Case Nos. 12-17668, 12-16995, and 12-16998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BEVERLY SEVCIK, et al., *Plaintiffs-Appellants*,

v.

BRIAN SANDOVAL, et al., *Defendants-Appellees*, and

COALITION FOR THE PROTECTION OF MARRIAGE, *Intervenor-Defendant-Appellee*.

On Appeal from the United States District Court for the District of Nevada
Case No. 2:12-CV-00578-RCJ-PAL, The Hon. Robert C. Jones, District Judge.

NATASHA N. JACKSON, et al., *Plaintiffs-Appellants*,

v.

NEIL S. ABERCROMBIE, Governor, State of Hawai'i, *Defendant-Appellant*,

LORETTA J. FUDDY, Director, Department of Health, State of Hawai'i, *Defendant-Appellee*, and

HAWAII FAMILY FORUM, *Intervenor-Defendant-Appellee*.

On Appeal from the United States District Court for the District of Hawaii
Case No. 1:11-cv-00734-ACK-KSC, The Hon. Alan C. Kay, Sr., District Judge.

BRIEF OF *AMICUS CURIAE* BRIEF OF ANTI-DEFAMATION LEAGUE · AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE · BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE · BOARD OF TRUSTEES OF THE PACIFIC CENTRAL DISTRICT/UNITARIAN UNIVERSALIST ASSOCIATION · HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA · THE HINDU AMERICAN FOUNDATION · INTERFAITH ALLIANCE FOUNDATION · THE INTERFAITH ALLIANCE HAWAI'I · THE JAPANESE AMERICAN CITIZENS LEAGUE · KESHET · THE NATIONAL COUNCIL OF JEWISH WOMEN · METROPOLITAN COMMUNITY CHURCHES · MORE LIGHT PRESBYTERIANS · NEHIRIM · PACIFIC CENTRAL DISTRICT/UNITARIAN UNIVERSALIST ASSOCIATION · PACIFIC

SOUTHWEST DISTRICT/UNITARIAN UNIVERSALIST ASSOCIATION · PEOPLE FOR THE AMERICAN WAY FOUNDATION · RECONCILINGWORKS: LUTHERANS FOR FULL PARTICIPATION · RELIGIOUS INSTITUTE, INC. · SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND · SOCIETY FOR HUMANISTIC JUDAISM · SOUTH ASIAN AMERICANS LEADING TOGETHER · SOUTHERN CALIFORNIA NEVADA CONFERENCE OF THE UNITED CHURCH OF CHRIST · T'RUAH: THE RABBINIC CALL FOR HUMAN RIGHTS · THE UNION FOR REFORM JUDAISM · THE CENTRAL CONFERENCE OF AMERICAN RABBIS · WOMEN OF REFORM JUDAISM · UNITARIAN UNIVERSALIST ASSOCIATION · UNIVERSAL FELLOWSHIP OF METROPOLITAN COMMUNITY CHURCHES · WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM

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CORPORATE DISCLOSURE STATEMENT OF *AMICI CURIAE*
FRAP RULE 26.1

Pursuant to Federal Rule of Appellate Procedure 26.1, amici Anti-Defamation League, Americans United for Separation of Church and State, Bend the Arc: A Jewish Partnership for Justice, Board of Trustees of the Pacific Central District/Unitarian Universalist Association, The Hindu American Foundation, Hadassah, The Women's Zionist Organization of America, Interfaith Alliance Foundation, The Interfaith Alliance Hawai'i, The Japanese American Citizens League, Keshet, The National Council of Jewish Women, Metropolitan Community Churches, More Light Presbyterians, Nehirim, Pacific Central District/Unitarian Universalist Association, Pacific Southwest District/Unitarian Universalist Association, People For the American Way Foundation, ReconcilingWorks: Lutherans For Full Participation, Religious Institute, Inc., Sikh American Legal Defense and Education Fund, Society for Humanistic Judaism, South Asian Americans Leading Together, Southern California Nevada Conference of the United Church of Christ, T'ruah: The Rabbinic Call for Human Rights, The Union for Reform Judaism, the Central Conference of American Rabbis, Women of Reform Judaism, Unitarian Universalist Association, Universal Fellowship of Metropolitan Community Churches, and Women's League for Conservative Judaism state that they are nonprofit organizations, they have no parent companies, and they have not issued shares of stock.

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IDENTITY AND INTEREST OF *AMICI*

Amici curiae are a diverse group of religious and cultural organizations that advocate for religious freedom, tolerance, and equality. *See* Appendix filed herewith. *Amici* have a strong interest in this case due to their commitment to religious liberty, civil rights, and equal protection of law.

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All parties have consented to the filing of this *amicus* brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amici support appellants' challenges to the constitutionality of Hawaii's and Nevada's marriage bans, including Nev. Const. art. I, § 21; Haw. Const. art. I, § 23; and Haw. Rev. Stat. § 572-1 (the "Marriage Bans"). Amici contend that the Marriage Bans violate not only the Fourteenth Amendment's Equal Protection Clause, but also the First Amendment's Establishment Clause. A decision overturning the Marriage Bans would assure full state recognition of civil marriages, while allowing religious groups the freedom to choose how to define marriage for themselves. Many religious traditions, including those practiced by many of the undersigned *amici*, attribute religious significance to the institution of marriage. *See Turner v. Safley*, 482 U.S. 78, 96 (1987) ("[M]any religions recognize marriage as having spiritual significance."). But religious views differ regarding what marriages qualify to be solemnized. Pursuant to the First Amendment, in order to guard religious liberty ***for all***, selective religious understandings cannot define marriage recognition under civil law.

The First Amendment prohibits denying individuals the right to marry on the grounds that such marriages would offend the tenets of a particular religious group. *Cf. Loving v. Virginia*, 388 U.S. 1 (1967) (rejecting religious justification for law restricting right of individuals of different races to marry). With the Marriage Bans, Hawaii and Nevada flouted this fundamental restriction by incorporating a

particular religious definition of marriage into law—a definition inconsistent with the faith beliefs of many other religious groups, including many of the undersigned *amici*, who embrace an inclusive view of marriage. Hawaii and Nevada had no legitimate secular purpose in adopting that selective religious definition of marriage. Rather, the legislative history and ballot initiative campaign materials confirm that those responsible for passing the Marriage Bans had the specific motive of tying the definition of marriage to a particular religious tradition's understanding of that civil institution. The Marriage Bans are therefore unconstitutional under the Establishment Clause.

This violation of the Establishment Clause also supports appellants' argument that the Marriage Bans are unconstitutional under the Fourteenth Amendment's Equal Protection Clause. Under a line of cases decided by the U.S. Supreme Court, including most recently *U.S. v. Windsor*, 133 S.Ct. 2675 (2013), and *Lawrence v. Texas*, 539 U.S. 558 (2003), moral condemnation of an identifiable group is never a legitimate governmental interest. While *amici* recognize the role that religious and moral beliefs have in shaping the public policy views of citizens and legislators, when governmental action is motivated by such beliefs alone and is directed inherently toward the disparagement of a single identifiable group, the government's conduct cannot survive even the lowest level of constitutional review. This principle, which is common to Establishment Clause

and Equal Protection analysis alike, renders the Marriage Bans unconstitutional under both provisions.

Finally, contrary to the claims of some supporters, the Marriage Bans are not rationally related to a legitimate governmental interest in protecting religious liberty. Such claims fail to explain how a ruling invalidating the Marriage Bans would interfere with religious liberty in any way. The case at bar concerns whether same-sex couples are entitled to the benefits of marriage. Concerns related to the potential for anti-discrimination suits are misplaced, for Hawaii and Nevada state laws already protect discrimination in public accommodations based on sexual orientation. While protecting religious liberty is a legitimate governmental interest in general, what the proponents of the Marriage Bans actually urge is that Hawaii and Nevada be allowed to enact a particular religious view of marriage to the exclusion of other religious views. State governments have no legitimate interest in enacting legislation that merely adopts a particular version of Judeo-Christian religious morality. Far from serving a legitimate governmental interest, using the law to enshrine such religious doctrine would violate both the Establishment Clause and the Fourteenth Amendment.

ARGUMENT

The Establishment Clause's secular purpose requirement and the Fourteenth Amendment's Equal Protection Clause speak with one voice against legislative resort to moral and religious condemnation of identifiable groups. Under both clauses, the government's action must serve a legitimate, secular purpose. The purpose doctrines under both Clauses are cut from the same cloth, and analysis under one can inform the other.

The U.S. Supreme Court has long implicitly acknowledged the significance of religious justifications under the Equal Protection Clause. The Court's decision overturning Virginia's law forbidding marriage between persons of different races is illustrative. In *Loving v. Virginia*, the Court dismissed a Virginia trial judge's proffered religious-based rationale, which cited God's hand in creating different races, recognizing instead that "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." 388 U.S. 1, 11 (1967). Ultimately, the Court recognized that the anti-miscegenation law served no secular purpose and was based on nothing more than racial discrimination—even if based on moral or religious belief.

The district court's decision in *Perry v. Schwarzenegger* (ultimately held by the Supreme Court to be the final decision overturning California's Proposition 8) further illustrates the overlap between these doctrines. Drawing upon both the

First and Fourteenth Amendments, the court observed the distinction in constitutional law between "secular" and "moral or religious" state interests. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930-31 (N.D. Cal. 2010) (citing *Lawrence*, 539 U.S. at 571 (Fourteenth Amendment) and *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 15 (1947) (Establishment Clause)), *aff'd*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vac'd for lack of standing to bring appeal*, *Hollingsworth v. Perry*, 133 S.Ct. 2652 (U.S. 2013). The court recognized that the state had no legitimate "interest in enforcing private moral or religious beliefs without an accompanying secular purpose." *Id.* The evidence presented in *Perry*'s lengthy bench trial established that "moral and religious views form[ed] the only basis for a belief that same-sex couples are different from opposite-sex couples." *Id.* at 1001. Acknowledging the lack of a secular purpose, the *Perry* court ultimately concluded that the only conceivable basis for Proposition 8 was a "private moral view that same-sex couples are inferior." *Id.* at 1003. Such private disapproval of a group is not a legitimate governmental interest. *Id.*

While the substantive issues in the present cases were argued under the Equal Protection Clause, the Establishment Clause supports an outcome similar to *Perry*'s. The Supreme Court's rejection of moral justifications under the Equal Protection Clause reflects concerns similar to those that arise under the Establishment Clause when legislation is motivated by a particular *religious*

doctrine. The Marriage Bans' failings under the Establishment Clause underscore and inform their failings under the Equal Protection Clause.

I. The Hawaii and Nevada Marriage Bans violate the Establishment Clause because they were enacted with the purpose of imposing a particular religious understanding of marriage as law at the expense of all others.

Religious belief can play an important role in the formation of some people's public policy preferences. But that role must be tempered by principles of religious liberty, as "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 796 n. 54 (1973). The Hawaii and Nevada Marriage Bans run afoul of longstanding Establishment Clause principles because they have a primarily religious purpose—to write one particular religious understanding of marriage into the law—at the expense of positions taken by other religious traditions.

A. The Establishment Clause prohibits laws that have the primary purpose or effect of aiding one religious view over others or favoring a particular religious viewpoint.

Since this country's founding, the concept of religious liberty has, at a minimum, included the equal treatment of all faiths without discrimination or preference. *See Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). As the Supreme Court explained in *Larson*:

> Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference. Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.

Id. at 245; *see also* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1636 (1989) ("The . . . proposition, that government may not prefer one religion over any other, receives overwhelming support in the American tradition of church and state.").

"[I]n . . . light of its history and the evils it was designed forever to suppress," the U.S. Supreme Court has consistently given the Establishment Clause "broad meaning." *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 14-15 (1947). The Supreme Court has invalidated laws that aid one particular religion. *Id.* at 15-16 ("Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another."). It has also rejected any law that has the purpose or primary effect of advancing certain religious denominations over others, *Larson*, 456 U.S. at 244, 247 (invalidating a law that distinguished between religious organizations based on how they collected funds because it "clearly grant[ed] denominational preferences"), or advancing religious over non-religious beliefs, *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding law

requiring teaching of creationism when evolution is taught unconstitutional because it lacked a secular purpose). For example, in *Epperson v. Arkansas*, 393 U.S. 97, 103, 106 (1968), the Court struck down a state law banning the teaching of evolution in public schools, because the "sole reason" for the law was that evolution was "deemed to conflict with a particular religious doctrine," and the Establishment Clause "forbids alike preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma." In *Lemon v. Kurtzman*, the Supreme Court distilled the above described principles into a test that remains instructive: a law must have a secular purpose; its primary effect cannot be to advance or inhibit religion; and it must not result in excessive governmental entanglement in religion. 403 U.S. 602, 622 (1971).

Most relevant here is the secular purpose requirement. The Supreme Court has discussed this rule at length, noting that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005). In *McCreary*, the Supreme Court emphasized that this test has "bite," such that a law will not survive scrutiny under the Establishment Clause simply because "some secular purpose" is constructed after the fact. 545 U.S. at 865 & n.13. In examining a law's "preeminent purpose," courts look to a variety of sources, including legislative history, statements on the record, and testimony given by supporters. *Edwards*,

482 U.S. at 587, 591-592. In the case of voter initiatives, courts may look to ballot arguments, advertisements, and messages promoted by the campaign to pass the suspect law. *See Perry*, 704 F. Supp. 2d at 930.

B. The Hawaii and Nevada Marriage Bans were enacted with a religious purpose based on a particular religious understanding of marriage.

As the U.S. Supreme Court explained in *McCreary*, examination of the purpose of a law "is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country." 545 U.S. at 861. The Court further explained that employing traditional tools of statutory interpretation such as legislative history allows a court to determine legislative purpose without resort to any "judicial psychoanalysis of a drafter's heart of hearts." *Id.* at 862.

In advocating for Nevada's Question 2, which amended the state constitution to define marriage as exclusively between a man and a woman, the initiative's supporters made no secret of the purpose behind the amendment. As one newspaper at the time described them, the highly organized group was made up of "a broad coalition of religious individuals including Christians, Catholics, Mormons, Jews and Muslims" who were not only "united by a fundamental belief that the scriptures define marriage as a union between a man and a woman, but" who also wanted "*to forbid others from believing differently*." *The Usual Suspects*, Las Vegas Weekly, January 20-26, 2000, at 20 (emphasis added). Richard Ziser,

Chairman of the Coalition for the Protection of Marriage in Nevada ("the Coalition"), the lead group advocating for Question 2, said of its passage:

> It's not a matter of wanting to deny homosexuals their rights. . . . That's not it. It's a moral issue. All of the major world religions define marriage to be between a man and a woman. All consider homosexuality to be a sin.

Stacy J. Willis, *Pushing Morals of Marriage Issue*, Las Vegas Sun, May 8, 2000, at 1A. In a letter to religious leaders across Nevada, the Coalition wrote: "The concept of same-sex marriage has drawn a line in the sand, a defining point in the battle for our culture. . . . This is a moral and social issue, which directly violates many of our sacred Scriptures." *Id.* at 5A. Another advocate called "the proliferation of same-sex marriage . . . a threat to our belief that marriage is ordained of God. Marriage is how we procreate which is a commandment we've been given. We encourage our members to ensure the sanctity of marriage." Ken Ward, *Campaign Initiative Asks Nevadans To Protect Marriage*, Beehive, Feb. 15, 2000, at 8.

In marketing materials distributed to supporters, the Coalition also couched its fight in undeniably religious terms. In one letter, the Coalition referred to marriage between a man and a woman, to the exclusion of same-sex couples, as a "sacred institution" that must be protected by voters. Ltr. From R. Ziser, Coalition for the Protection of Marriage in Nevada, to Supporters, August 2002. And in a pamphlet distributed to Nevada voters, the Coalition argued that marriage for

same-sex couples lacked the "moral authority" of marriage between a man and a woman, and that gay rights would "violat[e] the beliefs" of parents. *See* Exhibit A to Decl. of Tara L. Borelli in Supp. of Pl.'s Mtn. for Summ. Judgment, *Sevcik v. Sandoval*, No. 2:12-cv-00578-RCJ-PAL (D. Nev. Sept. 10, 2012) (ER 252).

In Hawaii, the State Legislature attempted to frame its Marriage Ban as a battle against judicial activism and danced around the religious beliefs underlying the legislation; however, floor debates, public testimony, and media coverage of H.B. 117 (the bill proposing the amendment) establish that advocates sought first and foremost to enshrine a particular religious belief into law.

Representatives voting for the bill openly acknowledged that their goal was to institutionalize a particular religious understanding of marriage. Representative Gene Ward, an advocate of the bill, revealed the illegitimate legislative purpose behind the bill, stating that "5,000 years of rich Judeo-Christian traditions and world civilizations that has [sic] never accepted or institutionalized homosexuality" provide "sufficient evidence" that homosexuality is not biological, and therefore same-sex marriage is not a civil right. H.B. 117, 19th Leg., Reg. Sess. (Jan. 23, 1997). Representative David Stegmaier even attempted to characterize his side's position as that of a unanimous religious majority: "The fact is that the traditions of all modern cultures and religions are embodied in what the Hawaii State Legislature is doing today concerning this most emotional issue." *Id.*

The belief that H.B. 117 would "save traditional marriage" by instituting Judeo-Christian beliefs also pervaded public testimony before the House and Senate. Letters from anti-marriage-equality groups, including Hawaii's Future Today, The Hawaii Catholic Conference, Christian Voice of Hawaii, and local churches touted their desire to "protect" marriage in accordance with their religious dogma. Reverend Dr. Rick Bartosik of the Mililani Community Church summarized the proponents' basic position: "A homosexual partnership (however loving and committed it may claim to be) is against God's created order and can never be regarded as a legitimate alternative to marriage, much less a legally sanctioned marriage." *See Hearing Before the Senate Committee on Judiciary*, 19th Leg., Reg. Sess. (Feb. 3, 1997).

At the ballot box, the extensive and costly media campaign in support of the Hawaii Ban promoted the fundamental message that a vote in favor would preserve a particular religious definition of marriage. Indeed, the American Society for the Defense of Tradition, Family, and Property—a Catholic organization—proclaimed in The Honolulu Advertiser in support of the Hawaii Ban: "Defend God's Law and the American Family." The Honolulu Advertiser, Nov. 1, 1996, at E14.

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Religious leaders took part in both of the Marriage Ban debates, and many witnesses in the S.B. 283[1] and H.B. 117 hearings invoked religious principles as the basis for their position that marriage ought to be limited to heterosexual couples. Indeed, the comments of these witnesses and their supporters reflect the very kind of "political division along religious lines [that] was one of the principal evils against which the First Amendment was intended to protect." *Lemon*, 403 U.S. at 622.

Many laws could or do have religious support and are still constitutional. But two characteristics of the Marriage Bans distinguish them from other laws that hew to religious traditions. For one, most such laws do not have a comparable center of gravity in terms of religious- and morality-based rhetoric in the public and legislative record. The prominent role of religious and moral proselytizing on the legislative record, in promotional materials, and throughout every aspect of the campaigns should raise concerns with this Court.

Second, laws that were partly influenced by religious considerations are still constitutional if their *primary* purpose and effect are secular. For example, the beliefs of many religious adherents, including many Muslims, Mormons, and Methodists, require that they abstain from alcohol. And various laws restricting

[1] *See* S.B. 283, 2009 Leg., 75th Sess. (Nev. 2009) (establishing domestic partnership for same-sex couples and discussing the religious motivations behind Nevada's marriage Ban).

the sale and consumption of alcohol exist throughout the United States. *See*, *e.g.*, Ky. Rev. Stat. § 242.185 (permitting dry counties); 23 U.S.C. § 158 (National Minimum Drinking Age Act of 1984). In some cases, religious and moral understanding may have played a part in the decisions of some lawmakers to pass such laws. But unlike the the Marriage Bans, most alcohol laws have legitimate, secular purposes—preventing driving deaths, for example, or protecting children from addiction—and their primary effect is to advance these governmental interests, not to advance religion.

Conversely, as discussed in the plaintiffs-appellants' briefs, the Marriage Bans have no legitimate secular purpose. In fact, as measured at the time of enactment, the Marriage Bans had no effect *except* to express a particular religious viewpoint. In the religious sphere, even among adherents of Christianity, there was at the time (and continues to be) considerable debate about how religion should treat marriage between same-sex couples. When the Marriage Bans were enacted, neither Hawaii nor Nevada had actually permitted any marriages between same-sex couples. The primary purpose of the Marriage Bans was to take sides in this religious debate by putting the full force of the state behind an express moral and religious condemnation of a vulnerable minority—gays and lesbians. The restriction of marriage to opposite-sex couples was thus a quintessential

governmental "endorsement" of religion—a misuse of governmental power to promote a religious view, with no legitimate secular purpose.

Before the Marriage Bans, Hawaii and Nevada already had statutes limiting marriage to unions between a man and a woman. The impetus for the states' unprecedented Marriage Bans was the desire of certain individuals and religious organizations to enshrine in their respective state constitutions a particular religious understanding of marriage. Supporters, legislators, and witnesses explicitly invoked Judeo-Christian values and traditions to justify their support for the constitutional amendments and opposition to the domestic partnership law. The amendment and the related Hawaii statute lacked any separate, rational, secular purpose. Under such circumstances, the Marriage Bans are unconstitutional under the Establishment Clause.

C. The U.S. Supreme Court's "moral disapproval" line of cases under the Equal Protection Clause is informed by the Establishment Clause.

Morality and religion play an important role in the lives of many Americans, and many are undoubtedly guided in their voting decision-making by personal religious and moral beliefs.[2] But under the Supreme Court's decision in *Lawrence*

[2] Separate from the constitutional and public policy issues involved, it should be noted that *amici* generally do not believe that homosexuality or marriage between same-sex couples is immoral. *See, e.g.*, Rev. Dr. C. Welton Gaddy, President, Interfaith Alliance, *Same-Gender Marriage & Religious Freedom: A Call to Quiet*

v. Texas, 539 U.S. 558 (2003), its decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013), and a line of cases preceding these decisions, to be constitutional a law must be rationally related to a legitimate governmental interest beyond the desire to disadvantage a group on the basis of moral disapproval.[3] The Hawaii and Nevada Marriage Bans lack any such legitimate interest. Just as the lack of a rationale beyond religiously motivated moral condemnation leads to a finding that the Marriage Bans lack a secular purpose, so should the Marriage Bans' deficiencies under the Establishment Clause support a finding that the Bans violate this Court's moral condemnation doctrine under the Equal Protection Clause.

The Supreme Court held in *Lawrence* that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)) (internal quotation marks omitted). As Justice O'Connor observed in her *Lawrence* concurrence,

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Conversations and Public Debates (Aug. 2009), http://www.interfaithalliance.org/equality/read.

[3] The majority opinion in *Lawrence* acknowledged the Equal Protection Clause theory as a "tenable argument," but grounded its decision in principles of due process in order to eliminate any questions as to the continuing validity of *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See Lawrence*, 539 U.S. at 574-575. In its due process analysis, the Court spoke not only of a protected liberty interest in the conduct prohibited by the Texas law—consensual sexual relations—but also of the Court's concern with laws that "demean[]" gay people and "stigma[tize]" a group that deserves "respect." *Id.* at 571-575; see also Nan D. Hunter, *Living with Lawrence*, 88 Minn. L. Rev. 1103, 1124 (2004).

"[m]oral disapproval of [a particular group], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." 539 U.S. at 582. Justice O'Connor further observed that the Court had "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Id.*

Earlier this year, in *Windsor*, the Supreme Court found that Section 3 of the federal Defense of Marriage Act—by which Congress excluded married same-sex couples from over 1,100 federal rights, benefits, and obligations—had the purpose of expressing moral condemnation against gays and lesbians by demeaning the integrity of their relationships, as well as by expressing "animus" and a "bare . . . desire to harm a politically unpopular group." *Windsor*, 133 S.Ct. at 2693-95. The Court held this purpose unconstitutional, this time under the equal protection guarantees of the Fifth Amendment. *Id.*

Lawrence and *Windsor* are the latest in a series of cases where the Court invalidated laws reflecting a "bare . . . desire to harm a politically unpopular group." *See Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (finding constitutional amendment banning gays and lesbians from receiving nondiscrimination protections in any local jurisdiction was motivated by animus and moral disapproval, and therefore unconstitutional under the equal protection clause)

(alteration in original) (citation omitted); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (finding law targeting hippies unconstitutional under equal protection clause). In these cases, the Court properly stripped away the rationales proffered in support of such laws and concluded that "animus," "negative attitudes," "unease," "fear," bias," or "unpopular[ity]" actually motivated the legislative actions at issue. *See Windsor*, 133 S.Ct. at 2693-95; *Lawrence*, 539 U.S. at 582; *Romer*, 517 U.S. at 634-35; *Moreno*, 413 U.S. at 534.

Underlying the decisions in *Windsor*, *Lawrence*, *Romer*, and *Moreno* is an awareness by the Supreme Court that allowing condemnation of a politically unpopular group to constitute a legitimate governmental interest would effectively eviscerate the equal protection guarantees of the Fifth and Fourteenth Amendments. Accordingly, the Supreme Court has consistently rejected moral condemnation as a governmental interest. *See also, Loving v. Virginia*, 388 U.S. 1, 3 (1967) (trial judge justified 25-year sentence of married mixed-race couple by invoking God's separation of the races).

This line of cases, which searches the record for moral condemnation of a group, is quite similar to Establishment Clause secular purpose analysis. As discussed above, statements throughout the legislative and public ballot efforts to pass the Marriage Bans demonstrate that the Bans' purpose was to preserve a particular religious "ideal" of marriage and to condemn a type of marriage that did

not fit that religious ideal. The proponents of the Bans were motivated by a desire to impose religious and moral condemnation on a minority, as in *Moreno* (hippies) and *Romer* (gays and lesbians). The record is rife with statements that make clear that the "traditional marriage" the Marriage Bans were designed to protect was that envisioned by a particular lineage of Judeo-Christian religious doctrine. This purpose is improper not only under the Establishment Clause, but also under the Equal Protection Clause.

There is no legitimate governmental interest that would justify a state's defining marriage to exclude same-sex couples. Numerous governmental interests have been proposed by the defenders of the Marriage Bans. As the plaintiffs-appellants' briefs explain, these professed interests are shams. What remains once these professed interests are rejected is clear from the record: a bare desire by the interest groups sponsoring the Marriage Bans to express their moral- and religious-based condemnation of gay and lesbian people. Under both the Establishment Clause and the Equal Protection Clause, the Marriage Bans are therefore unconstitutional.

II. Because religious definitions of marriage vary, including with respect to marriage for gay and lesbian couples, the Court should abide by this country's constitutional tradition of maintaining strict separation between religious policy and state law.

A. A significant and growing number of religious groups and individuals support marriage equality.

Different religious groups have different views on marriage. In most religious communities, there is disagreement among individual congregations—and, within congregations, disagreement among individual parishioners—about how to approach marriage. This diversity of belief is not new. Even within unified religious groups, restrictions on religious marriage have changed over time.

Many faith groups, such as the Catholic and Mormon churches, oppose equal marriage as part of their official doctrine. *See, e.g.*, The Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons* (2003); First Presidency and Council of the Twelve Apostles of the Church of Jesus Christ of Latter-Day Saints, *The Family: A Proclamation to the World* (1995). But other faiths openly welcome same-sex couples into marriage, including many of the undersigned *amici*.[4] The United Church of Christ and the Unitarian Universalist Association

[4] The fact that some religious groups welcome marriage between same-sex couples does not demonstrate that gay and lesbian individuals have "political power" as that term is used in the context of Equal Protection scrutiny. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 439-54 (Conn. 2008), for full treatment of this issue. In any case, many religious groups historically have been—and

officially support marriage equality, as do the largest Jewish denominations in the United States—Conservative, Reconstructionist, and Reform Judaism.[5] In other faiths that do not, at this time, officially support marriage equality, individual congregations have been allowed to decide for themselves whether to bless marriages between same-sex couples. Last year, for example, the Episcopalian National Cathedral in Washington, D.C. endorsed such marriages. Laurie Goodstein, *Washington National Cathedral Announced It Will Hold Same-Sex Weddings*, N.Y. Times, Jan. 9, 2013, at A-12 (noting that Episcopalian National Convention authorized official liturgy for blessing same-sex unions).

Further, even in faiths where there is no official recognition of marriage between same-sex couples, many members maintain their faith while still supporting equal marriage. A recent poll found that 63 percent of religious non-Christians, 56 percent of white Catholics, 53 percent of Hispanic Catholics, and 52

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apparently continue to be—strong opponents of equal marriage rights for same-sex couples.

[5] *See, e.g.*, Shaila Dewan, *United Church of Christ Backs Same-Sex Marriage*, N.Y. Times, July 5, 2005; Unitarian Universalist Association, *Freedom to Marry, For All People*, http://archive.uua.org/news/2004/freedomtomarry/index.html (2004) (last visited Oct. 23, 2013); Rabbi Elliot Dorff et al., *Rituals and Documents of Marriage and Divorce for Same-Sex Couples* (Spring 2012); Jewish Reconstructionist Movement, *JRF Homosexuality Report and Inclusion of GLBTQ Persons*, http;//archive.jewishrecon.org/node/1742?ref=jrf (last visited Oct. 23, 2013); General Assembly Union of American Hebrew Congregations, *Civil Marriage for Gay and Lesbian Jewish Couples* (Nov. 2, 1997), http://urj.org//about/union/governance/reso//?syspage=article&item_id=2000 (last visited Oct. 23, 2013).

percent of white mainline Protestants favored allowing gay and lesbian couples to marry. Robert P. Jones, Public Religion Research Institute, *Religious Americans' Perspectives on Same-Sex Marriage* (June 30, 2012).

While many religious institutions may have a history of defining marriage as between a man and a woman, those traditions are separate from, and cannot be allowed to dictate, civil law. The legal definition of civil marriage should not be tied to particular religious traditions, but should instead reflect a broad, inclusive institution designed to protect the fundamental rights of all members of our secular, constitutional republic. Although a religious group cannot be forced to open its doors or its sacraments to those who disagree with its traditions, neither can the government restrict access to the secular institution of civil marriage to align with particular, restrictive religious beliefs.

B. Civil and religious marriage are distinct, a tradition that religious groups on both sides of this debate recognize and value.

Under our constitutional scheme, religious groups have a fundamental right to adopt and modify the requirements for marriage within their own religious communities. But they do not have the right to impose their particular religious view onto the institution of civil marriage.

Many religious groups have historically recognized the benefit inherent in ensuring that their own rules on marriage are distinct from those embodied in civil law, because this provides them with autonomy to determine which marriages to

solemnize and under what circumstances. A number of religious groups that now support ingraining their religious understanding of marriage into the Hawaii and Nevada Constitutions forget their own traditions of supporting—and benefitting from—separation between church policy and state law. *See, e.g.*, Southern Baptist Convention, *Position Statement on Church and State*, http://www.sbc.net/aboutus/pschurch.asp (last visited Oct. 23, 2013) ("We stand for a free church in a free state. Neither one should control the affairs of the other."); Joseph F. Smith et al., *Presentation of the First Presidency to the April 1896 Conference of the Church of Jesus Christ of Latter Day Saints, reprinted in* U.S. Congress, *Testimony of Important Witnesses as Given in the Proceedings Before the Committee on Privileges and Elections of the United States Senate in the Matter of the Protest Against the Right of Hon. Reed Smoot, A Senator from the State of Utah, to Hold His Seat* 106 (1905) (Leadership of the Mormon Church, in defending a U.S. Senator against charges his Mormon faith made him ineligible to serve, wrote: "[T]here has not been, nor is there, the remotest desire on our part, or on the part of our coreligionists, to do anything looking to a union of church and state."); *cf. Illinois ex rel. 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.").

A review of practices surrounding interfaith, interracial, and post-divorce marriage illustrates the diversity of religious views of marriage and the tradition of keeping such views separate from civil law.

Interfaith Marriage: Some churches historically have prohibited (and some continue to prohibit) interfaith marriage, while others accept it. For example, the Roman Catholic Church's *Code of Canon Law* proscribed interfaith marriage for most of the twentieth century. Michael G. Lawler, *Marriage and the Catholic Church: Disputed Questions* 118-119 (2002) ("The church everywhere most severely prohibits the marriage between two baptized persons, one of whom is Catholic, and the other of whom belongs to a heretical or schismatic sect.") (quoting 1917 Code C.1060). Although this restriction was relaxed in 1983, modern Catholic doctrine still requires Catholics to obtain the Church's "express permission" to marry a Christian who is not Catholic and the Church's "express dispensation" to marry a non-Christian. 1983 Code C.1086, 1124; Roman Catholic Church, *Catechism of the Catholic Church* 1635 (1995 ed.). Similarly, Orthodox and Conservative Jewish traditions both tend to proscribe interfaith marriage, *see* David S. Ariel, *What Do Jews Believe?: The Spiritual Foundations of Judaism* 129 (1996), as do many interpretations of Islamic law, *see Bandari* v. *INS*, 227 F.3d 1160, 1163-1164 (9th Cir. 2000) (Iran's official interpretation of Islamic law forbids interfaith marriage and dating).

Despite these religious traditions prohibiting or limiting interfaith marriage, American civil law has not restricted or limited marriage to couples of the same faith, and doing so would be patently unconstitutional. *See Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *cf. Bandari*, 227 F.3d at 1168 ("[P]ersecution aimed at stamping out an interfaith marriage is without question persecution on account of religion.") (citation and internal quotation marks omitted).

Interracial Marriage: As with interfaith marriage, religious institutions in the past have differed markedly in their treatment of interracial relationships. For example, some fundamentalist churches previously condemned interracial marriage. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 580-581 (1983) (fundamentalist Christian university believed that "the Bible forbids interracial dating and marriage").

In the past, the Mormon Church discouraged interracial marriage. *See Interracial Marriage Discouraged*, Church News, June 17, 1978, at 2 ("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). Yet, in the context of its policy on excluding African-Americans from the priesthood, the Mormon Church 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, *reproduced in* Appendix, *Neither White Nor Black: Mormon Scholars Confront the Race Issue in a Universal Church* (Lester E. Bush, Jr. & Armand L. Mauss eds., 1984). Similarly, religious views regarding interracial marriage must not dictate the terms of civil marriage.

Marriage Following Divorce: Finally, the Catholic Church does not recognize marriages of those who have divorced and remarried, viewing those marriages as "objectively contraven[ing] God's law." *Catechism of the Catholic Church* 1650, 2384. However, civil law has not reflected this position, and passing a law that did so would interfere with the fundamental right to marry. *See Boddie v. Connecticut*, 401 U.S. 371, 376 (1971).

* * *

In all three instances discussed above, individual religious groups have adopted particular rules relating to marriage, yet those rules have not been allowed to dictate the confines of civil marriage law. At the same time, the religious groups that followed those rules were able to enforce them internally, due to our country's long tradition of separation between church and state. For some of these religious groups to now actively advocate for a religious-based understanding of marriage to

be imposed on all people through state constitutions smacks of a self-serving double standard.

III. Religious Liberty would not be threatened by a decision invalidating the Hawaii and Nevada Marriage Bans.

A. The Hawaii and Nevada Marriage Bans deny, rather than protect, religious liberty.

In past cases, such as the one challenging California's Proposition 8, proponents of marriage bans have claimed that excluding same-sex couples from marriage could be grounded in a legitimate governmental interest of promoting religious liberty. Similarly, in both Hawaii and Nevada, proponents' ads, flyers, and public statements warned voters that if same-sex couples could marry, ministers and their parishioners would see their religious freedoms curtailed, face discrimination lawsuits, and risk losing there tax-exempt status. Many defenders of the Hawaii and Nevada Marriage Bans have abandoned these arguments in this litigation, however, for good reason: raising "religious liberty" only serves to highlight that proponents of the Marriage Bans have selected one particular religious understanding of marriage as deserving of "religious liberty" protection—a religious preference that violates the Establishment Clause.

No one's religious liberty would be threatened by a ruling overturning the Marriage Bans. The First Amendment protects the right of religious groups and their adherents to make their own rules regarding the religious solemnization of

marriages. In the United States, civil marriage is a separate institution, and it has never mirrored the requirements of religious marriage. If anything, by adopting sectarian religious doctrine to restrict marriage, the Marriage Bans burden the religious liberty of those whose faith traditions have welcomed same-sex couples to enter legal marriages in religious ceremonies. Despite going through a similar ceremony and commitment as their religious brethren, albeit without state sanction and solemnization, same-sex couples face exclusion from the separate, parallel civil institution under the Marriage Bans.

Civil marriage in the United States must be—and always has been prior to now—blind to religious doctrine. Atheists have a right to civil marriage, as tests of faith for public rights are unconstitutional. *See Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding unconstitutional a belief-in-God test for holding public office). The fact that atheists enjoy the same legal right to civil marriage as religious people poses no threat to religious marriage traditions, nor does it cheapen or abrogate the institution of marriage. And as discussed above, civil marriage's inclusion of biracial couples, couples of different faiths, and couples with prior divorces has long been the norm, and at no point has this "open tent" approach impinged on religious liberty. Churches have continued to practice their marriage rituals without facing legal liability for refusing to consecrate certain kinds of marriages and without losing their tax-exempt status.

B. A decision overturning the Marriage Bans would not result in a flood of discrimination lawsuits against religious people.

In past marriage cases, parties and *amici* defending marriage bans have expressed concern that allowing marriage equality would cause a flood of lawsuits alleging anti-gay discrimination against religious people—particularly wedding vendors likes florists and photographers. But these arguments are a red herring: laws barring anti-gay discrimination are already on the books in both Nevada and Hawaii. Those who make such arguments actually take issue with the anti-discrimination laws and a state's decision to provide anti-discrimination protection with respect to public accommodations, not with the legal definition of marriage.

The vendors supposedly at risk of facing such lawsuits would not be newly exposed to litigation by invalidation of the Marriage Bans, because same-sex couples *already* have unofficial religious and non-religious marriage ceremonies throughout Nevada and Hawaii, as well as official civil union and/or domestic partnership ceremonies. Unofficial or not, wedding vendors have been—and will continue to be—subject to nondiscrimination laws for these kinds of ceremonies. Making the ceremonies official, or changing them from civil-union to marriage ceremonies—while important for the married couple—will make no difference whatsoever in any vendor's pre-existing obligation to comply with nondiscrimination laws.

Even if invalidation of the Marriage Bans were to result in an uptick in discrimination claims against vendors who refused to provide services to same-sex wedding ceremonies, such claims could and should be addressed within existing anti-discrimination frameworks. A business that avails itself of the benefits of doing business with the public must be subject to the public's rules for conducting that business. "The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State." *Roberts v. US. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring). Indeed, it is a fundamental principle of public accommodations law that when a business chooses to solicit customers from the general public, it relinquishes autonomy over whom to serve. As the Supreme Court of Nebraska explained in one of the earliest public accommodation decisions, "a barber, by opening a shop, and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during business hours. The statute will not permit him to say to one: 'You are a slave, or a son of a slave; therefore I will not shave you.'" *Messenger v. State*, 41 N.W. 638, 639 (Neb. 1889).

In short, to the extent the law requires it, "one who employ[s] his private property for purposes of commercial gain by offering goods or services to the public must stick to his bargain." *Heart of Atlanta Motel, Inc. v. United States*,

379 U.S. 241, 284 (1964) (Douglas, J., concurring) (quoting S. Rep. No. 872, 88th Cong., 2d Sess., pp. 22). Both Nevada and Hawaii have elected to apply this principle to protect same-sex couples, and will continue to do so whether or not marriage equality is the law. Excluding same-sex couples from marriage simply to foreclose potentially meritorious discrimination claims against a commercial business is not a legitimate government interest.

CONCLUSION

For the foregoing reasons, the judgment of the Hawaii and Nevada district courts should be overturned.

Respectfully submitted,

This 25th day of October 2013

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CERTIFICATE OF COMPLIANCE

This brief contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P 32(a)(7)(B)(iii), as calculated by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 25, 2013.

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Case Nos. 12-17668, 12-16995, and 12-16998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BEVERLY SEVCIK, et al., *Plaintiffs-Appellants*,

v.

BRIAN SANDOVAL, et al., *Defendants-Appellees*, and

COALITION FOR THE PROTECTION OF MARRIAGE, *Intervenor-Defendant-Appellee*.

On Appeal from the United States District Court for the District of Nevada
Case No. 2:12-CV-00578-RCJ-PAL, The Hon. Robert C. Jones, District Judge.

NATASHA N. JACKSON, et al., *Plaintiffs-Appellants*,

v.

NEIL S. ABERCROMBIE, Governor, State of Hawai'i, *Defendant-Appellant*,

LORETTA J. FUDDY, Director, Department of Health, State of Hawai'i, *Defendant-Appellee*, and

HAWAII FAMILY FORUM, *Intervenor-Defendant-Appellee*.

On Appeal from the United States District Court for the District of Hawaii
Case No. 1:11-cv-00734-ACK-KSC, The Hon. Alan C. Kay, Sr., District Judge.

APPENDIX TO BRIEF OF *AMICUS CURIAE* BRIEF OF ANTI-DEFAMATION LEAGUE · AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE · BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE · BOARD OF TRUSTEES OF THE PACIFIC CENTRAL DISTRICT/UNITARIAN UNIVERSALIST ASSOCIATION · HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA · THE HINDU AMERICAN FOUNDATION · INTERFAITH ALLIANCE FOUNDATION · THE INTERFAITH ALLIANCE HAWAI'I · THE JAPANESE AMERICAN CITIZENS LEAGUE · KESHET · THE NATIONAL COUNCIL OF JEWISH WOMEN · METROPOLITAN COMMUNITY CHURCHES · MORE LIGHT PRESBYTERIANS · NEHIRIM · PACIFIC CENTRAL DISTRICT/UNITARIAN UNIVERSALIST ASSOCIATION · PACIFIC

SOUTHWEST DISTRICT/UNITARIAN UNIVERSALIST ASSOCIATION · PEOPLE FOR THE AMERICAN WAY FOUNDATION · RECONCILINGWORKS: LUTHERANS FOR FULL PARTICIPATION · RELIGIOUS INSTITUTE, INC. · SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND · SOCIETY FOR HUMANISTIC JUDAISM · SOUTH ASIAN AMERICANS LEADING TOGETHER · SOUTHERN CALIFORNIA NEVADA CONFERENCE OF THE UNITED CHURCH OF CHRIST · T'RUAH: THE RABBINIC CALL FOR HUMAN RIGHTS · THE UNION FOR REFORM JUDAISM · THE CENTRAL CONFERENCE OF AMERICAN RABBIS · WOMEN OF REFORM JUDAISM · UNITARIAN UNIVERSALIST ASSOCIATION · UNIVERSAL FELLOWSHIP OF METROPOLITAN COMMUNITY CHURCHES · WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM

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APPENDIX

Amicus curiae Anti-Defamation League (ADL) was founded in 1913 to combat anti-Semitism and other forms of discrimination, to advance goodwill and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all. Today, ADL is one of the world's leading civil and human rights organizations combating anti-Semitism and all types of prejudice, discriminatory treatment and hate. As part of its commitment to protecting the civil rights of all persons, ADL has filed amicus briefs in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws, including *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694 (2012); *Christian Legal Soc. v. Martinez*, 130 S. Ct. 2971 (2010); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Boy Scouts of America v. Dale*, 530 US 640 (2000); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Romer v. Evans*, 517 U.S. 620 (1996). ADL has a substantial interest in this case. At issue are core questions about equality and constitutional rights. And the justifications offered by Petitioners and their amici—if embraced by this Court—would invite state-sanctioned prejudice of the strain that ADL has long fought.

Amicus curiae Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C. Its

mission is twofold: (1) to advance the free-exercise rights of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United was founded in 1947 and has more than 120,000 members and supporters across the country.

Americans United has long supported laws that reasonably accommodate religious practice. *See, e.g.*, Brief for Americans United for Separation of Church and State et al., as Amici Curiae Supporting Respondents, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), 2005 WL 2237539 (supporting exemption from federal drug laws for Native American religious practitioners); Brief for Americans United for Separation of Church and State and American Civil Liberties Union as Amici Curiae Supporting Petitioners, *Cutter v. Wilkinson*, 544 U.S. 709 (2005), 2004 WL 2945402 (supporting religious accommodations for prisoners). Consistently with its support for the separation of church and state, however, Americans United opposes measures that exceed the bounds of permissible accommodation by imposing substantial harms on innocent third parties. That concern is especially salient when the purported accommodation results in government-sanctioned discrimination against a class of people that historically has been the target of religious and moral disapproval.

Amicus curiae Bend the Arc: A Jewish Partnership for Justice, is a national organization inspired by Jewish values and the steadfast belief that Jewish Americans, regardless of religious or institutional affiliations, are compelled to create justice and opportunity for Americans.

Amicus curiae Board of Trustees of the Pacific Central District/Unitarian Universalist Association are trustees of a District comprising 38 Unitarian Universalist congregations in Hawaii, Northern California, and Northern Nevada, and that is committed to supporting the right of same sex couples to legally marry and to share fully and equally in the rights, commitments, and responsibilities of civil marriage.

Amicus curiae Hadassah, The Women's Zionist Organization of America, founded in 1912, has over 330,000 Members, Associates and supporters nationwide. In addition to Hadassah's mission of initiating and supporting pace-setting health care, education and youth institutions in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah vigorously condemns discrimination of any kind and, as a pillar of the Jewish community, understands the dangers of bigotry. Hadassah strongly supports the constitutional guarantees of religious liberty and equal protection, and rejects discrimination on the basis of sexual orientation. Hadassah supports government action that provides civil status to committed same-sex couples and

their families equal to the civil status provided to the committed relationships of men and women and their families, with all associated legal rights and obligations, both federal and state.

The Hindu American Foundation (HAF) is an advocacy organization for the Hindu American community. The Foundation educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF focuses on human and civil rights, public policy, media, academia, and interfaith relations. Through its advocacy efforts, HAF seeks to cultivate leaders and empower future generations of Hindu Americans.

Since its inception, the Hindu American Foundation has made legal advocacy one of its main areas of focus. From issues of religious accommodation and religious discrimination to defending fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about various aspects of Hindu belief and practice in the context of religious liberty, either as a party to the case or an *amici curiae*.

Amicus curiae Interfaith Alliance Foundation celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance's members across the country belong to 75 different faith

traditions as well as no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy and advocating for the proper boundaries between religion and government. Interfaith Alliance also seeks to shift the perspective on LGBT equality from that of problem to solution, from a scriptural argument to a religious freedom agreement, and to address the issue of equality as informed by our Constitution. *Same-Gender Marriage and Religious Freedom: A Call to Quiet Conversations and Public Debates* a paper by Interfaith Alliance President, Rev. Dr. C. Welton Gaddy, offers a diversity of ideas based on Interfaith Alliance's unique advocacy for religious freedom and interfaith exchange.

Amicus curiae The Interfaith Alliance Hawai'i, incorporated in 2003 as a chapter of the national The Interfaith Alliance, is an outgrowth of The Bridges for Justice and Compassion, the legislative and human needs committee of the former Hawai'i Council of Churches. The Interfaith Alliance Hawai'i is a progressive voice promoting the positive healing role of religion in public life by encouraging dialogue, challenging extremism, and facilitating nonviolent community activism. Its statement on marriage equality is:

> *The Interfaith Alliance Hawai'i is made up of clergy and lay-leaders representing more than 30 faith-based traditions. Some of our religious institutions perform and recognize marriages for same gender loving couples by officially blessing these unions, while others*

> *do so as individuals. Some find it contrary to their beliefs or teachings to perform marriages outside of an opposite-gender paradigm. We find our diversity to be a source of strength.*
>
> *We firmly believe that the state and federal governments have no place in defining the sanctity of some traditions to the exclusion of others, as pertaining to our diverse practices of marriage. For religious institutions, marriage is deeply rooted in the rites of passage and pastoral care according to the moral and ethical teachings of those traditions.*
>
> *We affirm the human dignity and worth of all people, thus we support civil liberties and religious liberties, regardless of affectional orientation and gender identity or expression. We also affirm that civil marriages for same gender-loving couples performed by the state do not endanger any of our religious traditions.*

Amicus curiae The Japanese American Citizens League, founded in 1929, is the nation's largest and oldest Asian-American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry and others. It vigilantly strives to uphold the human and civil rights of all persons. Since its inception, JACL has opposed the denial of equal protection of the laws to minority groups. In 1967, JACL filed an amicus brief in *Loving v. Virginia*, urging the Supreme Court to strike down Virginia's anti-miscegenation laws, and contending that marriage is a basic civil right of all persons. In 1994, JACL became the first API non-gay national civil rights organization, after the American Civil Liberties Union, to support marriage equality for same-sex couples, affirming marriage as a fundamental human right that should not be barred to same-sex couples. JACL continues to work actively to safeguard the civil rights of all Americans.

Amicus curiae Keshet is a national organization that works for the full equality and inclusion of lesbian, gay, bisexual, and transgender (LGBT) Jews in Jewish life. Led and supported by LGBT Jews and straight allies, Keshet cultivates the spirit and practice of inclusion in all parts of the Jewish community. Keshet is the only organization in the U.S. that works for LGBT inclusion in all facets of Jewish life – synagogues, Hebrew schools, day schools, youth groups, summer camps, social service organizations, and other communal agencies. Through training, community organizing, and resource development, we partner with clergy, educators, and volunteers to equip them with the tools and knowledge they need to be effective agents of change.

Amicus curiae The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Laws and policies that provide equal rights for same-sex couples." Our principles state that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society" and "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual

orientation, or gender identity must be eliminated." Consistent with our Principles and Resolutions, NCJW joins this brief.

Amicus curiae Metropolitan Community Churches ("MCC") was founded in 1968 to combat the rejection of and discrimination against persons within religious life based upon their sexual orientation or gender identity. MCC has been at the vanguard of civil and human rights movements and addresses the important issues of racism, sexism, homophobia, ageism, and other forms of oppression. MCC is a movement that faithfully proclaims God's inclusive love for all people and proudly bears witness to the holy integration of spirituality and sexuality.

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 Nehirim is a national community of lesbian, gay, bisexual, and transgender (LGBT) Jews, partners, and allies. Nehirim's advocacy work centers on building a more just and inclusive world based on the teachings in the Jewish tradition.

Amicus curiae Pacific Central District/Unitarian Universalist Association is an organization comprising 38 Unitarian Universalist congregations in Hawaii, Northern California, and Northern Nevada, and is committed to supporting the

right of same sex couples to legally marry and share fully and equally in the rights, commitments, and responsibilities of civil marriage.

Amicus curiae Pacific Southwest District/Unitarian Universalist Association is an organization comprising 50 Unitarian Universalist congregations in Arizona, Southern California, and Southern Nevada that join in affirming civil marriage as a fundamental civil right.

Amicus curiae People For the American Way Foundation (PFAWF), a nonpartisan citizens' organization established to promote and protect civil and constitutional rights, joins this brief on behalf of its 5,807 members of activists in the state of Hawaii and 8,130 members and activists in the state of Nevada. Founded in 1981 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF has been actively involved in litigation and other efforts nationwide to combat discrimination and promote equal rights, including efforts to protect and advance the civil rights of LGBT individuals. PFAWF regularly participates in civil rights litigation, and has supported litigation to secure the right of same-sex couples to marry. PFAWF joins this brief in order to vindicate the constitutional right of same-sex couples to equal protection of the law.

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 multifaith 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.

Amicus curiae the Sikh American Legal Defense and Education Fund (SALDEF) was founded in 1996 and is the oldest Sikh American civil rights and educational organization. We empower Sikh Americans through advocacy, education and media relations. SALDEF's mission is to protect the civil rights of Sikh Americans and ensure a fostering environment in the United States for future generations.

Amicus curiae Society for Humanistic Judaism (“SHJ”) mobilizes people to celebrate Jewish identity and culture, consistent with Humanistic ethics and a nontheistic philosophy of life. Humanistic Jews believe each person has a responsibility for their own behavior, and for the state of the world, independent of any supernatural authority. The SHJ is concerned with protecting religious freedom for all, and especially for religious, ethnic, and cultural minorities such as Jews, and most especially for Humanistic Jews, who do not espouse a traditional

religious belief. Humanistic Jews support the right and responsibility of adults to choose their marriage partners. The Society for Humanistic Judaism supports the legal recognition of marriage and divorce between adults of the same sex, and affirms the value of marriage between any two committed adults with the sense of obligations, responsibilities, and consequences thereof.

Amicus curiae South Asian Americans Leading Together (SAALT) is a national non-profit organization whose mission is to elevate the voices and perspectives of South Asian individuals and organizations to build a more just and inclusive society in the United States. As an organization that is committed to importance of equality and civil rights, SAALT joins this brief in an effort to ensure that the Constitution is not violated and all individuals are treated equally, regardless of their sexual orientation.

Amicus curiae Southern California Nevada Conference of the United Church of Christ ("SCNC") is a faith community gathered in over 130 diverse congregations in Southern California and Nevada. 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 SCNC's Annual Gathering approved a resolution supporting marriage equality for all. The next

year, on July 4, 2005, the UCC's General Synod adopted a resolution similarly affirming equal marriage rights for same-sex couples.

Amicus curiae T'ruah: The Rabbinic Call for Human Rights is an organization led by rabbis from all denominations of Judaism that acts on the Jewish imperative to respect and protect the human rights of all people. Our commitment to human rights begins with the Torah's declaration that all people are created in the image of God (Genesis 1:26). Within the Jewish canon, this core belief leads to teachings that equate harming a human being with diminishing the image of God. (See, for example, B'reishit Rabbah 34:14 and Mishnah Sanhedrin 6:5.) People of faith are not of one mind opposing civil marriage equality, and many interpretations of religion, including ours, support equal marriage rights. Judaism insists on the equality of every person before the law. The Torah instructs judges, "You shall not judge unfairly; you shall show no partiality" (Deuteronomy 16:19). Jewish law has developed strict guidelines to ensure that courts function according to this principle. The rights and protections afforded by civil marriage are legal and not religious in nature. The case at hand addresses tax obligations that may be incumbent on some couples married according to the laws of their state, but not on others. Jewish law accepts that "the law of the land is the law," and upholds the right of the government to impose taxes on its citizens. However, major Jewish legal authorities classify as "theft" a tax levied on one subgroup and

not on another (Maimonides, Mishneh Torah, Laws of Theft 5:14; Shulchan Aruch, Hoshen Mishpat 369:8). We thus believe it is important to state that people of faith are not of one mind opposing civil marriage equality, and that many interpretations of religion actually support such equality. The Universal Declaration of Human Rights similarly guarantees to every person equal rights, without "distinction of any kind," and specifies that "Men and women of full age * * * are entitled to equal rights as to marriage, during marriage and at its dissolution." While each rabbi or religious community must retain the right to determine acceptable guidelines for religious marriage, the state has an obligation to guarantee to same-sex couples the legal rights and protections that accompany civil marriage. Doing otherwise constitutes a violation of human rights, as well as the Jewish and American legal imperatives for equal protection under the law.

Amicus curiae The Union for Reform Judaism, whose 900 congregations across North America include 1.3 million Reform Jews, the Central Conference of American Rabbis (CCAR), whose membership includes more than 2,000 Reform rabbis, and the Women of Reform Judaism which represents more than 65,000 women in nearly 500 women's groups in North America and around the world oppose discrimination against all individuals, including gays and lesbians, for the stamp of the Divine is present in each and every human being. As Jews, we are taught in the very beginning of the Torah that God created humans B'tselem

Elohim, in the Divine Image, and therefore the diversity of creation represents the vastness of the Eternal (Genesis 1:27). Thus, we unequivocally support equal rights for all people, including the right to a civil marriage license. Furthermore, we whole-heartedly reject the notion that the state should discriminate against gays and lesbians with regard to civil marriage equality out of deference to religious tradition, as Reform Judaism celebrates the unions of loving same-sex couples and considers such partnerships worthy of blessing through Jewish ritual.

Amicus curiae Unitarian Universalist Association (UUA) is a denominational organization of congregations formed in 1961 by the union of the American Unitarian Association and the Universalist Church of America, two denominations with deep roots in American history, whose membership today comprises more than 1,000 congregations nationwide, ranging from recently organized congregations to many of America's founding churches, which first gathered in the 1600s so that the Pilgrims and Puritans could pursue their faith in freedom. Its member ship includes congregations from both Hawaii and Nevada. "Because Unitarian Universalists affirm the inherent worth and dignity of every person," and "[b]ecause marriage is held in honor among the blessings of life," the denomination's General Assembly resolved overwhelmingly in 1996 to support "legal recognition for marriage between members of the same sex," urging its

"member congregations to proclaim the worth of marriage between any two committed persons and to make this position known to their home communities."

Amicus curiae Universal Fellowship of Metropolitan Community Churches ("MCC"), with 250 congregations and 43,000 adherents, is the largest Christian denomination ministering primarily to gay, lesbian, bisexual, and transgendered people. Its Hawaii and Nevada congregations and clergy obviously have a direct interest in the outcome of these appeals, as do its congregations in other states where the MCC has obtained or seeks recognition of its congregants' marriages.

Amicus curiae, Women's League for Conservative Judaism (WLCJ) is the largest synagogue based women's organization in the world. As an active arm of the Conservative/Masorti movement, we provide service to hundreds of affiliated women's groups in synagogues across North America and to thousands of women worldwide. WLCJ strongly supports full civil equality for gays and lesbians with all associated legal rights and obligations, both federal and state and rejects discrimination on the basis of sexual orientation.

Respectfully submitted,

This 25th day of October 2013

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 25, 2013.

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

October 25, 2013

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