Nos. 12-144 and 12-307
OCTOBER TERM 2012

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al.*,
Petitioners,
—v.—
KRISTIN M. PERRY, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,
—v.—
EDITH SCHLAIN WINDSOR, in her capacity as Executor of the Estate of THEA CLARA SPYER, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH AND SECOND CIRCUITS

BRIEF *AMICUS CURIAE* OF THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF THE INDIVIDUAL RESPONDENTS ON THE MERITS

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INTEREST OF AMICUS

The American Jewish Committee, a national organization of more than 125,000 members and supporters with 26 regional offices, was founded in 1906 to protect the rights of American Jews. AJC has long believed that one of the most effective ways to achieve that goal is to ensure that all citizens enjoy the equal protection of the laws and equal rights of citizenship. These equal rights include the right to marry.[1]

As is the case with much of American society, AJC's position on official recognition of same-sex relationships has evolved. In 2004, AJC agreed to support civil unions for same-sex couples, but did not agree to support same-sex marriage. Over the last two years, the issue was debated intensely within the organization, culminating in a Resolution by AJC's Board of Governors adopted in October 2012. That Resolution insists that the basic American principles of equality and human dignity require that the federal and state governments extend the legal and economic benefits of marriage to those Americans who love people of the same gender. That right cannot be denied merely because other citizens find such relationships offensive or religiously objectionable.

AJC is also a strong supporter of religious liberty. Accordingly, it believes that just as religious objections should not bar official recognition of same-

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[1] This brief was prepared entirely by amicus and its counsel. No person other than amicus and its counsel made any financial contribution to the preparation or submission of this brief. The consents of the parties are on file with the Clerk.

sex marriage, neither should official recognition of such marriages compel religious recognition. We do not believe that this is a zero-sum game. It is possible to protect both liberties. This case does not call for resolution of any particular dispute about religious liberty. But neither should the Court's recognition of same-sex marriage be understood to preclude religious liberty with respect to marriage.

Each of these twin principles has been challenged, both in the briefing in these cases and elsewhere in the debate over same-sex marriage. To defend both principles, the AJC files this brief.

SUMMARY OF ARGUMENT

The Court must protect the right of same-sex couples to marry, and it must protect the right of synagogues, churches, and other religious organizations not to recognize those marriages. This brief is an appeal to protect the liberty of both sides in the dispute over same-sex marriage.

The choice of whom to marry is one of the most intimate and personal decisions that any human being can make. The right to marry has long been recognized as fundamental. Heightened scrutiny is therefore appropriate.

The reasons proffered for refusing civil marriage to same-sex couples do not come close to justifying denial of a fundamental right. Marriage is about far more than children. But even if children were the only purpose of marriage, it should not matter, because same-sex couples raise many children. Concern for children can neither explain civil

marriage nor explain the exclusion of same-sex couples.

This brief is principally devoted to the serious issues of religious liberty that arise in the wake of same-sex marriages. But it is not appropriate to prohibit same-sex civil marriage to avoid having to address those issues. No one can have a right to deprive others of their important liberty as a prophylactic means of protecting his own. And there is no burden on religious exercise when the state recognizes someone else's civil marriage. Burdens on religious exercise arise only when the state demands that religious organizations or believers recognize or facilitate a marriage in ways that violate their religious commitments.

The proper response to the mostly avoidable conflict between gay rights and religious liberty is to protect the liberty of both sides. Both sexual minorities and religious minorities make essentially parallel claims on the larger society. Both sexual orientation and religious faith, and the conduct that follows from each, are fundamental to human identity. Both same-sex couples, and religious organizations and believers committed to traditional understandings of marriage, face hostile regulation that condemns their most cherished commitments as gravely evil.

The American solution to this conflict is to protect the liberty of both sides. Same-sex couples must be permitted to marry, and religious dissenters must be permitted to refuse to recognize those marriages.

If this Court holds that same-sex marriage is constitutionally required, it must take responsibility

for the resulting issues of religious liberty. Every state that has enacted same-sex civil marriage by legislation has included provisions to protect religious liberty. But in the four states where same-sex marriage was first recognized by judicial decision, only one state has enacted more than a minimalist provision for religious liberty, and two have enacted no religious liberty provision at all. When courts constitutionalize same-sex civil marriage, those who would add religious liberty provisions to a marriage bill are deprived of a legislative vehicle and deprived of bargaining leverage. A constitutional decision by this Court will have similar effects on legislative efforts. If the Court protects same-sex marriage, it must also protect religious liberty with respect to marriage.

Marriage is both a legal relationship and a religious relationship. The two relationships are conceptually distinct, even though they are intertwined in law and especially in the culture. A state, or this Court, can change the definition of *civil* marriage. But neither can change the definition of *religious* marriage.

Many religious organizations and believers view marriage as an inherently religious institution, with civil marriage resting on a foundation of religious marriage. They will therefore refuse to recognize same-sex civil marriages as marriages. These religious refusals to recognize same-sex civil marriages will give rise to numerous religious liberty issues, from whether clergy must perform the wedding or provide pastoral counseling, to employment and spousal fringe benefits, to married student housing at religious colleges, to placement of

children for adoption at religious social service agencies. Religious organizations will face lawsuits, civil penalties, and loss of government benefits.

Doctrinal tools are available to protect religious liberty with respect to marriage. Government may not interfere "with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012). Whether to recognize a marriage, for purposes internal to the religious organization, is such a protected decision.

Some religious refusals to recognize same-sex civil marriages will likely be characterized as external rather than internal, as in the case of placing children for adoption. In those cases, religious liberty is still protected, subject to the compelling interest test, from laws that are not neutral, or not generally applicable. A law is not generally applicable if it has "at least some" secular exceptions. *Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990). Regulating religious conduct but not secular conduct that causes the same or similar alleged harms necessarily implies that the government "devalues religious reasons for [the regulated conduct] by judging them to be of lesser import than nonreligious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993).

Many laws are not generally applicable under this standard, and there will often be no compelling interest in requiring religious organizations to recognize a same-sex marriage, even when the context can be characterized as external. For example, in applying the compelling interest test, a

court might consider whether a religious organization that provides some service to married couples has a local monopoly, or whether same-sex couples can readily obtain comparable services from secular agencies. In the latter case, there might be no compelling interest in forcing the religious organization to violate its faith commitments.

Religious liberty is also protected by state constitutions and state Religious Freedom Restoration Acts. This Court should be clear that it is requiring only that governments recognize same-sex civil marriage, and that it is not suggesting any constitutional obstacle to state protection of religious liberty with respect to religious recognition of marriage.

In an appropriate future case, involving a law that is truly generally applicable, this Court should reconsider the rule that neutral and generally applicable laws may be applied in ways that burden or suppress the exercise of religion. That rule was never briefed or argued, and it has not been further developed in subsequent free exercise decisions, all of which were decided on other grounds.

ARGUMENT

I. THIS COURT SHOULD, AND SOONER OR LATER MUST, RECOGNIZE A RIGHT TO SAME-SEX MARRIAGE.

A. The Right to Marry Is Fundamental, and the Grounds Asserted in This Case Are Insufficient to Justify Denial of That Right.

The argument in support of the judgments below has been made effectively by the individual respondents, and by many other amici, and we will not repeat all of that analysis here. We will emphasize a few of the most salient points.

The choice of whom to marry is one of the most intimate and personal decisions that any human being can make. Government should not interfere with that choice without a very important reason. Nor should government leave a substantial class of people, on any realistic view of the matter, with no one to marry. A state's refusal to permit same-sex civil marriages, and federal refusal to recognize such marriages in states where they are already permitted, prima facie violates both the Due Process Clauses and the Equal Protection Clause. At the very least, some form of heightened scrutiny is required.

This Court has long recognized "the right to marry" as a right "of fundamental importance." *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978). It is a "fundamental freedom" and "one of the 'basic civil rights of man.'" *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). It is protected from discrimination, as in *Loving*, and it has long been understood to be part of

the liberty protected by the Due Process Clause. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). It is a relationship that is "intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

The Court has unanimously protected the right to marry even for prisoners. *Turner v. Safley*, 482 U.S. 78, 94-100 (1987). The laws at issue in these cases deprive law-abiding gays and lesbians of a right so fundamental that it is protected even for incarcerated felons.

The alleged government interests offered in defense of this deprivation do not fit the laws they are claimed to justify. They do not come close. Just as marriage is about much more than sexual intercourse, *Lawrence v. Texas*, 539 U.S. 558, 567 (2003), so it is about much more than procreation. Few if any married couples experience their marriage as exclusively, or even primarily, about procreation. Children are one important part of most marriages, and no part at all of many others. And if the only or principal purpose of state recognition of marriage were to enable children to live with two biological parents, then that policy has manifestly failed. A theoretical government interest, not remotely implemented in practice, cannot be a basis for denying the fundamental right to marry.

Moreover, as this Court recognized in *Zablocki*, denying the right to marry does little or nothing to prevent procreation. 434 U.S. at 390. Same-sex couples raise children resulting from assisted reproduction and from failed attempts to go straight — attempts generally induced by societal pressure and discrimination. They raise children from

adoption, and they raise children as foster parents. Denying these couples the stability and commitment of legally recognized civil marriage does nothing to protect any of these children, and may on occasion affirmatively harm them.

The government's interest in protecting children is undoubtedly important. But the claim that that interest is the reason for marriage does not fit the existing marriage laws, or the social understanding of marriage, or the lived experience of millions of married couples — all of which treat marriage as first and foremost a relationship between two adult spouses. The reasons offered to justify the bans on same-sex civil marriage are insufficient to justify such a profound intrusion into the fundamental right to marry.

In *Windsor*, the federal decision to override state definitions of civil marriage serves no legitimate federal interest. The United States cannot choose to save money, either on tax benefits or social welfare benefits, by arbitrarily cutting off a subclass of otherwise eligible beneficiaries who are legally married under the law of their state of residence. And the administration of the estate tax, which mostly affects the elderly and their grown children, is unusually far removed from any interest in protecting children, which is itself far removed from restrictions on same-sex civil marriage.

In *Perry*, wholly excluding same-sex couples from civil marriage deprives them of a fundamental right. And as implausible as it is to explain civil marriage in terms of protecting children, it is even more implausible to use children to explain the difference between civil marriage and a civil union that would

— if it were sufficiently well understood to be enforceable as a practical matter — confer all the same rights as civil marriage. If the Court prefers to proceed cautiously, deciding one case at a time, it should affirm the judgment in *Perry* on the narrow ground stated by the Court of Appeals.

The Court should not reverse on the merits. To do so would be wrong, for the reasons we have stated; it would also be unstable. In the area of same-sex relationships, where public understanding of the underlying facts is rapidly changing, the Court cannot reach a stable constitutional resolution by broadly rejecting constitutional claims. The last time it attempted to do so, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), it overruled the decision just seventeen years later, and parts of the *Bowers* opinions are now a permanent embarrassment in the United States Reports. The Court should not repeat its *Bowers* mistake in these cases.

B. Legitimate Concerns For Religious Liberty Are Not a Reason to Deny Same-Sex Couples the Right to Marry.

Both Proposition 8 and the Defense of Marriage Act have been defended on the ground that they protect the religious liberty of those with conscientious objections to same-sex marriage. The most complete exposition of this argument appears in the brief of the Becket Fund for Religious Liberty, filed in both cases.

As discussed in greater detail below, we agree that significant religious liberty issues will follow in the wake of same-sex civil marriage. But it is not an

appropriate response to prohibit same-sex civil marriage in order to avoid addressing issues of religious liberty. No one can have a right to deprive others of *their* important liberty as a prophylactic means of protecting his own important liberty. Just as one's right to extend an arm ends where another's nose begins, so each claim to liberty in our system must be defined in a way that is consistent with the equal and sometimes conflicting liberty of others. Religious liberty, properly interpreted and enforced, can protect the right of religious organizations and religious believers to live their own lives in accordance with their faith. But it cannot give them any right or power to deprive others of the corresponding right to live the most intimate portions of *their* lives according to *their* own deepest values.

The mere recognition of same-sex civil marriage *by the state* presents no issue of religious liberty. "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng v. Nw. Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 451 (1988) (internal quotation omitted). A conscientious objector can raise a free exercise claim only when the government has restricted or penalized the objector's own religiously motivated behavior. *See Lyng*, 485 U.S. at 450-52 (finding no burden on religious exercise from building of road on government land, even though resulting noise would interfere with longstanding religious use of the land); *Bowen v. Roy*, 476 U.S. 693, 699-701 (1986) (finding no burden on religious exercise from government's internal use of social security number to maintain records on plaintiffs'

child, despite claims that spiritual harms would result).

Religious liberty issues begin not when a same-sex couple marries, but when the state pressures religious organizations or believers to recognize or facilitate that marriage in ways that would require them to violate their religious commitments. The Court should acknowledge these issues, and commit itself to addressing them. But the existence of these issues cannot justify denying millions of other Americans the fundamental right to marry.

We teach our children that America is committed to "liberty and justice *for all*." We must protect religious liberty *and* the right to marry.

C. Same-Sex Couples and Religious Conscientious Objectors Make Essentially Parallel Claims, and Both Should Be Protected.

Same-sex civil marriage would be a great advance for human liberty. But failure to attend to the religious liberty implications could create a whole new set of problems for the liberties of those religious organizations and believers who cannot conscientiously recognize or facilitate such marriages. The net effect for human liberty will be no better than a wash if same-sex couples now oppress religious dissenters in the same way that those dissenters, when they had the power to do so, used to oppress same-sex couples. And that is what will happen, unless this Court clearly directs the lower courts to protect religious liberty as well as same-sex civil marriage.

There is a sad irony to the bitter conflict between supporters of same-sex civil marriage and religious organizations and believers committed to the view that marriage is for opposite-sex couples only. Sexual minorities and religious minorities make essentially parallel claims on the larger society, and the strongest features of the case for same-sex civil marriage make an equally strong case for protecting the religious liberty of dissenters. These parallels have been elaborated by scholars who work principally on religious liberty[2] and also by scholars who work principally on sexual orientation.[3]

First, both same-sex couples and committed religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For same-sex couples, the conduct at issue is to join personal commitment and sexual expression in a multi-faceted intimate relationship with the person they love. For religious believers, the conduct at issue is to live and act consistently with the demands made by the Being that they believe made us all and holds the whole world together.

No person who wants to enter a same-sex marriage can change his sexual orientation by any act of will, and no religious believer can change his

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[2] *See* Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claimants Have in Common*, 5 Nw. J.L. & Soc. Pol'y 206, 212-26 (2010).

[3] *See* William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in America*, 106 Yale L.J. 2411, 2416-30 (1997).

understanding of divine command by any act of will. Religious beliefs can change over time; far less commonly, sexual orientation can change over time. But these things do not change because government says they must, or because the individual decides they should; for most people, one's sexual orientation and one's understanding of what God commands are experienced as involuntary, beyond individual control. The same-sex couple cannot change its sexual orientation, and the religious believer cannot change God's mind.

In finding rights to same-sex civil marriage, courts have rejected the argument that marriage is simply conduct, presumptively subject to state regulation. They have rejected a distinction between sexual orientation and sexual conduct because, they have correctly found, both the orientation and the conduct that follows from that orientation are central to a person's identity. *See In re Marriage Cases*, 183 P.3d 384, 442-43 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 438 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 885, 893 (Iowa 2009).

Religious believers face similar attempts to dismiss their claims as involving mere conduct, subject to any and all state regulation. This is the premise of refusing judicial review to religiously burdensome laws that are truly generally applicable. *Emp't Div. v. Smith*, 494 U.S. 872 (1990). But believers cannot fail to act on God's will, and it is no more reasonable for the state to demand that they do so than for the state to demand celibacy of all gays and lesbians. Both religious believers and same-sex couples feel compelled to act on those things

constitutive of their identity, and they face parallel legal objections to their actions.

Both same-sex couples and religious dissenters also seek to live out their identities in ways that are public in the sense of being socially apparent and socially acknowledged. Same-sex couples claim a right beyond private behavior in the bedroom: they claim the right to participate in the social institution of civil marriage. Religious believers likewise claim a right to follow their faith not just in worship services, but in the charitable services provided through their religious organizations and in their daily lives.

Finally, both same-sex couples and religious dissenters face the problem that what they experience as among the highest virtues is condemned by others as a grave evil. Where same-sex couples see loving commitments of mutual care and support, many religious believers see disordered conduct that violates natural law and scriptural command. And where those religious believers see obedience to a loving God who undoubtedly knows best when he lays down rules for human conduct, many supporters of gay rights see intolerance, bigotry, and hate. Because gays and lesbians and religious conservatives are each viewed as evil by a substantial portion of the population, each is subject to substantial risks of intolerant and unjustifiably burdensome regulation.

The classically American solution to this problem is to protect the liberty of both sides. There is no reason to let either side oppress the other. Same-sex couples should not be denied the right to civil marriage; that is the immediate issue in this case. And when that right is secured, same-sex couples

should not be allowed to force dissenting religious organizations to recognize or facilitate their marriages.

II. WHEN THE COURT INVALIDATES LAWS PROHIBITING SAME-SEX CIVIL MARRIAGE, IT MUST TAKE RESPONSIBILITY FOR THE RESULTING RELIGIOUS LIBERTY ISSUES.

A. Judicial Protection of the Right to Same-Sex Marriage Tends to Displace Legislative Protection of Religious Liberty with Respect to Marriage.

All six jurisdictions that enacted same-sex civil marriage legislatively also enacted religious liberty protections for religious organizations that do not recognize same-sex marriages.[4] We are aware of pending bills for same-sex civil marriage in three additional states, all of which contain religious liberty protections.[5]

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[4] D.C. Code § 46-406 (West Supp. 2012); Me. Rev. Stat. tit. 19-A § 655.3 (Westlaw 2012); Md. Code Ann., Fam. Law § 2-202 note (Westlaw 2012), 2012 Md. Laws ch. 2 §§ 2-4; N.H. Rev. Stat. Ann. § 457:37 (LexisNexis Supp. 2012); N.Y. Dom. Rel. Law §§ 10-b, 11 (LexisNexis Supp. 2012); Vt. Stat. Ann. tit. 8 § 4501(b) (LexisNexis Supp. 2012), tit. 18 § 5144(b) (LexisNexis 2012); Wash. Rev. Code §§ 26.04.010, 26.04.900 (2012).

[5] A Bill for an Act Relating to Marriage Between Persons of the Same Sex, H.B. 1109 § 2 (Hawaii 2013); Religious Freedom and Marriage Fairness Act, S.B. 0010 §§ 15, 20 (Illinois 2013); An Act Relating to Domestic Relations — Persons Eligible to Marry, H. 5015 Substitute A § 4 (R.I. 2013)

In the four states that recognized same-sex marriage judicially, by constitutional interpretation, the situation is very different. There is no legislation to protect religious liberty with respect to marriage in Iowa[6] or Massachusetts.[7] In California, there is an extremely narrow provision that protects only the right not to perform the wedding ceremony.[8] Only Maine has so far enacted such a narrow exemption in the legislated states, and that was enacted by initiative and referendum, bypassing the legislative process. Among the judicial states there is more robust protection, more like that enacted in most of the legislative states, only in Connecticut.[9]

The reason is clear. When a legislature considers same-sex civil marriage legislation, there are supporters and opponents and undecided legislators. There may be supporters who also care about religious liberty. There may be undecideds or even opponents who will become supporters if adequate provision is made for religious liberty. In the democratic bargaining that is part of the legislative process, bills emerge that protect same-sex civil marriage *and* religious liberty.

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[6] The judicial decision was *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

[7] The judicial decision was *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

[8] Cal. Fam. Code § 400(a) (Deering Supp. 2012). The judicial decision was *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). This decision was overturned by Proposition 8, the ballot initiative at issue in this case.

[9] Conn. Gen. Stat. Ann. §§ 46b-22b, 46b-35a, 46b-35b (West Supp. 2012). The judicial decision was *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008).

The religious liberty provisions are sometimes inserted or redrafted at the last minute. They are sometimes poorly drafted, incomplete, and ambiguous. Most of them are far from ideal. But most of them at least attempt to provide meaningful protection for the liberty of religious organizations.

This bargaining process can break down when there is lopsided support for same-sex civil marriage. And it entirely breaks down when same-sex civil marriage becomes the law through a judicial decision on constitutional grounds. Those who would add religious liberty protections to a civil marriage bill are deprived of a vehicle and deprived of bargaining power. The result is that the legislature often does not attend to the specific issues of religious liberty raised by same-sex civil marriage. Those issues are left to litigation under the general religious liberty provisions of state and federal constitutions and state and federal Religious Freedom Restoration Acts.

The lesson is clear. If this Court constitutionalizes same-sex civil marriage for the country, it must attend to the resulting issues of religious liberty. The Court's decision will have made it far more difficult for legislatures to do so. Of course the Court cannot render advisory opinions on specific cases, but it should indicate that it understands the range of religious liberty implications, and that it understands that those issues will have to be addressed in future cases. The issues are judicially manageable, but this Court must acknowledge their existence, so that lower courts and legislatures will take them seriously when they arise in the wake of this Court's decision.

B. Marriage Is Both a Legal and a Religious Relationship, and Religious Organizations Must Remain Free to Define Religious Marriage.

Judges focused on discriminatory definitions of civil marriage have often failed to appreciate the range of religious liberty issues raised by same-sex marriage. The question is not simply whether clergy must perform same-sex wedding ceremonies, although that is certainly important. And it is not, as the Court of Appeals in *Perry* seemed to think, simply a matter of existing anti-discrimination laws. *Perry v. Brown*, 671 F.3d 1052, 1091 (9th Cir. 2012).

The religious disagreement over marriage equality begins with a disagreement over the nature of marriage. Marriage is a both a legal relationship and a religious relationship. Advocates of marriage equality tend to see the *legal* relationship as primary, but most religious organizations and many religious believers see the *religious* relationship as primary. Of course it is possible to distinguish the two relationships, but in our law and especially in our culture, they are deeply intertwined. If this Court invalidates discriminatory definitions of legal marriage — civil marriage in the more common usage — it must take pains not to interfere with the right of religious organizations to define religious marriage.

Civil marriage — the legal relationship — defines property rights, mutual duties of support, inheritance rights, pension rights, insurance coverage, social security benefits, tax liabilities,

evidentiary privileges, rights to sue for personal injury or file for bankruptcy, and much more. Massachusetts told its highest court that "hundreds of statutes" create rules or authorize benefits on the basis of marriage. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003). Equality with respect to these important consequences of civil marriage — most of them financial consequences — is of course part of the reason that civil marriage equality is so important.

The religious relationship is overlapping but very different. Marriage is a sacrament in the Catholic faith and an important religious commitment in most other faiths. Marriage is ordained in both the Jewish and Christian scriptures. *Genesis* 2:24; *Matthew* 19:6. Both scriptures repeatedly condemn adultery. *See, e.g., Exodus* 20:14; *Matthew* 19:18.

Sex and sexual morality are central to religious marriage, but increasingly peripheral to legal provisions for civil marriage. Consensual sex has been deregulated, both in and out of marriage. Adultery and fornication are no longer crimes, and alienation of affections is no longer a tort. It is possible, and of course extremely common, to have sex without marriage. And it is entirely possible, although presumably rare, to have a fully valid legal marriage without sex. Understandings about sex in a civil marriage are left to the married couple, and appropriately so. There is very little about sex among the hundreds of things defined by law as part of civil marriage.[10]

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[10] These distinctions between civil and religious marriage are further elaborated in Douglas Laycock, *Afterword*, in *Same-*

The state, or this Court as a matter of constitutional interpretation, can change the legal definition of civil marriage. But neither the state nor the Court can change the religious definition of religious marriage if religious authorities persist in their own definitions. Some synagogues, churches, and other religious organizations will refuse to recognize same-sex marriages, because for them, marriage is a religious relationship at its foundation, and a same-sex marriage is religiously invalid or religiously impossible.

It is this issue of religious recognition of same-sex civil marriages that gives rise to novel issues of religious liberty. Conflicts have arisen, and will continue to arise, between religious teachings and laws prohibiting discrimination on the basis of sexual orientation, with or without same-sex marriage. But same-sex marriage will increase the frequency and religious intensity of these conflicts. Once same-sex couples are civilly married, the existing discrimination laws suddenly apply to a relationship of profound religious significance, demanding that religious organizations and believers recognize a relationship that they believe to be both inherently religious and religiously invalid.

Every court that has held marriage discrimination unconstitutional has carefully explained that it is changing only civil marriage and not religious

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Sex Marriage and Religious Liberty 189, 202-03 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds., Rowman & Littlefield 2008) (hereafter Laycock, Picarello, & Wilson).

marriage.[11] That explanation is important, but it has done little to assuage religious objections. In part this is because the culture often fails to make the distinction. And in part it is because those who oppose same-sex marriage on religious grounds understand civil marriage to rest on the foundation of religious marriage. On this view, a civil marriage that departs too radically from the foundation of religious marriage is simply not a marriage. To treat it as though it were a marriage, for many religious organizations and believers, is to violate fundamental religious commitments. And when the inevitable lawsuits come, those charging churches and synagogues with discrimination will also be conflating civil marriage and religious marriage.

It is essential to distinguish the two relationships, and to commit to protecting the right to maintain religious understandings of the religious relationship.

C. Religious Refusal to Recognize Same-Sex Marriages Will Give Rise to Many Religious Liberty Issues.

The only book devoted to the issue, *Same-Sex Marriage and Religious Liberty*,[12] collected contributions from seven scholars — four who supported same-sex marriage and three who did not.

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[11] *See In re Marriage Cases*, 183 P.3d 384, 400, 407 n.11, 434 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 475 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 905-06 (Iowa 2009); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 954, 965 n.29 (Mass. 2003).

[12] Laycock, Picarello, & Wilson, *supra* note 10.

All seven agreed that legalizing same-sex civil marriage without providing robust religious exemptions would create widespread legal conflicts — conflicts that, as one contributor said, would work a "sea change in American law" and "reverberate across the legal and religious landscape."[13]

Both as organizations and as individuals, those committed to traditional understandings of religious marriage may refuse to recognize, assist, or facilitate same-sex marriages. Of course this means not performing the wedding ceremony or hosting the wedding reception. But it means much more than that.

Must rabbis, priests, and pastors provide religious marriage counseling to same-sex couples?[14] Must religious colleges provide married student housing to same-sex couples?[15] Must churches and synagogues employ spouses in same-sex marriages, even though such employees would be persistently

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[13] Marc D. Stern, *Same-Sex Marriage and the Churches*, in Laycock, Picarello, & Wilson, *supra* note 10, at 1.

[14] *Cf. Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (reversing summary judgment against religious counseling student expelled from graduate school for refusing to counsel with respect to problems in a same-sex relationship); Stern, *supra* note 13, at 22-23 (describing attempt by St. Cloud State University to require all social work students, as a condition of admission, to affirm the moral validity of same-sex relationships); *Missouri State U. Settles Lawsuit Filed by Student*, St. Louis Post-Dispatch, Nov. 9, 2006, at D4 (describing settlement with social work student disciplined for refusing to write legislator in support of gay adoption).

[15] *See Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001) (holding that lesbian couple stated a claim).

and publicly flouting the religious teachings they would be hired to promote? Must religious organizations provide spousal fringe benefits to the same-sex spouses of any such employees they do hire?[16] Must religious social service agencies place children for adoption with same-sex couples? Already, Catholic Charities in Illinois, Massachusetts, and the District of Columbia has closed its adoption units because of this issue.[17]

Religious colleges, summer camps, day care centers, retreat houses, counseling centers, meeting halls, and adoption agencies may be sued under public accommodations laws for refusing to offer their facilities or services to same-sex couples.[18] Or they may be penalized by loss of licensing,[19] accreditation,[20] government contracts, access to

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[16] *See Catholic Charities v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004) (upholding ordinance forcing religious charity either to extend spousal benefits to registered same-sex couples, or to lose access to all city housing and community development funds); Don Lattin, *Charities Balk at Domestic Partner, Open Meeting Laws*, San Francisco Chronicle, July 10, 1998, at A1 (describing how the Salvation Army lost $3.5 million in social service contracts with the City of San Francisco because it refused, on religious grounds, to provide benefits to the same-sex partners of its employees).

[17] Laurie Goodstein, *Illinois Bishops Drop Program over Bias Rule*, N.Y. Times, Dec. 29, 2011, at A16.

[18] *See* Stern, *supra* note 13, at 37-43 (assessing reach of public accommodation laws).

[19] *Id.* at 19-22 (describing licensing issues in both commercial and not-for-profit sectors).

[20] *See id.* at 23-24 (describing accreditation disputes in various academic disciplines); D. Smith, *Accreditation Committee Decides to Keep Religious Exemption*, 33 Monitor on

public facilities,[21] or tax exemption.[22] Tax exemption is a particular concern because of this Court's decision in *Bob Jones University v. United States*, 461 U.S. 574, 602-04 (1983), rejecting a free-exercise claim to tax exemption for a racially discriminatory religious college. The Court in *Bob Jones* was at pains to emphasize that it was considering only schools, not "churches or other purely religious institutions," and that it relied on the government's compelling interest "in denying public support to racial discrimination in education." *Id.* at 604 n.29. *Bob Jones* should not be extended to religious organizations that refuse to recognize same-sex civil marriages.

Psychology No. 1, at 16 (Jan. 2002) (describing a proposal of the American Psychology Association to revoke the accreditation of religious colleges and universities with statements of faith that preclude sex outside of marriage), *available at* http://www.apa.org/monitor/jan02/exemption.html.

[21] *See Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006) (upholding revocation of a boat berth at public marina due to Boy Scouts' refusal to pledge not to discriminate against gay members); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (holding that the Boy Scouts may be excluded from the state's combined charitable campaign for denying membership to openly gay individuals); Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, in Laycock, Picarello, & Wilson, *supra* note 10, at 69-76 (assessing implications of these cases).

[22] *See* Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in Laycock, Picarello, & Wilson, *supra* note 10, at 103 (describing threat to tax exemption for religious organizations with objections to same-sex marriage); Turley, *supra* note 21, at 62-69 (same).

There will also be disputes, on which the American Jewish Committee has taken no position, about individuals who provide creative and personal services that directly assist or facilitate marriages. Must a wedding planner, or a wedding photographer, plan or photograph a same-sex wedding, even though she thinks the ceremony makes a mockery of the religious institution of marriage?[23] Must a counselor in private practice counsel same-sex couples about their relationship difficulties, even though he thinks their relationship is religiously prohibited or intrinsically disordered? Of course no same-sex couple would ever *want* to be counseled by such a counselor. But disputes have arisen in such cases, facilitated by professional societies and educational programs that treat commitment to the gay-rights view of these issues as a matter of professional ethics.[24] Such efforts do not obtain counseling for same-sex couples, but they do threaten to drive from the helping professions all those who adhere to older religious understandings of marriage.

These religious liberty disputes can arise across a wide range of factual circumstances. But they involve a discrete and bounded set of potential claimants: churches, synagogues, and other places of worship, not-for-profit organizations with strong religious commitments, and individuals in a few occupations offering personal services closely connected to marriage. What is newly at issue in the

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[23] *Elane Photography, LLC v. Willock*, 284 P.3d 428 (N.M. Ct. App.), *cert. granted*, 2012-NMCERT-008 (2012) (photographer fined for refusing on religious grounds to photograph a same-sex commitment ceremony).

[24] *See* cases cited in note 14 *supra*.

wake of same-sex marriage is the right to refuse religious recognition to civil marriages that are fundamentally inconsistent with religious definitions of marriage.

III. DOCTRINAL TOOLS ARE AVAILABLE TO PROTECT RELIGIOUS LIBERTY WITH RESPECT TO MARRIAGE.

A. Religious Organizations Have the Right to Make Internal Decisions That Affect Their Faith and Mission.

In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (2012), this Court confirmed the longstanding rule that "ministers" cannot sue their religious employers for employment discrimination. But *Hosanna-Tabor* does not merely recognize the ministerial exception to employment discrimination law, as important as that is. The decision rests on a broader principle: that government may not interfere "with an internal church decision that affects the faith and mission of the church itself." *Id.* at 707. This plainly covers the religious body's definition of marriage and its willingness or unwillingness to solemnize or celebrate a marriage, or to provide the space for doing so. But it also extends prima facie to the ongoing decision of whether to recognize, for purposes internal to the religious organization, a marriage solemnized elsewhere.

This right to define religious doctrine and apply that doctrine to internal decisions extends beyond places of worship. *Hosanna-Tabor* involved a

religious school, and the lower courts have applied the doctrine to ministers employed in religious colleges,[25] nursing homes,[26] hospitals,[27] mission agencies,[28] and diocesan bureaucracies.[29]

The ministerial exception imposes an absolute bar to regulation within its scope. This may be an exception to the more common approach of strict scrutiny, or it may reflect a categorical judgment that the state never has a compelling interest in forcing an unwanted minister on an unwilling religious organization. There may be other internal decisions for which compelling interests are more readily conceivable — say, protecting children — and for which the appropriate standard of protection is strict scrutiny. But cases in which government will have a compelling interest in regulating religious decisions inside a religious organization must be quite rare. And religious recognition of religiously invalid marriages is not such a case.

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[25] *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006); *EEOC v. Catholic Univ.*, 83 F.3d 455 (D.C. Cir. 1996).

[26] *Shaliehsabou v. Hebrew Home*, 363 F.3d 299 (4th Cir. 2004).

[27] *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991).

[28] *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989).

[29] *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698 (7th Cir. 2003).

B. Religious Organizations Have a Right to Take "External" Actions, Subject to the Compelling Interest Test, If a Religiously Burdensome Law Has Secular Exceptions.

Some decisions are crucial to "the faith and mission" of a religious organization or individual but cannot easily be characterized as "internal." This is often the case when religious organizations offer services to the general public, as when Catholic Charities places children for adoption, or a religious college admits students of many faiths and of none. Where ever the line is ultimately drawn between internal and external, decisions on the external side of the line are protected by the rule in *Employment Division v. Smith*, 494 U.S. 872 (1990).

That rule is more protective than has sometimes been assumed. *Smith* held that the Free Exercise Clause creates no right to exemption from neutral and generally applicable laws, such as the "across-the-board criminal prohibition" at issue in that case. *Id.* at 884. *Smith*'s understanding of "generally applicable law" is indicated by its explanation of *Sherbert v. Verner*, 374 U.S. 398 (1963). *Sherbert* held that a worker who lost her job for refusing to work on her Sabbath was constitutionally entitled to unemployment compensation. The state required her to be available for work or lose eligibility, but that rule contained "at least some" secular exceptions. *Smith*, 494 U.S. at 884. And therefore, the Court said, the Constitution required a religious exception as well. Obviously there cannot be many acceptable reasons for refusing available work and claiming a government check instead, but there were "at least

some." The implication is that even rather narrow secular exceptions make a law less than generally applicable.

The Court subsequently made clear that categorical exceptions are as relevant as individualized exceptions. "[C]ategories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993). *See id.* at 543-44 (relying on categorical exclusions such as fishing, extermination, euthanasia, and hunting to show that ban on animal sacrifice was not generally applicable). The facts of *Lukumi* were extreme, but the Court was clear that its decision was not limited to such extreme cases. The ordinances in *Lukumi* fell "well below the minimum standard" of general applicability. *Id.* at 543.

Many laws of course contain exceptions or gaps in coverage. When a law exempts some category of secular conduct, but prohibits religious conduct that causes the same or similar alleged harms, the state "devalues religious reasons for [the regulated conduct] by judging them to be of lesser import than nonreligious reasons." *Id.* at 537-38. Sometimes explicitly, but always and inescapably implicitly, a secular exception without a religious exception indicates a "value judgment" that secular motivations "are important enough to overcome" the government's asserted interest, "but that religious motivations are not." *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.). Not every federal judge has read *Smith* and *Lukumi* so carefully as then-Judge Alito. But his

reading is the most faithful to this Court's opinions and to the underlying constitutional provision read in light of those opinions.

Some anti-discrimination laws are neutral and generally applicable under this standard, but others are not. If, for example, an anti-discrimination law exempts very small businesses, then the Constitution prima facie requires exemptions for religious conscience, subject to the compelling interest test. Religious liberty can be protected, in a wide range of cases, under the rule of *Employment Division v. Smith*.

C. Religious Liberty Is Also Protected by State Constitutions and by State and Federal Statutes.

With respect to federal law, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2006), will protect against any substantial burdens imposed on religious liberty after the Defense of Marriage Act is invalidated.

With respect to state law, additional protection for religious liberty is to be found in state constitutions and state Religious Freedom Restoration Acts (RFRAs). Sixteen states have now enacted state RFRAs,[30] and fourteen additional

[30] Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Louisiana, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. For citations, see Douglas Laycock, *The Religious Exemptions Debate*, 11 Rutgers J.L. & Religion 139, 142 n.16 (2009) (online journal available on Westlaw); La. Rev. Stat. Ann. §§ 13:5231 to 13:5242 (West 2012).

states have held that their state constitutions protect the exercise of religion from neutral and generally applicable laws.[31] That is, Congress and thirty states have rejected the rule of *Employment Division v. Smith*.

These state-law protections for religious liberty are of course not this Court's responsibility. But if the Court invalidates California's ban on same-sex civil marriage, it should clearly indicate that it does not mean to preclude state-law protections for religious liberty in this context. The Court would be protecting same-sex couples from discrimination by the state. It would not be directing states to override the free exercise of religion by religious organizations or by individual believers.

D. In an Appropriate Future Case, the Court Should Reconsider Free Exercise Exemptions from Generally Applicable Laws.

Some religious refusals to recognize same-sex marriages may be fundamental exercises of conscience, but may not be fairly viewed as "internal decisions," and may be subject to a law with no exceptions — a law that is truly generally applicable. In such a case, the Court should be open to reconsidering the rule announced in *Employment Division v. Smith*.

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[31] Alaska, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New York, North Carolina, Ohio, Washington, and Wisconsin. For citations, see Laycock, *supra* note 30, at 142-43 n.17.

As Justice Souter once explained, there are many reasons to reconsider *Smith*, beginning with the fact that the rule there announced was neither briefed nor argued. *Church of the Lukumi*, 508 U.S. 520, 571-77 (1993) (Souter, J., concurring in the judgment).

Although twenty-three years have now elapsed, *Smith* cannot be said to have become embedded in the law. *Smith*'s rule about generally applicable laws has been interpreted only in *Lukumi*, which would have come out the same way under any standard. *Smith* was merely a background assumption in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which interpreted a completely different clause of the Constitution. Individual Justices debated *Smith* in separate opinions, but *Smith* was not argued by the parties or interpreted by the Court.

Smith was not applied in *Locke v. Davey*, 540 U.S. 712 (2004). The ban on theology scholarships in that case was neither neutral nor generally applicable; it was upheld on the ground that a refusal to fund does not impose a cognizable burden on the exercise of religion. *Id.* at 720-21. *Smith* was not applied in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), which was decided under the federal RFRA, nor in *Hosanna-Tabor*, which was decided under the separate doctrine about internal church decisions.

These are all the significant free exercise decisions since *Smith*. The Court's remaining citations to *Smith* are little more than passing references and occasional cursory resolutions of secondary issues that were left unexplored. It is not

too late to have full briefing and argument on the rule announced in *Employment Division v. Smith*.

Heightened scrutiny of laws burdening the free exercise of religion would provide a means of protecting the essential interests of both same-sex couples and those with religious objections. In the example of adoption services, a court might consider whether comparable services are readily available from a secular agency. If so, it might conclude that there is no compelling interest in forcing religious adoption agencies to the hard choice of closing down or repeatedly violating their religious teachings on the nature of marriage.

Smith appears to mean that if a rule is generally applicable, government can refuse religious exemptions whether or not it has a plausible reason, or any reason at all. A rule of law that takes account of the weight of the competing constitutional interests would do justice more often than a rule of law that ignores those interests.

Whether or not *Smith* is reconsidered, there are important tools available to protect religious liberty within *Smith* itself, in the doctrine of *Hosanna-Tabor*, in the federal RFRA, and in state law. The Court should use these tools to protect religious liberty with respect to marriage, and it should make clear that state courts are free to use state law to the same end.

CONCLUSION

The judgments below should be affirmed. And this Court should make clear its commitment to protect the religious liberty of churches, synagogues, and other religious organizations that refuse to recognize same-sex civil marriages.

Respectfully submitted,

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