

IN THE  
**United States Court of Appeals**  
FOR THE TENTH CIRCUIT

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DEREK KITCHEN, individually, *et al.*,

*Plaintiffs-Appellees,*

—v.—

GARY R. HERBERT, in his official capacity as Governor of Utah, *et al.*,

*Defendants-Appellants.*

*(caption continued on inside cover)*

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Case No. 13-4178: Appealed from a Decision of the United States District Court  
for the District of Utah · Civil Case No. 2:13-CV-00217-RJS · Honorable Robert J. Shelby  
Case Nos. 14-5003 and 14-5006: Appealed from a Decision of the United States District Court  
for the Northern District of Oklahoma · Civil Case No. 04-CV-848-TCK-TLW · Honorable Terence C. Kern

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**BRIEF FOR AMICI CURIAE EPISCOPAL DIOCESE OF UTAH; BISHOP  
OF THE EPISCOPAL DIOCESE OF UTAH; MORMONS FOR EQUALITY;  
RECONSTRUCTIONIST RABBINICAL ASSOCIATION; RECONSTRUCTION-  
IST RABBINICAL COLLEGE; UNION FOR REFORM JUDAISM; UNITARI-  
AN UNIVERSALIST ASSOCIATION; UNITED CHURCH OF CHRIST; AFFIR-  
MATION; COVENANT NETWORK OF PRESBYTERIANS; FRIENDS FOR  
LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER CONCERNS;  
METHODIST FEDERATION FOR SOCIAL ACTION; MORE LIGHT PRESBY-  
TERIANS; PRESBYTERIAN WELCOME; RECONCILING MINISTRIES  
NETWORK; RECONCILINGWORKS: LUTHERANS FOR FULL PARTICIPA-  
TION; RELIGIOUS INSTITUTE, INC.; ALL SOULS UNITARIAN CHURCH  
OF TULSA; CATHEDRAL OF HOPE OF OKLAHOMA CITY; CHURCH OF  
THE OPEN ARMS OF OKLAHOMA CITY; CHURCH OF THE RESTORA-  
TION OF TULSA; CONGREGATION KOL AMI OF SALT LAKE CITY;  
EPWORTH UNITED METHODIST CHURCH OF OKLAHOMA CITY;  
FELLOWSHIP CONGREGATIONAL UNITED CHURCH OF CHRIST OF  
TULSA; FIRST UNITARIAN CHURCH OF OKLAHOMA CITY;  
MAYFLOWER CONGREGATIONAL UNITED CHURCH OF CHRIST  
OF OKLAHOMA CITY; MT. TABOR LUTHERAN CHURCH OF SALT  
LAKE CITY; ST. STEPHEN'S UNITED METHODIST CHURCH OF  
NORMAN, OKLAHOMA; TRINITY CHRISTIAN CHURCH OF EDMOND,  
OKLAHOMA; UNITED CHURCH OF NORMAN, OKLAHOMA; AND  
93 INDIVIDUAL FAITH LEADERS IN OKLAHOMA AND UTAH  
IN SUPPORT OF AFFIRMANCE IN FAVOR OF PLAINTIFFS-APPELLEES**

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MARY BISHOP, *et al.*,

*Plaintiffs-Appellees,*

—and—

SUSAN G. BARTON, *et al.*,

*Plaintiffs-Appellees/Cross-Appellants,*

—v.—

SALLY HOWE SMITH, in her official capacity as Court Clerk  
for Tulsa County, State of Oklahoma,

*Defendant-Appellant/Cross-Appellee.*

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned states that none of the organizations that join this brief issues stock or has a parent corporation that issues stock.

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**STATEMENT PURSUANT TO FED. R. APP. P. 29(a) & 29(c)(5)**

Pursuant to Rules 29(a) & 29(c)(5) of the Federal Rules of Appellate Procedure, the undersigned states that all parties have consented to the filing of this *amicus curiae* brief: Letters of consent to the filing of all *amicus curiae* briefs were filed by each party with the Clerk of the Court. The undersigned further states that no counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no persons or entities other than the *amici curiae* joining this brief, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

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## **INTERESTS OF *AMICI CURIAE***

*Amici curiae* (“*Amici*”) represent a broad range of religious groups, organizations, and leaders from Utah, Oklahoma, and nationwide who support equal treatment for same-sex couples with respect to civil marriage. While *Amici* come from faiths that have approached issues affecting lesbian and gay people and their families in different ways over the years, they are united in the belief that, in our diverse and pluralistic society, particular religious views or definitions of marriage should not be permitted to influence who the state allows to marry. Such rights must be determined by religiously neutral principles of equal protection under the law.

The individual interests of each of the *Amici* are listed in Addendum A to this brief.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Over a century and a half ago, Alexis de Tocqueville reflected on the central role of religion in the birth of the English colonies in America and its “peculiar power” in the cultural life of the United States, while simultaneously observing the necessary corollary that lies at the heart of religious freedom: “In America religion has, if one may put it so, defined its own limits. There the structure of religious life has remained entirely

distinct from the political organization. It has therefore been easy to change ancient laws without shaking the foundations of ancient beliefs.”<sup>1</sup>

Tocqueville’s reflection bears directly on the cases before this Court. By historical and legal tradition, American pluralism extends to religion and its expression. *Amici* here embrace and embody that pluralism and submit that the judgments below should be affirmed as consistent with fundamental principles of equal protection and religious freedom. In contrast to the *Kitchen* Appellants and those *amicus curiae* organizations urging reversal that would presume to declare a near-universal belief with respect to marriage within and across religions,<sup>2</sup> *Amici* here bear witness to the diversity of religious viewpoints on marriage across various faiths and denominations.

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<sup>1</sup> Alexis de Tocqueville, *Democracy in America*, Vol. II, Part 1, Ch. 1, at 432 (J.P. Mayer ed. (1969), George Lawrence trans. (1966), First Harper Perennial Modern Classics (2006)) (paragraph break omitted).

<sup>2</sup> See Br. of Appellants at 90-93, *Kitchen v. Herbert* (No. 13-4178) (Feb. 3, 2014). See also, e.g., Brief of Liberty Counsel, Inc. as *Amicus Curiae* Supporting Appellants at 28 (Feb. 10, 2014) (Nos. 13-4178, 14-5003, 14-5006) (characterizing belief that marriage is union between a man and a woman as belonging generally to “religious adherents”); Br. of U.S. Conference of Catholic Bishops, *et al.* as *Amici Curiae* Supporting Appellants at 4 (Feb. 10, 2014) (Nos. 13-4178, 14-5003, 14-5006) (characterizing *amici* “faith communities” as believing in “virtues of husband-wife marriage” without regard for range of views on marriage within *amici* denominations).



The American religious panorama embraces a multitude of theological perspectives on lesbian and gay people and same-sex relationships. A vast range of religious perspectives affirms the inherent dignity of lesbian and gay people, their relationships, and their families. This affirmation reflects the deeply rooted belief, common to many faiths, in the essential worth of all individuals and, more particularly, the growing respect accorded within theological traditions to same-sex couples. Thus, some faiths celebrate same-sex couples' marriages identically to those of different-sex couples. Others solemnize same-sex relationships in ways other than marriage.

Faiths embracing same-sex couples – both theologically and with respect to the distinct issue of equality under civil law – participate in the mainstream of American religious observance. They include Mainline Protestant denominations such as the United Church of Christ and the Episcopal Church; the Unitarian Universalist Church; portions of the Religious Society of Friends (Quakers); and Judaism's Reform, Reconstructionist, and Conservative movements. Millions of religious individuals from other faiths also embrace and celebrate same-sex couples, including members of many other Mainline and Evangelical Protestant denominations, Roman Catholics, Mormons, Orthodox Jews, and Muslims.

Utahans and Oklahomans are no exception to this grand and diverse mosaic. Appellants in *Kitchen* assert that Abrahamic faiths with “billions of believers” have formal positions prohibiting same-sex couples from marrying,<sup>3</sup> but this claim ignores the proven diversity of beliefs *among* those billions, including in Utah and Oklahoma. Nor is it even remotely true that all Jewish, Christian, and Muslim denominations have official stances that deny the inherent dignity of lesbian and gay people and their relationships. Myriad faith groups and millions of people of faith across Utah and Oklahoma and nationwide celebrate and embrace same-sex couples and their families.

Eliminating discrimination in civil marriage will not impinge upon religious doctrine or practice. All religions would remain free – as they are today with seventeen states and the District of Columbia permitting same-sex couples to marry – to define *religious* marriage in any way they choose. Nor would affirmance interfere with religious institutions’ constitutionally protected speech or operations. The types of conflicts forecast by certain *amici* favoring reversal already can and sometimes do arise under public accommodation laws whenever religiously affiliated organizations operate in the commercial or governmental spheres. Courts know how to respond if

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<sup>3</sup> Br. of Appellants at 93, *Kitchen v. Herbert* (No. 13-4178) (Feb. 3, 2014).

enforcement of civil rights laws overreaches to infringe First Amendment rights.

Certain *amici* supporting reversal have argued that permitting civil marriages of same-sex couples would gut a longstanding definition of marriage informed by “religious doctrines.”<sup>4</sup> But crediting such arguments would both enshrine a particular religious belief in the law – itself prohibited under the Establishment Clause – and implicitly privilege religious viewpoints that oppose marriage equality over those that favor it. The religious beliefs of certain individuals or faith groups prevalent in any one state cannot be permitted to determine the applicability of fundamental constitutional principles that are national in scope.

For these and other reasons, civil recognition of same-sex relationships, including through marriage, is fundamentally consistent with the religious pluralism woven into the fabric of American law, culture, and society. Affirmance in these two cases would not amount to “taking sides” with one religious view against another or constitute an attack on religion. Nor would it signal a judicial imprimatur on changing social mores. Rather, affirmance would recognize the creative tension inherent in religions’

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<sup>4</sup> See, e.g., Br. of U.S. Catholic Bishops, *supra* note 2, at 3.

interface with our pluralistic, changing society while confirming that all, regardless of faith, are entitled to equal protection under the law.

## ARGUMENT

The American religious landscape is vast and diverse.<sup>5</sup> Religious adherents differ on contentious issues, and religious bodies have themselves

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<sup>5</sup> According to survey data from the Pew Forum on Religion & Public Life, more than 90% of Americans believe in God or a universal spirit and more than 80% have some formal religious affiliation. U.S. Religious Landscape Survey, Pew Forum on Religion & Public Life, *Religious Beliefs and Practices: Diverse and Politically Relevant* (June 2008), at 5, 8, available at <http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf>. Religious affiliations and viewpoints also are diverse:

- i. While over 75% of religiously affiliated Americans are Christian, this group is comprised of: Protestants, including Evangelical (26.3%), Mainline (18.1%), and Historically Black (6.9%) churches; Roman Catholics (23.9%); Mormons (1.7%); Jehovah's Witnesses (0.7%); Orthodox (0.6%); and Others (0.3%).
- ii. Other religiously affiliated Americans are diverse as well, comprised of Jews (1.7%), Buddhists (0.7%), Muslims (0.6%), Hindus (0.4%), and other faiths (approximately 1.5%).
- iii. Yet other sizeable blocks of the American public are unaffiliated, whether agnostic (2.4%), atheist (1.6%), or nothing in particular (12.1%).

*Id.* at 217. In Utah, 58% of the population identifies as Mormon, 16% is religiously unaffiliated, 10% is Catholic, 7% is Evangelical Protestant, 6% is Mainline Protestant, and 1% identify as historically Black Protestant; in Oklahoma, 53% of the population identifies as Evangelical Protestant, 16% is Mainline Protestant, 12% is Catholic, 12% is religiously unaffiliated, and 3% identify as historically Black Protestant. U.S. Religious Landscape Survey, Pew Forum on Religion & Public Life, *Religious Affiliation: Diverse and Dynamic* (February 2008), at 98-99 available at <http://religious.pewforum.org/pdf/report-religious-landscape-study-full.pdf>.

evolved and disagreed over time – on marriage as well as other civil rights and social issues.<sup>6</sup> In view of that history and the wide range of modern religious thought on same-sex unions, it would be a mistake to elevate any one view on marriage above all others as the “Christian” or “religious” view. Indeed, it would be constitutionally inappropriate, because civil marriage is a secular institution, *see Maynard v. Hill*, 125 U.S. 190, 210 (1888), and the Constitution bars the government from favoring certain religious views over others, *see Larson v. Valente*, 456 U.S. 228, 244 (1982). Religious freedom means that all voices may contribute to our national conversation, but particular religious perspectives on marriage cannot be permitted to control the civil definition of marriage for all.

**I. A Wide Cross-Section Of American Religious Traditions Recognizes The Dignity Of Lesbian And Gay People And Their Relationships**

With time, and across traditions, religious Americans have affirmed that the dignity of lesbian and gay people logically and theologically follows

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<sup>6</sup> *See* Michael Perry, *Religion in Politics*, 29 U.C. Davis L. Rev. 729, 772 n.94 (1996) (chronicling shifts in religions’ views on usury, the dissolubility of marriages, and slavery, and noting that “[i]n each case one can see the displacement of a principle or principles that had been taken as dispositive”). As one example, the American Baptist Church once believed that churches and other institutions should be segregated on the basis of race, but later revised that view. *See* Pamela Smoot, *Race Relations: How Do Baptists Treat Their Brothers and Sisters?*, in *History Speaks To Hard Questions Baptists Ask* (2009), available at <http://www.baptisthistory.org/smootracerelations.pdf>.

from the premise that all persons have inherent dignity. In some traditions, this affirmation has affected religious practice – *e.g.*, in the ordination of clergy. In others, it has led to various forms of religious affirmation of same-sex unions. All of this confirms that no one “religious” view of even the rite of marriage predominates in America, putting aside the separate question of whether there is a common religious viewpoint on civil marriage.

**A. The Inherent Dignity Of Lesbian And Gay Individuals Informs The Theology Of Numerous Religious Believers And Bodies**

Nearly three decades ago, the United Church of Christ, with 1.1 million members today, adopted a policy of membership nondiscrimination with regard to sexual orientation.<sup>7</sup> In 1989, the 45th General Assembly for the Union of Reform Judaism, which represents 1.3 million Reform Jews, resolved to “urge [its] member congregations to welcome gay and lesbian Jews to membership, as singles, couples, and families” and to “embark upon a movement-wide program of heightened awareness and education to

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<sup>7</sup> Resolution, General Synod of the United Church of Christ, *Opening and Affirming Resolution* (July 2, 1985), available at <http://www.uccoalition.org/about/history/ucc-actions/> (citing Romans 12:4 for proposition that “Christians . . . are many members, but . . . one body in Christ” and encouraging congregations to adopt “a Covenant of Openness and Affirmation” with lesbian and gay members of the faith).

achieve the fuller acceptance of gay and lesbian Jews in our midst.”<sup>8</sup> These are but two examples – views on this subject abound, and common to them is the foundational theological belief in the dignity of lesbian and gay Americans *as persons*. The Episcopal Church,<sup>9</sup> the United Methodist Church,<sup>10</sup> the Evangelical Lutheran Church in America,<sup>11</sup> the Presbyterian Church (U.S.A.),<sup>12</sup> the Unitarian Universalist Church,<sup>13</sup> and

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<sup>8</sup> Resolution, Union of Reform Judaism, 60th General Assembly, *Gay And Lesbian Jews* (Nov. 1989), available at [http://urj.org/about/union/governance/reso//?syspage=article&item\\_id=2065](http://urj.org/about/union/governance/reso//?syspage=article&item_id=2065). Cf. Central Conference of American Rabbis, *Report of the Ad Hoc Committee on Homosexuality and the Rabbinat of the Central Conference of American Rabbis Annual Convention*, at 262 (1990), available at [http://borngay.procon.org/sourcefiles/CCAR\\_Homosexuality.pdf](http://borngay.procon.org/sourcefiles/CCAR_Homosexuality.pdf) (“all Jews are religiously equal regardless of their sexual orientation”).

<sup>9</sup> Resolution 2006-A167, the 75th General Convention of The Episcopal Church (2006), available at [http://www.episcopalarchives.org/cgi-bin/acts/acts\\_resolution-complete.pl?resolution=2006-A167](http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2006-A167).

<sup>10</sup> United Methodist Church, *Social Principles & Creed*, available at <http://www.umc.org/what-we-believe/the-social-community> (last visited February 22, 2014).

<sup>11</sup> Evangelical Lutheran Church in America, *Frequently Asked Questions about the 2009 Churchwide Assembly actions regarding human sexuality*, available at <http://www.elca.org/en/Faith/Faith-and-Society/Social-Statements/Human-Sexuality> (last visited Feb. 22, 2014).

<sup>12</sup> Final Report as approved by the 217th General Assembly, Theological Task Force on Peace, Unity and Purity of the Church, *A Season of Discernment*, at 20 (2006), available at <http://apps.pcusa.org/peaceunitypurity/finalreport/final-report-revised-english.pdf>.

Reconstructionist Judaism<sup>14</sup> are among the many other faith groups in Utah, Oklahoma and nationwide that affirm officially the sacred worth and inherent dignity of lesbian and gay people. Even the Mormon Church leadership, on record as opposing marriage for same-sex couples,<sup>15</sup> publicly “affirm[ed] that those who avail themselves of laws or court rulings authorizing same-sex marriage should not be treated disrespectfully” because “the gospel of Jesus Christ teaches us to love and treat all people with kindness and civility.”<sup>16</sup>

Religious individuals, too, have demonstrated an increasingly positive view of lesbian and gay Americans. According to a Public Religion Research Institute study, *the majority of Americans from most major*

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<sup>13</sup> Business Resolution, General Assembly of the Unitarian Universalist Association, *Confronting Sexual Orientation and Gender Identity Discrimination* (2010), available at <http://www.uua.org/statements/statements/169267.shtml>.

<sup>14</sup> Rabbi Shawn I. Zevit, *JRF Homosexuality Report and Inclusion of GLBTQ Persons*, available at <http://archive.is/3a6x> (last visited Feb. 22, 2014) (citing Reconstructionist Commission on Homosexuality, *Homosexuality and Judaism: The Reconstructionist Position* (1993)).

<sup>15</sup> See generally Brief for United States Conference of Catholic Bishops, National Assn. of Evangelicals, The Church of Jesus Christ of Latter-day Saints, et al. as *Amici Curiae* Supporting Appellants (Feb. 10, 2014) (Nos. 13-4178, 14-5003, 14-5006).

<sup>16</sup> The Church of Jesus Christ of Latter-day Saints, Official Statement, *Church Instructs Leaders on Same-Sex Marriage* (Jan. 10, 2014), available at <http://www.mormonnewsroom.org/article/church-instructs-leaders-on-same-sex-marriage>.



*religious groups* have positive moral and theological views of gay and lesbian people, including 62% of Roman Catholics, 63% of white Mainline Protestants, and 69% of non-Christian, religiously affiliated Americans.<sup>17</sup> While individual liberties should not be subject to public opinion polls, these figures put into perspective the statement of Appellants in *Kitchen* that “religious support for defining marriage as between one man and one woman is both widespread and deeply rooted in the religious texts of all three major Abrahamic faiths.”<sup>18</sup> Many of the denominations falling under that rubric (including Roman Catholics and numerous major Protestant denominations) have a *majority* of adherents who disagree with church leaders with respect to marriage equality.

Meanwhile, 57% of white Mainline Protestants and 50% of American Roman Catholics support the ordination of gay and lesbian clergy.<sup>19</sup> Unsurprisingly, therefore, some denominations – both Christian and Jewish

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<sup>17</sup> Public Religion Research Institute, *Generations at Odds: The Millennial Generation and the Future of Gay and Lesbian Rights*, at 18-20 (Aug. 29, 2011), available at <http://publicreligion.org/site/wp-content/uploads/2011/09/PRRI-Report-on-Millennials-Religion-Gay-and-Lesbian-Issues-Survey.pdf>.

<sup>18</sup> See Br. of Appellants at 92, *Kitchen v. Herbert* (No. 13-4178) (Feb. 3, 2014).

<sup>19</sup> Public Religion Research Institute, *supra* note 17, at 20.

– long have permitted openly lesbian and gay clergy.<sup>20</sup> Others more recently have amended their practices to admit openly lesbian and gay people to various forms of ministry.<sup>21</sup> Whether it be the ordination of lesbian and gay clergy, the express welcome to lesbian and gay congregants and their

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<sup>20</sup> The Unitarian Universalist Church called its first openly gay minister to serve as leader for a congregation in 1979. *See* Unitarian Universalist LGBT History Timeline, Unitarian Universalist Association of Congregations, available at <http://www.uua.org/lgbtq/history/20962.shtml> (last visited Feb. 22, 2014). The seminary for Reconstructionist Jews began accepting gay and lesbian applicants in 1984. *See* Zevit, *supra* note 14. The Central Conference of American Rabbis endorsed the view in 1990 that “all rabbis, regardless of sexual orientation, be accorded the opportunity to fulfill the sacred vocation that they have chosen.” Central Conference of American Rabbis, *supra* note 8, at 261. The Episcopal Church ordained its first openly gay priest in 1977. *See* Mireya Navarro, *Openly Gay Priest Ordained in Jersey*, N.Y. Times, Dec. 17, 1989.

<sup>21</sup> *See, e.g.*, Presbyterian Church (U.S.A.), *Presbyterian Church (U.S.A.) Approves Change In Ordination Standard* (May 10, 2011), available at <http://www.pcusa.org/news/2011/5/10/presbyterian-church-us-approves-change-ordination/> (reporting that new language in church’s Book of Orders effectively would open ordained ministry to persons in same-gender relationships); Amy Stone, *Out and Ordained, New York’s Jewish Theological Seminary Graduates its First Openly Lesbian Rabbi*, Lilith (2011), available at <http://lilith.org/articles/out-and-ordained/> (indicating that Conservative Jewish movement welcomed gay and lesbian rabbinical and cantorial students to Jewish Theological Seminary in 2007); Bishop Mark S. Hanson, *Message to Rostered Leaders* (Aug. 22, 2009), available at <http://www.salemsycamore.org/committees/task-forces/civil-unions/Bishop%20August%202009.pdf> (last visited Feb. 22, 2014) (citing Resolution 2 of the 2009 Evangelical Lutheran Church in America Churchwide Assembly as resolving to find “a way for people in such publicly accountable, lifelong, monogamous, same-gender relationships to serve as rostered leaders of the church”); Sarah Pulliam Bailey, *ELCA Lutherans Elect First Openly Gay Bishop* (Jun. 3, 2013), available at <http://www.religionnews.com/2013/06/03/elca-lutherans-elect-first-openly-gay-bishop/> (last visited Feb. 24, 2014).

families, or the affirmation that lesbian and gay individuals possess the same inherent dignity as any other person, the American religious landscape is one that includes same-sex couples and their families and that affirms their role in the faith community.

**B. A Vast Spectrum Of American Faith Groups And Religious Observers Affirms Same-Sex Couples' Relationships In A Multitude Of Ways, Including By Celebrating And Solemnizing Their Marriages**

Many faiths also more specifically accord doctrinal and theological affirmation to the loving, committed *relationships* that same-sex couples have elected to enter – unsurprisingly, in ways as diverse as America's religious families. For example, the Salt Lake Friends Meeting has affirmed, in line with approximately 250 other Quaker meetings around the country,<sup>22</sup> that it would “hold marriage under the care of the Meeting for all loving partners who wish to unite under our care.”<sup>23</sup> The Evangelical Lutheran Church in America has described the manner in which same-sex unions are, and are expected to be, like different-sex unions in several constitutive dimensions: “[T]he neighbor and community are best served

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<sup>22</sup> See Friends for Lesbian, Gay, Bisexual, Transgender, and Queer Concerns, *Collected Marriage Minutes*, available at <http://flgbtqc.quaker.org/minutes.html> (last visited Feb. 22, 2014).

<sup>23</sup> Salt Lake Monthly Meeting, Intermountain Yearly Meeting, *Minute* (Mar. 11, 1990), available at <http://flgbtqc.quaker.org/minutes.html>.

when same-gender relationships are lived out with lifelong and monogamous commitments that are held to the same rigorous standards, sexual ethics, and status as heterosexual marriage. [We] surround such couples and their lifelong commitments with prayer to live in ways that glorify God . . . .”<sup>24</sup>

Support for same-sex relationships in religious doctrine and practice likewise has informed a diverse array of formal marriage rituals. The Unitarian Universalist Association began celebrating the unions of same-sex couples as it would any other consenting adult couple’s union in 1979 and formally affirmed this practice in 1984.<sup>25</sup> The Conservative, Reform, and Reconstructionist Jewish movements allow their rabbis to perform religious wedding ceremonies for same-sex couples.<sup>26</sup> The United Church of Christ

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<sup>24</sup> See, e.g., 11th Churchwide Assembly, Evangelical Lutheran Church in America, *Human Sexuality: Gift and Trust* at 20 (Aug. 19, 2009), available at <http://www.elca.org/Faith/Faith-and-Society/Social-Statements/Human-Sexuality>.

<sup>25</sup> See LGBTQ Ministries Multicultural Growth and Witness, *LGBT History & Facts for Unitarian Universalists* (2011), available at <https://www.uua.org/documents/lgbtq/history.pdf>; Resolution of Immediate Witness, General Assembly of the Unitarian Universalist Association, *Support of the Right to Marry for Same-Sex Couples* (1996), available at <https://www.uua.org/statements/statements/14251.shtml>; Unitarian Universalist Association, *Unitarian Universalist LGBTQ: History & Facts*, available at <http://www.uua.org/lgbtq/history/185789.shtml> (last visited Feb. 22, 2014).

<sup>26</sup> See, e.g., E. Dorff, D. Nevins, & A. Reisner, *Rituals and Documents of Marriage and Divorce for Same-Sex Couples*, Rabbinical Assembly (Spring 2012), available at <http://www.rabbinicalassembly.org/sites/default/>

promulgated a new Order for Marriage – a template for marriage ceremonies – that could be used in any marriage ceremony regardless of gender.<sup>27</sup> The Episcopal Church acknowledged in 2000 that its membership includes same-sex couples living in “lifelong committed relationships . . . characterized by fidelity, monogamy, mutual affection and respect, careful, honest communication and the holy love which enables those in such relationships to see in each other the image of God,” and in 2012 approved a provisional liturgy for the blessing of same-sex unions that may be used with the

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files/public/halakhah/teshuvot/2011-2020/same-sex-marriage-and-divorce-appendix.pdf (endorsing Conservative rabbis’ right to solemnize marriages of same-sex couples and memorializing 13-0 vote by Rabbinical Assembly’s Committee on Jewish Law and Standards to approve endorsement); *id.* at 6 (“The Rabbinical Assembly maintains standards of rabbinic practice regarding marriage, and we shall apply the same standards to same-sex couples.”); Resolution, 111th Convention of the Central Conference for American Rabbis, *Resolution On Same Gender Officiation* (Mar. 2000), available at <http://ccarnet.org/rabbis-speak/resolutions/2000/same-gender-officiation/> (Reform movement); *Reconstructionist Movement Endorses Civil Marriage for Same-Sex Couples*, Reconstructionist Rabbinical College, *et al.*, available at <http://www.rrc.edu/news-media/news/reconstructionist-movement-endorses-civil-marriage-same-sex-couples> (last visited Feb. 22, 2014) (noting that in series of resolutions beginning in 1993 Reconstructionist movement affirmed holiness of commitments made by same-sex couples).

<sup>27</sup> United Church of Christ, *Order for Marriage, An Inclusive Version*, available at [http://www.ucc.org/worship/pdfs/323\\_346i\\_order-for-marriage-inclusive.pdf](http://www.ucc.org/worship/pdfs/323_346i_order-for-marriage-inclusive.pdf).

permission of the local bishop.<sup>28</sup> And some faiths that do not celebrate or solemnize marriages of same-sex couples per se accord recognition to them in various other ways.<sup>29</sup>

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<sup>28</sup> See Resolution 2000-D039, the 73rd General Convention of the Episcopal Church (2000), available at [http://www.episcopalarchives.org/cgi-bin/acts/acts\\_resolution-complete.pl?resolution=2000-D039](http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2000-D039); Resolution 2012-A049, the 77th General Convention of the Episcopal Church (2012), available at <http://www.generalconvention.org/gc/resolutions>; see also Episcopal Diocese of Utah, *Bishop's Policy on the Blessing of Same-Sex Couples* (Oct. 2012), available at <http://www.episcopal-ut.org/wp-content/uploads/2013/09/BishopsPolicyonSameSexCplsA.pdf> (last visited Feb. 26, 2014) (authorizing liturgy for blessing of same-sex couples); Episcopal Diocese of Oklahoma, *Policy Regarding Mandatory Consultation Prior to Same-Gender Blessings* (Apr. 2013), available at [http://s3.amazonaws.com/dfc\\_attachments/public/documents/3174655/BishopFinal\\_04\\_April\\_2013Policy\\_for\\_Mandatory\\_Consultation\\_\\_2\\_.pdf](http://s3.amazonaws.com/dfc_attachments/public/documents/3174655/BishopFinal_04_April_2013Policy_for_Mandatory_Consultation__2_.pdf) (last visited Feb. 26, 2014) (same).

<sup>29</sup> For example, although the Presbyterian Church (U.S.A.) does not formally solemnize same-sex couples' marriages, the church through its General Assembly overwhelmingly voted in 2012 (by a vote of 489-152) to "move the whole Presbyterian Church (U.S.A.) into a season of serious study and discernment concerning its meaning of Christian marriage." 2012 Assembly In Brief, Presbyterian Church (U.S.A.), *Same-Gender Marriage*, at 3 (2012), available at <http://www.pcusa.org/media/uploads/oga/publications/assemblyinbrief.pdf>. Same-gender domestic partners of members enrolled in the church's benefits plan became eligible for spousal and child benefits beginning in 2013. See Board of Pensions of the Presbyterian Church (U.S.A.), *Same-Gender Partner Benefits Approved for Benefits Plan of Presbyterian Church (U.S.A.)* (Mar. 3, 2012), available at <http://web.pensions.org/Publications/pensions/Home/Forms%20&%20Publications/Booklets%20&%20Brochures/DomesticPartnerpressrelease.pdf>. The Evangelical Lutheran Church in America's 2009 Churchwide Assembly, meanwhile, resolved by a vote of 619 to 402 to "commit itself to finding ways to allow congregations that choose to do so to recognize, support and hold publicly accountable lifelong, monogamous, same-gender relationships." Hanson, *supra* note 21. Following that action, more than

In short, even limited to the sphere of *religious* marriage, organized religion in the United States exhibits a tremendous diversity of views and practices regarding unions of same-sex couples.

## **II. Recognizing The Necessary Distinction Between Civil And Religious Marriage, A Growing Number Of Faiths Support Civil Marriage Equality**

More than a century ago, the Supreme Court held that “marriage is often termed . . . a civil contract . . . and does not require any religious ceremony for its solemnization.” *Maynard*, 125 U.S. at 210. *Amici* are therefore mindful that their own theological perspectives on marriage are distinct from the civil law on marriage. Recognizing that civil and religious marriage necessarily are two different things, and further undercutting any claim that religion speaks with one voice on marriage, many religions –

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300 Evangelical Lutheran Church in America congregations have performed blessings over same-sex couples’ unions, while many more have adopted other policies and practices affirming same-sex couples’ relationships. *See* ReconcilingWorks, *RIC Congregations List*, available at <http://www.reconcilingworks.org/ric/ric-congregations-list#results> (last visited Feb. 22, 2014).

The Mormon Church, too, announced that “the Church does not object to rights for same-sex couples regarding hospitalization and medical care, fair housing and employment rights, or probate rights.” The Church of Jesus Christ of Latter-day Saints, *Church Responds to Same-Sex Marriage Votes* (Nov. 5, 2008), available at <http://www.mormonnewsroom.org/article/church-responds-to-same-sex-marriage-votes> (last visited Feb. 24, 2014).

including *Amici* here – have distinct positions supporting equal *civil* marriage rights for same-sex couples.

Two Christian denominations that trace their history directly to the Puritans of New England support civil marriage for gay and lesbian couples.<sup>30</sup> Almost seventeen years ago, in 1996, the Unitarian Universalist Association formally resolved to support equal civil marriage rights.<sup>31</sup> In 2004, the Association further affirmed that “Civil Marriage is a Civil Right” and opposed any amendment of the United States Constitution to bar same-sex couples from marrying.<sup>32</sup> The following year, in 2005, the United Church of Christ “affirm[ed] equal marriage rights for couples regardless of gender and declar[ed] that the government should not interfere with couples

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<sup>30</sup> See generally Mark W. Harris, *Unitarian Universalist Origins: Our Historic Faith* (Oct. 2002), available at <http://www.uua.org/info/origins.html> (last visited Feb. 22, 2014); United Church of Christ, *Short Course in the History of the United Church of Christ*, available at <http://www.ucc.org/about-us/short-course/shortcourse.pdf> (last visited Feb. 22, 2014).

<sup>31</sup> Resolution of Immediate Witness, General Assembly of the Unitarian Universalist Association, *Support of the Right to Marry for Same-Sex Couples* (1996), available at <https://www.uua.org/statements/statements/14251.shtml>.

<sup>32</sup> Action of Immediate Witness, General Assembly of the Unitarian Universalist Association, *Oppose Federal Marriage Amendment* (2004), available at <http://www.uua.org/statements/statements/13433.shtml>.



regardless of gender who choose to marry and share fully and equally in the rights, responsibilities and commitment of legally recognized marriage.”<sup>33</sup>

In addition, the Reform,<sup>34</sup> Reconstructionist,<sup>35</sup> and Conservative<sup>36</sup> movements of Judaism all support equal civil marriage rights for same-sex

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<sup>33</sup> Resolution, General Synod of the United Church of Christ, *In Support of Equal Marriage Rights for All* (July 4, 2005), available at <http://www.ucc.org/assets/pdfs/in-support-of-equal-marriage-rights-for-all-with-background.pdf>.

<sup>34</sup> At its 1997 General Assembly, the Union of American Hebrew Congregations (now the Union for Reform Judaism) resolved to “[s]upport secular efforts to promote legislation which would provide through civil marriage equal opportunity for gay men and lesbians.” See General Assembly Resolution, Union of American Hebrew Congregations, *Civil Marriage for Gay and Lesbian Jewish Couples* (Oct. 29 – Nov. 2, 1997), available at [http://urj.org/about/union/governance/reso//?syspage=article&item\\_id=2000](http://urj.org/about/union/governance/reso//?syspage=article&item_id=2000). The 1997 resolution built on a 1996 resolution of the Central Conference of American Rabbis (“CCAR”) “support[ing] the right of gay and lesbian couples to share fully and equally in the rights of civil marriage.” Resolution, 107th Convention of the Central Conference of American Rabbis, *On Gay and Lesbian Marriage* (Mar. 1996), available at <http://ccarnet.org/rabbis-speak/resolutions/1996/on-gay-and-lesbian-marriage-1996/>.

<sup>35</sup> The Jewish Reconstructionist movement adopted a resolution in favor of full civil marriage equality for same-sex couples. See Reconstructionist Rabbinical Association, *et al.*, *Reconstructionist Movement Endorses Civil Marriage for Same-Sex Couples* (Apr. 2004), available at <http://www.rrc.edu/news-media/news/reconstructionist-movement-endorses-civil-marriage-same-sex-couples>.

<sup>36</sup> The Rabbinical Assembly – representing Conservative Judaism – resolved in 2011 to “support the extension of civil rights and privileges granted to married persons to same sex couples,” and as early as 1990, had resolved to “work for full and equal civil rights for gays and lesbians in our national life.” Resolution, Rabbinical Assembly, *Resolution In Support Of Equal*

couples, as does the American Friends Service Committee of the Religious Society of Friends (Quakers).<sup>37</sup> More than three-thousand clergy from numerous faiths have endorsed an open letter by the Religious Institute, Inc. calling for marriage equality.<sup>38</sup> *Amici* also note that the very church founded by the Pilgrims who sailed on the Mayflower in 1620 – First Parish in Plymouth, now a Unitarian Universalist congregation – has issued a proclamation invoking its historical pursuit of religious freedom, recounting its long history of openness to lesbian and gay congregants, and calling for full civil marriage equality for same-sex couples.<sup>39</sup> Given its historical

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*Rights And Inclusion For Gay, Lesbian, Bisexual, And Transgender (GLBT) Persons* (2011), available at <http://www.rabbinicalassembly.org/story/resolution-support-equal-rights-and-inclusion-gay-lesbian-bisexual-and-transgender-glb-person>.

<sup>37</sup> In 2004, the Executive Committee of the American Friends Service Committee Board of Directors, acting at the direction of the full board, approved a “minute” setting forth its “support for equal civil marriage rights for lesbian, gay, bisexual, and transgender people.” See American Friends Service Committee, *AFSC Board Statement on Equal Marriage* (2004), available at <http://afsc.org/sites/afsc.civicactions.net/files/documents/AFSC%20Board%20Minute.pdf>.

<sup>38</sup> Religious Institute, *Religious Declaration on Sexual Morality, Justice, and Healing* (Jan. 2010), available at <http://religiousinstitute.org/node/293>; Religious Institute, *List of Endorsers* (Jan. 10, 2012), available at <http://religiousinstitute.org/list-of-endorsers> (last visited Feb. 23, 2013).

<sup>39</sup> See Resolution, First Parish Church in Plymouth, *Resolution Demanding That All Persons, Regardless Of Sexual Orientation Or Gender Identification, Receive Equal Treatment Under The United States Constitution And The Laws Of The Land* (February 2013), available at

pedigree, the First Parish proclamation underscores the resonance of today's marriage equality debate with the nation's founding ideal of liberty.

In 2006, the Episcopal Church likewise called on federal, state, and local governments to provide same-sex couples protections equivalent to those “enjoyed by non-gay married couples” and “oppose[d] any state or federal constitutional amendment that prohibits same-sex civil marriage or civil unions,” a stance growing out of its “historical support of gay and lesbian persons as children of God and entitled to full civil rights.”<sup>40</sup> A decade ago, the United Methodist Church called for the “equal protection before the law” of couples and families who have “shared material resources, pensions, guardian relationships, mutual powers of attorney, and other such lawful claims.”<sup>41</sup> In line with the advocacy of these faith groups,

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<http://www.firstparishplymouth.org/SiteAssets/Social%20Action/Equal-treatment-lgbti-brief.pdf> (last visited Feb. 28, 2014).

<sup>40</sup> Resolution 2006-A095, the 75th General Convention of The Episcopal Church, *available at* [http://www.episcopalarchives.org/cgi-bin/acts/acts\\_resolution-complete.pl?resolution=2006-A095](http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2006-A095).

<sup>41</sup> *Equal Rights Regardless of Sexual Orientation*, from The Book of Discipline of The United Methodist Church (2004), *available at* <http://master.umc.org/interior.asp?mid=1753> (last visited February 22, 2014).

62% of *all* white mainline Protestants today favor allowing same-sex couples to marry civilly.<sup>42</sup>

Even within faiths that do not believe the government should issue marriage licenses to same sex couples – a position their leaders remain free to express – many adherents (in some cases, a majority) nonetheless have come to support equal access to civil marriage. The Roman Catholic Church hierarchy is strongly opposed to both civil and religious marriage for same-sex couples,<sup>43</sup> yet Catholic teaching joins other mainstream religions in affirming the fundamental human dignity of lesbian and gay individuals and calling for an end to “any forms of injustice, oppression, or violence against them.”<sup>44</sup> Consistent with the latter teachings, many individual American

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<sup>42</sup> Public Religion Research Institute, *A Shifting Landscape: A Decade of Change in American Attitudes about Same-sex Marriage and LGBT Issues* (Feb. 26, 2014), available at [http://publicreligion.org/site/wp-content/uploads/2014/02/2014.LGBT\\_REPORT.pdf](http://publicreligion.org/site/wp-content/uploads/2014/02/2014.LGBT_REPORT.pdf) (last visited Feb. 26, 2014).

<sup>43</sup> United States Conference of Catholic Bishops, *Between Man And Woman: Questions And Answers About Marriage And Same-Sex Unions* (2003), available at <http://www.usccb.org/issues-and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/questions-and-answers-about-marriage-and-same-sex-unions.cfm> (last visited Feb. 22, 2014). See generally Brief for U.S. Conference of Catholic Bishops, *supra* note 15.

<sup>44</sup> See, e.g., Statement, Bishops’ Committee on Marriage and Family, *Always Our Children: A Pastoral Message To Parents Of Homosexual Children And Suggestions For Pastoral Ministers* (1997), available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/>

Catholics have come to favor marriage equality: polling conducted by the Public Religion Research Institute in 2013 showed that 56% of Hispanic Catholics and 58% of white Catholics support marriage for same-sex couples,<sup>45</sup> whereas just three years before, 46% of all Catholics had favored same-sex marriage while 42% of all Catholics had expressed opposition.<sup>46</sup> Individual Mormons have expressed similar support for marriage equality as well: 65% of Mormon Utahans agree that same-sex couples should be allowed to enter civil unions or domestic partnerships, while nearly a third of Mormon Utahans believe that same-sex couples should be allowed to marry civilly.<sup>47</sup> There are American Muslims, too, who believe that their religious

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homosexuality/always-our-children.cfm (last visited Feb. 22, 2014) (observing that “respect for the God-given dignity of all persons means the recognition of human rights and responsibilities,” such that “the fundamental human rights of homosexual persons must be defended and . . . all of us must strive to eliminate any forms of injustice, oppression, or violence against them.”).

<sup>45</sup> Public Religion Research Institute, *supra* note 42.

<sup>46</sup> The Pew Forum on Religion and Public Life, *Religion and Attitudes Toward Same-Sex Marriage* (Feb. 7, 2012), available at <http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religion-and-Attitudes-Toward-Same-Sex-Marriage> (last visited Feb. 22, 2014) (citing comparative data from Aug.-Sept. 2010 and Oct. 2011).

<sup>47</sup> Brooke Adams, *Poll: Utahns Evenly Split on Same-Sex Marriage*, The Salt Lake Tribune, (Jan. 14, 2014), available at <http://www.sltrib.com/sltrib/news/57391605-78/marriage-sex-percent-state.html.csp> (last visited Feb. 28, 2014).

faith is not contravened when the government affords marriage rights to same-sex couples.<sup>48</sup>

The preceding surveys belie the claim of Appellants in *Kitchen* and certain *amici* favoring reversal that American religions speak uniformly or overwhelmingly in opposition to civil marriage equality for same-sex couples. To the contrary, American religious thought and practice embrace a rich diversity. No one view speaks for “religion” – even if, contrary to the Establishment Clause, it were appropriate to give weight to religious views in the application of the Constitution’s secular promise of equal protection.

### **III. Permitting Same-Sex Couples To Marry Civilly Will Not Impinge Upon Religious Beliefs, Practices, Or Operations, But Rather Will Prevent One Set Of Religious Beliefs From Being Imposed Through Civil Law**

Where civil marriages of same-sex couples are permitted, the First Amendment’s guarantees continue to protect the decisions of those faiths that choose not to solemnize such marriages, as well as those that do. Therefore, affirmance in these two cases would not alter the freedom of all religious communities to decide which religious unions are consistent with their beliefs. Nor would affirmance burden religious persons and institutions

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<sup>48</sup> See, e.g., Press Release, Muslims for Progressive Values, *Muslims for Progressive Values Applauds President Obama’s Support of Marriage Equality* (May 9, 2012), available at <http://mpvusa.org/mpv-on-supreme-court-decisions/> (applauding *Windsor* and *Perry* decisions for marriage equality).

in the pursuit of their religious activities or the exercise of conscience. To the contrary, reversal predicated on certain of the arguments of religious *amici* regarding express or implicit religious definitions of marriage would improperly favor one set of religious views (*e.g.*, rejecting civil marriage for same-sex couples) against other religious views (*e.g.*, like those of *Amici* here, favoring equal treatment under law for same-sex couples).

**A. Affirmance Would Not Interfere With The Exercise Of Religious Freedoms, Including The Freedom To Set Parameters For Religiously Sanctioned Marriage That May Differ From Those Established Under Civil Law**

However civil authorities define marriage, existing constitutional principles protect the autonomy of various religious entities to define *religious* marriages to comport with their respective tenets. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 (2012) (affirming principle that certain “matter[s] are] ‘strictly ecclesiastical,’” meaning they are “the church’s alone” (citation omitted)). In this manner, religion and the state reciprocally respect their own proper spheres. *See generally McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (“[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”).

This tradition of respect for religious autonomy has, indeed, permitted various religions to maintain rules regarding religious marriage that would be unenforceable under civil law – declining to sanctify or even recognize, for example, marriages between persons of different faiths and races, or successive marriage following divorce. Conservative Judaism, for example, prohibits interfaith marriages,<sup>49</sup> as did the Roman Catholic Church’s Code of Canon Law for much of the twentieth century.<sup>50</sup> The Mormon Church discouraged interracial marriage well after the Supreme Court’s ruling in *Loving v. Virginia*, 388 U.S. 1 (1967), that the Constitution requires states to allow interracial civil marriages.<sup>51</sup> As for unions following divorce, the Roman Catholic Church teaches that “[t]he remarriage of persons divorced from a living, lawful spouse is not permitted by God’s law as taught by

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<sup>49</sup> “Rabbis and cantors affiliated with the Conservative Movement may not officiate at the marriage of a Jew to a non-Jew, may not co-officiate with any other clergy, and may not officiate or be present at a purely civil ceremony.” Leadership Council on Conservative Judaism, *Conservative View on Intermarriage* (Mar. 7, 1995), available at <http://www.mazorguide.com/living/Denominations/conservative-intermarriage.htm>.

<sup>50</sup> Michael G. Lawler, *Interchurch Marriages: Theological and Pastoral Reflections*, in *Marriage in the Catholic Tradition: Scripture, Tradition, and Experience*, Ch. 22, at 222 (Todd A. Salzman, et al., eds., 2004).

<sup>51</sup> See *Interracial Marriage Discouraged*, The Deseret News, June 17, 1978, at 4 (“Now, the brethren feel that it is not the wisest thing to cross racial lines in dating and marrying.” (quoting President Spencer W. Kimball in a 1965 address to students at Brigham Young University)).



Christ”<sup>52</sup> and Roman Catholic priests “cannot recognize the union of people who are civilly divorced and remarried,”<sup>53</sup> even though states do.

The existence and persistence of such differences demonstrate that affirmance in these two cases would not burden religious liberty. Were more states to allow the civil marriages of same-sex couples – as they do for interfaith couples, interracial couples, and couples re-marrying after divorce – religions that disapprove of such unions would remain free to define *religious* marriage however they wish. *Amici* urging reversal and all faith groups for that matter could withhold spiritual blessing of any marriages and indeed bar those entering into them from being congregants at all, just as they are now free to do so on grounds of faith, race, prior marital status, or any other characteristic deemed religiously significant.

Eliminating Utah’s and Oklahoma’s unconstitutional and unequal treatment of same-sex couples under civil law would not change, mandate, control, or interfere with any parties’ religious practices. The religious freedoms embodied in the Constitution guarantee that diverse religious

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<sup>52</sup> United States Conference Of Catholic Bishops, *United States Catholic Catechism For Adults* 290 (2006).

<sup>53</sup> United States Conference Of Catholic Bishops, *Compendium – Catechism Of The Catholic Church* ¶ 349 (2006).

traditions and beliefs, including the sole right to define who can marry religiously, will flourish regardless of changes in civil marriage laws.

**B. Allowing The Civil Marriages Of Same-Sex Couples Will Not Burden Religious Organizations’ Ability To Operate And Govern Their Own Religious Affairs**

Appellants in *Kitchen*, as well as some *amici* supporting reversal, nonetheless suggest that allowing the civil marriages of same-sex couples will curtail religious organizations’ ability to operate their own affairs and serve their communities. For example, *amicus* Becket Fund raises the specter that, if this Court affirms the district courts’ rulings, religious institutions that wish not to allow marriages of same-sex couples as a matter of religious doctrine will be exposed to a “wave of private civil litigation under anti-discrimination laws” relating to public accommodations, housing, and employment. Br. for Becket Fund for Religious Liberty at 12-20. *See also* Br. for Liberty Counsel at 29 (warning that “those with sincerely held religious beliefs against same-sex unions being recognized will find their free exercise rights threatened”); *Kitchen* Appellants’ Br. at 94-97.

But the types of disputes anticipated by these *amici* have more to do with existing civil rights laws barring discrimination based on sexual orientation, where such laws exist, than with any conflicts likely to arise based on marital status should this Court affirm the judgments below. The

extent to which any religious institution is subject to state regulation as an employer or as a public accommodation is determined by existing statutes and relevant, binding case law. Indeed, just two years ago the Supreme Court unanimously ruled that an employment discrimination claim by the former employee of a religious institution had to give way to the First Amendment right of the employer to determine who qualifies as a minister under its *religious* understanding of that term. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. at 707, 709. When religious institutions act in a more secular sphere – *e.g.*, operating a catering facility or handling foster care placements – the balance between civil rights enforcement and First Amendment liberties may vary in particular cases. But such issues have nothing to do with the constitutional right to marry and are neither presented for decision here nor even within this Court’s jurisdiction.

**C. While *Amici* Respect All Fellow Faiths, Including Those That Embrace Different Religious Views On Marriage, It Is Constitutionally Impermissible To Impose Religious Views Through Civil Law To Curtail The Right Of Same-Sex Couples To Civilly Marry**

Since this nation’s founding, the concept of religious liberty has included the equal treatment of all faiths without discrimination or preference. *See Larson*, 456 U.S. at 244 (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially

preferred over another.”). Government action denying marriage rights on religious or quasi-religious grounds to same-sex couples violates this principle by putting the force of law behind one set of religious views.

Several *amici* in this case urge reversal on avowedly religious grounds that would wreak havoc with the Establishment Clause. For example, *amici* Catholic Bishops, *et al.* explain that some Evangelical Christians’ opposition to allowing same-sex couples to marry is based on “a biblical view focused on uniting a man and woman in a divinely sanctioned companionship for the procreation and rearing of children and the benefit of society.” *See* Br. for Catholic Bishops, *et al.*, at 9. But it would be plainly improper to enshrine such religious views in civil law. “Courts are not arbiters of scriptural interpretation” and “should not undertake to dissect religious beliefs.”

*Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981).

Certain *amici* favoring reversal insist that their doctrinal opposition to marriage for same-sex couples is fueled not by animus towards gay people but rather “[f]idelity to [r]eligious [b]eliefs” regarding “the personal, familial, and social virtues of traditional marriage.” *See* Br. of Catholic Bishops, *et al.* at 7-8. But it is not the dimension of animus that renders these justifications irrelevant and inadmissible to determine the permissible

scope of civil marriage rights – it is the fact that these views are frankly *religious*. Any attempt to have the Court embrace specifically religious views or definitions of marriage must be rejected – among other reasons because that result would disfavor and disadvantage *other religious believers*, like *Amici* here, who do not embrace the arguments or conclusions of *amici* seeking reversal.

By affirming the judgments of the courts below without reference to religiously based arguments, and affirming the constitutional promise of equal treatment for different- and same-sex couples, this Court will ensure that civil law neither favors nor disfavors any particular religious viewpoint, and it will leave individual faith communities free to determine for themselves whether or not to add religious sanction to particular unions.

## CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should affirm the judgments of the courts below that Utah's and Oklahoma's bans on marriages of same-sex couples are unconstitutional.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 29(b) &  
32(a)**

- (1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) & 29(b) because this brief contains 6,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
- (2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point Times New Roman font.

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**CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that with respect to the foregoing:

- (1) All required privacy redactions have been made pursuant to Tenth Circuit Local Rule 25.5.
- (2) The CM/ECF submission is an exact copy of the hard copies of this brief as filed with the Clerk of Court.
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 4, 2014 I electronically filed the foregoing with the court's CM/ECF system which will send notification of such filing to the counsel for all parties in these cases.

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## **ADDENDUM A: STATEMENTS OF INTEREST OF AMICI CURIAE**

*Amici curiae* The Episcopal Diocese of Utah and The Rt. Rev. Scott Hayashi, Bishop of the Episcopal Diocese of Utah.

*Amicus curiae* Mormons for Equality is composed of countless individuals associated with the Mormon faith and tradition who work to further the cause of full legal equality for lesbian, gay, bisexual, and transgender individuals, including recognition of civil marriage rights for same-sex couples.

*Amicus curiae* Reconstructionist Rabbinical Association (“RRA”), established in 1974, is the professional association of Reconstructionist rabbis. Comprised of over 300 rabbis, the RRA represents the rabbinic voice within the Reconstructionist movement.

*Amicus curiae* Reconstructionist Rabbinical College educates leaders, advances scholarship, and develops resources for contemporary Jewish life.

*Amicus curiae* Union for Reform Judaism, whose 900 congregations across North America include 1.3 million Reform Jews, is committed to ensuring equality for all of God’s children, regardless of sexual orientation.

*Amicus curiae* Unitarian Universalist Association was founded in 1961 and has nurtured a heritage of providing a strong voice for social justice and liberal religion. Unitarian Universalism is a caring, open-minded

faith community that traces its roots in North America back to the Pilgrims and the Puritans.

*Amicus curiae* United Church of Christ has more than 5,100 churches and 1.1 million members across the United States and serves God in the co-creation of a just and sustainable world.

*Amicus curiae* Affirmation represents lesbian, gay, bisexual, transgender, and queer people and their supporters in the United Methodist Community.

*Amicus curiae* Covenant Network of Presbyterians, a broad-based, national group of clergy and lay leaders, seeks to support the mission and unity of the Presbyterian Church (U.S.A.), articulate and act on the church's historic, progressive vision, work for a fully inclusive church, and find ways to live out the graciously hospitable gospel by living together with all our fellow members in the Presbyterian Church (U.S.A.).

*Amicus curiae* Friends for Lesbian, Gay, Bisexual, Transgender, and Queer Concerns ("FLGBTQC") is a faith community within the Religious Society of Friends (Quakers). FLGBTQC deeply honors, affirms, and upholds that of God in all people.

*Amicus curiae* Methodist Federation for Social Action mobilizes clergy and laity within The United Methodist Church to take action on issues

of peace, poverty, and people's rights within the church, the nation, and the world.

*Amicus curiae* More Light Presbyterians represents lesbian, gay, bisexual, and transgender people in the life, ministry, and witness of the Presbyterian Church (U.S.A.) and in society.

*Amicus curiae* Presbyterian Welcome is a diverse community of countless individuals representing lesbian, gay, bisexual, and transgender people in the Presbyterian Church (U.S.A.), through education, advocacy, and relationship building.

*Amicus curiae* Reconciling Ministries Network serves lesbian, gay, bisexual, and transgender United Methodists and their allies to transform their world into the full expression of Christ's inclusive love. Reconciling Ministries Network envisions a vibrant Wesleyan movement that is biblically and theologically centered in the full inclusion of God's children.

*Amicus curiae* ReconcilingWorks: Lutherans For Full Participation organizes lesbian, gay, bisexual, and transgender individuals and their allies within the Lutheran communion and its ecumenical and global partners.

*Amicus curiae* Religious Institute, Inc. is a multi-faith organization whose thousands of supporters include clergy and other religious leaders from more than 50 faith traditions. The Religious Institute partners with the

leading mainstream and progressive religious institutions in the United States.

*Amicus curiae* All Souls Unitarian Church in Tulsa began in 1921 with a traditional mainline Protestant style of worship but has since offered different liturgical forms of worship to congregants more accustomed to charismatic, non-denominational, and Pentecostal styles of worship. The church has 2,554 congregants.

*Amicus curiae* Cathedral of Hope of Oklahoma City, a United Church of Christ congregation founded in 2000, is a community of faith that welcomes people regardless of faith background, gender, sexual orientation, gender identity, gender expression, ability, or race.

*Amicus curiae* Church of the Open Arms of Oklahoma City, a United Church of Christ congregation founded in 1999, identifies its mission as following in the reconciling ministry of Jesus as an inclusive, justice-seeking community.

*Amicus curiae* Church of the Restoration of Tulsa is a Unitarian Universalist congregation founded in 1988 that is committed to religious freedom and social justice.

*Amicus curiae* Congregation Kol Ami of Salt Lake City is a synagogue that affiliates with both the Reform and Conservative movements of Judaism.

*Amicus curiae* Epworth United Methodist Church of Oklahoma City, founded in 1911, is a faithful, diverse Christian Community dedicated to the reconciling ministries of Jesus through traditions of inclusive hospitality open to all God's people.

*Amicus curiae* Fellowship Congregational United Church of Christ of Tulsa, founded in 1955, is an open and affirming congregation and makes a public covenant of welcome into its full life and ministry to persons of all sexual orientations, gender identities, and gender expressions.

*Amicus curiae* First Unitarian Church of Oklahoma City, founded in 1893, welcomes all individuals to its worship.

*Amicus curiae* Mayflower Congregational United Church of Christ of Oklahoma City, founded in 1957, endorses liberty of conscience and recovering for the church a hospitality that welcomes all persons.

*Amicus curiae* Mount Tabor Lutheran Church, an Evangelical Lutheran Church in America congregation, is in Salt Lake City and has congregants throughout the reaches of the Salt Lake metropolitan area.

*Amicus curiae* St. Stephen's United Methodist Church, a Protestant congregation in Norman, Oklahoma with more than 1,000 members, welcomes and affirms all persons without regard to any of the divisions which have been used to separate God's family such as ethnicity, race, color, ancestry, national origin, religion, age, gender, gender identity, sexual orientation, and physical or mental ability.

*Amicus curiae* Trinity Christian Church, a Christian Church (Disciples of Christ) congregation in Edmond, Oklahoma, affirms the primacy of the New Testament and the notion that congregations are the primary expression of the community of faith of the Christian Church (Disciples of Christ).

*Amicus curiae* United Church of Norman, Oklahoma, a United Church of Christ congregation founded in 2006, strives to follow Jesus as a faithful community living and working for inclusive social justice and human dignity.

*Amici curiae* leaders of Oklahoma and Utah religious communities include: The Rev. Canon Steven C. Andersen, Episcopal Diocese of Utah; Rev. Dr. Sharon Betsworth, St. Stephen's United Methodist Church of Norman, Oklahoma; Rev. Trina Bose, Epworth United Methodist Church of Oklahoma City; The Very Rev. Stephen Brehe (retired), St. George, Utah; The Rev. Lyn Zill Briggs, Church of the Resurrection of Centerville, Utah;

The Rev. Trace Browning, Chaplain, Rowland Hall St. Mark's School of Salt Lake City; Rev. Dr. Allen Buck, Jr., Summit United Methodist Church of Edmond, Oklahoma; The Rev. Vanessa Cato, Rector, Church of the Good Shepherd of Ogden, Utah; Rev. Mark Christian, First Unitarian Church of Oklahoma City; Rabbis Micah & Karen Citrin, Temple Israel of Tulsa; Rev. Jeni Markham Clewell, St. Stephen's United Methodist Church of Norman, Oklahoma; Rev. Shelly Daigle, St. Paul's United Methodist Church of Tulsa; Rev. Dr. Mark Y. A. Davies, Elder in Full Connection, Oklahoma Conference of the United Methodist Church; Rev. Gerald L. Davis, Minister, Church of the Restoration (Unitarian Universalist) of Tulsa; Rev. Noel J. Doherty, Priest (retired), Episcopal Diocese of Oklahoma; Rev. Kelli Driscoll, Bethany Christian Church (Disciples of Christ) of Tulsa; The Rev. James H. Drury, Vicar, Ascension St. Matthews Church of Price, Utah; Rev. Cathey Edwards, Hope Unitarian Church of Tulsa; Rev. Dr. B. Gordon Edwards (retired), Cimarron Presbytery – Presbyterian Church (U.S.A.) of Stillwater, Oklahoma; Rev. Nancy Eggen, United Campus Ministries of the University of Tulsa; Rev. Joseph Farber, Good Shepherd Episcopal Church of Sapulpa, Oklahoma; Rev. Victor Force, Open Arms United Church of Christ of Oklahoma City; Rev. Scott Foster, First United Presbyterian Church of Guthrie, Oklahoma; Rev. Todd Freeman, College Hill



Presbyterian Church (U.S.A.) of Tulsa, Oklahoma; Rev. Debra Garfinkel,  
Unitarian Universalist Church of the Restoration of Tulsa; The Rev. Claudia  
Giacoma, St. Luke's Episcopal Church of Park City, Utah; Rev. Twila  
Gibbons, St. Paul United Methodist Church of Tulsa; Rev. Tom Goldsmith,  
Senior Minister, First Unitarian Church of Salt Lake City; The Rev.  
Catherine Gregg, Rector, Grace Episcopal Church of St. George, Utah;  
Rabbi Vered Harris, Temple B'nai Israel of Oklahoma City; Rev. Don  
Heath, Trinity Christian Church (Disciples of Christ) of Edmond, Oklahoma;  
Rev. Mary Heath, Trinity Christian Church (Disciples of Christ) of Edmond,  
Oklahoma; The Rev. Terri Heyduk, Interim Pastor, St. Paul's Episcopal  
Church of Salt Lake City; Rev. Ginger Howl, United Methodist Clergy  
(retired) of Oklahoma City; The Rev. Deborah Hughes-Habel, Pastoral  
Associate, All Saints Episcopal Church of Salt Lake City; The Rev.  
Elizabeth Hunter, Deacon, Cathedral Church of St. Mark of Salt Lake City;  
Rev. Debbie Ingraham, Epworth United Methodist Church of Oklahoma  
City; The Rev. Mary Sheridan Janda, Priest of the Episcopal Diocese of  
Utah; Pastor Warren E. Jensen, United Church of Norman-UCC of Norman,  
Oklahoma; The Rev. Canon Diana Johnson (retired), Salt Lake City; Rev.  
Jonalu Johnstone, First Unitarian Church of Oklahoma City; The Rev.  
Sandra Jones, Deacon, St. Luke's Episcopal Church of Park City, Utah; Rev.

Steve Klemz, Pastor, Zion Evangelical Lutheran Church of Salt Lake City;  
Rev. Marlin Lavanhar, All Souls Unitarian Church of Tulsa; Rev. Bob  
Lawrence, Open Table United Church of Christ of Owasso, Oklahoma; Rev.  
Tamara Lebak, All Souls Unitarian Church of Tulsa; The Very Rev. Justin  
Alan Lindstrom, Dean, Saint Paul's Episcopal Cathedral of Oklahoma City;  
Rev. Nathan Mattox, University United Methodist Church of Tulsa; Rev. Dr.  
Kathy McCallie, Fellowship Congregational United Church of Christ of  
Tulsa; The Rev. Stephen L McKee, Trinity Episcopal Church of Tulsa; Rev.  
Dr. Robin Meyers, Mayflower Congregational United Church of Christ of  
Oklahoma City; The Rev. Michael Milligan (retired), Cathedral Church of  
St. Mark of Salt Lake City; The Rev. Antoinette Minor, Deacon, All Saints  
Episcopal Church of Salt Lake City; Rev. Richard Mize, Licensed Minister,  
Kansas-Oklahoma Conference, United Church of Christ; Rev. Kirt E.  
Moelling, St. Stephens United Methodist Church of Broken Arrow,  
Oklahoma; Rev. Chris Moore, Fellowship Congregational United Church of  
Christ of Tulsa; Most Rev. James W. Morgan, Jr., Bishop, Old Catholic  
Diocese of St. Michael the Archangel of Ogden, Utah; The Rev. Canon  
Mary June Nestler, Executive Officer, Episcopal Diocese of Utah of Salt  
Lake City; Rev. David Nichols, Mount Tabor Lutheran Church of Salt Lake  
City; Rev. Matt Perkins, Cathedral of Hope, United Church of Christ of

Oklahoma City; The Rev. L. E. (Pete) Poggemeyer, Jr., Deacon, Church of the Good Shepherd of Ogden, Utah; Rev. Curtis L. Price, Pastor, First Baptist Church of Salt Lake City; Rev. Barbara Prose, All Souls Unitarian Church of Tulsa; The Rev. Canon Pablo Ramos, Iglesia Episcopal de San Esteban of West Valley City, Utah; The Rev. Charles Robinson, Rector, St. Luke's Episcopal Church of Park City, Utah; Rev. Ron Robinson, Executive Director of the Unitarian Universalist Christian Fellowship of Tulsa; The Rev. Bonnie Joia Roddy (retired), Cathedral Church of St. Mark of Salt Lake City; The Rev. Jack Roddy, Deacon (retired), Cathedral Church of St. Mark of Salt Lake City; Rev. Susan Ross, First United Methodist Church of Pawnee Oklahoma and First United Methodist Church of Skedee, Oklahoma; Rev. Floyd M. Schoenhals, of Tulsa, Pastor (retired), Evangelical Lutheran Church in America; Rabbi Ilana Schwartzman, Congregation Kol Ami of Salt Lake City; The Rev. Dr. Matthew T. Seddon, Vicar, St. Stephen's Episcopal Church of West Valley City, Utah; The Rev. Claudia Seiter, Priest-in-Charge, St. Michael's Episcopal Church of Brigham City, Utah; The Rev. W. Lee Shaw (retired), St. Stephen's Episcopal Church of Salt Lake City; Rev. Scott Spencer, Albright United Methodist Church of Ponca City, Oklahoma; The Rev. Mrs. Judith Steele Barbuto (retired) of South Jordan, Utah; Rev. Jim Stovall, Open Arms United Church of Christ

of Oklahoma City; The Rev. James R. Tendick (retired), St. Francis Episcopal Church of Moab, Utah; Rev. Sonja Tobey, First United Methodist Church of Vinita, Oklahoma; Very Rev. Robert Trujillo, Vicar General, Old Catholic Diocese of St. Michael the Archangel of Ogden, Utah; The Rev. Lincoln Ure, Chaplain, St. Mark's Hospital of Salt Lake City; The Rev. Peter Van Hook, Ph.D., St. Mary's Episcopal Church of Provo; Rev. Amy Venable, St. Stephen's United Methodist Church of Norman, Oklahoma; The Very Rev. Ray Waldon, Cathedral Church of St. Mark of Salt Lake City; Rev. Lori Walke, Mayflower Congregational United Church of Christ of Oklahoma City; Rev. Dr. Richard Ward, Fellowship Congregational United Church of Christ of Tulsa; Rev. David Wheeler, First United Methodist Church of Miami, Oklahoma; Rev. Mark Whitley, Verdigris United Methodist Church of Verdigris, Oklahoma; Rev. Susan Whitley, Skiatook United Methodist Church of Skiatook, Oklahoma; The Rev. John F. Williams, Rector, St. James Episcopal Church of Midvale, Utah; Rev. Patty C. Willis, Minister, South Valley Unitarian Universalist Society of Salt Lake City; Anna Zumwalt, Soto Zen Buddhist Priest, Sunday Sitting Meditation Community of Salt Lake City.