No. 10-16696

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, ET AL.,
Plaintiffs-Appellees,
vs.
ARNOLD SCHWARZENEGGER, ET AL.,
Defendants,
and
PROPOSITION 8 OFFICIAL PROPONENTS
DENNIS HOLLINGSWORTH, ET AL.,
Defendants-Intervenors-Appellants.

Appeal From the United States District Court
for the Northern District of California
No. CV-09-02292 VRW
The Honorable Vaughn R. Walker

BRIEF OF *AMICI CURIAE* CALIFORNIA FAITH FOR EQUALITY, CALIFORNIA COUNCIL OF CHURCHES, GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, UNIVERSAL FELLOWSHIP OF METROPOLITAN COMMUNITY CHURCHES, THE EPISCOPAL BISHOPS OF CALIFORNIA AND LOS ANGELES, PROGRESSIVE JEWISH ALLIANCE, PACIFIC ASSOCIATION OF REFORM RABBIS, UNITARIAN UNIVERSALIST ASSOCIATION, AND UNITARIAN UNIVERSALIST LEGISLATIVE MINISTRY CALIFORNIA, IN SUPPORT OF PLAINTIFFS-APPELLEES KRISTIN M. PERRY, ET AL., AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

All corporate *amici* are nonprofit corporations that issue no stock and that are not controlled by any publicly held corporation.

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I. INTRODUCTION[1]

Amici, as religious organizations and faith leaders, wish to make several points about religion and law as they relate to a fundamental civil right – the right to marry.

That freedom to marry is a basic civil right, and the institution of marriage a core foundation of our system of ordered liberty, cannot be doubted. *See Loving v. Virginia*, 388 U.S. 1 (1967). The right "is of fundamental importance to all individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). And if equal justice and equal protection of law mean anything, it is that no one may be deprived of such a basic human right because of who they are, or what they believe.

Amici wholeheartedly concur with the plaintiffs-appellees on these points. Moreover, *amici* wish to emphasize that principles of religious freedom lying at the heart of our system of ordered liberty also strongly support the right of gay men and lesbian women to marry.

People of faith have come to a variety of conclusions about same-sex marriage. Many churches and clergy, as a matter of doctrine, withhold formal recognition of same-sex unions within their religious liturgy. Others, including the Episcopal Church in California, may permit clergy to bless same-sex relationships without

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[1] All parties have consented, pursuant to FRAP 29, to the filing of this brief. No party's counsel authored any part of this brief. No one other than *amici* and their counsel contributed money to fund the preparation or submission of this brief.

necessarily bringing them within the rite of marriage. Still others, including congregations of the United Church of Christ, Unitarian Universalist Association, and Metropolitan Community Churches, readily include same-sex couples in their rites of marriage. Many of California's Reform and Reconstructionist Rabbis joined its Congregationalist, Unitarian Universalist, and Metropolitan Community Church clergy in officiating legal marriages of same-sex couples in California – until Proposition 8 eliminated same-sex couples' right to marry.

Before this Court Proposition 8's Proponents have abandoned any contention that Proposition 8 advances religious-liberty interests. Yet their *amici* have submitted briefs insisting that same-sex couples' right to marry somehow threatens Californians' religious liberty, and that Proposition 8 is a reasonable response. In truth, according same-sex couples the same right to ***civil marriage*** that other Californians enjoy poses no real threat to the religious liberty of faith traditions limiting religious rites of marriage to mixed-sex unions. For even if civil marriage is recognized as a fundamental civil right of all people, religious organizations always have been free – and remain free – to frame their own rules restricting who may be joined in a religious rite of marriage.

Some churches, for example, will not permit the divorced to remarry in a religious ceremony. Some clergy decline to officiate interfaith marriages. No one can force them to. But the government ought not mandate that anyone's civil marriage

shall be void for failure to conform to theological doctrines or church rules governing religious marriage rites.

According equal marriage rights for all in our civil law threatens no one's religious liberty. Allowing same-sex couples the legal right to marry threatens the religious liberty of Catholics, for example, no more than does allowing civilly divorced citizens to remarry in contravention of Catholic doctrine. Same-sex couples' civil marriages threaten the religious liberty of those who oppose such unions in their churches and synagogues no more than interfaith marriages threaten the religious liberty of those who interpret their scripture and tradition to prohibit such unions. No one can force clergy of any denomination to solemnize any wedding that conflicts with his or her faith tradition, and no church, synagogue, or other place of worship loses its tax-exempt status for refusing religious rites of marriage to citizens possessing a civil right to marry.

Though Proponents' *amici* suggest that Proposition 8's demolition of same-sex couples' right to marry was designed to protect Californians' religious liberty, quite the opposite is true. The real threat to religious liberty comes from enforcing as law the religious doctrines of some sects, to outlaw marriages that others both recognize and sanctify. Clergy and congregations of the Unitarian Universalist Association, the United Church of Christ, the Universal Fellowship of Metropolitan Community Churches, Reform and Reconstructionist Rabbis, and others, proudly solemnized the

legal marriages of same-sex couples – until Proposition 8 adopted other sects' religious doctrine to outlaw those marriages. They should be free to do so again.

Amici respectfully submit that Proposition 8 unlawfully deprives many Californians of a fundamental right merely because of who they are, that it denies them equal protection of the law, and that it does so at the expense of religious freedom.

II. IDENTITY AND INTEREST OF *AMICI*

Amici have a direct interest in the issues presented by this case, as religious organizations and faith leaders who support both religious liberty and the full civil equality of all Californians, without discrimination on the basis of sexual orientation.

The identity and interest of *amici* are set forth, as required by FRAP 29(b), in the motion for leave to file this brief. As noted in that motion, **California Faith for Equality**, the **Unitarian Universalist Legislative Ministry California (UULM CA)**, and **Progressive Jewish Alliance (PJA)** are faith-based organizations that support, and have organized on behalf of, religious freedom and access to civil marriage for same-sex couples.

With a membership comprising more than 6,000 congregations in the State, the **California Council of Churches**' position is pro-religious freedom, pro-church autonomy, pro-equal protection, and anti-enactment of sectarian dogma concerning marriage. Churches in at least two of the 21 denominations represented in the

Council's membership – the **United Church of Christ** and the **Universal Fellowship of Metropolitan Community Churches (MMC)** – have welcomed same-sex couples to marry in religious ceremonies, and members of their clergy gladly officiated the legal marriages of same-sex couples until Proposition 8 interfered.

The **General Synod of the United Church of Christ** is the representative body of the national setting of the United Church of Christ ("UCC"), which has 5,600 churches in the United States, and more than 200 in California, whose clergy were free, until Proposition 8 took effect, to serve their California congregations by officiating the legal marriages of same-sex couples in their congregations.

The **Unitarian Universalist Association (UUA)** represents another faith tradition with deep roots in American history, whose Massachusetts clergy solemnize legal marriages of same-sex couples in New England's founding churches, and whose California clergy also gladly served their own congregations by solemnizing same-sex couples' legal marriages – until Proposition 8 stopped them.

The **Universal Fellowship of Metropolitan Community Churches (MCC)**, with 250 congregations and 43,000 adherents, is the largest Christian denomination ministering primarily to gays, lesbians, and transgender persons. Proposition 8 prevents its clergy from officiating legal marriages for same-sex couples in their congregations. MCC has a strong interest in restoring the rights abrogated by

Proposition 8, both of same-sex couples to enter legal marriages, and of MCC clergy to officiate.

The **Episcopal Bishop of California, the Rt. Rev. Marc Handley Andrus**, and the **Episcopal Bishop of Los Angeles, the Rt. Rev. J. Jon Breno**, both have spoken against Proposition 8, as spiritual leaders in a denomination whose 75th General Convention in 2006 resolved to "oppose any state or federal state or constitutional amendment that prohibits same-sex civil marriages or civil unions."[2]

The **Pacific Association of Reform Rabbis (PARR)** is the Western Region of the Central Conference of Reform Rabbis ("CCAR"). Many of its members officiated the legal marriages of same-sex couples in their California congregations, until Proposition 8 interfered.

As the California Council of Churches told the California Supreme Court in the *Marriage Cases*: "Our commitment to religious liberty for all and equal protection under the law leads us to assert that the State may not rely on the views of particular religious sects as a basis for denying civil marriage licenses to same-gender couples."[3]

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[2] Resolution 2006-A095, General Convention of the Episcopal Church (2009) (online at http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2006-A095 (accessed Oct. 25, 2010)).

[3] *In re Marriage Cases*, No. S147999, Brief of *Amici Curiae* Unitarian Universalist Association of Congregations, et al., at xv-xvi (Sept. 26, 2007) (online at

III. ARGUMENT

A. Proposition 8 Denies, Rather than Protects Religious Liberty

Proposition 8's Proponents have before this Court abandoned any contentions advanced below that revoking same-sex couples' right to marry might find a rational basis in promoting religious-liberty interests. And for good reason, as no credible case can be made that Proposition 8 protects anyone's religious liberty.

Yet Proponents' television ads and other materials undeniably warned voters that if same-sex couples may legally marry, then ministers who decline to officiate would face lawsuits, and their churches could lose their tax-exempt status. And before this Court, Proponents' *amici* contend even now that legal recognition of same-sex couples' civil marriages both "guaranteed wide-ranging church-state conflict," and "threatens the religious liberty of people and groups who cannot, as a matter of conscious, treat same-sex unions as the moral equivalent of man-woman marriage."[4] Calling the decision below a "judicial condemnation of religious beliefs," Proponents' *amici* say that allowing same-sex couples to marry "raises substantial religious liberty

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http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/unitarianamicus.pdf (accessed Oct. 25, 2010)).

[4] *Brief of Amicus Curiae the Beckett Fund for Religious Liberty in Support of Defendants – Intervenors – Appellants and in Support of Reversal*, at 2, 3.

concerns" sufficient to justify depriving same-sex couples of a fundamental civil right, thereby withdrawing the power of willing clergy to solemnize their legal marriages.[5]

The truth is that Proposition 8 finds no rational basis in concern for anyone's religious liberty. The *Marriage Cases* opinion itself had carefully specified that

> affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.

In re Marriage Cases, 183 P. 3d 384, 451-52 (Cal. 2008). Thus, as Chief Judge Walker aptly found,

> Proposition 8 does not affect the First Amendment rights of those opposed to marriage for same-sex couples. Prior to Proposition 8, no religious group was required to recognize marriage for same-sex couples.

1ER124 (findings of fact ¶62).

The First Amendment itself preserves every religion's ability to make its own rules concerning its own religious marriages. And by adopting sectarian religious doctrine to restrict marriage, Proposition 8 actually impinges upon the religious liberty of Californians whose faith traditions, congregations and clergy have welcomed same-sex couples to enter legal marriages in religious ceremonies. Establishment-clause

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[5] Brief of *Amici Curiae* United States Conference of Catholic Bishops, *et al.*, at 1, 2.

and free-exercise principles should operate together to ***prohibit*** the enactment, as law, of some sects' doctrines to deny legal status to others' marriages.

Proposition 8's advocates, Proponents' *amici* among them, often have insisted that their ballot measure was warranted because marriage is of divine origin – instituted by God.[6] But California's civil law should be blind to sectarian doctrines on divine law.[7] Even nonbelievers have a right to marry. That atheists and agnostics enjoy ***the same legal right*** to marry as those who revere marriage as a divine

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[6] Endorsing Proposition 8 in September 2008, for example, the California Southern Baptist Convention's Executive Board declared "marriage was the first institution ordained by God." *California Southern Baptist Board Endorses Proposed Constitutional Marriage Amend.*, Sept. 23, 2008, http://www.bpnews.net/bpnews.asp?id=28975 (accessed Oct. 25, 2010). The Mormon Church First Presidency's June 28, 2008 letter to all California congregations, was similarly grounded in an assertion that "[m]arriage between a man and a woman is ordained of God." First Presidency Preserving Traditional Marriage and Strengthening Families, June 28/29, 2010 http://www.jesuschrist.lds.org/ldsnewsroom/eng/commentary/california-and-same-sex-marriage (accessed Oct. 25, 2010)). The Roman Catholic Church's official *Catechism* agrees that "'God himself is the author of marriage.'" *Catechism of the Catholic Church* ¶1603 (Washington, D.C.: Libreria Editrice Vaticana, 2d ed. 1997). That Church's top doctrinal body insists that marriage "was established by the Creator." Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to give Legal Recognition to Unions between Homosexual Persons*, §2 at 11 (2003).

[7] "From the state's inception, California law has treated the legal institution of ***civil*** marriage as distinct from ***religious*** marriage." *Marriage Cases*, 183 P.3d at 407 n.11 (Court's emphasis). The Family Code provides: "No contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirements of any religious sect." Calif. Family Code. §420(c).

institution poses no threat to anyone's religious liberty. No atheist or agnostic couple may force any church or synagogue to open its doors to them. But neither may those who deem marriage a divine institution "protect" their own sectarian religious beliefs and practices by legislating any test of faith, or of religious propriety, to deprive nonbelievers or the unorthodox of the legal right to marry.[8]

That people of different faiths may marry one another similarly poses no threat to the religious liberty of faith traditions and clergy that reject, discourage, or restrict interfaith marriages. For most of the twentieth century, the Roman Catholic Church's *Code of Canon Law* proscribed interfaith marriages.[9] Dramatically liberalized in 1983, official Catholic doctrine still restricts interfaith marriage by requiring the Church's "express permission" for a Catholic to marry a non-Catholic Christian, and "an express dispensation" for a Catholic to marry a non-Christian.[10] Yet the Church and its priests have never faced legal liability for refusing marriage rites to mixed-

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[8] *See Torcaso v. Watkins*, 367 U.S. 488 (1961) (a religious test for public office held invalid as an invasion of "freedom of belief and religion").

[9] Michael G. Lawler, *Interchurch Marriages: Theological and Pastoral Reflections*, in *Marriage in the Catholic Tradition: Scripture, Tradition, and Experience* Ch. 22, 222 (Todd A. Salzman, et al., eds., 2004) (quoting Canon 1060 of the 1917 *Code of Canon Law*: "The church everywhere most severely prohibits the marriage between two baptized persons, one of whom is Catholic, the other of whom belongs to a heretical or schismatic sect.").

[10] *Catechism of the Catholic Church*, *supra* note 6, ¶1635.

faith couples, and the religious liberty of California's Catholics by no means requires, nor could it justify, the State's ***legal enforcement*** of their Church's rules regulating mixed-faith marriages.

In Judaism, the Orthodox and Conservative Movements forbid interfaith marriages.[11] The Rabbinic tradition proscribing mixed-faith marriage is grounded in scripture.[12] Yet California's Jews do not think their religious liberty needs the protection of state laws barring civil marriage of interfaith couples. Neither do their rabbis and synagogues risk legal liability or loss of tax-exempt status by limiting religious rites of marriage as they choose.

Islamic law is understood by many to bar interfaith marriages between a Muslim woman and non-Muslim man, and also to prohibit marriage of any Muslim to a polytheist or pagan.[13] Some nations strive to defend the Muslim faith by

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[11] *See* Louis M. Epstein, *Marriage Laws in the Bible and the Talmud* 145-219 (1942); *see also, e.g.*, David S. Ariel, *What Do Jews Believe?* 129 (1996) ("Judaism is clearly and unequivocally opposed to intermarriage between a Jew and a non-Jew"); Alfred J. Kolatch, *The Second Jewish Book of Why*, at 121 (2000).

[12] Kolatch, *The Second Jewish Book of Why*, at 120 ("The prohibition of marriages between Jews and non-Jews is biblical in origin. Deuteronomy 7:3 sets forth the law clearly: 'You shall not intermarry with them; do not give your daughters to their sons or take their daughters for your sons.'"); *see also* Genesis 24:3-4; Exodus 34:11-16; Joshua 23:11-13; Ezra 9-10; Nehemiah, 13:23-30; Malachi 2:11-12.

[13] Yohanan Friedman, *Tolerance and Coercion in Islam: Interfaith Relations in Muslim Tradition* 160-93 (2003).

incorporating these rules in their civil law.[14] But the religious liberty of California's Muslims could not justify California's adoption of similar rules, which the Ninth Circuit holds amount to religious persecution if backed by governmental power.[15]

Under California law, a legally divorced man or woman may marry again. This poses no threat to the liberty of Roman Catholics, whose Church both pronounces divorce "a grave offense against the natural law," and condemns remarriage by, or to, a divorced person as "public and permanent adultery."[16] The Roman Catholic Church insists that divorced people who remarry necessarily "find themselves in a situation that objectively contravenes God's law."[17] The Church accordingly "cannot recognize the union of people who are civilly divorced and remarried."[18] Those who divorce and remarry "cannot receive sacramental absolution, take Holy Communion, or

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[14] *See Bandari v. INS*, 227 F.3d 1160, 1163 (9th Cir. 2000) (noting Iranian Ayatollah's edict that "specifically forbids non-Muslims from marrying Muslim women"); *Norani v. Gonzales*, 451 F.3d 292, 293 (2d Cir. 2006) (noting that an interfaith Jewish-Muslim marriage "violates Iranian law and Muslim law (Shariah)").

[15] *See Bandari*, 227 F.3d at 1168.

[16] *Catechism of the Catholic Church*, *supra* note 6, ¶2384.

[17] *Id*. at ¶1650.

[18] U.S. Conference of Catholic Bishops, *Compendium – Catechism of the Catholic Church*, ¶349 (Washington, D.C.: Libreria Editrice Vaticana, 2006).

exercise certain ecclesial responsibilities as long as their situation, which objectively contravenes God's law, persists."[19]

Neither may they sue the Church for enforcing these rules. No one may compel a Catholic priest either to solemnize a wedding at odds with his Church's doctrine, or to give communion to those whom the civil law recognizes as legally divorced and remarried. No Catholic Church has lost its tax-exempt status for denying anyone its religious rites of marriage and communion. The ***civil right*** of the civilly divorced to remarry poses no threat to the religious liberty of Catholics.

Recognizing same-sex couples' legal right to marry threatens the religious liberty of those who reject such marriages no more than recognizing the legal right of mixed-race couples in *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), and in *Loving*, 388 U.S. 1, impaired the religious liberty of those who might reject interracial unions as contrary to God's law.

The Mormon Church for most of its history – indeed, until June of 1978 – both barred blacks from its priesthood, and condemned interracial marriage.[20] Its doctrine

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[19] *Id*. Pope Benedict XVI reportedly "dashed the hopes of those who begged him to let Catholics who have divorced and remarried without getting an annulment take Communion." David Van Biena & Jeff Israelly, *Getting to Know Him: How the Pope is Showing Hints of Being His Own Man*, TIME, Aug. 1, 2005, at 36, 38.

[20] *See generally* Newell G. Bringhurst, *Saints, Slaves, and Blacks: The Changing Place of Black People Within Mormonism* (1981); Lester E. Bush, Jr., *Mormonism's*

was controversial, but no one could force the Church to let black men enter its priesthood, and no interracial couple could insist upon being married in a Mormon temple. The Church faced no legal liability, and suffered no loss of its tax-exempt status, for refusing Mormon rites of marriage to mixed-race couples.

The Mormon Church itself observed, at the time, that "matters of faith, conscience, and theology are not within the purview of the civil law."[21] Church doctrine "affecting those of the Negro race who choose to join the church falls wholly within the category of religion," the First Presidency declared in 1969, and "has no bearing upon matters of civil rights."[22] The Church quite clearly was protected by the First Amendment when it limited marriage on the basis of race – even if it could not impose its religious doctrine on others ***as civil law***.

Allowing mixed-race couples to marry ***outside*** the Mormon Church thus presented no threat to Mormons' religious liberty to prohibit interracial marriages ***within*** their Church. Allowing same-sex couples to marry ***outside*** the Mormon

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Negro Doctrine: An Historical Overview, in *Neither White nor Black: Mormon Scholars Confront the Race Issue in a Universal Church* 53-129 (Lester E. Bush, Jr. & Armand L. Mauss, eds., 1984).

[21] First Presidency, *Statement on Position of Blacks within the Church and Civil Rights*, December 16, 1969, *reprinted in* Bringhurst, *Saints, Slaves, and Blacks*, *supra* note 20, at 231-32.

[22] *Id.*

Church similarly poses no threat to Mormons' religious liberty. Any law purporting to protect Mormons' "religious liberty" by banning either mixed-race marriages or same-sex marriages would have to be deemed utterly irrational.

The religious liberty of Proponents' religious *amici* simply is not enhanced or protected by inscribing their own faith traditions' doctrinal restrictions in California's constitution – unless "religious liberty" means freedom to force others to follow your own religious rules. It clearly does not. Our "'law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'"[23] Under our Constitution, "government may not promote or affiliate itself with any religious doctrine."[24] Thus, the Supreme Court readily invalidates state laws barring the teaching of Darwinian evolution or requiring instruction of "creation science," because they seek to codify religious doctrine.[25] It properly keeps religious doctrine out of our public schools.[26] The State cannot constitutionally choose to impose the

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[23] *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710-11 (1976) (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1872)); *accord Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 114 (1952).

[24] *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989).

[25] *See Epperson v. Arkansas*, 393 U.S. 97, 104-09 (1968) (Darwinian evolution); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987) (creation science).

[26] *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 618-19 (1992); *Epperson*, 393 U.S. at 108-09.

traditions of one religion on members of another; it cannot say what is kosher, or holy, or ordained by God.[27]

Perez v. Sharp, 198 P.2d 17, starkly frames the religious-liberty issue. When California law prohibited a mixed-race marriage of two Roman Catholics, whose Church blessed matrimony between believers of different races, the mixed-race couple argued "that the statutes in question are unconstitutional on the grounds that they prohibit the free exercise of their religion and deny to them the right to participate fully in the sacraments of that religion." *Id*. at 18. Justice Traynor wrote for a plurality of three justices that if "the law is discriminatory and irrational, it unconstitutionally restricts not only religious liberty but the liberty to marry as well." *Id*. Justice Edmonds provided the fourth vote, making a precedential majority, by agreeing that a couple's right to marry "is protected by the constitutional guarantee of religious freedom." *Id*. at 34 (Edmonds, J., concurring). Outlawing a marriage between two Catholics of different races, because others thought God intended the races to remain apart, violated Catholics' religious freedom. *See id*.

Surely, Unitarian Universalists, members of the United Church of Christ and Metropolitan Community Churches, Reform Jews, Reconstructionist Jews, and others

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[27] *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 430 (2d Cir. 2002); *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1346-49 (4th Cir. 1995) (Luttig, J., concurring).

whose faith traditions bless marital unions without regard to the contracting parties' race or sex, are entitled to the same religious liberty as Catholics. Proposition 8 deprives them of that liberty.

B. The Becket Fund's Brief Underscores Proposition 8's Fundamental Irrationality

In a far-fetched attempt to justify Proposition 8, The Becket Fund asserts that same-sex couples' marriages will produce "wide-ranging church-state conflict," because "California includes gender and sexual orientation as protected categories under public accommodations laws," and because "[u]nder California law, gender and sexual orientation discrimination in housing are prohibited."[28] The Becket Fund's objections clearly have far more to do with civil-rights laws protecting gays and lesbians from discrimination than they do with California's marriage law.

The City and County of San Francisco's brief shows how, with the exception of the right to marry, same-sex couples in California generally enjoy equal civil rights with mixed-sex couples, with state laws prohibiting discrimination in public employment, public accommodations, and the like. Domestic partners are accorded legal rights commensurate with married couples. And same-sex couples also enjoy the very same parental rights as mixed-sex couples, including the right to adopt.

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[28] Becket Fund Brief at 2, 6, 8 (citing Cal. Civil Code §§51(b), 51.5, 53, 782.5; Cal. Gov't Code §§12955-12956.2).

The Becket Fund's imagined "threat" to the religious liberty of Californians who wish to discriminate against same-sex couples comes from California's antidiscrimination laws, which Proposition 8 left untouched, not from the right to civil marriage that Proposition 8 abolished. If discrimination is illegal anyway, then simply acknowledging same-sex couples' right to marry poses no additional threat to the people or institutions wishing to discriminate against them. Proposition 8 cannot be characterized as a rational response to a purported threat posed by the anti-discrimination laws that Proposition 8 does not alter.

But the Becket Fund's brief does not trouble itself with making sense. Citing *Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006), for example, the Becket Fund says that if same-sex couples can marry, "[r]eligious institutions that object to same-sex marriage will face challenges to their ability to access a diverse array of government facilities and fora. This has already begun in Berkeley, where the Sea Scouts have been denied leases of public parkland due to their position on homosexuality."[29]

Yet *Evans* preceded the *Marriage Cases* by two years, and had nothing to do with same-sex marriages. And Proposition 8 does nothing to address whether California municipalities should subsidize the Sea Scouts. It does not touch the

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[29] Becket Fund Brief at 9.

antidiscrimination ordinance applied in that case, and thus cannot be deemed a rational response to *Evans*.

To further illustrate the threat posed by same-sex couples' civil marriages, the Becket Fund cites a 2003 district-court decision concerning the City of San Diego's dollar-a-year lease of 18 acres of Balboa Park to the Boy Scouts of America ("BSA") to operate regional headquarters from which it promotes an official program of taxpayer-subsidized religious discrimination against Unitarian Universalists, atheists, agnostics, homosexuals, and others.[30] But the San Diego decision preceded the *Marriage Cases* decision by half a decade, and the case had nothing to do with marriage. The district court could not possibly have guessed in 2003 that the BSA would in 2008 (during a lengthy and still pending appeal) enlist its taxpayer-sponsored facilities in the campaign to enact Proposition 8.[31] The right to marry simply was not an issue – and Proposition 8 cannot be deemed a rational response.

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[30] *Barnes-Wallace v. BSA*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003), *questions certified*, 607 F.3d 1167 (9th Cir. 2010).

[31] *See* 4ER1033 (Official Ballot Pamphlet, "Rebuttal to Argument in Favor of Proposition 8," signed by Robert Bolingbroke as "Council Commissioner, San Diego-Imperial Council, Boy Scouts of America" (available online at http://voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt8.htm (accessed Oct. 25, 2010))).

The Becket Funds' parade-of-horribles from other jurisdictions is similarly divorced from reality. The Becket Fund tells this Court, for example, that the State of New Jersey "has withdrawn the property tax exemption of a beach-side pavilion owned and operated by a Methodist Church, because the Church refused on religious grounds to host a same-sex civil union ceremony."[32]

In truth, the property was not owned by "a Methodist Church," but by the Ocean Grove Camp Meeting Association ("OGCMA") whose trustees must be Methodists, and which "owns all of the land in the seaside community of Ocean Grove, New Jersey."[33] OGCMA advertizes that it "welcomes everyone to enjoy this beautiful, seaside community without discrimination based on race, gender, income level, education, religion, or country of origin."[34] It obtained a New Jersey "Green Acres" real-property tax exemption for the community's beachfront boardwalk and pavilion as public facilities to be held open for all to enjoy on an equal basis.[35]

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[32] Becket Fund Brief at 14.

[33] *Ocean Grove Camp Meeting Association v. Vespa-Papaleo*, 339 Fed. Appx. 232, 235 (3d Cir. 2009).

[34] http://www.oceangrove.org/pages/faq (accessed Oct. 25, 2010).

[35] *Bernstein v. Parker*, No. PN34XB-03008, Finding of Probable Cause, at (NJ Office of the Attorney General, Dept. of Law & Public Safety, Div. on Civil Rights, Dec. 29, 2008) (online at http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf (accessed October 25, 2010)).

When OGCMA denied its lesbian residents the use of their own residential community's supposedly public facilities because OGCMA trustees objected to same-sex civil unions, the lesbian residents objected. And because the property in question no longer was held open to all persons on an equal basis, it no longer qualified for the "Green Acres" tax exemption accorded to properties made available for nondiscriminatory public use.[36]

The case involved neither a Methodist Church, as the Becket Fund states, nor same-sex couples' right to marry – which New Jersey did not recognize. How Proposition 8's abrogation of California's same-sex couples' right to marry – relegating them to the civil unions or domestic partnerships that OGCMA trustees found objectionable – could constitute a rational response is something that the Becket Fund never really explains.

As for the notion that religious institutions' charitable tax exemptions could be threatened by the civil marriages of same-sex couples, one of the Becket Fund's own editors acknowledges that "so long as large and historically important churches refuse to recognize gay marriages," it is "unlikely that the executive branch of any

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[36] *See id.*

jurisdiction would try to revoke tax exemptions over the issue."[37] The Becket Fund offers no reason to think that the nation's largest denominations – the Roman Catholic Church and the Southern Baptist Convention – might change their positions on marriage any time soon, let alone that same-sex couples' civil marriages seriously threaten religious institutions' tax-exempt status.

But even supposing the Becket Fund is right that "robust protections for conscientious objectors" are warranted,[38] they can be obtained either by ordinary legislative action or through the initiative process. That legislative accommodation may be readily available should be apparent from the Becket Fund's assertion that "consensus exists among state legislatures" that willingly provide the "specific exemptions for conscientious objectors to same-sex marriage," that the Becket Fund desires. Becket Fund Brief at 3.

Proposition 8's wholesale abrogation, by constitutional amendment, of same-sex couples' right to marry amounts to gross overreaction that ***forecloses*** the kind of legislative accommodation that the Becket Fund purports to favor. That is the kind of action that the Supreme Court invalidated in *Romer v. Evans*, 517 U.S. 620 (1996).

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[37] Douglas Laycock, "Afterword," in *Same-Sex Marriage and Religious Liberty* 189, 193 (Douglas Laycock, et al., eds.; The Becket Fund, 2008).

[38] Becket Fund Brief at 2.

C. The District Court Did Not Err in Rejecting Religious Rationales as a Sound Basis for Proposition 8

Proponents' *amici* suggest that Chief Judge Walker committed reversible error merely by observing that, on the record presented to him, "'moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples,'" and that those views cannot provide a rational basis for sustaining Proposition 8.[39] But Judge Walker was right, and committed no error in finding that Proposition 8 improperly codifies strongly negative attitudes toward homosexuality and homosexuals, that indeed have no rational basis. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

Proponents' *amici* cry foul, objecting that governmental arbiters lack authority to evaluate the rationality of religious motivations underlying Proposition 8.[40] And without doubt, well-established precedent holds that "'[r]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection.'"[41] In matters of faith, "'as is true of all expressions of First Amendment

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[39] Brief of Amici Curiae U.S. Conference of Catholic Bishops, et al., at 3 (quoting 1ER165).

[40] *See* Brief of Amici Curiae U.S. Conference of Catholic Bishops, et al., at 4-5.

[41] *Boy Scouts of America v. Dale,* 530 U.S. 640, 651 (2000) (quoting *Thomas v. Review Board of Indiana Employment Sec. Div.,* 450 U.S. 707, 714 (1981)); *accord, e.g., Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 531 (1993)

freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.'"[42] Thus, no court may interfere with a religious institution's doctrinal limitations on who may marry within the scope of its own religious rites. *See supra*.

Still, even statutes that impinge upon no fundamental right, and that target no disfavored minority, must have "at least a rational basis" to survive judicial review.[43] That is something that religious doctrine does not necessarily provide precisely because – as Proponents' *amici* must themselves acknowledge – religious rules need not be tethered to any judicially cognizable rational basis. "When the government appropriates religious truth," Justice Blackmun thus observed in *Lee v. Weisman,* "it 'transforms rational debate into theological decree.'"[44] Chief Judge Walker rightly recognized that Proposition 8 ***cannot*** be sustained on theological grounds.

(quoting *Thomas*); *see also Employment Div. v. Smith,* 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim.").

[42] *Dale,* 530 U.S. at 651 (quoting *Democratic Party v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 124 (1981)).

[43] *Honda Motor Co. v. Oberg*, 512 U.S. 415, 429 (1994); *see Lawrence*, 539 U.S. at 579-80.

[44] *Lee v. Weisman,* 505 U.S. 577, 607 (Blackmun, J., concurring) (quoting Nuechterlein, Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause,* 99 Yale L. J. 1127, 1131 (1990)).

Proponents' *amici* counter by invoking the inspiring sweep of American history, with illustrations of how religious belief has influenced the creation and growth of our nation and its institutions. That religion may motivate people to engage with the world, inspiring them to seek justice, can hardly be questioned – and is surely a good thing. Yet from this it hardly follows that governmental action must be accepted as rational whenever based in religious doctrine, or that such grounding can place any law beyond judicial review. Even the proponents of slavery once cited scripture to justify human bondage.[45]

Apparently blind to the irony of their argument, Proponents' *amici* cite the religious motivations of the Pilgrims who sailed on the Mayflower in 1620, that they might escape the Old World's established religious institutions in order to worship God according to their own conscience, and of the Puritans who in the next decade followed the Pilgrims to a New World.[46]

Two vibrant congregations descend from the Pilgrims who landed at Plymouth Rock in 1620 and celebrated the First Thanksgiving in 1621. The Pilgrims' First

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[45] *See, e.g.,* Richard Furman, *Exposition of the Views of the Baptists, Relative to the Coloured Population of the United States in a Communication to the Governor of South-Carolina* (Charleston: A.E. Miller, 1823).

[46] *See* Brief of *Amici Curiae* U.S. Conference of Catholic Bishops, *et al*, at 19-20 & n.3.

Parish Church in Plymouth, Massachusetts has held forth at the top of Town Square since 1620. And the Church of the Pilgrimage, separated by schism in 1801, stands next door. One church is affiliated with the Unitarian Universalist Association, and the other with the United Church of Christ. Both welcome committed same-sex couples to marry, as does the First Church in Boston that John Winthrop conceived as the beacon light of his Puritans' shining "City Upon a Hill."

If the history that Proponents' *amici* recite tells us anything, it is that the heirs of the Pilgrims and of the Puritans should be free to enter marriages in their own churches, on their own terms – and that the religious doctrines of others provide no sound or rational basis for depriving their marriages of legal recognition.

Proposition 8 cannot satisfy rational-basis review, let alone strict scrutiny.

IV. CONCLUSION

Proposition 8 amounts to an unconstitutional codification of hostility toward loving relationships of gay men and lesbian women, yet does nothing at all to advance anyone's religious liberty. Quite the contrary, religious freedom is diminished when

government imposes the doctrines of some faith traditions on all. And humanity is diminished when anyone is deprived of a basic right. The judgment below should be affirmed.

DATED: October 25, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certified that the Brief of A*mici Curiae* California Faith for Equality, California Council of Churches, General Synod of the United Church of Christ, Universal Fellowship of Metropolitan Community Churches, The Episcopal Bishops of California and Los Angeles, Progressive Jewish Alliance, Pacific Association of Reform Rabbis, Unitarian Universalist Association, and Unitarian Universalist Legislative Ministry California, in Support of Plaintiffs-Appellees Kristin M. Perry, et al., and Urging Affirmance uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief comprises 5,901 words according to the word count provided by Microsoft Word 2003 word processing software.

s/ ERIC ALAN ISAACSON

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DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. I hereby certify that on October 25, 2010, I electronically filed the foregoing document: Brief of A*mici Curiae* California Faith for Equality, California Council of Churches, General Synod of the United Church of Christ, Universal Fellowship of Metropolitan Community Churches, The Episcopal Bishops of California and Los Angeles, Progressive Jewish Alliance, Pacific Association of Reform Rabbis, Unitarian Universalist Association, and Unitarian Universalist Legislative Ministry California, in Support of Plaintiffs-Appellees Kristin M. Perry, et al., and Urging Affirmance 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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I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 25, 2010, at San Diego, California.

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