Case No. 14-5291

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY BOURKE, et al., *Plaintiffs-Appellees*,

v.

STEVE BESHEAR, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Kentucky, The Hon. John G. Heyburn, II presiding, Case No. 3:13-CV-00750

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

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CORPORATE DISCLOSURE STATEMENT OF *AMICI CURIAE*
FRAP RULE 26.1 (Local Rule Form)

Pursuant to Federal Rule of Appellate Procedure 26.1, amici Anti-Defamation League; Americans United for Separation of Church and State; Bend the Arc: A Jewish Partnership for Justice; Central Conference of American Rabbis; Global Justice Institute; Hadassah, The Women's Zionist Organization of America; The Hindu American Foundation; Interfaith Alliance Foundation; The Japanese American Citizens League; Jewish Social Policy Action Network; Keshet; Metropolitan Community Churches; More Light Presbyterians; The National Council of Jewish Women; Nehirim; People for the American Way Foundation; Presbyterian Welcome; ReconcilingWorks: Lutherans For Full Participation; Sikh American Legal Defense and Education Fund; Society for Humanistic Judaism; T'ruah: The Rabbinic Call for Human Rights; Women of Reform Judaism; and Women's League for Conservative Judaism state that they are nonprofit organizations, they have no parent companies, and they have not issued shares of stock.

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IDENTITY AND INTEREST OF *AMICI*

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

***

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

SUMMARY OF ARGUMENT

Amici support appellees' challenge to the constitutionality of Kentucky's marriage ban, including Kentucky Const. § 233A (the "Marriage Ban"). *Amici* contend that the Marriage Ban violates not only the Fourteenth Amendment's Equal Protection Clause, but also the First Amendment's Establishment Clause. A decision overturning the Marriage Ban would assure full state recognition of civil marriages, while allowing religious groups the freedom to choose how to define marriage for themselves. Many religious traditions, including those practiced by many of the undersigned *amici*, attribute religious significance to the institution of marriage. *See Turner v. Safley*, 482 U.S. 78, 96 (1987) ("[M]any religions recognize marriage as having spiritual significance."). But religious views differ regarding what marriages qualify to be solemnized. Under the First Amendment, which safeguards religious liberty ***for all***, selective religious understandings cannot define marriage recognition for purposes of civil law.

It is a violation of the First Amendment to deny individuals the right to marry on the grounds that such marriages would offend the tenets of a particular religious group. *Cf. Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (rejecting religious justification for law restricting right of individuals of different races to marry). Kentucky's Marriage Ban flouts this fundamental principle by incorporating a particular religious definition of marriage into law—a definition

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

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

Finally, contrary to the arguments of some supporters, the Marriage Ban is not rationally related to a legitimate governmental interest in protecting religious liberty. Such arguments fail to explain how a ruling invalidating the Marriage Ban would interfere with religious liberty in any way. The case at bar concerns whether same-sex couples are entitled to the benefits of civil marriage. Concerns related to the potential for anti-discrimination suits are a red herring: laws and policies barring anti-gay discrimination are already on the books in cities and counties in Kentucky. While protecting religious liberty is a legitimate governmental interest in general, what the proponents of the Marriage Ban actually urge is that Kentucky be allowed to enact a particular religious view of marriage to the exclusion of other religious views. State governments have no legitimate interest in enacting legislation that merely adopts a particular version of Judeo-Christian religious morality. Far from serving a legitimate governmental interest, using the law to enshrine such religious doctrine would violate both the Establishment Clause and the Fourteenth Amendment.

ARGUMENT

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

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

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

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

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

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

I.

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

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

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

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

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

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

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

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

Relevant here is the secular purpose requirement. The Supreme Court has discussed this rule at length, noting that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005). The Court has emphasized that this test has "bite," such that a law will not survive scrutiny under the Establishment Clause simply because "some secular purpose" is constructed after the fact. *Id.* at 865 & n.13.

The Court has explained that examination of the purpose of a law "is a staple of statutory interpretation that makes up the daily fare of every appellate court in

the country." *Id.* at 861. Employing traditional tools of statutory interpretation allows a court to determine legislative purpose without resort to any "judicial psychoanalysis of a drafter's heart of hearts." *Id.* at 862.

Specifically, in examining a law's "preeminent purpose," courts look to a variety of sources, including legislative history, statements on the record, and testimony given by supporters. *Edwards*, 482 U.S. at 587, 591–92. In the case of voter initiatives, courts may look to ballot arguments, advertisements, and messages promoted by the campaign to pass the suspect law. *See Perry*, 704 F. Supp. 2d at 930.

B. The Kentucky Marriage Ban was enacted with a religious purpose based on a particular religious understanding of marriage.

Kentucky's Constitutional Amendment 1 (the "Amendment"), passed in 2004, amended the state constitution to provide: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."

The Amendment's supporters made no secret of the religious motivations behind it. Senator Vernie McGaha was lead sponsor of Senate Bill 245, which placed the Amendment on the ballot. Senator McGaha cited the Bible on the Senate floor in encouraging his fellow legislators to "protect our communities from the desecration of [their] traditional values." John Cheves, *KY State Senate Oks*

Putting Gay Marriage Ban to a Vote, Lexington Herald-Leader, Mar. 12, 2004. He referred to marriage as a "divine institution designed to form a permanent union between man and woman." S. Debate, 108th Cong., 2nd Sess. (Ky. 2004). He then quoted scripture at length and asserted that First Corinthians 7:2 describes what he terms "the most sacred relationship of life" as between a man and "*his* own wife" and a woman and "*her* own husband." *Id.* He argued that the Amendment ought to be adopted to protect "the sacred institution of marriage join[ing] together a man and a woman for the stability of society and for the greater glory of God." *Id.*

Other supporters, including religious leaders, similarly couched the fight over the Amendment in undeniably religious terms. Kentucky's Catholic bishops supported the Amendment because "[m]arriage is a faithful, exclusive, and lifelong union between one man and one woman joined as husband and wife in an intimate partnership of life and love. Catholic Conference of Kentucky, *Kentucky Bishops Endorse SB 245 Conditionally*, Mar. 25, 2004 (expressing reservations about language in S.B. 245 regarding the judiciary). Pastor Rusty Russell, whose Southeast Christian Church in Louisville spent $150,000 on an ad campaign supporting the Amendment as representing "God's plan for marriage," framed the debate as follows: "God established in his word some guidelines for what marriage is and definition of what marriage is." Craig Hoffman, *Southeast Christian Church Enters Gay Marriage Debate*, WAVE3 News, Sept. 29, 2004.

Framing the question in similarly religion-based terms, one of the largest donors to the campaign in favor of the Amendment, the American Family Association of Kentucky[1] declared that "marriage defined as a union of a man and a woman is the basis of the family and all civilization. The design for marriage and family was made by God, not man (Genesis 2:22-25)." American Family Association of Kentucky, *About Us*, available at http://www.afaofky.com/aboutus.htm (last visited June 7, 2014). The fundamental message of those backing the Amendment was that a vote in favor would preserve and protect a specific religious view of "God's plan for marriage" and traditional religious values.

***

Many laws could or do have religious support and are still constitutional. But two characteristics of the Amendment distinguish it from other laws that hew to religious traditions. First, most such laws do not arise from a comparable level of religious and morality-based rhetoric in the public and legislative records. The prominent role of religious and moral proselytizing in the legislative record, in promotional materials, and throughout every aspect of the campaign should raise concerns with this Court.

[1] National Institute on Money in State Politics, *Kentucky Amendment 1: Same-sex Marriage Ban*, available at http://www.followthemoney.org/database/StateGlance/ballot.phtml?m=284 (last visited June 7, 2014).

Second, laws that were partly influenced by religious considerations are constitutional if their *primary* purpose and effect are secular. For example, the beliefs of many religious adherents, including many Muslims, Mormons, and Methodists, require that they abstain from alcohol. And various laws restricting the sale and consumption of alcohol exist throughout the United States. *See, e.g.*, Ky. Rev. Stat. § 242.185 (permitting dry counties); 23 U.S.C. § 158 (National Minimum Drinking Age Act of 1984). Religious and moral understandings may have played a part in the decisions of some lawmakers to pass such laws. But unlike the Marriage Ban, constitutional alcohol laws have legitimate, secular purposes—preventing driving deaths or protecting children from addiction—and their primary effect is to advance these governmental interests, not religion.

Conversely, as discussed in the plaintiffs-appellees' brief, the Marriage Ban has no legitimate secular purpose. In fact, as measured at the time of enactment, the Amendment had no effect *except* to express a particular religious viewpoint. When the Amendment was passed, Kentucky did not actually recognize same-sex marriages—the state already had statutes limiting marriage to unions between a man and a woman. *See, e.g.*, Ky. Rev. Stat. § 402.020(d). The impetus for the state's invidious Amendment was the desire of certain individuals and religious organizations to enshrine in their state constitution a particular religious understanding of marriage and to insulate it from state constitutional challenge.

In the religious sphere, even among adherents of Christianity, there was (and continues to be) considerable debate about how religion should treat marriage between same-sex couples. The primary purpose of the Amendment was to take sides in this religious debate by putting the full force of the state behind an express moral and religious condemnation of a vulnerable minority—gays and lesbians—whose relationships the Amendment's sponsor referred to as "a lie." Dunn, *supra*. The restriction of marriage to opposite-sex couples was thus a quintessential governmental "endorsement" of religion—a misuse of governmental power to promote a particular religious view, with no legitimate secular purpose. The Marriage Ban is therefore unconstitutional under the Establishment Clause.

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

The Marriage Ban's Establishment Clause deficiencies support the conclusion that the Marriage Ban violates the Equal Protection Clause. Morality and religion play an important role in the lives of many Americans, and many are undoubtedly guided in their voting by personal religious and moral beliefs.[2] But to be constitutional under the Supreme Court's decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), *United States v. Windsor*, 133 S. Ct. 2675 (2013), and earlier

[2] It should be noted that *amici* generally do not believe that homosexuality or marriage between same-sex couples is immoral. *See, e.g.*, Rev. Dr. C. Welton Gaddy, President, Interfaith Alliance, *Same-Gender Marriage & Religious Freedom: A Call to Quiet Conversations and Public Debates* (Aug. 2009), http://www.interfaithalliance.org/equality/read.

cases, a law must be rationally related to a legitimate governmental interest beyond the desire to disadvantage a group on the basis of moral disapproval.[3] The Kentucky Marriage Ban lacks any such legitimate purpose.

The Court held in *Lawrence* that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (internal quotation marks omitted). Justice O'Connor observed in her *Lawrence* concurrence that "[m]oral disapproval of [a particular group], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." 539 U.S. at 582. Justice O'Connor further observed that the Court had "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Id.*

[3] The majority opinion in *Lawrence* acknowledged the Equal Protection Clause theory as a "tenable argument," but grounded its decision in principles of due process in order to eliminate any questions as to the continuing validity of *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See Lawrence*, 539 U.S. at 574–75. In its due process analysis, the Court spoke not only of a protected liberty interest in the conduct prohibited by the Texas law—consensual sexual relations—but also of the Court's concern with laws that "demean[]" gay people and "stigma[tize]" a group that deserves "respect." *Id.* at 571–75; *see also* Nan D. Hunter, *Living with Lawrence*, 88 Minn. L. Rev. 1103, 1124 (2004).

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

Lawrence and *Windsor* are just the latest cases where the Court invalidated laws reflecting a "bare . . . desire to harm a politically unpopular group." *See Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (alteration in original) (citation omitted) (finding constitutional amendment banning gays and lesbians from receiving nondiscrimination protections in any local jurisdiction was motivated by animus and moral disapproval, and therefore unconstitutional under the equal protection clause); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (finding law targeting hippies unconstitutional under equal protection clause). In these cases, the Court properly stripped away the rationales proffered and concluded that "animus," "negative attitudes," "unease," "fear," bias," or "unpopular[ity]" actually motivated the legislative actions at issue. *See Windsor*,

133 S. Ct. at 2693–95; *Lawrence*, 539 U.S. at 582; *Romer*, 517 U.S. at 634–35; *Moreno*, 413 U.S. at 534.

Underlying these decisions is an awareness by the Supreme Court that allowing condemnation of a politically unpopular group to constitute a legitimate governmental interest would effectively eviscerate the equal protection guarantees of the Fifth and Fourteenth Amendments. Accordingly, the Supreme Court has consistently rejected moral condemnation as a governmental interest. *See also Loving v. Virginia*, 388 U.S. 1, 3 (1967) (striking down anti-miscegenation law after trial judge invoked God's separation of the races).

This line of cases, which searches the record for moral condemnation of a group, is quite similar to Establishment Clause secular-purpose analysis. As discussed above, statements throughout the legislative and public-ballot efforts to pass the Amendment demonstrate its purpose of preserving a particular religious "ideal" of marriage and condemning a type of marriage that does not fit that ideal. The Amendment's proponents were motivated by a desire to impose religious and moral condemnation on a minority, as in *Moreno* (hippies) and *Romer* (gays and lesbians). The record is rife with statements that make clear that the "traditional marriage" the Amendment was designed to protect was that envisioned by a particular lineage of Judeo-Christian religious doctrine. This purpose is improper under both the Establishment Clause and the Equal Protection Clause.

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

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

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

Different religious groups have different views on marriage, and the separation of church and state guaranteed by the Constitution protects those views. In most religious communities, there is disagreement both among and within individual congregations regarding marriage. This diversity of belief is not new. Even within unified religious groups, restrictions on religious marriage have changed over time.

Many faith groups, such as the Catholic Church and the Church of Jesus Christ of Latter-day Saints, oppose marriage equality as part of their official

doctrines. *See, e.g.*, The Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons* (2003); First Presidency and Council of the Twelve Apostles of the Church of Jesus Christ of Latter-Day Saints, *The Family: A Proclamation to the World* (1995).

Other faiths openly welcome same-sex couples into marriage, including many of the undersigned *amici*.[4] The United Church of Christ and the Unitarian Universalist Association officially support marriage equality, as do several Jewish denominations—the Reform, Conservative, Reconstructionist, and Humanistic Movements.[5] Some faiths allow individual congregations to decide whether to bless marriages between same-sex couples. Last year, for example, the

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

[5] *See, e.g.*, Shaila Dewan, *United Church of Christ Backs Same-Sex Marriage*, N.Y. Times, July 5, 2005; Unitarian Universalist Association, *Freedom to Marry, For All People* (2004) http://archive.uua.org/news/2004/freedomtomarry/index.html (last visited Feb. 24, 2014); Rabbi Elliot Dorff et al., *Rituals and Documents of Marriage and Divorce for Same-Sex Couples* (Spring 2012); General Assembly Union of American Hebrew Congregations, *Civil Marriage for Gay and Lesbian Jewish Couples* (Nov. 2, 1997), http://urj.org//about/union/governance/reso//?syspage=article&item_id=2000 (last visited Apr. 10, 2014); Society for Humanistic Judaism, *Society for Humanistic Judaism Supports Marriage Rights of Same-Sex Couples* (Apr. 2004), http://www.shj.org/MarriageEquality.htm (last visited Apr. 10, 2014).

Episcopalian National Cathedral in Washington, D.C. endorsed such marriages. Laurie Goodstein, *Washington National Cathedral Announced It Will Hold Same-Sex Weddings*, N.Y. Times, Jan. 9, 2013, at A-12 (noting that Episcopalian National Convention authorized official liturgy for blessing same-sex unions).

Further, even in faiths where there is no official recognition of marriage between same-sex couples, many members maintain their faith while still supporting equal marriage. A recent poll found that 63 percent of religious non-Christians, 56 percent of white Catholics, 53 percent of Hispanic Catholics, and 52 percent of white mainline Protestants favored allowing same-sex couples to marry. Robert P. Jones, Public Religion Research Institute, *Religious Americans' Perspectives on Same-Sex Marriage* (June 30, 2012).

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

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

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

Many religious groups have historically recognized the benefit inherent in ensuring that their own rules on marriage are distinct from those embodied in civil law: autonomy to determine which marriages to solemnize and under what circumstances. A number of religious groups that now support ingraining their religious understanding of marriage into the Kentucky Constitution forget their own traditions of supporting—and benefitting from—separation between church policy and state law. *See, e.g.*, Southern Baptist Convention, *Position Statement on Church and State*, http://www.sbc.net/aboutus/pschurch.asp (last visited Feb. 24, 2014) ("We stand for a free church in a free state. Neither one should control the affairs of the other."); Joseph F. Smith et al., *Presentation of the First Presidency to the April 1896 Conference of the Church of Jesus Christ of Latter Day Saints, reprinted in* U.S. Congress, *Testimony of Important Witnesses as Given in the Proceedings Before the Committee on Privileges and Elections of the United States Senate in the Matter of the Protest Against the Right of Hon. Reed Smoot, A Senator from the State of Utah, to Hold His Seat* 106 (1905) (Church leadership, in

defending a U.S. Senator against charges his Mormon faith made him ineligible to serve, wrote: "[T]here has not been, nor is there, the remotest desire on our part, or on the part of our coreligionists, to do anything looking to a union of church and state."); *cf. Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.").

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

Interfaith Marriage: Some churches historically prohibited (and some continue to prohibit) interfaith marriage, while others accept it. For example, the Roman Catholic Church's *Code of Canon Law* proscribed interfaith marriage for most of the twentieth century. Michael G. Lawler, *Marriage and the Catholic Church: Disputed Questions* 118–19 (2002) (quoting 1917 Code C.1060). Although this restriction was relaxed in 1983, modern Catholic doctrine still requires the Church's "express permission" to marry a non-Catholic Christian and "express dispensation" to marry a non-Christian. 1983 Code C.1086, 1124; Roman Catholic Church, *Catechism of the Catholic Church* 1635 (1995 ed.). Similarly, Orthodox and Conservative Jewish traditions both tend to proscribe

interfaith marriage, *see* David S. Ariel, *What Do Jews Believe?: The Spiritual Foundations of Judaism* 129 (1996), as do many interpretations of Islamic law, *see Bandari v. INS*, 227 F.3d 1160, 1163–64 (9th Cir. 2000) (Iran's official interpretation of Islamic law forbids interfaith marriage and dating).

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

Interracial Marriage: As with interfaith marriage, religious institutions in the past have differed markedly in their treatment of interracial relationships. For example, some fundamentalist churches previously condemned interracial marriage. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 580–81 (1983) (fundamentalist Christian university believed that "the Bible forbids interracial dating and marriage").

In the past, the Church of Jesus Christ of Latter-day Saints discouraged interracial marriage. *See Interracial Marriage Discouraged*, Church News, June

17, 1978, at 2 ("Now, the brethren feel that it is not the wisest thing to cross racial lines in dating and marrying.") (quoting President Spencer W. Kimball in a 1965 address to students at Brigham Young University). Yet, in the context of its policy on excluding African-Americans from the priesthood, the Church expressly recognized that its position on treatment of African-Americans was "wholly within the category of religion," applying only to those who joined the church, with "no bearing upon matters of civil rights." The First Presidency, *Statement on the Status of Blacks*, Dec. 15, 1969, *reproduced in* Appendix, *Neither White Nor Black: Mormon Scholars Confront the Race Issue in a Universal Church* (Lester E. Bush, Jr. & Armand L. Mauss eds., 1984). Similarly, religious views regarding interracial marriage must not dictate the terms of civil marriage.

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

* * *

In all three instances discussed above, individual religious groups have adopted particular rules relating to marriage, yet those rules do not dictate the

contours of civil marriage law. At the same time, the religious groups that have followed those rules have been able to enforce them internally, due to our country's long tradition of separation between church and state. For some of these religious groups to now advocate for a religion-based understanding of marriage to be imposed on all people throughout the state smacks of a hypocritical double standard.

IV. A decision invalidating the Kentucky Marriage Ban would not threaten religious liberty.

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

In past cases, such as the one challenging California's Proposition 8, opponents of marriage equality have claimed that excluding same-sex couples from marriage could be grounded in a legitimate governmental interest in promoting religious liberty. As in those cases, no one's religious liberty would be threatened by overturning the Kentucky Marriage Ban. The First Amendment protects the right of religious groups and their adherents to make their own rules regarding the religious solemnization of marriages. In the United States, civil marriage is a separate institution, and it does not mirror the requirements of religious marriage. If anything, by adopting sectarian religious doctrine to restrict marriage, the Marriage Ban burdens the religious liberty of those whose faith traditions welcome same-sex couples to enter legal marriages in religious

ceremonies. Despite going through a ceremony and commitment like their religious brethren (albeit without state solemnization), same-sex couples face exclusion from the separate, parallel civil institution.

Proponents of marriage bans have argued that if same-sex couples could marry, churches, private businesses, public schools, teachers, and counselors (among others) would see their religious freedoms curtailed, face discrimination lawsuits, and risk losing governmental benefits. This parade of horribles is misplaced and misunderstands the purpose and meaning of "religious liberty." These arguments only serve to highlight that proponents of the Marriage Ban have selected one particular religious understanding of marriage as deserving of "religious liberty" protection—a religious preference that violates the Establishment Clause.

Civil marriage in the United States must be—and always has been prior to now—blind to religious doctrine. Atheists have a right to civil marriage, as tests of faith for public rights are unconstitutional. *See Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding unconstitutional a belief-in-God test for holding public office). The fact that atheists enjoy the same legal right to civil marriage as religious people poses no threat to religious marriage traditions, nor does it cheapen or abrogate the institution of marriage. And as discussed above, civil marriage's inclusion of biracial couples, couples of different faiths, and couples with prior

divorces has long been the norm, and at no point has this "open tent" approach impinged on religious liberty. Churches have continued to practice their marriage rituals without facing legal liability for refusing to consecrate certain kinds of marriages and without losing their tax-exempt status.

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

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

In past marriage cases, parties and *amici* defending marriage bans have expressed concern that allowing marriage equality would cause a flood of lawsuits alleging anti-gay discrimination against religious people—particularly wedding vendors likes florists and photographers.[6] But these arguments are a red herring: laws and policies barring anti-gay discrimination are already on the books in cities and counties in Kentucky. Those who make such arguments actually take issue with the anti-discrimination laws and the government's decision to provide anti-discrimination protection with respect to public accommodations, not with the legal definition of marriage.

[6] This example was cited repeatedly in materials regarding the Kentucky Religious Freedom Act, enacted as Ky. Rev. Stat. § 446.350 in 2013 over Governor Beshear's veto. *See, e.g.*, Family Foundation of Kentucky, *House Bill 440: Religious Freedom Act Is Necessary As Courts Limit Freedoms*, available at http://www.insidefrankfort.com/files/HB%20440%20-%20Religious%20Freedom%20Act%20is%20Necessary%20as%20Courts%20Limit%20Freedoms.pdf.

The vendors supposedly at risk of facing sexual-orientation discrimination lawsuits would not be newly exposed to litigation by invalidation of Kentucky's Marriage Ban, because same-sex couples *already* have unofficial religious and non-religious marriage ceremonies throughout the state. Unofficial or not, wedding vendors have been—and will continue to be—subject to nondiscrimination laws for these kinds of ceremonies. Making the ceremonies official marriage ceremonies—while important for the married couple—will make no difference whatsoever to any vendor's pre-existing obligation to comply with nondiscrimination laws.

2. Commercial businesses have no constitutional right to discriminate.

A business that avails itself of the benefits of doing business with the public must be subject to the public's rules for conducting that business. "The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring). Indeed, it is a fundamental principle of public accommodations law that when a business chooses to solicit customers from the general public, it relinquishes autonomy over whom to serve. *Bell v. Maryland*, 378 U.S. 226, 314–15 (1964) (Goldberg, J., concurring) (quoting *Marsh v. Alabama*, 326 U.S. 501, 506 (1946)). As the Supreme Court of Nebraska

explained in one of the earliest public accommodation decisions, "a barber, by opening a shop, and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during business hours. The statute will not permit him to say to one: 'You are a slave, or a son of a slave; therefore I will not shave you.'" *Messenger v. State*, 41 N.W. 638, 639 (Neb. 1889).

In short, to the extent the law requires it, "one who employ[s] his private property for purposes of commercial gain by offering goods or services to the public must stick to his bargain." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 284 (1964) (Douglas, J., concurring) (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 22). Cities and counties in Kentucky have elected to apply this principle to protect same-sex couples, and will continue to do so whether or not marriage equality is the law. Excluding same-sex couples from marriage simply to foreclose potentially meritorious discrimination claims against a commercial business is not a legitimate governmental interest.

CONCLUSION

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

Respectfully submitted,

This 16th day of June 2014

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(b) because it contains 6,817 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on June 16, 2014.

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

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Case No. 14-5291

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY BOURKE, et al., *Plaintiffs-Appellees*,

v.

STEVE BESHEAR, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Kentucky, The Hon. John G. Heyburn, II presiding, Case No. 3:13-CV-00750

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

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APPENDIX

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

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

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

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

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

Amici curiae the Central Conference of American Rabbis (CCAR), whose membership includes more than 2,000 Reform rabbis, and the Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, oppose discrimination against all individuals, including gays and lesbians, for the stamp of the Divine is present in each and every human being. As Jews, we are taught in the very beginning of the Torah that God created humans B'tselem Elohim, in the Divine Image, and therefore the diversity of creation represents the vastness of the Eternal (Genesis 1:27). Thus, we unequivocally support equal rights for all people, including the right to a civil marriage license. Furthermore, we whole-heartedly reject the notion that the state should discriminate against gays and lesbians with regard to civil marriage equality out of deference to religious tradition, as Reform Judaism celebrates the unions of loving same-sex couples and considers such partnerships worthy of blessing through Jewish ritual.

Amicus curiae the Global Justice Institute is the social justice arm of Metropolitan Community Churches. We are separately incorporated, though WE

originally began as a "ministry" of MCC. We are working in Asia, Pakistan, Eastern Europe, Latin America, the Caribbean, Canada, the United States, East Africa and South Africa on matters of social justice and public policy primarily in the LGBTI communities, but also along lines of intersection with other marginalized communities.

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

Amicus curiae Hindu American Foundation (HAF) is an advocacy organization for the Hindu American community. The Foundation educates

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

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

Amicus curiae Interfaith Alliance Foundation celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance's members across the country belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a

pluralistic democracy and advocating for the proper boundaries between religion and government. Interfaith Alliance also seeks to shift the perspective on LGBT equality from that of problem to solution, from a scriptural argument to a religious freedom agreement, and to address the issue of equality as informed by our Constitution. Same-Gender Marriage and Religious Freedom: A Call to Quiet Conversations and Public Debates, a paper by Interfaith Alliance President, Rev. Dr. C. Welton Gaddy, offers a diversity of ideas based on Interfaith Alliance's unique advocacy for religious freedom and interfaith exchange.

Amicus curiae Japanese American Citizens League, founded in 1929, is the nation's largest and oldest Asian-American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry and others. It vigilantly strives to uphold the human and civil rights of all persons. Since its inception, JACL has opposed the denial of equal protection of the laws to minority groups. In 1967, JACL filed an amicus brief in *Loving v. Virginia*, urging the Supreme Court to strike down Virginia's anti-miscegenation laws, and contending that marriage is a basic civil right of all persons. In 1994, JACL became the first API non-gay national civil rights organization, after the American Civil Liberties Union, to support marriage equality for same-sex couples, affirming marriage as a

fundamental human right that should not be barred to same-sex couples. JACL continues to work actively to safeguard the civil rights of all Americans.

Amicus curiae 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 vulnerable in our society. For most of the last two thousand years, whether they lived in Christian or Muslim societies, Jews were a small religious minority victimized by prejudice and lacking sufficient political power to protect their rights.[1] During the Holocaust, not only Jews, but gays and lesbians, Gypsies and others were targeted for persecution and death at the hands of the Nazis. Perhaps because of their shared history as victimized outsiders, Jews have been especially sensitive to the plight of the lesbian and gay community as a discrete and insular minority within American society and throughout much of the world. As one of many voices within the progressive Jewish community,

[1] Even in the United States, Jews have been subjected to various forms of discrimination—formally such as in the requirements to hold public office *(see, e.g.,* Hartogensis, *Denial Of Equal Rights To Religious Minorities And Non-Believers In The United States* (1930) 39 Yale L.J. 659), or informally such as through quotas in higher education, particularly medical and legal education *(see, e.g.,* Halperin, *The Jewish Problem in U.S. Medical Education: 1920-1955* (2001) 56 J. Hist. Med. & Allied Sci. 140; Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law* (1995) 52 Wash. & Lee L.Rev. 3, 35).

JSPAN is committed to making marriage under civil law available to consenting couples without regard to their sexual orientation.

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

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

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

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

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

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

Amicus curiae Presbyterian Welcome is a non-profit corporation organized under the laws of the State of New York and headquartered in New York City. It has no parent corporation and issues no stock.

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

Amicus curiae the Sikh American Legal Defense and Education Fund (SALDEF) was founded in 1996 and is the oldest Sikh American civil rights and

educational organization. We empower Sikh Americans through advocacy, education, and media relations. SALDEF's mission is to protect the civil rights of Sikh Americans and ensure a fostering environment in the United States for future generations.

Amicus curiae Society for Humanistic Judaism (SHJ) mobilizes people to celebrate Jewish identity and culture, consistent with Humanistic ethics and a nontheistic philosophy of life. Humanistic Jews believe each person has a responsibility for their own behavior, and for the state of the world, independent of any supernatural authority. The SHJ is concerned with protecting religious freedom for all, and especially for religious, ethnic, and cultural minorities such as Jews, and most especially for Humanistic Jews, who do not espouse a traditional religious belief. Humanistic Jews support the right and responsibility of adults to choose their marriage partners. The Society for Humanistic Judaism supports the legal recognition of marriage and divorce between adults of the same sex, and affirms the value of marriage between any two committed adults with the sense of obligations, responsibilities, and consequences thereof.

Amicus curiae T'ruah: The Rabbinic Call for Human Rights is an organization led by rabbis from all denominations of Judaism that acts on the Jewish imperative to respect and protect the human rights of all people. Our commitment to human rights begins with the Torah's declaration that all people are

created in the image of God (Genesis 1:26). Within the Jewish canon, this core belief leads to teachings that equate harming a human being with diminishing the image of God. (See, for example, B'reishit Rabbah 34:14 and Mishnah Sanhedrin 6:5.) People of faith are not of one mind opposing civil marriage equality, and many interpretations of religion, including ours, support equal marriage rights. Judaism insists on the equality of every person before the law. The Torah instructs judges, "You shall not judge unfairly; you shall show no partiality" (Deuteronomy 16:19). Jewish law has developed strict guidelines to ensure that courts function according to this principle. The rights and protections afforded by civil marriage are legal and not religious in nature. The case at hand addresses tax obligations that may be incumbent on some couples married according to the laws of their state, but not on others. Jewish law accepts that "the law of the land is the law," and upholds the right of the government to impose taxes on its citizens. However, major Jewish legal authorities classify as "theft" a tax levied on one subgroup and not on another (Maimonides, Mishneh Torah, Laws of Theft 5:14; Shulchan Aruch, Hoshen Mishpat 369:8). We thus believe it is important to state that people of faith are not of one mind opposing civil marriage equality, and that many interpretations of religion actually support such equality. The Universal Declaration of Human Rights similarly guarantees to every person equal rights, without "distinction of any kind," and specifies that "Men and women of full age * * * are entitled to

equal rights as to marriage, during marriage and at its dissolution." While each rabbi or religious community must retain the right to determine acceptable guidelines for religious marriage, the state has an obligation to guarantee to same-sex couples the legal rights and protections that accompany civil marriage. Doing otherwise constitutes a violation of human rights, as well as the Jewish and American legal imperatives for equal protection under the law.

Amicus curiae, 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.