In the Supreme Court of the United States

JAMES OBERGEFELL, ET AL., Petitioners,
–v–
RICHARD HODGES, Director, Ohio Department of Health, ET AL., Respondents.

VALERIA TANCO, ET AL., Petitioners,
–v–
BILL HASLAM, Governor of Tennessee, ET AL., Respondents.

APRIL DEBOER, ET AL., Petitioners,
–v–
RICK SNYDER, Governor of Michigan, ET AL., Respondents.

GREGORY BOURKE, ET AL., Petitioners,
–v–
STEVE BESHEAR,Governor of Kentucky, ET AL., Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE AGUDATH ISRAEL OF AMERICA IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

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INTEREST OF AMICUS CURIAE [1,2]

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization with constituents all across the United States. Our interest in the outcome of this case is motivated by our responsibility to: (1) safeguard traditional marriage, (2) advocate for the constitutional validity of morality-based laws, and (3) protect our constituents' religious liberty rights.

The value of marriage and its utility in ensuring the stability of society is unquestioned. A weakening of the traditional institution of marriage could undermine and impair society as a whole. To that end, we believe it paramount that marriage be defined solely as the union between one man and one woman. We are deeply concerned about the potentially far-reaching consequences of a decision from this Court that might obliterate such a foundational value. Our religious teachings animate our concerns."[3]

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[1] The parties have consented to the filing of this brief, and such consents are on file with the court. As required by Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person other than the amicus, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Agudath Israel of America thanks Georgetown University Law Center student Joseph Wiener for his contribution, working under the supervision of the filing attorneys.

[3] *See, e.g.,* Talmud Chullin 92B (emphasizing the critical nature of gender-differentiated marriage for society); Yehuda Loewi, *Maharal*, *Commentary on the Agadoth*, *ad loc* (same).

Moreover, we are troubled by the specter of a ruling that could have the effect of invalidating many, if not all, morality-based laws. As the representatives of a community that believes that adherence to a moral code of conduct is the essence of a person's role in the world, and that society should take traditional notions of morality into account when forming its laws, we view such prospects with considerable apprehension.

Finally, we view with consternation the effect a judicial recognition of same-sex marriage might have on the religious liberty of our constituents. The decision to judicially impose same-sex marriage will automatically trigger exposure to civil liability for those who seek to strictly follow the tenets of their religion. For example, religious organizations and adherents that decline to involve themselves in a same-sex marriage might be penalized even though their religion forbids them from doing so. Church-state scholars on all sides of the same-sex marriage debate agree that these conflicts will arise unless mitigating religious conscience protections are enacted. Most states that recognized same-sex marriage have responded to this concern by including some religious liberty protections in their enacting legislation. We write to urge this Court to take these considerations into account, so that our minority community can find protection under the law and remain true to our religious beliefs.

SUMMARY OF ARGUMENT

I. State Decisions Not to Recognize Same-Sex Marriage Withstand Constitutional Scrutiny

In this section we argue that state decisions not to recognize same-sex marriage satisfy the rational basis review standard. We show that morality provides a rational basis upon which to legislate. Finally, we argue that striking down same-sex marriage laws on grounds they do not satisfy rational basis review would render a long-held and widely accepted viewpoint irrational.

II. The Legislative Process Should Be Left to Run Its Course So As to Avoid Conflict Between the Recognition of Same-Sex Marriages and Religious Liberties

In this section we show that the refusal of religious adherents and organizations to recognize same-sex marriage will give rise to many religious liberty issues. We argue that judicial recognition of same sex marriage will displace potential religious liberty protections afforded by the give-and-take of the legislative process. Finally, we suggest that the court should consider applying First Amendment protections for religious dissenters and reconsider Free Exercise exemptions from generally applicable laws.

ARGUMENT

I. STATE DECISIONS NOT TO RECOGNIZE SAME-SEX MARRIAGE WITHSTAND CONSTITUTIONAL SCRUTINY

The decision of some states to decline to recognize same-sex marriages was proper. Their decisions withstand Constitutional scrutiny for two reasons: (1) there is a biological need for both mothers and fathers in the process of creating a child, and (2) there is an emotional need for both mothers and fathers in the process of raising a child. Both reasons provide a sufficient rational basis under the rational basis review standard upon which to legislate. Furthermore, morals and morality-based laws provide a rational basis upon which to legislate. Finally, we ask this court to recognize that striking down the States' laws on grounds they do not satisfy rational basis review would render a long-held and widely accepted viewpoint irrational.

A. State Decisions Not to Recognize Same-Sex Marriage Satisfy the Rational Basis Review Standard

The appropriate test to apply to laws affecting same-sex marriages is the rational basis test. "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (emphasis added). Heightened scrutiny, by contrast, has generally only been applied to groups with diminished capacity to voice their views and concerns in the legislative system. And this Court has never expressly applied heightened scrutiny to laws involving marriage. Same-sex couples cannot be said to have no voice in the legislative system, and therefore cannot be considered a suspect class. Within the last decade, same-sex couples have created such an unprecedented upheaval in the legislative systems that it would be impossible to consider them under-represented.[4] It is therefore appropriate to apply the rational basis review test here.[5]

Importantly, rational basis review "with bite," *Bishop v. Smith*, 760 F.3d 1070, 1099 (10th Cir. 2014) (describing a category of cases utilizing a slightly higher level of scrutiny than classical rational basis review), a formulation of the test that found expression in a number of Supreme Court cases,[6] is wholly inapplicable in this case. Some cite

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[4] For a brief history of gay marriage in the United States, *see* http://timelines.latimes.com/gay-marriage/ (Last visited on March 29, 2015).

[5] Although some have argued that same-sex marriage is a fundamental constitutional right, that argument is outside of the scope of this brief.

[6] *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 530 (1973) (striking down law targeting unmarried persons); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 436-37 (1985) (striking down local ordinance targeting mentally retarded persons); *Romer v. Evans*, 517 U.S. 620, 624 (1996) (declaring amendment prohibiting anti-discriminatory laws against homosexual persons unconstitutional).

to *United States v. Windsor* for the proposition that rational basis "with bite" applies to same-sex marriage. 133 S.Ct. 2675 (2013) (striking down federal law rejecting recognition of state-recognized same-sex-marriages). But the *Windsor* decision rested primarily upon grounds of federalism and not upon grounds of heightened scrutiny for marriage. *See Windsor*, 133 S.Ct. at 2696 (Roberts, C.J. dissenting) (emphasizing that "it is undeniable that [the majority's opinion] is based on federalism). The Windsor decision is accordingly not dispositive in this case. And therefore, laws pertaining to the definition of marriage that do not implicate federalism concerns do not deserve the "with bite" scrutiny. Moreover, the laws defining marriage differ from the Supreme Court cases applying rational basis with bite. Whereas the "with bite" cases involved regulations of human activities, the laws at issue here pertain to the non-activity of marriage. That distinction will be further elaborated upon below in Section I, part B.

Applying the rational basis review test, gender differentiated marriage laws pass muster. Two factors support that unqualified assertion; they are biology and family. First, bearing children is an essential aspect of marriage, and biology necessitates the input of both a male and a female in that process. Second, and perhaps more importantly, studies have shown that properly raising those children requires the influences of both a mother and father. Each factor will be discussed in turn below.

i. The Biological Need for Both Male and Female Input in Creating a Child Creates a Rational Basis Upon Which to Legislate.

The institution of marriage was for millennia recognized for its role in providing family structure and as necessary for a cohesive society. It is "the foundation of the family and of society, without which there would be neither civilization nor progress" *Maynard v. Hill*, 125 U.S. 190, 211 (1888). Mankind was designed with the complimentary male and female reproductive organs for the common purpose of procreation.[7] To believe therefore that the stability and structure of marriage will be best achieved by legislatively confining it to the union of one man and one woman is not irrational. Because both males and females are biologically necessary in the childbearing process, a law requiring both of them to be present in a marriage is rational.

Nor is the classification overbroad by including some persons who may not be able to procreate, such as the elderly or infertile. *See Bostic v. Schaefer*, 760 F.3d 352, 381 (4th Cir. 2014). As Justice Alito noted in *Windsor*, "Marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if

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[7] *See* Talmud Sanhedrin 58a (interpreting the Bible's introduction of the concept of marriage "And [man] shall cling to his wife, and they will become one flesh" (Gen. 2:24) in reference to the child, through which their flesh "becomes one"); *see also*, Sherif Girgis, et al., *What is Marriage?*, 34 Harv. J.L. & PUB. POL'Y 245 (2010) (demonstrating the relationship between children and marriage).

it does not always do so." 133 S.Ct. at 2718 (Alito, J., dissenting) (presenting one of two competing views). States may reasonably assert that they only have the capability to frame their marriage laws in ways that draw bright-line rules. But a rule limiting marriage to those who can naturally procreate would be unable to effectively exclude the elderly or infertile. Aside from privacy concerns, these classes of persons involve circumstances that can be difficult to pinpoint—even to the persons themselves. A bright-line rule distinguishing between the fertile and infertile would therefore be inappropriate and unenforceable. But it is not difficult to pinpoint who is a man and who is a woman. That distinction is one that the states can reasonably recognize when crafting their marriage laws.

It follows, that if the common purpose of marriage is procreation, a legislature can rationally legislate upon that basis. Limiting marriage to the union of one man and one woman therefore would be permissible. When "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and non-beneficiaries is invidiously discriminatory." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Accordingly, because of its essential role in marriage, biology provides a rational basis upon which to legislate.

ii. The Need for Male and Female Input in Raising a Child Creates a Rational Basis Upon Which to Legislate

Just as both male and female inputs are necessary to create a child, male and female inputs are necessary to raise a child. According to one prominent psychologist, "[t]here is no fact that has been established by social science literature more convincingly than the following: all variables considered, children are best served when reared in a home with a married mother and father." A. Dean Byrd, *Gender Complementarity and Child-Rearing: Where Tradition and Science Agree*, 6 J. L. & FAM. STUD. 213, 214 (2004). And even Professor Michael Lamb, a current advocate of same-sex marriage, has stated that "[b]oth mothers and fathers play crucial and qualitatively different roles in the socialization of the child." Lamb, Michael E., *Fathers: Forgotten Contributors to Child Development*, 18 HUMAN DEV. 245, 246 (1975). States should therefore be permitted to sustain the millennia-old norm of dual-gender marriage on rational basis grounds.

Until recently, society commonly accepted the notion that children thrive best when raised jointly by their mothers and fathers. Millennia of human experience show that society needs husband-wife marriage. The sense of security and warmth such unions offer to children furnishes a rational basis upon which to distinguish between opposite-sex and same-sex couples. The critical role of mothers in a child's development is easy to comprehend. A mother provides warmth in a way that many fathers cannot. For example, mothers possess the ability to "read an

infant's facial expressions, handle with tactile gentleness, and soothe with the use of voice." A. Dean Byrd, *Gender Complementarity and Child-Rearing: Where Tradition and Science Agree*, 6 J. L. & FAM. STUD. at 214 (citing to 1987 Rossi study). Moreover, innate differences between men and women allow a child to benefit "from having before his or her eyes, every day, living models of what both a man and a woman are like." *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. App. Div. 2006). A father's unique contribution to child rearing therefore is also crucial. "The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable." David Popenoe, *Life Without Father: Compelling New Evidence That Fatherhood & Marriage Are Indispensable For The Good Of Children & Society* 146 (1996). And even though some children who join a same-sex marriage family would otherwise have been left in an orphanage with no family at all, that alone is an insufficient basis upon which to change the definition of marriage. The institutionalization of same-sex marriage will water-down the venerated notion of the two-parent biological family, and that harm can be reasonably held to eclipse the benefit same-sex marriage might afford.

Furthermore, once sensible rationales have been advanced supporting a law, the rational basis test must rest. "It could be that the assumptions underlying these rationales are erroneous, but the very fact that they are arguable is sufficient, on rational-basis review, to immunize the legislative choice from constitutional challenge." *Heller v. Doe*, 509 U.S.

312, 333 (1993). According to one observer, "statistics continue to show that the most stable family for children to grow up in is that consisting of a father and a mother." Lynne Marie Kohm, *The Homosexual "Union": Should Gay and Lesbian Partnerships be Granted the Same Status as Marriage?,* 22 J. CONTEMP. L. 51, 61 & nn. 53-54 (1996).[8] Even though some modern observers point to studies extolling the virtues of same-sex couple parenting, their arguments are not dispositive in light of the rule laid out in *Heller*. As stated above, once sensible rationales have been advanced in support of a law, the rational basis test must rest. Accordingly, the rational basis review standard as applied to gender-differentiated marriage laws is satisfied.

B. Morality Provides a Rational Basis Upon Which to Legislate.

Laws are legitimate even when founded upon notions of morality. This Court has long held that the "powers reserved to the states [are] to promote the general welfare, material and moral[s]" of their citizens. *Hoke v. United States*, 227 U.S. 308, 321

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[8] In a more recent large-scale, random, and representative sample study, young-adult children of parents in same-sex relationships were found to be more likely to suffer from a range of emotional and social problems. Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOCIAL SCIENCE RESEARCH 4 (2012). The study was attacked by some, but defended by others. *See*, *e.g.*, Johnson, Byron, et al., *A Social Scientific Response to the Regnerus Controversy* (2012), *available at* http://www.baylorisr.org/ 2012/ 06/a-social-scientific-response-to-the-regnerus-controversy/ (last visited on April 1, 2015).

(1913) (upholding federal laws against prostitution, finding "[t]here is unquestionably a control in the States over the morals of their citizens") (emphasis added). The Court reaffirmed its position more recently in *Barnes v. Glen Theatre Inc.,* where it stated: "The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation." 501 U.S. 560, 569 (1991) (emphasis added) (upholding indecency statute where "statute's purpose of protecting societal order and morality is clear from its text and history").

The compelling rights of governments to legislate in areas of morality was well articulated by the English jurist Lord Patrick Devlin: "If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail . . . [and] the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought." Patrick Devlin, *The Enforcement of Morals*, 45 PROCEEDINGS OF THE BRITISH ACADEMY 1, 10 (1959)*; see also* McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L. J. 1201 (1989). A society that takes morality seriously, therefore, must be permitted to utilize notions of morality in shaping its laws.

i. *Lawrence v. Texas* Only Invalidates Morality-Based Laws Involving Criminalized, Private Behavior.

Some courts have erroneously held that defending traditional notions of morality alone is not a sufficiently rational basis upon which to sustain a law. *Gill v.*

Office of Pers. Mgmt., 699 F.Supp.2d 374, 389 (D. Mass. 2010). The advocates for that approach cite *Lawrence v. Texas*, 539 U.S. 558 (2003), for support. Specifically, they quote, "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." *Id.* at 577. A careful review of *Lawrence*, however, demonstrates that that case is not controlling here and that morality considerations remain a legitimate rational basis upon which to craft certain laws.

An important distinction arises between the Court's statements in *Lawrence v. Texas* and the matter at issue here. *Lawrence* did not overturn the notion that morality can serve as a basis upon which to legislate. Rather, the Court was specifically concerned with the issues of regulating private behavior through the use of criminal law. *See id.* at 578 ("The state may not pass laws "making their private sexual conduct a crime") (emphasis added); *id.* at 571 (The issue is "enforce[ment of] these views . . . through operation of the criminal law") (emphasis added). Gender-differentiated marriage laws, by contrast, do not involve the regulation of private behavior. Marriage is, at its root, a public institution. Nor do gender-differentiated laws involve the use of criminal law to curtail private behavior. Thus, *Lawrence v. Texas* does not govern here. And accordingly, morality-based laws still provide a rational basis upon which to legislate.

ii. In the Alternative, *Lawrence v. Texas* Holds Morality-Based Laws Are Only Insufficient to Regulate Activities; Not to Regulate Non-Activities Like Marriage.

Even if *Lawrence* were read broadly, its holding would still not apply to gender-differentiated marriage laws, which are non-activities. At most, *Lawrence* can stand for the proposition that notions of morality are insufficient to prohibit any activities. *See id.* at 577 (holding morality concerns are "not a sufficient reason for upholding a law prohibiting [homosexual] practice[s]"). But *Lawrence* cannot stand for the proposition that notions of morality are insufficient to support laws governing non-activities like marriage. Indeed, *Lawrence* explicitly made that distinction when it stated: "The present case does not involve . . . whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle." In the context of defining marriage, the "relevant state action is not criminal prohibition, but [the] grant of a statutory privilege. And the asserted liberty interest is not the negative right to engage in private conduct without facing criminal sanctions, but the affirmative right to receive official and public recognition." *Lofton v. Sec'y of Dept. of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004). That distinction between activities and non-activities takes our case outside of the *Lawrence* decision. *Lawrence* is therefore not controlling in our case.

Indeed, marriage has always been legislatively controlled and rooted in notions of morality. The foundation for state regulation of marriage was established in *Maynard*, 125 U.S. 190 (1888). There the Court stated: "Marriage . . . as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." *Id.* At 205 (emphasis added). This insight led Justice Powell to observe that "[t]he state, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people." *Zablocki* v. *Redhail*, 434 U.S. 374, 399 (1978) (concurrence). Thus, even though marriage itself is a fundamental right, states may define marriage based on nothing more than morality concerns alone. As a result, the moral ground upon which state marriage regulations rest is appropriate, and the basis of their regulations are rational.

C. Striking Down Same-Sex Marriage Laws on Grounds They Do Not Satisfy Rational Basis Review Would Render a Long-Held and Widely Accepted Viewpoint Irrational.

Redefining marriage will not change the attitude of our constituents, or good people of all faiths, toward same-sex marriage. More importantly, if same-sex marriage laws are struck down on grounds they do not satisfy the rational basis test, then the long-held and widely accepted viewpoint of countless people will be branded irrational. Their attitudes will be regarded as outside the scope of acceptable modern beliefs. That would be an affront to our

community, as well as to many other religious communities. "It is no less unfair to paint the proponents of the measures as a monolithic group of hate-mongers than it is to paint the opponents as a monolithic group trying to undo American families. Tolerance, like respect and dignity, is best traveled on a two-way street." *DeBoer v. Snyder*, 772 F.3d 388, 413 (6th Cir.2014) (internal citations and quotation marks excluded).

Courts redefining marriage have taken pains to emphasize that their decisions are strictly legal and should not be interpreted as passing judgment on the religious definition of marriage. *See*, *e.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 905 (Iowa 2009) (stating the recognition of same-sex marriage "does not disrespect or denigrate the religious views of many Iowans who may strongly believe in marriage as a dual-gender union"). But courts declaring the marriage laws unconstitutional under the rational basis test have done just that—they have branded religious teachings on marriage as irrational and beyond the pale of acceptable belief. Such an approach risks branding religious people and adherents to traditional notions of marriage as pariahs. We urge the Court not to take that route.

II. THE LEGISLATIVE PROCESS SHOULD BE LEFT TO RUN ITS COURSE SO AS TO AVOID CONFLICT BETWEEN THE RECOGNITION OF SAME-SEX MARRIAGES AND RELIGIOUS LIBERTIES

Should this Court choose to recognize same-sex marriage, religious adherents and organizations that continue to act in accordance with their beliefs will find their religious liberties challenged by state

antidiscrimination laws. These challenges can be averted through state laws protecting the rights of religious parties to decline to participate in same sex marriages. But such laws are unlikely to come about unless the Court permits the marriage debate to play out in the legislative process.

A. The Refusal of Religious Adherents and Organizations to Recognize Same-Sex Marriage Will Give Rise to Many Religious Liberty Issues.

The recognition of same-sex marriage poses a threat to the liberty of religious organizations and individuals whose faith prevents them from acting in accordance with that recognition. Leading First Amendment scholars on both sides of the marriage debate recognize that conflicts between same-sex marriage and the religious liberties of those that oppose it are bound to occur and should be legislatively addressed. *See Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, Douglas Laycock, Anthony R. Picarello Jr. & Robin Fretwell Wilson eds., 2008; *see also*, Marc D. Stern, *Same-Sex Marriage and the Churches*, in *Emerging Conflicts*, 1 (describing scope of anticipated conflicts).

The most obvious areas of conflict will arise with regard to religious institutions and the people they service or employ. *See, e.g. Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (regarding religious marriage counselor's refusal to counsel same sex couple); *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001) (regarding student housing for same-sex couples on campus of religious college); *Catholic Charities v. City of Portland,* 304 F.Supp.2d 77 (D. Me. 2004)

(regarding fringe spousal benefits for same-sex couples employed by religious organizations); Laurie Goodstein, Illinois Bishops Drop Program over Bias Rule, NEW YORK TIMES, Dec. 29, 2011, at A16 (regarding religious organization closing its adoption center rather than place children with same-sex couples). While the so-called "ministerial exception" would afford protections to clergy members in some of the above scenarios, *see Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (2012) (recognizing a limited ministerial exception), it would likely not afford protections in all of them.

Disputes might also arise with regard to religious individuals who provide marriage-related services. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 77 (N.M. 2013), cert. denied, 134 S. Ct. 1787 (2014) (photographer required to pay nearly $7,000 for declining for religious reasons to photograph same-sex marriage ceremony). In 2013, for example, a Mennonite couple declined to host a same-sex marriage in their wedding gallery on grounds it violated their deeply held religious beliefs.[9] The Iowa Civil Rights Commission sued the couple, forcing them to choose between adhering to their faith or face the expense and backlash of public lawsuit. The wedding gallery was located in a renovated building that formerly housed a church, and was a private place of business at the time of the suit. In the face of mounting pressure and public criticisms the parties

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[9] Available at: http://www.nydailynews.com/news/national/iowa-wedding-venue-lawsuit-refuse-same-sex-ceremonies-article-1.1481816 (last visited April 1, 2015).

ultimately reached a private settlement. Sadly, however, the couple chose to stop hosting weddings altogether.[10] The couple stated: "Of course, it's kind of a crushing blow because [weddings are] a major part of our business."

The Orthodox Jewish community that we represent is likely to also encounter some of those conflicts. In fact, our organization has personal knowledge of such an incident. In a local Jewish community in Maryland, a kosher certification agency was compelled to certify the kosher status of a gay wedding out of fear of a discrimination lawsuit. This is but one example of the liability exposure dissenting religious adherents and institutions might face as a result of a judicial recognition of same-sex marriage.

B. Judicial Recognition of Same Sex Marriage Will Displace Potential Religious Liberty Protections Afforded by the Give-And-Take of the Legislative Process.

Allowing the give-and-take of the legislative process to run its course would ameliorate some of the above concerns. A judicial recognition of same sex marriage, by contrast, "would short-circuit" the state political processes. *Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1072 (D. Haw. 2012) (declining to impose same-sex marriage, leaving that decision to the legislature) (quotation omitted). Where public debate exists and legislative action is contemplated,

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[10] Available at: http://www.desmoinesregister.com/story/news/investigations/2015/01/28/gortz-haus-owners-decide-stop-weddings/22492677/ (last visited April 1, 2015).

extra consideration should be given to the "doctrine of judicial self-restraint" which "requires [the Court] to exercise the utmost care whenever we are asked to break new ground in this field." *Collins v. City of Harker Heights, Tex*, 503 U.S. 115, 125 (1992). "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

In *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), this Court highlighted the importance of letting the people make difficult policy choices through democratic means. Justice Kennedy's plurality opinion emphasized that "[o]ur constitutional system embraces . . . the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Id.* at 1636-37.

> Were the Court to rule that the question addressed by Michigan voters is . . . too delicate to be resolved [by the people] . . . that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then . . . to act through a lawful electoral process.

Id. at 1637; *see also id.* at 1651 (Breyer, J., concurring) ("[T]he Constitution creates a democratic political system through which the people themselves must together find answers to disagreements of this kind." (internal citations and quotation marks

excluded)). Striking down the state marriage laws will turn a very active political debate into a dead end. Moreover, it would communicate a profound and unjustified mistrust in the ability of ordinary Americans to debate and decide important social issues for themselves. As justice Scalia aptly noted, judicial determination of such an important question "cheat[s] both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat." *Windsor*, 133 S.Ct. at 2711 (Scalia, J., dissenting).

Professor Laycock explained that unavoidable conflict between same-sex marriage proponents and conscientious objectors does not necessarily mean unmanageable conflict. He stated: "For the most part, these conflicts are not zero-sum games, in which every gain for one side produces an equal and opposite loss for the other side. If legislators and judges will treat both sides with respect, harm to each side can be minimized." 35 Douglas Laycock, Afterword, in *Emerging Conflicts* 196. Legislative consideration of same sex marriage would enable tradeoffs in which religious liberty protections can be enacted alongside same sex marriage recognition. Judicial recognition of same-sex marriage, however, puts a thumb on one side of the scale. It robs religious dissenting minority communities of the opportunity that our democratic system of government has committed to affording them. Namely, to be heard and have their interests protected. Allowing the give-and-take of the legislative process to runs its course, therefore, should be of paramount importance.

C. The Court Should Consider Applying First Amendment Protections for Religious Dissenters and Reconsider Free Exercise Exemptions From Generally Applicable Laws.

If this Court constitutionalizes same-sex marriage, it should do so in light of the protections afforded by the First Amendment. Primarily, the First Amendment should be taken into account with regard to marriage discrimination or sexual orientation discrimination claims. As the law currently stands, *Employment Division v. Smith* would not allow religious adherents and organizations to seek shelter under the First Amendment's freedom of religion clause. 494 U.S. 872, 884 (1990) (holding governments may refuse to recognize religious exemptions to generally applicable laws). In *Church of the Lukumi v Hialeah*, however, Justice Souter supported the idea that *Smith*'s ruling should be reconsidered. 508 U.S. 520, 571-77 (1993) (Souter, J., concurring in the judgment) (noting the rule announced in *Smith* had never been briefed nor argued).

First Amendment protections that should be applied to same-sex-marriage and religious liberty conflicts include the freedoms of speech, association, and religion. *See* U.S. Const. amend. I. The Free Speech Clause prohibits governments from discriminating against a religious institution's viewpoint on sexuality. *See generally*, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (states may not require parade organizers to recognize legitimacy of homosexual group and include them in parade);

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (public schools may not deny access to church wishing to show religiously oriented film series about family values and child-rearing). It also protects the right of religious institutions to retain their expressive character through their own membership policies. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding First Amendment prohibits state law forcing Boy Scouts to accept homosexual Scout leaders against religious objections). The importance of First amendment protections in the arena of same-sex marriage discrimination claims is not hard to envision. *See*, *e.g.*, *Elane Photography*, 309 P.3d at 59, cert. denied, 134 S. Ct. 1787 (2014) (Supreme Court declined to hear photographer's freedom of speech case when she refused to photograph same-sex ceremony for religious reasons). A rule of law that takes the weight of the competing constitutional interests into account would better serve justice than a rule of law that ignores them.

Without taking First Amendment concerns into account, the Court's decision will make it far more difficult for legislatures to do so later on. Of course the Court cannot render advisory opinions on specific cases, but it should indicate it understands the range of religious liberty implications this case brings to bear, and that it understands that those issues will have to be addressed in future cases. The issues are judicially manageable, but this Court must acknowledge their existence, so that lower courts and legislatures will take them seriously when they arise in the wake of this Court's decision.

CONCLUSION

We ask that the judgments below be affirmed, and that this Court make clear its commitment to protect the religious liberty of religious organizations that decline to celebrate same-sex marriages.

Respectfully submitted,

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