationists 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* Wallenstein, *Race, Marriage and Law,* at 15 (quoting Law of Virginia (1691)).

As Dr. Martin Luther King, Jr., told *Jet* magazine in the wake of the *Loving* decision, "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, 6/29/1967, 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* at 277 (1987).

Like their anti-miscegenationist counterparts, so-called "traditional marriage preservationists" 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 because marriage for same-sex couples does not fit the concept of marriage.[5] Just as interracial marriage did not fit the ideal conception of marriage because it introduced racial impurity into the sacred institution, same-sex unions purportedly represent a threat to the institution itself because they would introduce a form of pollution to marriage. Specifically, to so-called marriage traditionalists, "gay marriage threatens monogamy because homosexual couples—particularly male homosexual couples—tend to see monogamy as nonessential, even to the most

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[5] *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 Judiciary*, 109th Cong. 68 (2005) (statement of Lynn Wardle, BYU Professor of Law), *available at* http://www.gpo.gov/fdsys/pkg/ CHRG-109shrg52/pdf/CHRG-109shrg52.pdf ("[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 ... [T]he institution of marriage is ... crucial to the organization of society and the transmission of social values."); *see also* Robert Nagel, *Diversity and the Practice of Interest Assessment*, 53 Duke L.J. 1515, 1533 (2004) ("[M]arriage is the primary institution that has been used all over the world to tame the turbulent power of human sexuality, to raise psychologically healthy children, to instill moral values, and to provide for some degree of mutual protection and support. Whatever its variations and shortcomings, if there is not sufficient social consensus regarding the importance of the institution of heterosexual marriage, it is hard to imagine any social arrangement the protection of which could amount to a compelling interest.").

loyal and committed relationships." Stanley Kurtz, *The Libertarian Question*, Nat.Rev.Online, 4/30/2003.[6]

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 marriage for same-sex couples is the notion that such relationships are not "natural" because they are: (1) purely sexual, (2) symptoms of psychological pathology, (3) contrary to biology, and (4) contrary to God's plan.

A. Opponents Have Framed Both Interracial Relationships and Same-Sex Relationships as Purely Sexual

The rhetoric of opponents of same-sex and mixed-race marriages tends to characterize these relationships as purely sexual rather than based on intimacy, romantic love, and commitment. *See* Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 Harv.C.R.-C.L.Rev. 255, 255-57 (2002).[7] Because historically, marriage is

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[6] http://article.nationalreview.com/?q=NjkwMWIzYmVlOGI1Njk3NzNlZGExNWZhZTFkMDgzYWI=; *see also* Stanley Kurtz, *Point of No Return*, Nat.Rev.Online, 8/3/2001, http://article.nationalreview.com/?q=MTUwZTViZWZiMWFkM2ExNjI4Mzg0ODBkZTA4YjQwNjM=# (arguing that gay couples who "actually disdain traditional marriage … will nonetheless get married" for "the financial and legal benefits of marriage").

[7] *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), *at*

perceived as making sex legitimate, excluding same-sex and mixed-race couples from marriage bolsters the view that such relationships are profane and therefore legitimately prohibited. Josephine Ross, *Sex, Marriage and History: Analyzing the Continued Resistance to Same-Sex Marriage*, 55 SMU.L.Rev. 1657, 1660-61 (2002).

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." Ross, *Sexualization,* at 257-58. 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.

The imagery of this "predatory sexuality" attributed to African-Americans justified segregation in nearly every aspect of life. For example, Judge Thomas N.

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http://www.nclrights.org/site/DocServer/20051201 Prop22ACLJ amicusbrief.pdf?docID=1801 (referring to gay males' "promiscuity").

Norwood, a prominent southern jurist and congressperson, in his speech titled "Address on the Negro," used the imagery of black men and women stalking whites in the street much like animals hunt their prey, stating, "illicit miscegenation thrives and the proof stalks abroad in breeches and petticoats along our streets and highways." Thomas Norwood, *Address on the Negro* 26 (1907). Race and sex became inextricably intertwined because "[t]he abolition of slavery had opened a door in the mind of every Southerner: a nightmarish vision of an inevitable overthrow of sexual taboos between black and white. If the Negro were given equality, he might one day go the whole route—claim complete sexual equality—especially and specifically, marriage and sexual fraternization with white women." Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 How.L.J. 1, 97 (1996) (*quoting* Laurence Baughman, *Southern Rape Complex: Hundred Year Psychosis* 147 (1966)).

Similarly, rhetoric from opponents of marriage for same-sex couples is rife with sexualization. Marriage traditionalists portray gays and lesbians as promiscuous, fundamentally controlled by their sexual desires, and always more interested in their own sexual gratification. *See, e.g.,* Carlos Ball & Janice Farrell-Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parenting*, 1998 U.Ill.L.Rev. 253, 257 (challenging Lynn Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U.Ill.L.Rev. 833). Other

sexualized characterizations of sexual minorities refer to gay people as self-destructive, hedonistic, lacking in moral character, and compare sexual minorities to pedophiles, child molesters, and the mentally ill. *See*, *e.g.*, Susan 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 (2006). These themes emerged prominently in the Proposition 8 campaign. RT-1918-22 (official Proposition 8 proponent William Tam believes that homosexuality is linked to pedophilia and that gays and lesbians are 12 times more likely to molest children); *see also* 1-ER-140-44 (describing how the Proposition 8 campaign relied on fears about gays and lesbians).

At times, the sexualization of same-sex couples is achieved via subtle code words, such as the suggestion that same-sex couples who wish to be married are succumbing to their "adult needs" and "sexual preferences." Other times, it is far more blunt, as in the argument by one prominent scholar that the key question regarding whether same-sex couples may adopt children is whether "nurturing [is] more important than parental *sexual behavior*." Lynn Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U.Ill.L.Rev. 833, 864-67 (emphasis added).

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 lack of marriage rights itself supports sexualized understandings because it "affect[s] the nature of the sexuality, [by] making it secret, closeted and sinful." *Id.* at 260.

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

Opponents of interracial marriage relied on pseudo-scientific theories, such as eugenics, to argue that certain personality traits were biologically inherited and drawn along racial lines. Eugenicists, who were little more than scientific racists, asserted that any 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). Proponents of eugenics used the alleged inferiority of blacks to draw the conclusion that social and political divisions between the races were the result of inherent biological differences, and that the dichotomy between the superior white and inferior black was so biologically entrenched that the only way to maintain a civil society was to implement rigid boundaries between blacks and whites. *See* Julie Nokov, *Racial Constructions: The Legal*

Regulation of Miscegenation in Alabama, *1890-1934*, 20 Law & Hist.Rev. 225, 244-50 (2002).[8]

The legal community was not above the fray and joined laypersons in denouncing interracial marriage on the basis of biology. In 1854, the California Supreme Court affirmed the concept of racial hierarchy, referring to those of Chinese descent 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). Nearly 100 years later, when California's Supreme Court concluded in *Perez v. Sharp*, 198 P.2d 17, 44-45 (Cal. 1948) that the State's anti-miscegenation laws violated equal protection, Justice Shenk continued to cling to this pseudo-scientific justification and dissented, relying in his opinion on a variety of eugenicist research suggesting "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, 198 P.2d at 44-45 (Shenk, J., dissenting). One legal commentator at the time wrote that "[r]ecent legislation limiting the right to marry is based not on historic rules or race

[8] It is important to note that proponents of eugenics did not operate on the periphery of science; rather, they were some of the most well-respected persons in their field. *See generally* Mark Haller, *Eugenics: Hereditarian Attitudes in American Thought* (1963) (discussing prominent eugenicist scientists such as Charles Devenport, Henry Goddard, Lothrop Stoddard, and Margaret Sanger); *see also Buck v. Bell*, 274 U.S. 200 (1927) (Justice Oliver Wendell Holmes, Jr. endorsing eugenics).

feeling but on scientific facts." J.P. Chamberlain, *Eugenics and Limitations of Marriage*, A.B.A.J., July 1923, at 429. Similarly, Madison Grant, a prominent lawyer, 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).

In addition to eugenics, social science claims were also brought to bear in arguing against interracial relationships, in the same way that such research is now being used against same-sex couples. Some psychiatrists and psychologists asserted that people intermarry because of a "deep seated psychological sickness," a willingness to "defy the prevalent cultural prejudice of society," "the lure of the exotic," as repudiation of one's 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."[9]

[9] 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,[10] but the misuse of science has endured in the debate over marriage equality. Although scientific professional organizations have discredited all notions that homosexuality is an illness (1-ER-51, 71, 111), opponents of marriage for same-sex couples continue to use pseudo-scientific arguments to deny sexual minorities the right to marry. *See*, *e.g.*, Wardle, *Homosexual Parenting*, at 852-57; Wardle, *When Dissent is Stifled: The Same-Sex Marriage and Right-to-Treatment Debates*, <http://www.narth.com/docs/wardle.html> (visited 10/19/10).

Thus, despite the scientific consensus that homosexuality is a normal variant of human sexuality, opponents of marriage by same-sex couples continue to reference discredited studies or misrepresent the findings of other research. *See* Stephen Newman, *The Use and Abuse of Social Science in the Same-Sex Marriage Debate*, 49 N.Y.L.Sch.L.Rev. 537 (2004-2005).

C. Opponents of Interracial and Same-Sex Relationships Have Used Faulty Social Science Arguments to Pathologize Such Attraction as an Illness

Opponents of marriage rights for same-sex couples similarly argue that same-sex love results from psychological issues that can be changed or "cured." Charles Socarides, the founder of the National Association for the Research and

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

Therapy of Homosexuality (NARTH),[11] a well-known group suggesting that homosexuality is an illness and can be changed, regularly asserts that "[h]omosexuality is a psychological and psychiatric disorder, there is no question about it." Rick Weiss, *Limit Attempts to Convert Gays?*, Mobile Register (Ala.), 8/14/1997, at A1 (quoting Socarides). NARTH further asserts that sexual minorities are generally "mentally disturbed." N.E. Whitehead, *Homosexuality and Mental Health Problems*, <http://www.narth.com/docs/whitehead.html> (visited 10/19/10).

Marriage-equality opponents attempt to challenge the scientific methods of certain psychological studies, ignoring contrary studies, drawing different conclusions from particular studies than that of the researchers, or referencing studies that have been discredited by the psychological community.[12] One regularly referenced study by Robert L. Spitzer is used to argue that so-called "reparative therapies" are effective and thus that sexual orientation is a psychological disorder which can be "cured." *See*, *e.g.*, A. Dean Byrd, *Spitzer*

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[11] NARTH submitted an amicus brief supporting Proponents in this appeal, and an official Proponent of Proposition 8 who testified at the trial, William Tam, relied on NARTH's research as his information source about homosexuality. 1-ER-57.

[12] *See generally* Becker, *Many are Chilled*, at 233-42 (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).

Study Critiqued in the Journal of Gay and Lesbian Psychotherapy, <http://www.narth.com/docs/spitzerstudy.html> (visited 10/19/10); Roy Waller & Linda Nicolosi, *Spitzer Study Published: Evidence Found for Effectiveness of Reorientation Therapy*, <http://www.narth.com/docs/ evidencefound.html> (visited 10/19/10).[13] Like the attacks on interracial couples, by using faulty science to frame homosexuality as an "illness," opponents of marriage for same-sex couples erroneously suggest that there is a legitimate scientific justification for stigmatizing same-sex couples and denying them the right to marry.

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

The Bible served as a primary source in the debate against interracial marriage. 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

[13] Not only has the American Psychological Association publicly disavowed and discredited the study, but Spitzer himself has suggested that his results have been misrepresented, saying that "[i]t bothers me to be [NARTH's] knight in shining armor because ... I totally disagree with the Christian Right .... What they don't mention is that change [in sexual orientation] is pretty rare." Sandra Boodman, *Vowing to Set the World Straight: Proponents of Reparative Therapy Say They Can Help Gay Patients Become Heterosexual. Experts Call that a Prescription for Harm*, Washington Post, 8/16/2005, at HE01; *see also* RT-2318-19 (Herek).

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"* at 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." *State v. Gibson*, 36 Ind. 389, 404 (1871). 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" in accordance with the God of nature. *Wolfe v. Georgia Ry. & Elec. Co.*, 58 S.E. 899, 902-03 (Ga.Ct.App. 1907). Still another court asserted, "[t]he 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." *West Chester & Phil. R.R. v. Miles*, 55 Pa. 209, 213 (1867). But perhaps the most famous religious apology for anti-miscegenation laws was articulated by the trial judge in *Loving*. Judge Leon Bazile of the Circuit Court of Caroline County,

Virginia, explained the reason for Virginia's law prohibiting interracial marriage, thusly:

> 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.

Even though reliance on religious doctrine as the basis for public policy is as improper today as it was in the days of anti-miscegenation laws, today opponents of marriage between two persons of the same sex use (their) Biblical interpretations to suggest that homosexuality is unnatural because it is against God's will. Indeed, like their anti-miscegenationist counterparts, opponents of marriage for same-sex couples almost always attempt to clothe their arguments in literal and selective interpretations of the Bible. Opponents of marriage for same-sex couples often quote Leviticus 18:22 — "You shall not lie with a male as with a woman; it is an abomination" — as Biblical support for anti-homosexual campaigns against marriage equality.

Focus on the Family, the premier organization opposing both marriage and civil unions between persons of the same sex, 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."[14] 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."[15] Becker, *Many are Chilled,* at 220.

Similarly, Proposition 8 proponent William Tam stated that Proposition 8 would cause states one-by-one to fall into Satan's hands (1-ER-57, 141), and that if it did not pass, there would be "social moral decay." RT-1954-55. A Proposition 8 ad even warned that "the devil wants to blur the lines between right and wrong when it comes to family structure"; "marriage is the symbol of our salvation and the symbol of our relationship with Christ"; that God is "giving America a second chance"; and implored voters to "stand up for Jesus Christ" and not deny Jesus like Peter did. PX0401; *see also* 1-ER-136-38.

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[14] Focus on the Family's Position Statement on Same-Sex "Marriage" and Civil Unions (6/15/2010), <http://www.citizenlink.com/2010/06/focus-on-the-familys-position-statement-on-same-sex-marriage-and-civil-unions/> (visited 10/19/10).

[15] *See also* Congregation for the Doctrine of the Faith, Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons (10/1/1986), <http://www.dignityusa.org/ratzinger> (discussing the Catholic perspective on homosexuality).

IV.

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

Procreation and a couple's ability to raise healthy, productive children is a prominent argument against marriage for same-sex couples, which mirrors that of interracial marriage. *See Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995); Romano, *Black-White Marriage*, at 80. Historically, there were two strains to the "harm to children" argument with respect to interracial marriage: first, that society would ostracize mixed-race children, resulting in psychological damage,[16] and second, that mixed-race children would be physically inferior to pure-blood children or otherwise abnormal.[17] Therefore, "[t]he state believed ... that it was better for a child to be reared in a [pure blood] institution, no matter how bad, than

[16] Because of the fear that inter-racial unions were a danger to the children involved, courts sometimes used the threat of psychological damage to rationalize removing mixed-race children from their biological home. *See* Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, and Adoption* 12 (2003).

[17] 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.").

to be adopted into a family of a different race, no matter how good."[18] Kennedy, *Interracial Intimacies*, at 12.

At the heart of the anti-miscegenationist argument that mixed-race coupling produced damaged children lay the misplaced fear that the children who were products of such relationships were physically and mentally inferior to children born of same-race parents. 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"). From Reconstruction until the Supreme Court's decision in *Loving*, society and the courts firmly believed that the children of interracial marriages would suffer physical ailments as a direct result of their mixed heritage.

In the 1869 case, *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 not only unnatural,

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[18] In recent years, each of these arguments has been applied to children raised by same-sex parents, as well. *E.g.*, *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 820 (11th Cir. 2004) (finding 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 unstable backgrounds, to be placed in a home anchored by both a father and a mother"); *Anderson v. King County*, 138 P.3d 963, 1002 (Wash. 2006) (Johnson, concurring).

but is always productive of deplorable results. Our daily observation shows us that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the fullblood of either race." *Id.*

Nearly 100 years later, the fear of so-called mixed-blood children was still sufficiently persuasive to permit a white man to annul his out-of-state marriage to an Asian woman under Virginia's anti-miscegenation laws. *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955). Virginia's Supreme Court upheld the annulment, explaining: "We are unable to read in the Fourteenth Amendment to the Constitution ... any words or any intendment which ... denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens." *Id.* In California's landmark anti-miscegenation case, *Perez*, the respondent defended the anti-miscegenation statute by stating that those who wished to break this law were from the "dregs of society" and that their children would be a "burden on the community." 198 P.2d at 25.

Anti-miscegenationists also focused on the psychological stress resulting from the supposed lack of racial identity. *See* Romano, *Black-White Marriage*, at 136, 220. 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* Kennedy, *Interracial Intimacies*, 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 its assigned color would raise the child. *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 was in popular culture's conception of 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 and exclusion and will become angry, rebellious, and perhaps suicidal because their families are different. *See* Wardle, *Homosexual Parenting*, at 854, 856 n.115 (discussing self-destructive tendencies among children of gays and lesbians and equating homosexual relationships with family-damaging extramarital affairs). They maintain that the children of same-sex parents 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.

Opponents of marriage equality go on to link the incidence of homosexuality in young people with "prostitution, running away from home, substance abuse, HIV infection, highly promiscuous behavior with multiple partners, and premature sexual activity," as well as anxiety, depression, and cross-dressing. *Id.* Marriage traditionalists such as James C. Dobson, argue that children of same-sex families "are caught in a perpetual coming and going" because, in their view, "homosexuals are rarely monogamous, often having as many as three hundred or more partners in a lifetime." *Eleven Arguments Against Same-Sex Marriage*, http://www.taxtyranny.ca/images/HTML/GayWatch/GayWatch36.html (visited 10/21/10). Even more troubling are arguments, including those relied on during the Proposition 8 campaign, that falsely link homosexuality to pedophilia,

attempting to foster fear that children of same-sex couples will be molested. 1-ER-57. For example, author Steve Baldwin describes the motivations of the GLBT-rights movement and the North American Man-Boy Love Association as one in the same, namely the reduction or elimination of age-of-consent laws. Steve Baldwin, *Child Molestation and the Homosexual Movement*, 14 Regent U.L.Rev. 267, 270-73, 277 (2001-2002).[19] Baldwin demonizes the entire homosexual community, arguing that "an unmistakable manifestation of the attack on the family unit is the homosexual community's efforts to target children both for their own sexual pleasure and to enlarge the homosexual movement." *Id.*, at 267.[20]

This notion that gay parents are a threat to their own children has even found some purchase in the courts. 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

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[19] Contrary to the studies cited by the opponents of marriage for same-sex couples and parenting, there is a wealth of peer-reviewed research finding that same-sex parents are every bit as nurturing and supportive—if not more so—than their heterosexual counterparts. *See, e.g.*, Heather Latham, *Desperately Clinging to the Cleavers: What Family Law Courts Are Doing About Homosexual Parents, and What Some Are Refusing To See*, 29 Law & Psychol.Rev. 223, 234-36 (2005).

[20] *See* Jon Dougherty, *Report: Pedophilia More Common Among 'Gays:' Research Purports to Revel 'Dark Side' of Homosexual Culture*, WorldNetDaily, 4/29/02, <http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=27431> (visited 10/19/10). *See also* Timothy Dailey, *Homosexuality and Child Sexual Abuse*, OrthodoxyToday.org, <http://www.orthodoxytoday.org/articles/DaileyHomosexualAbuse.php> (visited 10/19/10); NARTH, *The Problem of Pedophilia* (1998), <http://www.narth.com/docs/pedophNEW.html> (visited 10/19/10).

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. Similarly, in *Bottoms*, the Virginia Supreme Court found that the mother's homosexual relationship rendered her an unfit parent as a matter of law, and thus favored placing the child in the custody of a third party. 457 S.E.2d at 108-09. And in *Lofton*, the Eleventh Circuit found constitutional a ban on same-sex couples adopting children 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 unstable backgrounds, to be placed in a home anchored by both a father and a mother." 358 F.3d at 820.

CONCLUSION

In the final analysis, 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. We suffered through the same awful dirge when slave owners sought to preserve

the ban against slave marriage and segregationists opposed interracial marriage. Then, as now, some 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.

But the certainty and monotony with which some will always sound the death knell for society, morality, and faith, just because two adults choose to marry cannot obscure the reality that we heard virtually the same arguments for almost three hundred years to justify preventing two black people from marrying and then a black man from marrying a white woman. Nor, when all is said and done, can these jeremiads about how marriage equality for same-sex couples will lead to our final slouching toward Gomorrah obscure the reality recognized long ago by the great African-American gay writer, James Baldwin, that it is "an inexorable law that one cannot deny the humanity of another without diminishing one's own."[21]

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[21] James Baldwin, *Fifth Avenue Uptown*, collected in *The Price of the Ticket* 213 (1985).

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and contains **6,994** words, exclusive of exempted sections, as counted by the 2003 Microsoft Word word-processing program used to generate this brief.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 2003 Microsoft Word with a 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 25, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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