Case No. S147999

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

IN RE MARRIAGE CASES

JUDICIAL COUNCIL COORDINATION PROCEEDING No. 4365

AFTER A DECISION OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION THREE

Nos. A110449, A110450, A110451, A110463, A110651, A110652

SAN FRANCISCO SUPERIOR COURT
NOS. JCCP4365, 429539, 429548, 504038
LOS ANGELES SUPERIOR COURT NO. BC088506

Honorable Richard A. Kramer, Judge

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION

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APPLICATION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS CHALLENGING MARRIAGE EXCLUSION AND STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to California Rule of Court, Rule 8.250, Howard University School of Law Civil Rights Clinic (including the clinic's faculty members, supervising attorneys and student attorneys) hereby respectfully applies for leave to file an *amicus curiae* brief in support of the City and County of San Francisco and the individuals and organizations challenging the marriage exclusion.

Although Howard University is often recognized as one of our nation's historically black colleges and universities, from its founding in 1867 to the present day Howard's mission has always been to provide a quality education for blacks *and* whites, women *and* men, in an integrated setting. In pursuit of that mission, Howard University School of Law has long placed the defense of human rights, equality, and dignity at the heart of its educational practice. When more than seventy years ago Charles Hamilton Houston, a former Howard law professor and Dean, the late Justice Thurgood Marshall, a former Howard student, and the cadre of lawyers from the NAACP Legal Defense and Education Fund (many of whom were also former Howard students) developed the winning legal strategy challenging the pernicious separate but equal racial segregation doctrine of *Plessy v. Ferguson*, their fight was not only against racial subordination, but also against all forms of social apartheid that would deny human beings the full equal protection promise of the United States Constitution.

Today, this Court faces the question of whether marriage, an important expression of human dignity, should be equally available to same-sex couples as to opposite-sex couples, or whether such couples will be relegated to the separate but allegedly equal second-class status of civil unions. In considering that 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*, in

pursuit of Howard University's educational practice of defending human rights, equality, and dignity, respectfully submit 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. As the brief demonstrates, the same arguments asserted by opponents of the right of same-sex couples to marry were also made to justify racial apartheid and the ban against interracial marriage. We are long past the time when anyone would seriously claim that interracial marriages threaten the moral fabric of our civilization, are contrary to nature, or will be harmful to children of such relationship. Therefore, the onus should be on opponents of same-sex marriage to demonstrate how arguments that time and experience have so thoroughly rejected in the context of interracial marriage should now be dug up, dusted off, and given any consideration, much less credence, in the context of same-sex marriage.

SUMMARY OF ARGUMENT

Until 1967, marriage between black and white partners continued to be illegal in several states. David Fowler, *Northern Attitudes Towards Interracial Marriage: Legislation and Public Opinion the Middle Atlantic States of the Old Northwest, 1780-1930* 339-439 (New York: Garland Publishing, 1987) (hereinafter, Fowler, *Northern Attitudes*). Throughout the nation's history, opponents of interracial marriage justified criminal prohibitions against such unions by pointing to the purported detrimental effect of mixed-race birth 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. Randall Kennedy, *Interracial Intimacies* (Pantheon Books, 2003). While public debate over interracial unions has generally died since the *Loving v. Virginia* decision in 1967, today the opposition to same-sex marriage has come to rely on arguments that are strikingly similar to those that were raised by opponents to interracial marriage. Without acknowledging that these arguments were rejected in the earlier debate over mixed-race couples' right to civil marriage, opponents of

marriage between two persons of the same sex have attacked same-sex couples as being potentially destructive of American society, same-sex marriage as devaluing of the social currency of heterosexual marriage, and same-sex parenting as posing a threat to their children and others. Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 Nw. U.L. Rev. 1543 (2005).

Throughout American history, the institution of marriage has been accepted as a stabilizing tool for building and organizing society. *See* William M. Hohengarten, *Same-Sex Marriage and the Right of Privacy*, 103 Yale L.J. 1495, 1501-05 (1994) (hereinafter, Hohengarten, *Right of Privacy*). Because the benefits of state-sanctioned marriage have been traditionally extended only to opposite sex couples, marriage has been perceived as a legal means of encouraging procreation within a stable environment for raising children. Marriage in America, as elsewhere, however, is a highly complex concept; while rooted in the quasi-contractual relationship legally uniting two individuals in the eyes of the law, legal marriage also creates a unique social status. Hohengarten, *Right of Privacy*, 103 Yale L.J. at 1499. The state's recognition of two individuals' mutual commitment allows married persons the exclusive benefits of the status, including pecuniary advantages, social recognition, and an altered personal identity. *Id.* A couple must not only be acknowledged by the members of their society as being "proper" beneficiaries of the status of marriage, but also must be recognized by the government as being a part of the class of persons who may enter into a marriage contract. As such, groups like same-sex couples and interracial couples have remained on the fringes of the marriage debate, and have often been denied the right to enter into the contract of marriage altogether.

This brief addresses the historical arguments against interracial sex, marriage, and parenting, many of which arguments, are resurrected in the briefs of the State and its *amici*, while exposing the similarities and differences between

those arguments and the recent opposition to marriage between same-sex couples. Specifically this brief catalogues our country's historical portrayal of interracial unions and the various legal arguments made against recognition of marriages between the races. The brief also discusses the present-day social and political arguments against same-sex marriage, adoption, and child rearing as they parallel the earlier debate. The point of this brief is this: there is nothing new about the arguments marshaled in opposition to same-sex marriage. The very same arguments were assembled in opposition to interracial marriage. As a society, we have rightfully rejected these attempts to deny full human dignity to interracial couples and individuals. We should do no less for same-sex couples.

ARGUMENT

I. PRIOR TO *LOVING V. VIRGINIA*, INTERRACIAL MARRIAGE WAS, LIKE SAME-SEX MARRIAGE TODAY, WIDELY CONSIDERED ATHREAT TO ESTABLISHED SOCIAL ORDER AND TO THE INSTITUTIONS OF AMERICAN MARRIAGE AND FAMILY.

> *It is through the marriage relation that the homes of a people are created . . . . These homes, in which the virtues are most cultivated and happiness most abounds, are the true officinæ gentium – the nurseries of States. Who can estimate the evil of introducing into their most intimate relations, elements so heterogeneous that they must naturally cause discord, shame, disruption of family circles and estrangement of kindred?*[1]

> *"[T]wo dogs and cats do not constitute a family. A family by definition is . . . [a] husband meaning a male and a wife meaning a female . . . ."*[2]

> *Marriage is, by definition, the union of one man and one woman, not because of any animus toward homosexuals, polygamists,*

[1] *Green v. State of Alabama*, 58 Ala. 190, 194 (Ala. 1877).
[2] Michael Mello, *Legalizing Gay Marriage* 55 (2004) (quoting a Letter to the Editor of the Burlington (Vermont) Free Press, dated March 23, 2003).

polyandrists or any other group of people, but because it is the joining of a man and a woman that perpetuates society.[3]

A. Interracial Sex and Marriage Was Once Considered, Like Same-Sex and Marriage, a Threat to the "Natural" Social Order.

As recently as 1967, 16 states still had miscegenation statutes on their books. Fowler, *Northern Attitudes* at 339-439. Until the Supreme Court's landmark decision in *Loving v. Virginia*, 388 U.S. 1 (1967), prohibitions against interracial marriage, or the "amalgamation of the races," were upheld on the grounds that mixed marriage was "against the natural order" and detrimental to the very foundation of American society, among other things. Anti-miscegenationists argued that mixing races would begin a slippery slope leading to social chaos. Many white Americans disdained the prospect of interracial marriage because it threatened to "weaken" white blood, and by extension, white society. Renee C. Romano, *Race Mixing: Black-White Marriage in Postwar America* 47 (2003) (hereinafter Romano, *Black-White Marriage*). Hence, for the majority of American history, beginning as early as 1664 in Maryland, the civil contract of marriage was legally recognized only if performed between persons of the same (legally-defined) race, "to prevent 'abominable mixture and spurious issue.'" Kennedy, *Interracial Intimacies* at 219. While many states specifically enacted laws criminalizing interracial sex, anti-miscegenation laws were largely targeted at criminalizing interracial cohabitation and denying the existence of marriages between a white person and a person of another race, especially if that race was black. *Id.* at 215-18; *see Fields v. State*, 132 So. 605 (Ala. 1931): "[I]t was not enough for that state to prove that the defendants had engaged in a single act of sexual intercourse, or even occasional sexual acts; rather it had to show that they had had an ongoing *relationship*." *See also* Joel Williamson, *After Slavery: The*

[3] Answer Brief of Campaign for Cal. Families on the Merits as Amici Curiae at 12, *In Re: Marriage Cases*, No. S 147999 (Cal. June 6, 2007).

Negro in South Carolina during Reconstruction, 1861-1877 (1965). In 1913, Wyoming became the last of 42 states to enact laws making interracial marriages void, while states also made criminal the act of "living in fornication" with a person of another race.[4] "*Every* state whose black population reached or exceeded 5 percent of the total eventually drafted and enacted antimiscegenation laws." Kennedy at 219 (citing Joseph Golden, *Patterns of Negro-White Intermarriage*, 19 Am. Soc. Rev. 144 (1954)).

Americans saw mixed-race unions as potentially detrimental to the overall existence of society. Such marriages posed a threat to the white supremacist ideology that formed the foundation of an American society built upon the institution of enslavement. 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, June 29, 1967, at 24. This white supremacist ideology was evident in assertions by some white opponents of interracial marriage: that mixed race individuals threatened society by virtue of their multi-racial identity. Neither black nor white, "mulattoes" were likely to have the "audacity" and arrogance of white America coupled with the "savagery" of black America. George M. Fredrickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny 1817-1914* at 277 (reporting an 1899 letter to the editor of *The Independent*, in which a woman reader explained that 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 white audacity").

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[4] While criminal laws prohibiting interracial marriage existed in most states at some point in American history, eight states and the District of Columbia never enacted such laws. Alaska, Connecticut, Hawaii, Minnesota, New Hampshire, New Jersey, Vermont, and Wisconsin did not develop laws concerning marriage or sexual relations between the races. David H. Fowler, *Northern Attitudes* at 336.

Further, the possibility of "white negroes" – white-skinned people who were legally black – would wholly destroy the American construction of race. Eva Saks, *Representing Miscegenation Law, in Interracialism: Intermarriage in American History, Literature, and Law* 73 (Werner Sollors, ed., 2000). Because the racial hierarchy created by the institution of enslavement structured American society, any time the white race was "diluted" by black "blood" the status of all white citizens was jeopardized. Redefining race in terms other than the dichotomy of black and white promised to upset the social fabric of the nation. The fact that race was (and remains) a legal fiction was irrelevant: so long as miscegenation was not acknowledged and socially stigmatized, society viewed all children born to white mothers as white and all children born to black women as black.

Clear definition of racial identity was deemed necessary not only for social order, but also to ensure that the laws against interracial mixing were enforceable. If the state (or even individuals) were to acknowledge that mixed race people existed, miscegenation laws would be of no force. The crime of miscegenation was defined as intermarrying, cohabitating, or interbreeding of persons of *different races* (Saks, *Representing Miscegenation Law* at 62 (emphasis added)); thus, the enforcement of anti-miscegenation laws required a clear definition of racial identity and complete racial separation to be effective. Likewise, if a person could *look* white, but *be* black, miscegenation laws would be impossible to enforce. In *Representing Miscegenation Law*, Saks discusses the case of *Jones v. State*, 47 So. 100 (Ala. 1908), in which a black man was prosecuted for cohabitating with a "white woman." Saks, *Representing Miscegenation Law* at 62. The prosecution was based upon the fact that a witness testified that the wife *looked like* a white woman, and therefore was a white woman. *Jones*, 47 So. at 102. The ambiguity of race was clearly exposed: the law could not protect what could not be defined.

Throughout the country's history of slavery and segregation and up to fairly recent times, interpretations of the Christian faith and teachings were commonly used to support claims that interracial sex and marriage threatened the natural

social order. The Bible was used as a primary source in the debate against interracial marriage – not only was interracial marriage "unnatural" and a threat to white supremacy, but it violated basic Christian teachings. James Graham Cook, *The Segregationists* 214 (1962). 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." *Id.* An argument against miscegenation was also derived from the "opposition expressed by Moses and Ezra to the intermarriage of Jews with heathens (Deuteronomy 7:3 and Ezra 9-10)." *Id.* One court explained, "The natural law, which forbids their intermarriage and that amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of the races." *West Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209 (1867) (citing *State v. Gibson,* 36 Ind. 389, 404 (1871)). Perhaps the most famous Christian apology for anti-miscegenation laws was articulated by the trial judge in *Loving v. Virginia*, Judge Leon Bazile of the Circuit Court of Caroline County, Virginia, who explained the reason for Virginia's law prohibiting interracial marriage as follows:

> 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 v. Virginia, 388 U.S. 1, 3 (1967). Similarly in *Kinney v. Commonwealth*, Judge Joseph Christian of the Supreme Court of Appeals of Virginia explained:

> The purity of public morals the moral and physical development of both races and highest advancement of our cherished southern civilization under which two distinct races are to work out and accomplish the destiny to which the almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God

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

Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858 (1878).

Like anti-miscegenationists of the past, today's opponents of gay marriage assert that legalization of same-sex marriage will destroy society and the institution of marriage. This time, the argument is rooted in a baseless and invidious stereotype of gays and lesbians as non-monogamous and amoral. "Gay marriage threatens monogamy because homosexual couples – particularly male homosexual couples – tend to see monogamy as nonessential, even in the most loyal and committed relationships." Stanley Kurtz, *The Libertarian Question*, Nat'l Rev. Online, April 30, 2003, available at <http://www.nationalreview.com/kurtz/kurtz04302003.asp>. Based on the erroneous and wholly unsubstantiated stereotype that homosexual couples engage in more sex outside of committed relationships than heterosexual couples, anti-gay marriage activists contend that allowing same-sex couples the opportunity to marry will result in a separation between marriage and monogamy. *Id.*; *see also* Stanley Kurtz, *Point of No Return*, Nat'l Rev. Online, August 3, 2001 (*citing* Gretchen Stiers, *Study: From This Day Forward*, 1999) available at <http://article.nationalreview.com> (enter search terms "Point of No Return) (arguing that gay couples who "actually disdain traditional marriage will nonetheless get married" for the financial and legal benefits of marriage). Extended to the implausible (as it is by opponents of marriage equality), this stereotype results in pronouncements that advocates of same-sex marriage actually seek to see "marriage abolished (and multiple sexual unions legitimized)." *Id.*

So-called "traditional marriage preservationists" point to marriage and the family as the main social device used to transmit values and beliefs across generations. *See, e.g.*, Justin T. Wilson, *Preservationism, Or The Elephant In The Room: How Opponents of Same-Sex Marriage Deceive Us Into Establishing Religion*, Duke J. of Gender L. & Pol'y 561, 634 (2007) ("For civilizations to