Case No. 13-4178

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEREK KITCHEN, et al., *Plaintiffs-Appellees*,

v.

GARY R. HERBERT, in his official capacity as Governor of Utah, and SEAN D. REYES, in his official capacity as Attorney General of Utah, *Defendants-Appellants*, and

SHERRIE SWENSON, as Salt Lake County Clerk, *Defendant*.

On Appeal from the United States District Court for the District of Utah,
The Hon. Robert J. Shelby presiding, Case No. 2:13-CV-00217 RJS

BRIEF OF *AMICI CURIAE* ANTI-DEFAMATION LEAGUE · AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE · BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE · CENTRAL CONFERENCE OF AMERICAN RABBIS · HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA · THE HINDU AMERICAN FOUNDATION · INTERFAITH ALLIANCE FOUNDATION · THE INTERFAITH ALLIANCE OF COLORADO · THE JAPANESE AMERICAN CITIZENS LEAGUE · JEWISH SOCIAL POLICY ACTION NETWORK · KESHET · METROPOLITAN COMMUNITY CHURCHES · MORE LIGHT PRESBYTERIANS · THE NATIONAL COUNCIL OF JEWISH WOMEN · NEHIRIM · PEOPLE FOR THE AMERICAN WAY FOUNDATION · PRESBYTERIAN WELCOME · RECONCILINGWORKS: LUTHERANS FOR FULL PARTICIPATION · RELIGIOUS INSTITUTE, INC. · SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND · SOCIETY FOR HUMANISTIC JUDAISM · SOUTH ASIAN AMERICANS LEADING TOGETHER · T'RUAH: THE RABBINIC CALL FOR HUMAN RIGHTS · WOMEN OF REFORM JUDAISM · AND WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM · IN SUPPORT OF APPELLEES AND SUPPORTING AFFIRMANCE

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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; Central Conference of American Rabbis; Hadassah, The Women's Zionist Organization of America; The Hindu American Foundation; Interfaith Alliance Foundation; The Interfaith Alliance of Colorado; The Japanese American Citizens League; Jewish Social Policy Action Network; Keshet; Metropolitan Community Churches; More Light Presbyterians; The National Council of Jewish Women; Nehirim; People for the American Way Foundation; Presbyterian Welcome; ReconcilingWorks: Lutherans For Full Participation; Religious Institute, Inc.; Sikh American Legal Defense and Education Fund; Society for Humanistic Judaism; South Asian Americans Leading Together; T'ruah: The Rabbinic Call for Human Rights; Women of Reform Judaism; 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 appellees' challenges to the constitutionality of Utah's marriage ban, including Utah Const. art. I, § 29 and Utah Code § 30-1-2(5) (the "Marriage Ban"). *Amici* contend that the Marriage Ban violates not only the Fourteenth Amendment's Equal Protection Clause, but also the First Amendment's Establishment Clause. A decision overturning the Marriage Ban 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, which safeguards religious liberty ***for all***, selective religious understandings cannot define marriage recognition under civil law.

It is a violation of the First Amendment to deny 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 Ban, Utah 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. Utah had no legitimate secular purpose in adopting that selective religious definition of marriage. Rather, the legislative history and ballot initiative campaign confirm that those responsible for passing the Marriage Ban had the specific motive of tying the definition of marriage to a particular religious tradition's understanding of that civil institution. The Marriage Ban is therefore unconstitutional under the Establishment Clause.

This violation of the Establishment Clause also supports appellees' argument that the Marriage Ban is unconstitutional under the Fourteenth Amendment's Equal Protection Clause. Under a line of cases decided by the U.S. Supreme Court, including most recently *United States 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, governmental action motivated by such beliefs alone and directed inherently toward the disparagement of a single identifiable group, 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 Ban unconstitutional under both provisions.

Finally, contrary to the arguments of some supporters, the Marriage Ban is not rationally related to a legitimate governmental interest in protecting religious liberty. Such arguments fail to explain how a ruling invalidating the Marriage Ban 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 a red herring: laws barring ant-gay discrimination are already on the books in numerous cities and counties in Utah. While protecting religious liberty is a legitimate governmental interest in general, what the proponents of the Marriage Ban actually urge is that Utah 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: 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 and this Court have long implicitly acknowledged the connection between religious justifications and the Equal Protection guarantee. The Supreme 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 religion-based rationale, which cited God's hand in creating different races, and recognized 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 concluded that the anti-miscegenation law served no secular purpose and was based on nothing more than racial discrimination—even if grounded in moral or religious belief.

The Northern District of California's decision in *Perry v. Schwarzenegger* (held by the Supreme Court to be the final decision overturning California's

Proposition 8) further illustrates the overlap between these doctrines. 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vac'd for lack of standing to bring appeal sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). Drawing upon both the First and Fourteenth Amendments, the court observed the distinction in constitutional law between "secular" and "moral or religious" state interests. *Id.* at 930–31 (citing *Lawrence*, 539 U.S. at 571 and *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 15 (1947)). 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.*

The Establishment Clause supports an outcome here similar to *Perry*'s. Just as the Supreme Court has rejected moral justifications under the Equal Protection Clause, Establishment Clause concerns arise when legislation is motivated by a

particular *religious* doctrine. The Marriage Ban's failings under the Establishment Clause underscore and inform its failings under the Equal Protection Clause.

I. The Utah Marriage Ban violates the Establishment Clause because it was enacted with the purpose of imposing a particular religious understanding of marriage as law.

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 Utah Marriage Ban runs afoul of longstanding Establishment Clause principles because it has 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 or favoring one religious view over others.

Since this country's founding, the concept of religious liberty has 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 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). The Establishment Clause "forbids alike preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma." *Epperson v. Arkansas*, 393 U.S. 97, 103, 106 (1968) (striking down state ban on teaching evolution in public schools where "sole reason" for the law was that evolution was "deemed to conflict with a particular religious doctrine"). 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 with religion. 403 U.S. 602, 622 (1971).

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). The Court has 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. *Id.* 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, 591–92. 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 Utah Marriage Ban was 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.

Utah's Question 3 (the "Amendment"), passed in 2004, amended the state constitution to define marriage as exclusively between a man and a woman and to deny the "same or substantially equivalent legal effect" to any other union. Its supporters made no secret of the purpose behind it. The official voter guide's "Rebuttal to Argument Against" the Amendment, written by its legislative proponents, is rife with religious language:

> The Founders of our nation believed that the majority of Americans would always remain moral and choose wisely. Now, in 2004, a small percentage of the population wants to radically alter the established meaning of marriage in ways never before contemplated. . . .

> Now [same-sex couples] demand official public sanction (marriage) as if the laws of nature somehow no longer exist. . . .
>
> The Declaration of Independence specifically recognizes the "Creator," "the Laws of Nature and of Nature's God," "the Supreme Judge of the World," and our "firm reliance on the protection of divine providence." President Kennedy reminded us that "the rights of man come not from the generosity of the state, but from the hand of God."

Lt. Gov. of the State of Utah, *Utah Voter Information Pamphlet* 37 (2004).

In the weeks leading up to the election, supporters of the Amendment continued to make the religious basis for their position clear. Just two weeks before the Amendment was up for vote, the Church of Jesus Christ of Latter-day Saints—the ban's most vocal and moneyed proponent—published a statement on its position on marriage, which did not specifically mention the Utah Amendment, but did track its language:

> We of The Church of Jesus Christ of Latter-day Saints reach out with understanding and respect for individuals who are attracted to those of the same gender. We realize there may be great loneliness in their lives but there must also be recognition of what is right before the Lord.
>
> As a doctrinal principle, based on sacred scripture, we affirm that marriage between a man and a woman is essential to the Creator's plan for the eternal destiny of His children. . . .
>
> Any other sexual relations, including those between persons of the same gender, undermine the divinely created institution of the family. *The Church accordingly favors measures that define marriage as the union of a man and a woman and that do not confer legal status on any other sexual relationship.*

First Presidency of the Church of Jesus Christ of Latter-day Saints, *First Presidency Statement on Same-Gender Marriage*, Oct. 20, 2004 (emphasis added).

Other supporters, including legislators, couched the fight over the Amendment in undeniably religious terms. Rep. LaVar Christensen referred to the Amendment as "a moral question" and said that "we make no apologies for that." *As Gay Couples Marry, LDS Leaders Decry Efforts To Destroy the Family*, Sunstone Magazine, Mar. 2004, at 72, 73 ("Sunstone"). He also stated that judges and others had practiced "moral relativism, turned separation of church and state on its head, taken God out of the picture." Bob Bernick, Jr., *Utah House OKs Amendment To Outlaw Same-Sex Marriage*, Deseret News, Feb. 25, 2004. Rep. David Ure made even less effort to hide the fact that advocates of the amendment sought first and foremost to enshrine a particular religious belief into law: "We have the right to declare what's in the nature of God's law." Sunstone at 73. The fundamental message of those proposing the Amendment was that a vote in favor would preserve and protect a particular religious definition of marriage. The belief that Question 3 would "save traditional marriage" by instituting Judeo-Christian beliefs also pervaded testimony and debate in both the House and Senate. *See e.g. House Floor Debate*, 2004 Gen. Leg. Sess. (Feb. 24, 2004), available at http://utahlegislature.granicus.com/MediaPlayer.php?view_id=5&clip_id=10015.

***

Many laws could or do have religious support and are still constitutional. But two characteristics of the Amendment distinguish it from other laws that hew to religious traditions. First, most such laws do not have a comparable level of religious- and morality-based rhetoric in the public and legislative record. The prominent role of religious and moral proselytizing in 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 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 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). Religious and moral understandings may have played a part in the decisions of some lawmakers to pass such laws. But unlike the Marriage Ban, constitutional alcohol laws have legitimate, secular purposes—preventing driving deaths or protecting children from addiction—and their primary effect is to advance these governmental interests, not religion.

Conversely, as discussed in the plaintiffs-appellees' brief, the Marriage Ban has no legitimate secular purpose. In fact, as measured at the time of enactment,

the Amendment had no effect *except* to express a particular religious viewpoint. When the Amendment was passed, Utah did not actually permit same-sex marriages. In the religious sphere, even among adherents of Christianity, there was (and continues to be) considerable debate about how religion should treat marriage between same-sex couples. The primary purpose of the Amendment 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—whose relationships the amendment's sponsor referred to as "sexual perversion." Sunstone at 73. The restriction of marriage to opposite-sex couples was thus a quintessential governmental "endorsement" of religion—a misuse of governmental power to promote a particular religious view, with no legitimate secular purpose.

Before the Amendment, Utah already had statutes limiting marriage to unions between a man and a woman. *See, e.g.*, Utah Code § 30-1-2. The impetus for the state's unprecedented Amendment was the desire of certain individuals and religious organizations to enshrine in their state constitution a particular Judeo-Christian religious understanding of marriage and to insulate it from state constitutional challenge. The Amendment and the related statute lack any separate, rational, secular purpose. Under such circumstances, the Marriage Ban is unconstitutional under the Establishment Clause.

C. "Moral disapproval" does not render the Utah Marriage Ban rationally related to a legitimate state interest.

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.[1] But under the Supreme Court's decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), *United States v. Windsor*, 133 S. Ct. 2675 (2013), and a line of cases preceding those cases, 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.[2] The Utah Marriage Ban lacks any such legitimate interest. Just as the lack of a rationale beyond religiously motivated moral condemnation evidences the Amendment's lack of secular purpose, so should its Establishment Clause deficiencies support a finding that it

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

[2] 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 574–75. 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 571–75; *see also* Nan D. Hunter, *Living with Lawrence*, 88 Minn. L. Rev. 1103, 1124 (2004).

violates 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 v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (internal quotation marks omitted). Justice O'Connor observed in her *Lawrence* concurrence, "[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.*

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 just the latest 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) (alteration in original) (citation omitted) (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); *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 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 these decisions 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) (striking down anti-miscegenation law after trial judge invoked 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 Amendment demonstrate its purpose of preserving a particular religious "ideal" of marriage and condemning a type of marriage that did not fit that ideal. The Amendment's proponents 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 Amendment was designed to protect was that envisioned by a particular lineage of Judeo-Christian religious doctrine. This purpose is improper under both the Establishment Clause and 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 Ban. But as the plaintiffs-appellees' brief explains, 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 Ban to express their moral- and religion-based condemnation of gay and lesbian people. Under both the Establishment

Clause and the Equal Protection Clause, the Marriage Ban is therefore unconstitutional.

II. The Court should abide by the constitutional tradition of strict separation between religious policy and state law.

A. Religious definitions of marriage vary and a significant and growing number of religious groups and individuals support marriage equality.

Different religious groups have different views on marriage, and the separation of church and state guaranteed by the Constitution protects those views. In most religious communities, there is disagreement both among and within individual congregations regarding 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 Church and Church of Jesus Christ of Latter-day Saints, oppose marriage equality 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).

Other faiths openly welcome same-sex couples into marriage, including many of the undersigned *amici*.[3] The United Church of Christ and the Unitarian Universalist Association officially support marriage equality, as do several Jewish denominations—the Reform, Conservative, and Reconstructionist Movements.[4] Some faiths allow individual congregations to decide 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

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

[4] *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* (2004) http://archive.uua.org/news/2004/freedomtomarry/index.html (last visited Feb. 24, 2014); Rabbi Elliot Dorff et al., *Rituals and Documents of Marriage and Divorce for Same-Sex Couples* (Spring 2012); 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 Feb. 24, 2014).

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 percent of white mainline Protestants favored allowing same-sex 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 requirements for marriage within their own religious communities. But they do not have the right to impose their particular religious views 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 Utah Constitution 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 Feb. 24, 2014) ("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) (Church leadership, 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 separating such views from civil law.

Interfaith Marriage: Some churches historically 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* 118–19 (2002) (quoting 1917 Code C.1060). Although this restriction was relaxed in 1983, modern Catholic doctrine still requires the Church's "express permission" to marry a non-Catholic Christian and "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, 1163–64 (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, 580–81 (1983) (fundamentalist Christian university believed that "the Bible forbids interracial dating and marriage").

In the past, the Church of Jesus Christ of Latter-day Saints 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 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 divorce and remarry, 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 do not 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 advocate for a religion-based understanding of marriage to be

imposed on all people throughout the state smacks of a hypocritical double standard.

III. A decision invalidating the Utah Marriage Ban would not threaten religious liberty.

A. The Utah Marriage Ban denies, rather than protects, religious liberty.

No one's religious liberty would be threatened by overturning the Utah Marriage Ban. 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 Ban burdens the religious liberty of those whose faith traditions welcome same-sex couples to enter legal marriages in religious ceremonies. Despite going through a ceremony and commitment like their religious brethren (albeit without state solemnization) same-sex couples face exclusion from the separate, parallel civil institution.

The appellants and their *amici* claim that excluding same-sex couples from marriage is grounded in the state's interest of promoting religious liberty. In fact, appellants argue that if same-sex couples could marry, churches, private businesses, public schools, teachers, and counselors among others would see their religious freedoms curtailed, face discrimination lawsuits, and risk losing governmental

benefits. This parade of horribles is misplaced and misunderstands the purpose and meaning of "religious liberty." These arguments only serve to highlight that proponents of the Marriage Ban have selected one particular religious understanding of marriage as deserving of "religious liberty" protection—a religious preference that violates the Establishment Clause.

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 Ban would not result in a flood of discrimination lawsuits against religious people.

1. Marriage equality is a separate and distinct issue from anti-discrimination laws.

In past marriage cases, as here, 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 numerous cities and counties in Utah. Those who make such arguments actually take issue with the anti-discrimination laws and the government's decision to provide anti-discrimination protection with respect to public accommodations, not with the legal definition of marriage. If the appellants are concerned about the passage of potential anti-discrimination laws or the application of existing laws to same-sex couples, then they can attempt to convince the Legislature or the voters to enact exemptions from these laws.

The vendors supposedly at risk of facing sexual orientation discrimination lawsuits would not be newly exposed to litigation by invalidation of Utah's Marriage Ban, because same-sex couples *already* have unofficial religious and non-religious marriage ceremonies throughout the state. 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 to official 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.

2. Commercial businesses have no constitutional right to discriminate.

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. U.S. 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. *Bell v. Maryland*, 378 U.S. 226, 314–15 (1964) (Goldberg, J., concurring) (quoting *Marsh v. Alabama*, 326 U.S. 501, 506 (1946)). 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., 22). Cities and counties in Utah 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 governmental interest.

CONCLUSION

For the foregoing reasons, the judgment of the Utah district court should be affirmed.

Respectfully submitted,

This 4th day of March 2014

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on March 4, 2014.

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