Nos. 12-144, 12-307

In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, *ET AL.*, *Petitioners,*

v.

KRISTIN M. PERRY, *ET AL.*, *Respondents.*

UNITED STATES, *Petitioner*,

v.

EDITH SCHLAIN WINDSOR AND
BIPARTISAN LEGAL ADVISORY GROUP, *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Second Circuits

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF HOLLINGSWORTH AND THE BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS

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QUESTIONS PRESENTED

1. Given the predictable conflict between same-sex marriage and religious liberty, was maintaining religious liberty a rational basis for People of the State of California and the United States Congress to define marriage as the union of a man and a woman?

2. Should the people have the opportunity in the first instance to work out solutions to the conflict between same-sex marriage and religious liberty?

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INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions.[1] It has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. It is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of all religious people to pursue their beliefs without excessive government interference.

The Becket Fund has also represented religious people and institutions with a wide variety of views about same-sex marriage and homosexuality, including religious people and institutions on all sides of the same-sex marriage debate, and including both non-LGBT and LGBT clients. As a religious liberty law firm, the Becket Fund does not take a position on same-sex marriage as such, but focuses instead on same-sex marriage only as it relates to religious liberty.

The Becket Fund has long sought to facilitate academic discussion of the impact that according legal recognition to same-sex marriage could have on religious liberty. In December 2005, it hosted a confer-

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[1] Parties to both cases have consented to the filing of this brief and letters indicating their consent are on file with the Clerk. *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

ence of noted First Amendment scholars—representing the full spectrum of views on same-sex marriage—to assess the religious freedom implications of legally-recognized same-sex marriage. The conference resulted in the book *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Douglas Laycock, Anthony R. Picarello Jr. & Robin Fretwell Wilson eds., 2008) ("*Emerging Conflicts*"). To date, *Emerging Conflicts* remains the touchstone of scholarly discourse about the intersection of same-sex marriage and religious liberty.

Based on its expertise in the field of religious liberty generally, and the intersection of same-sex marriage and religious liberty specifically, the Becket Fund submits this brief to demonstrate that concerns about the potential conflict between same-sex marriage and religious liberty are both rational and well-founded in fact. In its view, this conflict is best resolved not by judicial decree, but by the legislative process, which is more adept at balancing competing societal interests, including religious liberty.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Religious liberty intersects with same-sex marriage in two important ways relevant to the cases before the Court.

The first intersection goes to the motivations behind DOMA and Proposition 8. DOMA and Proposition 8 were rational responses to court decisions that gave legal recognition to same-sex marriage without addressing the significant church-state conflicts that would result.

The second intersection concerns the effects of this Court's decision in these cases. Were the judicial branch to take the question of how to deal with conflicts between religious liberty and same-sex marriage away from the political process, it would likely result in perpetual struggle without prospect of a political resolution. The commitments are simply too great on both sides to impose a judicial resolution. And setting church and state permanently at odds would be bad for both.

Rational response. DOMA was passed largely in reaction to *Baehr* v. *Lewin*, which held—without mentioning religious liberty—that Hawaii's existing marriage laws were likely unconstitutional. 852 P.2d 44 (Haw. 1993) (plurality op.); see *Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 6 (1st Cir. 2012). Proposition 8 was passed in response to *In re Marriage Cases*, in which the California Supreme Court asserted that religious freedom is unaffected by same-sex marriage because "no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs."[2] *In re Marriage Cases*, 183 P.3d 384, 451-52 (Cal. 2008)

By limiting religious freedom concerns to "forced solemnization," the California Supreme Court allowed itself to be distracted by a red herring—albeit one that parties on opposing sides of the marriage

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[2] The Hawaii Supreme Court later repeated the California court's error by stating that no clergy would be required to solemnize same-sex marriage and rejecting concerns about anti-discrimination lawsuits as "groundless." *Baehr* v. *Miike*, 910 P.2d 112, 115 (Haw. 1996).

debate have been all too happy to indulge. Among scholars, "[n]o one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them." Marc D. Stern, *Same-Sex Marriage and the Churches, in Emerging Conflicts* 1; see also Marriage and Religious Freedom, An Open Letter From Religious Leaders in the United States to All Americans (Jan. 12, 2012) ("the First Amendment creates a very high bar" for forced solemnizations).

But there are many other reasonably foreseeable—and potentially legislatively avoidable—conflicts between same-sex marriage and religious liberty that made it rational for Congress and the people of California to object to the judicial redefinition of marriage reflected in *Baehr* and *In re Marriage Cases*.

These conflicts fall into two broad categories. *First*, objecting religious institutions and individuals will face an increased risk of lawsuits under federal, state, and local anti-discrimination laws, subjecting religious organizations to substantial civil liability if they choose to continue practicing their religious beliefs. *Second*, religious institutions and individuals will face a range of penalties from federal, state and local governments, such as denial of access to public facilities, loss of accreditation and licensing, and the targeted withdrawal of government contracts and benefits.

These foreseeable conflicts implicate the fundamental First Amendment rights of religious institutions, including the rights to freedom of religion and freedom of association. *Amicus* cannot predict how these First Amendment issues will play out in every instance. But while *Windsor* ignored these concerns

and *Perry* dismissed them, the scholarly consensus is that the threat to religious liberty is real. This threat unquestionably provided a rational basis for Congress to proceed cautiously by enacting DOMA and for the people of California to return to the traditional definition of marriage by voting for Proposition 8.

The judicial role. This conclusion is reinforced by the fact that every state legislature to adopt same-sex marriage has included stronger conscience protections than the state and federal court decisions that invalidated DOMA and Proposition 8. In the sixteen years since DOMA was enacted, six states and the District of Columbia have adopted same-sex marriage laws through the democratic process. All of these laws have included conscience protections. If religious liberty concerns were, as *Perry* held, irrational, then these legislatures were acting irrationally. Even worse than this oblique judicial condemnation of religious accommodations is the effect of the decisions below; uncorrected they would cut off the debate over same-sex marriage and religious liberty just as it is starting in earnest.

As the most recent state-level votes on the issue demonstrate, that debate is vigorous, and it is safe to say that a public consensus is still in the process of forming. But if this Court were to invalidate DOMA and Proposition 8 on Equal Protection grounds, the debate would be short-circuited. Worse, the country would face a perpetual church-state conflict that might take decades to resolve, if ever. The better path is to allow the democratic process time to work.

ARGUMENT

I. According legal recognition to same-sex marriage without robust protections for religious liberty will result in wide-ranging church-state conflict.

Recognizing a constitutional right to same-sex marriage without simultaneously protecting conscience rights threatens the religious liberty of people and organizations who cannot, as a matter of conscience, treat same-sex unions as the moral equivalent of opposite-sex marriage. Without conscience protections, widespread and intractable church-state conflicts will result.

Why is this so?

Several factors are at work. First, there is the scope of the underlying theological dispute: an estimated 160 million Americans—97.6% of all religious adherents in the United States and more than half of the entire population—belong to religious bodies that affirm the traditional definition of marriage.[3] This number has not changed significantly in the past ten years.[4] For example, just this past summer, the Pres-

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[3] Marriage Law Project, World Religions and Same-Sex Marriage 4-5 & n.8 (2002).

[4] See Pew Forum on Religion & Public Life, Religious Groups' Official Positions on Same-Sex Marriage (Dec. 7, 2012), http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religious-Groups-Official-Positions-on-Same-Sex-Marriage.aspx (several mainline Protestant denominations now allow the blessing of same-sex unions while maintaining a distinction between same-sex unions and traditional marriage).

byterian Church (U.S.A.), which allows non-celibate gay clergy, rejected a redefinition of marriage.[5]

Until the 1990s, no larger religious group in the United States officially endorsed same-sex marriage, and only a handful do today.[6] While of course not all individual believers agree with their religion's official position on marriage, many do, and religious organizations themselves are generally bound by official teaching.

Second, the religious commitments are deep ones. For the largest world religions present in the United States, the institution of opposite-sex marriage is central to their moral teaching about sexual relationships.[7] For these groups, opposite-sex marriage holds special theological significance. As a result, programs and teaching are frequently organized around the distinction between married couples and couples who are not married: benefits such as marriage retreats,

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[5] See G. Jeffrey MacDonald, *Presbyterian church rejects same-sex marriage*, Christian Science Monitor, July 7, 2012.

[6] See Pew Forum (noting that "Reform and Reconstructionist Jewish movements have supported gay and lesbian rights, including same-sex marriage, since the mid-1990s," and that "Unitarian Universalist Association of Congregations passed a resolution in support of same-sex marriage" in 1996). Some United Church of Christ congregations also conduct same-sex marriage ceremonies.

[7] See, *e.g.*, *Sex, Marriage, and Family in World Religions* xxii-xxvii (Don S. Browning, M. Christian Green, & John Witte, Jr. eds., 2009) (describing opposite-sex limitation on marriage in Buddhism, Christianity, Confucianism, Hinduism, Islam, and Judaism and the central role of sexual complementarity within marriage for world religions).

marriage counseling, and the use of religious property for private ceremonies are all offered to couples who are married and denied to those who are not.

Third, the relatively short history of same-sex marriage thus far indicates that there will be a great deal of litigation in the future. The first state to give civil recognition to same-sex marriage was Massachusetts, in 2003, and every other state to recognize same-sex marriage has done so within the last five years.[8] Even so, litigation has already begun. Because litigation under anti-discrimination laws increases exponentially over time, a few lawsuits now are a strong indicator of many more lawsuits to come.[9] Indeed, once this Court rules in the cases before it, perhaps the greatest disincentive to suing religious people and organizations over their objections same-sex marriage will disappear: namely, worries about what this Court might think of those lawsuits.

Fourth, the stakes are especially high in this Court. A ruling from this Court that objecting to same-sex marriage is always irrational, or that making distinctions regarding same-sex marriage consti-

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[8] *Goodridge* v. *Dep't of Publ. Health*, 798 N.E.2d 941 (Mass. 2003); Connecticut (2008); Iowa (2009); Vermont (2009); New Hampshire (2010); Washington, D.C. (2010); New York (2011); Washington (2012); Maine (2013); Maryland (2013).

[9] See, *e.g.,* Vivian Berger *et al.*, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 Hofstra Lab. & Emp. L.J. 45, 45 (2005) ("The number of employment discrimination lawsuits rose continuously throughout the last three decades of the twentieth century. In the federal courts, such filings grew 2000% * * * .").

tutes discrimination against a quasi-suspect class, will have two major negative effects on religious objectors. One is that they will immediately be vulnerable to lawsuits under anti-discrimination laws never designed for that purpose. In the Appendix, we have set forth a non-exhaustive list of the many state laws prohibiting gender, marital status, and sexual orientation discrimination and identifying the religious exemptions, if any for each such law. These laws could be triggered by recognition of same-sex marriage. See Appendix 1a-101a.

The other negative effect is that this Court's disapprobation would cast suspicion on religious objectors in a way that existing laws against sexual orientation discrimination do not. Were this Court to hold, as *Perry* did, that maintaining a distinction between opposite-sex marriage and other legal relationships "dishonor[s]" gays and lesbians—or concludes, as the Department of Justice has argued in DOMA litigation, that "defending traditional notions of morality * * * evidences * * * animus" towards gays and lesbians[10]—then these longstanding practices will suddenly become *prima facie* evidence of anti-gay discrimination, instead of what they are: expressions of

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[10] United States' Superseding Br. 48, *Massachusetts* v. *U.S. Dep't of Health and Human Servs.*, No. 10-2204 (1st Cir. Sept. 22, 2011), ECF 5582082; *cf.* United States' Br. 37-38, *Windsor*, Nos. 12-2335 & 12-2435 (2d Cir. Aug. 10, 2012), ECF 120 (making the same argument but substituting "disapproval" for "animus"); but see United States' Br. 22-23, *Windsor*, No. 1:10-cv-08435 (S.D.N.Y. Aug. 19, 2011), ECF 71 (making the same argument using "animus").

longstanding moral worldviews that put opposite-sex marriage at the center of human sexuality.[11]

Perry was therefore wrong to dismiss—in response to *amicus*'s brief—religious liberty concerns as a rational basis for Proposition 8.[12] Redefining marriage affects many religious groups in ways that allowing same-sex domestic partnerships does not. By contrast, no legislation adopting same-sex marriage has ever branded the opposing view as irrational or animus-based; it has simply changed the law. Indeed, it is very likely that many Americans have voted in favor of legal recognition for same-sex marriage even though the practice runs contrary to their own religious beliefs—and they don't view those beliefs as irrational.

Given these factors, it is not surprising that a scholarly consensus has emerged that giving legal

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[11] The post-decision history of *Christian Legal Society* v. *Martinez*, 130 S.Ct. 2971 (2010) demonstrates the power of this Court's perceived approval or disapproval. Although that case turned on a wayward stipulation and concerned public universities, it has subsequently been used as a justification for excluding Christian organizations from both public and private university campuses. See, *e.g.*, Bob Smietana, *Anti-bias policies drive some religious groups off campuses*, USA Today, Apr. 2, 2012 (describing disputes around country and noting that the private Vanderbilt University cited *Martinez* in defense of its all-comers policy that applies to all groups except fraternities and sororities); Intervarsity Christian Fellowship/USA, *Campus Challenges*, http://www.intervarsity.org/page/campus-challenges (claiming 41 separate efforts to exclude Christian group since *Martinez* was decided).

[12] *Perry* v. *Brown*, 671 F.3d 1052, 1091 (9th Cir. 2012).

recognition to same-sex marriage will result in widespread, foreseeable, and to some extent legislatively avoidable church-state conflict. Some scholars argue that the rights of religious believers should nearly always give way to the right of gays and lesbians to be free from discrimination.[13] Others support strong exemptions for objecting religious believers.[14] But there is widespread scholarly agreement that the conflict is coming.

Since neither *Baehr* nor *In re Marriage Cases* even recognized these conflicts—let alone resolved them—it was entirely rational for Congress and the people of California to respond as they did. And given the certainty of those conflicts, it would be prudent for this Court to stay its hand and allow the political process an opportunity to mitigate those conflicts.

A. Leading legal scholars on both sides of the marriage debate recognize the conflict between same-sex marriage and religious liberty and support legislative exemptions.

As noted above, there is a clear consensus among leading legal scholars that conflicts between same-sex marriage and religious liberty are real and should be legislatively addressed. This scholarly consensus confirms that concerns over potential church-state conflict as a result of court decisions that found a constitutional right to same-sex marriage without discussing corresponding protections for religious believers

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[13] Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in Emerging Conflicts* 123, 154.

[14] Douglas Laycock, *Afterword*, *in Emerging Conflicts* 189, 197-201.

provided a rational basis for both DOMA and Proposition 8.

In the *Emerging Conflicts* book, seven prominent scholars of First Amendment law agreed that legal recognition of same-sex marriage, without more, would create widespread conflicts with religious liberty. See, *e.g.*, Marc D. Stern, *Same-Sex Marriage and the Churches, in Emerging Conflicts* 1 (describing scope of anticipated conflicts). Professor Chai Feldblum of Georgetown University wrote from her own experience as a lesbian who had been raised in an Orthodox Jewish family, arguing that conscientious objections to same-sex marriage are legitimate:

> I believe those who advocate for LGBT equality have downplayed the impact of such [anti-discrimination] laws on some people's religious beliefs and, equally, I believe those who have sought religious exemptions from such civil rights laws have downplayed the impact that such exemptions would have on LGBT people.

Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in Emerging Conflicts* 123, 124-25. Feldblum went on to confirm the real threat to religious liberty that legal recognition of same-sex marriage presents, and treated the position of religious objectors as rational, though she ultimately concluded that religious claims should fail. See *id.* at 155-56.

Others, such as leading religious liberty scholar Douglas Laycock—who likewise supports giving legal recognition to same-sex marriage—argue that some conflicts between same-sex marriage and religious liberty are unavoidable, but some could be mitigated by providing conscience protections. See*, e.g.,* Douglas Laycock, *Afterword*, *in Emerging Conflicts* 189, 197-

201. There is a consensus, however, that serious conflicts between same-sex marriage and religious liberty exist.

In addition to the scholarly consensus that there is a conflict, there is also a scholarly consensus that the conflict should be addressed by enacting legislative exemptions for conscientious objectors. Legal scholars have written a series of detailed open letters to legislators in states considering same-sex marriage legislation arguing that threats to religious liberty should be legislatively addressed. See Appendix at 102a (Letter from Prof. Robin Fretwell Wilson and others to the Governor of Illinois (Dec. 18, 2012); *id.* at 137a (Letter from Prof. Douglas Laycock and others to Members of the Illinois Senate (Dec. 24, 2012) (supporting both same-sex marriage and strong religious exemptions)).

In response, two other prominent First Amendment scholars—Professors Ira Lupu and Robert Tuttle of George Washington University—published a law review article disagreeing with some of the specific religious liberty accommodations recommended in the open letters, but agreeing that many conscience protections are indeed necessary and advisable if the threat to religious liberty is to be mitigated.[15]

Leading scholars within the gay rights movement also advocate legislative protections for religious objectors. Professor William Eskridge of Yale has written that "Gay rights advocates put [the religious ex-

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[15] See Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 Nw. J. L. & Soc. Pol'y 274 (2010).

emption] provision in ENDA, and it should be retained."[16] Professor Andrew Koppelman of Northwestern and Jonathan Rauch of the Brookings Institution have both advocated legislative accommodations as a solution to the conflict between same-sex marriage and religious liberty.[17]

There is thus a scholarly consensus that the conflicts between same-sex marriage and religious liberty are real, deeply rooted, and far-reaching. And, although they disagree about the details, scholars have reached a separate consensus that these conflicts can be significantly mitigated by carefully-crafted legislative exemptions.

These two consensuses reinforce the commonsense conclusion that members of Congress and the people of California acted rationally when they rejected giving legal recognition to same-sex marriage without conscience protections. And they counsel judicial restraint in the cases before the Court.

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[16] William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Law*, 106 Yale L.J. 2411, 2456 (1997) (referring to proposed Employment Non-Discrimination Act).

[17] See, *e.g.,* Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 Brook. L. Rev. 125 (2006); David Blankenhorn & Jonathan Rauch, *A Reconciliation on Gay Marriage,* N.Y. Times, Feb. 21, 2009.

B. Religious people and institutions that object to same-sex marriage will face a wave of private civil litigation under anti-discrimination laws never intended for that purpose.

As the scholarly consensus indicates, religious institutions face significant new sources of civil liability if same-sex marriage is given legal recognition without concurrent protections for individuals and institutions with conscientious objections. Without strong conscience protections, giving legal recognition to same-sex marriage will enable same-sex spouses to bring suit against religious institutions under gender, marital status, and sexual orientation anti-discrimination laws, most of which were never designed to reach claims by members of same-sex marriages. See, *e.g.*, *Martinez* v. *County of Monroe*, 850 N.Y.S.2d 740, 743 (N.Y. App. Div. 2008) (refusal to provide benefits based on same-sex marriage contracted in Ontario violated New York's prohibition on marital status discrimination); *Baehr*, 852 P.2d at 64 (limitation of marriage to opposite-sex couples was form of sex-based discrimination); *Butler* v. *Adoption Media, LLC*, 486 F.Supp.2d 1022, 1056 (N.D. Cal. 2007) (allowing marital status claim to go forward in dispute over adoption by same-sex couple).

To be sure, in some states—like California—existing laws regarding equal treatment of domestic partners result in similar conflicts. But granting legal recognition to same-sex marriage nationwide will automatically trigger a host of federal, state, and local statutes nationwide. See *e.g.*, Appendix at 1a-101a (listing state laws). And while some of these laws, especially those concerning sexual orientation discrimi-

nation, include religious exemptions, in most cases they do not, and the accommodations are also simply not designed to respond to judicial redefinition of civil marriage.

What follows is a non-exhaustive description of these potential conflicts.

Public accommodation laws. Religious institutions often provide a broad array of programs and facilities to their members and to the general public, such as hospitals, schools, adoption services, and marital counseling. Religious institutions have historically enjoyed wide latitude in choosing what religiously-motivated services and facilities they will provide, and to whom they will provide them. But giving legal recognition to same-sex marriage without robust conscience exemptions will restrict that freedom in at least two ways.

First, most states include gender, marital status, or sexual orientation as protected categories under public accommodations laws. See Appendix at 1a-101a (listing state laws). Second, religious institutions and their related ministries are facing increased risk of being declared places of public accommodation, and thus being subject to legal regimes designed to regulate secular businesses. For example, some laws require church halls be treated as public accommodations if they are rented to non-members. See, *e.g.*, Hutchinson, Kan. Human Relations Commission, *Definitions and FAQs Under Proposed Sexual Orientation and Gender Identity Protections* 4 (2012).[18] When coupled with legally-recognized same-

[18] http://www.hutchgov.com/egov/docs/1332537777_170654.pdf.

sex marriage, these two facts create significant liability risk for religious objectors. Indeed, expansion of the definition of "public accommodation" is what precipitated the divisive *Boy Scouts* v. *Dale* litigation: unlike other states, New Jersey's Supreme Court held that the Boy Scouts were a "place of public accommodation."[19]

This risk is greatest for those religious organizations that serve people with different beliefs. Unfortunately, the more a religious organization seeks to minister to the general public (as opposed to just co-religionists), the greater the risk that the service will be regarded as a public accommodation giving rise to liability.

Some of the many religiously-motivated services that could be "public accommodations" are: healthcare services, marriage counseling, family counseling, job training programs, child care, gyms and day camps,[20] life coaching, schooling,[21] adoption services,[22] and the use of wedding ceremony facilities.[23]

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[19] *Dale* v. *Boy Scouts of America*, 160 N.J. 562, 602 (N.J. 1999), *reversed*, *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000).

[20] See Melissa Walker, *YMCA rewrites rules for lesbian couples*, Des Moines Register, Aug. 6, 2007 (city forced YMCA to change its definition of "family" or lose grant).

[21] See *Gay Rights Coalition of Georgetown Univ. Law Ctr.* v. *Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (en banc) (public accommodations statute required equivalent access to all university facilities.).

[22] See *Butler*, 486 F.Supp.2d 1022 (Arizona adoption facilitation website was public accommodation under California law).

And religious business owners face the same risks: when New Mexico photographer Elaine Huguenin declined for religious reasons to photograph a same-sex commitment ceremony, she was sued under the New Mexico Human Rights Act and required to pay nearly $7,000 on the basis that her business constituted a public accommodation. *Elane Photography, LLC* v. *Willock*, 284 P.3d 428, 433 (N.M. Ct. App. 2012), *cert. granted*, 2012-NMCERT-008 (N.M. Aug. 16, 2012).

Of the thousands of American religious organizations that minister to the public in one or more of the ways mentioned above, many simply want to avoid the appearance—and reality—of condoning or subsidizing same-sex marriage through their "family-based" services. Yet after *Baehr* and *In re Marriage Cases*, the law threatened to forbid these institutions from expressing and acting on their religious objections to same-sex marriage precisely because they seek to serve the broader public. DOMA and Proposition 8 were rational responses to that concern.

Housing discrimination laws. Religious colleges and universities frequently provide student housing and often give special treatment to married couples. Legally married same-sex couples could reasonably be expected to seek these benefits, but many religious educational institutions would conscientiously object to providing similar support for same-sex unions. Housing discrimination lawsuits would result.

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[23] See *Bernstein* v. *Ocean Grove Camp Meeting Ass'n*, Num. DCR PN34XB-03008 (N.J. Off. of Att'y Gen., Div. on Civil Rts., Oct. 23, 2012) (Methodist organization violated public accommodations law by denying same-sex couples use of wedding pavilion because it opened pavilion for other weddings).

For example, under Federal law, gender discrimination in housing is prohibited. See 42 U.S.C. § 3604. There are some limited exemptions for religious institutions, see 42 U.S.C. § 3607, but they would not automatically cover all conflicts triggered by legal recognition of same-sex marriage—and determining their scope would require costly litigation. Similarly, state and local housing laws ban discrimination on the basis of gender, marital status, and sexual orientation—and the religious exemptions are also limited. See, *e.g.*, Cal. Gov't Code §§ 12955.4, 12995 (recognizing limited exemptions for certain religious organizations); 775 Ill. Comp. Stat. § 5/3-106 (recognizing limited exemptions for certain religious organizations); see Appendix at 1a-101a (collecting state housing discrimination laws).

In several states, courts have required landlords to facilitate the unmarried cohabitation of their tenants, over strong religious objections.[24] If unmarried couples cannot be discriminated against in housing due to marital status protections, legally married same-sex couples would have comparatively stronger

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[24] See *Smith* v. *Fair Employment & Hous. Comm'n.*, 51 Cal. Rptr. 2d 700 (Cal. 1996) (no substantial burden on religion where landlord required to rent to unmarried couples despite sincere religious objections because landlord could avoid the burden by exiting the rental business). See also *Thomas* v. *Anchorage Equal Rights Comm'n,* 102 P.3d 937, 939 (Alaska 2004); *Swanner* v. *Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Attorney General* v. *Desilets*, 636 N.E.2d 233, 235 (Mass. 1994). But see *State by Cooper* v. *French,* 460 N.W.2d 2 (Minn. 1990) (state constitutional protection of religious conscience exempted landlord from ban against marital status discrimination in housing).

protection, as public policy tends to favor and subsidize marriage as an institution. *Levin* v. *Yeshiva Univ.*, 96 N.Y.2d 484 (N.Y. 2001) is an example. In *Levin*, the court held that two lesbian students had stated a valid disparate impact claim of sexual orientation discrimination after the university refused to provide married student housing benefits to unmarried couples. If same-sex marriage is adopted without religious protections, plaintiffs would not have to rely on sexual orientation discrimination claims—the much more common laws against marital status discrimination would suffice.

Employment discrimination laws. Religious organizations that object to same-sex marriage may also face private lawsuits when one of their employees enters into a civilly-recognized same-sex marriage. For many religious institutions, an employee's entering a same-sex marriage would constitute a public repudiation of the institution's core religious beliefs in a way that less public relationships do not. Some employers will respond by changing the terms of employment for those employees. These employees may then sue under laws prohibiting gender, sexual orientation, or marital status discrimination in employment. See Appendix 1a-101a (listing state anti-discrimination laws). If the employee is a "minister," or the relevant statute includes an exemption, then the defendant religious employer could raise an affirmative defense. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *EEOC*, 132 S. Ct. 694, 707 (2012); *Spencer* v. *World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) *cert. denied,* 132 S. Ct. 96 (2011) (applying Title VII's religious exemption). But where the employee does not qualify as a minister and no legislative exemption is in place, the em-

ployer will be exposed to liability for any alleged adverse employment action. See, *e.g.*, *Roe* v. *Empire Blue Cross Blue Shield*, No. 12-cv-4788-PKC (S.D.N.Y. filed June 19, 2012) (class action lawsuit filed after adoption of same-sex marriage in New York against Catholic medical center and its insurer seeking same-sex spousal benefits).

Moreover, if same-sex marriage is adopted without protections, religious employers may be automatically required to provide insurance to all legal spouses—both opposite-sex and same-sex—to comply with anti-discrimination laws. For example, after the District of Columbia passed a same-sex marriage law without strong conscience protections, the Catholic Archdiocese of Washington was forced to stop offering spousal benefits to any of its new employees.[25]

C. Religious people and institutions that object to same-sex marriage will be penalized by state and local governments.

Adopting same-sex marriage also subjects religious organizations to the denial of generally available government benefits. Where same-sex marriage is adopted without religious protections, those who conscientiously object to such marriages can be labeled unlawful "discriminators" and thus denied access to otherwise generally available state and local government benefits.

The government benefits which are placed at risk in a judicial imposition of same-sex marriage fall into

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[25] William Wan, *Same-Sex Marriage Leads Catholic Charities to Adjust Benefits*, Wash. Post, March 2, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030103345.html.

five categories: (1) access to government facilities and fora, (2) government licenses and accreditation, (3) government grants and contracts, (4) tax-exempt status, and (5) educational opportunities.

1. Exclusion from government facilities and fora.

Religious institutions that object to same-sex marriage will face challenges to their ability to access a diverse array of government facilities and fora. This is borne out in the reaction to the Boy Scouts' requirement that members believe in God and not advocate for, or engage in, homosexual conduct. Because of this belief, the Boy Scouts have had to fight to gain equal access to public after-school facilities.[26] They have lost leases to city campgrounds and parks,[27] a lease to a government building that served as their headquarters for 79 years,[28] and the right to participate in a state-facilitated charitable payroll deduction program.[29] All of this has happened despite this Court's decision in *Dale*. If same-sex marriage is adopted without robust protections for conscientious objectors, religious organizations that object to same-sex marriage would expect to face similar penalties

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[26] *Boy Scouts of America* v. *Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (challenge to Boy Scouts' use of school facilities).

[27] *Evans* v. *City of Berkeley*, 129 P.3d 394 (Cal. 2006) (equal access to boat berths denied to Scouts).

[28] *Cradle of Liberty Council, Inc.* v. *City of Philadelphia*, 851 F. Supp. 2d 936, 939 (E.D. Pa. 2012).

[29] *Boy Scouts of Am.* v. *Wyman*, 335 F.3d 80 (2d Cir. 2003) (Boy Scouts could be excluded from state's workplace charitable contributions campaign).

under these more-restrictive laws, notwithstanding any constitutional rights that they may have.

2. Loss of licenses or accreditation.

A related concern exists with respect to licensing and accreditation decisions. In Massachusetts, for example, the state threatened to revoke the adoption license of Boston Catholic Charities, a large and longstanding religious social-service organization, because it refused on religious grounds to place foster children with same-sex couples. Rather than violate its religious beliefs, Catholic Charities shut down its adoption services.[30] This sort of licensing conflict would only increase after judicial recognition of same-sex marriage, since many governments would require all civil marriages to be treated identically.

Similarly, religious colleges and universities have been threatened with the loss of accreditation because they object to sexual conduct outside of opposite-sex marriage. In 2001, for example, the American Psychological Association, the accrediting body for professional psychology programs, threatened to revoke the accreditation of religious colleges that prefer coreligionists, in large part because of concerns about "codes of conduct that prohibit sex outside of mar-

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[30] Patricia Wen, "*They Cared for the Children": Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families*, Boston Globe, June 25, 2006 (Catholic Charities had to choose between following Church beliefs and continuing to offer social services); *cf.* 102 Mass. Code Regs. §§ 1.03(1), 5.04(1)(c); 110 Mass. Code Regs. § 1.09(2) (regulations requiring non-discrimination based upon marital status and sexual orientation).

riage and homosexual behavior."[31] Where same-sex marriage is adopted without strong religious protections, religious colleges and universities that oppose same-sex marriage will likely face similar threats.[32] And the same issue will also affect licensed professionals.[33]

3. Disqualification from government grants and contracts.

Religious universities, charities, hospitals, and social service organizations often serve secular government purposes through contracts and grants. For instance, religious colleges participate in state-funded financial aid programs, religious counseling services provide marital counseling and substance abuse treatment, and religious homeless shelters care for those in need.

Many contracts and grants require recipients to be organized "for the public good" and forbid recipients to act "contrary to public policy." If same-sex mar-

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[31] D. Smith, *Accreditation committee decides to keep religious exemption*, 33 Monitor on Psychology 1 (Jan. 2002) (describing why APA ultimately abandoned proposal).

[32] Religious law schools may be particularly vulnerable. The Association of American Law Schools' (AALS) current guidance allows schools to regulate "conduct" that is "directly incompatible with their "essential religious tenets," but warns that if their beliefs include a "prohibition of all nonmarital sexual conduct, the school must, nevertheless, comply with" AALS bylaws on sexual orientation discrimination. AALS Handbook, Interpretive Principles to Guide Religiously Affiliated Member Schools (1993), http://www.aals.org/about_handbook_sgp_rel.php.

[33] See discussion of *Ward* v. *Polite*, *infra*.

riage is recognized without specific accommodations for religious organizations, those organizations that refuse to approve, subsidize, or perform same-sex marriages could be found to violate such standards, thus disqualifying them from participation in government contracts and grants.

For example, in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), a religious college was denied *all* federal student financial aid for failing to comply, for religious reasons, with Title IX's anti-discrimination affirmation requirements; this even though there was no evidence of actual gender discrimination. In the marriage context, religious universities that oppose same-sex marriage could be denied access to government programs (such as scholarships, grants, or tax-exempt bonds) by governmental agencies that adopt an aggressive view of applicable anti-discrimination standards.

Religious organizations opposed to same-sex marriage also face the loss of government social service contracts. After the District of Columbia adopted same-sex marriage, Catholic Charities stopped providing foster care services for the city because it had to choose between continuing its program and violating its religious beliefs regarding the recognition of same-sex marriages.[34] And in Illinois, a state court held that Catholic Charities was required to place children for adoption with couples in civil unions or forgo its annual contracts with the state.

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[34] Michelle Boorstein, *Citing same-sex marriage bill, Washington Archdiocese ends foster-care program*, Wash. Post, Feb. 17, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/02/16/AR2010021604899.html.

Catholic Charities of the Diocese of Springfield v. *Illinois et al.*, No. 2011-MR-254, 2011 WL 3655016 (Ill. Cir. Ct. Aug. 18, 2011). If same-sex marriage is given legal recognition without accommodation for religious objectors, many religious organizations will be forced either to extend benefits to same-sex spouses or to stop providing social services in partnership with government.[35]

4. Loss of state or local tax exemptions.

Most religious institutions have charitable tax-exempt status under federal, state and local laws. But without conscience protections, that status could be stripped by state agencies and local governments based solely on that religious institution's conscientious objection to same-sex marriage.[36] Whether the First Amendment could provide an effective defense to this kind of penalty is an open question.[37]

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[35] See, *e.g.*, *Catholic Charities of Maine, Inc.* v. *City of Portland,* 304 F. Supp. 2d 77 (D. Me. 2004) (upholding ordinance forcing religious charity to either extend employee spousal benefit programs to registered same-sex couples, or lose access to all city housing and community development funds).

[36] "[P]rivate churches losing their tax exemptions for their opposition to homosexual marriages * * * are among the very dangers from the left against which I warned." Prof. Richard A. Epstein, *Same-Sex Union Dispute: Right Now Mirrors Left*, Wall St. J., July 28, 2004, at A13.

[37] See *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983) (rejecting Free Exercise Clause defense to IRS withdrawal of 501(c)(3) status based on religious belief against interracial dating and marriage). See also Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious*

5. Loss of educational and employment opportunities.

The conflict between same-sex marriage and religious liberty affects individual religious believers, too. Vermont has held that individual town clerks are may be fired if they seek to avoid issuing civil union licenses to same-sex couples for religious reasons, and at least twelve Massachusetts Justices of the Peace had to resign because they could not facilitate same-sex marriages.[38] The situation is particularly acute for state-employed professionals like social workers who face a difficult choice between their conscience and their livelihood.[39]

Students at public universities face similarly stark choices. When Julea Ward, a Master's in Counseling student in her final semester at Eastern Michigan University, told her professors that she had no problem counseling individual gay and lesbian clients

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Groups with Unpopular Practices, *in Emerging Conflicts* 59, 64-65 (supporting same-sex marriage but arguing that objectors' tax exemptions should not be stripped); Douglas Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, *in Emerging Conflicts* 103, 108-11 (arguing that *Bob Jones* should not apply to conscientious objectors to same-sex marriage).

[38] *Brady* v. *Dean*, 790 A.2d 428 (Vt. 2001) (Vermont clerks); Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. Times, May 17, 2004 (Massachusetts Justices of the Peace) .

[39] Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. Pub. L. 475 (2008) (describing dismissals and resignations of social service workers where conscience protections were not provided).

but could not in good conscience help them with their same-sex relationships, she was expelled for violating the school's anti-discrimination policy. *Ward* v. *Polite*, 667 F.3d 727, 738 (6th Cir. 2012). If the Ninth Circuit's declaration that refusing to endorse same-sex marriage demonstrates "animosity" and "dislike" towards gays and lesbians is adopted by this Court, conflicts like these will be even more widespread as religious believers' long-held views on marriage suddenly become *prima facie* evidence of discriminatory animus under anti-discrimination laws.

II. Given the threat to religious liberty, DOMA and Proposition 8 are rational responses to the threat to religious liberty posed by court decisions to adopt same-sex marriage without conscience protections.

The foregoing examples are hardly exhaustive. They suffice to show, however, that the California Supreme Court's failure to provide any conscience protections in *In re Marriage Cases*—and the Hawaii Supreme Court's similar failure in *Baehr*— created a significant threat to the ability of religious people and institutions to live in accordance with their beliefs. Democratic action designed to eliminate that threat is not irrational.

Neither of the decisions under review grappled with the religious liberty concerns raised by court-ordered adoption of same-sex marriage. *Windsor* did not even acknowledge that they existed. Judge Reinhardt's opinion in *Perry* acknowledged the religious liberty concerns raised by *amicus*, 671 F.3d at 1091, but first mischaracterized them as concerns that "religious organizations would be penalized * * * for refusing to provide services to *families headed by same-*

sex spouses" and then dismissed them on the ostensible ground that "Proposition 8 did nothing to affect" California's existing anti-discrimination laws. *Ibid.* (emphasis added).

But because so many major religious groups center their teachings regarding sexual morality around opposite-sex marriage, changing the definition of marriage itself—which is precisely what Proposition 8 was designed to address—triggers a distinct set of religious liberty concerns. See *supra* Section I. Moreover, being forced to call a same-sex relationship a "marriage" creates a conflict of conscience for many religious organizations where "civil union" or "domestic partnership" would not. *Perry* only aggravated this sort of church-state conflict by concluding that denying the title of marriage to same-sex couples shows "animosity" or "dislike" towards gays and lesbians, even if they are treated equally in every other respect.

Some have argued that these conflicts should be discounted because they supposedly arise from neutral and generally applicable laws. See Plf's Resp. to *amicus* at 4-5, *Perry* v. *Schwarzenegger*, No. 3:09-cv-02292 (N.D. Cal. Feb. 26, 2010), Dkt. No. 607. Even if that were true—and it is not—that would neither eliminate the conflicts, nor make it irrational for voters to be concerned about them. To the contrary, the lack of Free Exercise protection would only increase voters' rational concerns, since they would then have no way to avoid burdens imposed by these supposedly neutral, generally applicable laws. Since this Court has specifically invited states to consider protections for religious activity that go beyond what the Free Exercise Clause protects, it can hardly be irrational for California voters to take them up on the offer. See

Employment Div. v. *Smith*, 494 U.S. 872, 890 (1990) (because First Amendment rights are not "banished from the political process" legislative religious protections are to be expected).[40]

III. American citizens and their legislatures are competent to decide on the legal definition of marriage through political processes.

This Court should hesitate to strike down DOMA and Proposition 8 for another reason as well: doing so

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[40] With respect to Proposition 8, it was also rational for voters to be concerned about the religious liberty of public school students and their parents. Voters could rationally be concerned about advancing restrictions on student speech objecting to same-sex marriage. See, *e.g.*, *Harper* v. *Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171 (9th Cir. 2006), *vacated as moot,* 549 U.S. 1262 (2007)) (student's religious speech objecting to homosexuality could be banned under *Tinker* because it would "destroy the self-esteem" of LGBT students). Similarly, voters could rationally be concerned that adoption of same-sex marriage would reduce parents' ability to find out what their children were taught about same-sex marriage. See *Parker* v. *Hurley*, 514 F.3d 87 (1st Cir.), *cert. denied*, 555 U.S. 815 (2008) (Massachusetts parents could not obtain notice of when their young children would be taught curriculum designed to celebrate same-sex marriage).

The Ninth Circuit responded to these concerns by stating that California schools have long "been prohibited from giving any instruction that discriminates on the basis of sexual orientation," *Perry*, 671 F.3d at 1091, but this is beside the point. Adopting same-sex marriage without conscience protections necessarily weakens religious objectors' claims. See, *e.g.*, *Parker*, 514 F.3d at 95 (Massachusetts' recognition of same-sex marriage weakened parents' Free Exercise claim under *Smith*).

"'would short-circuit'" the work that state legislatures are already doing in this area. *Jackson* v. *Abercrombie*, No. 11-cv-734, 2012 WL 3255201 (D. Haw. Aug. 8, 2012) (quoting *Dist. Attorney's Office for the Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 72-73 (2009)). "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997). As a result, "[t]he doctrine of judicial self-restraint requires [this Court] to exercise the utmost care whenever we are asked to break new ground in this field." *Collins* v. *City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). Six states have already enacted same-sex marriage laws, all of which provide greater protection for conscience rights than the court decisions which gave rise to DOMA and Proposition 8. See *infra* at 32-33 n.42. Striking down DOMA and Proposition 8 as Plaintiffs request risks turning a very active political debate into a dead end. It would also communicate a profound and, *amicus* believes, unjustified mistrust in the ability of Americans to debate and decide important political issues for themselves.

A. Because many of the conflicts between same-sex marriage and religious liberty can be avoided—at least in part—by legislative exemptions, the judiciary should allow the legislatures to go first.

Six states—Maine, Maryland, New Hampshire, New York, Washington, and Vermont—and the District of Columbia have adopted same-sex marriage by legislative action.[41] Although their laws vary, and no

[41] Massachusetts and Iowa have same-sex marriage by

state has provided complete protection to conscientious objectors, each of the six states and the District of Columbia has attempted to address the conflicts between same-sex marriage and religious liberty by providing accommodations for conscientious objectors.[42]

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judicial rulings. See *Goodridge* v. *Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Varnum* v. *Brien*, 763 N.W.2d 862 (Iowa 2009). Connecticut's legislature adopted same-sex marriage legislation—with several religious exemptions—after its previous marriage/civil union system was struck down. *Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *see* Conn. Gen. Stat. §§ 46b-35a, 46b-35b, 38a-624a (providing religious exemptions).

[42] 2012 Me. Legis. Serv. § 1 (I.B. 3) (exempting clergy and religious organizations from "host[ing] any marriage in violation of" their religious beliefs and protecting them from lawsuits or loss of tax-exempt status for their failure to do so) (to be codified at Me. Rev. Stat. Ann. tit. 19-A, § 655); 2012 Md. Laws ch. 2 § 2-2, -3, -4 (exempting religious organizations from solemnizing or providing services or accommodations related to the solemnization and protecting their ability to offer religious programs consistent with their definition of marriage; permitting religious fraternal organizations to limit insurance coverage to spouses in opposite-sex marriages; and permitting religious adoption and foster care agencies which do not receive government funding to limit their placements to opposite-sex married couples) (to be codified at Md. Code Ann., Fam. Law §§ 2-201, 2-202, 2-406); N.H. Rev. Stat. § 457:37 (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges * * * related to" the "solemnization," "celebration," or "promotion" of a marriage); N.Y. Dom. Rel. Law § 11(1) (exempting religious organizations from solemnizing or providing services or accommodations related to the solemnization of

The fact that every state legislature to address same-sex marriage has recognized the conflict with religious liberty is strong evidence that this concern is rational: if protecting religious liberty is irrational, then all of these legislatures have been acting irrationally. The truth, of course, is that the state legislatures and voters who have adopted these laws attempt to balance competing legitimate societal interests. And that is something that the political branches can do far more easily than the judicial branch.

B. Allowing the people to decide avoids a frozen conflict and facilitates their acceptance of whatever may be the ultimate result of their public debate.

If the history of the same-sex marriage debate in this country teaches anything, it is that the public discussion will continue long after this Court has issued its opinion. The only question is whether that discussion will become a frozen conflict—a political

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marriages that they do not recognize; protecting religious organizations' ability to limit certain kinds of housing to opposite-sex spouses); Vt. Stat. Ann. 9 § 4502(l) (2009) (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges * * * related to" the "solemnization" or "celebration" of a marriage); Wash. Rev. Code § 26.04.010 (2012) (exempting religious organizations from solemnizing or providing services or accommodations related to the solemnization of marriages that they do not recognize); D.C. Code § 46-406(e) (exempting religious organizations from providing "services, accommodations, facilities, or goods * * * related to" the "celebration," "solemnization," or "promotion" of a marriage).

debate without hope of political remedy—or whether it will be allowed to evolve as society changes.

Using the judicial power to end debate now will perpetuate the conflict, not end it. This Court's role in reshaping American abortion laws provides an example of this dynamic in action: as Justice Ginsburg has observed, when *Roe* v. *Wade* was decided in 1973, "legislatures all over the United States were moving on [abortion]," and "[t]he law was in a state of flux." Adam Liptak, *Gay Vows, Repeated From State To State*, N.Y. Times, Apr. 12, 2009. This Court's decision to strike down nearly all existing abortion laws on a single day created "a perfect rallying point" for the pro-life cause, *ibid.*, and 40 years later *Roe* remains at the epicenter of the public conflict over abortion.

Striking down DOMA and Proposition 8 would result in the same kind of self-perpetuating conflict that emerged after *Roe*. Nearly any rationale for striking down these two laws will throw the marriage laws of all fifty states into doubt. As with the abortion conflict, judicial preemption of the deliberative process would reduce the political discussion to two sides shouting at each other endlessly with no constructive result—the political equivalent of trench warfare.

That conflict would be exacerbated by the inevitable perception that overturning DOMA and Proposition 8 was anti-democratic. It would be seen, rightly or wrongly, as the Court overruling both Congress and the voters. And it would also send the message that Americans and their representatives are not competent to decide thorny issues.

John Hart Ely famously said that "constitutional law appropriately exists for those situations where

representative government cannot be trusted, not those where we know it can." *Democracy and Distrust* 183 (1980). This is a situation where representative government *can* be trusted. That many people disagree strongly is simply a sign that the debate is not over. Indeed, democracy without disagreement is not worthy of the name. See, *e.g.*, Isaiah Berlin, *Two Concepts of Liberty*, *in Four Essays on Liberty* 118 (Oxford 1969); Robert Huckfeldt, Paul E. Johnson & John Sprague, *Political Disagreement* (2004) ("* * * a democracy without conflict and disagreement is not a democracy. Democratic institutions are not designed to eliminate conflict and disagreement, but only to manage disagreement in a productive manner."). And citizens reasoning through those disagreements—the very process of deliberation—ensures the vitality of our democratic system by accepting, rather than suppressing, disagreement and dissent:

> If citizens do not try to deliberate about issues such as sexual harassment, homosexual rights, or racial justice, they may never learn how to do so responsibly. Sexist, homophobic, and racist messages will not thereby disappear from American politics; they will retreat between the lines.

Amy Guttman & Dennis Frank Thompson, *Democracy and Disagreement* 109 (1996).

Moreover, using the judicial power to strike DOMA and Proposition 8 down will also prevent legislatures from arriving at workable compromises regarding religious liberty. Although many have argued in the press or elsewhere that the debate over same-sex marriage is a winner-take-all battle, there is po-

tential middle ground. Professor Laycock has explained that:

> unavoidable conflict [between the interests of same-sex couples and the interests of conscientious objectors] does not necessarily mean unmanageable conflict. For the most part, ***these conflicts are not zero-sum games***, in which every gain for one side produces an equal and opposite loss for the other side. If legislators and judges will treat both sides with respect, harm to each side can be minimized. Of course that is a huge "if."

Douglas Laycock, *Afterword*, *in Emerging Conflicts* 196 (emphasis added). Managing these conflicts will require detailed exploration and balancing of all of the societal interests at stake. That is a job that legislatures can undertake far more easily than the judiciary. In Justice Brennan's view, "government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities"—but those exemptions can only be granted, and pluralism protected, through political, not judicial processes.[43]

Finally, if this Court declines to freeze the debate, voters are free to revisit their decisions. That is what happened in Maine: in 2009, voters rejected a same-sex marriage law in a statewide referendum, but in 2012, they adopted a same-sex marriage law—including religious exemptions—in a second statewide referendum. *Maine Rejects Same-Sex Mar-*

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[43] *Walz* v. *Tax Commission*, 397 U.S. 664, 692 (1970) (Brennan, J., concurring).

riage Law, CNN.com, Nov. 4, 2009[44]; *A Festive Mood in Maine as Same-Sex Marriage Becomes Legal*, N.Y. Times, Dec. 30, 2012, at A20.[45] By contrast, were the question removed from ordinary political processes, such reconsideration and fine-tuning would be all but impossible.

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At this juncture in our Nation's political life, same-sex marriage and religious liberty stand in conflict. Given that conflict—acknowledged by scholars and legislatures alike—it is not irrational for voters, or Congress, or the courts to act to protect the rights of conscience. Indeed, it is the political philosophy of the United States that governments are formed solely to protect a set of pre-existing rights that includes religious freedom. *Declaration of Independence*, preamble. Since court decisions left Americans with an all-or-nothing choice between same-sex marriage and full protection for the rights of conscience, DOMA and Proposition 8 were entirely rational responses to the threat to religious liberty.

The wide-ranging nature of the conflict also implicates the judicial role. DOMA and Proposition 8 both present multi-dimensional social issues. Yet because courts are limited to resolving cases and controversies, they are forced to address these complex issues in a binary way. That structural limitation, taken together with the prospect of legislative solutions and

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[44] http://articles.cnn.com/2009-11-04/politics/maine.same.sex_1_marriage-maine-john-baldacci-same-sex?_s=PM:POLITICS.

[45] http://www.nytimes.com/2012/12/30/us/same-sex-marriage-becomes-legal-in-maine.html.

the high value our country puts on religious freedom, counsels judicial restraint in the cases before the Court.

CONCLUSION

For the foregoing reasons, the Court should reverse the lower courts and uphold the constitutionality of both DOMA and Proposition 8.

Respectfully submitted.

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