Nos. S168047, S168066, S168078

IN THE

Supreme Court of California

KAREN L. STRAUSS *et al.*, Petitioners,
v.
MARK B. HORTON, as State Registrar of Vital Statistics, etc., *et al.*,
Respondents,
and
DENNIS HOLLINGSWORTH *et al.*, Interveners.

ROBIN TYLER *et al.*, Petitioners,
v.
THE STATE OF CALIFORNIA *et al.*, Respondents,
and
DENNIS HOLLINGSWORTH *et al.*, Interveners.

CITY AND COUNTY OF SAN FRANCISCO *et al.*, Petitioners,
v.
MARK B. HORTON, as State Registrar of Vital Statistics, etc., *et al.*,
Respondents,
and
DENNIS HOLLINGSWORTH *et al.*, Interveners.

APPLICATION AND PROPOSED BRIEF *AMICI CURIAE* OF THE CALIFORNIA CATHOLIC CONFERENCE, THE SEVENTH-DAY ADVENTIST CHURCH STATE COUNCIL, THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF INTERVENERS

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APPLICATION AND INTEREST OF THE *AMICI*

Pursuant to California Rule of Court 8.200(c), *amici curiae* California Catholic Conference, The Seventh-day Adventist Church State Council, United States Conference of Catholic Bishops, and Union of Orthodox Jewish Congregations of America respectfully request permission to file the accompanying brief in support of Interveners Donald Hollingsworth *et al*. The brief will assist the Court by setting forth the uniquely important perspective of three major faith communities with respect to marriage. *Amici* have a profound interest in the established definition of marriage and in the outcome of this case:

The California Catholic Conference ("Conference") is the official public policy arm of the Roman Catholic Church in California. The Conference's mission is to advocate for the Catholic Church's public policy agenda statement and to facilitate common pastoral efforts in the Catholic community. The Conference speaks on behalf of California's two Catholic archdioceses, ten dioceses, the Cardinal Archbishop of Los Angeles, the Archbishop of San Francisco, the Bishops of Sacramento, Santa Rosa, Stockton, Fresno, Oakland, San Jose, Monterey, San Bernardino, Orange, and San Diego, and California's auxiliary bishops regarding public policy matters concerning the Catholic Church in California. To this end, the Conference represents the interests of the Catholic Church and its bishops before the California Legislature, executive agencies of the State, and

courts throughout California. The Catholic Conference has a keen interest in the present case.

The Seventh-day Adventist Church State Council is believed to be not only the oldest, but the only public policy organization in the western United States devoted exclusively to issues of liberty of conscience and religion, and upholding the separation of church and state. The Council is a subsidiary of the Pacific Union Conference of Seventh-day Adventists, the administrative body for the church in a five state western region that includes California, with more than 500 Adventist churches and some 175,000 church members in this state. The Seventh-day Adventist Church advocates 28 fundamental doctrinal beliefs, and identifies "Marriage and the Family" as Fundamental Belief No. 23. The official statement begins: "Marriage was divinely established in Eden and affirmed by Jesus to be a lifelong union between a man and a woman in loving companionship." We believe that marriage, though, is more than a religious belief. It is also a civil institution based on important human needs regarding the formation of stable family units and child-rearing. In protecting the traditional view of marriage, we join the almost unanimous consensus of virtually all cultures and societies throughout history that children have the right to a mother and a father.

The **United States Conference of Catholic Bishops** ("USCCB") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, protection of the rights of parents and children, the sanctity of life and marriage, and the importance of education. Values of particular importance to the Conference are the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of this nation's jurisprudence in that regard.

The **Union of Orthodox Jewish Congregations of America** (the "U.O.J.C.A.") is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States, with approximately 50 affiliated congregations in the State of California. It is the largest Orthodox Jewish umbrella organization in this nation. Through its Institute for Public Affairs, the U.O.J.C.A. researches and advocates legal and public policy positions on behalf of the Orthodox Jewish community. The U.O.J.C.A. has filed, or joined in filing, briefs with state and federal courts in many of the important cases which affect the Jewish community and American society at large. Regarding the case before this Court, the Jewish tradition has always recognized the sanctity and special nature of the institution of marriage, and that only the relationship between a man and a woman can be considered marriage. Moreover, Judaism teaches that the institution of

marriage is central to the formation of a healthy society and the raising of children.

Respectfully submitted this 15th day of January, 2009.

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ARGUMENT

Interveners have ably explained how California law and precedent confirm that Proposition 8 is a valid expression of the will of the People, and may not be overturned except by the People. Interveners' Br. 6-35. The purpose of this brief is different. It is to explain why it makes good common sense—even to a coalition as broad as present *amici*—to uphold those laws and precedents, and so to let stand the process and judgment that Proposition 8 represents.

First, it serves the common good of society to allow the interconnected and religiously sensitive issues of marriage, family and children to be discussed and decided within the political process, not silenced by judicial pronouncement. A decision based on the vigorous, wide-open, public debate represented by the Proposition 8 campaign reflects the best of California's democratic traditions and reaffirms the competence of the People—including those of great faith or no faith at all—to decide important moral questions. Popular, rather than judicial, deliberation and decision-making is also much more likely to lead to an eventual balancing of the various societal interests at stake in a society as diverse as California's. And the People are more likely to view as legitimate a decision that represents such broad popular participation, and that allows for such necessary compromises, in turn promoting durable acceptance of the decision and social peace.

Second, it would serve the common good not to create a systemic, irresolvable conflict between church and state, as judicial resolution of these questions would threaten to do. Regardless of who wins or loses those church-state fights in the manifold areas of law where they will arise—housing, public accommodations, and others—society as a whole would be better off to avoid those fights in the first place. And those fights can indeed be avoided if the democratic process is allowed to work its magic, as noted above, but especially in the form of allowing for reasonable statutory and regulatory religious accommodations for those who are constrained by conscience to treat marriage as exclusively between one man and one woman. Although no one expects these religious adherents or their ministers to be required actually to conduct same-sex marriage ceremonies, we do expect them to be—and have already seen them be—sued and otherwise punished for their refusal to treat same-sex and different-sex couples as moral equivalents in the numerous other contexts where religious institutions operate in society.

In sum, *amici* come from substantially different religious traditions, each with its own views of traditional marriage and same-sex relationships. But *amici* are united in the conviction that the way to resolve the societal conflict over these issues is by allowing the diverse members of civil society—on all sides—to deliberate reasonably and decide together, rather than have that debate and decision cut off by the judiciary.

I. The People should be allowed to debate and decide the legal definition of marriage.

A. Allowing the People to decide reaffirms the competence of the People to engage in reasoned public debate and decision-making about questions of social and moral importance.

"Come, let us reason together …." - *Isaiah 1:18.*

Petitioners' argument boils down to asking this Court to declare that the People cannot be trusted to address matters of social and moral importance in an intelligent and rational way. Petitioners' Br. 12-43. Petitioners demand that this Court remove from the People their democratic authority to resolve a question on which reasonable people of goodwill may disagree. Accepting this profoundly undemocratic approach would not only contradict California's long tradition of citizen-led democracy, it would cut off this crucial public debate just as it is getting started in earnest.

This Court should have, and should reflect in its decision, confidence in the ability of the People to use their faculty of reason to discuss, debate, and decide the various important questions implicated by the marriage debate. These questions can be discussed, and are being discussed, fruitfully, by reasonable people holding different views by means of reasoned public discourse. Indeed, religious institutions like *amici* have been engaged in rational debate and deliberation about such questions for centuries. But if this Court pre-emptively removes those

questions from the democratic deliberative process, particularly as a matter of constitutional law, that debate will become idle chatter. Democratic values would be dishonored, and a large portion of the population would reasonably feel that their rights as democratic citizens had been devalued.

Democratic self-governance presupposes disagreement. 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 (Cambridge 2004) ("… a democracy without conflict and disagreement is not a democracy. Democractic 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 (Harvard 1996).

In purely republican systems of government, the locus of the debate over disagreements is within the representative assembly. But in systems

that allow for some direct democracy, like ancient Athens (at times), Switzerland, and much of the American West (including California), the other major locus of the debate is the public discourse of the People themselves. *See* Maimon Schwarzschild, *Popular Initiatives and American Federalism, or Putting Direct Democracy in Its Place*, 13 J. CONTEMP. LEGAL ISSUES 531, 559 (2004) (arguing that because it is "embedded in federal and republican institutions," "[d]irect democracy in America promotes value pluralism, by promoting institutional pluralism, pluralism of participants in political life, and pluralism of outcomes.").

To have a system of direct democracy at all is thus to credit the People themselves with the ability to decide disagreements in a rational way. And as Alexander Hamilton wrote, our system of government is based on the idea of reason at the center of debate:

> It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from ***reflection and choice***, or whether they are forever destined to depend for their political constitutions on accident and force.

THE FEDERALIST NO. 1 at 3 (Jacob E. Cooke ed., 1961) (emphasis added). The argument of the Federalist Papers—an effort to convince the people of New York to ratify the proposed Constitution—was directed to their "reflection and choice." Proposition 8, like any future initiatives that may touch on its subject matter, was directed to the reflection and choice of the

People, and after reflecting, they chose. To hold otherwise would be to say that the People themselves are incapable of rational choice on this subject.[1]

B. Allowing the People to decide allows for a resolution that involves the balancing of competing interests, which is especially appropriate in a diverse society.

Although many have argued in the press or elsewhere that same-sex marriage is a winner-take-all battle, there is room for at least some middle ways in the debate. Leading religious liberty scholar and University of Michigan law professor Douglas Laycock has explained that:

> unavoidable conflict [between the rights of same-sex couples and the rights of conscience of those with moral objections] 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 and 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 big "if."

Douglas Laycock, *Afterword*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 196 (Rowman & Littlefield 2008) (emphasis added). Managing the unavoidable conflicts, not to mention the avoidable conflicts, will require detailed exploration and balancing of all of

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[1] Allowing the People to debate the role of marriage in society also reflects the strong bias towards more debate inherent in the initiative process. As the U.S. Supreme Court has held, that bias is part of American government in general and California's initiative process in particular: "there is ***no significant state or public interest*** in curtailing debate and discussion of a ballot measure." *Citizens Against Rent Control/Coalition for Fair Housing* v. *City of Berkeley*, 454 U.S. 290, 299 (1981). Similarly, any restrictions on public debate must be "'closely drawn to avoid unnecessary abridgment'" of First Amendment freedoms. *First National*

the societal interests at stake. That is a job that the People, largely in conjunction with their elected representatives, can undertake far more easily than the judiciary. The unparalleled diversity of society in California underscores the importance of a democratic, rather than judicial, solution.

Indeed, the People have already demonstrated that, notwithstanding their great differences, they are capable of managing such conflicts and reaching viable compromises. First, the People's representatives have already created domestic partnerships and enacted laws that protect homosexual citizens from discriminatory practices. CAL. FAMILY CODE § 297.5; CAL. CIVIL CODE § 51. These are relatively recent innovations that are still being developed and evaluated. The Court should not short-circuit that process of evaluation.

Second, the public debate leading up to Proposition 8 was as robust a debate as any other with respect to a ballot initiative, becoming the most expensive social issue campaign in American history and sparking the highest vote totals—over 13 million voters—among the propositions on the ballot in November. *See, e.g.*, CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008 GENERAL ELECTION 7, *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf; John Wildermuth, *Voters Backing Same-Sex Marriage Ban*, S.F. CHRON.,

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Bank of Boston v. *Bellotti*, 435 U.S. 765, 786 (1978) (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976)).

Nov. 5, 2008 at A-3.

Third, the People are free to revisit their decisions—whether on Proposition 8 through future initiatives, or on particular legislation—should the public debate lead in that direction, as many have predicted it will. The passage of Proposition 8 indicates both that the People can debate and decide these issues, and that the debate continues. By contrast, if this question is decided judicially, by removing this question from even the initiative process, not to mention the ordinary legislative process, such reconsideration and fine-tuning would be all but impossible.

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

However this Court rules on the petition before it, there will be public debate. The only question is whether that debate will become a "frozen conflict" in the nature of the abortion debate, or whether it will be allowed to develop in accordance with societal change, as with the civil rights movement of the 1960s. *Amici* urge this Court, in the strongest possible terms, to follow the latter course.

The debate is just beginning and should not be cut off prematurely. The debate over the meaning of marriage and its relation to same-sex relationships began in earnest on November 18, 2003, the date that the Massachusetts Supreme Judicial Court legalized same-sex marriage in that state in *Goodridge* v. *Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003),

and triggered an unprecedented wave of legal and political controversy that has now spread to California courts. Anticipating the conflict, the People of California explicitly rejected same-sex marriage by ballot initiative measure in 2000,[2] and have chosen instead to accommodate the interests of same-sex couples through robust domestic partnership legislation.[3]

In the context of American or Californian history, six or nine years is not a long time for a debate of this magnitude to last. And with the passage of Proposition 8, there has been for the first time a debate that focuses both on the availability of other legal structures, such as domestic partnerships, and on the interests of others, including religious institutions, that will be affected by legal recognition of same-sex marriage. The debate is thus at its beginning, not its end.

Using the judicial power to stifle debate now will perpetuate the conflict, not end it. The judiciary is not the branch of government in the best position to provide a final resolution of a sensitive social question such as the definition of marriage. Courts declare *rights;* their function does not contemplate their assessing and reshuffling the complex web of

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[2] *See* Proposition 22, formerly CAL. FAMILY CODE § 308.5 (2000) ("[o]nly marriage between a man and a woman is valid"). *See also* CAL. FAMILY CODE § 300 (1977) (marriage is "between a man and a woman").

[3] CAL. FAMILY CODE §§ 297 and 297.5.

relationships connected to marriage. *California Teachers Ass'n* v. *Governing Bd. of Rialto Unified Sch. Dist.*, 14 Cal.4th 627, 633 (Cal. 1997) ("[A]s this court has often recognized, the judicial role in a democratic society is fundamentally to interpret laws, not to write them. The latter power belongs primarily to the people and the political branches of government ....") (quoting *Kopp* v. *Fair Political Practices Comm'n*, 11 Cal.4th 607, 675 (Cal. 1995) (Werdegar, J., concurring)). By design, courts do not balance competing political interests, or hear from all of society. That is the job of the political branches, who can take into account far more than courts, which are limited to the arguments of the litigants before them.

Declaring *rights* before civil society and its institutions have settled the underlying dispute over the *relationships* to which the rights pertain would result in the kind of frozen conflict that is rare but recurrent (and always regrettable) in American political life. As with the abortion conflict, judicial preemption of the deliberative process would reduce the discussion to two sides shouting at each other endlessly with no constructive result—the political equivalent of trench warfare.

That frozen conflict would be exacerbated by the inevitable perception that overturning Proposition 8 would be a profoundly anti-democratic act. It would be seen, rightly or wrongly, as the Court overruling the People twice in a row. And that perception would ultimately harm the legitimacy of the Court's role in the polity.

II. Removing the definition of legal marriage from the People would needlessly generate wide-ranging church-state conflict.

Allowing the political process to determine whether and how same-sex couples are legally recognized will more likely result in accommodations for those who disagree with same-sex marriage. By contrast, simply overturning California's legal definition of marriage will threaten the religious liberty of people and groups who cannot, as a matter of conscience, treat same-sex unions as the moral equivalent of husband-wife marriage.[4] Immediate, widespread, and perpetual church-state conflict would result.

In general, these conflicts will take two forms. First, objecting religious institutions will face lawsuits under various anti-discrimination laws, which will force religious institutions to "change [their] religious

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[4] Many religious organizations that support husband-wife marriage do not object to domestic partnerships as defined under California law. Cal. Family Code § 297(a) ("adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."). This is so because these novel arrangements do not necessarily proclaim a sexual relationship in conflict with religious beliefs. See, e.g., In re Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004) (noting that civil unions encompass unions other than "homosexual couples"). Many religious groups cannot approve same-sex marriage because, unlike domestic partnerships, the marital union has—from centuries long past through modern times—been religiously, culturally, and legally presumed to be a sexual relationship. See, e.g., Stepanek v. Stepanek 193 Cal. App. 2d 760 (Cal. Dist. Ct. App. 1961) (finding physical inability to engage in coitus per se grounds for annulment).

policies or practices with regard to same-sex couples" or face substantial liabilities. *In re Marriage Cases*, 43 Cal.4th 757, 855 (Cal. 2008). Second, religious institutions will face a range of penalties from state and local governments, such as the targeted withdrawal of government benefits and denial of access to government facilities.

Both types of conflict implicate the fundamental First Amendment rights of religious institutions, including the rights to freedom of religion and freedom of association. It is unclear how these First Amendment issues would be resolved. But the important point for present purposes is that, regardless of the outcome of any particular case, these conflicts can and should be avoided by allowing the political process to anticipate the most significant conflicts and address them constructively by appropriate legislative and regulatory accommodations.

A. 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.

Changing the definition of marriage will allow members of same-sex marriages to bring suit against religious institutions under gender, marital status, and sexual orientation anti-discrimination laws, which were never designed to reach claims by members of same-sex marriages. A small subset of these laws have narrow religious accommodations, but those accommodations are not tailored to the new applications made possible by the judicial redefinition of legal marriage. If the scope of the state's anti-

discrimination laws is to be drastically expanded, it should be expanded through the political process, in part because that process would allow for appropriate consideration of conflicting fundamental rights, such as those of objecting religious institutions.

Housing discrimination laws. Religious colleges and universities frequently provide student housing and often give special priority, benefits, or subsidies to married couples. Legally married same-sex couples could reasonably be expected to seek these special benefits, but many religious educational institutions would be constrained by their consciences from providing similar support for a same-sex sexual relationship. Housing discrimination lawsuits would result.

Under California law, gender, marital status, and sexual orientation discrimination in housing are all prohibited. *See* CAL. GOVERNMENT CODE §§ 12955-12956.2; CAL. CIVIL CODE §§ 53, 782.5. There are some limited exemptions for religious institutions, *see* CAL. GOVERNMENT CODE §§ 12955.4, 12995, but they would not cover the vast majority of conflicts created by legal recognition of same-sex marriage. For example, under current law, a religious college can provide married students housing on a preferential basis. CAL. GOVERNMENT CODE § 12995. But once same-sex marriage is legally recognized, "married students" will mean both opposite-sex and same-sex couples. That means that a religious college whose religious principles prevent it from subsidizing or otherwise facilitating

same-sex sexual conduct would have to either violate its religious principles, or stop offering married student housing.

Public accommodation laws. From hospitals, to schools, to pastoral and marital counseling, religious institutions provide a broad array of programs and facilities to their members and to the general public. Religious institutions have historically enjoyed wide latitude in choosing what religiously-motivated services and facilities they will provide, and to whom they will provide those services. Changing the legal definition of marriage, however, may well disrupt that pattern, in light of two additional facts. First, California includes gender, marital status and sexual orientation as protected categories under public accommodations laws. *See* CAL. CIVIL CODE § 51(b) (forbidding discrimination in "all business establishments of every kind whatsoever"); CAL. CIVIL CODE § 51.5 (forbidding discriminatory boycotts). Second, as explained further below, 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. When coupled with legalized same-sex marriage, these two facts would create a widespread risk of liability for those ministries that refuse, for religious reasons, to provide identical services to legally married same-sex couples.

This risk is greatest for those religious institutions that have very open membership and service provision policies. Ironically, the more a

religious institution seeks to minister to the general public (as opposed to just coreligionists) out of religious imperative, the greater the risk that a service or facility will be regulated under public accommodation statutes as a business "open to the public."

In addition to health-care services, a few of the many religiously-motivated services that can potentially be deemed "public accommodations" include: marriage counseling, family counseling, job training programs, child care, gyms and day camps,[5] life coaching, schooling,[6] adoption services,[7] and even the use of wedding reception facilities.[8] Of the thousands of California religious organizations that

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[5] *See* Melissa Walker, *YMCA rewrites rules for lesbian couples*, DES MOINES REGISTER, Aug. 6, 2007 (city forced YMCA to change definition of "family" or lose federal grant).

[6] See *Gay Rights Coalition of Georgetown University Law Center* v. *Georgetown University*, 536 A.2d 1 (D.C. Ct. App. 1987) (en banc) (holding that while the D.C. public accommodations statute did not require a Catholic university to give homosexual groups university "recognition," it nevertheless required the university to allow them equivalent access to all university facilities.).

[7] *See Butler* v. *Adoption Media*, 486 F.Supp.2d 1022 (N.D. Cal. 2007) (administrators of Arizona adoption facilitation website found subject to California's public accommodations statute because they refused to post profiles of same-sex couples as potential adoptive parents).

[8] *See Bernstein* v. *Ocean Grove Camp Meeting Ass'n*, No. PN34XB-03008 (N.J. Dep't. of Law and Public Safety, Notice of Probable Cause issued Dec. 29, 2008) (finding that religious organization likely violated public accommodations laws by denying same-sex couple use of wedding pavilion).

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.[9] Yet it is possible that the law would forbid these institutions from expressing and acting on their religious objections to same-sex marriage, precisely because they reach out to the broader public.[10]

B. Religious people and institutions that object to same-sex marriage will be labeled "bigots" and penalized by state and local governments.

As discussed above, providing legal recognition to same-sex marriages would generate extensive litigation based on state anti-discrimination statutes, threatening religious organizations with *civil liability* for opposing same-sex marriage. But judicial recognition of same-sex marriage invites a second type of conflict. Specifically, by declaring that differential treatment of same-sex and different-sex marriage is discriminatory, the Court invites state and local governments to label religious organizations that oppose same-sex marriage as unlawful

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[9] *See supra* n.5.

[10] Unlike many other states, California has *no* religious exemptions to its statutory bans on gender, marital status, and sexual orientation discrimination in public accommodations. *See* CAL. CIVIL CODE § 51(b). For a comprehensive comparison to other state public accommodations laws and exemptions, *see* Same-Sex Marriage and State Anti-Discrimination Laws (October 2008), *available at* http://www.becketfund.org/files/34a97.pdf.

"discriminators," thus denying them access to a variety of *government benefits*. The benefits that religious groups stand to lose fall into four categories: (1) government grants and contracts; (2) access to government facilities and fora; (3) government licenses and accreditation; and (4) tax-exempt status.

1. Denial of government grants and contracts.

Religious universities, charities, hospitals, and social service organizations receive a significant amount of government funding to serve secular purposes through contracts and grants. Many contracts and grants, like other government benefits, require recipients to be organized "for the public good" and forbid recipients to act "contrary to public policy." If same-sex marriage 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.[11] Many state and local laws carry similar penalties for institutions that are deemed to discriminate on any number of different grounds. Thus, for example, religious universities that oppose same-sex marriage could be denied access to government funds (such as scholarships, grants, or tax-exempt bonds) by governmental agencies that choose to adopt an aggressive view of applicable anti-discrimination standards.

Religious organizations opposed to same-sex marriage also face the loss of government-funded social service contracts. In 1998, the Salvation Army lost $3.5 million in social service contracts with the City of San Francisco because it refused, on religious grounds, to provide benefits to the same-sex partners of its employees.[12] If same-sex marriage is judicially required without accommodation for religious organizations, many religious organizations will be forced either to extend benefits to same-sex spouses, or to stop providing social services in cooperation with government.[13]

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[11] The U.S. Congress has since provided a legislative correction to the Department of Education's and the Supreme Court's application of Title IX. *See* CIVIL RIGHTS RESTORATION ACT OF 1987, 20 U.S.C. § 1687.

[12] Don Lattin, *Charities balk at domestic partner, open meeting laws*, S.F. CHRON., July 10, 1998 at A-1.

[13] *See, e.g.*, *Catholic Charities of Maine* 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).

2. Exclusion from government facilities and fora.

Religious institutions that object to same-sex marriage will also face challenges to their equal access to a diverse array of government facilities and fora. An example foreshadowing this threat is the reaction to the Boy Scouts' controversial requirement that members believe in God and not advocate for, or engage in, homosexual conduct.

For example, because of their position on homosexual conduct, the Boy Scouts had to fight to gain equal access to public after-school facilities.[14] They have lost leases to city campgrounds,[15] a lease to a government building that served as their headquarters for 79 years,[16] marina

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[14] *Boy Scouts of America, South Florida Council* v. *Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (preliminarily enjoining a school board from continuing to exclude the Boy Scouts from school facilities based on their negative views of homosexual conduct).

[15] *Barnes-Wallace* v. *Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (revoking Boy Scouts' use of publicly leased park land), *question certified to this Court in Barnes-Wallace* v. *City of San Diego*, 530 F.3d 776 (9th Cir. 2008).

[16] *Cradle of Liberty Council* v. *City of Philadelphia*, 2008 WL 4399025 (E.D. Pa. Sept. 25, 2008) (denying motion to dismiss Boy Scouts' lawsuit against city for lease termination based on policies regarding homosexuals).

berths reserved for "public interest" groups,[17] and the right to participate in a state-facilitated charitable payroll deduction program.[18]

Local government reaction to the Boy Scouts suggests what will happen to religious organizations that conscientiously object to same-sex marriage once it is legally recognized. Without specific accommodations, these religious organizations will suffer a wave of lawsuits, adverse administrative determinations, and municipal ordinances singling them out for exclusion from public privileges and benefits.

3. Loss of licenses or accreditations.

A related concern exists for religious institutions in the context of 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.[19] Rather than violate its religious beliefs, Catholic Charities shut

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[17] *Evans* v. *City of Berkeley*, 38 Cal.4th 1 (Cal. 2006) (affirming revocation of a boat berth subsidy at public marina due to Scouts' exclusion of atheist and openly gay members).

[18] *Boy Scouts of America* v. *Wyman*, 335 F.3d 80 (2nd Cir. 2003) (holding that the Boy Scouts may be excluded from the state's workplace charitable contributions campaign for denying membership to the openly gay).

[19] *Cf.* 102 CODE MASS. REGS. §§ 1.03(1); 5.04(1)(c); 110 CODE MASS. REGS. § 1.09(2) (requiring adoption agencies to maintain a written

down its adoption services.[20] This sort of licensing conflict would increase after judicial recognition of same-sex marriage, as religious organizations in California would not be able to rely on a distinction between domestic partnerships and legal marriages.

Religious colleges and universities have also been threatened with the loss of accreditation because of their opposition to homosexual conduct. In 2001, for example, the American Psychological Association, which is the only government-approved body that can accredit professional psychology programs, threatened to revoke the accreditation of religious colleges and universities that had codes of conduct forbidding homosexual behavior.[21] If same-sex marriage is judicially mandated, religious colleges and universities that oppose same-sex marriage could face similar threats.

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statement of purpose declaring that agency does not discriminate upon basis of sexual orientation).

[20] 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 at A1 (explaining that Catholic Charities had to choose between following Church beliefs and continuing to offer social services)..

[21] D. Smith, *Accreditation committee decides to keep religious exemption*, 33 MONITOR ON PSYCHOLOGY 1 (Jan. 2002) (describing why the APA ultimately abandoned its proposal), *available at* http://www.apa.org/monitor/jan02/exemption.html.

4. Loss of state or local tax exemptions.

Most religious institutions have charitable tax-exempt status under federal, state and local laws. But that status could be stripped by state and local governments based solely on that religious institution's conscientious objection to same-sex marriage.[22] In New Jersey, for example, the state has withdrawn the property tax exemption of a beach-side pavilion owned and operated by a Methodist Church, because the Church refused on religious grounds to host a same-sex civil union ceremony.[23] Scholars disagree as to whether the First Amendment would represent an effective defense to this kind of penalty.[24]

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[22] "[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.

[23] Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, N.Y. TIMES, Sept. 18, 2007.

[24] *See Bob Jones* 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 Groups with Unpopular Practices*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 64-65 (supporting legal recognition of same-sex marriage but arguing that opposition to such recognition should not result in stripping of objectors' tax exemption); Douglas W. Kmiec, *Same-Sex Marriage and the Coming Anti-Discrimination Campaigns*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 108-111 (arguing that *Bob Jones* should not apply to conscientious objectors to same-sex marriage).

CONCLUSION

The public debate over the proper role of marriage in society will be with us for a long time. This Court has no power to end it, nor should it want to. The question before the Court is thus not whether that debate will happen, but on what terms. Will each side try to use reason to convince the other, and respectfully take into account the interests others have? Or will the Court intervene in a way that freezes the debate, forcing each side to assume an entrenched ideological position and shout at the other in frustration for decades? Most importantly, will the Court avoid needless church-state conflict by allowing the People to accommodate the rights of conscience through the political process, or will the Court set in motion a tidal wave of litigation pitting religious institutions systemically against government for generations? *Amici* urge the Court to allow the People to take the path of reason.

Respectfully submitted this 15th day of January, 2009.

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CERTIFICATE OF COMPLIANCE

I, James F. Sweeney, hereby certify that this Brief *Amici Curiae* complies with Rules 8.204(b) and 8.4 regarding form and, being 5,987 words long, complies with Rule 8.520(c).

Dated: January 15, 2009

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