No. 12-144

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al.*,

Petitioners,

v.

KRISTIN M. PERRY, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ANTI-DEFAMATION LEAGUE *ET AL.* IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE* ANTI-DEFAMATION LEAGUE *ET AL.* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*[1]

Amici curiae respectfully submit this brief in support of Respondents.

The 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

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket *amicus* consent letters.

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.[2]

ADL has a substantial interest in this case. At issue are core questions about equality and constitutional rights. And the religious and moral justifications offered by Petitioners' *amici* to support Proposition 8—if embraced by this Court—would threaten to invite state-sanctioned prejudice of the strain that ADL has long fought.

There are 18 other *amici* that have joined this brief: Americans United for Separation of Church and State, Bend the Arc—A Jewish Partnership for Justice, The Central Conference of American Rabbis and Women of Reform Judaism, Congregation Beit Simchat Torah, Hadassah—The Women's Zionist Organization of America, Inc., The Hindu American Foundation, The Interfaith Alliance Foundation, The Japanese American Citizens League, Jewish Social Policy Action Network, Keshet, Lutherans Concerned/North America, Metropolitan Community Church, The National Council of Jewish Women, Nehirim, People for the American Way Foundation, The Religious Coalition for Reproductive Choice,

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[2] *See*, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* 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 Am.* v. *Dale*, 530 US 640 (2000); *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Romer* v. *Evans*, 517 U.S. 620 (1996).

T'ruah: Rabbis for Human Rights-North America, and Women's League for Conservative Judaism. Their interest statements are included in the Appendix to this brief.

SUMMARY OF ARGUMENT

While Petitioners largely shy away from explicitly embracing religious and moral rationales for Proposition 8, their *amici* do not. Many argue that Proposition 8 has a rational basis because the Judeo-Christian religious tradition has historically recognized marriage as a union between opposite-sex partners and has frowned upon same-sex relationships and sexual intimacy. *See*, *e.g.*, Liberty, Life & Law Foundation Br. 3. Others attempt to recast religious opposition to marriage equality as concern for religious freedom, arguing that Proposition 8 is a rational bid to avoid "reasonably foreseeable * * * conflicts between same-sex marriage and religious liberty." Becket Fund Br. 4.

Those arguments should be rejected. This Court has refused for three-quarters of a century to uphold laws disfavoring minority groups based on religious or moral disapproval alone—with the one, now-discredited exception of *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). And for good reason: Time and again throughout our nation's history, laws that disadvantaged or degraded particular groups have been justified by resort to morality and religion. And time and again, our society has come to see those laws as repugnant, and the religious and moral disapproval justifying them as little more than a means to enshrine the status quo. Not surprisingly, the religious and moral disapproval itself has receded as society shifts and the minority group gains

greater public acceptance. That history helps explain why this Court rejected moral disapproval in *Lawrence* v. *Texas*, explaining that traditional morality is " 'not a sufficient reason to uphold a law.' " 539 U.S. 558, 577 (2003) (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

The Court should hew to this practice and reject religious or moral disapproval as a legitimate basis for a law that strips Californians of their state right to a civil marriage. Like the moral and religious justifications for slavery, segregation, interracial-marriage bans, and laws restricting women's roles in public life, the moral and religious objections to marriage equality are proving ephemeral. Indeed, even religious groups among Petitioners' *amici* have tempered their views in just the past few years. These swiftly shifting sands underscore why moral and religious disapproval—including the chimera of protecting the "religious liberty" of those who condemn marriage equality—are too weak a foundation for government discrimination.

ARGUMENT

I. PETITIONERS' *AMICI* HAVE ADVANCED RELIGIOUS AND MORAL JUSTIFICATIONS FOR PROPOSITION 8.

ADL joins in Respondents' arguments exposing as fatuous—and necessarily irrational—the purported secular grounds advanced by Petitioners for justifying Proposition 8. As the Ninth Circuit held, none of these proffered objectives was actually furthered by Proposition 8, and for that reason alone none offers a rational basis for the law. Pet. App. 70a. With those grounds set to the side, there is but one interest left to support Proposition 8: religious and moral disap-

proval[3] of marriage equality and, in some cases, of gay people themselves.

Perhaps recognizing that this Court's precedents render that interest constitutionally insufficient, Petitioners shy away from endorsing it. Their *amici*, however, have no such reservations. The Citizens United's National Committee for Family, Faith and Prayer (Citizens United), for example, argues that "[i]t is entirely possible for the people of California, without exhibiting bias, animus or irrationality, to embrace the notion that since God instituted the ordinance of marriage, as created beings we should defer to His definition of marriage." Citizens United Br. 37. And the National Association of Evangelicals (NAE) argues that "Proposition 8 is not invalid because it * * * reflects a moral judgment consistent with certain religious beliefs * * * [or] because it embodies a moral judgment, since marriage laws fall within a State's police power to regulate public morality." NAE Br. 2-3. Additional examples abound. *See*, *e.g.*, Foundation for Moral Law Br. 8-9; Liberty, Life and Law Foundation Br. 3, 24.

Others among Petitioners' *amici* offer a twist on the religious-moral rationale for Proposition 8: They express concern for the *religious liberty* of those who disapprove of marriage equality on religious grounds. *See* Christian Legal Society Br. 5 ("[I]f this Court declares that religious judgments about marriage, family, and sexual behavior are the legal equivalent of racism, it will diminish the religious liberty of

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[3] Moral justifications for Proposition 8 are inextricably intertwined with religious justifications. The moral disapproval of marriage equality is grounded in the Judeo-Christian tradition, not in any universal concept of moral good. *See Bowers*, 478 U.S. at 196 (Burger, J., concurring).

millions of religious believers and religious communities"); Becket Fund Br. 4 (Proposition 8 addresses a threat to religious liberty because a believer's opposition to legally enshrined marriage equality could trigger litigation and government penalties); *accord* Conference of Catholic Bishops Br. 21-24; Robert P. George Br. 30; Liberty, Life and Law Foundation Br. 10-11; Thomas More Law Center Br. 11. And while Petitioners themselves do not advance this argument, they endorse it. Pet. Br. 31 n.2 ("As our amici will demonstrate, Proposition 8 advances other important societal interests," including "accommodating the * * * fundamental rights of institutions and individuals who support the traditional definition of marriage on religious or moral grounds.").

The topside briefs, in short, rely heavily on religious and moral disapproval of marriage equality as justification for Proposition 8. No surprise there. It was, after all, that disapproval, not Petitioners' post-hoc rationalizations, that primarily motivated the change in law. *See* Pet. App. 90a, 209a, 276a. But as we explain below, this religious and moral disapproval cannot legitimize discrimination.[4]

II. RELIGIOUS AND MORAL DISAPPROVAL HAS HISTORICALLY BEEN AN UNSUSTAINABLE BASIS FOR JUSTIFYING LAWS DISADVANTAGING MINORITY GROUPS.

Proponents of laws that marginalize disadvantaged groups have long relied on arguments grounded in

[4] Though ADL agrees with Respondents that Proposition 8 should be examined with heightened scrutiny, discriminatory laws based on religious or moral disapproval do not survive even rational basis review. This brief proceeds under that less exacting rubric.

morality and religion to justify the discrimination. Time and again, however, society has come to see these laws as a stain on the nation's history and to view the religious and moral justifications offered for them as wrong, both spiritually and philosophically.

A. Laws That Disadvantaged Minority Groups Have Historically Been Justified By Religious And Moral Disapproval.

Throughout American history, the pattern is clear: Laws that now seem preposterous were defended—and, in many cases, extolled—in their day on grounds of religious and moral disapproval.

1. Slavery provides a striking example. From the colonial period until the ratification of the Thirteenth Amendment, supporters of slavery frequently relied on scripture not only to deflect abolitionist concerns but also to insist that slavery was a moral *good*—a central part of God's plan. *See* W. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief & Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657, 666-667 (2010). Slavery supporters prominently argued, for example, that " 'the Negro was a heathen and a barbarian, an outcast among the peoples of the earth, a descendant of Noah's son Ham, cursed by God himself and doomed to be a servant forever on account of an ancient sin.' " D. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law & Politics* 12 (1978) (quoting 2 G. Myrdal, *et al.*, *An American Dilemma: The Negro Problem and Modern Democracy* 85 (1944)). A related theory held that "negroes were human but that unlike whites they were not created in the image of God and [were] one of several inferior races created by God after Adam." 6 J.

Smith, *The Biblical & "Scientific" Defense of Slavery* xxv-xxvi (1993). Defenders of slavery also emphasized "that God's Chosen (Abraham, Isaac, and Jacob) owned slaves and that Leviticus required the Israelites to secure 'bondsmen' from among the 'heathen' surrounding Israel" that were to be "inherit[ed] * * * for a possession." Eskridge, *supra*, at 667.

This scriptural justification was not embraced by extremist sects alone. To the contrary, it represented the dominant viewpoint of nearly every major religious group in the United States during this period. In fact, when abolitionists began to mount challenges to slavery, clergymen of all denominational stripes were among the institution's most ardent defenders. *Id.* at 669. And following Lincoln's Emancipation Proclamation, 96 religious leaders from 11 different denominations issued a proclamation of their own entitled "An Address to Christians Throughout the World" demanding the preservation of slavery. *Id.*

The biblical defense of slavery gained currency within the judicial sphere as well. For example, in *Scott* v. *Emerson*, 15 Mo. 576 (Mo. 1852), the Missouri Supreme Court counseled:

> When the condition of our slaves is contrasted with the state of their miserable race in Africa; when their civilization, intelligence, and instruction in religious truths are considered * * * we are almost persuaded, that the introduction of slavery amongst us was, in the providence of God * * * a means of placing that unhappy race within the pale of civilized nations.

Id. at 587. Indeed, even this Court accepted a religiously rooted notion of African-Americans as inferi-

or, noting that that inferiority "was regarded as an axiom in morals as well as in politics, which no one thought of disputing[.]" *Dred Scott* v. *Sandford*, 60 U.S. 393, 407 (1857).

2. Nor did the Thirteenth Amendment put an end to religious and moral justifications for African-American subjugation. Instead, those opposed to equal rights for former slaves simply modified their reading of scripture: If the Bible no longer could be read to condone slavery, it could at least be read to mandate segregation. Eskridge, *supra*, at 694. The theories of Reverend Benjamin Morgan Palmer, leader of the Southern Presbyterian Church, provide a telling example. Recall that, according to Biblical tradition, Africans descended from Ham. Palmer theorized that since Ham's grandson Nimrod built the Tower of Babel, and God reacted by scattering the tower's builders " 'abroad from thence upon the face of all the earth,' " God would do the same thing again if Ham's current descendants challenged segregation: "[I]f arrogant descendants of Ham * * * sought to disrupt the divine plan for segregation of the races, the Lord would thwart those plans through divine dispersion that reaffirmed the original design." *Id.* at 669-670. Southern whites relied on this and other "modernized" interpretations of scripture to advocate a " 'right not to associate' with black people." *Id.* at 669.

Just as with slavery, these arguments gained widespread acceptance, including within the judiciary. In *West Chester & Philadelphia Railroad Co.* v. *Miles*, 55 Pa. 209 (Pa. 1867), the Pennsylvania Supreme Court opined that "following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix." *Id.* at 213.

Thus the legal basis for segregation: "When, therefore, we declare a right to maintain separate relations as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself[.]" *Id.* at 214. This passage was cited repeatedly by other courts as a basis for upholding Jim Crow laws. *See, e.g.*, *Berea College* v. *Commonwealth*, 29 Ky. L. Rptr. 284 (Ky. 1906); *Bowie* v. *Birmingham Ry. & Elec. Co.*, 125 Ala. 397, 408-409 (1900); *State* v. *Gibson*, 36 Ind. 389 (1871).

3. Segregationist arguments grounded in religion and morality were perhaps most ubiquitous in the struggle against interracial marriage. Seizing on this Court's pronouncement that marriage "ha[s] more to do with the morals and civilization of a people than any other institution," *Maynard* v. *Hill*, 125 U.S. 190, 205 (1888), opponents of interracial marriage relied on scripture to argue that marriage between the races was immoral and a contravention of God's word. They cited to numerous biblical passages to justify their position, including Deuteronomy 7:3 (instructing the Israelites not to marry members of other tribes); Ezra 9:1-3 (discussing the "abominations" of marrying members of other nations); and Genesis 28:1 (describing Isaac's instruction to Jacob not to "take a wife of the daughters of Canaan," i.e., of African descent). *See* Eskridge, *supra*, at 673 n.79, 675.

Again, these beliefs found their way into scores of judicial opinions upholding bans on interracial marriage. In *Kinney* v. *Commonwealth*, 71 Va. 858 (1878), for example, the Virginia Supreme Court held

that "[t]he purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization" all required that the races "be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion." *Id.* at 869. Likewise, in *Green* v. *State*, 51 Ala. 190 (1877), the Alabama Supreme Court wrote: "[S]urely there can not be any tyranny or injustice in requiring both [blacks and whites] alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare He has made the two races distinct." *Id.* at 195. *See*, *e.g.*, *Scott* v. *State*, 39 Ga. 321, 326 (1869); *Miles*, 55 Pa. at 213.

Perhaps most notoriously, a Virginia trial court held in the mid-1960s—in a decision later overturned by this Court—that Virginia's prohibition on interracial marriage fulfilled God's Word: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents." *Loving* v. *Virginia*, 388 U.S. 1, 3 (1967) (citing trial court opinion). "And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." *Id.*

Such beliefs maintained a robust following well into the second half of the twentieth century. *See id.*; *see also State ex rel. Hawkins* v. *Board of Control*, 83 So. 2d 20 (Fla. 1955) (noting that "segregation is not a new philosophy generated by the states" but rather part of "God's plan"). But as laws supporting segregation began to fall, the arguments for segregation shifted; they began to focus more on religious liberty

and the associational freedom of white Christians not to associate with non-whites. *See* Eskridge, *supra*, at 672-674. After this Court struck down the "separate but equal" doctrine in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), Southern churches created religious academies so white Christians would not be burdened by having to attend segregated schools. *See* U.S. Comm'n on Civil Rights, Discriminatory Religious Schools & Tax Exempt Status 1 (1982). When the Treasury Department removed those schools' tax-exempt designations, fundamentalists protested that the government was infringing on their religious liberty to run segregated schools as the Bible demanded. *See Tax Exempt Status of Private Schools: Hearing Before the Subcomm. on Taxation & Debt Mgmt. Generally of the S. Comm. on Fin.*, 96th Cong. 18 (1979). Bob Jones University made the same argument before this Court in defending its segregationist admissions policy as late as 1983. *See Bob Jones Univ.* v. *United States*, 461 U.S. 574, 602-603 (1983).

4. Similar arguments grounded in religion and morality were advanced to support laws discriminating against women. *See* A. Padilla & J. Winrich., *Christianity, Feminism & the Law*, 1 Colum. J. Gender & L. 67, 75-86 (1991). As one scholar has noted: "There is assumed to be a literal scriptural foundation for a patriarchal family governance structure of husband as 'head' of the household," with his "wife as caregiver/homemaker and submissive or deferential to the husband's authority." L. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools & Sex Equality*, 69 Fordham L. Rev. 1617, 1643 (2001).

As with race, this belief structure influenced judicial decision-making. In *Bradwell* v. *Illinois*, 83 U.S. 130 (1873), for example, a member of this Court opined that Illinois could deny women admission to the state bar because "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* at 141 (Bradley, J., concurring). That God Himself ordained women to be homemakers (not lawyers) provided the key justification for this view: "The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. * * * The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." *Id.*

B. Such Justifications Have Been Abandoned And Opinions Upholding Them Are Viewed As Anachronistic Blemishes.

The discriminatory laws catalogued above have been universally repudiated. This Court rejected miscegenation laws in *Loving*. It rejected segregation in *Brown*. It has repudiated opinions upholding racially discriminatory laws that rested on moral and religious disapproval. *See*, *e.g.*, *South Carolina* v. *Regan*, 465 U.S. 367, 412 (1984) (referring to *Dred Scott* as one of three worst decisions in history). And the Court over the past four decades has rejected earlier, religion-driven views regarding the place of women in society. In *Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982), for example, the Court held that any test for determining the validity of gender-based classifications "must be

applied free of fixed notions concerning the roles and abilities of males and females." *Id.* at 724-725. And in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), the Court, repudiating Justice Bradley's concurrence in *Bradwell*, noted the "long and unfortunate history of sex discrimination" in America. *Id.* at 684.

Tellingly, as societal support for discrimination has ebbed, the religious and moral disapproval that undergirded that discrimination has *itself* receded. After the Civil War, clergymen modified their interpretation of scripture so that the Bible endorsed segregation instead of slavery. *See supra* at 9-10. Likewise, the 1960s witnessed all of the major Protestant denominations "abandon[ ] the racist renderings of the biblical stories about Noah, Ham, Canaan, Nimrod, Isaac, and Jacob" altogether. Eskridge, *supra*, at 681. And many religious groups have embraced the precise opposite of their old approach to women's rights issues. Many Protestant churches, for example, now ordain women and embrace gender-neutral policies, *see* C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1, 44 (2011), and have introduced programs to address discrimination against women within the church, *see* E. Wendorff, *Employment Discrimination & Clergywomen: Where the Law Has Feared to Tread*, 3 Cal. Rev. L. & Women's Stud. 135, 140 (1993).

This shift is just the latest incarnation of a recurring national dynamic: Religious justifications for discriminatory laws vanish as popular support for those forms of discrimination fade. Or, as Professor Eskridge put it, "[r]eligious doctrine on matters relating to race and sexuality has been relentlessly dynamic: the Word of God has changed constantly." Eskridge, *supra*, at 712.

III. THIS COURT HAS CEASED TO RELY ON RELIGIOUS AND MORAL DISAPPROVAL ALONE AS A LEGITIMATE BASIS FOR ANY LAW.

The unstable half-life of religious and moral justifications for discriminatory past practices is one reason this Court no longer relies on religious and moral disapproval alone to uphold laws, particularly laws burdening minority groups.

1. As one scholar has systematically demonstrated, "the post-World War II Court has *never* relied exclusively on morality to sustain government action with the exception of the now-discredited *Bowers* v. *Hardwick*." S. Goldberg, *Morals-Based Justifications for Lawmaking: Before & After* Lawrence *v.* Texas, 88 Minn. L. Rev. 1233, 1267-68 (2004) (emphasis added). In cases ranging from adult-entertainment bans to blue laws to commercial-speech restrictions, the Court has confronted laws that most easily could be justified on grounds of moral and religious disapproval. *See id.* at 1268-80. And while some members of the Court have sometimes defended such laws on those grounds, *see id.* at 1272-73, the Court has consistently refused to do so.

Among the most prominent examples are decisions upholding restrictions on adult entertainment. In those cases, rather than relying on unvarnished moral and religious disapproval of sexually explicit entertainment, the Court has cited concrete harms caused by adult entertainment, such as a correlation with increased crime or a tendency to promote anti-social behavior. For example, in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), the majority upheld a ban on obscene films not because such films were immoral but because they detracted from "the inter-

est of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." *Id.* at 57-58. Indeed, the majority explicitly declined to rest on moral or religious grounds alone: "The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful.'" *Id.* at 59. By the time the Court upheld another ban on nude dancing in *City of Erie* v. *Pap's A.M.*, 529 U.S. 277 (2000), the number of Justices willing to rely exclusively on the "traditional power of government to foster good morals" was down to two, *see id.* at 310 (Scalia, J., concurring in the judgment), while four other Justices voted to uphold the ban exclusively on the ground that the law prevented secondary harms such as increased crime, *see id.* at 296-298 (plurality op.), and a fifth disagreed only over whether the city had presented sufficient evidence of those secondary harms, *see id.* at 314-315 (Souter, J., concurring in part and dissenting in part).

In other areas, too, the Court has been unwilling to point to moral and religious preferences alone as the basis for a law. *See* Goldberg, *supra*, at 1276-81. Indeed, even in contexts where the religious and moral basis for a law is almost inescapable, this Court has declined to uphold the law solely on those grounds. In *McGowan* v. *Maryland*, 366 U.S. 420 (1961), the Court acknowledged that Sunday closing laws were vestigial reminders of early Christian disapproval of work, travel, and alcohol consumption on the Sabbath. *Id.* at 433. But the Court upheld Maryland's Sunday closing laws as justified by a current, secular goal of "improvement of the health, safety, recreation and general well-being of our

citizens." *Id.* at 444. The state's legitimate interest, the Court held, was merely "to set one day apart from all others as a day of rest, repose, recreation and tranquility." *Id.* at 450.

2. As Professor Goldberg's survey acknowledges, some of the Court's opinions in these areas have at least nodded toward the continuing relevance of morality as a motive for government action, even if they have not been willing to rely on moral and religious disapproval in practice. The Court's teachings have been far more categorical, however, when it comes to laws that discriminate against, or disadvantage, minority groups. In cases like *Lawrence*, the Court has made its position clear: Government may *not* act against a particular group based solely on a majority's view of what morality or religion commands.

a. In *Bowers*, the Court upheld Georgia's criminal prohibition on oral and anal sex as valid under the Due Process Clause. The majority opinion held explicitly that moral disapproval provided a rational basis for the law. Responding to the argument that "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was "an inadequate rationale to support the law," the Court wrote: "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U.S. at 196. Chief Justice Burger's concurring opinion added citations to religious condemnation of same-sex relations and forceful statements to the effect that "[c]ondemnation of [homosexual conduct] is firmly rooted in Judeo-

Christian moral and ethical standards." *Id.* at 196-197 (Burger, C.J., concurring).

In separate dissenting opinions, Justice Blackmun and Justice Stevens laid the foundation for this Court's eventual return to form in *Lawrence*. "The legitimacy of secular legislation depends * * * on whether the State can advance some justification for its law beyond its conformity to religious doctrine," Justice Blackmun explained. *Id.* at 211 (Blackmun, J., dissenting). Justice Stevens, for his part, highlighted the very jurisprudential principle we identify in this brief: "Our prior cases make [this proposition] abundantly clear: * * * [T]he 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." *Id.* at 216 (Stevens, J., dissenting).

Bowers, of course, did not last long. The Court presaged its demise in *Romer* v. *Evans*, 517 U.S. 620 (1996). There, the Court held that a Colorado constitutional amendment that would have removed all legal protections for gay men and lesbians as a class had no "legitimate governmental purpose." *Id.* at 635. The Court reached that conclusion without so much as mentioning *Bowers* or the supposedly legitimate interest in enshrining the community's moral and religious views that *Bowers* had endorsed, and that the *Romer* dissent insisted should control the case. *See id.* at 636 (Scalia, J., dissenting).

Finally, in *Lawrence*, this Court squarely rejected *Bowers*—and did so in the strongest possible terms. In striking down Texas's criminal ban on same-sex intercourse, the Court expressly adopted the reasoning of Justice Stevens' dissent in *Bowers*, holding

that the dissent "should have been controlling in *Bowers* and should control here." 539 U.S. at 577-578. And the Court directly rejected any argument that moral and religious disapproval could suffice as a rational basis for Texas's law. "[R]eligious beliefs, conceptions of right and acceptable behavior, and * * * ethical and moral principles * * * do not answer the question before us," it explained. *Id.* at 571. "The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law." *Id.*

Ultimately, the Court concluded that "[t]he Texas statute furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual." *Id.* at 578 (emphasis added). As the *Lawrence* dissent recognized, this conclusion firmly established that "the promotion of majoritarian sexual morality is not even a *legitimate* state interest." *Id.* at 599 (Scalia, J., dissenting).

IV. THE MORAL AND RELIGIOUS ARGUMENTS IN THIS CASE REST ON SHIFTING GROUNDS, AND UNDER *LAWRENCE* THIS COURT SHOULD REJECT THEM.

By roundly repudiating *Bowers*, the Court reaffirmed an essential constitutional principle: that enforcing majoritarian morals, standing alone, offers no rational basis for a law that disfavors unpopular groups. That principle forecloses the religious and morality-based arguments advanced by Petitioners' *amici*. And while that is reason enough to affirm, it is worth recognizing that in this case—as with religious and moral justifications for slavery, segregation, and bans on interracial marriage—law and history intersect. For when it comes to LGBT (Les-

bian, Gay, Bisexual and Transgender) rights and marriage equality, history is repeating itself: Religious and moral objections to marriage equality are dissipating quickly as societal attitudes fundamentally recalibrate.

A. Religious Teachings On LGBT Rights And Marriage Equality Are Shifting.

1. Until recently, many religions vehemently opposed homosexuality and homosexual behavior—and the law followed suit. Between 1879 and 1961, most American states and the federal government adopted statutes criminalizing sodomy and imposing civil disabilities on gay people. Eskridge, *supra*, at 689. These laws were premised, at least in part, on the view that same-sex sodomy is a carnal sin and contrary to Biblical purity rules. *Id.* As one evangelical newspaper explained:

> Romans 1:18-32 shows that homosexuality is contrary to nature, and that it is part of the degeneration of man that guarantees ultimate disaster in this life and in the life to come. The Church had better make it plain that Christianity and homosexuality are incompatible even as it proclaims deliverance for the homosexual from his sinful habit through faith in Jesus Christ.

Editorial, *The Options of Modern Man*, 14 Christianity Today 132, 134 (1969).

Not all religious groups expressed such hostility toward homosexuality, of course. But among those who did, the anti-gay rhetoric, and action, only intensified as the gay-rights movement began to emerge. In 1965, "the Roman Catholic Church * * * almost single-handedly blocked sodomy reform in

New York based upon the Church's view that sodomy is a carnal sin." Eskridge, *supra*, at 690. In 1972, Mormon activists in Idaho convinced that state to reverse course and *reinstate* a sodomy ban it had just repealed. *Id.* at 692. In 1986, the President of the Southern Baptist Convention preached that "God Himself created AIDS to show His displeasure with homosexuality." *Id.* at 695. And two years later, Southern Baptists adopted a formal resolution condemning homosexuality as an "abomination in the eyes of God." *Id.* at 695-96.

2. But more recently—just as in the cases of integration, interracial marriage, and the like—religious teachings have shifted, some quite dramatically. *See generally* Eskridge, *supra*, at 689-700. In 1978—less than a decade after the Stonewall Riots ushered in the gay-rights movement—the Presbyterian Church issued a comprehensive statement concluding, after reexamining scripture, that the "Sin of Sodom" was rape (rather than gay sex) and that St. Paul's condemnations "refer to dissolute behaviors rather than to any and all homosexual relations." *Id.* at 700-701. By 1986, most mainstream Protestant denominations had decided that the Bible does not support criminal sanctions against consensual same-sex relations. *Id.* at 699.

Some religious denominations have gone much further. During the last three decades, most mainstream Protestant denominations, including the Unitarian Universalist Association, the Presbyterian Church, the Quakers, the Episcopal Church, the United Methodist Church, the Evangelical Lutheran Church in America, the United Church of Christ, and the Disciples of Christ, have announced that LGBT

people are entitled to equal treatment and issued statements beseeching their members not to reject LGBT congregants. *Id.* at 699-700. During this same period, Unitarians, the United Church of Christ, and Reform, Reconstructionist and Conservative Jews began ordaining openly gay rabbis and ministers. *Id.* at 707. The Episcopal Church followed suit in 1989. *Id.*

Indeed, even some groups that previously resisted gay rights have embraced a more tolerant stance of late. In 1994, the Vatican issued a statement that LGBT persons "must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided." *Id.* And the Southern Baptist Convention has questioned the vehemence of its earlier condemnations. In 2009, the editor of the *Baptist Standard* asserted that expelling LGBT members from the church was not "redemptive" because it singles out one sin while turning a blind eye to others. *Id.* at 705-706.

3. To be sure, for the Catholic Church, Mormons, Southern Baptists, and some other groups, marriage equality has become "the new Maginot Line for homosexuality." *Id.* at 708. However, in general, moral and religious condemnations of same-sex marriage have waned in recent years. A number of groups, including the Union of American Hebrew Congregations (Reform Jews), the Unitarian Universalist Church, the United Church of Christ, the Quakers, and the Episcopal Church, now embrace marriage equality. *See* Human Rights Campaign, *Faith Positions*.[5]

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[5] *Available at* http://www.hrc.org/resources/entry/faith-positions.

Other groups have taken more incremental approaches. In 2004, the Presbyterian General Assembly passed a resolution indicating support for laws recognizing same-sex relationships. *See* Human Rights Campaign, *Stances of Faiths on LGBT Issues: Presbyterian Church (USA).*[6] In 2009, the Evangelical Lutheran Church in America voted by a substantial majority to "commit to finding ways to allow congregations that choose to do so to recognize, support and hold publicly accountable, lifelong, monogamous, same-gender relationships." Human Rights Campaign, *Stances of Faiths on LGBT Issues: Evangelical Lutheran Church in America.*[7]

Of course, "the shift of religious discourse toward acceptance of gay people has continued at different paces for different denominations." Eskridge, *supra*, at 704-705. Change has not come overnight, but neither did it come overnight with slavery, segregation, interracial marriage, or women's rights. The bottom line is that "the tension between equal rights for gay people and liberty for religious people has been obliterated for a good many denominations and reduced for others," and "the evolution continues." *Id.* at 709.

B. Given The Historical Parallels, This Court Should Reaffirm *Lawrence* And Reject *Amici*'s Religious And Moral Disapproval As A Legitimate Basis For Proposition 8.

1. The very fate that befell religious and moral justifications for unequal treatment in other con-

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[6] *Available at* http://www.hrc.org/resources/entry/stances-of-faiths-on-lgbt-issues-presbyterian-church-usa.

[7] *Available at* http://www.hrc.org/resources/entry/stances-of-faiths-on-lgbt-issues-evangelical-lutheran-church-in-america.

texts, *see supra* at 13-14, is now befalling religious and moral disapproval of marriage equality: It is dissipating. Especially in light of this history, the Court should reject *amici*'s religious and moral disapproval as a rational basis for Proposition 8. It instead should reaffirm what it held in *Lawrence*: "[T]he 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 that practice." 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)). As Justice Scalia aptly observed in *Lawrence*: "If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct * * * what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the Constitution'? " *Id.* at 604-605 (Scalia, J., dissenting). The answer: There is none.

2. Nor should the Court countenance the "religious liberty" rationale advanced by several of Petitioners' *amici*. This argument comes in several flavors, none convincing. Some *amici* warn that if the Court strikes down Proposition 8 as irrational, then those who express religiously-based disapproval of marriage equality will be "marginalize[d] and stigmatize[d]." Robert P. George Br. 31; *accord* Christian Legal Soc. Br. 32 (to belong to certain religious groups "will become the effective equivalent of being a member of a racist organization"); Thomas More Br. 8-9 (ruling for Respondents would implicitly "declare as * * * bigoted" those "who adhere to the traditional view of marriage"). Of course, it is entirely possible that those who adhere to the "traditional view of marriage" one day *will* be viewed as bigots by

societal consensus; history suggests, after all, that views on such issues will not remain static. *See supra* at 13-14, 21-22. But that is hardly a reason to uphold a discriminatory law. Indeed, the argument is absurd: If *amici* were correct, then no discriminatory but religiously based law could *ever* be struck down; concern that the believers who helped enshrine the law in the first place not be called bigots would keep it in place. That notion flies in the face of *Lawrence*, not to mention *Loving*, *Brown*, and a host of other cases invalidating discriminatory policies.

Other *amici* offer a different twist on the religious-freedom argument. They assert that Proposition 8 was rationally enacted to protect organizations that feel religiously bound to discriminate against LGBT people and to refuse to recognize their legally-protected relationships. *See*, *e.g.*, Becket Fund Br. 21. But as the court below recognized, Pet. App. 82a, that argument makes no sense on the facts of this case. Both before and after Proposition 8, California law has featured anti-discrimination laws prohibiting discrimination against LGBT people and has offered broad protection to same-sex relationships through domestic partnership laws. *Id.* Before and after Proposition 8, those laws have provided religious exemptions (which the Becket Fund helpfully compiles in the Appendix to its brief, *see* Br. 3a-14a). "Proposition 8 did nothing to affect those laws." Pet. App. 82a. It therefore is illogical to suggest that Proposition 8 was motivated, or rationally could have been motivated, by a desire to protect religious groups in this way. As the Ninth Circuit aptly observed: "Amicus' argument is * * * more properly read as an appeal to the Legislature, seeking reform

of the State's antidiscrimination laws to include greater accommodations for religious organizations." *Id.* If Petitioners felt that stronger religious accommodations were needed in California to protect those who oppose marriage equality on religious grounds, they were free to convince the Legislature or the voters to enact them.

No matter how framed, the religious-freedom argument can gain no traction in a case, like this one, involving a challenge to a discriminatory law; this Court is not in the habit of upholding discriminatory laws to protect religious prerogatives. *Amici* would do better to recognize that religious liberty is best safeguarded when religious groups retain the freedom to define religious marriage for themselves, remembering that *civil* marriage is an institution of government, which is prohibited from establishing laws reflecting particular religious viewpoints. *See* U.S. Const. amend. I.[8] As this Court held in *West Virginia State Board of Education* v. *Barnette*, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism,

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[8] Indeed, it is worth noting that many Jewish and Christian groups now embrace marriage equality. If, as several *amici* still argue, Proposition 8 rationally enshrines the "traditional" Judeo-Christian view of marriage, then it has established one religious viewpoint to the exclusion of another. *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."). For a more in-depth discussion of how Proposition 8—like the federal Defense of Marriage Act—violates the Establishment Clause, *see* Brief of *Amici Curiae* Religious Advocacy Organizations (including ADL) in Support of Respondent, *United States* v. *Windsor*, No. 12-307.

religion, or other matters of opinion[.]" 319 U.S. 624, 642 (1943).

3. Finally, Petitioners and many *amici* suggest that since moral and religious attitudes toward marriage equality are changing, this Court should step aside and let anti-marriage equality laws gradually obsolesce. *See*, *e.g.*, Pet. Br. 55-61. In support of their appeal to gradualism, Petitioners quote *Washington* v. *Glucksberg*, 521 U.S. 702 (1997), for the proposition that "Americans are in an earnest and profound debate about the morality" of marriage equality and that the Court should "permit[ ] this debate to continue, as it should in a democratic society." Pet. Br. 58 (quoting *Glucksberg*, 521 U.S. at 735). Petitioners further insist, also relying on *Glucksberg*, that Proposition 8 is "rational *per se*" precisely *because* it reflects historically prevailing social attitudes that have not yet been fully abandoned: " 'If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.' " Pet. Br. 6 (quoting *Glucksberg*, 521 U.S. at 723).

But *Glucksberg* neither implicated equal-protection concerns nor examined laws disadvantaging particular classes of people, and so its paean to gradualism and "common consent" does not apply here. The historical development of this nation's commitment to equal protection demonstrates as much. The *Dred Scott* Court infamously announced that the Framers intended that the term "men," as used in the Declaration of Independence, "would not in any part of the civilized world be supposed to embrace the negro race, which, *by common consent*, had been excluded from civilized Governments and the family of nations, and doomed to slavery." 60 U.S. at 410 (em-

phasis added). And yet the Fourteenth Amendment abrogated *Dred Scott*. The lesson must be that neither "common consent" nor ongoing morality debates can salvage a law that deprives a class of people of their constitutional right to equal protection. *See Bowers*, 478 U.S. at 210 (Blackmun, J., dissenting) ("I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny").

Nor can such a law await the results of the "laboratory" tests of "courageous state[s]." Pet. Br. 60 (quoting *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Under that theory, this Court should have abstained from deciding cases like *Brown* and *Loving* and instead should have waited for the state legislatures to vindicate equal rights. That is not how the Fourteenth Amendment works.

It took 60 years for *Plessy*'s mandate of "separate but equal" to be reversed, and it was not the legislatures or the people who reversed it; it was this Court. *See Brown*, 347 U.S. at 493-495 (overruling *Plessy* v. *Ferguson*, 163 U.S. 537 (1896)). Rightly so. When a law violates the constitutional guarantee of equality, it cannot be saved by an appeal to a more enlightened future.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

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INTEREST OF *AMICI CURIAE*—Continued

Americans United for Separation of Church and State

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). Consistent 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.

Bend the Arc –A Jewish Partnership for Justice

Amicus curiae Bend the Arc—A Jewish Partnership for Justice (Bend the Arc) is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

The Central Conference of American Rabbis and the Women of Reform Judaism

Amicus curiae The Central Conference of American Rabbis (CCAR), whose membership includes more than 1,800 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, are committed to ensuring equality for all of God's children, regardless of sexual orientation.

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). We oppose discrimination against all individuals, including gays and lesbians, for the stamp of the Divine is present in each and every human being. 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.

Congregation Beit Simchat Torah (CBST)

Amicus curiae Congregation Beit Simchat Torah (CBST) was founded in 1973 and is a vibrant spiritual community and a progressive voice within Judaism. CBST is the world's largest LGBT synagogue and attracts and welcomes gay men, lesbians, bisexuals, transgender, queer and straight individuals and families who share common values. Passionate, provocative, and deeply Jewish, CBST champions a Judaism that rejoices in diversity, denounces social injustice wherever it exists, and strives for human rights for all people locally, nationally and internationally. This case is of the upmost importance to Congregation Beit Simchat Torah who has fought fervently for Marriage Equality.

Hadassah—The Women's Zionist Organization of America, Inc.

Amicus curiae Hadassah, The Women's Zionist Organization of America, Inc., 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

Amicus curiae The Hindu American Foundation ("HAF") is an advocacy group providing a progressive voice for over two million Hindu Americans. The Foundation interacts with and educates leaders in public policy, academia, and the media about Hinduism and issues concerning Hindus both domestically and internationally, including religious liberty; the portrayal of Hinduism; hate speech; hate crimes, and human rights. HAF has both litigated and participated as *amicus curiae* in numerous cases involving issues of separation of church and state as well as the right to free exercise and subscribes to the view that all religions and adherents thereof should be treated equally and with dignity by the state.

The Interfaith Alliance Foundation

Amicus curiae Interfaith Alliance Foundation, which joins this amicus brief, is a 501(c)(3) non-profit organization. No publicly-held corporation owns ten percent or more of The Interfaith Alliance Foundation. Interfaith Alliance celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and unit-

ing 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.

The Japanese American Citizens League

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.

Jewish Social Policy Action Network (JSPAN)

Amicus curiae The Jewish Social Policy Action Network (JSPAN) is a membership organization of American Jews dedicated to protecting the Constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. It has filed numerous briefs in this Court and the lower federal courts seeking to uphold those liberties.

JSPAN is vitally interested in this case because the issue is at the heart of the Jewish experience in America. For most of the last two thousand years, Jews lived primarily in countries in which the government was at one with the ruling Christian or Muslim class, and therefore treated Jews as less than equal citizens. In America, Jews were freed from this linkage and were able fully to be both Jews and Americans. As a consequence, American Jews have always shared a great concern when any groups are subjected to a civil disability because they do not read scripture with the same understanding as those who write the civil laws.

Keshet

Amicus curiae Keshet is a national grassroots organization that works for the full equality and inclusion of LGBT Jews in Jewish life. Led and supported by LGBT Jews and straight allies, Keshet strives to

cultivate 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.

Lutherans Concerned/North America

Amicus curiae Lutherans Concerned/North America (d.b.a. ReconcilingWorks: Lutherans for Full Participation), founded in 1974, works at the intersection of oppressions to embody, inspire, advocate and organize for the acceptance and full participation of people of all sexual orientations and gender identities within the Lutheran communion and in society. Our ministry is compelled by the call of God in our lives to witness to the reconciling love of Jesus and to work for justice.

Metropolitan Community Church

Amicus curiae Metropolitan Community Church (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.

The National Council of Jewish Women

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.

Nehirim

Amicus curiae Nehirim is a national community of 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.

People For the American Way Foundation

Amicus curiae People For the American Way Foundation (PFAWF) on behalf of the African American Ministers Leadership Council, a nonpartisan

citizens' organization established to promote and protect civil and constitutional rights, joins this brief on behalf of its program, the African American Ministers Leadership Council—a network comprised of 1100 African American ministers—and its Equal Justice Task Force. 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.

The Religious Coalition for Reproductive Choice

Amicus curiae Founded in 1973, the Religious Coalition for Reproductive Choice (RCRC) is dedicated to mobilizing the moral power of the faith community for reproductive justice through direct service, education, organizing and advocacy. For RCRC, reproductive justice means that all people and communities should have the social, spiritual, economic, and political means to experience the sacred gift of sexuality with health and wholeness.

T'ruah: Rabbis for Human Rights-North America

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). The Talmud comments that when human king strikes coins from a single mold, all emerge identical; in contrast, God creates all human beings from a single mold and yet each emerges unique. (Mishnah Sanhedrin 4:5) One of the areas of human difference concerns sexual orientation.

Judaism insists that all people—regardless of their individual differences—should be treated equally. The Torah and later law notice that some people—by virtue of poverty or social position—may be less likely to receive fair treatment before the law, and therefore command judges to treat all petitioners equally.

The insistence that human beings are created in the image of God also spawns a commandment to procreate—that is, to partner with God in creating new divine images. In fact, this is the first commandment that the Torah gives to human beings. Today, many same sex couples are having and raising children. Denying these couples the rights of marriage challenges their ability to fulfill this divine commandment.

The Universal Declaration of Human Rights similarly guarantees that, "Men and women of full age * * * are entitled to equal rights as to marriage, during marriage and at its dissolution."

T'ruah represents 1800 rabbis and cantors, and tens of thousands of American Jews. Three of the four major denominations of Judaism—the Reform, Conservative, and Reconstructionist Movements—all permit religious ceremonies for same-sex marriages. Since the State authorizes our rabbis and cantors to conduct civil marriages, the refusal to recognize some of the marriages we conduct constitutes a restriction on our own role as clergy.

While each rabbi or religious community retains 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.

Women's League for Conservative Judaism

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.