

No. 12-307

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR, et al.,
Respondents.

**On Writ Of Certiorari To The United States
Court Of Appeals For The Second Circuit**

**BRIEF OF *AMICI CURIAE* BISHOPS OF THE
EPISCOPAL CHURCH IN THE STATES OF
CALIFORNIA, CONNECTICUT, IOWA, MAINE,
MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE,
NEW YORK, VERMONT, AND WASHINGTON AND
THE DISTRICT OF COLUMBIA; THE JEWISH
THEOLOGICAL SEMINARY OF AMERICA;
MANHATTAN CONFERENCE OF THE
METROPOLITAN NEW YORK SYNOD OF THE
EVANGELICAL LUTHERAN CHURCH IN AMERICA;
THE RABBINICAL ASSEMBLY; THE
RECONSTRUCTIONIST RABBINICAL ASSOCIATION;
RECONSTRUCTIONIST RABBINICAL COLLEGE;
RABBI AKIVA HERZFELD OF SHAAREY TPHILOH;
THE UNION FOR REFORM JUDAISM; UNITARIAN
UNIVERSALIST ASSOCIATION; UNITED CHURCH
OF CHRIST; THE UNITED SYNAGOGUE OF
CONSERVATIVE JUDAISM; AFFIRMATION;
COVENANT NETWORK OF PRESBYTERIANS; FRIENDS
FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND
QUEER CONCERNS; METHODIST FEDERATION FOR
SOCIAL ACTION; MORE LIGHT PRESBYTERIANS;
PRESBYTERIAN WELCOME; RECONCILING
MINISTRIES NETWORK; RECONCILINGWORKS:
LUTHERANS FOR FULL PARTICIPATION; AND
RELIGIOUS INSTITUTE, INC. ON THE MERITS AND
IN SUPPORT OF AFFIRMANCE IN FAVOR OF
RESPONDENT EDITH SCHLAIN WINDSOR**

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<i>Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC</i> , 132 S. Ct. 694 (2012)	29, 32, 36
<i>Larson v. Valente</i> , 456 U.S. 228 (1982)	7, 37
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967).....	31
<i>Maynard v. Hill</i> , 125 U.S. 190 (1888)	7, 20
<i>McCollum v. Bd. of Educ.</i> , 333 U.S. 203 (1948)	29
<i>Thomas v. Review Bd. of Indiana Employment Sec. Div.</i> , 450 U.S. 707 (1981).....	39
OTHER AUTHORITIES	
11th Churchwide Assembly, Evangelical Lu- theran Church in America, <i>Human Sexuali- ty: Gift and Trust</i> (Aug. 19, 2009), http:// www.elca.org/What-We-Believe/Social-Issues/ Social-Statements/JTF-Human-Sexuality.aspx	17
107th Convention of the Central Conference of American Rabbis, <i>Resolution on Gay and Lesbian Marriage</i> (Mar. 1996), http:// ccarnet.org/rabbis-speak/resolutions/1996/on- gay-and-lesbian-marriage-1996/	23
111th Convention of the Central Conference of American Rabbis, <i>On Same Gender Officiation</i> (Mar. 2000), http://ccarnet.org/ rabbis-speak/resolutions/2000/same-gender- officiation/	18

TABLE OF AUTHORITIES – Continued

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American Friends Service Committee, <i>AFSC Board Statement on Equal Marriage</i> (2004), http://afsc.org/sites/afsc.civicaactions.net/files/documents/AFSC%20Board%20Minute.pdf	24
Bishops' Committee on Marriage and Family, <i>Always Our Children: A Pastoral Message To Parents Of Homosexual Children And Suggestions For Pastoral Ministers</i> (1997), http://www.usccb.org/issues-and-action/human-life-and-dignity/homosexuality/always-our-children.cfm	27
Board of Pensions of the Presbyterian Church (U.S.A.), <i>Same-Gender Partner Benefits Approved for Benefits Plan of Presbyterian Church (U.S.A.)</i> (Mar. 3, 2012), http://web.pensions.org/Publications/pensions/Home/Forms%20&%20Publications/Booklets%20&%20Brochures/DomesticPartnerpressrelease.pdf	19
Michael J. Broyde, <i>The Covenant-Contract Dialectic in Jewish Marriage and Divorce Law, in Covenant Marriage in Comparative Perspective</i> (John Witte & Eliza Ellison eds., 2005)	39
<i>Catechism of the Catholic Church</i> (2d ed. 2000)	31
Central Conference of American Rabbis, <i>Report of the Ad Hoc Committee on Homosexuality and the Rabbinate of the Central Conference of American Rabbis Annual Convention</i> (1990), http://borngay.procon.org/sourcefiles/CCAR_Homosexuality.pdf	9, 14

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E. Dorff, D. Nevins & A. Reisner, <i>Rituals and Documents of Marriage and Divorce for Same-Sex Couples</i> , Rabbinical Assembly (Spring 2012).....	18
Barbara Dunlap-Berg, <i>Church membership tops 12 million</i> , United Methodist News Feed, http://www.umc.org/site/apps/nlnet/content3.aspx?c=lwL4KnN1LtH&b=2789393&ct=9135453	10
Evangelical Lutheran Church in America, <i>Frequently Asked Questions about the 2009 Churchwide Assembly actions regarding human sexuality</i> , http://www.elca.org/What-We-Believe/Social-Issues/Social-Statements/JTF-Human-Sexuality/cwafaqs.aspx	11
Evangelical Lutheran Church in America, <i>History of the ELCA, A Union of Common Beliefs</i> , http://www.elca.org/Who-We-Are/History.aspx	11
First Parish Church in Plymouth, <i>Resolution Demanding That All Persons, Regardless Of Sexual Orientation Or Gender Identification, Receive Equal Treatment Under The United States Constitution And The Laws Of The Land</i> (Feb. 4, 2013), https://www.dropbox.com/s/3ptdnty9xvx6sta/same%20sex%20marriage%20resolution%2002-02-13.doc	25

TABLE OF AUTHORITIES – Continued

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First Presidency, <i>Statement on the Status of Blacks</i> (Dec. 15, 1969), in <i>Neither White Nor Black: Mormon Scholars Confront the Race Issue in a Universal Church</i> (Lester E. Bush, Jr. & Armand L. Mauss eds., 1984).....	31
General Assembly of the Unitarian Universalist Association, <i>Confronting Sexual Orientation and Gender Identity Discrimination</i> (2010), http://www.uua.org/statements/statements/169267.shtml	12
General Assembly of the Unitarian Universalist Association, <i>Oppose Federal Marriage Amendment</i> (2004), http://www.uua.org/statements/statements/13433.shtml	22
General Assembly of the Unitarian Universalist Association, <i>Support of the Right to Marry for Same-Sex Couples</i> (1996), http://www.uua.org/statements/statements/14251.shtml	17, 21
General Synod of the United Church of Christ, <i>In Support of Equal Marriage Rights for All</i> (July 4, 2005), http://www.ucc.org/assets/pdfs/in-support-of-equal-marriage-rights-for-all-with-background.pdf	22
General Synod of the United Church of Christ, <i>Opening and Affirming Resolution</i> (July 2, 1985), http://www.uccoalition.org/programs/ona/background/1985/	9
Laurie Goodstein, <i>Episcopal Vote Reopens a Door to Gay Bishops</i> , N.Y. Times, July 14, 2009	14

TABLE OF AUTHORITIES – Continued

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Laurie Goodstein, <i>Episcopalians Approve Rite to Bless Same-Sex Unions</i> , N.Y. Times, July 10, 2012	19
Laurie Goodstein, <i>Openly Gay Man Is Made A Bishop</i> , N.Y. Times, Nov. 3, 2003.....	14
Bishop Mark S. Hanson, <i>Message to Rostered Leaders</i> (Aug. 22, 2009), http://www.elca.org/What-We-Believe/Social-Issues/Social-Statements/JTF-Human-Sexuality/Message-to-Rostered-Leaders.aspx	14, 20
Mark W. Harris, <i>Unitarian Universalist Origins: Our Historic Faith</i> (Oct. 2002), http://www.uua.org/info/origins.html	21
<i>Interracial Marriage Discouraged</i> , The Deseret News, June 17, 1978	31
Michael G. Lawler, <i>Interchurch Marriages: Theological and Pastoral Reflections, in Marriage in the Catholic Tradition: Scripture, Tradition, and Experience</i> (Todd A. Salzman, <i>et al.</i> , eds., 2004).....	30
LGBT Ministries Multicultural Growth and Witness, Unitarian Universalist Association, <i>LGBT History & Facts for Unitarian Universalists</i> (2011), http://www.uua.org/documents/lgbtq/history.pdf	17
Leadership Council on Conservative Judaism, <i>Statement on Intermarriage</i> (Mar. 7, 1995), http://www.mazorguide.com/living/Denominations/conservative-intermarriage.htm	30

TABLE OF AUTHORITIES – Continued

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William P. Marshall, <i>Solving the Free Exercise Dilemma: Free Exercise as Expression</i> , 67 Minn. L. Rev. 545 (1983).....	34
Muslims for Progressive Values, <i>Muslims for Progressive Values Applauds President Obama’s Support of Marriage Equality</i> (May 9, 2012), http://www.mpvusa.org/uploads/Obama_Supports_Same_Sex	27
Natural Family Planning Program, United States Conference of Catholic Bishops, <i>Conjugal Love</i> , http://www.usccb.org/issues-and-action/marriage-and-family/natural-family-planning/upload/nfp-conjugal-love.pdf	38
Mireya Navarro, <i>Openly Gay Priest Ordained in New Jersey</i> , N.Y. Times, Dec. 17, 1989	14
New England Yearly Meeting Faith and Practice Online, <i>General Organization and Structure of Meeting for Business</i> , http://www.neym.org/fponline/general.html	16
New England Yearly Meeting 2009: Minute 53, <i>Minute of Affirmation for Consideration of Monthly Meetings</i> (2009), http://www.neym.org/2009Sessions/2009_NEYM-AdultMinutes.pdf	15
Gustav Niebuhr, <i>Interracial Dating Ban to End at Bob Jones University</i> , N.Y. Times, Mar. 4, 2000	31
Michael Perry, <i>Religion in Politics</i> , 29 U.C. Davis L. Rev. 729 (1996)	7

TABLE OF AUTHORITIES – Continued

	Page
The Pew Forum on Religion & Public Life, <i>Religion and Attitudes Toward Same-Sex Marriage</i> (Feb. 7, 2012), http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religion-and-Attitudes-Toward-Same-Sex-Marriage.aspx	27
The Pew Forum on Religion & Public Life, <i>Religious Beliefs and Practices: Diverse and Politically Relevant</i> (June 2008), http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf	6, 7
Philadelphia Yearly Meeting, <i>Minute of the Philadelphia Yearly Meeting</i> (July 27, 2006), http://flgbtqc.quaker.org/minutes.html#philadelphia	16
Presbyterian Church (U.S.A.), <i>Presbyterian Church (U.S.A.) Approves Change In Ordination Standard</i> (May 10, 2011), http://www.pcusa.org/news/2011/5/10/presbyterian-church-us-approves-change-ordination/	14
Presbyterian Church (U.S.A.), <i>Same-Gender Marriage</i> (2012), http://www.pcusa.org/media/uploads/oga/publications/assemblyinbrief.pdf	19
Public Religion Research Institute, <i>Generations at Odds: The Millennial Generation and the Future of Gay and Lesbian Rights</i> (Aug. 29, 2011), http://publicreligion.org/site/wp-content/uploads/2011/09/PRRI-Report-on-Millennials-Religion-Gay-and-Lesbian-Issues-Survey.pdf	13

TABLE OF AUTHORITIES – Continued

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Rabbinical Assembly, <i>Resolution In Support Of Equal Rights And Inclusion For Gay, Lesbian, Bisexual, And Transgender (GLBT) Persons</i> (2011), http://www.rabbinicalassembly.org/story/resolution-support-equal-rights-and-inclusion-gay-lesbian-bisexual-and-transgender-glbtperson?tp=212	24
ReconcilingWorks, <i>RIC Congregations List</i> , http://www.reconcilingworks.org/ric/ric-congregations-list#results	20
Reconstructionist Rabbinical Association, <i>et al.</i> , <i>Reconstructionist Movement Endorses Civil Marriage for Same-Sex Couples</i> (Apr. 2004), http://www.rrc.edu/news-media/news/reconstructionist-movement-endorses-civil-marriage-same-sex-couples	23
Reconstructionist Rabbinical College, <i>Directory of Reconstructionist Congregations and Havurot</i> , http://www.jewishrecon.org/directory?ref=jrf	12
Religious Institute, Inc., <i>List of Endorsers</i> (Jan. 10, 2012), http://religiousinstitute.org/list-of-endorsers (last visited Feb. 23, 2013).....	25
Religious Institute, Inc., <i>Religious Declaration on Sexual Morality, Justice, and Healing</i> (Jan. 2010), http://religiousinstitute.org/node/293	24

TABLE OF AUTHORITIES – Continued

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Resolution 2000-D039, 73rd General Convention of The Episcopal Church (2000), http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2000-D039	19
Resolution 2006-A095, 75th General Convention of The Episcopal Church (2006), http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2006-A095	25
Resolution 2006-A167, 75th General Convention of The Episcopal Church (2006), http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2006-A167	10
Resolution 2012-A049, 77th General Convention of The Episcopal Church (2012), http://www.generalconvention.org/gc/resolutions	19
Resolution 2012-D018, 77th General Convention of The Episcopal Church (2012), http://www.generalconvention.org/gc/resolutions	26
Rosemary Radford Ruether, <i>Women, Reproductive Rights and the Catholic Church</i> , 16 <i>Feminist Theology</i> 184 (Jan. 2008)	7
Pamela Smoot, <i>Race Relations: How Do Baptists Treat Their Brothers and Sisters?</i> , in <i>History Speaks To Hard Questions Baptists Ask</i> (2009), http://www.baptisthistory.org/smootracerelations.pdf	7

TABLE OF AUTHORITIES – Continued

Page

South Central Yearly Meeting, <i>Minute of the South Central Yearly Meeting of Friends</i> (Apr. 1-4, 1999), http://flgbtqc.quaker.org/minutes.html#southcentral	16
Amy Stone, <i>Out and Ordained, New York's Jewish Theological Seminary Graduates its First Openly Lesbian Rabbi</i> , <i>Lilith</i> (2011), http://www.lilith.org/pdfs/LILSu11_FINAL_Outandordained.pdf	14
Theological Task Force on Peace, Unity and Purity of the Church, Final Report as approved by the 217th General Assembly of the Presbyterian Church (U.S.A.), <i>A Season of Discernment</i> (2006), http://apps.pcusa.org/peaceunitypurity/finalreport/final-report-revised-english.pdf	11
Alexis de Tocqueville, <i>Democracy in America</i> (J.P. Mayer ed. (1969), George Lawrence trans. (1966), First Harper Perennial Modern Classics (2006))	2
Lisa Tuttle, <i>Reconstructionist Movement Issues Joint Statement On Same-Sex Marriage Bans</i> (Nov. 19, 2008), http://archive.jewishrecon.org/same-sex-marriage-bans?ref=jrf	18
Union of American Hebrew Congregations, <i>Civil Marriage for Gay and Lesbian Jewish Couples</i> (Oct. 29–Nov. 2, 1997), http://urj.org/about/union/governance/reso//?syspage=article&item_id=2000	23

TABLE OF AUTHORITIES – Continued

	Page
Union of Reform Judaism, 45th General Assembly, <i>Human Rights Of Homosexuals</i> (Nov. 1977), http://urj.org/about/union/governance/reso/?syspage=article	9
Union of Reform Judaism, 60th General Assembly, <i>Gay And Lesbian Jews</i> (Nov. 1989), http://urj.org/about/union/governance/reso/?syspage=article&item_id=2065	9
Unitarian Universalist Association, <i>Unitarian Universalism and LGBTQ Issues: History & Facts</i> (Aug. 21, 2012), http://www.uua.org/lgbtq/history/index.shtml	17
Unitarian Universalist Association, <i>Unitarian Universalist LGBT History Timeline</i> , http://www.uua.org/lgbtq/history/20962.shtml	13
Unitarian Universalist Association, <i>UUA Membership Statistics, 1961-2012</i> (Dec. 6, 2012), http://www.uua.org/directory/data/demo/graphics/281427.shtml	11
United Church of Christ, <i>Order for Marriage, An Inclusive Version</i> , http://www.ucc.org/worship/pdfs/323_346i_order-for-marriage-inclusive.pdf	18
United Church of Christ, <i>Short Course in the History of the United Church of Christ</i> , http://www.ucc.org/about-us/short-course/shortcourse.pdf	21

TABLE OF AUTHORITIES – Continued

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United Methodist Church, 2008 Book of Resolutions: Resolution #2041, <i>Church To Be In Ministry To Persons Of All Sexual Orientations</i> (amended and readopted 2008), http://www.umc.org/site/apps/nlnet/content2.aspx?c=lwL4KnN1LtH&b=4951419&content_id=%7BCAF9E91C-06A0-4D90-8AC2-97E9A0102D1B%7D&notoc=1	10
United States Conference of Catholic Bishops, <i>Between Man And Woman: Questions And Answers About Marriage And Same-Sex Unions</i> (2003), http://www.usccb.org/issues-and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/questions-and-answers-about-marriage-and-same-sex-unions	26
United States Conference of Catholic Bishops, <i>Compendium – Catechism of the Catholic Church</i> (2006).....	32
United States Conference of Catholic Bishops, <i>United States Catholic Catechism For Adults</i> (2006).....	32
Shawn I. Zevit, <i>JRF Homosexuality Report and Inclusion of GLBT Persons</i> , http://archive.jewishrecon.org/node/1742?ref=jrf	12, 13

INTERESTS OF THE *AMICI CURIAE*¹

Amici curiae (“*Amici*”) represent a broad range of religious groups, organizations, and leaders who support equal treatment for same-sex couples affecting state-regulated civil marriage. While *Amici* come from faiths that have approached issues with respect to lesbian and gay people and their families in different ways over the years, they are united in the belief that, in our vastly diverse and pluralistic society, particular religious views or definitions of marriage should not be permitted to influence who the state permits to marry or how legally married couples are treated by the federal government. Such rights must be determined by religiously neutral principles of equal protection under the law.

The individual interests of each of the *Amici* are listed in Appendix A to this brief.



¹ Pursuant to Rules 37.3 and 37.6 of the Rules of the Supreme Court, all parties have consented to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no persons or entities other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over a century and a half ago, Alexis de Tocqueville reflected on the central role of religion in the birth of the English colonies in America and its “peculiar power” in the cultural life of the United States, while simultaneously observing the necessary corollary that lies at the heart of religious freedom: “In America religion has, if one may put it so, defined its own limits. There the structure of religious life has remained entirely distinct from the political organization. It has therefore been easy to change ancient laws without shaking the foundations of ancient beliefs.”²

Tocqueville’s reflection bears directly on the case before this Court. By historical and legal tradition, American pluralism extends to religion and its expression. *Amici* here affirm and embody that pluralism and submit that the judgment below should be affirmed as consistent with fundamental principles of equal protection and religious freedom. In contrast to those *amicus curiae* organizations urging reversal that would presume to declare a universal religious belief with respect to marriage,³ *Amici* here bear

² Alexis de Tocqueville, *Democracy in America*, Vol. II, Part 1, Ch. 1, at 432 (J.P. Mayer ed. (1969), George Lawrence trans. (1966), First Harper Perennial Modern Classics (2006)) (paragraph break omitted).

³ See, e.g., Brief for Catholic Answers, *et al.* as *Amici Curiae* Supporting Respondent BLAG at 13, *United States v. Windsor* (Continued on following page)

witness to the diversity of religious viewpoints on marriage across various faiths and denominations.

The American religious panorama embraces a multitude of theological perspectives on lesbian and gay people and same-sex relationships. A vast range of religious perspectives affirms the inherent dignity of lesbian and gay people, their relationships, and their families. This affirmation reflects the deeply rooted belief, common to many faiths, in the essential worth of all individuals and, more particularly, the growing respect accorded within theological traditions to same-sex couples. Thus, some faiths celebrate same-sex couples' marriages identically to those of different-sex couples. Others solemnize same-sex relationships in ways other than marriage.

Faiths embracing same-sex couples – both theologically and with respect to the distinct issue of

(Jan. 28, 2013) (No. 12-307); Brief for Chaplain Alliance for Religious Liberty, *et al.* as *Amici Curiae* Supporting Respondent BLAG at 3-4, *United States v. Windsor* (Jan. 29, 2013) (No. 12-307); Brief for Citizens United, *et al.* as *Amici Curiae* Supporting Respondent BLAG at 30-31, *United States v. Windsor* (Jan. 29, 2013) (No. 12-307); Brief for Liberty, Life and Law Foundation and North Carolina Values Coalition as *Amici Curiae* Supporting Respondent BLAG at 23, *United States v. Windsor* (Jan. 25, 2013) (No. 12-307); Brief for Manhattan Declaration as *Amicus Curiae* Supporting Respondent BLAG at 5, *United States v. Windsor* (Jan. 28, 2013) (No. 12-307); Brief for Westboro Baptist Church as *Amicus Curiae* at 19, *United States v. Windsor* (Jan. 25, 2013) (No. 12-307).

equality under civil law – participate in the mainstream of American religious observance. They include Mainline Protestant denominations such as the United Church of Christ and the Episcopal Church; the Unitarian Universalist Church; portions of the Religious Society of Friends (Quakers); and Judaism’s Reform, Reconstructionist, and Conservative movements. Millions of religious individuals from other faiths also embrace and celebrate same-sex couples, including members of many other Protestant denominations, Roman Catholics, Orthodox Jews, and Muslims. These citizens comprise a major part of the American religious landscape.

Eliminating discrimination in civil marriage will not impinge upon religious doctrine or practice. All religions would remain free – as they are today with nine states and the District of Columbia permitting same-sex couples to marry – to define *religious* marriage in any way they choose. Nor would affirmance interfere with religious institutions’ constitutionally protected speech or operations. The types of conflicts forecast by certain other *amici* already can and sometimes do arise under public accommodation laws whenever religiously affiliated organizations operate in the commercial or governmental spheres. Courts know how to respond if enforcement of civil rights laws overreaches to infringe First Amendment rights. In any event, the issue largely is irrelevant here, because the couples affected by the Defense of Marriage Act (“DOMA”) already are lawfully married under state law. It appears that what those other

amici want is not protection for their own free speech and free exercise rights, but rather immunity from disapproval they may face by those who affirm the rights and relationships of lesbian and gay people.

Certain *amici* supporting reversal have argued that civil recognition for the marriages of same-sex couples would alter a longstanding “Christian” definition of “marriage.”⁴ But this and other religiously based arguments for limiting civil recognition of marriage to different-sex couples cannot constitutionally be given weight by this Court. Crediting such arguments would improperly both enshrine a particular religious belief in the law – itself prohibited under the Establishment Clause – and implicitly privilege religious viewpoints that oppose marriage equality over those that favor it.

For these and other reasons, civil recognition of same-sex relationships, including through marriage, is fundamentally consistent with the religious pluralism woven into the fabric of American law, culture, and society. An affirmance here would not amount to “taking sides” with one religious view against another or constitute an attack on religion. Nor would it

⁴ See Br. for Catholic Answers, *et al.*, *supra* note 3, at 13; Br. for Chaplain Alliance for Religious Liberty, *et al.*, *supra* note 3, at 1-2; Br. for Citizens United, *et al.*, *supra* note 3, at 30-31; Br. for Liberty, Life and Law Foundation and North Carolina Values Coalition, *supra* note 3, at 25; Br. for Manhattan Declaration, *supra* note 3, at 6; Br. for Westboro Baptist Church, *supra* note 3, at 29.

signal a judicial imprimatur on changing social mores. Rather, an affirmance would recognize the creative tension inherent in religions' interface with our pluralistic, changing society while confirming that all, regardless of faith, are entitled to equal protection under the law.

ARGUMENT

Americans are a religious people, but diversely so.⁵ Religious adherents differ on contentious issues,

⁵ According to survey data from the Pew Forum on Religion & Public Life, more than 90% of Americans believe in God or a universal spirit and more than 80% have some formal religious affiliation. U.S. Religious Landscape Survey, Pew Forum on Religion & Public Life, *Religious Beliefs and Practices: Diverse and Politically Relevant* (June 2008), at 5, 8, available at <http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf>. Religious affiliations and viewpoints also are diverse:

- i. While over 75% of religiously affiliated Americans are Christian, this group is comprised of: Protestants, including Evangelical (26.3%), Mainline (18.1%), and Historically Black (6.9%) churches; Roman Catholics (23.9%); Mormons (1.7%); Jehovah's Witnesses (0.7%); Orthodox (0.6%); and Others (0.3%).
 - ii. Other religiously affiliated Americans are diverse as well, comprised of Jews (1.7%), Buddhists (0.7%), Muslims (0.6%), Hindus (0.4%), and other faiths (approximately 1.5%).
 - iii. Yet other sizeable blocks of the American public are unaffiliated, whether agnostic (2.4%), atheist (1.6%), or nothing in particular, whether secular
- (Continued on following page)

and religious bodies have themselves evolved and disagreed over time – on marriage as well as other civil rights and social issues.⁶ In view of that history and the wide range of modern religious thought on same-sex unions, it would be a mistake to elevate any one view on marriage above all others as the “Christian” or “religious” view. Indeed, it would be constitutionally inappropriate, because civil marriage is a secular institution, *see Maynard v. Hill*, 125 U.S. 190, 210 (1888), and the Constitution bars the government from favoring certain religious views over others, *see Larson v. Valente*, 456 U.S. 228, 244 (1982). Religious freedom means that all voices may contribute to our national conversation, but particular religious

and unaffiliated (6.3%) or religious and unaffiliated (5.8%).

Id. at 217.

⁶ See Michael Perry, *Religion in Politics*, 29 U.C. Davis L. Rev. 729, 772 n.94 (1996) (chronicling shifts in religions’ views on usury, the dissolubility of marriages, and slavery, and noting that “[i]n each case one can see the displacement of a principle or principles that had been taken as dispositive”). As one example, the American Baptist Church once believed that churches and other institutions should be separated on the basis of race, but later revised that view. See Pamela Smoot, *Race Relations: How Do Baptists Treat Their Brothers and Sisters?*, in *History Speaks To Hard Questions Baptists Ask* (2009), available at <http://www.baptisthistory.org/smootracereactions.pdf>. As another example, the Roman Catholic Church once sought to curtail women’s suffrage but later championed it. See Rosemary Radford Ruether, *Women, Reproductive Rights and the Catholic Church*, 16 *Feminist Theology* 184, 185 (Jan. 2008).

perspectives on marriage cannot be permitted to control civil recognition of marriage for all.

I. A Wide Cross-Section Of American Religious Traditions Recognizes The Dignity Of Lesbian And Gay People And Their Relationships

With time, and across traditions, religious Americans have affirmed that the dignity of lesbian and gay people logically and theologically follows from the premise that all persons have inherent dignity. In some traditions, this affirmation has affected religious practice – *e.g.*, in the ordination of clergy. In others, it has led to various forms of religious affirmation of same-sex unions. All of this confirms that no one “religious” view of even the rite of marriage predominates in America, putting aside the separate question of whether there is a common religious viewpoint on civil marriage.

A. The Inherent Dignity Of Lesbian And Gay Individuals Informs The Theology Of Numerous Religious Believers And Bodies

Nearly three decades ago, the United Church of Christ, with 1.1 million members today, adopted a policy of membership nondiscrimination with regard

to sexual orientation.⁷ In 1989, the 45th General Assembly for the Union of Reform Judaism, which represents 1.5 million Reform Jews, resolved to “urge [its] member congregations to welcome gay and lesbian Jews to membership, as singles, couples, and families” and to “embark upon a movement-wide program of heightened awareness and education to achieve the fuller acceptance of gay and lesbian Jews in our midst.”⁸ These are but two examples – views on this subject abound, and common to them is the foundational theological belief in the dignity of lesbian and gay Americans *as persons*:

⁷ Resolution, General Synod of the United Church of Christ, *Opening and Affirming Resolution* (July 2, 1985), available at <http://www.uccoalition.org/programs/ona/background/1985/> (citing Romans 12:4 for proposition that “Christians . . . are many members, but . . . one body in Christ” and encouraging congregations to adopt “a Covenant of Openness and Affirmation” with lesbian and gay members of the faith).

⁸ Resolution, Union of Reform Judaism, 60th General Assembly, *Gay And Lesbian Jews* (Nov. 1989), available at http://urj.org/about/union/governance/reso/?syspage=article&item_id=2065. Cf. Resolution, Union of Reform Judaism, 45th General Assembly, *Human Rights Of Homosexuals* (Nov. 1977), available at http://urj.org/about/union/governance/reso/?syspage=article&item_id=2158 (affirming the “belief that private sexual acts between consenting adults are not the proper province of government and law enforcement agencies”); Central Conference of American Rabbis, *Report of the Ad Hoc Committee on Homosexuality and the Rabbinate of the Central Conference of American Rabbis Annual Convention*, at 262 (1990), available at http://borngay.procon.org/sourcefiles/CCAR_Homosexuality.pdf (“all Jews are religiously equal regardless of their sexual orientation”).

- The Episcopal Church, with more than 2.1 million members, has “reaffirm[ed] that gay and lesbian persons are by Baptism full members of the Body of Christ and of The Episcopal Church as ‘children of God who have a full and equal claim with all other persons upon the love, acceptance, and pastoral concern and care of the Church.’”⁹
- The United Methodist Church, with 7.8 million members in the United States,¹⁰ has affirmed that “homosexual persons no less than heterosexual persons are individuals of sacred worth” and that “all persons are equally valuable in the sight of God.”¹¹
- The Evangelical Lutheran Church in America, composed of nearly 4.8 million

⁹ Resolution 2006-A167, 75th General Convention of The Episcopal Church (2006), *available at* http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2006-A167.

¹⁰ See Barbara Dunlap-Berg, *Church membership tops 12 million*, United Methodist News Feed, *available at* <http://www.umc.org/site/apps/nlnet/content3.aspx?c=lwL4KnN1LtH&b=2789393&ct=9135453> (last visited Feb. 23, 2013).

¹¹ 2008 Book of Resolutions: Resolution #2041, United Methodist Church, *Church To Be In Ministry To Persons Of All Sexual Orientations* (amended and readopted 2008), *available at* http://www.umc.org/site/apps/nlnet/content2.aspx?c=lwL4KnN1LtH&b=4951419&content_id=%7BCAF9E91C-06A0-4D90-8AC2-97E9A0102D1B%7D¬oc=1.

members,¹² has articulated its “commit[ment] to welcoming all people, regardless of sexual orientation, and their families into our congregations.”¹³

- The Presbyterian Church (U.S.A.), with 1.9 million members, has concluded that it would be “grave error to deny baptism or church membership to gay and lesbian persons or to withhold pastoral care to them and their families.”¹⁴
- The Unitarian Universalist Church, with over 1,000 congregations,¹⁵ likewise has affirmed the “inherent worth and dignity of every human being, including

¹² See Evangelical Lutheran Church in America, *History of the ELCA, A Union of Common Beliefs*, available at <http://www.elca.org/Who-We-Are/History.aspx> (last visited Feb. 23, 2013).

¹³ Evangelical Lutheran Church in America, *Frequently Asked Questions about the 2009 Churchwide Assembly actions regarding human sexuality*, available at <http://www.elca.org/What-We-Believe/Social-Issues/Social-Statements/JTF-Human-Sexuality/cwafaqs.aspx> (last visited Feb. 23, 2013).

¹⁴ Theological Task Force on Peace, Unity and Purity of the Church, Final Report as approved by the 217th General Assembly of the Presbyterian Church (U.S.A.), *A Season of Discernment*, at 20 (2006), available at <http://apps.pcusa.org/peaceunity/purity/final-report/final-report-revised-english.pdf>.

¹⁵ See Unitarian Universalist Association, *UUA Membership Statistics, 1961-2012* (Dec. 6, 2012), available at <http://www.uua.org/directory/data/demographics/281427.shtml> (last visited Feb. 23, 2013).

lesbian, gay, bisexual, and transgender individuals.”¹⁶

- Reconstructionist Judaism, with nearly 100 congregations in the United States,¹⁷ also has enunciated acceptance of gay and lesbian members, avowing that “the inherent dignity, integrity and equality of human beings” has “primacy over historically conditioned attitudes.”¹⁸

Religious individuals, too, have demonstrated an increasingly positive view of lesbian and gay Americans. According to a Public Religion Research Institute study, *the majority of Americans from most major religious groups* have positive moral and theological views of gay and lesbian people, including 62% of Roman Catholics, 63% of white Mainline Protestants, and 69% of non-Christian, religiously

¹⁶ Business Resolution, General Assembly of the Unitarian Universalist Association, *Confronting Sexual Orientation and Gender Identity Discrimination* (2010), available at <http://www.uua.org/statements/statements/169267.shtml>.

¹⁷ See Reconstructionist Rabbinical College, *Directory of Reconstructionist Congregations and Havurot*, available at <http://www.jewishrecon.org/directory?ref=jrf> (last visited Feb. 23, 2013).

¹⁸ Shawn I. Zevit, *JRF Homosexuality Report and Inclusion of GLBT Persons*, available at <http://archive.jewishrecon.org/node/1742?ref=jrf> (last visited Feb. 23, 2013) (citing Reconstructionist Commission on Homosexuality, *Homosexuality and Judaism: The Reconstructionist Position* (1993)).

affiliated Americans.¹⁹ While individual liberties should not be subject to public opinion polls, these figures put into perspective the statement of *amicus* Becket Fund for Religious Liberty (“Becket Fund”) that most religious adherents belong to bodies that oppose marriage equality.²⁰ Many of the faiths counted in that total (including Roman Catholics and many major Protestant denominations) have a *majority* of adherents who disagree with church leaders on this question.

Meanwhile, 57% of white Mainline Protestants and 50% of American Roman Catholics support the ordination of gay and lesbian clergy.²¹ Unsurprisingly, therefore, some denominations – both Christian and Jewish – long have permitted openly lesbian and gay clergy.²² Others more recently have amended their

¹⁹ Public Religion Research Institute, *Generations at Odds: The Millennial Generation and the Future of Gay and Lesbian Rights*, at 18-19 (Aug. 29, 2011), available at <http://publicreligion.org/site/wp-content/uploads/2011/09/PRRI-Report-on-Millennials-Religion-Gay-and-Lesbian-Issues-Survey.pdf>.

²⁰ See Brief for The Becket Fund for Religious Liberty as *Amicus Curiae* Supporting Respondent BLAG at 6, *United States v. Windsor* (Jan. 28, 2013) (No. 12-307).

²¹ Public Religion Research Institute, *supra* note 19, at 20.

²² The Unitarian Universalist Church called its first openly gay minister to serve as leader for a congregation in 1979. See Unitarian Universalist Association, *Unitarian Universalist LGBT History Timeline*, available at <http://www.uua.org/lgbtq/history/20962.shtml> (last visited Feb. 23, 2013). The seminary for Reconstructionist Jews began accepting gay and lesbian applicants in 1984. See Zevit, *supra* note 18. The Central Conference of American Rabbis endorsed the view in 1990 that

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practices to admit openly lesbian and gay people to various forms of ministry.²³ Such changes have extended to top leadership eligibility as well, as in the election of the first openly gay bishop in the Episcopal Church in 2003.²⁴

“all rabbis, regardless of sexual orientation, be accorded the opportunity to fulfill the sacred vocation that they have chosen.” Central Conference of American Rabbis, *supra* note 8, at 261. The Episcopal Church ordained its first openly gay priest in 1977. See Mireya Navarro, *Openly Gay Priest Ordained in New Jersey*, N.Y. Times, Dec. 17, 1989, at 54.

²³ See, e.g., Presbyterian Church (U.S.A.), *Presbyterian Church (U.S.A.) Approves Change In Ordination Standard* (May 10, 2011), available at <http://www.pcusa.org/news/2011/5/10/presbyterian-church-us-approves-change-ordination/> (reporting that new language in church’s Book of Orders effectively would open ordained ministry to persons in same-gender relationships); Amy Stone, *Out and Ordained, New York’s Jewish Theological Seminary Graduates its First Openly Lesbian Rabbi*, Lilith (2011), available at http://www.lilith.org/pdfs/LILSu11_FINAL_Outandordained.pdf (indicating that Conservative Jewish movement welcomed gay and lesbian rabbinical and cantorial students to Jewish Theological Seminary in 2007); Bishop Mark S. Hanson, *Message to Rostered Leaders* (Aug. 22, 2009), available at <http://www.elca.org/What-We-Believe/Social-Issues/Social-Statements/JTF-Human-Sexuality/Message-to-Rostered-Leaders.aspx> (last visited Feb. 23, 2013) (citing Resolution 2 of the 2009 Evangelical Lutheran Church in America Churchwide Assembly as resolving to find “a way for people in such publicly accountable, lifelong, monogamous, same-gender relationships to serve as rostered leaders of the church”).

²⁴ See Laurie Goodstein, *Openly Gay Man Is Made A Bishop*, N.Y. Times, Nov. 3, 2003, at A1; see also Laurie Goodstein, *Episcopal Vote Reopens a Door to Gay Bishops*, N.Y. Times, July 14, 2009, at A11.

Whether it be the ordination of lesbian and gay clergy, the express welcome to lesbian and gay congregants and their families, or the affirmation that lesbian and gay individuals possess the same inherent dignity as any other person, the American religious landscape is one that includes same-sex couples and their families and that affirms their role in the faith community.

B. A Vast Spectrum Of American Faith Groups And Religious Observers Affirms Same-Sex Couples' Relationships In A Multitude Of Ways, Including By Celebrating And Solemnizing Their Marriages

Loving, committed relationships that same-sex couples have elected to enter also have been accorded doctrinal and theological affirmation in many faiths – unsurprisingly, in ways as diverse as America's religious families. For example, having witnessed “[f]or many years . . . the blessings of having same-sex couples and marriages in [their] midst,” and ascribing these blessings to “the work of the Spirit,” the New England Yearly Meeting of Friends (Quakers) reached a formal consensus in 2009 to rejoice in same-sex couples' marriages.²⁵ The Evangelical

²⁵ See New England Yearly Meeting 2009: Minute 53, *Minute of Affirmation for Consideration of Monthly Meetings*, at 32 (2009), available at http://www.neym.org/2009Sessions/2009_NEYM-AdultMinutes.pdf:

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Lutheran Church in America has described the manner in which same-sex unions are, and are

For many years, many of our monthly meetings have experienced the blessings of having same-sex couples and marriages in our midst. With every marriage taken under its care, the meeting affirms that each relationship is the work of the Spirit, and a blessing to the couple, to their families and to the Friends community. We affirm the good order of same-sex marriages that are and have been conducted in some monthly meetings of [New England Yearly Meeting]. We encourage all of our constituent monthly meetings to discern how they can best offer to all couples the same care, and affirmations of their leadings to walk together in love.

*See also, e.g., Philadelphia Yearly Meeting, Minute of the Philadelphia Yearly Meeting (July 27, 2006), available at <http://flgbtqc.quaker.org/minutes.html#philadelphia> (last visited Feb. 23, 2013) (“affirm[ing] the marriage of same-gender couples conducted under the care of Monthly Meetings of the Religious Society of Friends”); South Central Yearly Meeting, *Minute of the South Central Yearly Meeting of Friends* (Apr. 1-4, 1999), available at <http://flgbtqc.quaker.org/minutes.html#southcentral> (last visited Feb. 23, 2013) (“endorses[ing] the marriages of individuals under the care of Monthly Meetings without regard to gender”).*

Friends are organized into monthly, quarterly, and yearly meetings. There is no national or international body of Friends that is superior in authority to the separate yearly meetings. *See* New England Yearly Meeting Faith and Practice Online, *General Organization and Structure of Meeting for Business*, available at <http://www.neym.org/fponline/general.html> (last visited Feb. 23, 2013). Nearly all yearly meetings, including New England, are represented on the Friends World Committee for Consultation; and New England Yearly Meeting is associated with other yearly meetings in the Friends United Meeting and in the Friends General Conference.

expected to be, like different-sex unions in several constitutive dimensions: “[T]he neighbor and community are best served when same-gender relationships are lived out with lifelong and monogamous commitments that are held to the same rigorous standards, sexual ethics, and status as heterosexual marriage. [We] surround such couples and their lifelong commitments with prayer to live in ways that glorify God, find strength for the challenges that will be faced, and serve others.”²⁶

Support for same-sex relationships in religious doctrine and practice likewise has informed a diverse array of formal marriage rituals. The Unitarian Universalist Association began celebrating the unions of same-sex couples as it would any other consenting adult couple’s union in 1979 and formally affirmed this practice in 1984.²⁷ The Conservative, Reform, and Reconstructionist Jewish movements allow their

²⁶ See, e.g., 11th Churchwide Assembly, Evangelical Lutheran Church in America, *Human Sexuality: Gift and Trust* (Aug. 19, 2009), available at <http://www.elca.org/What-We-Believe/Social-Issues/Social-Statements/JTF-Human-Sexuality.aspx>.

²⁷ See LGBT Ministries Multicultural Growth and Witness, Unitarian Universalist Association, *LGBT History & Facts for Unitarian Universalists* (2011), available at <http://www.uua.org/documents/lgbtq/history.pdf>; Resolution of Immediate Witness, General Assembly of the Unitarian Universalist Association, *Support of the Right to Marry for Same-Sex Couples* (1996), available at <http://www.uua.org/statements/statements/14251.shtml>; Unitarian Universalist Association, *Unitarian Universalism and LGBTQ Issues: History & Facts* (Aug. 21, 2012), available at <http://www.uua.org/lgbtq/history/index.shtml> (last visited Feb. 23, 2013).

rabbis to perform religious wedding ceremonies for same-sex couples. Indeed, this practice was approved by a unanimous vote of the Rabbinical Assembly's Committee on Jewish Law and Standards.²⁸ The United Church of Christ promulgated a new Order for Marriage – a template for marriage ceremonies – so that it could be used in any marriage ceremony regardless of gender.²⁹ The Episcopal Church acknowledged in 2000 that its membership includes same-sex couples living in “lifelong committed relationships . . . characterized by fidelity, monogamy, mutual affection and respect, careful, honest

²⁸ See, e.g., E. Dorff, D. Nevins & A. Reisner, *Rituals and Documents of Marriage and Divorce for Same-Sex Couples*, Rabbinical Assembly (Spring 2012) (endorsing Conservative rabbis' right to solemnize marriages of same-sex couples and memorializing 13-0 vote by the Rabbinical Assembly's Committee on Jewish Law and Standards to approve endorsement); *id.* at 6 (“The Rabbinical Assembly maintains standards of rabbinic practice regarding marriage, and we shall apply the same standards to same-sex couples.”); Resolution, 111th Convention of the Central Conference of American Rabbis, *Resolution On Same Gender Officiation* (Mar. 2000), available at <http://ccarnet.org/rabbis-speak/resolutions/2000/same-gender-officiation/> (Reform movement); Lisa Tuttle, *Reconstructionist Movement Issues Joint Statement On Same-Sex Marriage Bans* (Nov. 19, 2008), available at <http://archive.jewishrecon.org/same-sex-marriage-bans?ref=jrf> (last visited Feb. 23, 2013) (noting that in series of resolutions beginning in 1993 Reconstructionist movement affirmed holiness of commitments made by same-sex couples).

²⁹ United Church of Christ, *Order for Marriage, An Inclusive Version*, available at http://www.ucc.org/worship/pdfs/323_346i_order-for-marriage-inclusive.pdf.

communication and the holy love which enables those in such relationships to see in each other the image of God,” and in 2012 approved a provisional liturgy for the blessing of same-sex unions that may be used with the permission of the local bishop.³⁰ And some faiths that do not celebrate or solemnize marriages of same-sex couples per se accord recognition to them in various other ways.³¹

³⁰ See Resolution 2000-D039, 73rd General Convention of The Episcopal Church (2000), *available at* http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2000-D039; Resolution 2012-A049, 77th General Convention of The Episcopal Church (2012), *available at* <http://www.generalconvention.org/gc/resolutions>; see also Laurie Goodstein, *Episcopalians Approve Rite to Bless Same-Sex Unions*, N.Y. Times, July 10, 2012, at A15.

³¹ For example, although the Presbyterian Church (U.S.A.) does not formally solemnize same-sex couples’ marriages, the church through its General Assembly overwhelmingly voted in 2012 (by a vote of 489 to 152) to “move the whole Presbyterian Church (U.S.A.) into a season of serious study and discernment concerning its meaning of Christian marriage.” 2012 Assembly In Brief, Presbyterian Church (U.S.A.), *Same-Gender Marriage*, at 3 (2012), *available at* <http://www.pcusa.org/media/uploads/oga/publications/assemblyinbrief.pdf>. Same-gender domestic partners of members enrolled in the church’s benefits plan became eligible for spousal and child benefits beginning in 2013. See Board of Pensions of the Presbyterian Church (U.S.A.), *Same-Gender Partner Benefits Approved for Benefits Plan of Presbyterian Church (U.S.A.)* (Mar. 3, 2012), *available at* <http://web.pensions.org/Publications/pensions/Home/Forms%20%20Publications/Booklets%20%20Brochures/DomesticPartnerpressrelease.pdf>.

The Evangelical Lutheran Church in America’s 2009 Churchwide Assembly, meanwhile, resolved by a vote of 619 to
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In short, even limited to the sphere of *religious* marriage, organized religion in the United States exhibits a tremendous diversity of views and practices regarding unions of same-sex couples.

II. Recognizing The Necessary Distinction Between Civil And Religious Marriage, A Growing Number Of Faiths Support Civil Marriage Equality

More than a century ago, this Court held that “marriage is often termed . . . a civil contract . . . and does not require any religious ceremony for its solemnization.” *Maynard*, 125 U.S. at 210. *Amici* are therefore mindful that their own theological perspectives on marriage are distinct from the civil law on marriage. Recognizing that civil and religious marriage necessarily are two different things, and further undercutting any claim that religion speaks with one voice on marriage, many religions – including *Amici*

402 to “commit itself to finding ways to allow congregations that choose to do so to recognize, support and hold publicly accountable lifelong, monogamous, same-gender relationships.” Hanson, *supra* note 23. Following that action, more than 300 Evangelical Lutheran congregations have performed blessings over same-sex couples’ unions, while many more have adopted other policies and practices affirming same-sex couples’ relationships. See ReconcilingWorks, *RIC Congregations List*, available at <http://www.reconcilingworks.org/ric/ric-congregations-list#results> (last visited Feb. 23, 2013).

here – have distinct positions supporting equal *civil* marriage rights for same-sex couples.³²

Two Christian denominations that trace their history directly to the Puritans of New England support civil marriage for gay and lesbian couples.³³ Almost seventeen years ago, in 1996, the Unitarian Universalist Association – discussed above regarding its practice of *religiously* solemnizing same-sex unions – formally resolved to support equal civil marriage rights in part because the marriage equality debate “ha[d] focused on the objections of certain religious communities” to equal access to marriage.³⁴ In 2004, the Association further affirmed that “Civil

³² *Amici* do not suggest that their spiritual views on civil marriage equality should be imposed on anyone else. Rather, they present some of their beliefs here to counter the notion that any one segment of the religious community can claim divine or some other universally normative authority as a basis for exclusively reserving civil marriage for heterosexual couples. See generally Br. for Catholic Answers, *et al.*, *supra* note 3; Br. for Liberty, Life and Law Foundation and North Carolina Values Coalition, *supra* note 3; Br. for Manhattan Declaration, *supra* note 3; Br. for Westboro Baptist Church, *supra* note 3.

³³ See generally Mark W. Harris, *Unitarian Universalist Origins: Our Historic Faith* (Oct. 2002), available at <http://www.uua.org/info/origins.html> (last visited Feb. 23, 2013); United Church of Christ, *Short Course in the History of the United Church of Christ*, available at <http://www.ucc.org/about-us/short-course/shortcourse.pdf> (last visited Feb. 23, 2013).

³⁴ Resolution of Immediate Witness, General Assembly of the Unitarian Universalist Association, *Support of the Right to Marry for Same-Sex Couples* (1996), available at <http://www.uua.org/statements/statements/14251.shtml>.

Marriage is a Civil Right,” and opposed any amendment of the United States Constitution to bar same-sex couples from marrying.³⁵ The following year, in 2005, the United Church of Christ “affirm[ed] equal marriage rights for couples regardless of gender and declar[ed] that the government should not interfere with couples regardless of gender who choose to marry and share fully and equally in the rights, responsibilities and commitment of legally recognized marriage.”³⁶

³⁵ Action of Immediate Witness, General Assembly of the Unitarian Universalist Association, *Oppose Federal Marriage Amendment* (2004), available at <http://www.uua.org/statements/statements/13433.shtml>.

³⁶ Resolution, General Synod of the United Church of Christ, *In Support of Equal Marriage Rights for All* (July 4, 2005), available at <http://www.ucc.org/assets/pdfs/in-support-of-equal-marriage-rights-for-all-with-background.pdf>. Echoing the proper distinction between religious and civil marriage, the United Church of Christ General Synod concluded that “theologically and biblically, there is neither justification for denying any couple, regardless of gender, the blessings of the church nor for denying equal protection under the law in the granting of a civil marriage license, recognized and respected by all civil entities.” *Id.* See also *id.* (“[L]egislation to ban recognition of same-gender marriages further undermine[s] the civil liberties of gay and lesbian couples and contributes to a climate of misunderstanding and polarization increasing hostility against gays and lesbians.”).

In addition, the Reform,³⁷ Reconstructionist,³⁸ and Conservative³⁹ movements of Judaism all support

³⁷ At its 1997 General Assembly, the Union of American Hebrew Congregations (now the Union for Reform Judaism) resolved to “[s]upport secular efforts to promote legislation which would provide through civil marriage equal opportunity for gay men and lesbians.” General Assembly Resolution, Union of American Hebrew Congregations, *Civil Marriage for Gay and Lesbian Jewish Couples* (Oct. 29–Nov. 2, 1997), available at http://urj.org/about/union/governance/reso/?syspage=article&item_id=2000. As part of the foundation for this resolution, the Union of American Hebrew Congregations recognized that, “[n]o less than heterosexual couples, gay men or lesbians living in monogamous domestic relationships have demonstrated, like their counterparts, love for one another, compassion for the sick, and grief for the dead.” *Id.* The 1997 resolution built on a 1996 resolution of the Central Conference of American Rabbis (“CCAR”) “support[ing] the right of gay and lesbian couples to share fully and equally in the rights of civil marriage.” Resolution, 107th Convention of the Central Conference of American Rabbis, *On Gay and Lesbian Marriage* (Mar. 1996), available at <http://ccarnet.org/rabbis-speak/resolutions/1996/on-gay-and-lesbian-marriage-1996/>. The CCAR resolution specifically recognized that civil marriage is a question of civil law and thus completely distinct from rabbinic officiation at religious marriages. *Id.*

³⁸ The Jewish Reconstructionist movement adopted a resolution in favor of full civil marriage equality for same-sex couples. See Reconstructionist Rabbinical Association, *et al.*, *Reconstructionist Movement Endorses Civil Marriage for Same-Sex Couples* (Apr. 2004), available at <http://www.rrc.edu/news-media/news/reconstructionist-movement-endorses-civil-marriage-same-sex-couples>. See *id.* (“[T]he Reconstructionist movement now endorses and supports the right of same-sex couples to share fully and equally in the rights, responsibilities, and commitments of civil marriage.”).

³⁹ The Rabbinical Assembly – representing Conservative Judaism – resolved in 2011 to “support the extension of civil

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equal civil marriage rights for same-sex couples, as does the American Friends Service Committee of the Religious Society of Friends (Quakers).⁴⁰ More than three thousand clergy from numerous faiths have endorsed an open letter by the Religious Institute, Inc. calling for marriage equality.⁴¹ *Amici* also note

rights and privileges granted to married persons to same sex couples,” and as early as 1990, had resolved to “work for full and equal civil rights for gays and lesbians in our national life.” Resolution, Rabbinical Assembly, *Resolution In Support Of Equal Rights And Inclusion For Gay, Lesbian, Bisexual, And Transgender (GLBT) Persons* (2011), available at <http://www.rabbinicalassembly.org/story/resolution-support-equal-rights-and-inclusion-gay-lesbian-bisexual-and-transgender-glb-person?tp=212>.

⁴⁰ In 2004, the Executive Committee of the American Friends Service Committee Board of Directors, acting at the direction of the full board, approved a “minute” setting forth its “support for equal civil marriage rights for lesbian, gay, bisexual, and transgender people.” See American Friends Service Committee, *AFSC Board Statement on Equal Marriage* (2004), available at <http://afsc.org/sites/afsc.civicaactions.net/files/documents/AFSC%20Board%20Minute.pdf>. Noting that some advocate civil unions for same-sex couples, while reserving civil marriage for heterosexual couples, the Executive Committee disagreed: “It is our belief that government sanction should be applied equally. All couples should be granted civil union licenses or all should be granted marriage licenses.” *Id.* Like *Amici* here, the American Friends Service Committee Executive Committee was “careful to distinguish between civil law, in which no single religious view should predominate, and the right of various faith traditions, denominations, and congregations to decide for themselves whether they will perform, support, or recognize [same-sex] marriages.” *Id.*

⁴¹ Religious Institute, Inc., *Religious Declaration on Sexual Morality, Justice, and Healing* (Jan. 2010), available at

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that the very church founded by the Pilgrims who sailed on the Mayflower in 1620 – First Parish in Plymouth, now a Unitarian Universalist congregation – has issued a proclamation invoking its historical pursuit of religious freedom, recounting its long history of openness to lesbian and gay congregants, and calling for full civil marriage equality for same-sex couples.⁴² Given its historical pedigree, the First Parish proclamation underscores the resonance of today’s marriage equality debate with the nation’s founding ideal of liberty.

In 2006, the Episcopal Church likewise called on federal, state, and local governments to provide same-sex couples protections equivalent to those “enjoyed by non-gay married couples” and “oppose[d] any state or federal constitutional amendment that prohibits same-sex civil marriage or civil unions,” a stance growing out of its “historical support of gay and lesbian persons as children of God and entitled to full civil rights.”⁴³ In 2012, the Episcopal Church called on

<http://religiousinstitute.org/node/293>; Religious Institute, Inc., *List of Endorsers* (Jan. 10, 2012), available at <http://religiousinstitute.org/list-of-endorsers> (last visited Feb. 23, 2013).

⁴² See Resolution, First Parish Church in Plymouth, *Resolution Demanding That All Persons, Regardless Of Sexual Orientation Or Gender Identification, Receive Equal Treatment Under The United States Constitution And The Laws Of The Land* (Feb. 4, 2013), available at <https://www.dropbox.com/s/3ptdnty9xvx6sta/same%20sex%20marriage%20resolution%2002-02-13.doc> (last visited Feb. 23, 2013).

⁴³ Resolution 2006-A095, 75th General Convention of The Episcopal Church (2006), available at <http://www.episcopal>
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Congress “to repeal federal laws that have a discriminatory effect on same-gender civilly married couples, and to pass legislation to allow the U.S. federal government to provide benefits to those couples.”⁴⁴

Even within faiths that do not believe the government should issue marriage licenses to same-sex couples – a position their leaders remain free to express – many adherents (in some cases, a majority) nonetheless have come to support equal access to civil marriage. For example, the Roman Catholic Church hierarchy is strongly opposed to both civil and religious marriage for same-sex couples.⁴⁵ Yet Catholic teaching joins other mainstream religions in affirming the fundamental human dignity of lesbian and gay individuals and calling for an end to “any forms

archives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2006-A095.

⁴⁴ Resolution 2012-D018, 77th General Convention of The Episcopal Church (2012), *available at* <http://www.generalconvention.org/gc/resolutions>.

⁴⁵ United States Conference of Catholic Bishops, *Between Man And Woman: Questions And Answers About Marriage And Same-Sex Unions* (2003), *available at* <http://www.usccb.org/issues-and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/questions-and-answers-about-marriage-and-same-sex-unions.cfm> (last visited Feb. 23, 2013). *See also* Brief for United States Conference of Catholic Bishops as *Amicus Curiae* Supporting Respondent BLAG, *United States v. Windsor* (Jan. 29, 2013) (No. 12-307).

of injustice, oppression, or violence against them.”⁴⁶ Consistent with the latter teaching, many individual American Catholics have come to favor marriage equality: polling conducted by the Pew Forum in late 2011 showed that “[a]mong Catholics as a whole, supporters” of marriage for same-sex couples had come to “outnumber opponents (52% vs. 37%),” whereas just one year before, 46% had favored same-sex marriage while 42% expressed opposition.⁴⁷ There are American Muslims, too, who believe that their religious faith is not contravened when the government affords marriage rights to same-sex couples.⁴⁸

⁴⁶ See, e.g., Statement, Bishops’ Committee on Marriage and Family, *Always Our Children: A Pastoral Message To Parents Of Homosexual Children And Suggestions For Pastoral Ministers* (1997), available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/homosexuality/always-our-children.cfm> (last visited Feb. 23, 2013) (observing that “respect for the God-given dignity of all persons means the recognition of human rights and responsibilities,” such that “the fundamental human rights of homosexual persons must be defended and . . . all of us must strive to eliminate any forms of injustice, oppression, or violence against them”).

⁴⁷ The Pew Forum on Religion & Public Life, *Religion and Attitudes Toward Same-Sex Marriage* (Feb. 7, 2012), available at <http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religion-and-Attitudes-Toward-Same-Sex-Marriage.aspx> (last visited Feb. 23, 2013) (citing comparative data from Aug.-Sept. 2010 and Oct. 2011).

⁴⁸ See, e.g., Press Release, Muslims for Progressive Values, *Muslims for Progressive Values Applauds President Obama’s Support of Marriage Equality* (May 9, 2012), available at http://www.mpvusa.org/uploads/Obama_Supports_Same_Sex

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The preceding survey belies the claim of certain *amici* favoring reversal that American religions speak uniformly or overwhelmingly in opposition to marriage equality for same-sex couples. To the contrary, American religious thought and practice embrace a rich diversity. No one view speaks for “religion” – even if, contrary to the Establishment Clause, it were appropriate to give weight to religious views in evaluating and applying the Constitution’s secular promise of equal protection.

III. Recognizing Civil Marriages Of Same-Sex Couples Will Not Impinge Upon Religious Beliefs, Practices, Or Operations, But Rather Will Prevent One Set Of Religious Beliefs From Being Imposed Through Civil Law

Where lawful civil marriages of same-sex couples are recognized, the First Amendment’s guarantees continue to protect the decisions of those faiths that choose not to solemnize such marriages, as well as those that do. Therefore, affirmance here would not alter the freedom of all religious communities to decide which religious unions are consistent with their beliefs. Nor would affirmance burden religious persons and institutions in the pursuit of their religious activities or the exercise of conscience. To the

Marriage_FINAL.pdf (espousing the belief that same-sex couples should be allowed to marry).

contrary, reversal predicated on certain of the arguments of religious *amici* regarding express or implicit religious definitions of marriage would improperly favor one set of religious views (*e.g.*, rejecting the marriages of same-sex couples) against other religious views (*e.g.*, like those of *Amici* here, favoring equal treatment under law for married same-sex couples).

A. Affirmance Would Not Interfere With The Exercise Of Religious Freedoms, Including The Freedom To Set Parameters For Religiously Sanctioned Marriage That May Differ From Those Established Under Civil Law

However civil authorities define marriage, existing constitutional principles protect the autonomy of various religious entities to define *religious* marriages to comport with their respective tenets. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 (2012) (affirming principle that certain “matter[s are] ‘strictly ecclesiastical,’” meaning they are “the church’s alone” (citation omitted)); *see also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”). In this manner, religion and the state reciprocally respect their own proper spheres. *See generally McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (“[T]he First Amendment rests upon the premise that both religion and

government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”).

This tradition of respect for religious autonomy has, indeed, permitted various religions to maintain rules regarding religious marriage that would be unenforceable under civil law – declining to sanctify or even recognize, for example, marriages between persons of different faiths and races, or successive marriages following divorce. Conservative Judaism, for example, prohibits interfaith marriages: “Rabbis and cantors affiliated with the Conservative Movement may not officiate at the marriage of a Jew to a non-Jew, may not co-officiate with any other clergy, and may not officiate or be present at a purely civil ceremony.”⁴⁹

For most of the twentieth century, the Roman Catholic Church’s Code of Canon Law also proscribed interfaith marriages.⁵⁰ Considerably liberalized in 1983, official Catholic doctrine still restricts interfaith marriage by requiring the Church’s “express permission” for a Catholic to enter a “mixed

⁴⁹ Leadership Council on Conservative Judaism, *Statement on Intermarriage* (Mar. 7, 1995), available at <http://www.mazorguide.com/living/Denominations/conservative-intermarriage.htm>.

⁵⁰ Michael G. Lawler, *Interchurch Marriages: Theological and Pastoral Reflections*, in *Marriage in the Catholic Tradition: Scripture, Tradition, and Experience*, Ch. 22, at 222 (Todd A. Salzman, *et al.*, eds., 2004).

marriage” with a non-Catholic Christian, and “an express dispensation” for a Catholic to enter a “disparity of cult” marriage with a non-Christian – without which any marriage to a non-Christian is deemed invalid.⁵¹

Historically, religious institutions also have differed markedly from each other and from the government in their treatment of interracial unions. For example, some fundamentalist groups condemned interracial marriage well after this Court’s ruling in *Loving v. Virginia*, 388 U.S. 1 (1967), that the Constitution requires states to allow interracial civil marriages.⁵² The Church of Jesus Christ of Latter-day Saints also has had a history of discouraging interracial marriages.⁵³

⁵¹ *Catechism of the Catholic Church* ¶ 1635 (2d ed. 2000).

⁵² See Gustav Niebuhr, *Interracial Dating Ban to End at Bob Jones University*, N.Y. Times, Mar. 4, 2000, at A11.

⁵³ See *Interracial Marriage Discouraged*, The Deseret News, June 17, 1978, at 4 (“Now, the brethren feel that it is not the wisest thing to cross racial lines in dating and marrying.” (quoting President Spencer W. Kimball in a 1965 address to students at Brigham Young University)). In the different but conceptually related context of its historical policy on excluding African-Americans from the priesthood, the Church of Jesus Christ of Latter-day Saints expressly recognized that its position on treatment of African-Americans was “wholly within the category of religion,” applying only to those who joined the church, with “no bearing upon matters of civil rights.” The First Presidency, *Statement on the Status of Blacks* (Dec. 15, 1969), in *Neither White Nor Black: Mormon Scholars Confront the Race Issue in a Universal Church* 222 (Lester E. Bush, Jr. & Armand

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As for unions following divorce, the Roman Catholic Church teaches that “[t]he remarriage of persons divorced from a living, lawful spouse is not permitted by God’s law as taught by Christ.”⁵⁴ This means that Roman Catholic priests “cannot recognize the union of people who are civilly divorced and remarried,”⁵⁵ even though states do.

Conversely, states may sometimes prohibit marriages that are acceptable within a particular faith community. Indeed, even as they advocate here for an end to DOMA, many *Amici* faiths already religiously celebrate marriages of same-sex couples, and still other *Amici* have worked and/or are working within their own faiths to bring official religious approval to these unions. See discussion *supra* at Point I(B). The two efforts, however, are and should remain separate, and *Amici* here emphasize the importance of that separation as fully consistent with the Religion Clauses.

L. Mauss eds., 1984). That religions continue to be given wide latitude in determining matters of intrafaith doctrine and discipline – who counts as a minister being a prime example – was quite recently confirmed by this Court in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012). See discussion *supra* at 29, and *infra* at 36-37.

⁵⁴ United States Conference of Catholic Bishops, *United States Catholic Catechism For Adults* 290 (2006).

⁵⁵ United States Conference of Catholic Bishops, *Compendium – Catechism of the Catholic Church* ¶ 349 (2006).

In any event, the existence and persistence of differences such as those discussed above demonstrate that affirmance would not burden religious liberty. Were the federal government to start recognizing the lawful civil marriages of same-sex couples – as it does interfaith marriages, interracial marriages, and re-marriages after divorce – religions that disapprove of such unions would remain free to define *religious* marriage however they wish. They could withhold spiritual blessing of such marriages and indeed bar those entering into them from being congregants at all, just as they are now free to do so on grounds of faith, race, prior marital status, or any other characteristic deemed religiously significant.

Amici urging reversal fail to explain how their religious practice would be burdened by the fact that other people are afforded equal marriage rights by the state. For example, the brief of *amici* Liberty, Life and Law Foundation and North Carolina Values Coalition scarcely even touches on the actual legal consequences of recognizing the marriages of same-sex couples. Instead, it focuses on fears of having to “endorse or facilitate” marriages of same-sex couples,⁵⁶ to “affirm” such marriages,⁵⁷ or being subject to “[c]ompelled recognition” of objectionable unions.⁵⁸ Other than public accommodation law issues

⁵⁶ Br. for Liberty, Life and Law Foundation and North Carolina Values Coalition, *supra* note 3, at 16, 18.

⁵⁷ *Id.* at 22.

⁵⁸ *Id.* at 23.

(addressed *infra* at Point III(B)), *amici* do not identify any cognizable impact on religious practices such as might constitute a free exercise violation. Rather, they seem to suggest that the deep offense they take at seeing same-sex couples marry – and the public disapprobation they may face for failing to embrace such marriages – is in and of itself an assault on religion. To similar effect is the brief of *amici* Chaplain Alliance for Religious Liberty, *et al.*, filed on behalf of military chaplains with religious objections to marriage equality. They express the fear that, if same-sex couples are permitted to marry and unequal treatment of them under the law becomes, within military culture, the equivalent of racism, those who continue to disapprove of same-sex couples' marriages will be marginalized or forced out of the military.⁵⁹

But the Free Exercise Clause does not protect religious actors from the consequences of their statements and actions, or from the expression of others whom they may offend. There is no protected constitutional right not to be considered – correctly or incorrectly – a “discriminator.” It is no accident that the Free Exercise Clause shares an amendment with the Free Speech Clause, because robust and open debate is crucial to both freedoms. *See, e.g.*, William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545, 546-47 (1983) (arguing that free exercise of religion bears

⁵⁹ Br. for Chaplain Alliance for Religious Liberty, *et al.*, *supra* note 3, at 13-14.

directly on freedom of speech, that both have their proper public dimension, and that Religion Clauses, together, offer “a unitary protection for individual liberty”).

Eliminating DOMA’s unconstitutional distinction between lawfully married couples solely based on sexual orientation would not change, mandate, control, or interfere with any other party’s religious practices. The religious freedoms embodied in the Constitution guarantee that diverse religious traditions and beliefs, including the sole right to define who can marry religiously, will flourish regardless of changes in civil marriage laws.

B. Recognizing The Civil Marriages Of Same-Sex Couples Will Not Burden Religious Organizations’ Ability To Operate And Govern Their Own Religious Affairs

Amici supporting reversal nonetheless suggest that recognizing the civil marriages of same-sex couples will curtail religious organizations’ ability to operate their own affairs and serve their communities.⁶⁰ For example, *amicus* Becket Fund raises the specter that, if this Court rules that Section 3 of DOMA is unconstitutional, religious institutions that

⁶⁰ *See, e.g.*, Br. for Catholic Answers, *et al.*, *supra* note 3, at 22-32; Br. for Liberty, Life and Law Foundation and North Carolina Values Coalition, *supra* note 3, at 4-21; Br. for Manhattan Declaration, *supra* note 3, at 15-21.

wish not to respect the marriages of same-sex couples as a matter of religious doctrine will be exposed to a “wave of private civil litigation under anti-discrimination laws” relating to public accommodations, housing, and employment.⁶¹

But the types of disputes anticipated by the Becket Fund have more to do with existing civil rights laws barring discrimination based on sexual orientation than with any conflicts that are likely to arise based on marital status if this Court affirms the judgment below. Indeed, because DOMA concerns discrimination against couples *who are already legally married under state law*, the arguments about state anti-discrimination laws largely are irrelevant here.

In any event, the extent to which any religious institution is subject to state regulation as an employer or as a public accommodation is determined by existing statutes and relevant, binding case law. Indeed, just last year this Court unanimously ruled that an employment discrimination claim by the former employee of a religious institution had to give way to the First Amendment right of the employer to determine who qualifies as a minister under its *religious* understanding of that term. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. at 707, 709 (“The purpose of the [ministerial] exception [to employment discrimination laws] is not to

⁶¹ Br. for Becket Fund for Religious Liberty, *supra* note 20, at 15-21.

safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful – a matter ‘strictly ecclesiastical’ – is the church’s alone” (internal citation omitted)). This Court need not pre-determine these issues in order to affirm.

C. While *Amici* Respect All Fellow Faiths, Including Those That Embrace Different Religious Views On Marriage, It Is Constitutionally Impermissible To Impose Religious Views Through Civil Law To Curtail The Right Of Same-Sex Couples To Civilly Marry

Since this nation’s founding, the concept of religious liberty has included the equal treatment of all faiths without discrimination or preference. *See Larson*, 456 U.S. at 244 (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”). Government action denying recognition on religious or quasi-religious grounds of the civil marriages of same-sex couples violates this principle by putting the force of law behind one set of religious views.

Several *amici* in this case urge reversal on avowedly religious or quasi-theological grounds that would wreak havoc with the Establishment Clause. For example, *amicus* Manhattan Declaration bases its arguments largely on an exposition of what “Christians

believe” about marriage and the assertion that the “Christian definition of marriage” is and should be enshrined in secular law.⁶² Similarly, *amici* Robert P. George, *et al.* assert that the government’s understanding of marriage must be concordant with the definition of marriage as a “conjugal” relationship, defined by the sexually complementary roles of a man and a woman.⁶³ Although these *amici* largely present their argument through a philosophical lens, it has religious implications.⁶⁴

These assertions improperly seek to enshrine particular religious or quasi-theological views in civil law. The “conjugal” notion of marriage may be one propounded by certain philosophers or by certain religious faiths. But it does not express a universal definition of marriage, religious or otherwise. Judaism, for example, understands marriage more as a contractual than a conjugal union, as evidenced by the process Judaism has established for divorce

⁶² See Br. for Manhattan Declaration, *supra* note 3, at 5-6.

⁶³ See Brief for Robert P. George, *et al.* as *Amici Curiae* Supporting Respondent BLAG at 5, *United States v. Windsor* (Jan. 29, 2013) (No. 12-307).

⁶⁴ See, *e.g.*, Natural Family Planning Program, United States Conference of Catholic Bishops, *Conjugal Love 1*, available at <http://www.usccb.org/issues-and-action/marriage-and-family/natural-family-planning/upload/nfp-conjugal-love.pdf> (arguing that “[a]uthentic conjugal love will be more highly prized, and wholesome public opinion created about it if Christian couples give outstanding witness to faithfulness and harmony in their love,” and that “[m]arriage and conjugal love are by their nature ordained toward the begetting and educating of children”).

within the faith, a process akin to exiting a contractual relationship.⁶⁵ More fundamentally, that some groups believe that marriage should be viewed primarily as a conjugal union may serve their faiths well, but provides no legitimate basis for action by the government, which must remain neutral, in structuring law and public policy, among particular religious viewpoints. “Courts are not arbiters of scriptural interpretation” and “should not undertake to dissect religious beliefs.” *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981). The overtly religious arguments of *amici* who would have the Court adopt and impose specifically religious definitions of marriage must be rejected – among other reasons because that result would disfavor and disadvantage *other religious believers*, like *Amici* here, who do not embrace the arguments or conclusions of *amici* seeking reversal.

By affirming the judgment of the court below that Section 3 of DOMA is unconstitutional without reference to religiously based arguments, and affirming the constitutional promise of equal treatment for lawfully married different- and same-sex couples, this Court will ensure that civil law neither favors nor

⁶⁵ See Michael J. Broyde, *The Covenant-Contract Dialectic in Jewish Marriage and Divorce Law*, in *Covenant Marriage in Comparative Perspective* 53, 58 (John Witte & Eliza Ellison eds., 2005) (“Talmudic Jewish law treated marriage formation as a private contract requiring the consent of both parties, and divorce as the other side of that marriage contract, albeit with certain limitations.”).

disfavors any particular religious viewpoint, and it will leave individual faith communities free to determine for themselves whether or not to add religious sanction to particular unions.

◆

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should affirm the judgment of the Court of Appeals holding that Section 3 of DOMA is unconstitutional.

Respectfully submitted,

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**APPENDIX A: STATEMENTS OF
INTEREST OF AMICI CURIAE**

Amici curiae Bishops of The Episcopal Church include the Rt. Rev. Marc Handley Andrus, Bishop of California; the Rt. Rev. Mary Gray-Reeves, Bishop of El Camino Real (Cal.); the Rt. Rev. J. Jon Bruno, Bishop of Los Angeles (Cal.); the Rt. Rev. Diane Jardine Bruce, Bishop Suffragan of Los Angeles (Cal.); the Rt. Rev. Mary D. Glasspool, Bishop Suffragan of Los Angeles (Cal.); the Rt. Rev. Barry L. Beisner, Bishop of Northern California; the Rt. Rev. James R. Mathes, Bishop of San Diego (Cal.); the Rt. Rev. Chester L. Talton, Bishop of San Joaquin (Cal.); the Rt. Rev. Ian T. Douglas, Bishop of Connecticut; the Rt. Rev. Laura J. Ahrens, Bishop Suffragan of Connecticut; the Rt. Rev. James E. Curry, Bishop Suffragan of Connecticut; the Rt. Rev. Alan Scarfe, Bishop of Iowa; the Rt. Rev. Stephen T. Lane, Bishop of Maine; the Rt. Rev. Eugene Taylor Sutton, Bishop of Maryland; the Rt. Rev. Joe Goodwin Burnett, Assistant Bishop of Maryland; the Rt. Rev. James Joseph Shand, Bishop of Easton (Md.); the Rt. Rev. M. Thomas Shaw SSJE, Bishop of Massachusetts; the Rt. Rev. Gayle E. Harris, Bishop Suffragan of Massachusetts; the Rt. Rev. Douglas J. Fisher, Bishop of Western Massachusetts; the Rt. Rev. A. Robert Hirschfeld, Bishop of New Hampshire; the Rt. Rev. Andrew M.L. Dietsche, Bishop of New York; the Rt. Rev. Lawrence C. Provenzano, Bishop of Long Island (N.Y.); the Rt. Rev. Gladstone B. Adams III, Bishop of Central New York; the Rt. Rev. Prince G. Singh,

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Bishop of Rochester (N.Y.); the Rt. Rev. R. William Franklin, Bishop of Western New York; the Rt. Rev. Thomas C. Ely, Bishop of Vermont; the Rt. Rev. Gregory H. Rickel, Bishop of Olympia (Wash.); the Rt. Rev. James E. Waggoner, Jr., Bishop of Spokane (with respect to the portion of the diocese located in the State of Washington); and the Rt. Rev. Mariann Edgar Budde, Bishop of Washington (D.C.).¹ As Bishops serving in civil jurisdictions where same-sex couples have been granted the right to marry, The Episcopal Church has authorized them to provide a “generous pastoral response” to civilly married couples.²

Amicus curiae The Jewish Theological Seminary of America (“JTS”) is a preeminent institution of Jewish higher education that integrates rigorous academic scholarship and teaching with a commitment to strengthening Jewish tradition, Jewish lives, and Jewish communities. As the intellectual center of the Conservative Movement, JTS is committed to educating the public on Jewish perspectives regarding important social issues and providing an informed Jewish voice on those issues.

¹ The territory of each diocese of The Episcopal Church is described at <http://www.episcopalchurch.org/browse/diocese>.

² Resolution 2009-C056, 76th General Convention of The Episcopal Church (2009), *available at* http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2009-C056; Resolution 2012-A049, 77th General Convention of The Episcopal Church (2012), *available at* <http://www.generalconvention.org/gc/resolutions>.

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Amicus curiae Manhattan Conference of the Metropolitan New York Synod of the Evangelical Lutheran Church in America represents the pastors and members of the Evangelical Lutheran Church in America in the Manhattan area. The Evangelical Lutheran Church in America was formed from three separate and well-established North American church bodies: The American Lutheran Church, The Association of Evangelical Lutheran Churches, and The Lutheran Church in America.

Amicus curiae Rabbinical Assembly (the “Assembly”) is the international association of Conservative rabbis. Since its founding in 1901, the Assembly has been the creative force shaping the ideology, programs, and practices of the Conservative movement, and is committed to building and strengthening the totality of Jewish life. Rabbis of the Assembly serve congregations throughout the world, and also work as educators, officers of communal service organizations, and college, hospital, and military chaplains.

Amicus curiae Reconstructionist Rabbinical Association (“RRA”), established in 1974, is the professional association of Reconstructionist rabbis. Comprised of nearly 300 rabbis, the RRA represents the rabbinic voice within the Reconstructionist movement.

Amicus curiae Reconstructionist Rabbinical College educates leaders, advances scholarship and develops resources for contemporary Jewish life.

Amicus curiae Rabbi Akiva Herzfeld of Shaarey Tphiloh serves the oldest Mainline Orthodox synagogue north of Boston. The congregation was founded in 1904 on Newberry Street in Portland, Maine and moved to its present location in 1954.

Amicus curiae Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, is committed to ensuring equality for all of God's children, regardless of sexual orientation.

Amicus curiae Unitarian Universalist Association was founded in 1961 and has nurtured a heritage of providing a strong voice for social justice and liberal religion. Unitarian Universalism is a caring, open-minded faith community that traces its roots in North America back to the Pilgrims and the Puritans.

Amicus curiae United Church of Christ has more than 5,100 churches and 1.1 million members across the United States, and serves God in the co-creation of a just and sustainable world.

Amicus curiae United Synagogue of Conservative Judaism ("USCJ") is the congregational arm of Conservative Judaism in North America. USCJ is committed to a dynamic Judaism that is learned and passionate, authentic and pluralistic, joyful and accessible, egalitarian and traditional, and thereby seeks to create the conditions for a powerful and vibrant Jewish life for the individual members of its sacred communities.

Amicus curiae Affirmation represents lesbian, gay, bisexual, transgender, and queer people and their supporters in the United Methodist Community.

Amicus curiae Covenant Network of Presbyterians, a broad-based, national group of clergy and lay leaders, seeks to support the mission and unity of the Presbyterian Church (U.S.A.), articulate and act on the church's historic, progressive vision, work for a fully inclusive church, and find ways to live out the graciously hospitable gospel by living together with all our fellow members in the Presbyterian Church (U.S.A.).

Amicus curiae Friends for Lesbian, Gay, Bisexual, Transgender, and Queer Concerns ("FLGBTQC") is a faith community within the Religious Society of Friends. FLGBTQC deeply honors, affirms, and upholds that of God in all people.

Amicus curiae Methodist Federation for Social Action mobilizes clergy and laity within The United Methodist Church to take action on issues of peace, poverty and people's rights within the church, the nation, and the world.

Amicus curiae More Light Presbyterians represents lesbian, gay, bisexual, and transgender people in the life, ministry, and witness of the Presbyterian Church (U.S.A.) and in society.

Amicus curiae Presbyterian Welcome is a diverse community of countless individuals representing lesbian, gay, bisexual, and transgender people in the

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Presbyterian Church (U.S.A.), through education, advocacy, and relationship building.

Amicus curiae Reconciling Ministries Network serves lesbian, gay, bisexual, and transgender United Methodists and their allies to transform their world into the full expression of Christ's inclusive love. Reconciling Ministries Network envisions a vibrant Wesleyan movement that is biblically and theologically centered in the full inclusion of God's children.

Amicus curiae ReconcilingWorks: Lutherans For Full Participation organizes lesbian, gay, bisexual, and transgender individuals and their allies within the Lutheran communion and its ecumenical and global partners.

Amicus curiae Religious Institute, Inc. is a multi-faith organization whose thousands of supporters include clergy and other religious leaders from more than fifty faith traditions. The Religious Institute, Inc. partners with the leading mainstream and progressive religious institutions in the United States.
