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, in her Capacity as Executor of the Estate of Thea Clara Spyer, and BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Ninth And Second Circuits

BRIEF *AMICUS CURIAE* OF CATHOLIC ANSWERS, CHRISTIAN LEGAL SOCIETY, AND CATHOLIC VOTE EDUCATION FUND IN SUPPORT OF PETITIONER HOLLINGSWORTH AND RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.

2. Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

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INTEREST OF THE *AMICI CURIAE*[1]

The **Christian Legal Society** ("CLS") believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their beliefs and speech. For that reason, CLS was instrumental in passage of the Equal Access Act of 1984, which protects the right of students to meet for "religious, political, philosophical or other" speech on public secondary school campuses. 20 U.S.C. §§ 4071-4074 (2013). *See* 128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield). Nearly every case decided under the Act has been brought by either a religious or homosexual student group seeking to meet for disfavored speech. CLS is proud of its 35 years of work to protect freedoms of speech and expressive association for all Americans.

CLS is an association of Christian attorneys, law students, and law professors, with student chapters at approximately ninety public and private law schools. As Christian groups have done for nearly two millennia, CLS requires its leaders to agree with a statement of central, traditional Christian beliefs, by which CLS has defined itself for over fifty years. CLS law student chapters typically are small groups of

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[1] All parties consented to the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. Only *amici curiae*, their members, and their counsel made a monetary contribution.

students who meet for weekly prayer, Bible study, and worship at a time and place convenient to the students. CLS meetings are open to all students.

For the past two decades, CLS student chapters have been threatened with exclusion from university campuses by university administrators who misuse nondiscrimination policies. These policies typically serve important interests, including protecting religious students. Too frequently, however, university administrators misinterpret university nondiscrimination policies to exclude religious student groups from campus because they refuse to recant their traditional religious beliefs in favor of ideologies that are more fashionable on campus.

As a result of its own experience as a religious organization that has been excluded from the public square for holding traditional Christian beliefs, CLS is deeply concerned about the impact of these cases upon the ability of persons of faith to follow their religious beliefs if the Court were to adopt a standard of "intermediate scrutiny" when reviewing laws using sexual orientation as a suspect (or quasi-suspect) classification.

Catholic Answers is America's largest lay-run organization dedicated to Catholic apologetics and evangelization. It began in 1979 and uses a wide variety of media to explain and defend the teachings of the Catholic Church. These media include print, audio, and video publications, as well as a daily, live, call-in radio program and extensive online resources.

Catholic Answers is an apostolate dedicated to serving Christ by bringing the fullness of Catholic truth to the world. It helps good Catholics become better Catholics, brings former Catholics "home," and leads non-Catholics into the fullness of the faith.

The **CatholicVote Education Fund** is a nonpartisan voter education program devoted to building a culture that embodies respect for the sanctity of life, religious liberty, marriage, and the family. Members of CatholicVote.org seek to serve their country by supporting educational activities designed to promote an authentic understanding of ordered liberty and the common good in light of the Roman Catholic religious tradition. They firmly believe that the lively interplay of the natural law tradition and religious faith present at the founding of this great nation account for its tremendous contribution to the progress of western civilization. *See* www.youtube.com/catholicvote. Moreover, members of CatholicVote maintain that the commitment to democratic self-government which provides the fundamental premise upon which this nation rests requires that the will of the people be respected where, as here, it is fully consistent with the natural law.

Members of CatholicVote.org believe there is no institution more important to the continued vitality of our illustrious nation, and its great tradition of ordered liberty and respect for the common good, than the institution of the family, properly understood in

light of the natural law tradition as the union of one man and one woman in marriage.

SUMMARY OF ARGUMENT

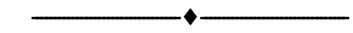
This Court is being asked to recognize sexual orientation as a suspect or quasi-suspect class for purposes of federal equal protection jurisprudence. But to do so would, at both a theoretical and a practical level, necessarily diminish the ability of our nation's religious individuals and communities to live according to their faith.

Federal courts have overwhelmingly refused to recognize sexual orientation as a suspect classification, in part because to do so would have "far-reaching implications." *Massachusetts v. U.S. Dept. of Health & Human Srvs.*, 682 F.3d 1, 9 (1st Cir. 2012). One of the most significant of those far-reaching consequences would be its harmful impact on religious liberty. There is already a broad and intense conflict between the gay rights movement and religious liberty regarding marriage, family, and sexual behavior. If the Court creates a new suspect classification for sexual orientation, it will take sides in that conflict and place millions of religious believers and organizations at a potentially irreversible disadvantage in their efforts to consistently live out their faith.

This brief first addresses the nature of religious liberty itself, particularly its essential element that

believers have space to not just *believe* their faith but to *live* it, both privately and publicly. Next, the brief describes the existing conflict between the gay rights movement and religious believers and organizations. Finally, the brief identifies three specific ways in which raising sexual orientation to a suspect class would intensify the conflict in a manner that would deeply harm the lives of religious believers.

Notably, this harm to religious liberty will occur even though equal protection principles serve to restrict *government* rather than private actors. In an era of pervasive government influence on private life, what affects the government inevitably affects the governed, and all the more so when the change results from a shift in basic constitutional values. Transforming sexual orientation into a new suspect class will pressure government actors to deny religious citizens participation in the public square, an exclusion that will effectively prevent believers from acting on their faiths' call to serve in the public square. Such a change will also provide a legal basis for government agents to restrict the freedom of religious people in the "private square" through the misuse of antidiscrimination laws to penalize religious believers for holding traditional religious beliefs. In sum, if this Court declares that religious judgments about marriage, family, and sexual behavior are the legal equivalent of racism, it will diminish the religious liberty of millions of religious believers and religious communities.



ARGUMENT

I. Religious Liberty Is A Fundamental Right That, When Properly Respected, Broadly Protects The Personal Duty To Live One's Faith.

Religion necessarily involves not just belief but also behavior. A group of religious liberty experts, including adherents of Christianity, Judaism, and Islam, recently explained: "Religion is . . . the effort to achieve a harmony with whatever transcendent order of reality there may be." Timothy Samuel Shah, The Witherspoon Institute Task Force on International Religious Freedom, *Religious Freedom: Why Now? Defending an Embattled Human Right* 12 (2012) (hereinafter "*Religious Freedom*"). This effort at harmony is not embodied "simply [in] a set of theoretical beliefs about reality" but rather in vibrant "human *response* to what is ultimate in reality." Joseph Boyle, *The Place of Religion in the Practical Reasoning of Individuals and Groups*, 43 Am. J. Juris. 1, 3 (1998) (emphasis added). Moreover, this conscience-compelled behavior must often be manifested in a community. *See* Monica Duffy Toft, *et al.*, *God's Century: Resurgent Religion and Global Politics* 21 (2011).

Religious liberty, then, means "the freedom to engage one's entire self" – including the self in the context of community – "in pursuit of ultimate reality." *Religious Freedom* at 16. Our country's founders, who made religious liberty the "first freedom in our Bill of Rights," *Canyon Ferry Baptist Church of E. Helena v. Unsworth*, 556 F.3d 1021, 1037 (9th

Cir. 2009) (Noonan, J., concurring), recognized this fundamental human right and its primacy. James Madison himself, "the leading architect of the religion clauses of the First Amendment," *Arizona Christian Sch. Tuition Org. v. Winn*, ___ U.S. ___, 131 S. Ct. 1436, 1446 (2011) (citation and internal quotation marks omitted), understood that:

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe.

James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in Everson v. Board of Educ. of Ewing,* 330 U.S. 1, 64 (1947) (appendix to dissent of Rutledge, J.).

Like many other faiths, Christianity has never limited its reach to matters of theology and ceremonial observance. *See*, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 713 (2012) (Alito, J., concurring) ("Religious teachings cover the gamut from moral conduct to metaphysical truth."). A fundamental necessity in many religions, including Christianity, is a code of conduct that appears superficially unrelated to worship, prayer, or theology, and is often manifested by service in the public square. *See, e.g., Isaiah* 58:5-7 (rejecting purely religious rituals and commanding believers to instead

oppose and cure social injustice as a form of religious worship); *James* 1:27 ("Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress.") (New International Version (hereinafter "NIV")). Christianity specifically teaches that actions that may not appear inherently religious are a direct, even required, act of service to God, as Jesus taught:

> Then the King [will say] . . . "I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in, I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me." Then the righteous will answer him, "Lord, when did we [do these things for you]?" The King will reply, "I tell you the truth, whatever you did for one of the least of these brothers of mine, you did for me."

Matthew 25:34-40 (NIV).

This same religious obligation to serve God beyond the context of ceremonial worship occurs in other faiths, including Judaism and Islam. *See*, *e.g.*, *Deuteronomy* 15:11 (NIV) ("I command you to be openhanded toward your brothers, and toward the poor and needy in your land."). *See also* The Koran 662, *Surah* 107:1-7 (Arthur J. Arberry, trans., Oxford Univ. Press 1983) (admonishing to provide for the physical needs of the poor); *id.* at 431, *Surah* 33:35

(identifying almsgiving as a precondition to forgiveness).

Thus, religious believers fulfill spiritual obligations by meeting the physical needs of people in a myriad of ways, through adoption agencies, homeless shelters, orphanages, medical clinics, job training, and other practical assistance. This service has deep theological roots in the Christian office of "deacon," which the early Church established to set apart spiritual leaders whose main duty was to "wait on tables" and serve those in need. *Acts* 6:2-4 (NIV). Thus, while an act of service may not include explicitly "spiritual" conduct, it retains a fundamentally religious character for many persons of faith. *See Hosanna-Tabor*, 132 S. Ct. at 709 (noting that even the "heads of congregations" have "secular" duties, "such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities").

Throughout Church history, this call to serve God by serving His people has often been understood to require political engagement, an understanding which played a key role in our nation's founding and in its great civil rights movements. *Canyon Ferry*, 556 F.3d at 1036-37 (Noonan, J., concurring). As Martin Luther King, Jr. explained, a church that had no impact outside its four walls and stood silent in the face of immorality was an "irrelevant social club," not the vibrant life-changing – even culture-changing – institution God commanded it to be. Martin Luther King, Jr., *Letter From Birmingham Jail* (1963),

available at http://www.stanford.edu/group/King/frequentdocs/birmingham.pdf at 9 (last visited January 15, 2013). Similarly, the Catholic Church teaches its members not only to recognize certain things as immoral, but also to oppose through lawful means such immorality as a matter of justice. *See Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1047 (9th Cir. 2010) (en banc) (noting that the Catholic Church taught that "it was the moral duty of Catholics to oppose" certain changes regarding family life and structure). The "very existence" of religious groups is "dedicated to the collective expression and propagation of shared religious ideals," a mission for which the First Amendment gives "special solicitude." *Hosanna-Tabor*, 132 S. Ct. at 712-13 (Alito, J., concurring).

Despite this expansive legal, theological, and cultural recognition of religion as an all-encompassing way of life, some wish to push religious believers and communities out of public life by shrinking the First Amendment to protect only "freedom to worship." Ronald J. Colombo, *The Naked Private Square* (2012), Hofstra Univ. Legal Studies Research Paper No. 12-26, at 29-30, *available at* http://ssrn.com/abstract=2173801 (detailing recent governmental efforts to limit "free exercise" to "freedom of worship"). Labeling it as "extreme," this Court has unanimously rejected the government's analogous argument that the First Amendment affords religious groups only the same constitutional protections that "social club[s]" enjoy. *Hosanna-Tabor*, 132 S. Ct. at 706, 709.

Yet by making sexual orientation a new protected class under our Constitution, this Court would hand the government a tremendous tool to constrain traditional churches, synagogues, and mosques to catechism and ceremony, and to force religious believers to restrict the exercise of their faith to those narrow confines. As this Court observed in the context of nondiscrimination laws' application to religious organizations, the "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987).

II. A Broad And Fundamental Conflict Exists Between Religious Liberty And Sexual Orientation Protections.

If sexual orientation is found to be the constitutional equivalent of race, then religious believers who affirm traditional beliefs regarding marriage and sexuality will suddenly become the equivalent of racists, as will their organizations, ministries, and outreach efforts. Both gay activists and traditional religious believers recognize that there is a fundamental conflict between their positions. According to Professor Chai Feldblum, current Commissioner of the Equal Employment Opportunity Commission, "an inevitable choice between liberties must come into play" so that:

> Just as we do not tolerate private *racial* beliefs that adversely affect African-Americans in the commercial arena, even if such beliefs

> are based on religious views, we should similarly not tolerate private beliefs about sexual orientation . . . that adversely affect the ability of LGBT people to live in the world.

Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, 123-56, 153 (Douglas Laycock, *et al*. eds. 2008).

Commissioner Feldblum claimed that the inevitable clash is between "identity liberty" (of homosexuals and bisexuals) and "belief liberty" (of religious people). *Id.* at 130. But that assertion falsely assumes that many religious persons do not define their identities by their faith. This incorrect assumption goes to the core of the conflict: many gay-rights advocates see sexual orientation as a matter of personal identity but dismiss religious liberty as merely a matter of personal opinion, occasionally to be tolerated but generally to be suppressed. Too often gay rights advocates equate traditional religious beliefs regarding sexual orientation and sexual conduct to racism, insisting that these traditional religious beliefs should not be tolerated outside a tightly restricted personal sphere.

By contrast, many traditional religious believers approach issues regarding sexual orientation as primarily religious questions about sexual behavior, rather than personal identity. Moreover, many traditional religious believers experience religion as a matter of personal identity and, thus, deem religious

liberty to be a fundamental right necessary to allow them to fulfill that identity by living out their duty to obey God. To these people, all sexual behavior outside the bond of marriage between a man and a woman is sinful and, out of obedience to God, should be avoided on both a personal and societal level. Indeed, Christian Scripture identifies marriage as the sole proper context for sex, and family as inseparably fundamental to the purpose of sex. This understanding forms the foundation of traditional Christian belief on sexuality.[2]

Such religious beliefs are, of course, in deep conflict with popular conceptions of sexuality. The point here is not to resolve the dispute, but to simply point out that it exists and generates serious social and legal tensions. As Princeton Professor of Jurisprudence Robert P. George, currently a visiting professor at Harvard Law School, recently reported:

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[2] As an example, a leading contemporary pastor and author, Timothy Keller, head minister at the Church of the Redeemer in New York City, explains the basic Christian understanding of sexual relationships as follows: "The Christian sex ethic can be summarized like this: Sex is for use within marriage between a man and woman." Timothy Keller, *The Meaning of Marriage: Facing the Complexities of Commitment with the Wisdom of God* 221 (2011). As to the biblical understanding of marriage, traditional Christianity teaches that "[a]ccording to the Bible, God devised marriage to . . . create a stable human community for the birth and nurture of children, and to accomplish . . . this by bringing the complementary sexes into an enduring whole-life union." *Id.* at 16.

> Advocates of [same-sex marriage] are increasingly open in saying that they do not see these disputes about sex and marriage as honest disagreements among reasonable people of goodwill. They are, rather, battles between the forces of reason, enlightenment, and equality – those who would "expand the circle of inclusion" – on one side, and those of ignorance, bigotry, and discrimination – those who would exclude people out of "animus" – on the other. The "excluders" are to be treated just as racists are treated – since they are the equivalent of racists. . . . [This treatment will include] stigmatiz[ing] them and impos[ing] various forms of social and even civil disability upon them and their institutions. In the name of "marriage equality" and "non-discrimination," liberty – especially religious liberty and the liberty of conscience – and genuine equality are undermined.

Robert P. George, *Marriage, Religious Liberty, and the "Grand Bargain"* (July 19, 2012), *available at* http://www.thepublicdiscourse.com/2012/07/5884/ (last visited Jan. 11, 2013).

Preeminent religious liberty scholar, Professor Douglas Laycock, recently warned: "For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle – suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized." Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407,

407 (2011). Professor Laycock explains his "sense . . . that the deep disagreements over sexual morality . . . have generated a much more pervasive hostility to certain kinds of religion, and this hostility has consequences." *Id*. at 414. After providing examples to support his sense that "[t]he gay rights movement sees traditional religious teachings about same-sex relationships as simple bigotry," *id.* at 415, he warns against taking a "path [that] causes the very kinds of human suffering that religious liberty is designed to avoid," a path leading to an America in which religious persons "who cannot change their mind [about a moral issue] are sued, fined, forced to violate their conscience, and excluded from occupations if they refuse." *Id*. at 419.

Lest such a warning seem extreme, consider the proceedings below in which a federal district court adopted *as a finding of fact* that "[r]eligious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians." *Perry v. Schwarzenegger,* 704 F.Supp. 2d 921, 985 (N.D. Cal. 2010) (Finding No. 77). In support of this remarkable finding, the district court cited the religious doctrine of the Catholic Church, the Southern Baptist Convention, the Evangelical Presbyterian Church, the Free Methodist Church, the Lutheran Church – Missouri Synod, and the Orthodox Church of America. *Id.* at 986 (Finding Nos. 77(j), (k), (l), (m), (n), (o), (p)). It relied upon a witness's testimony that "religion is the chief obstacle for gay and lesbian political progress." *Id.* at 985 (Finding No. 77(c)). The

court also cited a CNN exit poll that claimed that "84 percent of people who attended church weekly voted in favor of Proposition 8." *Id.* (Finding No. 77(g)).

But the First Amendment prohibits federal courts from sitting in judgment of churches' religious doctrine. "[T]he First Amendment precludes" such an inquiry because "'the law knows no heresy, and is committed to the support of no dogma.'" *United States v. Ballard,* 322 U.S. 78, 86 (1944) (quoting *Watson v. Jones*, 13 Wall. 679, 728 (1873)). "When the triers of fact undertake" to determine the truth of religious doctrines or beliefs, "they enter a forbidden domain." 322 U.S. at 87. Protection of religious beliefs does not "turn on a judicial perception of the particular belief or practice in question." *Thomas v. Review Board,* 450 U.S. 707, 714 (1981). Quite simply, "[c]ourts are not arbiters of scriptural interpretation." *Id.* at 716. At bottom, "[p]articularly in this sensitive area, it is not within the judicial function and judicial competence to inquire" into religious doctrine. *Id*. *See Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 833-834 (1989).

Or consider a number of recent cases involving conflicts between the gay rights movement and religious liberty:

- A wedding photographer was fined nearly $6700 because she declined to photograph a same-sex commitment ceremony solely because doing so would violate her religious beliefs. *Elane Photography*, *LLC v. Willock*, 284

P.3d 428 (N.M. Ct. App. 2012), *cert. granted*, 2012-NMCERT-8 (N.M. Aug. 16, 2012);

- Two graduate students at public universities were expelled from their programs because they were honest about the effect that their religious beliefs would have on their ability to counsel same-sex couples. *Compare Ward v. Polite,* 667 F.3d 727 (6th Cir. 2012) (reviving student's free speech and free exercise claims) *with Keeton v. Anderson-Wiley,* 664 F.3d 865 (11th Cir. 2011) (denying preliminary injunctive relief to student);

- An African-American woman was fired from her job as a public university administrator for writing a letter to the editor of the local newspaper expressing her personal viewpoint based on her religious beliefs that the gay rights movement should not be equated with the civil rights movement. *Dixon v. Univ. of Toledo*, 702 F.3d 269 (6th Cir. 2012);

- A municipal government adopted an official resolution "denouncing the Catholic Church and doctrines of its religion" as "hateful and discriminatory rhetoric" because of the church's position that "Catholic agencies not place children for adoption in homosexual households." *Catholic League,* 624 F.3d at 1047. *See also American Family Ass'n v. City & Cnty. of San Francisco,* 277 F.3d 1114 (9th Cir. 2002) (addressing an official resolution by the same municipality denouncing other religious groups' speech);

- Religious psychologists have challenged a recent California law banning psychologists from counseling minor clients, at their and their parents' request, about ways to diminish sexual attraction toward – or sexual conduct with – members of the client's same sex. *Welch v. Brown,* ___ F.Supp. 2d ___, 2012 WL 6020122 (E.D. Cal. Dec. 3, 2012) (granting preliminary injunction); *Pickup v. Brown,* ___ F.Supp. 2d ___, 2012 WL 6021465 (E.D. Cal. Dec. 4, 2012) (denying preliminary injunction);

- Parents of elementary public schoolchildren challenged a school district's failure to notify them that their children would be taught to accept homosexual relationships despite their parents' contrary religious beliefs. *Parker v. Hurley,* 514 F.3d 87 (1st Cir. 2008);

- Public school students have been forbidden from expressing a traditional religious viewpoint regarding homosexual behavior. *See, e.g., Zamecnik v. Indian Prairie Sch. Dist. No. 204,* 636 F.3d 874 (7th Cir. 2011); *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602 (6th Cir. 2008); *Hansen v. Ann Arbor Pub. Schs.*, 293 F.Supp. 2d 780 (E.D. Mich. 2003).

See also Marc D. Stern, *Same-Sex Marriage and the Churches, in* Same-Sex Marriage and Religious Liberty: Emerging Conflicts 1-58 (Douglas Laycock, *et al.* eds., 2008) (collecting cases).

Conflicts outside of court have been just as common. For example, Catholic Charities has provided adoption services nationwide for over a century, specializing in placing children with special needs. Yet it was excluded by state governments from providing adoption and foster care services in Massachusetts, Illinois, and Washington, D.C., because of its faith-based refusal to place adoptive children with homosexual couples.[3]

In New Jersey, an evangelical ministry was found to have violated state antidiscrimination law for refusing to rent its facilities for a same-sex commitment ceremony.[4] Small businesses run by religious owners have faced charges before human rights commissions for refusing to create expressive products that advocate "gay pride" or endorse homosexual behavior.[5]

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[3] *See* Laurie Goodstein, *Bishops Say Rules on Gay Parents Limit Freedom of Religion*, N.Y. Times, Dec. 28, 2011, *available at* http://www.nytimes.com/2011/12/29/us/for-bishops-a-battle-over-whose-rights-prevail.html?pagewanted=all (last visited Jan. 25, 2013).

[4] *See* Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, N.Y. Times, Sept. 18, 2007, *available at* http://www.nytimes.com/2007/09/18/nyregion/18grove.html (last visited Jan. 25, 2013).

[5] *See* Scott Sloan, *Commission Sides with Gay Group against Hands on Originals*, Lexington Herald-Leader, Nov. 26, 2012, *available at* http://www.kentucky.com/2012/11/26/2421990/city-rules-hands-on-originals.html (last visited Jan. 25, 2013).

In Massachusetts, following the state supreme court's recognition of same-sex marriage, the state's chief legal counsel told justices of the peace that they must perform same-sex marriages despite religious objections or face liability for discrimination. The same thing happened with town clerks in Iowa and New York.[6]

Relatedly, Congress' recent enactment of religious liberty protection for military service members, including explicit protection for military chaplains whose religious beliefs prohibit them from conducting same-sex commitment ceremonies, National Defense Authorization Act for Fiscal Year 2013, § 533(b), was criticized in the President's signing statement as "an unnecessary and ill-advised provision." Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, 2013 Daily Comp. Pres. Docs. 00004, p. 1 (Jan. 2, 2013).

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[6] *See* Katie Zezima, *Obey Same-Sex Marriage Law, Officials Told*, N.Y. Times, April 26, 2004, *available at* http://www.nytimes.com/2004/04/26/us/obey-same-sex-marriage-law-officials-told.html (last visited Jan. 25, 2013); *see also* Thomas Kaplan, *Rights Collide as Town Clerk Sidesteps Role in Gay Marriages*, N.Y. Times, Sept. 27, 2011, *available at* http://www.nytimes.com/2011/09/28/nyregion/rights-clash-as-town-clerk-rejects-her-role-in-gay-marriages.html (last visited Jan. 25, 2013); *Official: Iowa Clerks Must Obey Marriage Ruling*, Sioux City Journal, April 17, 2009, *available at* http://siouxcityjournal.com/news/official-iowa-clerks-must-obey-marriage-ruling/article_b4f5e728-35b1-5d30-941d-8df2d4b34206.html (last visited Jan. 25, 2013).

Perhaps the sharpest blows to religious liberty came in the wake of Proposition 8's passage in California in 2008. Numerous religious believers lost their jobs, and businesses owned by religious believers faced boycotts when it was discovered that they had donated to the pro-Proposition 8 campaign. *See* Lynn D. Wardle, *A House Divided: Same-Sex Marriage and Dangers to Civil Rights*, 4 Liberty U.L.Rev. 537, 555-57 (2010). Mormons in particular were heavily targeted after their names and addresses were published on the internet resulting "in a spate of violent threats against, attacks upon, and intrusions upon select Mormons, their places of worship, their communities, their businesses, and numerous other vindictive acts of harassment and intimidation by homosexual activists to punish and 'pay back' that religious community." *Id.*

Religious liberty must be reinforced. The "right to religious freedom" cannot be redefined to mean the "right to resign one's job" or the "right to recant one's beliefs." Instead, it must remain the right to hold traditional religious beliefs, even those not shared by the current cultural elite, and to do so without fear of retaliation at the workplace or expulsion from the public square.

III. Recognizing Sexual Orientation As A Suspect Class Will Legally Undermine The Ability Of Many Religious People To Live Their Faiths.

In considering whether a law violates the Equal Protection Clause of the Fourteenth Amendment or the implicit equal protection guarantee of the Fifth Amendment, this Court applies different levels of scrutiny to different types of classifications. *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 217 (1995) (explaining that this Court's analysis of Fifth and Fourteenth Amendment equal protection claims is "precisely the same"). Classifications based on, for instance, race and national origin are subject to strict scrutiny, while classifications based on sex and illegitimacy receive intermediate scrutiny. *Clark*, 486 U.S. at 461. Virtually all other classes receive rational basis scrutiny, which deferentially asks only whether the statutory classification in question is conceivably "rationally related to a legitimate governmental purpose." *Id.* Classifications based on sexual orientation have always been subject to rational basis scrutiny, including in cases before this Court, *see, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996), and in eleven of the twelve federal courts of appeals to rule on the issue. *See Windsor v. United States*, 699 F.3d 169, 189 (2d Cir. 2012) (Straub, J., dissenting in part) (observing the majority's break with this Court and eleven other circuits when it found that sexual orientation was entitled to heightened scrutiny).

As with recognizing fundamental rights, courts must be careful about identifying new suspect classes because such recognition takes important decisions out of the normal "democratic processes." *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440 (1985). Such caution is particularly apt here given the "far-reaching implications" of raising sexual orientation to a suspect class. *U.S. Dept. of Health & Human Srvs.*, 682 F.3d at 9.

Constitutional guarantees of equal protection generally limit only *government* action, not private conduct. But there are at least three broad ways in which changing the constitutional status of sexual orientation will harm religious liberty. First, a change in status will increase pressure on government entities to exclude religious groups from public programs and opportunities. Second, governments with sexual orientation antidiscrimination laws will more likely argue that forbidding discrimination based on sexual behavior is a sufficiently compelling interest to override the free exercise, free speech, and free association rights of religious individuals and entities. Third, adding sexual orientation to the same legal category as race will unmistakably endorse the message to society that traditional religious beliefs about marriage and the family are – as a matter of constitutional law – akin to racism, a form of condemnation that will result in marginalization and ostracism of religious believers.

A. Exclusion from the Public Square

Raising sexual orientation to a suspect class might effectively bar religious citizens from public life. To determine whether government may restrict First Amendment liberties in order to protect a certain class, courts look to whether this Court has recognized that class as suspect for purposes of equal protection jurisprudence. If a class has been so recognized, courts are much more willing to find that the government's action is supported by a compelling interest, and thus allow regulations to diminish constitutional liberties in order to protect the class. By contrast, if this Court does not recognize a class as suspect, then other courts are much less likely to find government motives to be compelling.

As Justice Thomas has observed, the fact that a certain class had "never been accorded any heightened scrutiny under the Equal Protection Clause of . . . the federal . . . Constitution[ ]" is prime evidence that an antidiscrimination law protecting that class likely does not protect a sufficiently compelling interest to override religious liberty. *Swanner v. Anchorage Equal Rights Commission,* 513 U.S. 979, 981 (1994) (Thomas, J., dissenting from denial of certiorari) (internal quotation marks and citations omitted). As Judge O'Scannlain explained in greater detail:

> [A]lthough equal protection analysis may not be determinative of the compelling interest inquiry, it assuredly is not . . . [ ] irrelevant.[ ] The Equal Protection Clause is concerned

> more specifically than any other constitutional provision with the issue of discrimination; it is therefore eminently sensible to look to equal protection precedent as a proxy for the importance that attaches to the eradication of particular forms of discrimination. The fact that courts have not given unmarried couples any special consideration under the Equal Protection Clause is potent circumstantial evidence that society lacks a compelling governmental interest in the eradication of discrimination based upon marital status.

Thomas v. Anchorage Equal Rights Commission, 165 F.3d 692, 715 (9th Cir. 1999), *rev'd on other grounds en banc*, 220 F.3d 1134 (9th Cir. 2000).

Concluding that "[n]ot all discrimination is created equal," the panel found that "there is simply no support from any quarter for recognizing a compelling government interest in eradicating marital-status discrimination that would excuse what would otherwise be a violation of the Free Exercise Clause." 165 F.3d at 717. *Cf. Attorney Gen. v. Desilets*, 636 N.E.2d 233, 239 (Mass. 1994) ("Because there is no constitutionally based prohibition against discriminating on the basis of marital status, marital status discrimination is of a lower order than those discriminations" referred to in the state constitution, *i.e.,* "sex, race, color, creed or national origin.").

By contrast to the marital status discrimination at issue in *Swanner* and *Thomas*, fashioning sexual

orientation as a new suspect class akin to race might create significant support for allowing even non-neutral and non-generally-applicable sexual orientation antidiscrimination laws to infringe upon religious liberty. *See, e.g.*, *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 921 (1st Cir. 1988) (Bownes, J., dissenting in part) ("The Supreme Court has noted that the states and the federal government have a compelling interest in eliminating invidious discrimination by private persons on the basis of race and sex. Consequently, it routinely has upheld statutes aimed at eradicating such discrimination, even though they have the incidental effect of abridging the First Amendment rights of the discriminators.") (citations omitted).

A good example of how the public square could be closed to believers is a case dealing with the exclusion of the Boy Scouts from a state employees' charitable giving program. In *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003), shortly after this Court's decision in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), a Connecticut government official unilaterally launched an investigation into whether to remove the Boy Scouts from the state employees' charitable giving program because the Boy Scouts do not permit homosexual individuals to become Boy Scout leaders. The state official removed the Boy Scouts from the program, justifying the action as an effort to avoid being "a party to discrimination in violation of Connecticut's Gay Rights Law." *Id.* at 85. After the Boy Scouts sued, the State affirmed that it excluded the

Scouts "to ensure that state facilities not be used in furtherance of discrimination and that State employees not be subjected to solicitation on behalf of discriminating organizations." *Id.* at 87. While the court ultimately ruled against the Scouts on unrelated grounds, one member of the court expressed his opinion that a simpler route to the same conclusion would have been simply to hold that Connecticut had a compelling interest in enforcing its antidiscrimination statute that overrode the Boy Scouts' associational rights. *Id.* at 92 n.5. Such weighing would undoubtedly gain much greater authority were this Court to elevate sexual orientation to a suspect classification.

The potential impact of such a change is staggering. On the public level, religious organizations and individuals may be frozen out of, or tightly restricted within, professions like psychological counseling to which states control licensure and ethical requirements.[7] Religious adoption and foster care services, already targeted for exclusion in certain states, may be constitutionally compelled to cease adoption and foster-care placement.[8] Access to public funding for

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[7] *See Ward*, 667 F.3d at 730; *Keeton*, 664 F.3d at 880-81; *Welch*, 2012 WL 6020122 at *17; *Pickup*, 2012 WL 6021465 at *26.

[8] For example, in *Lofton v. Sec'y of Dept. of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), the court upheld under rational basis review a Florida law that limited adoption of children to opposite-sex couples; however, were sexual orientation made a suspect class, a different result might be reached.

family services conducted by religious organizations could be slashed or barred entirely. Already existing efforts to revoke tax-exempt status for traditional religious groups would intensify. Access to public facilities could become severely restricted,[9] inflicting a potentially fatal blow to the many religious groups and churches that rent school facilities for religious services.[10] Governments may condition access to facilities and programs that effectively bar many religious citizens from participation in the public square.

B. Encroachment on Private Liberty

The employment practices of many religiously-affiliated entities, like schools, hospitals, and social welfare services, would be open to challenge. Religious business owners, even those whose services are primarily expressive (like photographers and graphic

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[9] *See Cradle of Liberty Council, Inc. v. City of Philadelphia*, 851 F.Supp. 2d 936 (E.D. Pa. 2012) (addressing the city's attempt to evict a Boy Scout troop because of the Boy Scout's leadership policies).

[10] *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 120 (2d Cir. 2007) (Leval, J., concurring) (suggesting church could be barred from renting a public facility because it withholds communion from persons who are not baptized members of the church); *Bronx Household of Faith v. Bd. of Educ.,* 876 F.Supp. 2d 419 (S.D.N.Y. 2012) (describing the importance of access to public buildings for small religious groups), *on appeal*, No. 12-2730 (oral arg. Nov. 19, 2012).

artists), would be compelled to create expressive products that violate their beliefs.

As a setback for both religious liberty and federalism, states and municipalities that have enacted religious liberty exemptions to their sexual orientation antidiscrimination laws may face lawsuits seeking judicial rescission under the federal Constitution. These needed exemptions have already been the subject of criticism. *See, e.g.,* Feldblum, *Moral Conflict and Conflicting Liberties, supra*, at 150-55 (arguing that religious liberty exemptions from sexual orientation laws should be extremely limited); Mark Strasser, *Public Policy, Same-Sex Marriage, and Exemptions for Matters of Conscience*, 12 Fla. Coastal L.J. 135 (2010) (arguing that conscience exemption may violate constitutional guarantees); Jennifer Abodeely, *Thou Shall Not Discriminate: A Proposal For Limiting First Amendment Defenses to Discrimination in Public Accommodations*, 12 Scholar 585 (2010) (discussing ways to circumvent religious liberty defenses against sexual orientation discrimination laws).

Transforming sexual orientation into a new suspect class would not only significantly increase calls for removal of the exemptions, it would provide a legal basis for challenging them. In *Barnes-Wallace v. City of San Diego*, ___ F.3d ___, 2012 WL 6621341 (9th Cir. Dec. 20, 2012), a same-sex couple and an agnostic couple challenged as unconstitutional a lease in which San Diego permitted the Boy Scouts use of public land. The plaintiffs alleged that the leases

violated the Equal Protection Clause "by endorsing, supporting, and promoting defendants' discrimination based on sexual orientation." *Id.* at *13. The Ninth Circuit ultimately rejected the claim, *id.* at *14, but the district court had suggested in dicta that such a claim could be colorable. *See Barnes-Wallace v. Boy Scouts of Am.*, 275 F.Supp. 2d 1259, 1381 (S.D. Cal. 2003). If this Court gives the government a compelling interest in eradicating sexual orientation discrimination, lower courts might conclude that the Constitution bans accommodations of religion in the context of sexual orientation laws.

The carefully negotiated efforts of states and their citizens to strike a balance in the conflict between religious liberty and sexual orientation protections could be swept aside. If states and municipalities were forced to remove their religious liberty exceptions, religious individuals and communities might have very limited legal recourse to protect their ability to fully live out their faiths. In recognizing sexual orientation as a new suspect class, the Court could unintentionally destroy the compromises that State and local laws have enacted, replacing efforts toward mutual accommodation with an all-or-nothing battle worse than the conflicts that led to the compromises.

A related harm from elevating sexual orientation to a suspect class would be the corresponding diminished protection that Title VII, 42 U.S.C. § 2000e, would offer to shield believers from private discrimination. Employers will have less incentive to, and

perhaps even feel pressured not to, accommodate expressions of conventional religious beliefs about marriage and the family. For instance, employers could argue that it would be an "undue burden" to permit such expression because they would upset a protected class. At least one appellate court has already accepted a form of that argument under the current rational-basis standard. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004). More recently, a federal district court signaled a willingness to consider a similar argument. *Gadling-Cole v. West Chester Univ.*, 868 F.Supp. 2d 390, 397-98 (E.D. Pa. 2012). *See also Buonanno v. AT&T Broadband, LLC*, 313 F.Supp. 2d 1069, 1081 (D. Colo. 2004) (employee improperly fired for refusing to sign a statement demanding that he "value" the beliefs of coworkers, implicitly including beliefs that were immoral under his religious faith, which employer claimed created an undue hardship by, for instance, losing innovative ways to reach homosexual consumers).

Similarly, employees who are required to fulfill job functions that directly conflict with their beliefs will be more likely to face situations where they must either violate their faith or lose their livelihood. For instance, in *Slater v. Douglas Cnty.*, 743 F.Supp. 2d 1188 (D. Or. 2010), a county fired a long-time employee from her position as county clerk because she requested that she not be required to register domestic partners. While the county's argument that accommodating the request would cause "an undue

hardship" was ultimately unsuccessful, *id.* at 1191, it would likely have carried more weight were sexual orientation a suspect class.

C. Defining Millions of Religious Believers as Bigots

In essence, Respondents ask this Court to declare that the traditional religious beliefs of many Americans are completely wrong on a subject of singular societal importance. And not merely wrong in the way that we may consider those who disagree with us to be wrong about one of the myriad issues of electoral politics, but wrong about a fundamental commitment enshrined in our nation's Constitution. To be a devout Catholic, Protestant, Mormon, Muslim, or Orthodox Jew will become the effective equivalent of being a member of a racist organization.

In short, respondents seek affirmation of their own preferences, and corresponding condemnation of contrary religious faiths in many ways, and one of the most potent is in obtaining suspect class status for sexual orientation. Suspect class status has been historically reserved for morally neutral categories, categories upon which people could discriminate only for reasons that our history and traditions decisively condemn as "evil." *See Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (noting that racism is a "revolting moral evil" that the country wisely restricted through constitutional amendment and statutory law). By elevating sexual orientation to suspect class

status, the Court would correspondingly consign traditional religious beliefs regarding marriage and the family to the same circle of constitutional purgatory as racism. Thus, simply by virtue of affirming the traditional faith that their churches, synagogues, or mosques have publicly supported for centuries, tens of millions of religious believers in the United States would be branded as the legal equivalent of racists.

Religious believers will then face harsh dilemmas, rarely faced in a country founded as a refuge for those seeking religious liberty. While the treatment of race as a suspect category broadly accords with their religious beliefs, privileging sexual orientation and its related conduct as a new suspect category will deepen and provoke further widespread tensions. The faith communities that, for millennia, have been committed to the belief that sexual conduct should occur only within the marital union of a man and a woman are unlikely to change those beliefs or otherwise fade away.

Besides contradicting the spirit and purposes of the First Amendment, treating religion with such hostility would not "succeed in keeping religious controversy out of public life, given the political ruptures caused by the alienation of segments of the religious community." *McDaniel v. Paty*, 435 U.S. 618, 641 n.25 (1978) (Brennan, J., concurring in the judgment) (citation omitted). The Court has long recognized that establishing *any* official orthodoxy creates social and religious strife. *West Va. Bd. of Ed. v. Barnette,* 319 U.S. 624, 642 (1943) ("If there is any fixed star in

our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."). *Cf.* Shima Baradaran-Robison, *et al.*, *Religious Monopolies and the Commodification of Religion*, 32 Pepp. L. Rev. 885, 888, 936-37 (2005) (state-sanctioned orthodoxy can embolden the dominant society to persecute those who hold disfavored views). Establishment of a new government orthodoxy would be particularly inappropriate here, where it would make political heretics out of faithful religious citizens and spawn profoundly corrosive conflicts between church and state.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

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