No. 12-144

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, *ET AL.*,

Petitioners,

—v.—

KRISTIN M. PERRY, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* CALIFORNIA COUNCIL OF CHURCHES; CALIFORNIA FAITH FOR EQUALITY; UNITARIAN UNIVERSALIST LEGISLATIVE MINISTRY CALIFORNIA; NORTHERN CALIFORNIA NEVADA CONFERENCE, UNITED CHURCH OF CHRIST; SOUTHERN CALIFORNIA NEVADA CONFERENCE, UNITED CHURCH OF CHRIST; PACIFIC ASSOCIATION OF REFORM RABBIS; CALIFORNIA NETWORK OF METROPOLITAN COMMUNITY CHURCHES — IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE

STACEY MARIE KAPLAN
KESSLER TOPAZ MELTZER & CHECK, LLP
One Sansome Street, Suite 1850
San Francisco, California 94104
(415) 400-3000

ERIC ALAN ISAACSON
Counsel of Record
655 West Broadway, Suite 1900
San Diego, California 92101
(619) 231-1058
eisaacson@rgrdlaw.com

Attorneys for Amici Curiae

February 28, 2013

QUESTION PRESENTED

Whether Proposition 8's withdrawal, from gay and lesbian same-sex couples alone, of the right to marry denies them equal protection of the laws with respect to this fundamental right.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES—Continued

Page

STATUTES, RULES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

SECONDARY AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

IDENTITY AND INTEREST OF *AMICI*

Speaking on behalf of California's communities of faith, whose members are actually subject to Proposition 8, *Amici curiae* are religious organizations that have for years labored on behalf of religious liberty and equality under the law for all Californians.[1]

Amici as California faith organizations have vigorously opposed governmental discrimination turning on whether a committed couple's union accords with liturgical doctrines even of the State's largest and most powerful religious movements. Their work has included organizing efforts to file *amicus curiae* briefs affirming all Californians' right to marry and opposing governmental discrimination based on sexual orientation, gender, and religious doctrine.[2]

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that they authored this brief in whole, and that no person or entity other than *amici* made any monetary contribution toward the brief's preparation or submission. All parties have consented to the brief's filing through letters of consent filed with the Clerk.

[2] *See, e.g.*, Brief of California Council of Churches, *et al.* (filed Jan. 15, 2009), *Strauss v. Horton*, 46 Cal. 4th 364, 377-78, 207 P.3d 48 (2009) (Nos. S168047, S168066, S168078) (available online at http://www.courts.ca.gov/documents/s1680xx-amcur-council-churches.pdf) (accessed Feb. 27, 2013); Brief of Unitarian Universalist Legislative Ministry California, *et al.* (filed Feb. 3, 2010), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-cv-02292-VRW), 2010 WL 474972; Brief of California Faith for Equality, *et al.* (filed Oct. 25, 2010), *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696), 2010 WL 4622578.

Amici submit that civil marriage is a civil right that California's citizens should be able to enjoy, whatever their religious identity or sexual orientation. It is quite simply wrong for civil law to impose on all citizens the liturgical limitations that some faith communities place on their own religious rites of marriage.

The identities and interest of *Amici* filing this brief are as follows:

1. *Amicus curiae* **California Council of Churches** is an organization of Christian churches representing the theological diversity of California's mainstream and progressive communities of faith. From its beginnings in 1913, the Council's membership today has grown to comprise more than 6,000 California congregations, with more than 1.5 million individual members, drawn from 21 denominations that span the spectrum of California's mainstream Protestant and Orthodox Christian communities.

Some of its member churches, particularly those congregations affiliated with the **United Church of Christ** and the **Universal Fellowship of Metropolitan Community Churches**, gladly welcomed same-sex couples seeking to be legally married in religious rites – until Proposition 8 took effect. Proposition 8 has a direct impact on these churches and their clergy, impairing the performance of their religious mission.

The Council's position on same-sex marriage is unequivocally pro-religious freedom and pro-church autonomy. In California's *Marriage Cases* and subsequent litigation, the California Council of Churches has consistently declared: "Our commitment to religious liberty for all and equal

protection under the law leads us to assert that the State may not rely on the views of particular religious sects as a basis for denying civil marriage licenses to same-gender couples."[3]

2. *Amicus curiae* **California Faith for Equality** is a multi-faith coalition whose mission is to educate, support, and mobilize California's faith communities to promote equality for LGBT people, and to safeguard religious freedom. As a multi-faith organization, it respects and values the wisdom and perspectives of all faith traditions, including both those that celebrate same-sex marriage as a religious rite, and those that do not. Formed in 2005, and formally incorporated in October 2009, California Faith for Equality has been instrumental in organizing California's faith communities to support equal civil rights for all Californians. It speaks on behalf of California's churches, clergy, and same-sex couples who are directly subject to Proposition 8's discriminatory withdrawal of same-sex couples' right to marry.

3. *Amicus Curiae* **Unitarian Universalist Legislative Ministry California** is a statewide justice ministry that cultivates and connects leaders and communities sharing Unitarian Universalist values and principles. The Ministry advocates public policies that: uphold the worth

---

[3] Brief of the Unitarian Universalist Association of Congregations, *et al.*, at xv-xvi (filed Sept. 26, 2007), *In re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384 (2008) (No. S147999) (*available online at* http://www.courts.ca.gov/documents/unitarianamicus.pdf) (accessed Feb. 27, 2013); Brief of Unitarian Universalist Legislative Ministry California, *et al.*, at 6-7, *Perry v. Schwarzenegger*, *supra* note 2.

and dignity of every person; further justice, equity, and compassion in human relations; promote democratic processes; protect religious freedom; and engender respect for the interdependent web of all existence. As a matter of human dignity, California's Unitarian Universalist congregations and clergy have long supported same-sex couples' freedom to marry, both in Unitarian Universalist religious rites, and as a fundamental civil right. Hundreds of same-sex couples were legally married in ceremonies solemnized by California's Unitarian Universalist clergy from June 17, 2008, to November 4, 2008, when Proposition 8 took effect – directly impairing Unitarian Universalist clergy's ability to serve their California congregations.

4. *Amicus curiae* **Northern California Nevada Conference United Church of Christ ("NCNC")** is a manifestation of the church of Jesus Christ and a constituting body of the United Church of Christ (UCC). The Conference's membership includes 130 local churches in the State of California, from the Oregon border to the southern borders of Inyo, Tulare, Kings, and Monterey counties. In 2005 the Conference co-sponsored the resolution adopted by the General Synod of the United Church of Christ, urging "Equal Marriage Rights for All." Before Proposition 8 took effect, clergy in the Conference's California churches were free to solemnize legal marriages of committed same-sex couples – and many did so. Proposition 8 directly affects the Conference's churches, abridging the freedom of their clergy and members.

5. *Amicus curiae* **Southern California Nevada Conference of the United Church of Christ ("SCNC")** is a faith community gathered in over 130 diverse congregations, most of them in Southern California. Its mission is to be a united

and uniting community of the people of God, covenanting together for mutual support and common mission. Its denomination, the United Church of Christ (UCC), is a "mainline" Protestant denomination in the Reformed tradition, whose history is witness to a long and profound commitment to peace-seeking and advocacy of justice for all. In 2004, delegates at the Conference's Annual Gathering approved a resolution supporting marriage equality for all. The next year, on July 4, 2005, their denomination's General Synod adopted a resolution affirming equal marriage rights for same-sex couples. Until Proposition 8 took effect, many of the Conference's churches gladly welcomed same-sex couples to lawfully wed in rites solemnized by their clergy. Proposition 8 directly affects the Conference's California churches, depriving many of their members of the right to marry, and impairing their clergy's ability to serve them.

6. *Amicus curiae* **Pacific Association of Reform Rabbis ("PARR")**, represents rabbis in the Western Region of the Central Conference of American Rabbis ("CCAR"). Dedicated to the principles of Reform Judaism, PARR is an organization of over 350 Reform rabbis in California and twelve other states, one Canadian province, and New Zealand. PARR opposes Proposition 8 based on Reform Judaism's beliefs and resolutions. In 1996 the CCAR endorsed civil marriage for gay people and in 2000 it recognized the right of Reform rabbis to perform religious marriage ceremonies for gay and lesbian Jews. PARR has a direct interest in this case, as Proposition 8 bars its members from solemnizing the legal marriages of same-sex couples in their California congregations.

7. *Amicus curiae* **California Network of Metropolitan Community Churches** is a statewide organization of Metropolitan Community Churches ("MCC"). The first MCC worship service, in a Los Angeles suburb in 1968, launched an international movement of Christian churches with a particular, but by no means exclusive, outreach to the LGBT community. The MCC's California churches' ministry has naturally included solemnization of same-sex couples' lawful marriages. That ministry has been directly impaired by Proposition 8's discriminatory withdrawal of same-sex couples' right to marry.

SUMMARY OF ARGUMENT

Ours is a pluralistic society, of many faiths and persuasions, whose constitutional framework must ensure fundamental liberty and equal rights for all. California's Proposition 8 violated basic principles when it targeted gay and lesbian couples to withdraw from them alone, an extraordinarily important civil right: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967).[4]

Civil marriage unquestionably is a secular institution that "does not require any religious ceremony for its solemnization." *Maynard v. Hill*, 125 U.S. 190, 210 (1888). Nor should it require compliance with any religious doctrine or dogma –

---

[4] *See also*, *e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("the right to marry is of fundamental importance for all individuals") (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

not in a pluralistic society such as ours that celebrates freedom and diversity in religious belief and practice.

It should be clear, however, that governmental limitations on the right to marry may seriously abridge citizens' religious liberty. *Amici's* experience demonstrates that Proposition 8 does exactly that by outlawing marriages of same-sex couples which – until Proposition 8 put an end to them – were being lawfully solemnized in hundreds of California's churches and synagogues.

With this brief we endeavor to show that this Court has itself sustained the right to marry as "an exercise of religious faith," *Turner v. Safley*, 482 U.S. 78, 96 (1987), and that the seminal decision on marriage equality is at its core a religious-liberty precedent. For in *Perez v. Sharp*,[5] a Catholic couple persuaded California's Supreme Court to overturn California's law against mixed-race marriages as a violation of their religious freedom. *See infra* 10-19.

When this Court reviewed the issue nearly two decades later in *Loving*, Catholic Bishops filed an *amicus curiae* brief urging this Court to follow *Perez* because "marriage is an exercise of religion protected by the First and Fourteenth Amendments" and thus "can be restrained only upon a showing that it constitutes a grave and immediate danger to interests which the state may lawfully protect."[6]

---

[5] 32 Cal. 2d 711, 198 P.2d 17 (1948).

[6] Brief of *Amicus Curiae*, Urging Reversal, on behalf of John J. Russell, Bishop of Richmond; Lawrence Cardinal

Ironically, the Catholic Bishops and lay organizations that recently filed *amicus* briefs supporting Proposition 8 have failed to recognize the principle's universality: If Catholics in *Perez* had a religious-liberty interest in legal recognition of mixed-race marriages to be solemnized in their own churches, then Reform and Reconstructionist Jews, as well as Unitarian Universalists, and members of the United Church of Christ and Metropolitan Community Churches, all must have a similar religious-liberty interest in legal recognition of same-sex marriages that – but for Proposition 8 would be solemnized in their own churches and synagogues. *See infra* at 19-23.

Amici submit that religious liberty is honored not by state laws withdrawing equal rights and imposing sectarian limitations concerning who may marry, but rather by recognizing marriage as a

---

Shehan, Archbishop of Baltimore; Paul A. Hallinan, Archbishop of Atlanta; Philip M. Hannan, Archbishop of New Orleans; Robert E. Lucey, Archbishop of San Antonio; Joseph B. Brunini, Apostolic Administrator of Natchez-Jackson; Lawrence M. DeFalco, Bishop of Amarillo; Joseph A. Dirick, Apostolic Administrator of Nashville; Thomas K. Gorman, Bishop of Dallas-Ft. Worth; Joseph H. Hodges, Bishop of Wheeling; John L. Morkovsky, Apostolic Administrator of Galveston-Houston; Victor J. Reed, Bishop of Oklahoma City and Tulsa; L. J. Reicher, Bishop of Austin; Thomas Tschoepe, Bishop of San Angelo; Ernest L. Unterkoefler, Bishop of Charleston; Vincent S. Waters, Bishop of Raleigh; The National Catholic Conference for Interracial Justice; and The National Catholic Social Action Conference (hereinafter "Catholic Bishops' *Loving* brief") at 19 (filed Feb. 16, 1967), *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 66-395), 1967 WL 113926.

fundamental civil right shared by *all* people, of *all* faiths and persuasions, without regard to the doctrines and dogma of any particular sect or sects – not even those of the State's largest and most powerful ones. *Perez* and *Turner* are sound decisions that this Court should follow. *See infra* at 23-30.

That some defend Proposition 8's withdrawal of this right, as somehow necessary to protect the religious liberty of sectarians whose churches' liturgical doctrines preclude offering religious rites of marriage to same-sex couples, reflects a profound misunderstanding of what really is at stake.

The Becket Fund, and others, suggest that Proposition 8 has a rational basis in speculative fears that honoring same-sex couples' right to equality under the civil law of matrimony somehow threatens the religious liberty of Californians whose religious liturgies do not encompass same-sex unions. The imagined threats come not from matrimonial law, which Proposition 8 affects, but from California's anti-discrimination laws, which provide broad protections for same-sex couples *despite* Proposition 8's withdrawal of their legal right to marry. Proposition 8 did not change California's laws barring discrimination against same-sex couples in matters of housing, employment, and health-care coverage. And it does not, in any respect, protect anyone's religious freedom by depriving same-sex couples of a basic civil right. *See infra* at 30-37.

ARGUMENT

A. This Court Held in *Turner v. Safley* that Although Civil Marriage Is a Secular Institution, Its Arbitrary Restriction Improperly Abridges the Free Exercise of Religion

Marriage in California, as in the United States more generally, has long been a secular civil institution, free from the many liturgical limitations that particular faith traditions are entitled to follow regarding what marriages they will solemnize with their own religious rites. A civil marriage, this Court has said, "must be founded upon the agreement of the parties" but "does not require any religious ceremony for its solemnization."[7] "From the state's inception,

---

[7] *Maynard*, 125 U.S. at 210. The Pilgrims who sailed in the Mayflower, landed at Plymouth Rock, and celebrated the First Thanksgiving in 1621, began the American tradition that lawful marriage should be "a civil thing," when in 1621 they celebrated the "first marriage in this place." 1 William Bradford, *History of the Plymouth Plantation, 1620-1647*, at 216-18 (Boston: Massachusetts Historical Society, 1912) (recounting the "first marriage in this place, which, according to the laudable custome of the Low–c[o]untries . . . was thought most requisite to be performed by the magistrate, as being a civill thing"); *see* Eric Alan Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty*?, 8 Stan. J. Civ. Rts. & Civ. Libs. 123, 138-39 (2012). The Pilgrims thus adopted "a doctrinal principle separating the responsibility of the church to minister to its members from the civil obligation of the magistrate to regulate and protect the rights of all." Jeremy Dupertuis Bangs, *Strangers and Pilgrims, Travellers and Sojourners: Leiden and the Foundations of the Plymouth Plantation* 640 (Plymouth, Massachusetts: General Society of Mayflower Descendents, 2009).

California law has treated the legal institution of civil marriage as distinct from religious marriage."[8] This is as it should be, for in a pluralistic society such as ours, sectarian doctrines and forms ought not control the exercise of a civil right.

Still it would be a mistake to think that the fundamental civil right of marriage and the constitutional right to free exercise of religion have no relation. For in addition to being a secular civil right, marriage also has an important place in religious life for most (if not all) communities of faith – each of which must be free to celebrate matrimonial rites on its own terms.

This Court held in *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), that "the decision to marry is a fundamental right" that prison inmates retain even though incarcerated, since "the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication," and "the religious and personal aspects of the marriage commitment" remain "unaffected by the fact of confinement or the pursuit of legitimate corrections goals." *Id.* at 96. These elements of free exercise and free expression are, this Court held, "sufficient to form a constitutionally protected marital relationship in the prison context." *Id.*

---

[8] *In re Marriage Cases*, 43 Cal. 4th at 792 n.11, 183 P.3d 384, 407 n.11 (citation omitted), *superseded by* California Marriage Protection Act, a.k.a. "Proposition 8," enacting Cal. Const. art. I, §7.5; *see also* Cal. Fam. Code §420(c) ("No contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirements of any religious sect.").

The religious significance of marriage is no less important outside of prison when same-sex couples seek to marry with the blessings of clergy in Reform and Reconstructionist synagogues, and in Unitarian Universalist, United Church of Christ, and Metropolitan Community churches. Proposition 8, by targeting gay and lesbian couples for withdrawal of the right to marry is unconstitutional because it directly impairs "an exercise of religious faith as well as an expression of personal dedication." *Turner*, 482 U.S. at 96.

B. The Seminal Decision Striking Down California Laws Against Mixed-Race Marriages Did So on Religious-Liberty Grounds

The seminal decision sustaining a mixed-race couple's right to civil marriage was also a religious-liberty precedent, as Catholics for the Common Good acknowledge in an *amicus* brief *opposing* similar respect for the religious liberty of Reform and Reconstructionist Jews, Unitarian Universalists, and members of the United Church of Christ and Metropolitan Community Churches.[9]

In the California Supreme Court's 1948 decision reported officially as *Perez v. Sharp*, and by West Publishing Co. as *Perez v. Lippold*,[10] a Roman

---

[9] *See Amicus Curiae* Brief for Catholics for the Common Good, *et al.* at 21, 23-24 (filed Jan. 29, 2013), *Hollingsworth v. Perry* (No. 12-144), 2013 WL 416203.

[10] 32 Cal. 2d 711, 198 P.2d 17 (1948). The different captions apparently resulted from a succession in the Office of County Clerk (named in his official capacity), which was reflected in one reporter, but not the other.

Catholic couple represented by an activist Roman Catholic lawyer successfully argued that California's ban on mixed-race marriage violated their religious freedom.[11]

On this at least the Catholics for the Common Good *amicus* brief is absolutely correct: "The hero of *Perez* is Daniel Marshall, the President of the Catholic Interracial Council of Los Angeles, and the attorney who represented Sylvester Davis, an African-American male, and Andrea Perez, a woman of Mexican descent."[12]

Perez was deemed "white" under California law, which barred her marriage to Davis, a black man. Both were members of Saint Patrick's Catholic Church in Los Angeles, where Marshall led "a small but very determined Catholic Interracial Council" that he had formed in 1944 to advance the cause of racial equality.[13] When the Los Angeles County Clerk refused to issue Perez and Davis a marriage license because California statutes proscribed mixed-race marriages, Marshall took their case straight to California's Supreme Court, demanding a writ directing the County Clerk to

---

[11] *See generally* Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* 205-31 (Oxford & New York: Oxford University Press, 2009); Fay Botham, *Almighty God Created the Races: Christianity, Interracial Marriage & American Law* 11-51 (Chapel Hill: University of North Carolina Press, 2009).

[12] *Amicus Curiae* Brief for Catholics for the Common Good at 21.

[13] Pascoe, *supra* note 11, at 206 & 204.

issue a license. Marshall did so even though his own Church's Diocesan officials disapproved.[14]

The court papers in *Perez* starkly framed the mixed-race couple's right to marry in terms of religious liberty. "There is no rule, regulation or law of the Roman Catholic Church which forbids a white person and a Negro person from receiving conjointly the sacrament of matrimony and thus to intermarry," the couple's writ petition averred.[15] The County Clerk's refusal of a "license to intermarry" thus had denied them of "the right to participate fully in the sacramental life of the religion in which they believe," thereby impinging upon "the free exercise and enjoyment . . . of their

---

[14] Historian Peggy Pascoe explains:

> At the Los Angeles Diocese, Catholic officials were appalled that Marshall had put the Catholic Church in the position of seeming to endorse interracial marriage. When Marshall wrote to ask Auxiliary Bishop Joseph McGucken, a onetime [Catholic Interracial Council] supporter, to testify in the *Perez* case, he received an immediate, and visceral, refusal. "I cannot think of any point in existing race relationships that will stir up more passion and prejudice," McGucken fumed. "I want to make very clear that I am not at all willing to be pulled into a controversy of this kind."

Pascoe, *supra* note 11, at 214 (quoting letter from Auxiliary Bishop Joseph T. McGucken to Daniel G. Marshall, April 26, 1947, in Box 17, Folder 29, John LaFarge Papers, Georgetown University Special Collections, Washington, D.C.).

[15] Petition for Writ of Mandamus, ¶¶5, 6, at 3 (filed Aug. 8, 1947), *Perez v. Sharp*.

religious profession and worship."[16] An accompanying brief argued that, thanks to the many states' laws then proscribing mixed-race marriages, "petitioners are prohibited from participating in the full sacramental life of the religion of their choice in over 60 per cent of the states of the Union."[17]

The County of Los Angeles countered that while the couple's Church might *permit* mixed-race marriages, no religious-liberty interest could be at stake, as the Catholic faith did not demand that adherents marry outside their own race: "Marrying a person of another race, even insofar as the Church tolerates or permits it, is certainly not required."[18] "It is true that the Catholic religion forbids illicit intercourse," the County acknowledged, "but it is not necessary to marry one of another race to avoid such illicit intercourse. A good Catholic could just as well live up to his religion by avoiding the intercourse. The

---

[16] *Id.*, ¶15, at 4.

[17] Memorandum of Points and Authorities, ¶XXII, at 5 (filed Aug. 8, 1947), *Perez v. Sharp*. Marshall's oral argument reiterated that his Catholic clients "have the right to participate in the full sacramental life of their church . . . and that Section 69 of the Civil Code denies them the right to participate fully in the sacramental life of their religion." Oral Argument in Support of Petition at 4 (Oct. 6, 1947), *Perez v. Sharp*.

[18] Respondent's [Supplemental] Brief in Opposition to Writ of Mandate at 51 (filed Oct. 6, 1947), *Perez v. Sharp*.

petitioners will not be violating their religion by failing to get married."[19]

Three of the California Supreme Court's seven justices found the County's arguments thoroughly persuasive.[20] Justice B. Rey Schauer and Justice Homer R. Spence both concurred in Justice John W. Shenk's opinion declaring that because "petitioners' alleged right to marry is not a part of their religion in the broad sense that it is a duty enjoined by the church," their claims were weaker even than those of Mormon polygamists in *Reynolds v. United States*,[21] whose faith had affirmatively *required* them to take more than one wife.[22] In contrast with the Mormon polygamists, Perez and Davis could argue only "that their marriage is permissive under the dogma, beliefs and teaching of the church to which they claim membership and that the sacrament of matrimony will be administered to them by a priest of the church if and when a license issues."[23]

Yet the Catholic couple's religious-liberty argument carried the day. For though no opinion

---

[19] *Id.* at 51-52. County counsel began his oral argument: "In the present case, the petitioners do not show that it is religion that compels them to marry, but that it is their own worldly choice." Transcript of oral argument on behalf of Respondent, at 2, *Perez v. Sharp*.

[20] *Perez*, 32 Cal. 2d at 742-63, 198 P.2d at 35-47 (Shenk, J., joined by Schauer and Spence, J.J., dissenting).

[21] 98 U.S. 145, 161 (1878).

[22] *Perez*, 32 Cal. 2d at 744, 198 P.2d at 36 (Shenk, J., dissenting).

[23] *Id.*

was joined by a majority of the court, Shenk's three-justice opinion was but a dissent.

Justice Roger J. Traynor, himself a Catholic, filed a three-justice plurality opinion, joined by Chief Justice Phil S. Gibson and Justice Jesse W. Carter. It set out the mixed-race couple's argument,

> that the statutes in question are unconstitutional on the grounds that they prohibit the free exercise of their religion and deny to them the right to participate fully in the sacraments of that religion. They are members of the Roman Catholic Church. They maintain that since the church has no rule forbidding marriages between Negroes and Caucasians, they are entitled to receive the sacrament of matrimony.[24]

Writing for his three-justice plurality, Justice Traynor declared that if "the law is discriminatory and irrational, it unconstitutionally restricts not only religious liberty but the liberty to marry as well."[25] Justice Edmonds, a "Christian Scientist for whom religious freedom mattered,"[26] provided the fourth vote – which was needed for a precedential majority on the seven-justice tribunal. He filed a separate concurring opinion unequivocally holding

---

[24] *Perez*, 32 Cal. 2d at 713, 198 P.2d at 18 (Traynor plurality).

[25] *Id.*, 32 Cal. 2d at 713-14, 198 P.2d at 18 (Traynor plurality).

[26] Botham, *supra* note 11 at 42.

that the right to marry "is protected by the constitutional guarantee of religious freedom."[27] By denying legal standing to the marriage of two Catholics, whose Church allowed people of different races to marry, the State of California had violated their religious freedom.

Justice Traynor's plurality opinion addressed religious liberty only briefly, and then devoted greater attention to equal-protection concerns and to the character of civil marriage as a fundamental secular right. But Justice Edmonds' separate concurrence, grounded on religious liberty, provided the rationale on which a majority of the court's justices agreed: "By a four-to-three vote, the court invalidated California's antimiscegenation law on the basis of the constitutional right to freedom of religion."[28] Applying familiar rules of *stare decisis*, religious liberty provided the decision's precedential *ratio decidendi*.[29]

---

[27] *Perez*, 32 Cal. 2d at 740, 198 P.2d at 34 (Edmonds, J., concurring); *see* Botham, *supra* note 11, at 42 ("Justice Edmonds cast the deciding vote that gave victory to Andrea Perez and Sylvester Davis."; "what is clear is that Edmond's opinion shifted the entire outcome of the case").

[28] David W. Southern, *John LaFarge and the Limits of Catholic Interracialism, 1911-1963*, at 274 (Baton Rouge & London: Louisiana State University Press, 1996).

[29] *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007); *Marks v. United States*, 430 U.S. 188, 193 (1977); *Estate of Lopes*, 152 Cal. App. 3d 302, 306-07, 199 Cal. Rptr. 425, 428-29 (1984); *People v. Harris*, 71 Cal. App. 3d 959, 966, 139 Cal. Rptr. 778, 783 (1977); 9 B.E. Witkin, California Procedure, Appeal §809, at 879 (5th ed. 2008) ("It is possible for a concurring opinion, not the main opinion, to constitute

If *Perez* is correct, then Proposition 8 is an unconstitutional abridgment of California same-sex couples' religious liberty to marry, and of their faith communities' and clergy's right to celebrate and solemnize their marriages, just as California's law denying legal recognition to mixed-race unions violated a Catholic couple's religious liberty.

C. Catholic Bishops Endorsed *Perez v. Sharp's* Religious-Liberty Rationale When this Court Considered a Baptist Couple's Appeal in *Loving v. Virginia*

When the constitutionality of state laws proscribing mixed-race marriages got to this Court in *Loving*, nearly two decades after *Perez*, Catholic bishops weighed in as *amici curiae* fully supporting *Perez*'s religious-liberty rationale.[30]

The case arose from Virginia. Rejecting a Baptist couple's contention that statutes proscribing their marriage were unconstitutional, the Virginia trial court invoked what many Americans once took as binding Scriptural law – that "Almighty God created the races" and "that He did not intend for the races to mix."[31] Virginia's

---

the majority position of the court on a particular point."); *see also id.,* Appeal §538, at 608-10.

[30] *See supra* note 6.

[31] *Loving*, Circuit Court opinion, reprinted in *Loving*, No. 66-395, Transcript of Record, at 8, 16. The trial court declared:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the

Supreme Court affirmed, following its own 1955 decision in *Naim v. Naim*,[32] which had sustained Virginia's laws against racial mixing in "a public institution established by God himself."[33]

When *Loving* reached this Court, sixteen Catholic bishops and apostolic administrators filed

---

> 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.

Id.; *see* Pascoe, *supra* note 11, at 275; *Loving*, 388 U.S. at 3 (quoting trial court); *see also Bowers v. Hardwick*, 478 U.S. 186, 210 n.5 (1986) (Blackman, J., joined by Brennan, Marshall & Stevens, J.J., dissenting) (same quote); *cf. People v. Greenleaf*, 780 N.Y.S.2d 899, 902 (New Paltz Justice Ct. 2004).

[32] 197 Va. 80, 87 S.E.2d 749 (1955), *vacated and remanded*, 350 U.S. 891 (1955), *reinstated on remand*, 197 Va. 734, 90 S.E. 2d 849 (Va. 1956), *motion to recall mandate denied*, 350 U.S. 985 (1956).

[33] *Naim*, 197 Va. at 84, 87 S.E.2d at 752 (quoting *State v. Gibson*, 36 Ind. 389, 402-03 (1871)). Following *State v. Gibson*, 36 Ind. at 404, *Naim* sustained Virginia law barring marriage between members of different races, declaring "that the natural law which forbids their intermarriage and the social amalgamation which leads to a corruption of races is as clearly divine as that which imparted to them different natures." *Naim*, 197 Va. at 84, 87 S.E. 2d at 752. God's law was a common refrain in the precedents sustaining such laws. *See*, *e.g.*, *Gibson*, 36 Ind. at 404; *Green v. State*, 58 Ala. 190, 195 (1877) ("Surely there can not be any tyranny or injustice in requiring both alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare that He has made the two races distinct."); *Scott v. Georgia*, 39 Ga. 321, 326 (1869) (holding that members of different races may not intermarry because the "God of nature made it otherwise").

an *amicus curiae* brief asserting that Virginia's laws denying recognition to mixed-raced marriages violated the Baptist couple's religious liberty.[34] Even with respect to marriages outside their own Church, the Catholic bishops opposed permitting legal enactments grounded upon the "views of third persons to determine one of the most personal and sensitive of human decisions."[35] They urged this Court to follow the lead of *Perez*, where Justice Traynor's three-justice plurality opinion had found that California's anti-miscegenation statute "unconstitutionally restricted both religious freedom and the liberty to marry."[36] The critical fourth vote in *Perez*, the Catholic bishops underscored, was provided by Justice Edmonds' "separate concurring opinion," clearly holding the right to marry "'is protected by the constitutional guarantee of religious freedom.'"[37]

The Catholic bishops concluded by asserting that "marriage is an exercise of religion protected by the First and Fourteenth Amendments" and that "as such, marriage can be restrained only upon a

---

[34] *See* Botham, *supra* note 11, at 3, 170-74.

[35] Botham, *supra* note 11, at 170-74; Catholic Bishops' *Loving* brief at 17.

[36] Catholic Bishops' *Loving* Brief at 18. The Catholic Bishop's brief thus "reiterated California Supreme Court Justice Roger Traynor's assertion that if California's anti-miscegenation statutes were unconstitutional and discriminatory, then they restricted two fundamental human liberties: religious freedom and the freedom to marry." Botham, *supra* note 11, at 172.

[37] Catholic Bishops' *Loving* Brief at 18 (quoting *Perez*, 32 Cal. 2d at 740, 198 P.2d at 34 (Edmonds, J., concurring)).

showing that it constitutes a grave and immediate danger to interests which the state may lawfully protect."[38] That view accords with the *ratio decidendi* of *Perez*, and with this Court's holding in *Turner* that depriving prison inmates, as a group, of the right to marry trampled their "exercise of religious faith." *Turner*, 482 U.S. at 96.

The Catholic bishops believed then that religious liberty protected the marriage right not only of Catholics, but of non-Catholics as well. From its *amicus* brief filed in this case, however, it appears that the U.S. Conference of Catholic Bishops has since concluded that religious liberty protects only marriages that their own Church approves, and not the marriages of same-sex couples that – but for Proposition 8 – would be solemnized in Reform and Reconstructionist synagogues, and in Unitarian Universalist, United Church of Christ, and Metropolitan Community churches.

That is *not* a fair understanding of religious liberty, or of equal protection of the law. Catholics, and their marriages, are not specially privileged over the marriages of liberal Jews, Unitarian Universalists, and members of the United Church of Christ and Metropolitan Community churches.

The Catholic Answers *amicus* brief asserts that religious liberty "means 'the freedom to engage one's entire self' – including the self in the context of community – 'in pursuit of ultimate reality.'"[39]

---

[38] Catholic Bishops' *Loving* Brief at 19.

[39] Brief *Amicus Curiae* of Catholic Answers, Christian Legal Society, and Catholic Vote Education Fund at 6 (filed Jan. 29, 2013) (No. 12-144), 2013 WL 390985 (quoting

Yet the freedom to engage one's entire self in lawful wedlock, in the context of a religious community, is one that Catholic Answers would have this Court *deny* to same-sex couples who seek to marry in their own churches and synagogues.

If religious liberty and equal protection of the law mean anything, the right to marry is one properly enjoyed by all Americans, of all faiths, and of any sexual orientation. Proposition 8 is unconstitutional.

D. *Perez* and *Turner* Remain Good Law that this Court Should Reaffirm and Follow

Though *Loving* cited – and implicitly rejected – the Virginia courts' religious rationale for *outlawing* mixed-race marriages,[40] and though it cited *Perez* with approval,[41] it did not clearly endorse *Perez*'s religious-liberty rationale. In light of this Court's subsequent holding in *Turner*, that marriage most often involves a constitutionally protected "exercise of religious faith," 482 U.S. at 96, the Court should do so now.

For *Perez*'s religious-liberty rationale remains sound law, that should apply as fully to a same-sex couple who would marry in a Reform or Reconstructionist synagogue, or in a Unitarian

---

Timothy Samuel Shah, *Religious Freedom: Why Now? Defending an Embattled Human Right* 16 (Witherspoon Institute Task Force on International Religious Freedom, 2012)).

[40] *Loving*, 388 U.S. at 3.

[41] *Id.* at 6 n.5.

Universalist, United Church of Christ, or Metropolitan Community church, as it did in *Perez* to a mixed-race couple seeking to marry in a Catholic church.

Two objections must, of course, be answered. One is that the *Perez* holding's religious-liberty rationale conflicts with this Court's decisions sustaining criminal penalties for Mormon polygamy, as the *Perez* dissenters insisted.[42] The other is that *Perez* was impliedly overruled by this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that Oregon may criminalize sacramental use of peyote.

Perez does not conflict with this Court's decisions rejecting free-exercise challenges to federal laws criminalizing Mormon polygamy. For as Justice Edmonds' separate concurrence noted, those decisions were grounded in what this Court perceived as compelling justifications that simply find no parallel here.[43]

In *Reynolds v. United States,* 98 U.S. 145 (1878), this Court embraced the view of Professor Francis Lieber, that polygamy posed a grave threat to the very existence of democratic institutions: "In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the Government of the people, to a greater or less extent, rests." *Id.* at 165-66. The Court grounded *Reynolds'* holding on the assumption that

---

[42] *See Perez*, 32 Cal. 2d at 744-45, 198 P.2d at 36 (Shenk, J., dissenting).

[43] *See Perez*, 32 Cal. 2d at 741-42, 198 P.2d at 35 (Edmonds, J., separate concurrence).

"polygamy leads to the patriarchal principle, . . . which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy." *Id.* at 166. Congress could criminalize polygamy "because of the evil consequences that were supposed to flow from plural marriages" as harbingers of despotism threatening democratic order itself.[44]

To the same effect is *Davis v. Beason*, 133 U.S. 333 (1890), which reaffirmed *Reynolds*' holding and rationale for criminalizing polygamy. *Davis* added that a system of plural marriage will "tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community." *Id.* at 341.

Same-sex relationships are entirely different from the patriarchal polygamous systems condemned by *Reynolds* and *Davis*. Where Mormon polygamy was grounded in patriarchal inequality, and the subjection of women as a class, today's

---

[44] *Id.* at 168. *See also Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 569 (1993) (Souter, J., concurring) (citing *Reynolds'* rationale); Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 113-14 (Cambridge, Mass. & London: Harvard University Press, 2000); Mark Philip Strasser, *On Same-Sex Marriage, Civil Unions, and the Rule of Law: Constitutional Interpretations at the Crossroads* 124-25 (Westport, Connecticut: Praeger Publishers, 2002).

same-sex marriages are grounded in recognizing the full humanity, dignity, and equality of *all* citizens. Same-sex couples' marriages thus pose *none* of the threats to our democratic institutions that were said to flow from polygamy.[45]

Neither will recognizing full civic equality for gay and lesbian citizens "destroy the purity of the marriage relation," "disturb the peace of families," "degrade women," or "debase man," as *Davis* put it. 133 U.S. at 341. Committed same-sex relationships cannot even remotely be characterized as crimes "pernicious to the best interests of society," to again quote *Davis*. *Id.* Neither Congress nor the States may criminalize peaceable same-sex relationships. *See Lawrence v. Texas,* 539 U.S. 558, 578-79 (2003).

Though nineteenth-century Mormons' social system of patriarchal polygamy might be characterized as "a defiant stand against the West's most basic political and personal values," it should be clear that the movement toward same-sex marriage honors egalitarian personal autonomy and full human dignity for all.[46] No credible

---

[45] *See generally* E.J. Graff, *What is Marriage For?: The Strange Social History of Our Most Intimate Institution* 168-77 (Boston: Beacon Press, rev. ed. 2004).

[46] E.J. Graff, *What is Marriage For?*, *supra* note 45, at 177. Judge Richard A. Posner has suggested that prohibiting polygamy may further egalitarian objectives, observing that "the prohibition of bigamy (polygamy) . . . increases the sexual and marital opportunities of younger, poorer men." Richard A. Posner, *Sex and Reason* 215 (Cambridge: Harvard Univ. Press, 1992). He observes that "polygamy is anomalous in a system of companionate marriage, because a man is unlikely to have the same

argument can be made that recognizing same-sex couples' full citizenship and right to marry might produce the kind of social problems this Court imagined would flow from the Mormons' system of polygamy.

Neither has *Perez* been impliedly overturned by this Court's holding in *Employment Division v. Smith*, 494 U.S. 872, 874 (1990), that the Free Exercise Clause "permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug."

Obviously, no criminal prohibition is at issue here, and *Lawrence* flatly bars criminal sanctions for consensual same-sex relationships. But more than that, *Smith* itself recognized this Court's many holdings that "the First Amendment bars application" even of "a neutral, generally applicable law to religiously motivated action" when religious-liberty interests operate "in conjunction with other constitutional protections, such as freedom of speech and of the press,"[47] or

---

reciprocal relationship of love and trust with multiple wives; as well as with the fact already noted that it benefits a few men at the expense of the many." *Id.* at 216. Nor has polygamy generally been associated with decent treatment of women, for as Judge Posner observes: "It may not be an accident that the congeries of practices loosely referred to as 'female circumcision' – primarily, the removal of the clitoris and (until marriage) the sewing up of the entrance to the vagina (infibulation) – are found only, as far as I am able to determine, in polygamous societies." *Id.* at 256-57.

[47] *Smith*, 494 U.S. at 881 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940) (invalidating a

"the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to direct the education of their children."[48] This case involves such additional interests.

This Court has many times recognized marriage itself as a fundamental liberty interest.[49] Marriage rests at the heart of the interests protected by this Court's decisions protecting autonomy in matters of family life – such as *Pierce*, 268 U.S. at 534-35, *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923), and *Yoder*, 406 U.S. 205, as well as by the right to privacy recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and extended in other decisions.[50]

---

licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, 321 U.S. 573 (1944) (same)).

[48] *Smith*, 494 U.S. at 881 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school)).

[49] *See, e.g.*, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Loving*, 388 U.S. at 12 ("[m]arriage is one of the 'basic civil rights of man'") (citation omitted).

[50] *See, e.g.*, *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990).

The element of free speech also is present – implicated by what marriage communicates. This Court held in *Turner*, that even prison inmates retain their fundamental right to marry, because "[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life." *Turner*, 482 U.S. at 95. These include the fact that "inmate marriages, like others, are expressions of emotional support and public commitment," *id.*, as well as the fact that "many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication." *Id.* at 96.

The expressive element of marriage clearly implicates "speech in its full constitutional sense."[51] "When two people marry . . . they express themselves more eloquently, tell us more about who they are and who they hope to be, than they ever could do by wearing armbands or carrying red flags."[52] "If the First Amendment deserves interpretations that will 'protect a rich variety of expressional modes,' there is no reason in logic for

---

[51] Bryan H. Wildenthal, *To Say "I Do": Shahar v. Bowers, Same-Sex Marriage, and Public Employee Marriage Rights*, 15 Ga. St. U. L. Rev. 381, 382 (1998); *see also* David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. Cal. L. Rev. 925 (2001).

[52] Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 654 (1980).

excluding the expression that is at the heart of [our] most intimate associations."[53]

In sum, the religious-liberty holdings of *Perez* and *Turner* remain good law, under which Proposition 8's differential treatment of same-sex marriages cannot be sustained.

E. The Becket Fund and Other *Amici* Misstate the Threat to Religious Liberty

The Becket Fund and other *amici* supporting Proposition 8's abridgement of marital rights portray same-sex couples' marriages as posing a grave threat to religious liberty. This, they insist, provided a rational basis for stripping California's same-sex couples of the right to marry. They are mistaken.

The purported "threats" to "liberty" come not from same-sex marriages, but from California's civil-rights laws – which generally protect same-sex couples *as though* they were married, and which are readily subject to legislative revision or judicial limitation if and when truly necessary to accommodate religious-liberty concerns.

Though Proposition 8 removed the right to marry, it left intact California's constitutional guarantee that gay and lesbian couples may form families on the same basis as other couples,[54] and

---

[53] *Id.* at 654 (quoting Laurence Tribe, *American Constitutional Law* 579 (1978)); *see generally* Cruz, *supra* note 51.

[54] *Strauss v. Horton*, 46 Cal. 4th 364, 407-11, 445-46, 207 P.3d 48, 74, 77, 102 (2009).

did nothing to change the many California laws requiring equal treatment of LGBT people in education, employment, housing, public accommodations, insurance policies, and health-care service plans.[55]

Under California law "[r]egistered domestic partners . . . have the same rights . . . and shall be subject to the same responsibilities . . . as are granted to and imposed upon spouses."[56] And same-sex couples have the same right as heterosexual Californians to procreate and to raise children together.[57]

The examples of "conflict" supposedly posed by civil-rights laws all miss the point – as California civil-rights laws remain in place. That revisions to such laws might be readily obtained if truly necessary to protect religious liberty is apparent.

---

[55] *See, e.g.* Cal. Civ. Code §51(b); Cal. Ed. Code §200; Cal. Gov. Code §11135; *id.* §§12920 *et seq.*; Cal. Health & Safety Code §1365.5; Cal. Ins. Code §§1374.58, 10140; Cal. Lab. Code §4600.6(g)(2); Cal. Stats. 1999, ch. 592; Cal. Code Regs., tit. 10, §2632.4.

[56] Cal. Fam. Code §297.5(a); *Marriage Cases*, 43 Cal. 4th at 806, 183 P.3d at 417; *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 845, 115 P.3d 1212, 1223 (2005).

[57] *See Elisa B. v. Superior Court*, 37 Cal. 4th 108, 117 P.3d 660 (2005); *K.M. v. E.G.*, 37 Cal. 4th 130, 117 P.3d 673 (2005); Cal. Fam. Code §297.5(d) ("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."); *see also* Cal. Welf. & Inst. Code §16013(a); *Sharon S. v. Superior Court*, 31 Cal. 4th 417, 440, 73 P.3d 554, 570 (2003) ("any otherwise qualified single adult or two adults, married or not, may adopt a child").

The *amici* raising dire cries of threatened persecution purport to speak not on behalf of helpless minorities – but for America's *largest* and *most powerful* religious movements. The Catholic Church ranks first, with more than 68 million adherents in the United States, and the Southern Baptist Convention second, with more than 16 million.[58] The Becket Fund says "an estimated 160 million Americans – 97.6% of all religious adherents in the United States and more than half of the entire population – belong to religious bodies that affirm the traditional definition of marriage."[59]

These are groups that can readily protect their legitimate interests. Even crediting the Becket Fund's claims that "robust protections for conscientious objectors" might be warranted,[60] they can be obtained by ordinary legislative processes – as should be apparent from the fact that many state legislatures, including California's, have already acted to accommodate "conscientious

---

[58] *See Yearbook of American & Canadian Churches 2012*, at 11-14 (Eileen W. Lindner, ed.; Nashville: Abington Press for the National Council of Churches, 2012).

[59] Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of *Hollingsworth* and the Bipartisan Legal Advisory Group Addressing the Merits at 6 (filed Jan. 28, 2013), *Hollingsworth v. Perry* (No. 12-144), 2013 WL 439976 (citation omitted).

[60] Becket Fund *Hollingsworth* & *Windsor* Brief at 22.

objectors" to full civic equality of gay and lesbian citizens.[61]

Examples given of religious believers supposedly persecuted for their beliefs have nothing to do with marriage, and little foundation in fact. The Catholics for the Common Good *amicus* brief, for example, says that California "recently banned any attempt to change a person's sexual orientation."[62] Yet the statute at issue, Cal. Stats. 2012, ch. 835, §2 (to be codified at Cal. Bus. & Prof. Code §§865, 865.1, 865.2), merely protects *minors* from a discredited "therapy" that the California Legislature determined is ineffective and likely harmful. The statute applies only to the professional conduct of a licensed therapist "designated as a mental health professional under California law or regulation,"[63] under a statutory scheme that *expressly exempts* pastoral counseling.[64] It has no relation at all to anyone's right to marry.

---

[61] *See* Becket Fund *Hollingsworth* & *Windsor* Brief at 31-33 & n.42; Cal. Stats. 2012, ch. 834, §1 (amending Cal. Family Code §400).

[62] *Amicus Curiae* Brief for Catholics for the Common Good at 32.

[63] Cal. Stats. 2012, ch. 835, §2 (to be codified at Cal. Bus. & Prof. Code §865(a)).

[64] *See* Cal. Bus. & Prof. Code §2063 ("Nothing in this chapter shall be construed so as to . . . . regulate, prohibit, or apply to any kind of treatment by prayer, nor interfere in any way with the practice of religion."); *id.* §4980.01(b) ("[t]his chapter shall not apply to any priest, rabbi, or minister of the gospel of any religious denomination when performing counseling services as part of his or her pastoral or professional duties").

The Becket Fund holds out the frightening prospect of "'[p]rivate churches losing their tax exemptions for their opposition to homosexual marriages.'"[65] Yet the Becket Fund's own "touchstone" publication on the subject acknowledges that "so long as large and historically important churches refuse to recognize gay marriages," it is "unlikely that the executive branch of any jurisdiction would try to revoke tax exemptions over the issue."[66] The Becket Fund offers no reason to think that same-sex couples' civil marriages seriously threaten any religious institutions' tax-exempt status.

The Catholic Answers *amicus* brief, nonetheless reports that "[i]n New Jersey, an evangelical ministry was found to have violated state antidiscrimination law for refusing to rent its facilities for a same-sex commitment ceremony."[67] The Catholics for the Common Good *amicus* brief bemoans this "denial of tax exemption for refusal to rent [a] religiously owned pavilion for a civil union ceremony."[68] The Becket Fund's *amicus curiae* briefs below in this proceeding declared that the State of New Jersey had indeed "withdrawn the property tax exemption of a beach-side pavilion owned and operated by a Methodist Church,

---

[65] Becket Fund *Hollingsworth* & *Windsor* Brief at 26 n.36 (citation omitted).

[66] Douglas Laycock, *Afterword* to *Same-Sex Marriage and Religious Liberty* 189, 193 (Douglas Laycock, *et al.*, eds.; The Becket Fund, 2008).

[67] Brief *Amicus Curiae* of Catholic Answers at 19.

[68] *Amicus Curiae* Brief for Catholics for the Common Good at 32.

because the Church refused on religious grounds to host a same-sex civil union ceremony."[69]

In fact, the Becket Fund's assertions were false. The property in question was not owned by any church, but by a residential community, the Ocean Grove Camp Meeting Association (whose trustees must be Methodists) and which "owns all of the land in the seaside community of Ocean Grove, New Jersey,"[70] whose population the 2010 Census placed at 3,342.[71] Ocean Grove leases out residential properties in the resort community, advertising on the Internet that it "welcomes everyone to enjoy this beautiful, seaside community without discrimination based on race, gender, income level, education, religion, or country of origin."[72] It obtained a New Jersey

---

[69] Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Defendants-Intervenors-Appellants and in Support of Reversal at 14 (filed Sept. 24, 2010), *Perry v. Brown* (f.k.a. *Perry v. Schwarzenegger*), 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696), 2010 WL 4075746; *see also* Brief *Amicus Curiae* of The Becket Fund for Religious Liberty in Support of Defendant-Intervenors at 9 (filed Jan. 8, 2010), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292 VRW), 2010 WL 97697 ("In New Jersey, for example, the state has withdrawn the property tax exemption of a beach-side pavilion owned and operated by a Methodist Church, because the Church refused on religious grounds to host a same-sex civil union ceremony.").

[70] *Ocean Grove Camp Meeting Ass'n v. Vespa-Papaleo*, 339 Fed. Appx. 232, 235 (3d Cir. 2009).

[71] *See* Isaacson, *supra* note 7, at 150.

[72] This is from the "Frequently Asked Questions" page of the Ocean Grove Camp Meeting Association ("OGCMA"):

"Green Acres" real-property tax exemption for the community's beachfront boardwalk and pavilion not as religious properties, but as public facilities to be held open for all to enjoy on an equal basis.[73] A lesbian couple, who were long-term members of the residential community, thought that included them, so they applied to use the pavilion for a civil-commitment ceremony.[74]

When Ocean Grove denied its lesbian residents the use of their own residential community's supposedly public facilities, New Jersey officials found probable cause to conclude that it no longer

---

> Q. Does the OGCMA discriminate in offering land leases?
>
> A. No. The OGCMA welcomes everyone to enjoy this beautiful, seaside community without discrimination based on race, gender, income level, education, religion, or country of origin.

Frequently Asked Questions, Ocean Grove Camp Meeting Ass'n, *available online at* http://www.oceangrove.org/pages/faq (accessed Feb. 26, 2013). The beach community's publicly stated policy of nondiscrimination drew many gay and lesbian residents: "By the mid-1990s, gay and lesbian couples were moving in, and by the time the controversy arose, about one-fourth of the residents were estimated to be same-sex couples." Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 Wash. & Lee J. Civil Rts. & Soc. Just. 3, 51-52 (2008) [hereinafter *Microperformances of Identity*].

[73] N.J. Office of the Att'y Gen., Dep't of Law & Pub. Safety, Div. on Civ. Rts, No. PN34XB-03008, Finding of Probable Cause, Bernstein v. Parker (Dec. 29, 2008).

[74] Poirier, *Microperformances of Identity*, *supra* note 72, at 76.

qualified for the "Green Acres" tax exemption accorded to properties made available for nondiscriminatory public use.[75] No church's tax-exempt status was revoked, or even questioned.

Fears that same-sex couples' marriages pose grave threats to religious liberty are not grounded in reality.

CONCLUSION

Consistent with principles of religious liberty recognized in *Perez* and *Turner*, and with equal protection of the laws for *all* Californians, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

ERIC ALAN ISAACSON
(Counsel of Record)
655 West Broadway, #1900
San Diego, CA 92101
Telephone: (619)231-1058
Email: eisaacson@rgrdlaw.com

STACEY MARIE KAPLAN
Kessler Topaz Meltzer & Check, LLP
One Sansome Street, #1850
San Francisco, CA 94104
Telephone: (415)400-3000

Attorneys for *Amici Curiae* California Council of Churches; California Faith for Equality; Unitarian Universalist Legislative Ministry California; Northern California Nevada Conference,

[75] *See* Isaacson, *supra* note 7, at 150-51.

United Church of Christ; Southern California Nevada Conference, United Church of Christ; California Network of Metropolitan Community Churches

DATED: February 28, 2013