No. S147999

In the Supreme Court of California
In re Marriage Cases

Judicial Council Coordination Proceeding No. 4365

After a Decision of the Court of Appeal
First Appellate District, Division Three

Nos. A110449, A110450, A110451, A110463, A110651, A110652
San Francisco Superior Court Nos. JCCP4365, 429539, 429548, 504038
Los Angeles Superior Court No. BC088506
Honorable Richard A. Kramer, Judge

Application and Proposed Brief *Amicus Curiae* of The Becket Fund for Religious Liberty in Support of State Defendants

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

APPLICATION AND INTEREST OF *AMICUS CURIAE*

Proposed *Amicus curiae* the Becket Fund for Religious Liberty is a nonpartisan, interfaith, public-interest law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of religious institutions to pursue their missions without excessive government regulation and entanglement.

The Becket Fund's proposed *amicus* brief will assist the Court in deciding this case by addressing the impact that a change to the definition of the legal term "marriage" is likely to have on religious liberty. The Becket Fund has dedicated significant resources to the study of these issues in a neutral, academic manner. In December of 2005, the Becket Fund hosted a conference of noted First Amendment scholars from across the political and religious spectrum to assess the religious freedom implications of legalized same-sex marriage, the ultimate result of which was an anthology of scholarly papers. Drafts are available online,[1] and final versions will soon be published by an academic press.

Although some of the scholars wholeheartedly support same-sex marriage and others oppose it, they all share one conclusion—changing the legal definition of "marriage" to include same-sex couples will create an unprecedented level of legal conflict under the Free Speech and Religion

[1] *See* http://www.becketfund.org/index.php/article/494.html.

Clauses of the First Amendment. These conflicts will arise in manifold areas of law (such as public accommodation law, employment discrimination and employment benefits law, professional accreditation, government contracting, and many others) that routinely apply to a wide range of religious institutions (such as houses of worship, religious schools, religious hospitals, and other religious social service providers). Regardless of how these conflicts would ultimately be resolved, there can be no doubt that they would arise with great frequency if this Court (and others) were to take the step of expanding the legal definition of "marriage" to include couples that many religious groups cannot, in conscience, affirm or support as "married."

Amicus also submits its brief to counter the conclusory assertions made by some legal activists in the marriage debate who state that "the free exercise of religion is not constrained, but enhanced, by recognizing the civil right of marriage between same-sex partners." *See* Brief *Amici Curiae* of Iowa Faith Leaders *et. al*. at 1, filed Jan. 29, 2007, in *Varnum* et al. v. *Brien*, No. CV5965, Iowa Dist. Ct. for Polk County (Aug. 20, 2007).[2] Those arguments focus exclusively on the unremarkable fact that legalizing

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[2] *See also* Brief *Amici Curiae* of Religious Organizations and Clergy at 8, filed Dec. 12, 2006, in *Kerrigan* et al. v. *Commissioner of Public Health* et al., No. S.C.17716, Sup. Ct. of Conn. (pending)); *see generally* Brief *Amici Curiae* of Religious Organizations and Clergy, filed Aug. 31, 2007, in *Chambers* v. *Ormiston*, No. 06-340-M.P., Sup. Ct. Rhode Island (pending)).

same-sex marriage will not render the traditional religious marriage ceremonies illegal. *Id.* at 8. This is plainly true and wholly uncontested, but this non-issue is raised nonetheless to distract from the actual and numerous threats to religious freedom in other areas.[3] Specifically, expanding legal marriage to include same-sex couples will trigger myriad government prohibitions and penalties against religious institutions that, as a matter of religious conscience, believe that marriage is limited to different-sex couples, and therefore cannot treat same-sex unions as morally equivalent.[4]

Applicant believes that its brief on this topic will assist this Court in

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[3] As for the claim that legalizing same-sex marriage would "enhance" religious liberty, plaintiffs' *amici* fail to identify a single burden on religious freedom that would be relieved by such a change.

[4] Notably, the signatories to those briefs consist exclusively of persons and groups that "support the dignity of loving, committed same-sex couples, and believe that same-sex couples should be permitted to enter civil marriage." *See* Brief *Amici Curiae* of Iowa Faith Leaders at 8; *see also* Brief *Amici Curiae* of [Connecticut] Religious Organizations and Clergy at iii; Brief *Amici Curiae* of [Rhode Island] Religious Organizations and Clergy at 1. These signatories, who have faced no threat to their religious liberty under the current legal definition of marriage, would face no greater threat if that definition changed since their theology *supports* same-sex marriage. But their briefs completely ignore the many interests of religious groups (perhaps the majority) that theologically *oppose* same-sex marriage. And it is precisely those more traditional religious institutions whose religious liberty is threatened. One would hope that religious institutions that support same-sex marriage would nonetheless recognize and affirm the religious liberty of other religious institutions to hold a different view on that contested theological question without the risk of government sanction.

addressing the issues presented on appeal and therefore applies for permission to file the proposed Brief *Amicus Curiae*.[5]

[5] The Becket Fund uniquely represents religious clients with positions on *all* sides of this issue, including Agnostics, Anglicans, Buddhists, Christians, Jews, Hindus, Muslims, Unitarians, and Zoroastrians, among many others.

STATEMENT OF THE ISSUES

1. Whether redefining legal marriage to include same-sex couples will risk pervasive church-state conflict.

2. Whether legalizing same-sex marriage will harm religious liberty by creating the risk of civil suits against religious institutions that refuse to treat legally married same-sex couples as morally equivalent to married men and women.

3. Whether legalizing same-sex marriage will harm religious liberty by creating the risk that government will strip its benefits from religious institutions that refuse to treat legally married same-sex couples as morally equivalent to married men and women.

ARGUMENT

On November 18, 2003, the Massachusetts Supreme Judicial Court legalized same-sex marriage in that state in *Goodridge* v. *Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003), and unleashed an unprecedented wave of legal and political controversy that has now spread to California courts.[6] Anticipating the conflict, the people of California explicitly rejected same-sex marriage by referendum in 2000[7] and have instead chosen to accommodate the interests of same-sex couples through robust domestic partnership legislation.[8] *Amicus* writes to explain how overturning California's legal definition of marriage will threaten the religious liberty of people and groups who cannot, as a matter of religious conscience, treat homogamous unions as morally equivalent to husband-wife marriage,[9] creating widespread church-state conflict as a result.

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[6] To date, every state high court that has considered the issue has refused to follow Massachusetts' lead. *See*, *e.g.*, *Andersen* v. *King County*, 138 P.3d 963 (Wash. 2006) (rejecting same-sex marriage as a constitutional right); *Hernandez* v. *Robles*, 7 N.Y.3d 338 (N.Y. 2006) (same). *See also* *Lewis* v. *Harris*, 908 A.2d 196 (N.J. 2006) (rejecting same-sex marriage as a constitutional right, but ordering legislative conferral of equivalent rights to same-sex couples); *Baker* v. *State*, 744 A.2d 864 (Vt. 1999) (same).

[7] *See* Proposition 22, now FAMILY CODE § 308.5 (2000) ("[o]nly marriage between a man and a woman is valid."). *See also* FAMILY CODE § 300 (1977) (marriage is "between a man and a woman").

[8] FAMILY CODE §§ 297 and 297.5.

[9] Many religious organizations that support husband-wife marriage do not automatically object to civil unions or domestic partnerships as defined

I. Legalizing Same-Sex Marriage Will Create the Risk of Civil Suits Against Religious Institutions That Refuse to Treat Legally Married Same-Sex Couples as Morally Equivalent to Married Men and Women.

A. *Religious institutions that reflect disapproval of same-sex marriage in their employment policies risk suits under employment anti-discrimination laws.*

If current trends persist, religious institutions morally opposed to same-sex marriage will soon face the circumstance where one of their employees legally marries a same-sex partner. For many religious institutions, such a public act would represent a fundamental repudiation of the institution's core religious beliefs. These employers may well terminate their relationship with employees out of a desire to stay faithful to their institution's moral and religious teachings and to make clear that the

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under California law. FAMILY CODE § 297(a) ("adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."). This is so because these novel arrangements do not necessarily signify a sexual relationship in conflict with religious beliefs. *See*, *e.g.*, *Kerrigan* v. *State*, 49 Conn. Supp. 644, 655 n. 7 (2006) ("compatible adults, especially older people, *whatever their sexual disposition*, [may] choose to order their financial, household and testamentary affairs through state recognized civil unions.") (emphasis added); *In re Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N.E.2d 565, 570 (Mass. 2004) (noting that civil unions encompass unions other than "homosexual couples") (emphasis added). Many religious groups are notably more resistant to same-sex marriage because, unlike domestic partnerships, the marital union has—from centuries long past through modern times—been religiously, culturally, legally and historically *presumed* to be a sexual relationship. *See Stepanek* v. *Stepanek* 193 Cal. App. 2d 760 (Cal. Dist. Ct. App., 1st Dist., Div. 2, 1961) (finding physical inability to engage in coitus *per se* grounds for annulment).

institution does not condone certain behavior. Terminated persons, in turn, might sue under employment anti-discrimination statutes, using a variety of theories such as discrimination based on sexual orientation, sex, or marital status.[10]

While some religious employers may be willing to overlook or ignore an individual employee's same-sex marriage when making some employment decisions, many would at the same time refuse, on religious grounds, to subsidize or otherwise treat *the union* as equivalent to husband-wife marriage when it comes to providing spousal benefits. If same-sex marriage is legalized, same-sex couples that were once denied spousal benefits (or had not yet requested them) would be expected to demand that their religious employers extend all spousal health and retirement benefits to their newly married partners in due course.

Before *Goodridge*, courts generally did not require employers to extend benefits to same-sex partners absent specific language in state or municipal anti-discrimination statutes.[11] But the reasoning in those cases

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[10] California law prohibits these forms of employment discrimination, GOVERNMENT CODE § 12940(a), but provides limited exemptions for certain religious institutions, *id.* §§ 12926(d) and 12926.2.

[11] *See, e.g.*, *Lilly* v. *City of Minneapolis*, No. MC 93-21375, 1994 WL 315620 at *9 (Minn. Dist. Ct. June 3, 1994) (denial of government health insurance benefits to same-sex couples did not violate the Minnesota Human Rights Statute but "chang[ing] the marital status classification. . . . would have a great impact on employer benefit plans, which might have to cover homosexual partners.").

suggests that, if marriage is redefined, decisions refusing to extend spousal benefits would be reconsidered. Religiously-affiliated employers may thereafter be automatically required to provide insurance to all legal "spouses"—both husband-wife and same-sex—to comply with state and municipal anti-discrimination laws.[12]

B. *Religious institutions that refuse to extend housing benefits to same-sex couples on terms identical to those offered to married men and women risk suits under fair housing laws.*

Just as same-sex couples will seek employee benefits for their spouses from their religious employers, they will seek benefits from religious institutions in other contexts as well, such as housing. Religious colleges and universities frequently provide student housing and often give special priority, benefits, or subsidies to husband-wife married couples. Conflict looms at those religious schools that oppose same-sex sexual

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[12] In California, it appears that secular businesses are already required by the Unruh Civil Rights Act to extend equivalent spousal benefits to domestic partners. *See Koebke* v. *Bernardo Heights Country Club*, 36 Cal.4th 824 (Cal. 2005) (private club that denied spousal benefits to domestic partners of club members engaged in impermissible marital status discrimination despite club's family-oriented business justifications) (citing CIVIL CODE § 51). *Cf.*; *Catholic Charities of Maine* 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). *But see Partners Healthcare Sys.* v. *Sullivan*, No. 06-11436, 2007 WL 1810218 (D. Mass. Jun. 25, 2007) (Massachusetts sexual orientation anti-discrimination laws preempted by ERISA and therefore not applicable to certain employment benefit plans).

conduct and that will refuse in conscience to subsidize or otherwise condone homosexual cohabitation on their campus by extending housing benefits and services to same-sex couples, whatever the legal status of their unions.

In a handful of states, courts have forced landlords to facilitate the unmarried cohabitation of their tenants, over strong religious objections.[13] If *unmarried* couples cannot be discriminated against in housing due to marital status protections, legally *married* same-sex couples would have comparatively stronger protection, as public policy tends to favor and subsidize marriage as an institution, especially in states like California which outlaw marital status discrimination.[14]

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[13] *See Smith* v. *Fair Employment & Housing Comm'n*., 12 Cal.4th 1143 (Cal. 1996) (finding no substantial burden of religion in forcing landlord to rent to unmarried couples despite sincere religious objections because landlord could avoid the burden by exiting the rental business). *See also Swanner* v. *Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Ala. 1994). *But see State by Cooper* v. *French*, 460 N.W.2d 2 (Minn. 1990) (holding state constitutional protection of religious conscience exempted landlord from ban against marital status discrimination in housing).

[14] Although California code ostensibly grants domestic partners the same protection from discrimination as is granted to "spouses" under FAMILY CODE § 297.5(f), the grant's legal effect is unclear in light of conflicts with FAMILY CODE § 308.5 (2000) ("[o]nly marriage between a man and a woman is valid") and FAMILY CODE § 300 (1977) (marriage is "between a man and a woman"). *See also* "Alimony provides a same-sex union test," L.A. TIMES, July 22, 2007, *available at* 2007 WLNR 13980688 (discussing ruling from the bench by Judge Michael Naughton in Orange County Superior Court that entrance into domestic partnership after a divorce is not equivalent to remarriage for purposes of alimony determinations); *Garber* v. *Garber*, 04D006519 (Orange County Sup. Ct.),

But one need not argue by analogy to see what lies in store for religious schools that will not accept homosexual cohabitation. The New York Court of Appeals decision in *Levin* v. *Yeshiva University*, 96 N.Y.2d 484 (N.Y. 2001), addressed the issue directly. In *Levin*, the court held that two lesbian students had stated a valid "disparate impact" claim of sexual-orientation discrimination after the university refused to provide married student housing benefits to unmarried same-sex couples.[15] Thus, the right of religious universities to implement their beliefs—in particular, to support and favor husband-wife married students—was already being challenged as illegally discriminatory before the plaintiffs filed for recognition of same-sex marriage in this suit.[16]

If this Court follows the reasoning of *Goodridge* and *Levin*, local bodies will be all the more likely to require religious schools to violate their beliefs by forcing them to subsidize and otherwise facilitate homosexual cohabitation.

C. *Religious institutions that refuse to extend their services or facilities to same-sex couples on terms identical to those*

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appeal pending in No. G039050, Cal. Ct. App., 4th Dist., Div. 3 (filed July 31, 2007).

[15] *Id.* at 496. Yeshiva did not make its religious affiliations an issue in the appeal. *Id.* at 489.

[16] Sexual orientation discrimination in housing is similarly prohibited in California law, GOVERNMENT CODE §§ 12955-12956.2, with limited exemptions for religious institutions, *id*. § 12955.4.

offered to married men and women risk suits under public accommodation laws.

From hospitals, to schools, to counseling, to marriage services, religious institutions provide a broad array of programs and facilities to their members and to the general public. Religious institutions have historically enjoyed wide latitude in choosing what religiously-motivated services and facilities they will provide, and precisely to whom they will provide those services. However, changing the legal definition of marriage may require a reassessment of that understanding for two reasons. First, states like California have added sex, sexual orientation and marital status as protected categories under public accommodations laws.[17] Second, religious institutions and their related ministries are facing increased risk of being declared places of public accommodation, and thus being subject to legal regimes designed to regulate secular businesses. These two facts, when coupled with legalized same-sex marriage, would subject to widespread liability those ministries that refuse, for religious reasons, to provide identical services to married same-sex couples.

This risk is especially acute for those religious institutions that have very open membership and service provision policies. Ironically, the more

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[17] California law prohibits sexual orientation, sex, and marital status discrimination in provision of services in "all business establishments of every kind whatsoever." CIVIL CODE § 51(b). California also prohibits all business boycotts against any organization on account of the sexual orientation of its employees or customers. *Id.* § 51.5.

a religious institution seeks to minister to the general public (as opposed to just coreligionists) out of religious impulse, the greater the risk that a service or facility will be regulated under public accommodation statutes as a business "open to the public." For example, in *Catholic Charities* v. *Superior Court of Sacramento*, 32 Cal. 4th 527 (2004), this Court found that Catholic Charities was neither sufficiently staffed with co-religionists nor sufficiently inculcated religious values in its service provision to be exempt, for religious reasons, from laws requiring prescription contraception insurance coverage for its employees. In other words, an organization's religious motivation for providing services that have secular counterparts is not enough to provide a religious-freedom defense to regulatory burdens, even if the organization has a religious identity such as being an "organ of the Catholic Church." *Id.* at 539.

In addition to health care services, a few of the many religiously-motivated services that can potentially fall under this rubric include: marriage counseling, family counseling, job training programs, child care, gyms and day camps,[18] life coaching, schooling,[19] adoption services,[20] and

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[18] *See infra* at n. 36 (describing lesbian couple's efforts to force redefinition of "family membership" policy at YMCA in Iowa).

[19] *See Gay Rights Coalition of Georgetown University Law Center* v. *Georgetown University*, 536 A.2d 1 (D.C. Ct. App. 1987) (*en banc*) (holding that while the D.C. public accommodations statute did not require a Catholic university to give homosexual groups university "recognition," it

even the use of wedding reception facilities.[21] Of the thousands of California religious organizations that minister to the public in one or more of the ways mentioned above, many simply want to avoid the appearance (and reality) of condoning or subsidizing same-sex marriage through their "family-based" services.[22] Yet it is possible that none of these institutions would be able to voice their religious objections to same-sex marriage in this way.[23] Unlike several other states, California has no explicit religious

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nevertheless required the university to allow them equivalent access to *all* university facilities.).

[20] *See Butler* v. *Adoption Media*, 486 F.Supp.2d 1022 (N.D. Cal. 2007) (administrators of Arizona adoption facilitation website found subject to California's public accommodations statute because they refused, on religious grounds, to post profiles of same-sex couples as potential adoptive parents).

[21] *See Harriet Bernstein* et al. v. *Ocean Grove Camp Meeting Assoc.*, No. PN34XB-03008 (NJ Dep't. of Law and Public Safety, filed June 19, 2007) (seeking damages and injunction against religious organization that denied complainants use of wedding pavilion for civil union ceremony); *see also Smith and Chymyshyn* v. *Knights of Columbus*, 2005 BCHRT 544 (British Columbia Human Rights Tribunal 2005) (fining Knights of Columbus for refusing to rent a hall for use for a same-sex couple's wedding reception).

[22] *See infra* at n. 36.

[23] This is not to suggest that religious liberty interests have no limits. For example, a religiously-affiliated hospital should not be allowed to deny critical medical care to a person solely because they discover that the patient had at some point entered a same-sex marriage.

exemptions to its public accommodations laws banning sex, marital status, and sexual orientation discrimination.[24]

D. Religious institutions that publicly express their religious disapproval of same-sex marriage risk hate-speech and hate-crime litigation.

Suits under increasingly numerous state hate-crime laws are also potential avenues of civil or criminal liability for religious institutions that actively preach against homosexual marriage. General hate-crime statutes exist in at least 45 states.[25] Of those, currently 32 states,[26] including California,[27] have hate-crime laws referencing sexual orientation. Ministers and preachers could face conspiracy or incitement suits under these laws if, after hearing a preacher's strongly-worded (but non-violent) sermon against same-sex marriage, a congregant commits a hate crime against a person or business. This possibility, by itself, may chill controversial religious

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[24] *See* CIVIL CODE § 51(b). For comparison to other state public accommodations exemptions, *see* Brief *Amicus Curiae* of the Becket Fund for Religious Liberty at 4 in *Boy Scouts* v. *Wyman*, No. 03-956 (2004) (listing state anti-discrimination codes and religious exemptions) (available at http://www.becketfund.org/litigate/boyscoutsvwyman-amicus.pdf).

[25] *See* Human Rights Campaign, "State Hate Crimes Laws," (available at https://w3.hrc.org/Template.cfm?Section=Home&Template=/ContentManagement/ContentDisplay.cfm&ContentID=13382) (updated July 9, 2007, last visited on Sep. 17, 2007)).

[26] *See id*. This figure does not include the District of Columbia's ban on sexual orientation-based hate crimes. *Id.*

[27] CIVIL CODE § 51.7; PENAL CODE § 422.6.

expression. Some states have already taken the next step and banned sexual-orientation related hate speech directly, as in Massachusetts and Pennsylvania.[28] In fact, religious speakers have already been arrested (though not convicted) in Pennsylvania for the hate crime of peacefully opposing gay rights in public.[29]

While California specifically exempts non-violent speech from its civil and criminal anti-hate provisions,[30] it does allow for punishment for persons who "incite" businesses to boycott any organization on account of the sexual orientation of its employees or customers. CIVIL CODE §§ 51.5. Thus, a minister or imam that tells business owners that they have a religious obligation to not patronize pro-same-sex marriage organizations may be liable for unlawful incitement to boycott. But even without

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[28] Pennsylvania's hate-crimes statute (18 PA. CONS. STAT. § 2710) bans "ethnic intimidation" (*i.e.*, hate-speech) on the basis of sexual orientation if the message is "motivated by hatred." Massachusetts' hate speech law, MASS. GEN. LAWS 151B § 4(4)(A), makes it unlawful to "intimidate" another person in the "exercise or enjoyment" of the right to be free from sexual orientation discrimination in employment and housing, but currently exempts religious institutions, *id.* §§ 1(5), 4(18).

[29] In 2004, an organized group of Christians was arrested for "ethnic intimidation" under hate crimes laws for nonviolently protesting at a Philadelphia gay pride event, even though the event was open to the public and held on city streets and sidewalks. Although the criminal hate-crime charges against the protesters were eventually dismissed, the protesters' subsequent civil suit against the city for violations of their civil rights was dismissed as well. *See Startzell* v. *City of Philadelphia*, No. 05-05287, 2007 WL 172400, at *6 (E.D. Pa. Jan. 18, 2007).

[30] CIVIL CODE § 52.1(j); PENAL CODE § 422.6(c).

statutory hate-speech prohibitions, suits over quintessentially religious speech opposing same-sex marriage are no longer conjectural in America.[31]

II. Legalizing Same-Sex Marriage Will Create the Risk That Government Will Strip Its Benefits from Religious Institutions That Refuse to Treat Legally Married Same-Sex Couples as Morally Equivalent to Married Men and Women.

As discussed above, legalizing same-sex marriage would generate extensive litigation over state anti-discrimination statutes that directly *regulate* religious institutions' marriage-related policies. Another battleground awaits over whether governments may *withdraw* funding or access to government benefits to religious organizations they label as "discriminators" because of their long-standing opposition to same-sex marriage. Governments are already arguing that law or public policy prevents them from providing government services to or, even associating with, such discriminatory religious organizations.

Many government-funded programs require that recipients be organized "for the public good," or that they not act "contrary to public policy." Thus, religious institutions that refuse to approve, subsidize, or

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[31] In *Bryce* v. *Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002), a church discovered that its youth minister had just had a civil commitment ceremony with her homosexual partner and responded by a series of parish discussions condemning the relationship and homosexual conduct generally as sinful, idolatrous, and incompatible with Scripture. The youth minister sued her church for sexual harassment in order to silence its religious speech.

perform state-sanctioned same-sex marriages could well be found to violate such general standards, and therefore lose their access to public fora, government funding, or tax exempt status. In states where courts and legislatures cannot force religious groups to accept same-sex marriage norms, revocation of special government benefits and accommodations may prove equally effective. The amount of government benefits at risk is large and only stands to grow in light of the increasing cooperation between faith-based organizations and state and federal governments through health, education, and "charitable choice" programs.

A. *Religious institutions that refuse to recognize same-sex marriages risk losing their tax-exempt status.*

Since the overwhelming majority of religious institutions receive tax-exempt status, the potential exists for staggering financial loss due to the revocation of tax-exemptions by government authorities—potentially federal, but more likely state or local—for religious institutions that refuse to affirm same-sex marriage. Activist efforts to punish objecting religious groups in this manner have not yet succeeded in court or at the ballot box, and are especially unlikely in the near future to succeed at the federal level. But if these targeted tax-revocations were to occur, First Amendment defenses to such attacks will likely be unavailing.[32]

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[32] "[P]rivate churches losing their tax exemptions for their opposition to homosexual marriages . . . are among the very dangers from the left

In *Bob Jones* v. *United States*, 461 U.S. 574 (1983), a religious university that banned interracial dating and marriage as part of its admissions policy lost its tax exemption, even though the policy stemmed directly from the school's sincerely held religious beliefs. In affirming the IRS decision and rejecting the school's Free Exercise defense, the Supreme Court reasoned that

> the Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.

Id. at 604. Where the political will supports it, legislative and executive acts may well reflect the determination that houses of worship that hold fast to husband-wife marriage are, as in *Bob Jones*, "so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred," *id.* at 592, and must therefore have their tax exempt status revoked. Although those institutions will be virtually defenseless in court under the First Amendment, taxing authorities need not go so far to instill conformity through fear. The mere *threat* of losing tax-exempt status would compel many religious institutions to conform, rather

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against which I warned." Richard A. Epstein, *Same-Sex Union Dispute: Right Now Mirrors Left*, WALL ST. J., July 28, 2004 at A13.

than risk compromising so severely their ability to provide desperately needed social and spiritual services.

B. *Religious institutions that refuse to recognize same-sex marriages risk exclusion from competition for government-funded social service contracts.*

Even where houses of worship are not targeted, their religiously affiliated social service organizations could be. As it stands, religious universities, charities and hospitals receive significant government funding, but that funding could one day be stripped away through lawsuits or the decisions of regulatory bodies.

In *Grove City College* v. *Bell*, 465 U.S. 555 (1984), a religious college was denied *all* federal student financial aid for failing to comply with Title IX's written anti-discrimination affirmation requirements, even though there was no evidence of actual discrimination.[33] Religious universities that reject same-sex marriage are open to similar funding attacks from state education agencies that choose to adopt an aggressive view of state law. This is especially true in California, which is more likely to include sexual orientation protections in its anti-discrimination statutes than other states.

A related concern exists for religious institutions in the adoption

[33] The U.S. Congress has since provided a legislative correction to the Department of Education's and the Supreme Court's application of Title IX. *See* CIVIL RIGHTS RESTORATION ACT OF 1987, 20 U.S.C. § 1687.

context. Will state governments force religious institutions to place orphan children under the care of same-sex couples? It has already happened. In Massachusetts, Boston Catholic Charities, a large religious social-service organization, was pushed out of the adoption business because it was forced to choose between placing foster children with homosexual couples (and violating its religious convictions), or losing its state adoption agency license altogether.[34] In California, a lower court recently found administrators of an Arizona adoption facilitation website subject to *California's* public accommodations statute because they refused, as a matter of religious principle, to post profiles of same-sex couples as potential adoptive parents. *See Butler* v. *Adoption Media*, 486 F.Supp.2d 1022 (N.D. Cal. 2007). As a result, the adoption site can no longer accept profiles from *any* California resident.[35]

Finally, the Young Men's Christian Association (YMCA) in Iowa was forced to change their definition of "family" to include gays and lesbian unions or lose $102,000 in government support for the YMCA's community programs. In that case, the YMCA was found to have violated

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[34] Patricia Wen, *Archdiocesan agency aids in adoptions by gays; Says it's bound by antibias laws*, BOSTON GLOBE, Oct. 22, 2005 (reporting on Catholic Charities having to "choose between its mission of helping the maximum number of foster children possible [hundreds of adoptions] and conforming to the Vatican's position on homosexuality.").

[35] *See* http://www.alliancedefensefund.org/news/pressrelease.aspx?cid =4128 (visited on Sep. 17, 2007).

Des Moines' public accommodations laws after refusing to extend "family membership" benefits to a lesbian couple which had entered a civil union in Vermont. Although the YMCA addressed the concern by creating a new membership class that allowed gay and lesbian couples to receive identical benefits as "family" members—the city council was not satisfied and required the YMCA to include gays and lesbians under *the YMCA's* definition of "family" or lose funding.[36]

Gay rights advocates have successfully fought and won legal battles by using municipal laws that forbid outsourced government service providers from discriminating based on sexual orientation.[37] Cooperation with government service agencies—if done on or through houses of worship, religious hospitals, or religious schools—may run afoul of these

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[36] *See* "Consider us family, lesbians tell YMCA," Des Moines Register, June 22, 2007, at 1A (lesbian couple—whose YMCA "family membership" was revoked based on a policy that tracked the state law marriage definition as between a man and a woman—filed complaint with city's human rights commission, which found "probable cause" that the policy violated city ordinance prohibiting discrimination in public accommodations based on sexual orientation); "YMCA rewrites rules for lesbian couples," Des Moines Register, Aug. 6, 2007 (despite YMCA's compliance with the commission's ruling in creating equivalent category for same-sex couples, City forced YMCA to change "family" definition or lose federal grant); "Lesbians reject YMCA Agreement," Des Moines Register, Aug.7, 2007 (after YMCA changed its "family" definition, lesbian couple refused to sign settlement due to confidentiality clause).

[37] *See Under 21* v. *New York*, 126 Misc. 2d 629 (N.Y. Spec. Term 1984) (noting that funds cannot be used to support or encourage the discrimination on the basis of sexual orientation by others in the context of private providers of government services.).

local anti-discrimination laws if the houses of worship receive government funding and can be cast as government "contractors."

C. *Religious institutions that refuse to recognize same-sex marriages risk exclusion from government facilities and fora.*

Religious institutions will likely face challenges to their equal access to a diverse array of public subsidies on the one hand, and access to fora where they may freely discuss their religious beliefs on the other. A useful parallel is the retaliation that the Boy Scouts of America continue to face over their membership criteria. The Boy Scouts' controversial requirement—that members believe in God and not advocate for or engage in homosexual conduct—has resulted in numerous lawsuits by activists and municipalities seeking to deny the Boy Scouts *any* access to state benefits and public fora.

For example, the Boy Scouts fought to regain equal access to public after-school facilities[38] and use of military resources for their annual Jamboree.[39] They appear to have *permanently* lost leases to city

[38] *Boy Scouts of America, South Florida Council* v. *Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (preliminarily enjoining a school board from continuing to exclude the Boy Scouts from school facilities based on their negative views of homosexual conduct).

[39] *Winkler* v. *Gates*, 481 F.3d 977 (7th Cir. 2007) (vacating lower court Establishment Clause decision banning military loans of land and logistics for annual Scout Jamboree due to insufficient standing).

campgrounds,[40] a lease to a downtown headquarters building,[41] marina berths reserved for "public interest" groups,[42] and the right to participate in a state-facilitated charitable payroll deduction program.[43]

Government ostracism of the Boy Scouts is merely a foreshadowing of that which awaits religious organizations that persist in their theology-based opposition to same-sex marriage, especially in jurisdictions where same-sex marriage is legal. These religious organizations will be forced to either change their beliefs and messages concerning same-sex marriage or risk an avalanche of lawsuits and municipal ordinances seeking their targeted exclusion from public privileges and benefits.[44]

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[40] *Barnes-Wallace* v. *Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (revoking use of publicly leased park land based to avoid violating the Establishment Clause based on the Scouts' required belief in God), *question certified to state Supreme Court by Barnes-Wallace* v. *City of San Diego*, 471 F.3d 1038 (9th Cir. 2006).

[41] Joseph A. Slobodzian, *Council Votes to End City Lease with Boy Scouts*, PHILADELPHIA INQUIRER, June 1, 2007 at B1 (noting city decision to evict Boy Scouts from their city-owned headquarters of 79 years due to their policy of excluding openly gay members).

[42] *Evans* v. *City of Berkeley*, 38 Cal.4th 1 (Cal. 2006) (affirming revocation of a boat berth subsidy at public marina due to Scouts' exclusion of atheist and openly gay members).

[43] *Boy Scouts of America* v. *Wyman*, 335 F.3d 80 (2nd Cir. 2003) (holding that the Boy Scouts may be excluded from the state's workplace charitable contributions campaign for denying membership to the openly gay).

[44] *See, e.g.*, *Catholic Charities of Maine* v. *City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004) (upholding ordinance forcing religious charity

D. *Religious institutions that refuse to recognize same-sex marriages risk exclusion from the state function of licensing marriages.*

Religious institutions may soon face a stark choice: either abandon their religious principles regarding marriage or be deprived of their ability to perform legally recognized ones. As courts push the civil definition of marriage into greater conflict with the historical religious definition, controversy will inevitably grow over *how* a civil marriage is solemnized and *who* can do the solemnizing.

If clergy act in the place of civil servants when legally marrying couples, they may soon be regulated just like civil servants. Vermont has already held that the free exercise rights of town clerks are not violated if they are fired for refusing to participate in the issuance of civil union licenses to same-sex couples for religious reasons.[45] And at least 12 dissenting Massachusetts justices of the peace have been forced to resign for refusing to perform same-sex marriages, despite the fact that they were perfectly willing and able to perform husband-wife marriages.[46] Since clergy fulfill an important government function when legally solemnizing

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to either extend employee spousal benefit programs to registered same-sex couples, or lose access to all city housing and community development funds).

[45] *Brady* v. *Dean*, 173 Vt. 542, 547 (2001).

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

marriages, there may be a strong movement to strip all clergy who refuse to solemnize same-sex marriages of their authority to perform that civil function over Free Exercise objections.

Indeed, some state legislation prohibits officials who conduct marriage ceremonies from discriminating in certain ways. The Texas Family Code, for example, forbids persons authorized to conduct a marriage ceremony – including clergy – "from discriminating on the basis of race."[47] California's marriage codes could easily be amended to follow the Texas model but also include a prohibition on clergy discriminating based on sex or sexual orientation when solemnizing civil marriages.

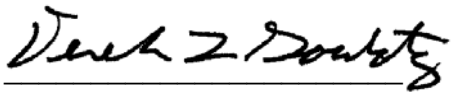
CONCLUSION

In sum, if this Court rules for Plaintiffs, the California courts would surely face a wave of church-state litigation created by newly conflicting religious and legal definitions of "marriage." *Amicus* urges the Court to rule against Plaintiffs so that those new conflicts will not arise.

[47] TEX. FAM. CODE § 2.205. *Cf.* CAL. FAM. CODE § 354(d) ("Applicants for a marriage license shall not be required to state, for any purpose, their race or color").

Respectfully submitted this 17th day of September, 2007.

The Becket Fund for Religious Liberty
AMICUS CURIAE



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PROOF OF SERVICE AND CERTIFICATION OF COMPLIANCE WITH RULES

I, Roger T. Severino, hereby certify that this Brief *Amicus Curiae* complies with Rules 8.204(b) and 8.4 regarding form and, being 3,777 words long, complies with Rule 8.520(c). I also declare that all copies filed with the Court and all service copies have been printed on recycled paper in accordance with Rules 1.22 and 1.6 and that all the parties listed below have been served copies of this brief as provided under Rule 1.21(a) and (b).

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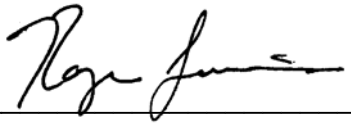

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