Nos. 12-144, 12-307

In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,
Petitioners,
v.
KRISTIN M. PERRY, ET AL.,
Respondents.

UNITED STATES,
Petitioner,
v.
EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth and Second Circuits

BRIEF OF LIBERTY, LIFE AND LAW FOUNDATION AND NORTH CAROLINA VALUES COALITION AS *AMICI CURIAE* IN SUPPORT OF HOLLINGSWORTH AND BIPARTISAN LEGAL ADVISORY GROUP ADDRESSING THE MERITS AND SUPPORTING REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

Liberty, Life and Law Foundation ("LLLF") and North Carolina Values Coalition ("NCVC") , as *amici curiae*, respectfully urge this Court to reverse the decisions of the Ninth and Second Circuits.

LLLF is a North Carolina nonprofit corporation established to promote the legal defense of religious liberty, sanctity of human life, liberty of conscience, family values, and other moral principles. LLLF is gravely concerned about the growing hostility to religious expression in America and the related threats to liberty and conscience. LLLF's counsel, Deborah J. Dewart, is the author of a book, *Death of a Christian Nation*, and many *amicus curiae* briefs in this Court and the federal circuits.

The North Carolina Values Coalition ("NCVC") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom in North Carolina by working in the arenas of public policy and politics to protect marriage and religious liberty. NCVC spearheaded the statewide ballot initiative in 2012 to amend North Carolina's Constitution to protect the time-honored definition of marriage (one man and one woman). The Marriage Amendment passed by a vote of 61% to 39% of the state's voters. A total of 1,317,178 citizens voted for

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[1] The parties have consented to the filing of this brief. *Amici curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

the Amendment. NCVC's Executive Director, Tami L. Fitzgerald, served as Chairwoman of Vote FOR Marriage NC, the referendum committee that worked to pass the Amendment.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

If this Court short-circuits the democratic process and redefines the right to marry by judicial fiat, it will wreak havoc on state statutes and constitutions across the nation. And not only that—it will cause irreparable damage to a broad array of cherished liberties, including religious freedom, conscience, speech, association, privacy, and the right to earn a living. This Court should consider the far-reaching consequences of a ruling against Petitioners and ensure equal protection for the liberties of all Americans.

ARGUMENT

I. THIS COURT SHOULD EXERCISE JUDICIAL RESTRAINT AND DECLINE TO CREATE A RIGHT TO SAME-SEX MARRIAGE BY JUDICIAL DECREE.

Courts rightly hesitate to announce new fundamental rights. Judicial restraint is imperative because the asserted rights are removed from the arena of public debate and legislative action. *Washington v. Glucksberg*, 521 U.S. 702, 720-1 (1997). Even the right to marry—as the concept has been widely understood for centuries—does not appear in the text of the Constitution. Redefining that right is a radical proposition and a matter of heated debate.

Alternative sexual lifestyles and family structures are too controversial to warrant disregarding the liberties of those who hold opposing viewpoints. Even the Ninth Circuit agreed that "people of good will may disagree" over same-sex marriage, "sometimes strongly." *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012). The LGBT community seeks legal protection, tolerance, and social approval. But their newly emerging rights do not trump the constitutional freedoms of those who cannot conscientiously support their objectives.

Citizens all over the country have initiated legal action to halt the trend toward enhanced gay rights. Proposition 8 is merely one of these efforts. Over half of the states have amended their constitutions to preserve marriage. Colorado and Ohio voters passed initiatives to ban special protections for gays and lesbians. This Court struck down the overly broad Colorado initiative that essentially rendered gays and lesbians non-citizens, but the more narrowly drafted Ohio initiative survived judicial review. *Romer v. Evans*, 517 U.S. 620, 630 (1996) ("it deprives gays and lesbians even of the protection of general laws and policies"); *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997) (remanded). The very fact that such initiatives have been proposed and passed is evidence that many Americans are deeply troubled.

There is an "uncomfortable intersection of law, culture, and religion" in this case. *In re Marriage Cases,* 143 Cal.App.4th 873, 938 (2006) (Parrilli, J., concurring). Same-sex intimacy is contrary to centuries of religious teaching. It would "cast aside

millennia of moral teaching" to convert it to a fundamental right. *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, J., concurring). "The decision whether to turn our backs on millennia of moral teaching should be the product of careful and thoughtful judgment and not of a subtle and manipulative campaign of propaganda." Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 Notre Dame L. Rev. 393, 415 (1994). Even in overruling *Bowers*, this Court acknowledged that:

> The condemnation [of homosexual conduct] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.

Lawrence v. Texas, 539 U.S. 558, 571 (2003).

II. THIS COURT MUST PRESERVE THE LIBERTY OF ALL AMERICANS. A RULING AGAINST PETITIONERS WOULD HAVE A DEVASTATING IMPACT ON A BROAD ARRAY OF CONSTITUTIONAL RIGHTS.

Gay rights have vastly expanded in recent years. Advocates have accomplished this dramatic social and political change by exercising their rights to free speech, association, and the political process. But overly aggressive advocacy threatens to erode the

freedoms of all Americans—including speech, association, religion, and privacy. Ironically, by stifling the rights of dissenters, LGBT advocates weaken the First Amendment generally and ultimately threaten their own cause.

The best way to protect the rights of gays and lesbians is to preserve the constitutional liberties of *all* citizens. Americans who want to guard their own civil rights must respect their opponents rather than crushing them with debilitating legal penalties:

> The price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.

United States v. Ballard, 322 U.S. 78, 95 (1944).

Even sympathetic commentators acknowledge that gays and lesbians cannot demand for themselves what they would deny to others. Their rights do not supersede those of everyone else. Walter J. Walsh, *The Fearful Symmetry of Gay Rights, Religious Freedom, and Racial Equality*, 40 How. L.J. 513, 546, 570 (1997). Some even recognize the intrusion on religious liberty:

> In some instances, full gay equality would be a fundamental affront to liberty interests of religious or traditionalist groups, in ways that full gender or race equality no longer are.

William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, Collisions of Liberty and Equality in American Public Law*, 106 Yale L.J. 2411, 2473 (1997).

Anti-discrimination laws and policies have already spawned a multitude of lawsuits. Religion is one of the chief casualties but not the only one. In two cases, this Court held that anti-discrimination laws should not be applied so expansively as to infringe association rights. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston,* 515 U.S. 557 (1995); *Boy Scouts of Am. v. Dale,* 530 U.S. 640 (2000). *Dale* appreciated the growing potential for conflict as anti-discrimination laws expand their reach beyond the places and persons encompassed by common law. *Id.* at 657. *Hurley* noted the expansion and held that the particular application of the Massachusetts statute infringed the parade organizers' rights, affirming our nation's commitment to protect expression regardless of content. *Hurley,* 515 U.S. at 571, 581. Although gay rights have gained wider public acceptance, those who oppose their practices have not forfeited the right to free expression. *Dale,* 530 U.S. at 660. "General antidiscrimination statutes [should] not be read expansively, beyond their clear application, when the broad reading would directly burden protected First Amendment rights." Eskridge, *Coming Out,* 106 Yale L.J.at 2462-2463. Another commentator sums it up well:

> If Americans are going to preserve their civil liberties...they will need to develop thicker skin. One price of living in a free society is toleration of those who intentionally or unintentionally offend others. The current trend, however, is to give offended parties a legal remedy, as long as the offense can be construed as "discrimination." ... *A society that undercuts civil liberties in pursuit of the "equality" offered by a statutory*

> *right to be free from all slights will ultimately end up with neither equality nor civil liberties*.

David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223, 245 (2003) (emphasis added). If this Court creates a new right to same-sex marriage—allegedly under the Equal Protection Clause—it is bound to generate new inequalities and erode time-honored liberties.

Anti-discrimination statutes have already posed threats to religious liberty. Commentators on both sides observe the legal quagmire:

> When a legislature acts to protect homosexual behavior under antidiscrimination laws, it elevates homosexual practices to the status of protected activities while at the same time branding many mainstream religious institutions and individuals as outlaws engaged in antisocial and immoral behavior.

Duncan, *Who Wants to Stop the Church,* 69 Notre Dame L. Rev. at 397-398.

> This conflict between the statutory rights of individuals against private acts of discrimination and the near universally-recognized right of free exercise of religion places a complex legal question involving competing societal values squarely before the courts.

Jack S. Vaitayanonta, *In State Legislatures We Trust? The "Compelling Interest" Presumption and Religious*

Free Exercise Challenges to State Civil Rights Laws, 101 Colum. L. Rev. 886, 887 (2001). See also Harlan Loeb and David Rosenberg, *Fundamental Rights in Conflict: The Price of a Maturing Democracy*, 77 N.D. L. Rev. 27, 29 (2001); Bernstein, *Defending the First Amendment,* 82 N.C. L. Rev. at 228 ("The laudable goal of the ever-broadening antidiscrimination edifice is to achieve a fairer, more just society. Yet even, or perhaps especially, well-meaning attempts to achieve a praiseworthy goal must be criticized when the means used to achieve that goal become a threat to civil liberties.").

What the Equal Protection Clause clearly forbids is irrational, arbitrary, or unreasonable discrimination. Discrimination is not "arbitrary" where its purpose is to avoid endorsing a cause. *Hurley,* 515 U.S. 557 (parade organizers did not exclude individual homosexuals, but were not required to grant access to a gay organization). The First Amendment protects a broad spectrum of expression, popular or not. In fact, the increasing popularity of an idea makes it all the more essential to protect the voices of those who hold different views. *Dale*, 530 U.S. at 660. Censorship spells death for a free society. "Once used to stifle the thought that we hate...it can stifle the ideas we love." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167-168 (4th Cir. 1976); *Gay Lib. v. Univ. of Missouri*, 558 F.2d 848, 856 (8th Cir. 1977). Justice Black said it well in discussing the Communist Party, which advocated some of the most dangerous ideas of the twentieth century:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and

> assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party v. SACB,* 367 U.S. 1, 137 (dissenting opinion) (1961).

Healy v. James, 408 U.S. 169, 187-188 (1972).

This principle cuts across all viewpoints. A public university may not squelch student speech or association based on viewpoint. *Id*. at 187-188. An early student gay rights group sought to provide a forum to discuss homosexuality. *Gay Lib.*, 558 F.2d 848. The university did not want to recognize the student organization, but officials could not restrict the group's right to speak and associate merely because it disagreed with the ideas expressed. *Id*. at 852, citing *Healy v. James*, 408 U.S. at 187.

Citizens on both sides of the marriage debate are entitled to equal protection. *See* Josiah N. Drew, *Notes and Comments, Caught Between the Scylla and Charybdis: Ameliorating the Collision Course of Sexual Orientation Anti-Discrimination Rights and Religious Free Exercise Rights in the Public Workplace*, 16 BYU J. Pub. L. 287, 313 (2002) (drawing analogy between sexual orientation and religion). Courts must not dictate a particular view of sexual morality and squelch dissenting voices. *Dale,* 530 U.S. at 651, 661. This case holds the potential to not only chill those voices—but to penalize them and gut the First Amendment.

III. A RULING AGAINST PETITIONERS WOULD HAVE A CATASTROPHIC IMPACT ON RIGHTS OF CONSCIENCE GENERALLY AND RELIGIOUS LIBERTY SPECIFICALLY.

America's founders spoke passionately about the religious underpinnings of our judicial system. Benjamin Franklin forewarned:

> "If a sparrow cannot fall to the ground without His notice, is it probable that an empire can rise without His aid? We've been assured in the sacred writing that, 'Except the Lord build the house, they labor in vain that build it.'"

James Madison, *The Papers of James Madison*, Henry Gilpin, editor (Washington: Langtree and O'Sullivan, 1840), Vol. II, p. 185, June 28, 1787.

Thomas Jefferson, who first penned the phrase "separation of church and state"—in order to reassure the Danbury Baptists of their religious freedom—cautioned against discarding our religious roots: "And can the liberties of a nation be thought secure when we have removed their only firm basis—a conviction in the minds of the people that these liberties are the gift of God?" Thomas Jefferson, *Notes on the States of Virginia* (Philadelphia: Mathew Carey, 1794), p. 237, Query XVIII.

This case has the potential to accelerate the collision course between gay rights advocates and people who cannot conscientiously embrace their objectives because they hold a traditional view of

marriage and family. This Court should proceed cautiously so as not to dismantle liberties of conscience and religion. Congress has ranked religious freedom "among the most treasured birthrights of every American." Sen. Rep. No. 103-111, 1st Sess., at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N., 1893-1894. America's founders risked their lives to escape religious tyranny and observe their faith free from government intrusion.

> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Girouard v. United States, 328 U.S. 61, 68 (1946). We dare not sacrifice the priceless American freedoms on which this country was founded.

A. A Ruling Against Petitioners Would Erode Integrity By Forcing Many Citizens To Violate Conscience.

The ability to follow conscience is a critical American freedom that cuts across a broad spectrum of issues and viewpoints. There is currently an epidemic of lawsuits challenging the requirement that employer-

mandated health insurance programs include access to contraception and abortion-producing drugs.[2] If a government compels its citizens to violate conscience as a condition of participating in society, the impact on integrity is potentially disastrous. Integrity is a key component of a free society where citizens trust one another in their daily interactions. It is dangerous indeed to breed a citizenry that lacks conscience and integrity.

Liberty of conscience is even broader than the free exercise of religion although integrally related to it. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1491 (1990). This Court, recognizing man's "duty to a moral power higher than the State," quoted Harlan Fiske Stone (later Chief Justice):

> "...both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation

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[2] There are 43 cases in process, many in district courts and some on appeal. See http://www.becketfund.org/hhsinformationcentral/ (last visited 01/18/13).

> of the conscience of the individual will not in fact ultimately lose it by the process." Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919).

United States v. Seeger, 380 U.S. 163, 170 (1965).

People of faith should not have to choose between allegiance to the state and faithfulness to God, particularly where their beliefs can be accommodated without sacrificing public peace and safety. Generally, the claims likely to be triggered by coerced recognition of same-sex marriage would be conscientious objector claims rather than civil disobedience. Conscientious objection claims rarely endanger the community and are "very close to the core of religious liberty." Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 565, 611, 615-616 (2006). If morally shocking behavior (flag burning, computer-generated child pornography, cross burnings) is protected as free expression, Americans should be able to graciously decline to participate in activities that would compromise their faith or conscience. *Id*. at 616.

This approach is consistent with *Emp't Div., Ore. Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) and the text of the First Amendment. The word "prohibit" is crucial, because "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Sherbert v. Verner,* 374 U.S. 398, 412 (1963) (Douglas, J., concurring); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439,

450-1 (1988); McConnell, *Origins,* 103 Harv. L. Rev. at 1486. Prior to *Smith*, many winning cases involved conscientious objectors—believers seeking freedom from state compulsion to commit an act against conscience. *Girouard v. United States,* 328 U.S. 61; *Sherbert v. Verner*, 374 U.S. 398 (Sabbath work); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (flag salute); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (education). Many losing cases implicated "civil disobedience" claimants seeking to engage in illegal or even criminal conduct. *Jacobson v. Massachusetts,* 197 U.S. 11 (1905) (vaccination); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor). O'Callaghan, *Lessons From Pharaoh*, 39 Creighton L. Rev. at 564. *Smith* repeatedly emphasized the *criminal* conduct at issue. *Smith,* 494 U.S. at 874, 878, 887, 891-892, 897-899, 901-906, 909, 911-912, 916, 921.

B. A Ruling Against Petitioners Would Have A Crushing Impact On Religious Liberty.

The Ninth Circuit quickly dismissed the religious liberty implications of this case because Proposition 8 changed no laws or government policies concerning sexual orientation, and thus allegedly did nothing to "decrease the likelihood that religious organizations would be penalized." *Perry v. Brown*, 671 F.3d at 1091. The Court missed the boat entirely. California's broad-sweeping Unruh Act (Cal. Civ. Code § 51) prohibits discrimination on the basis of marital status. Even without legislative changes, there would be penalties for refusing to recognize same-sex marriages. Moreover, the Court failed to grapple with the massive impact on individuals and small businesses—similar to

what is already occurring across the nation as a result of anti-discrimination mandates.

Religious belief and conduct are both protected. Early state constitutions were typically framed to limit religious conduct only if it actually threatened peace, safety, or morality. McConnell, *Origins,* 103 Harv. L. Rev. at 1461-62. These provisos would be superfluous if protection was confined solely to beliefs. Free exercise is not limited to outright prohibitions of religious practice, nor should it be understood as an unrestrained right of personal autonomy that precludes reasonable regulations for public health and safety. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 170, 172 (1992).

Religions commonly include a moral code of behavior. O'Callaghan, *Lessons From Pharaoh,* 39 Creighton L. Rev. at 587. Religious belief and conduct both merit legal protection:

> Thus the Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.... *In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom*.

Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940) (emphasis added). Even if enhancing gay rights is a permissible end, it should be undertaken with

extraordinary caution so as not to infringe religious liberty.

Belief and conduct cannot be neatly split into airtight compartments, although the scope of protection differs. *Sherbert v. Verner,* 374 U.S. at 402-403; *Wisconsin v. Yoder,* 406 U.S. at 219-220; *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983). Religious beliefs need not be "acceptable, logical, consistent, or comprehensible to others" (*Thomas v. Review Bd. of Ind. Emp't*, 450 U.S. 707, 714 (1981)) and religious practices may be "abhorrent to some" but nevertheless protected. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

Religious moral codes commonly regulate sexual conduct—and that is what is at stake here. A state mandate to affirm same-sex marriage would have an explosive impact on religious persons who could easily treat all individuals with equal respect and dignity but cannot in good conscience endorse or facilitate same-sex marriage.

The government must avoid showing hostility to religion by refusing to acknowledge religious motivation. In some respects, the issue of same-sex marriage is similar to anti-discrimination laws, which rightly prohibit the refusal to conduct business with an entire group based on personal animosity or stereotypes. In both cases, the First Amendment demands that courts consider religious motivation. Motivation can make a radical difference in two seemingly identical situations. A person who deliberately refuses medical treatment, desiring to die, commits suicide. But a person who wants to live, yet

refuses treatment because of religious convictions, does not. Gerard V. Bradley, *Beguiled: Free Exercise Exemptions And The Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 263-264 (1991). In the criminal law context, killing another person in self-defense is justifiable homicide. The same act, premeditated with malice aforethought, is first degree murder. The former carries no legal penalties, while the latter warrants severe consequences. In free exercise cases involving unemployment benefits, this Court agrees: "[T]o consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 142 (1987); *Thomas v. Review Bd.,* 450 U.S. at 708. The same principle is true here. A person's religiously motivated refusal to recognize same-sex unions is not tantamount to unlawful discrimination, nor is it irrational animosity. To hold otherwise would exhibit callous disregard for religion.

Sexual orientation is not analogous to race. Gays and lesbians have never been bought and sold as slaves, or denied the right to participate in the political process, because of their sexual orientation. African-Americans were enslaved for many years, treated as property rather than persons, and denied even the most elementary civil rights. Women were denied the right to vote for many years, and elimination of gender discrimination has gained increasing recognition as an important state interest. *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984) (admission of female members would not hinder the association's expressive purposes); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (same). In *Romer*,

this Court rejected an attempt to deny basic political protections to gays and lesbians. *Romer,* 517 U.S. at 630. But "discrimination" against persons engaged in morally controversial behavior—by refusing to endorse or facilitate it—does not warrant the same legal penalties as racial or gender discrimination. Duncan, *Who Wants to Stop the Church,* 69 Notre Dame L. Rev. at 399. Race and gender are morally neutral traits that tell nothing of a person's character or conduct. *Id*. at 402-403. Gays and lesbians already enjoy the same civil rights as other citizens. *Id*. at 400. They do not lack political power, as shown by the plethora of anti-discrimination laws—and the very fact that these cases are before the Court. Moreover, sexual orientation is inextricably intertwined with the tendency to engage in particular conduct.[3] *Id*. at 402-403. Many Americans hold strong moral and religious objections to that conduct.

Coerced recognition of same-sex marriage is likely to impose crippling burdens on people of faith. Courts have identified various levels of burden in free exercise cases:

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[3] Courts have long acknowledged conduct as an integral component of homosexuality. *Woodward v. United States,* 871 F.2d 1068, 1076 (Fed. Cir. 1989) (primarily behavioral); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (inference of probable conduct); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996) (rebuttable presumption of propensity or intent to engage in conduct); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (same); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997) (admission of orientation is evidence of conduct); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990).

- Condition for government benefit: *Sherbert v. Verner*, 374 U.S. 398 (unemployment benefits); *Thomas v. Review Bd.,* 450 U.S. 707 (same); *Hobbie,* 480 U.S. 136 (same); *Frazee v. Ill. Dept. of Employment Sec.*, 489 U.S. 829 (1989) (same); *Bob Jones Univ.,* 461 U.S. 574 (tax exemption); *Bowen v. Roy*, 476 U.S. 693 (1986) (welfare benefits).

- Financial sacrifice or inconvenience—but without discontinuing the activity: *Braunfeld v. Brown,* 366 U.S. 599, 605-606 (1961) (Sunday closing); *Bob Jones Univ.,* 461 U.S. 574 (tax exemption); *Tony and Susan Alamo Foundation v. Sec'y of Labor,* 471 U.S. 290 (1985) (recordkeeping, minimum wage, overtime); *United States v. Lee,* 455 U.S. 252 (1982) (Social Security tax payment); *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (university required to grant student group tangible benefits but not endorsement).

- Criminal penalties for religiously mandated conduct: *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); *Prince v. Massachusetts*, 321 U.S. 158 (child labor); *Wisconsin v. Yoder*, 406 U.S. 205 (compulsory education); *Smith,* 494 U.S. 872 (illegal drugs); *Gonzales v. O Centro Espirita Beneficente*, 546 U.S. 418 (2006) (same).

- Discontinue the activity altogether or violate religious conscience: *Smith v. Fair Emp't and Housing Comm'n*, 12 Cal.4th 1143, 1170 (1996) (apartment rental); *Swanner v. Anchorage Equal*

Rights Comm'n, 874 P.2d 274 (Alaska 1994) (same); *State by Cooper v. French,* 460 N.W.2d 2 (Minn. 1990) (same); *McCready v. Hoffius II*, 593 N.W.2d 545 (Mich. 1999) (same); *Rasmussen v. Glass,* 498 N.W.2d 508 (Minn. Ct. of App. 1993) (food delivery to abortion clinic).

The impact of these burdens varies widely. Claimants typically do not prevail where they can continue the activity at issue while observing religious commands. Imposing an incidental burden on religion as a condition for some public benefit is of a "wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications" (*Bowen v. Roy*, 476 at 704)—"far removed from the historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause" (*id*. at 703). But even in that context, there is legally cognizable harm when a person must choose between adherence to conscience and an important benefit. *Sherbert v. Verner,* 374 U.S. at 412; *Thomas v. Review Bd.,* 450 U.S. at 716; *Hobbie,* 480 U.S. at 141.

Where a government mandate imposes substantial penalties on a believer who follows his faith, the burden is far heavier than a law which incidentally makes religious practice more difficult or less convenient. Alvin C. Lin, *Note, Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 Geo. L.J. 719, 731-732 (2001). Coerced recognition of same-sex marriage would impose burdens of the highest order—similar to what is happening in the contraception mandate cases.

Small family-owned businesses face the untenable choice of following conscience or becoming liable for crippling penalties that will cause them to shut down. The same scenario will occur if people of faith must choose between acknowledging same-sex unions or incurring draconian penalties, either through litigation or government fines. No American should be compelled to make such a choice.

C. A Ruling Against Petitioners Would Have A Disproportionately Harsh Impact On Christianity.

America's founders wisely declined to establish a national religion, leaving the people free from government intrusion.[4] But Christianity had an undeniably prominent role in the nation's founding and early history. This Court once declared America to be "a Christian nation." *Church of the Holy Trinity v. United States,* 143 U.S. 457, 471 (1892). A century ago, the Texas Supreme Court relied on Scripture as the genesis for human marriage:

> Marriage was not originated by human law. When God created Eve, she was a wife to Adam; they then and there occupied the status of husband to wife and wife to husband.

Grigsby v. Reib, 105 Tex. 597, 607 (Tex. Sup. Ct. 1913). It would be ironic indeed if this Court's pronouncement

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[4] There were originally many *state* establishments, but these were long ago abolished.

on same-sex marriage caused unique and disproportionate burdens on American Christians.

Laws prohibiting sexual orientation discrimination have already triggered religious concerns that cannot be ignored. Those concerns would escalate exponentially if same-sex marriage becomes legal—especially without carefully crafted religious exemptions. America's history and judicial system is inescapably linked to religion:

> "We have no government armed with power capable of contending with human passions unbridled by morality and religion.... Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."

John Adams, *The Works of John Adams, Second President of the United States*, Charles Francis Adams, editor (Boston: Little, Brown, 1854), Vol. IX, p. 229, October 11, 1798.

Today the nation is characterized by religious pluralism. Many faith traditions enjoy freedom under the First Amendment umbrella. These faiths do not all agree about the propriety of same-sex marriage and those who do not embrace the concept are not equally burdened. But within the broad tradition of Christianity, many would be harshly penalized by a legal mandate to affirm same-sex marriage. This is a critical example of the severe burden that same-sex marriage would place on many people of faith, unless the democratic process is allowed to move with caution and enact adequate religious exemptions.

Compelled recognition of same-sex marriage would gut the core of Christianity for many believers. And like abortion, same-sex marriage would enhance sexual freedom at the expense of religious liberty. Where core religious beliefs are implicated, the government bears a heavier burden to justify the intrusion and strict scrutiny should be applied. Even one commentator who advocates a "compelling interest" presumption in religious challenges to civil rights laws would leave room for courts to grant an exemption where a "core" religious belief is burdened. Vaitayanonta, *In State Legislatures We Trust?,* 101 Colum. L. Rev. at 889, 923.

Christianity teaches that God affirmed sexuality as a fundamental element of the created order when He created male and female in His image (Genesis 1:26-27, 2:7, 2:18-23). He ordained their union in the covenant of marriage, to bear children and instruct them in His law (Genesis 2:24-25; Deuteronomy 4:9-10). New Testament Scripture draws an analogy between husband-wife and Jesus Christ's relationship to His church (Ephesians 5:31-32). For many Christians, erasure of the male-female distinction is tantamount to a pantheistic worldview that blurs the distinction between God the Creator and His creation, and homosexuality is not a minor aberration. As one theologian expressed it:

> Though presented in the righteous robes of civic justice, homosexuality represents a complete distortion of creation's sexual structures. We cannot understand the radical implications of

> homosexuality's acceptance until we realize that homosexuality turns the blueprint for life inside out and upside down.

PETER JONES, THE GOD OF SEX (2006), 27.

Many Christians are troubled when conduct they consider sin morphs into a constitutional right. The expansion of civil rights has accelerated in recent decades. It is time to put on the brakes to avoid annihilating the First Amendment. Conduct once criminalized is now constitutionally protected. One author observes that "sex outside of marriage has gone from misdemeanor to compelling interest in one generation, and religious believers who resist the change must be crushed." Laycock & Thomas, *Interpreting the Religious Freedom Restoration Act,* 73 Tex.L.Rev. 209, 223-224 (1994) (discussing marital status discrimination in the housing industry). Sodomy was transformed from a crime (*Bowers*) to a protected liberty interest (*Lawrence*) in less than twenty years. There is no compelling interest in imposing such radical change on religious objectors so as to coerce their endorsement or active assistance. Many view same-sex intimacy as sin. Not all sin is criminalized, but neither is it a civil right. A common view is that "[w]e are all sinners. But we all do not demand that our sins be recognized as civil rights." Duncan, *Who Wants to Stop the Church,* 69 Notre Dame L. Rev. at 415.

Moreover, Christians view marriage in the context of family, contrary to the modern liberal focus on autonomy. "Liberalism"—the protection for individual rights—was originally linked to religion and supportive

of religious freedom, but those connections have been severed. Liberalism now stands for "individualism, independence, and rationality." Freedom *from* religion increasingly replaces the freedom *of* religion in liberal thought. Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 172-174 (1993). The Ninth Circuit reflects this exaltation of the individual, quoting the California Supreme Court's declaration that "the right to marry is an integral component of an individual's interest in personal autonomy protected by the privacy provision of article I, section 1 [of the California Constitution], and of the liberty interest protected by the due process clause of article I, section 7." *Perry v. Brown*, 671 F.3d at 1066, quoting *In re Marriage Cases,* 183 P.3d 384, 426 (Cal. 2008).

A legal requirement to affirm or facilitate same-sex marriage, and the corollary redefinition of the family, would be a grave burden on fundamental Christian teachings for many believers. One commentator wisely suggests that avoidance of sin be considered "per se integral to religious practice," entitling believers to strict scrutiny. O'Callaghan, *Lessons From Pharaoh,* 39 Creighton L. Rev. at 612-613. Moreover, the religious neutrality of laws enhancing gay rights is questionable. A law that reflects only one side of such a contentious issue is hardly neutral. McConnell, *Origins,* 103 Harv. L. Rev. at 1420 (discussing definitions of "neutrality"). A law may satisfy "formal neutrality" yet lack "substantive neutrality" where it encourages or discourages religious practice. Duncan, *Who Wants to Stop the Church,* 69 Notre Dame L. Rev. at 422, n113; *Church of Lukumi Babalu Aye,* 508 U.S.

at 562 (Souter, J., concurring); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001 (1990).

IV. A RULING AGAINST PETITIONERS WOULD HAVE A CORROSIVE EFFECT ON OTHER FUNDAMENTAL LIBERTIES.

Religious liberty is a critical freedom that would be injured by the legalization of same-sex marriage. But it does not stand alone. Religious freedom is often integrally intertwined with other cherished constitutional rights which would be equally at risk if this Court pronounces a right to same-sex marriage.

A. A Ruling Against Petitioners Would Threaten Free Speech Rights.

The "fixed star in our constitutional constellation" barring any public official from prescribing orthodoxy in religion (*Barnette*, 319 U.S. at 642)—shines across decades of precedent and prohibits the government from conditioning participation in society on the demise of a citizen's free speech and religious liberties.

A recent Sixth Circuit case shows how gay rights can impede free speech. *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012). Julea Ward was a student in the final stages of a graduate counseling program at the University of Michigan. In a mandatory student practicum, she was assigned a gay student to counsel. She asked to refer this client because she could not in good conscience affirm same-sex relationships. The university subjected her to a disciplinary hearing and ultimately expelled her—in spite of her excellent

academic performance (3.91 GPA). *Id*. at 729-730. Reversing the district court's summary judgment in favor of the university, the Sixth Circuit concluded that "a reasonable jury could conclude that Ward's professors ejected her from the counseling program because of hostility toward her speech and faith." *Id*. at 730. Compelled speech approving same-sex unions grates against the First Amendment.

Ward v. Polite is a classic example of compelled speech and impermissible viewpoint discrimination. The First Amendment protects against government coercion to endorse or subsidize a cause. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Barnette,* 319 U.S. 624. The government has no power to force a speaker to either support or oppose a particular viewpoint. *Hurley,* 515 U.S. at 575. The state may not coerce approval of same-sex intimacy. *Dale,* 530 U.S. at 654. Compelled religious speech is particularly odious to the Constitution. "Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship...." *Barnette*, 319 U.S. at 646 (Murphy, J., concurring). This is not new: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 13 Wall. 679, 728 (1872). The government has no business imposing a particular view of sexual morality on religious institutions and individuals who want to be left alone to operate their ministries and businesses according to religious convictions. Duncan, *Who Wants to Stop the Church,* 69 Notre Dame L. Rev. at 396.

Ward is not the only recent example of the potential for conflict between gay rights and free speech:

- *Walden v. Ctrs. for Disease Control & Prevention,* 669 F.3d 1277, 1281 (11th Cir. 2012) (Christian counselor fired for refusing to *lie* to homosexual clients she referred to other counselors)

- *Harper v. Poway Unified Sch. Dist.,* 445 F.3d 1166 (9th Cir. 2006), vacated and remanded, 549 U.S. 1262 (2007) (Christian student forbidden to wear t-shirt proclaiming the biblical view of homosexuality)

- *Zamecnik v. Indian Prairie Sch. Dist. #204,* 636 F.3d 874 (7th Cir. 2011) (school could not prohibit students from wearing t-shirts that said "Be Happy, Not Gay" merely because of the potential for hurt feelings)

The Sixth Circuit rightly concluded that "[t]olerance is a two-way street." *Ward v Polite*, 667 F.3d at 735. Religious liberty is decimated when secular ideologies employ the strong arm of the state to advance their causes, promoting tolerance and respect for some while suppressing others. McConnell, *"God is Dead!"*, 1993 BYU L. Rev. at 186-188. Coerced recognition of same-sex marriage chills protected speech and threatens to compel speech in line with a government-mandated sexual orthodoxy.

B. A Ruling Against Petitioners Would Interfere With The Right To Earn A Living Or Enter A Profession.

In some situations, coerced recognition of same-sex marriage would exclude people of faith from a

profession (or specialty) or compel personal services in violation of common law and perhaps also the Thirteenth Amendment.

"The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971). *Ward v. Polite* exemplifies the potential exclusion of a citizen from a profession—in that case, counseling—because of religious convictions. If all professional counselors must affirm same-sex relationships, regardless of conscience or religion, many people of faith will be unable to enter the profession. Cal. Const. art. 1, § 8 provides that no person shall be "disqualified from entering or pursuing a…profession…because of…creed…." But two physicians lost their Free Exercise claim against a lesbian woman who sued them for refusing to perform an intrauterine semination procedure to enable her to become pregnant with a child she intended to raise with her live-in female partner. *North Coast Women's Care Med. Group, Inc. v. Superior Court*, 44 Cal. 4th 1145 (2008). That troubling precedent—based on the state's statutory anti-discrimination scheme, well before the legalization of same-sex marriage in California—would exclude some doctors from specializing in fertility treatments if they cannot in good conscience facilitate redefinition of the family. Same-sex couples have a legal right to adopt children in some jurisdictions, just as pregnant women have the legal right to abortion, but in neither case is there an accompanying right to draft unwilling accomplices. In this "clash of autonomies," the other

party's "right to choose" is entitled to equal protection. Courtney Miller, *Note, Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations*, 15 S. Cal. Rev. L. & Social Justice 327, 340-341, 344 (2006). State coercion of personal services compromises both personal and professional integrity, particularly in a relationship where fiduciary obligations are not easily divorced from moral convictions. The interests of both the client/customer *and* the professional can be better served in other ways, such as referral. Jennifer Tetenbaum Miller, *Note, Free Exercise v. Legal Ethics: Can a Religious Lawyer Discriminate in Choosing Clients?*, 13 Geo. J. Legal Ethics 161, 166-167, 182 (1999).

North Coast Women's also exposes grave concerns about coerced personal services. A requirement to actively perform personal services imposes a direct and crushing burden—a critical component in some cases. Courts decline to specifically enforce personal service contracts because enforcement might constitute involuntary servitude.[5]

> [T]he general rule is that a contract for service will not be specifically enforced, either directly by means of a decree directing the defendant to perform it, or indirectly by an injunction restraining him from violating it. Especially is this the rule where the relation between the

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[5] In litigation, a plaintiff might seek monetary damages rather than specific enforcement—but financial penalties may be so crippling as to threaten the defendant's livelihood.

> parties to the contract is one of mutual confidence and the contract stipulates for acts that require special knowledge, skill, or ability, or the exercise of judgment, discretion, integrity, and like personal qualities.

Paramount Pictures Corp. v. Holden, 166 F. Supp. 684, 688 (D. Cal. 1958), quoting *Poultry Producers v. Barlow*, 189 Cal. 278, 288 (1922). Common law disfavored specific performance, and courts want to avoid the friction and social costs of a failed personal relationship. *Barndt v. Cnty. of Los Angeles*, 211 Cal.App.3d 397, 404 (1989) (staff physician could not specifically enforce settlement agreement that required his appointment to the hospital's cardiology department).

Thirteenth Amendment concerns lurk just beneath the surface. "The words involuntary servitude 'have a larger meaning than slavery.' ... The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, *by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude*." *Bailey v. State of Alabama*, 219 U. S. 219, 241 (1911) (emphasis added). There may be a Thirteenth Amendment violation where an individual has "no available choice but to work or be subject to legal sanction." *United States v. Kozminski*, 487 U.S. 931, 942-943 (1988).

In the context of expanding gay rights, there are many situations—as in *North Coast Women's*—where a religious objector has "no available choice but to work

or be subject to legal sanction." Just to facilitate same-sex weddings, people of faith may be compelled to provide a wide array of services: Photographers,[6] florists, tailors, caterers, printers, bakeries, bed-and-breakfast establishments,[7] reception venues.[8] These examples barely scratch the surface, as there are a multitude of other situations where religious faith and gay rights may clash to such an extent that a person must either perform services contrary to conscience—or be forced out of business by crippling litigation or fines.

Discontinuing an activity altogether is more oppressive than continuing to conduct it at greater expense or inconvenience. *Wisconsin v. Yoder,* 406 U.S. at 218; *Bowen v. Roy,* 476 U.S. at 704. The burden is equally harsh for coerced personal services. If the government compels the performance of services that affirm same-sex marriage, persons who believe homosexuality is sinful are faced with the gruesome

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[6] See *Elane Photography v. Willock*, 284 P.3d 428, 433 (2012) (New Mexico Human Rights Commission fined a Christian photographer $6,637.94 in fees and costs for her religiously motivated refusal to photograph a same-sex commitment ceremony.)

[7] Lambda Legal filed suit in the First Circuit Court of Hawaii on behalf of a lesbian couple refused accommodations by Aloha Bed & Breakfast. The Hawaii Civil Rights Commission intervened as a plaintiff. See http://www.lambdalegal.org/in-court/cases/cervelli-v-aloha-bed-and-breakfast (last visited 01/17/13).

[8] The Wildflower Inn, a small country resort in Lyndonville, Vermont, settled a lawsuit filed by a lesbian couple (Baker and Linsley) after its owners refused to host a same-sex wedding reception. See http://www.aclu.org/lgbt-rights/baker-and-linsley-v-wildflower-inn (last visited 01/17/13).

choice to either violate their religious convictions and sin under the state's compulsion, or get out of business. Duncan, *Who Wants to Stop the Church,* 69 Notre Dame L. Rev. at 414; O'Callaghan, *Lessons From Pharaoh,* 39 Creighton L. Rev. at 562.

Believers do not forfeit their constitutional rights when they enter the commercial sphere. Free exercise cases often arise in connection with commerce. *Braunfeld v. Brown,* 366 U.S. 599 (Sunday closing); *Sherbert v. Verner,* 374 U.S. 398 (and other unemployment cases); *Lee,* 455 U.S. 252 (Amish business); *Roberts,* 468 U.S. 609 (commercial association); *Alamo Fdn.,* 471 U.S. 290; *State ex rel. McClure v. Sports & Health Club, Inc.,* 370 N.W.2d 844, 853 (Minn. 1985) (hiring); *Rasmussen v. Glass,* 498 N.W.2d 508 (food delivery); *Swanner,* 874 P.2d 274 (housing); *Attorney Gen. v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994) (same). The state actively regulates commerce but exercises minimal control over the internal affairs of religious entities, so it is no surprise that conflicts between religion and regulation often occur in a commercial setting. Some of these claimants succeeded (*Sherbert, Rasmussen, Desilets*), while others did not (*Braunfeld, Lee, Roberts, Alamo Fdn., McClure, Swanner*). The "commercial" factor is only one of many and does not determine the outcome.

Lee is frequently cited to oppose religious exemptions in the commercial sphere. But *Lee* does not hold that believers shed their constitutional rights in the business world. Note the often quoted language in context:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but *every* person cannot be shielded from *all* the burdens incident to exercising *every* aspect of the right to practice religious beliefs. When 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.

Lee, 455 U.S. at 261 (emphasis added). Religious freedom is more limited in the commercial realm but not abrogated altogether.

If believers must abandon their moral principles in the commercial sphere, they will be squeezed out of full participation in civic life. O'Callaghan, *Lessons From Pharaoh,* 39 Creighton L. Rev. at 561-3. Religion does not end where daily business begins. Its moral precepts cannot be removed from the public realm. If religion is confined to the private fringes of life, the constitutional guarantees of the First Amendment ring hollow. McConnell, *"God is Dead,"* 1993 BYU L. Rev. at 176.

A state mandate to engage in sinful conduct is essentially a statement that "no religious believers who refuse to do [X-sinful act] may be included in this part of our social life." O'Callaghan, *Lessons From Pharaoh*, 39 Creighton L. Rev. at 573. Banning religious believers from participation in society is contrary to the First Amendment and our American traditions.

C. A Ruling Against Petitioners Would Intrude On Rights To Privacy.

Even if there is a sphere of privacy which government may not transgress, and even if private sexual conduct is a fundamental right, there is no corollary right to draft unwilling private citizens to assist in the exercise of that right. Nor is there a right to deny those unwilling accomplices their own right to privacy.

Lawrence v. Texas repeatedly turns on the assumption that homosexual persons have a right to enjoy personal privacy and define their own morality:

- Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. *Lawrence v. Texas*, 539 U.S. at 562.

- [A]dults may choose to enter upon [a homosexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. *Id*. at 567.

- Persons in a homosexual relationship may seek autonomy for these purposes [personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education], just as heterosexual persons do. *Id*. at 574.

- The State cannot demean [a homosexual person's] existence or control their destiny by making their private sexual conduct a crime.

> Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833, 847 (1992). *Id*. at 578.

Now that this Court has sanctioned their own rights to privacy and autonomy in *Lawrence*, LGBT advocates recently passed legislation that substantially intrudes on the rights of others to the same liberties. Cal. Sen. Bill No. 1172 (to be codified as Cal. Bus. and Prof. Code §§ 865, 865.1, 865.2) prohibits a mental health provider from engaging in sexual orientation change efforts with a patient under 18 years of age under all circumstances. Two lawsuits are pending with mixed results at the preliminary stages: *Pickup v. Brown*, 2012 U.S. Dist. LEXIS 172034, Case No. 2:12-CV-02497-KJM-EFB (E.D. Cal. Dec. 4, 2012) (injunction denied); *Welch v. Brown*, 2012 U.S. Dist. LEXIS 172029, Case No. 2:12-cv-02484-WBS-KJN (E.D. Cal. Dec. 3, 2012) (injunction granted). *Welch* was filed by a marriage and family therapist who is also an ordained minister, a psychiatrist, and an adult who experienced same-sex attractions as a child. The district court granted an injunction, finding the new law subject to strict scrutiny because it interferes with free speech and is not viewpoint neutral. *Welch*, at *3. The Court did not need to reach the cause of action for privacy. *Id*. But this case involves an explosive intersection of rights to privacy, speech, religion, and association. The law establishes a state orthodoxy in highly sensitive matters of morality and trespasses in

the privacy of the counseling room—where it does not belong. It denies to people of faith the very rights that LGBT advocates demand for themselves.

CONCLUSION

"Our obligation is to define the liberty of all, not to mandate our own moral code." *Lawrence v. Texas,* 539 U.S. at 571, quoting *Casey*, 505 U.S. at 850. If this Court bypasses the states and the people and proclaims a constitutional right to same-sex marriage, it will be destroying the liberty of many Americans by mandating a moral code contrary to their deepest convictions. *Amici curiae* urges this Court to rule in favor of Petitioners so as to protect the religious and other constitutional rights of persons who cannot in good conscience affirm same-sex marriage.

Respectfully Submitted,

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