No. 12-307

In The

Supreme Court of the United States

UNITED STATES OF AMERICA, *PETITIONER,*

v.

EDITH SCHLAIN WINDSOR, *et al.*, *RESPONDENTS.*

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN HUMANIST ASSOCIATION AND AMERICAN ATHEISTS, INC., AMERICAN ETHICAL UNION, THE CENTER FOR INQUIRY, MILITARY ASSOCIATION OF ATHEISTS AND FREETHINKERS, SECULAR COALITION FOR AMERICA, SECULAR STUDENT ALLIANCE, AND SOCIETY FOR HUMANISTIC JUDAISM, IN SUPPORT OF RESPONDENTS ADDRESSING THE MERITS

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INTERESTS OF *AMICI CURIAE* [1]

This *amici curiae* brief in support of the Respondents is being filed on behalf of the American Humanist Association ("AHA") and American Atheists, Inc., the American Ethical Union, the Center for Inquiry, the Military Association of Atheists and Freethinkers, the Secular Coalition for America, the Secular Student Alliance and the Society for Humanistic Judaism. *Amici* comprise a diverse array of secular and humanist organizations that advocate on behalf of the separation of church and state and equality rights and offer a unique viewpoint concerning the history of civil liberties and rights in the United States of America.

AHA has a long history of supporting equal rights for gays and lesbians. It remains committed to advancing equality for lesbian, gay, bisexual and transgender people and their families. AHA's LGBT Humanist Council seeks to improve the lives of LGBT individuals through education, public service and outreach, and serves as a resource for its members, the greater freethought community and the public on LGBT issues. Humanists celebrate the happiness brought into the lives of LGBT couples by

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[1] *Amici* file this brief with the consent of all parties. Consents of the parties are on file with the Clerk of the Court. No counsel for any party in this case authored in whole or in part this brief. No person or entity, other than *amici*, their members or their counsel made a monetary contribution for the preparation or submission of this brief. The *amici* have no parent corporations, and no publicly held companies own 10% or more of their stock.

their love for each other, and reject discrimination against gays and lesbians because it finds no basis in reason.

This case concerns core humanist and atheist interests regarding the equal, fair and just application of our laws to all of citizens and the separation of church and state.

SUMMARY OF ARGUMENT

This is not simply a case about gay rights. It is a case about human rights, which find their compelling moral imperative in a consideration of our common humanity. Empathy for our fellow man and woman, grounded in the recognition that each of us could be him or her, is the force that compels the just among us to insist on upholding the ideal of legal equality for all.

Nor is this case, properly considered, merely about the civil institution of marriage, the right to build a committed and stable life with the one you love on the same legal basis as any other human being. The denial of *any* civil right on the basis of traits that make up the core identity of another human, absent a compelling justification, violates our most foundational constitutional values.

An application of these general principles resolves the particular case before the Court. It is a violation of equal protection to discriminate against gays and lesbians, including but not limited to denial of legal recognition of their marriages, as the Defense of Marriage Act ("DOMA") does. The purported governmental interests that its defenders put forward to justify its passage are illusory, having either no logical connection to the legislation or embodying an illegitimate interest, such as animus toward homosexuals or the promotion of a particular religious view.

Some who oppose this conclusion, including many *amici curiae* who have filed briefs in favor of the appellants, claim that their "religious liberty," to use their own intentionally overbroad, yet vague, phrasing, would be violated if this Court confirms a right to legal equality for gays and lesbians. The fundamentalist Christians among them cite their Bible's condemnation of homosexuality. Of course, no decision of this Court striking down a law denying recognition to such marriages would require these individuals to engage in any sexual activity their religion forbids. Instead, the only "right" they can claim is one that, given the secular nature of our government as guaranteed by the Establishment Clause, cannot exist: the right to have their religious views written into law so that others may be compelled to follow them.

Because the First Amendment forbids, rather than requires, any law solely grounded in or codifying a religious "moral" commandment, such objections can be accorded no weight.

Our Constitution prohibits any law or practice that leaves any group of us in second-class citizen status. DOMA, by denying federal recognition of the marriages of gays and lesbians simply because of who they are, does just this. This Court should therefore strike it down as a betrayal of the Fourteenth Amendment and a step backwards in the long struggle for genuine equality in American society.

ARGUMENT

I. DOMA VIOLATES EQUAL PROTECTION BECAUSE IT REFLECTS AND PERPETUATES PREJUDICE TOWARDS A PROTECTED CLASS AND IS NOT JUSTIFIED BY ANY VALID GOVERNMENTAL INTEREST.

It is a fundamental democratic ideal of the American republic, forged in the crucible of the Civil War and codified in the Fourteenth Amendment enacted in its wake, that "we are a free people whose institutions are founded upon the doctrine of equality." *Loving v. Virginia*, 388 U.S. 1, 11 (1967). The late date of this Court's decision in *Loving*, however, is telling. The promise of legal equality has all too frequently been empty for those groups deemed by the ruling white, Christian majority to be alien, unworthy, abnormal or inferior. It has been left to this Court to be a bulwark against such majoritarian discrimination and to stand up for the Constitution's guarantees of liberty and equality to every individual. As this Court summarized its role in *West Virginia Bd. of Ed. v. Barnette,* our fundamental civil liberties and rights, including that to legal equality, must be "place[d] . . . beyond the reach of majorities and . . . establish[ed] . . . as legal principles to be applied by the courts. . . . [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections." 319 U.S. 624, 638 (1943).

The passage of the Fourteenth Amendment was a milestone in the long, unfinished struggle for

equality in American society. Although it was racial slavery that was the issue at the forefront of the Civil War, the language of the Equal Protection Clause was not limited to preventing discrimination on the basis of race. It defends equality for all, forbidding the government to "deny to *any* person . . . the equal protection of the laws." U.S. Const. Amend. XIV, §1 (emphasis added).[2] This provision enshrines, as a cornerstone value of the republic, a command that our government strive for equality in how it treats *every* person.

A. Laws such as DOMA, which divide people on the basis of sexual orientation, draw a suspect legislative classification requiring heightened judicial scrutiny.

The question in this case is not whether DOMA discriminates on the basis of sexual orientation. It clearly does. See e.g. *Varnum v. Brien,* 763 N.W.2d 862, 884 (Iowa 2009) (stating that laws that ban recognition of "civil marriages between two people of the same sex classif[y] on the basis of sexual orientation"). Instead, the question is

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[2] The same restriction on state action in the Fourteenth Amendment applies to federal action under the Fifth Amendment (and, for the sake of convenience and simplicity, will be referred to as "equal protection" herein). The Due Process Clause of the Fifth Amendment "forbid[s] [federal] discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (quoting *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954)); see also *Buckley v. Valeo,* 424 U.S. 1, 93 (1976) (stating that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment").

whether the government can justify such discrimination as a means to protect a sufficiently important governmental interest. It cannot.

In interpreting the Constitution's guarantee of legal equality, this Court has developed a jurisprudence that requires courts to subject to strict judicial scrutiny any law or policy that treats people differently on the basis of arbitrary "suspect" classifications. See e.g. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). Courts must "treat[] as presumptively invidious those [legislative] classifications that disadvantage a 'suspect class.'" *Id.* It is not, of course, a particular class of citizens that is "suspect," but rather the government's discrimination against them that is. Governmental line-drawing that "likely . . . reflect[s] deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective" is suspect. *Id.* at n.14.

Amici support and endorse, and will not duplicate in their entirety here, the plaintiff's arguments that discrimination against gays and lesbians is, upon application of this Court's precedents, suspect and therefore subject to heightened judicial scrutiny. Sexual orientation is a core element of personal identity and has no relationship to the ability to function or excel in society. Gays and lesbians have suffered a history of unequal treatment motivated by outright bigotry. They represent a small proportion of the population and so are in need of protection from hostile political majorities. Cf. *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) (plurality) (applying heightened

scrutiny to gender classifications even though women constitute a majority of the populace). The very fact that this case is before the Court itself illustrates that gays and lesbians frequently have been unable politically to prevent the passage of discriminatory laws.

B. <u>There is no legitimate governmental interest, compelling or otherwise, that can justify denying recognition of the marriages of gays and lesbians.</u>

When a law discriminates among individuals on the basis of a suspect classification, or burdens a fundamental right, it may only be upheld if the government can "demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Plyler,* 457 U.S. at 217.

There is a variety of supposed governmental interests that the defendants in this case have scrambled to cook up for litigation purposes as they seek to obscure their true motivations. As summarized by the court below, these included "protection of the fisc, uniform administration of federal law notwithstanding recognition of same-sex marriage in some states but not others, the protection of traditional marriage generally, and the encouragement of 'responsible' procreation." *Windsor v. U.S.*, 699 F. 3d 169, 180 (2nd Cir. 2012).

As to the asserted interest in uniformity, it "is suspicious because Congress and the Supreme Court have historically deferred to state domestic relations laws, irrespective of their variations." *Id.* at 185. In

fact "[t]o the extent that there has ever been 'uniform' or 'consistent' rule in federal law concerning marriage, it is that marriage is 'a virtually exclusive province of the States,'" rather than the Congress. *Id.* at 186. As this Court has emphasized, "the Constitution delegated no authority to the Government of the United States on the subject of marriage." *Haddock v. Haddock,* 201 U.S. 562, 575 (1906). In addition, DOMA does not in fact create a uniform national marriage law; each state's law continues to operate. DOMA simply evinces a refusal by the federal government to accept a state's rule as to the parties to marriage if it is one that the Congress did not like. If the federal government were truly seeking a uniform rule, that rule would be simple: a person is married for purposes of federal law if he is or she is married under state law where he or she lives. The result DOMA creates is decidedly unequal, however: some of those legally married in their state of residence are treated as such for the purposes of federal law and others are not.

The proper role of the federal government as to the institution of marriage is to ensure that states, in exercising their prerogative to legislate on the subject, do not violate the right of their citizens to marry, including by denying disfavored classes thereof the right to do so. See *e.g. Loving.* It is a rather perverse betrayal of this duty for Congress to intrude into the regulatory province of the states to discriminate rather than to prevent discrimination.

As to saving money, while government may in general have "a valid interest in preserving the fiscal

integrity of its programs . . . [it] may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969); see also *Craig v. Boren*, 429 U.S. 190, 198 (1976) (stating that "administrative ease and convenience [are not] . . . sufficiently important objectives to justify" discrimination). Just as a state could not decide to exclude African Americans from its schools in order to reduce its education budget, Congress cannot exclude gays and lesbians from receiving federal marriage benefits simply because doing so is cheaper. Our constitutional rights are not fiscal burdens to be shirked simply because protecting them is not without cost. See *Frontiero*, 411 U.S. at 690 ("[A]lthough efficacious administration of governmental programs is not without some importance, the Constitution recognizes higher values than speed and efficiency") (internal quotation omitted).

The purported governmental interest in refusing to change a statutory scheme of long standing for the sake of maintaining a "tradition" of doing so is not much in the way of a justification. As this Court has noted, the "[a]ncient lineage of a legal concept does not give it immunity from attack" for being discriminatory. *Heller v. Doe*, 509 U.S. 312, 326 (1993). To the contrary, "neither history nor tradition" could justify the discriminatory restrictions on who could marry whom at issue in *Loving*. *Lawrence,* 539 U.S. at 577-78. It is quite a weak argument indeed to seek to justify something on the basis that it has been done in the past. In

fact, the past is exactly where discrimination on the basis of sexual orientation belongs.

In addition, DOMA does not actually have any effect on state laws barring marriage equality, other than barring the effect for federal purposes of those that do so. It therefore cannot be said to serve the purpose of preserving traditional laws, which could be repealed or overturned at any time without any violation of DOMA.

Finally, and for similar reasons, DOMA does not serve any purported governmental interest in "responsible" procreation (by means of promoting "natural" conception and an allegedly optimal mother-father parenting arrangement). Even if these were somehow valid ends to induce, the fact that they are "incentives for heterosexual couples . . . [means] that DOMA does not affect [them] in any way." *Windsor,* 699 F. 3d at 188. DOMA denies recognition to gay marriages but leaves straight marriages untouched, and therefore can logically have no connection to the childrearing choices of heterosexual couples. The only possible argument that reconciles this disconnect would necessarily include an assertion that denying marriage equality preserves the institution of marriage as a straights-only institution, preserving it from the "degradation" of sharing it with an inferior group. Needless to say, this reprehensible rationale is one grounded in bigotry, and so is not one that can *legitimately* justify the very discrimination in embodies.

In the end, these asserted governmental interests, having no actual relationship to the issue

at hand, can provide no logical justification for DOMA. It is therefore immaterial whether, within this Court's estimation, such interests must be merely "legitimate" or as strong as "compelling." They are neither, but instead the illusory, *post hoc* phantasms that appear to be grounded in either their own discriminatory animus or a desire to see the weight of law put behind their particular religious views.

All of the foregoing logical arguments against marriage equality having been shown to be unfounded, we are left with those founded in religious interests, often in the guise of "morality" or "tradition," to which we now turn.

C. Traditional notions of religious morality are not a valid governemental interest that can justify discrimination in their name.

In developing and applying its equal protection jurisprudence, this Court has rightly cautioned against a reliance on history or tradition as an acceptable reason to uphold a discriminatory law. Such "justifications" may simply embody the very discrimination at issue. See *e.g. Miss. Univ. Women v. Hogan*, 458 U.S. 718, 724-725 (1982) (stating that the "test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females" and that "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic

notions").[3] This is a sensible approach upon consideration; after all, the foremost purpose in enacting the Fourteenth Amendment was to reject and remedy the long history of deeply entrenched racial discrimination that stained American society from its earliest days. It was intended to force a new beginning, changing the law in order to change society by repudiating its long-standing norms of discrimination. Its broad language did not limit such change to protecting former slaves and their descendants, but guaranteed the right to equality to all.

These traditional norms took the form not only of discriminatory laws, but also of the "moral" justifications for them. Consider, for example, the justifications that a Christian slaveholder found in his Bible. Leviticus 25:44-46 says that "you may buy male and female slaves from among the nations that are around you . . . and they may be your property." Once acquired, he could rely on Ephesians 6:5 to compel obedience with its command to slaves to "obey [their] earthly masters with fear and trembling, with a sincere heart, as [they] would Christ." As Jefferson Davis, president of the secessionist Confederate States of America, put it, "[s]lavery was established by the decree of Almighty God . . . . It is sanctioned in the Bible, in both

[3] How America traditionally defined marriage is therefore material to this litigation not, as the proponents of DOMA would have it, to justify rejecting a change to it, but rather as contrary evidence showing the longstanding nature of discrimination against gays and lesbians in American society.

Testaments, from Genesis to Revelation."[4] Following the abolition of slavery itself, many Christian racists continued to look to the Bible to justify enduring racial discrimination, citing the story in Genesis 9:25 of the "mark of Cain" for their view that dark-skinned peoples are cursed by God, and therefore must be treated as inferiors.

Racial discrimination is in no way unique in finding its justification in long-standing history and traditional religious views. Opponents of equal rights for women could point to Timothy 2:12, which said "suffer not a woman to teach, nor to usurp authority over the man, but to be in silence." Opponents of equal legal rights for gays and lesbians likewise frequently ground their position in what they say are the moral commands of their religion. Many of them who are Christians cite the story of Sodom and Gomorrah (found in Genesis 19:1-11) or Leviticus 20:13, which calls for the murder of those who engage in gay sex, saying that "[i]f a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death; their blood is upon them."[5]

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[4] Mason I. Lowance, *A House Divided: The Antebellum Slavery Debates in America, 1776-1865*, 60 (2003).

[5] Of course, not all Christians read these portions of the Bible as compelling them to discriminate against African Americans, women and gays and lesbians, but it is clear that sufficiently large portions of the Christian-majority electorate have voted to discriminate on the basis of sexual orientation in approving the myriad of anti-marriage equality measures that have been enacted in recent years, often as constitutional amendments requiring a super majority vote. As a counterpoint, *amici* AHA, AEU and SHJ would like to state that their humanist beliefs require them to respect and honor the wishes of those gay or

As this Court has recognized, "for centuries there have been powerful voices to condemn homosexual conduct as immoral . . . shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." *Lawrence v. Texas*, 539 U.S. 558, 571 (2003). Noting that "[t]hese considerations do not answer the question before us, however . . . [which is] whether the majority may use the power of the State to enforce these views on the whole society." *Id.* In rejecting lawmaking grounded in religious moral commands, the Court declared that its "obligation is to define the liberty of all, not to mandate our own moral code." *Id.* Rather than bowing to a "history and tradition" of legal discrimination against gays and lesbians, the new, more inclusive direction of "our laws and traditions in the past half century are of most relevance here." *Id.* at 571-72. The Court noted, in overruling an earlier contrary decision, *Bowers v. Hardwick*, 478 U.S. 186 (1986), that decision's misguided reliance on "the history of Western civilization and Judeo-Christian moral and ethical standards." *Id.* at 572. It advised us to look instead forward, just as did the authors of the Fourteenth Amendment, who "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Id.* at 579. Indeed, the time has long since come for this Court to make the promise of liberty and equality real for *all* of our fellow Americans, including gays and lesbians, and

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lesbian individuals seeking to be married in ceremonies involving their organizations.

to reject any law that codifies ancient religious bigotry against them.

Opposing *amici curiae*, representing a range of conservative religious special interest groups, argue that *Lawrence* did not overturn a supposedly pre-existing rule that moral condemnation, without any other governmental interest, can be a legitimate basis for legislation. They are correct in asserting that *Lawrence* did not change the law. They are wrong as to what that law was. *Lawrence* reaffirmed that this Court has "*never* held that moral disapproval, without any other asserted governmental interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Lawrence,* 539 U.S. at 582 (O'Connor, J., concurring) (emphasis added). *Bowers*, the sole outlier, "was not correct when it was decided, and it is not correct today." *Id.* at 578. As Justice Stevens recognized in his *Bowers* dissent, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Bowers,* 478 U.S. at 216. This statement was expressly adopted by the Court in overruling *Bowers*. *Lawrence,* 539 U.S. at 577-78.

In fact, "[m]oral disapproval of [a] group . . . is an interest that is insufficient to satisfy [even] rational basis review under the Equal Protection Clause." *Id.* at 582 (O'Connor, J., concurring) (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (rejecting moral disapproval of hippies as a legitimate interest, stating that a "bare . . . desire to

harm a politically unpopular group" is not a legitimate governmental interest) and *Romer v. Evans,* 517 U.S. 620, 634-35 (1996) (noting that such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected").

Opposing *amici curiae* point to the *Lawrence* dissent's suggestion that, if morality is an insufficient governmental interest, a number of state laws would be "called into question." *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) (referring to "laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity"). Even putting aside the repulsive calumny inherent in lumping together marriage equality with bestiality and incest, a careful review of each instance in which this Court has considered such laws reveals that morality has never stood alone as justification for them. In every instance, the decision relied on the governmental interest in preventing other *concrete* harms of the prohibited conduct and not on a bare assertion of immorality.

This is true of this Court's decisions regarding sexual speech. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976) (upholding a zoning ordinance that dispersed sexually explicit adult movie theatres geographically, based on the city's interest in preventing crime and prostitution as a "secondary effect"); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (upholding a similar statute as a means to "prevent crime, protect the city's retail trade, maintain property values, and

generally protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (rejecting a reliance on an asserted "government interest in protecting . . . morality" and instead relying on the secondary effects doctrine, finding a governmental interest in "preventing prostitution, sexual assault, and associated crimes"); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000) (upholding a similar nudity statute finding it was "aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments"); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973) (upholding an injunction against the showing of two films, finding that states have a right to make a "morally neutral judgment" that the film would "injure the community" or "endanger public safety").

Similarly, in cases involving supposedly obscene or offensive speech, the Court has refused to rest its reasoning on morality alone. *See Bethel School Dis. No. 403 v. Fraser*, 478 U.S. 675, 683-86 (1986) (upholding the suspension of a high school student for a sexually explicit speech, but only after describing the harm it caused to young students, finding that schools had a legitimate interest in developing civility and protecting children, and finding that the speech "would undermine the school's basic educational mission"); *Cohen v. California*, 403 U.S. 15, 22-23 (1971) (rejecting an asserted right of "States, acting as guardians of public morality, [to] properly remove [an] offensive word from the public vocabulary").

In considering bans on polygamy and bigamy, the Court in doing so has always cited the harm that such practices cause, in addition to any moral arguments. See *Estin v. Estin*, 334 U.S. 541, 546 (1948) (protecting children); *Davis v. Beason*, 133 U.S. 333, 341 (1890) (disturbing the peace of families, degrading women, and debasing men).[6]

Similarly, the Court has upheld legislation targeting the harms associated with various practices considered by some to be immoral vices, independent of their supposed "immorality." See *Crowley v. Christensen*, 137 U.S. 86, 91 (1890) (finding alcohol leads to "neglect of business and waste of property" and is associated with crime and misery); *Phalen v. Commonwealth of Virginia*, 49 U.S. 163, 168 (1850) (finding that lotteries harm the poor and ignorant); *Posadas de Puerto Rice Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986) (finding that restrictions on lotteries protect the health, safety, and welfare of citizens).

Opposing *amici curiae* also have argued that if morality is no longer a basis for legislation, laws such as those setting a minimum wage, establishing legal and medical ethics codes, or forbidding discrimination or animal cruelty would all be left without a sufficient justification to survive rational basis review. These laws, of course, are all justified by an interest in seeking to prevent harm to or

[6] Whether these other interests are still sufficient today is a question we do not address. It is sufficient to observe that the Court in its ruling explicitly did not rely on morality, standing alone, as a governmental interest justifying these laws.

promote the welfare of those in need of protection. Preventing harm may be a moral value, but it is the prevention of harm itself that is a proper motivation for legislation, not any morality behind it. Concern for *concrete* effects removes such justifications from the same category as the empty "morality" of mere disapproval grounded in repugnance and nothing more.

As discussed *supra*, DOMA can be justified by no actual governmental interests that can logically be shown to prevent harm or promote welfare. All that is left to its defenders is a moral argument that homosexuals are sinful and therefore not to be permitted to share the institution of marriage with heterosexuals. This kind of spiteful, self-righteous "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Moreno*, 413 U.S. at 534. Because moral disapproval of a group cannot be the foundation for a law discriminating against it, DOMA does not satisfy the judicial scrutiny required of it.

D. **DOMA lacks a legitimate secular purpose in violation of the Establishment Clause.**

Recognizing the difficulty in finding the real interest furthered by DOMA, "we consider the reason left unspoken by [its proponents]: religious opposition to same-sex marriage." *Varnum*, 763 N.W.2d at 904. As the Iowa Supreme Court recognized, "religious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage." *Id.*

The aforementioned *amici curiae* do not hide the fact that their religious views underpin their opposition to marriage equality. See e.g. *Brief for Westboro Baptist Church as Amici Curiae in Support of Neither Party* (claiming that "[i]t is no small matter for a nation to accept the sin of sodomy . . . [t]he description of the utter annihilation of Sodom and Gomorrah and three nearby cities is stark, and directly tied to homosexuality"). They are of course free to hold and express such views. However, because our government must not only provide legal equality for all but also must remain secular, their religious rules cannot be written into law.

This Court has made clear that the "First Amendment has erected a wall between church and state. That wall must be kept high and impregnable." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 18 (1947). To do so, "the Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs." *County of Allegheny v. ACLU,* 492 U.S. 573, 610 (1989). In order to secure this freedom from state-backed religion, the Constitution requires that every law must have a "secular purpose" and not "advance . . . religion." *Id.* at 592 (citation omitted). Rather than be codified into law, "religion must be a private matter for the individual, the family, and the institutions of private choice." *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

Religion has been a driving force behind legislation denying recognition of gay marriages, including DOMA. Religious support can, of course,

constitutionally coincide with legislation. A law is not unconstitutional merely because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). For example, the fact that the biblical Ten Commandments forbid murder and theft does not necessarily invalidate laws that criminalize such conduct. However, in enacting such laws, "legislatures [must] conclude that the general welfare of society, *wholly apart from any religious considerations*, demands such regulation." *Id.* (emphasis added). The concrete harms mitigated by murder laws are apparent. But when there is no such legitimate secular governmental interest, as has been established as to DOMA *supra*, such laws do not merely "harmonize" with religious views; they embody, promulgate and establish them as legally binding even on those who do not follow that religion's rules, thereby violating the Establishment Clause.

II. STRIKING DOWN THIS DISCRIMINATORY LAW DOES NOT IN ANY WAY IMPAIR RELIGIOUS LIBERTY.

The various anti-gay religious *amici curiae* have attempted to justify DOMA by claiming that it is necessary to protect what they call their "religious liberty." What they mean by this phrase is not clear, perhaps intentionally so. Regardless of the outcome of this case, such groups remain free, under the Free Speech and Free Exercise Clauses, to form anti-gay churches, to spread their anti-gay message, and to refuse to perform religious wedding ceremonies for same-sex couples.

The Becket Fund, for example, claims, without apparent irony, in its brief that laws such as DOMA serves to prevent "wide-ranging church-state conflict" (rather than itself breaching the wall of separation). *Brief Amicus Curiae of the Becket Fund for Religious Liberty* at 4. They assert that anti-gay religious institutions and individuals "will face an increased risk of lawsuits under . . . anti-discrimination laws" and "a range of penalties from federal, state and local governments, such as denial of access to public facilities, loss of accreditation and licensing, and the targeted withdrawal of government contracts and benefits." *Becket Br.* at 5.

At heart, this objection amounts to a claim that anti-gay religious institutions should have a special right to ignore the law. Because, as will be shown below, antidiscrimination laws do not violate the First Amendment, they have no such right and this claim is therefore meritless. To the extent that these objections amount to a plea that legislatures exempt them from such laws, they are not properly directed in a brief submitted to this Court. It is the exclusive role of legislatures, not judges, to create religious exceptions to neutral statutes of general applicability, such as public accommodations laws. See *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990) (noting that "to say that a[n] . . . exemption is permitted . . . is not to say that it is constitutionally required" and that such accommodations should be left "to the political process").

This Court has rightly made clear that the Constitution requires that our laws apply to and govern the conduct of all equally, religious and secular alike. The Free Exercise Clause does not give a religious actor a special right to ignore a law by claiming that complying with it conflicts with its religion. As this Court recognized, doing so would undermine the rule of law, permitting anyone who wants to break the law the ability to claim some "religious" reason that he must be allowed to do so. Pursuant to *Smith*, a Free Exercise Clause challenge to a law is *only* available if the law is not neutral and of general applicability (*i.e.* only if it discriminatorily singles out particular religious conduct *as such* for regulation). If a law is "not specifically directed at . . . religious practices," it does not violate the Free Exercise Clause. *Id.* at 878. In other words, it is only when "the object of a law is to infringe upon or restrict practices *because of* their religious motivation, [that] the law [is] . . . not neutral," and therefore unconstitutional. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (emphasis added).

Accordingly, when considering an asserted Free Exercise Clause defense to the application of a law to a defendant who claims that the law inhibits in some way his free exercise of religion, a court, applying the *Smith* test, must reject this challenge unless the defendant can prove that the law was enacted with the *express* purpose of discriminating against a *particular* religious practice *because of* its religious nature. Religion-neutral laws that incidentally burden religion are not unconstitutional.

In refusing to require courts to undertake a strict scrutiny analysis of any law to which a defendant asserts a right to a religious exemption, this Court reasoned that doing so "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," noting in particular that this would include "laws providing for equality of opportunity." *Id.* at 889. The Court unequivocally concluded that "[t]he First Amendment's protection of religious liberty does not require this." *Id.*

Applying the *Smith* test, this Court concluded that an antidiscrimination statute is a "valid and neutral law of general applicability" (so long as it does not dictate "internal church decision[s]," such as ministerial hiring). *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 707 (2012).

Even pre-*Smith*, this Court found that when religious believers enter into commerce, they must comply with the law and cannot justify law-breaking that infringes the legal rights of others by claiming some special religious privilege. The Court held that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *U.S. v. Lee*, 455 U.S. 252, 261 (1982).

Although the federal public accommodations law[7] fails to protect against discrimination on the basis of sexual orientation, the laws of 21 states plus the District of Columbia now do so. Such laws provide invaluable "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer* at 631. It may well be all too easy for some to discount the great value of such laws, because, "[t]hese are protections taken for granted by most people either because they already have them or do not need them." *Id.*

These laws may rightly require that religious actors engaged in business with the public serve all customers, regardless of sexual orientation. If these religious actors are engaged in commerce in an industry in which marriage is implicated, the same rule would apply. If they find this offends their religious beliefs, they may restrict their activities to avoid coming within the ambit of the law. A church may always choose to wed only its own members and avoid offering services to the public if it wishes to do so, thereby not becoming a place of public accommodation.

Additionally, public accommodations laws do not impinge on the Free Speech Clause rights of religious institutions when they choose to do business with the public at large. Although the First Amendment creates a right to expressive association, *Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984), as well as its necessary

[7] 42 U.S.C. 2000a.

corollary, the "freedom not to associate," *id.* at 623, this latter right "is not, however, absolute. Infringements on [it] may be justified by regulations adopted to serve compelling state interests." *Id.*

The state's interest in "eradicating [private] discrimination" is, as this Court has repeatedly recognized, just such a "compelling interest of the highest order." *Id.* at 623, 624.[8] This interest recognizes "the importance, both to the individual and to society, of removing barriers to . . . social integration that have historically plagued certain disadvantaged groups." *Id.* at 626. The compelling nature of this interest is not diminished by the defendant's assertion of "religious liberty" interests. See e.g. *Bob Jones University v. U.S.*, 461 U.S. 574, 604 (1983) (holding that the government's compelling interest in eradicating discrimination "substantially outweighs *whatever burden* denial of tax benefits places on [a racist religious university's] exercise of their religious beliefs") (emphasis added).

Public accommodations laws therefore apply in general even to private religious institutions in those limited circumstances in which they choose to engage in commerce with members of the public. This does not mean that anti-gay groups can be forced to accept gay members. See *Boy Scouts of*

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[8] See also *New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 17 n.5 (1988) (recognizing "the State's 'compelling interest' in combating invidious discrimination" when considering a challenge to an antidiscrimination law on expressive association grounds) and *Board of Directors of Rotary Intern. v. Rotary Club of Duarte,* 481 U.S. 537, 549 (1987) (same).

America v. Dale, 530 U.S. 640 (2000). They also have the right to control their own message when engaging in an inherently expressive activity. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (rejecting application of public accommodations law to require private parade organizer to include a gay group because "a speaker has the autonomy to choose the content of his own message"); see also *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006) (stating that the "expressive nature of a parade was central to our holding in *Hurley*").

In its other activities, however, a religious group may properly come within the ambit of such neutral and generally applicable laws. Because a religiously-affiliated business is "not speaking" when it does business with a gay customer as required by a public accommodations statute, the First Amendment is not implicated. *Id.* at 64. This sort of conduct "does not sufficiently interfere with any message" of the business because compliance with the law cannot "be viewed as sending the message that they see nothing wrong with" equal rights for gays and lesbians. *Id.* at 64-65. Even if it were speech, the public "can appreciate the difference between speech a [group] sponsors and speech [it] permits because legally required to do so, pursuant to an equal access policy." *Id.* at 65.

Nor can allowing gays and lesbians access to a group's facilities to do business with it as it does with other members of the public violate any right to expressive association. This sort of "association"

with them is in no way akin to forcing them to be accepted as members of the group. This "distinction is critical"; the First Amendment is implicated in this instance only when a group is "force[d] . . . 'to accept members it does not desire.'" *Id.* at 69, (quoting *Dale,* 530 U.S. 640). Mere "association," in the sense of interaction, is not speech. A group may "object to having to treat [gay people] like other [people], but [a] regulation of [such] conduct does not violate the First Amendment." *Id.* at 70.

Therefore, no actual First Amendment interests would be protected by carving out exceptions for religious anti-gay groups from public accommodations laws; their limited rights to exclude members and control their own message when speaking are already protected.

Amici also claim that they may lose access to certain governmental benefits because of their discriminatory views. This may be true, but it is likewise no violation of the First Amendment. When the government conditions the receipt of benefits on compliance with its nondiscrimination policies, it does not violate free exercise rights. See *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2995, n.27 (2010) (holding that "[i]n seeking an exemption from [a governmental] policy [prohibiting discrimination], [a religious group] . . . seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause"). Any group that does not like the conditions placed on such benefits may simply forego them. The government is permitted to "dangl[e] the carrot of subsidy" to encourage private

groups to stop discriminating. *Id.* at 2987, citing *Norwood v. Harrison*, 413 U.S. 455, 463 (1973) (stating that the fact that "the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination").

In conclusion, the application of laws that prohibit discrimination on the basis of sexual orientation to anti-gay religious organizations does not violate the First Amendment. To the extent that such groups wish to be exempted from such laws, their pleas are properly directed to legislators. Finally, the fact that such laws apply *vel non* to such institutions regardless of the legal status of marriage for gays and lesbians makes these arguments particularly inapposite in this case. These concerns are simply red herrings. False cries of "religious liberty" do not give religious groups the right to have the laws be whatever they would like them to be.

CONCLUSION

This Court would not, in deciding this case, be taking sides in the *Kulturkampf* over homosexuality in American culture. Whether the love of a man for another man or a woman for another woman should be labeled morally repugnant, or is instead to be celebrated for the joy it brings into their lives, is not before the Court. This Court does not, and cannot, decide issues of religion or its morality. The Court is instead presented with a much different question: whether legislation may be used as a sword to deny

the basic humanity and civil rights of gays and lesbians, or whether the Constitution acts as a shield, protecting such individuals from the codification of deeply ingrained social bias against them. The answer is clear: our Constitution requires that our laws treat each of us with equality and forbids them to create any class of second class citizens. There being no legitimate basis for the discriminatory law denying legal recognition of the marriages of gays and lesbians at issue here, it must be struck down.

For the foregoing reasons, *Amici Curiae* request that the judgment of the United States Court of Appeals for the Second Circuit be upheld.

Respectfully submitted,

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APPENDIX

IDENTIFICATION OF *AMICI CURIAE*

The American Humanist Association ("AHA") advocates for the rights and viewpoints of humanists. Founded in 1941 and headquartered in Washington, D.C., its work is extended through more than 100 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The Mission of the American Humanist Association is to promote the spread of humanism, raise public awareness and acceptance of humanism and encourage the continued refinement of the humanist philosophy. Most recently, the American Humanist Association filed *amicus curiae* briefs with this Court in *Christian Legal Society v. Martinez*, *Salazar v. Buono*, *Pleasant Grove City v. Summum*, *Arizona Christian School Tuition Organization v. Winn*, and *Hosanna-Tabor Evangelical Church and School v. E.E.O.C.*

American Atheists, Inc., is a nonprofit educational organization dedicated to the complete and absolute separation of religion and government, accepting the explanation of Thomas Jefferson that the First Amendment to the Constitution of the United States was meant to create a "wall of separation" between state and church. Protecting our secular government includes protecting citizens whose right to marriage is thwarted by laws dictated

by the religion of the majority. American Atheists' members live in a nation of Christian privilege that every day makes them second-class citizens. American Atheists seeks in this amicus brief to assist in ensuring that the majority's religious preference does not dictate how citizens' marital rights are determined under the law in the United States.

The American Ethical Union ("AEU") is a federation of Ethical Culture/Ethical Humanist Societies and circles throughout the United States. Ethical Culture is a humanistic educational movement inspired by the ideal that the supreme aim of human life is working to create a more humane society. AEU has participated over the years in a number of *amicus curiae* briefs in defense of religious freedom and church-state separation.

The Military Association of Atheists and Freethinkers ("MAAF") is an independent 501(c)(3) project of Social and Environmental Entrepreneurs. MAAF is a community support network that connects military members from around the world with each other and with local organizations. In addition to our community services, MAAF takes action to educate and train both the military and civilian communities about atheism in the military and the issues that face us. Where necessary, MAAF identifies, examines and responds to insensitive practices that illegally promote religion over nonreligion within the military or unethically discriminate against minority religions or differing beliefs. MAAF supports separation of church and

state and First Amendment rights for all service members.

The Center for Inquiry ("CFI") is a nonprofit educational organization dedicated to fostering a secular society based on science, reason, freedom of inquiry, and humanist values. Consistent with its commitment to fundamental human rights for all persons, regardless of sexual orientation, CFI has been a steadfast advocate for LGBT rights, in particular the right of same-sex couples to marry. CFI has previously appeared as an amicus in this Court and has filed amicus briefs in the California Supreme Court (*In re Marriage Cases* (2008) 43 Cal. 4th 757 [76 Cal.Rptr.3d 683, 183 P.3d 384],) and the Iowa Supreme court (*Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)) in support of same-sex marriage.

The Secular Coalition for America ("SCA") is a 501(c)4 advocacy organization located in Washington, D.C. whose purpose is to amplify the diverse and growing voice of the nontheistic community in the United States. SCA lobbies the U.S. Congress on issues relevant to secular Americans including the federal funding of religious schools and separation of church and state.

The Secular Student Alliance ("SSA") is a network of over 400 atheist, agnostic, humanist and skeptic groups on high school and college campuses. Although it has a handful of international affiliates, the organization is based in the United States with the vast majority of its affiliates at U.S. high schools and colleges. The mission of the SSA is to organize,

unite, educate and serve students and student communities that promote the ideals of scientific and critical inquiry, democracy, secularism and human-based ethics.

The Society for Humanistic Judaism ("SHJ") mobilizes people to celebrate Jewish identity and culture, consistent with Humanistic ethics and a nontheistic philosophy of life. Humanistic Jews believe each person has a responsibility for their own behavior, and for the state of the world, independent of any supernatural authority. The SHJ is concerned with protecting religious freedom for all, and especially for religious, ethnic and cultural minorities such as Jews, and most especially for Humanistic Jews, who do not espouse a traditional religious belief. The SHJ's members want to ensure that they, as well as people of all faiths and viewpoints, will not be discriminated against by government favoring of any one religion over another or theistic religion over humanistic religion. SHJ supports the legal recognition of marriage between adults of the same sex, and affirms the rights of these couples to all benefits provided to married couples. SHJ, with rabbis and madrikhim solemnizing same-sex couples' lawful marriages within the United States, has a compelling interest in this litigation, which bears directly on the legal recognition, with all human rights, to be accorded those marriages.