Docket No. 12-17668

In the

United States Court of Appeals

for the

Ninth Circuit

BEVERLY SEVCIK, et al.,

Plaintiffs and Appellants,

v.

BRIAN SANDOVAL, et al.,

Defendants and Appellees.

Appeal from a Decision of the United States District Court for the District of Nevada (Las Vegas), No. 2:12-cv-00578-RCJ-PAL · Honorable Robert C. Jones

BRIEF OF AMICUS CURIAE PACIFIC JUSTICE INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that *Amicus Curiae*, the Pacific Justice Institute, is not a corporation that issues stock or has a parent corporation that issues stock.

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INTEREST OF AMICUS CURIAE[1] [2] [3]

Amicus Curiae Pacific Justice Institute ("PJI") is a nonprofit public interest legal firm organized under § 501(c)(3) of the Internal Revenue Code. *Amicus* is dedicated to providing legal services to the community without charge in cases implicating First Amendment rights, particularly in the areas of religious liberty and free speech. Without providing for robust protections for religious liberty, a ruling mandating the creation or recognition of same sex-marriage, or a ruling declaring sexual orientation to be a suspect or quasi-suspect classification, will result in wide-ranging threats to religious freedom. This case therefore has the potential to adversely impact PJI's past, present, and future clients. PJI submits this brief to demonstrate that concerns about the conflict between same-sex marriage and religious liberty are rational and demonstrated by the recent experience of religious believers.

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[1] No party's counsel authored the brief in whole or in part, and no one other than *Amicus*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

[2] This brief is filed with consent of all parties; thus no motion for leave to file is required. *See* Notice of All Parties' Consent to Amicus Curiae Briefs, ECF No. 19; *see also* Fed. R. App. P. 29(a).

[3] With permission, *Amicus* has derived many of the arguments in this brief from the amicus brief filed by the Becket Fund for Religious Liberty and the amicus brief filed by Catholic Answers in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

SUMMARY OF ARGUMENT

Appellants contend that Nevada's laws affirming marriage as the union of one man and one woman violate their rights to due process and equal protection under the United States Constitution, and further contend that their claim of sexual orientation discrimination is entitled to heightened constitutional review. *Amicus* respectfully submits that if this Court were to accept as valid either of these contentions, the ability of our Nation's religious individuals and communities to live according to their faith will be diminished.

Legislative and popular debate is necessary to balance competing claims of allegedly constitutional import, and judicially redefining marriage will prevent that in this case. Indeed, where same-sex marriage is instituted without robust protections for religious liberty, it becomes increasingly difficult for people of faith to live lives of integrity and service both in and out of the public square.

This claim is no mere rhetorical flourish—experience teaches us that religious institutions and individuals objecting to same-sex marriage would face an increased risk of lawsuits under state and local nondiscrimination laws, potentially subjecting them to substantial civil liability if they continue to practice their religious beliefs; and they would also face a range of penalties from state and local governments, such as denial of access to public facilities, loss of accreditation and licensing, and the targeted withdrawal of government contracts and benefits.

Additionally, constitutionalizing sexual orientation as a suspect or quasi-suspect class, absent any legal or logical warrant to do so, would only exacerbate the conflict and further diminish the ability of believers to live out their faith. Similar to the effect that judicially redefining marriage would have on believers, a novel legal understanding that sexual orientation is deserving of special constitutional protection would provide license for government actors to subject religious organizations and individuals to disfavored treatment.

Appellants, relying on *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), suggest that a ruling in their favor does not present any religious liberty concerns because "no religion will be required to change its religious policies," and "no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs." 183 P.3d at 451-52. But as explained below, the burdens on religion created by a judicial ruling constitutionalizing same-sex marriage or declaring sexual orientation to be a suspect or quasi-suspect classification are far broader than requiring officiants to solemnize same-sex unions in conflict with their faith. Appellants have thus ignored the heart of the religious freedom concerns presented by this case—concerns that are explored in this brief.

In sum, a judicial mandate foisting same-sex marriage on the People of Nevada, against their sovereign will, would be tantamount to declaring that particular moral judgments about marriage are irrational, and would force religious

organizations and individuals to confront an intolerable Hobson's Choice—either heed the message that same-sex marriage and sexual orientation nondiscrimination now trump the demands of conscience, or suffer public humiliation and the prospect of societal marginalization for living out their faith. Given these stakes, *Amicus* respectfully requests that this Court stay its hand, affirm Nevada's marriage laws as rational and constitutional, and let the democratic process resolve this issue.

ARGUMENT

I. According Legal Recognition to Same-Sex Marriage Without Robust Protections for Religious Liberty Will Result in Wide-Ranging Conflicts with Religious Freedom.

Many religious organizations and individuals cannot, as a matter of doctrine or conscience, treat same-sex unions as the moral equivalent of opposite-sex marriage. Consequently, mandating the creation of same-sex marriage, without simultaneously protecting the conscience rights of religious believers, threatens religious liberty and almost guarantees that widespread and intractable church-state conflicts will result.

The reasons for this are not difficult to divine. An estimated 160 million Americans—97.6% of all religious adherents in the United States and more than half of the entire population—belong to religious bodies that affirm the traditional

definition of marriage.[4] While not all individual believers agree with their religion's official position on marriage, many do. And these religious commitments are deep ones. For the largest American faith groups, the institution of marriage is central to their moral teaching about sexual relationships, and it holds special theological significance.[5] The stakes in this conflict are therefore especially high and do not readily admit of compromise, and the relatively short history of same-sex marriage evinces a growing trend toward litigation rather than peaceful coexistence. In 2003, Massachusetts became the first state to give civil recognition to same-sex marriage, and every other state to recognize same-sex marriage has done so within the last five years,[6] but litigation has already begun in many jurisdictions and promises to increase in frequency.[7]

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[4] Marriage Law Project, World Religions and Same-Sex Marriage (2002), *available at* http://www.scribd.com/doc/149135886/World-Religions-and-Same-Sex-Marriage-pdf (last visited Dec. 16, 2013).

[5] *See, e.g.*, *Sex, Marriage, and Family in World Religions* xxii-xxvii (Don S. Browning, M. Christian Green, & John Witte, Jr. eds., 2009) (describing opposite-sex limitation on marriage in Buddhism, Christianity, Confucianism, Hinduism, Islam, and Judaism and the central role of sexual complementarity within marriage for world religions).

[6] *Goodridge v. Dep't of Publ. Health*, 798 N.E.2d 941 (Mass. 2003); Connecticut (2008); Iowa (2009); Vermont (2009); New Hampshire (2010); Washington, D.C. (2010); New York (2011); Washington (2012); Maine (2013); Maryland (2013); Minnesota (2013); Illinois (2013); New Jersey (2013).

[7] Because litigation under nondiscrimination laws increases exponentially over time, the few pending lawsuits are a strong indicator of many more to come. *See, e.g.*, Vivian Berger *et al.*, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 Hofstra Lab. & Emp. L.J. 45, 45 (2005) ("The number of employment discrimination lawsuits rose continuously

A scholarly consensus thus has emerged that legally recognizing same-sex marriage will result in widespread, foreseeable , and, to some extent, legislatively avoidable conflicts with religious liberty. Some scholars argue that the rights of religious believers should nearly always give way to the right of gays and lesbians to be free from discrimination,[8] while others support strong exemptions for conscientious religious believers.[9] But there is widespread scholarly agreement that the conflict exists and threatens to persist if not addressed proactively and comprehensively.[10]

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throughout the last three decades of the twentieth century. In the federal courts, such filings grew 2000% . . . .").

[8] Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in Same-Sex Marriage and Religious Liberty: Emerging Conflicts* 123, 154 (2008).

[9] Douglas Laycock, *Afterword*, *in Emerging Conflicts*, *supra* note 8, at 189,197-201.

[10] *See, e.g.*, *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (2008) (outlining the position of seven prominent scholars of First Amendment law, and concluding that legal recognition of same-sex marriage, absent legislative exemptions or accommodations for believers, would create widespread conflicts with religious liberty); Letter from Prof. Robin Fretwell Wilson and others to Minnesota Representative (May 2, 2013), *available at* http://mirrorofjustice.blogs.com/files/mn-main-letter-pdf-1.pdf (noting that although the state's same-sex marriage bill had included certain religious exemptions already, more were needed, because without them "some religious individuals will still be forced to choose between violating the law or engaging in conduct that violates their deepest religious beliefs"); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 Nw. J. L. & Soc. Pol'y 274, 296-97 (2010) (agreeing that many conscience protections are indeed necessary and advisable if the threat to religious liberty is to be mitigated); David Blankenhorn & Jonathan Rauch, *A Reconciliation on Gay Marriage*, N.Y. Times, Feb. 21, 2009 (advancing a proposal for federally recognized civil unions, but only in those states that enacted "robust religious-conscience exceptions").

A ruling from this Court that objecting to same-sex marriage is irrational or predicated upon animus will subject religious believers to government and private discrimination for adhering to a longstanding moral worldview held by cultures and religions for millennia. A non-exhaustive discussion of these concerns follows.

A. Religious people and institutions that object to same-sex marriage will face a wave of private civil litigation under nondiscrimination laws never intended for that purpose.

Judicially mandating same-sex marriage in Nevada will permit parties to wield the state's nondiscrimination laws as a sword against religious organizations and individuals, forcing them to recognize or participate in same-sex marriages or to be punished accordingly. Although parties can of course bring claims under those statutes presently, a judicial imprimatur requiring same-sex marriage will only amplify the deleterious impact on believers. Regrettably, these laws provide no discernible religious exemptions sufficient to permit believers to live out their faith *in the world*. Thus they will be subject to suit for living in accord with their religious convictions.

1. Public accommodation laws.

Religious institutions often provide a broad array of programs and facilities to their members *and* to the general public, through hospitals, schools, adoption services, and counseling centers, and they have historically enjoyed wide latitude in choosing what religiously motivated services and facilities they will provide,

and to whom they will provide them. But giving legal recognition to same-sex marriage without robust conscience exemptions will restrict that freedom in Nevada.

This is because in some situations, litigants have successfully argued that religious institutions and their related ministries qualify as public accommodations, which means that legal regimes designed to regulate secular businesses begin to dictate terms of belief and behavior to religion. For example, some laws require that church halls (and other religiously owned facilities) be treated as public accommodations if they are rented to non-members.[11] When coupled with legally recognized same-sex marriage, these expansive constructions of public accommodations laws create a significant risk of liability for religious objectors.

Indeed, expansion of the definition of "public accommodation" is what precipitated the divisive *Boy Scouts v. Dale* litigation: unlike other states, New Jersey's Supreme Court held that the Boy Scouts were a "place of public

[11] *See, e.g.*, Hutchinson, Kan. Human Relations Commission, *Definitions and FAQs Under Proposed Sexual Orientation and Gender Identity Protections* 4 (2012), http://www.hutchgov.com/egov/docs/1332537777_170654.pdf; *Stevens v. Optimum Health Inst.-San Diego*, 810 F. Supp. 2d 1074, 1089 (S.D. Cal. 2011) (concluding that a nonprofit religious health institute was both a "business establishment" under California nondiscrimination law and a "public accommodation" under the California Disabled Persons Act, where the institute offered activities and services to nonmembers, nonadherents, and nonbelievers, and where it did not require attendees to attend or participate in any program activities or to adhere to any of its beliefs or values).

accommodation."[12] This particular risk is greatest for those religious organizations that serve people with different beliefs. Unfortunately, and ironically, the more a religious organization seeks to minister to the general public (as opposed to just coreligionists), the greater the risk that the service will be regarded as a public accommodation and thus will give rise to liability. Some of the many religiously motivated services that could qualify as "public accommodations" are healthcare services,[13] marriage counseling, gyms and day camps,[14] schools,[15] adoption services,[16] and the use of wedding ceremony facilities.[17] In other words, it is in the very place where religious believers and organizations seek to serve the public that they are most likely to run into conflict with nondiscrimination laws never designed for them.

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[12] *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1218 (N.J. 1999), *reversed*, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

[13] *See Stevens*, 810 F. Supp. 2d at 1089.

[14] *See* Melissa Walker, *YMCA rewrites rules for lesbian couples*, Des Moines Register, Aug. 6, 2007 (city forced YMCA to change its definition of "family" or lose grant).

[15] *See Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (en banc) (public accommodations statute required equivalent access to all university facilities).

[16] *See Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022 (N.D. Cal. 2007) (Arizona adoption facilitation website was public accommodation under California law).

[17] *See Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. DCR PN34XB-03008 (N.J. Off. of Att'y Gen., Div. on Civil Rts., Oct. 23, 2012) (Methodist organization violated public accommodations law by denying same-sex couples use of wedding pavilion because it opened pavilion for other weddings).

2. Housing discrimination laws.

Religious colleges and universities frequently provide student housing and often give special treatment to married couples. Legally married same-sex couples could reasonably be expected to seek these benefits, but many religious educational institutions would conscientiously object to providing similar support for these same-sex unions. Housing discrimination lawsuits would likely result, especially given the fact that Nevada law bans discrimination in housing on the basis of gender identity, sexual orientation, and familial status, but provides no discernible religious exemptions sufficient to protect believers.[18]

Courts in several states have required landlords to facilitate the unmarried cohabitation of their tenants over strong religious objections.[19] It stands to reason that if housing laws prohibit landlords from declining to rent to unmarried couples, legally married same-sex couples would have comparatively stronger protection, as public policy tends to favor and subsidize marriage as an institution.[20]

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[18] *See* Nev. Rev. Stat. § 118.020 *et. seq*.

[19] *See Smith v. Fair Emp't & Hous. Comm'n.*, 913 P.2d 909 (Cal. 1996) (no substantial burden on religion where landlord required to rent to unmarried couples despite sincere religious objections, because landlord could avoid the burden by exiting the rental business). *See also Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 939 (Alaska 2004); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994).

[20] *See, e.g., Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001) (holding that a same-sex couple stated a valid disparate impact claim of sexual orientation discrimination after university refused to provide married student housing benefits to unmarried couples).

3. Employment discrimination laws.

Religious organizations that object to same-sex marriage will also face private lawsuits when one of their employees enters into a legally recognized same-sex marriage. For those organizations this would constitute a public repudiation of core religious beliefs—a repudiation that may require changes to that employee's terms of employment. Such decisions could leave the organization vulnerable to suit under Nevada laws prohibiting sexual orientation discrimination in employment.[21] While Nevada law does provide for some religious exceptions in that context, they are exceedingly narrow, not designed to meet the conflict precipitated by same-sex marriage, and thus unlikely to forestall litigation.[22]

Moreover, if same-sex marriage is adopted without conscience protections, religious employers may be automatically required to provide insurance to all legal spouses—both opposite sex and same sex—to comply with nondiscrimination laws. Indeed, after the District of Columbia passed a same-sex marriage law without robust religious protections, the Catholic Archdiocese of Washington was forced to stop offering spousal benefits to any of its new employees because it

[21] *See* Nev. Rev. Stat. § 613.330.

[22] *See* Nev. Rev. Stat. § 613.350; *see, e.g.*, *Roe v. Empire Blue Cross Blue Shield*, No. 12-cv-4788-PKC (S.D.N.Y. filed June 19, 2012) (class action lawsuit filed after adoption of same-sex marriage in New York against Catholic medical center and its insurer seeking same-sex spousal benefits).

could not in good conscience treat same-sex relationships as equivalent to opposite-sex marriages.[23]

B. Religious organizations and individuals that object to same-sex marriage will be penalized by state and local governments.

Where same-sex marriage is adopted without religious protections, those who conscientiously object to such marriages will be labeled unlawful "discriminators" undeserving of benefits otherwise available to all citizens on an equal basis. Religion is thereby effectively singled out for disfavored treatment. The recent experience of religious organizations and individuals is telling: they have been denied access to government facilities and fora, government licenses and accreditation, government grants and contracts, tax-exempt status, and educational opportunities. A few examples should suffice to establish the gravity of the threat.

1. Exclusion from government facilities and fora.

Because of their former requirement that their members must not engage in homosexual conduct, the Boy Scouts have had to fight to gain equal access to public after-school facilities.[24] They have lost leases to city campgrounds and

[23] William Wan, *Same-Sex Marriage Leads Catholic Charities to Adjust Benefits*, Wash. Post, March 2, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030103345.html.

[24] *Boy Scouts of Am. v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (challenge to Boy Scouts' use of school facilities).

parks,[25] a lease to a government building that served as their headquarters for 79 years,[26] and the right to participate in a state-facilitated charitable payroll deduction program.[27] All of this has happened despite the Supreme Court's affirming the Boy Scouts' constitutional right to maintain their moral standards.[28] If same-sex marriage is adopted without robust protections for conscientious objectors, religious organizations that object to same-sex marriage should expect to face similar penalties.

2. Loss of licenses or accreditation.

In Massachusetts, the state threatened to revoke the adoption license of Boston Catholic Charities, a large and longstanding religious social-service organization, because it refused on religious grounds to place foster children with same-sex couples. Rather than violate its religious beliefs, Catholic Charities shut down its adoption services.[29] Similarly, when the District of Columbia enacted a

[25] *Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006) (equal access to boat berths denied to the Sea Scouts).
[26] *Cradle of Liberty Council, Inc. v. City of Philadelphia*, 851 F. Supp. 2d 936, 939 (E.D. Pa. 2012).
[27] *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (Boy Scouts could be excluded from state's workplace charitable contributions campaign).
[28] *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).
[29] Patricia Wen, '*They Cared for the Children': Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families*, Boston Globe, June 25, 2006 (Catholic Charities had to choose between following Church beliefs and continuing to offer social services); *cf.* 102 Mass. Code Regs. §§ 1.03(1), 5.04(1)(c); 110 Mass. Code Regs.

law permitting same-sex marriage, Catholic Charities reported that D.C. government officials informed them that they "no longer would be allowed to continue to provide foster care and publicly-funded adoption programs in the District of Columbia" as a result of their religious beliefs regarding marriage.[30] Thus, D.C. Catholic Charities, much like Boston Catholic Charities, was forced to close its foster-care and adoption programs,[31] notwithstanding the fact that in both instances other foster care and adoption agencies were willing and able to place children with same-sex couples.

Facing similar danger are religious colleges and universities, which have been threatened with the loss of accreditation because they object to sexual

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§ 1.09(2) (regulations requiring non-discrimination based upon marital status and sexual orientation).

[30] Archdiocese of Washington, *Same-Sex Marriage Legislation and the Implications for Catholic Charities* 1 (Mar. 1, 2010), *available at* http://www.adw.org/family/pdf/10Marr_CathChar%20Impact_0301.pdf. (letter from the Archdiocese of Washington discussing this situation).

[31] *See Same-Sex 'Marriage' Law Forces D.C. Catholic Charities to Close Adoption Program*, Catholic News Agency, Feb. 17, 2010, *available at* http://www.catholicnewsagency.com/news/same-sex_marriage_law_forces_d.c._catholic_charities_to_close_adoption_program/ (quotations omitted) ("Although Catholic Charities has an 80-year legacy of high quality service to the vulnerable in our nation's capital, the D.C. Government informed Catholic Charities that the agency would be ineligible to serve as a foster care provider due to the impending D.C. same-sex marriage law"); Julia Duin, *Catholics End D.C. Foster-Care Program*, Washington Times, Feb. 18, 2010, *available at* http://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/ ("The Archdiocese of Washington's decision to drop its foster care program is the first casualty of the District of Columbia's pending same-sex marriage law").

conduct outside the traditional marriage covenant. In 2001, for example, the American Psychological Association, the accrediting body for professional psychology programs, threatened to revoke the accreditation of religious colleges that prefer coreligionists, in large part because of concerns about "codes of conduct that prohibit sex outside of marriage and homosexual behavior."[32] Religious colleges and universities that oppose same-sex marriage will likely face similar threats in the future,[33] as the judicial recognition of same-sex marriage would permit governments to require that all civil marriages be treated identically.

3. Disqualification from government grants and contracts.

Religious universities, charities, hospitals, and social service organizations often serve secular government purposes through grants and contracts: religious colleges participate in state-funded financial aid programs; religious counseling services provide marital counseling and substance abuse treatment; and religious homeless shelters care for those in need. Many grants and contracts require

[32] D. Smith, *Accreditation committee decides to keep religious exemption*, 33 Monitor on Psychology 1 (Jan. 2002) (describing why the APA ultimately abandoned the proposal).

[33] Religious law schools may be particularly vulnerable. The Association of American Law Schools' (AALS) current guidance allows schools to regulate "conduct" that is "directly incompatible with [their] essential religious tenets," but warns that if their beliefs include a "prohibition of all nonmarital sexual conduct, the school must, nevertheless, comply with" AALS bylaws on sexual orientation discrimination. AALS Handbook, Interpretive Principles to Guide Religiously Affiliated Member Schools (1993), http://www.aals.org/about_handbook_sgp_rel.php.

recipients to be organized "for the public good" and forbid recipients to act "contrary to public policy." If same-sex marriage is judicially mandated without permitting those religious organizations to act in concert with their beliefs, those organizations that refuse to approve, subsidize, or perform same-sex marriages could be found to violate such standards, thus disqualifying them from participation in government contracts and grants.[34] Similarly, many religious organizations will be forced either to extend benefits to same-sex spouses or to stop providing social services in partnership with government.[35]

4. Loss of state or local tax exemptions.

Most religious institutions have charitable tax-exempt status under federal, state and local laws. But without conscience protections, that status could be stripped by state agencies and local governments based solely on that religious

[34] The case of *Grove City College v. Bell*, 465 U.S. 555 (1984), is instructive. There, a religious college was denied *all* federal student financial aid for failing to comply, for religious reasons, with Title IX's nondiscrimination affirmation requirements, even absent any evidence of actual gender discrimination. In the marriage context, it is not difficult to predict that religious universities that oppose same-sex marriage could be denied access to government programs (such as scholarships, grants, or tax-exempt bonds) by governmental agencies that adopt an aggressive view of applicable nondiscrimination standards.

[35] *See, e.g., Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004) (upholding ordinance forcing religious charity to either extend employee spousal benefit programs to registered same-sex couples, or lose access to all city housing and community development funds).

institution's conscientious objection to same-sex marriage.[36] For example, in California a bill was introduced and passed in one of the houses by state lawmakers that aimed to strip youth organizations of their tax exemptions in the event that they engaged in discrimination based upon religion and sexual orientation.[37] Whether the First Amendment could provide an effective defense to this kind of penalty is an open question.[38] But even if it could, it is hardly a great consolation to realize that, in the wake of a judicial mandate creating same-sex marriage, protracted litigation would potentially be required for each religious organization seeking to preserve its tax-exempt status.

5. Loss of educational and employment opportunities.

The conflict between same-sex marriage and religious liberty also affects individual religious believers.

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[36] "[P]rivate churches losing their tax exemptions for their opposition to homosexual marriages . . . are among the very dangers from the left against which I warned." Prof. Richard A. Epstein, *Same-Sex Union Dispute: Right Now Mirrors Left*, Wall St. J., July 28, 2004, at A13.

[37] California Senate Bill 626, *available at* http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0301-0350/sb_323_bill_20130814_amended_asm_v97.pdf.

[38] *See Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (rejecting Free Exercise Clause defense to IRS withdrawal of 501(c)(3) status based on religious belief against interracial dating and marriage). *See also* Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices, in Emerging Conflicts* 59, 64-65 (supporting same-sex marriage but arguing that objectors' tax exemptions should not be stripped); Douglas Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in *Emerging Conflicts* 103, 108-11 (arguing that Bob Jones should not apply to conscientious objectors to same-sex marriage).

a. Government officials and employees.

Vermont has held that individual town clerks may be fired if they seek to avoid issuing civil union licenses to same-sex couples for religious reasons.[39] At least twelve Massachusetts Justices of the Peace had to resign because they could not facilitate same-sex marriages.[40] Before the New York Legislature enacted a law permitting same-sex marriage in June 2011, at least two municipal clerks were forced to resign their positions because of their religious convictions against facilitating same-sex marriages.[41] After marriage was redefined in Canada, several Saskatchewan marriage commissioners refused to solemnize same-sex marriages

[39] *Brady* v. *Dean*, 790 A.2d 428 (Vt. 2001).

[40] Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. Times, May 17, 2004.

[41] Laura L. Fotusky, Barker Town Clerk, submitted her resignation on July 11, 2011. *See New York Town Clerk Quits Over Opposition to Gay Marriage*, Fox News, July 12, 2011, *available at* http://www.foxnews.com/politics/2011/07/12/new-york-town-clerk-quits-over-gay-marriage-opposition/ ("Laura Fotusky submitted a letter of resignation to the town board . . . , saying her religious beliefs prevent her from signing a marriage certificate for a gay couple, as she'd be required to do as a municipal clerk."); Dan Wiessner, *New York Town Clerk Quits Over Gay Marriage Licenses*, Reuters, July 12, 2011, *available at* http://www.reuters.com/article/2011/07/12/us-gaymarriage-newyork-resignation-idUSTRE76B7BJ20110712. Around that time, Ruth Sheldon, Granby Town Clerk, also resigned rather than compromise her religious beliefs. *See* Jen Doll, *Ruth Sheldon, Town Clerk, Will Also Resign Instead of Performing Gay Marriages*, The Village Voice, July 18, 2011, *available at* http://blogs.villagevoice.com/runninscared/2011/07/ruth_sheldon_gay_marriage.php.

based on their religious convictions,[42] and the Court of Appeal flatly rejected a conscience exemption proposal, reasoning that such an exemption would "violate the equality rights of gay and lesbian individuals."[43] As with marriage commissioners and clerks, the situation is equally acute for state-employed professionals like social workers, who face a difficult choice between their conscience and their livelihood.[44]

b. Students and the parents of students.

Students at public universities face similarly stark choices. When Julea Ward, a counseling student in her final semester at Eastern Michigan University, told her professors that she had no problem counseling individual gay and lesbian clients, but could not in good conscience help them with their same-sex relationships, she was expelled.[45]

And parents of public school students will not emerge from this conflict unscathed either—they can expect to be stripped of control over the direction of their children's education. For instance, less than a year after Massachusetts began issuing marriage licenses to same-sex couples, parents sued the Lexington,

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[42] *In re Matter of Marriage Commissioners Appointed under the Marriage Act*, 1995, SS 1995, c. M-4.1, 2011 SKCA 3 (Can.).
[43] *Id*. at 1-2.
[44] Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. Pub. L. 475 (2008) (describing dismissals and resignations of social service workers where conscience protections were not provided).
[45] *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012).

Massachusetts school district, raising a constitutional challenge to the district's refusal to provide prior notice and an opportunity to exempt their children from exposure to materials that celebrated same-sex marriage.[46] The First Circuit rejected the parents' claim, holding that even though "the school's choice of books for young students has . . . deeply offended [their] sincerely held religious beliefs," they were "not entitled to a federal judicial remedy under the U.S. Constitution."[47] Indeed, because "Massachusetts [had] recognized gay marriage under its state constitution," the court concluded that "it [was] entirely rational for its schools to educate their students regarding that recognition."[48]

II. Recognizing sexual orientation as a suspect or quasi-suspect classification will, much like a judicial mandate creating same-sex marriage, legally undermine the ability of many religious organizations and individuals to live out their faith.

Any ruling that accords suspect or quasi-suspect classification to sexual orientation effectively declares that treating opposite-sex couples differently than same-sex couples is akin to invidious racism or sexism. This, in turn, would tend to diminish the ability of believers to live integrated lives of faith in the world.

In considering whether a law violates the Equal Protection Clause of the Fourteenth Amendment, courts apply different levels of scrutiny to different types

[46] *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008).
[47] *Id*. at 107.
[48] *Id*. at 95.

of classifications.[49] Classifications based on race, alienage, and national origin are subject to strict scrutiny; classifications based on sex and illegitimacy receive intermediate scrutiny; and virtually all other classes receive rational basis scrutiny, which deferentially asks only whether the statutory classification in question is "rationally related to a legitimate governmental purpose."[50]

Classifications based on sexual orientation have always been subject to rational basis scrutiny, as cases before the Supreme Court and eleven of the twelve federal courts of appeals to rule on the issue confirm.[51] And there is good reason for the relative stability in this area—as with recognizing fundamental rights, courts must be careful about identifying new suspect classes, because such recognition takes important decisions out of the normal "democratic processes," which is precisely where they belong.[52]

Caution is particularly appropriate here, given the threats to religious liberty from raising sexual orientation to a suspect classification. In determining whether the government may restrict First Amendment liberties, for example, courts routinely look to whether a class has been established as suspect for purposes of

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[49] *Clark v. Jeter*, 486 U.S. 456, 461 (1988).
[50] *Id.*
[51] *See Romer v. Evans*, 517 U.S. 620, 632 (1996); *Windsor v. United States*, 699 F.3d 169, 189 (2nd Cir. 2012) (Straub, J., dissenting in part) (stating that the *Windsor* majority broke with the Supreme Court and all eleven other circuits when it found that sexual orientation was entitled to heightened scrutiny).
[52] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

equal protection jurisprudence.[53] Courts are much more apt to find that laws passed on behalf of a suspect class are supported by a compelling interest, meaning that otherwise inviolate constitutional rights, like religious liberty, may be trumped by state or local laws in those instances. Absent such elevated status, the compelling interest is difficult to establish, and thus the implicated constitutional rights will prevail.[54]

Fashioning sexual orientation as a new suspect classification, akin to race, would create significant support for allowing the government to override the constitutional rights (e.g., free exercise, free speech, and free association rights) of religious organizations and individuals when they are seeking to live consistently with their faith on matters implicating human sexuality, relationships, and

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[53] *See Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979, 981 (1994) (Thomas, J., dissenting from denial of certiorari) (internal quotation marks and citations omitted) (observing that the fact that a certain class had "never been accorded any heightened scrutiny under the Equal Protection Clause of . . . the federal . . . Constitution[]" was prime evidence that a nondiscrimination law protecting that class likely did not protect a sufficiently compelling interest to override religious liberty); *Thomas v. Anchorage Equal Rights Comm'n*,165 F.3d 692, 714-15 (9th Cir. 1999) *rev'd on other grounds en banc*, 220 F.3d 1134 (9th Cir. 2000) ("The fact that courts have not given unmarried couples any special consideration under the Equal Protection Clause is potent circumstantial evidence that society lacks a compelling governmental interest in the eradication of discrimination based upon marital status.").

[54] *See Thomas*, 165 F.3d at 717 (concluding that "there is simply no support from any quarter for recognizing a compelling government interest in eradicating marital-status discrimination that would excuse what would otherwise be a violation of the Free Exercise Clause").

families.[55] *Amicus* has already provided myriad examples in the previous section to establish the dangers to religious freedom. And those threats are pervasive—virtually no sphere of existence is spared the reach of government oversight. Elevating sexual orientation to a suspect classification cannot but exacerbate the situation. Equating the decision to treat opposite-sex couples differently than same-sex couples with the decision to treat one race differently than another would surely reduce whatever tolerance or formal exemptions currently exist for religious adherents. It will also unmistakably endorse the message to society that traditional religious beliefs about marriage and the family are—as a matter of federal constitutional law—akin to racism.

A. Religious exemptions would be jeopardized.

Announcing that sexual orientation is a suspect classification under federal constitutional law, in contravention of decades of jurisprudence to the contrary, would encourage the rescission of existing religious exemptions, and would discourage any incentive to provide religious exemptions in the future. Such

[55] *See, e.g., Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 921 (1st Cir. 1988) (Bownes, J., dissenting in part) (noting that the Supreme Court has "routinely . . . upheld statutes aimed at eradicating [race and sex] discrimination, even though they have the incidental effect of abridging the first amendment rights of the discriminators," because it has concluded that "states and the federal government have a compelling interest in eliminating invidious discrimination by private persons on the basis" of those categories).

exemptions are already subject to constant criticism,[56] and a judicial decision declaring sexual orientation to be a suspect or quasi-suspect classification would provide a legal basis to challenge those religious exemptions.

In *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067 (9th Cir. 2012), for instance, the plaintiffs challenged as unconstitutional a lease in which defendant San Diego gave the Boy Scouts control over public land. The plaintiffs alleged that the leases violated the Equal Protection Clause "by endorsing, supporting, and promoting defendants' discrimination based on sexual orientation."[57] While this Court ultimately rejected the claim for lack of standing,[58] the district court below had suggested in dicta that such a claim could be colorable.[59]

Following the logic of *Barnes-Wallace*, a plaintiff could argue that exemptions allowing private actors (including religious organizations and individuals) to draw religiously motivated distinctions between opposite-sex

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[56] *See* Feldblum, *supra*, at 125 (arguing that "religious liberty exemptions from [sexual orientation] civil rights laws" should be disfavored); Mark Strasser, *Public Policy, Same-Sex Marriage, and Exemptions for Matters of Conscience*, 12 Fla. Coastal L.J. 135 (2010) (arguing that conscience exemption laws relegate homosexuals to a special untouchable status and that the creation of these exemptions may violate constitutional guarantees); Jennifer Abodeely, *Thou Shall Not Discriminate: A Proposal For Limiting First Amendment Defenses to Discrimination in Public Accommodations*, 12 Scholar 585 (2010) (recommending ways to circumvent religious liberty defenses against sexual orientation discrimination laws).

[57] *Id.* at 1084.

[58] *Id.* at 1085.

[59] *See Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1281 (S.D. Cal. 2003).

marital relationships and same-sex relationships unconstitutionally "supports and promotes" discrimination. Indeed, to the extent such a claim was colorable, it would be more powerful than in *Barnes-Wallace*, where the extent of the complained-of "support and promotion" was a single plot of land, while exemptions presumably permit religious actors the freedom to act in concert with their beliefs in many locations and contexts.

In short, if this Court were to establish sexual orientation as a suspect or quasi-suspect classification, courts might conclude that the Constitution prohibits exemptions for religious organizations that treat opposite-sex marital relationships differently than same-sex relationships. That would be an astonishing departure from history and precedent.[60]

B. Religious believers would be vilified for their beliefs.

Declaring sexual orientation to be a suspect or quasi-suspect classification would announce that the millennia-old teachings of every major faith tradition concerning issues of human sexuality are irrational and akin to racism. Such a conclusion would brand religious believers as completely wrong on matters of the utmost societal importance. To be a devout Catholic, Protestant, Mormon,

[60] *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339-40 (1987) (upholding a constitutional challenge to a statutory religious exemption).

Muslim, or Orthodox Jew will become the effective equivalent of being a member of a racist organization.

Religious believers would then face terrible dilemmas. While the treatment of race as a suspect category broadly accords with their religious beliefs, privileging sexual orientation and its related conduct as a new suspect category will deepen and provoke further widespread tensions. Nothing suggests that the large faith communities that for thousands of years have sanctioned sexual conduct only within the marital union of a man and a woman will change or otherwise disclaim those beliefs.

Suspect-classification status has been historically reserved for morally neutral categories, categories upon which people could discriminate only for reasons that our history and traditions decisively condemn as "evil."[61] Sexual orientation, as the district court in this case rightly recognized, does not belong in this category. By elevating sexual orientation to suspect-class status, this Court would consign traditional religious beliefs regarding human sexuality and marriage to the same constitutional dustbin as racism. This Court should decline to take that unwarranted step. Instead, this Court should affirm religious liberty, deny the

[61] *See Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (noting that racism is a "revolting moral evil" that the country wisely restricted through constitutional amendment and statutory law).

relief requested by Appellants, and preserve the rights of religious adherents in Nevada to live their faith in the world.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court affirm the decision of the district court below.

Dated: January 24, 2014

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,417 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: January 24, 2014

s/ Kevin T. Snider

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I hereby certify that on January 27, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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