

**SUPREME COURT
OF THE
STATE OF CONNECTICUT**

S.C. 17716

ELIZABETH KERRIGAN, ET AL.

v.

COMMISSIONER OF PUBLIC HEALTH, ET AL.

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS
LIBERTY IN SUPPORT OF DEFENDANTS-APPELLEES

COUNSEL FOR *AMICUS CURIAE*:

THE BECKET FUND
FOR RELIGIOUS LIBERTY
ANTHONY R. PICARELLO, JR.
ROGER T. SEVERINO
1350 CONNECTICUT AVENUE NW
SUITE 605
WASHINGTON, DC 20036-1735
TELEPHONE: (202) 955-0095
FACSIMILE: (202) 955-0090

PHELON, FITZGERALD & WOOD, P.C.
HOWARD M. WOOD, III*
JURIS NUMBER: 02560
773 MAIN STREET
MANCHESTER, CT 06040
TELEPHONE: (860) 643-1136
FACSIMILE: (860) 643-5773
**ADMITTED IN THE STATE OF
CONNECTICUT*

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STATEMENT OF THE ISSUES

Amicus adopts the statement of issues of the Defendants and adds:

1. Whether redefining the fundamental institution of marriage to include same-sex couples will risk pervasive church-state conflict.
2. Whether 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 traditionally married men and women.
3. Whether 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 traditionally married men and women.

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INTEREST OF *AMICUS*¹

Amicus, 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 persons and institutions to pursue their missions without excessive government regulation and entanglement.

The Becket Fund's *amicus* brief addresses 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, we 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,² 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 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

¹ *Amicus*' motion for leave to file this brief as *amicus curiae* under Practice Book § 67-7 and exceed the page limit was granted by this Court on April 5, 2007.

² See <http://www.becketfund.org/index.php/article/494.html>.

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 those conflicts would arise 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 of some plaintiffs’ *amici*, to the effect that same-sex marriage will in no way harm the interests or rights of religious persons and institutions that conscientiously object to treating sex and different sex unions as moral equivalents.³

Applicant believes that its brief on this topic will assist this Honorable Court in addressing the issues presented on appeal.

³ See Brief and Appendix of Various *Amici Curiae* Religious Organizations and Clergy, filed December 12, 2006. Notably, the brief signers were composed exclusively of persons and groups that openly declare that “[t]here is no difference in marriages between a man and a woman, two men, or two women.” *Id.* appx. at 8. These *amici* can hardly speak on behalf of the many (and probably majority) religious groups that oppose same-sex marriage. In contrast, the Becket Fund uniquely represents religious clients with positions on *all* sides of this issue, from (literally) Agnostics, to Anglicans, to Buddhists, to Christians, to Zoroastrians, among many others.

STATEMENT OF FACTS

Amicus adopts Defendants' statement of facts.

ARGUMENT

On November 18, 2003, the Massachusetts Supreme Judicial Court legalized same-sex marriage 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 Connecticut. The people of Massachusetts are reconsidering democratically the wisdom of the *Goodridge* decision,⁴ and every other state high court that has considered the issue has refused to follow Massachusetts' lead.⁵ In order to avoid creating further legal turmoil, neither should the Connecticut Supreme Court.

The Connecticut legislature rejected Massachusetts' approach, instead adopting civil unions in 2005, thereby creating "an identical set of legal rights in Connecticut for same sex couples and opposite sex couples," while explicitly preserving the definition of the marriage as a union of one man and one woman. *Kerrigan v. State*, 49 Conn. Supp. 644, 655 (citing P.A. 05-10). The lower court upheld Connecticut's marriage-civil union distinction,⁶ on the

⁴ The Massachusetts Supreme Judicial Court has held that efforts to amend the constitution to eliminate same-sex marriage by referendum may proceed. See *Schulman v. Attorney General*, 447 Mass. 189 (Mass. 2006).

⁵ See e.g., *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (rejecting same-sex marriage); *Hernandez v. Robles*, 7 N.Y.3d 338 (N.Y. 2006) (rejecting same-sex marriage); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (ordering the conferral of marriage-like rights to same-sex couples, but not mandating the redefinition of marriage itself). See also *Baker v. State*, 744 A.2d 864 (Vt. 1999) (same).

⁶ Due to their novelty, many religious organizations that support traditional marriage do not find civil unions *per se* objectionable, although they certainly do object to several applications. This contrasts with the marital union which has historically *presumed* a sexual relationship that many religious groups do not accept among same-sex couples as a matter

theory that if there were any harm to plaintiffs, it would not be of “constitutional magnitude.” *Id.* at 659. While *amicus* agrees that Connecticut’s addition of civil unions presents no legal harm to *supporters* of same-sex marriage, *amicus* writes now to explain how changing the long-standing legal definition of marriage will have a significant impact on *opponents* of same-sex marriage, creating widespread church-state conflicts as a result.

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 Traditionally Married Men and Women.

A. *Religious institutions that disapprove of employees entering into same-sex marriages risk suits under employment anti-discrimination laws.*

If current trends persist, religious institutions that oppose same-sex marriage will soon face the circumstance where one of their employees obtains a legal marriage with a same-sex partner. For many religious institutions, an employee’s entering a same-sex marriage would necessarily constitute a public repudiation of the institution’s core religious beliefs. These employers may well seek to terminate employees who reject the employer’s moral and religious teachings in such an open and notorious way. Terminated employees, in turn, might sue under employment anti-discrimination statutes, using a variety of theories such as discrimination based on sexual orientation,⁷ sex, or (now) marital status.⁸

of conscience. Indeed, the state itself recognizes that civil unions are innovative creatures, and that entering one does not necessarily constitute a public declaration of a couple’s intent to enter a sexual relationship. *Kerrigan v. State*, 49 Conn. Supp. 644, 655 n. 7 (“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).

⁷ Connecticut law prohibits sexual orientation discrimination in employment, housing, public accommodations, credit practices, educational services, licensure programs and allocation of tangible state benefits. See CONN. GEN. STAT. §§ 46a-81c.

If legalized same-sex marriage becomes more common, employees will likely ask their religious employers to extend spousal health and retirement benefits to those partners, just as they would to different-sex spouses. Some religious employers may be willing to overlook or ignore an employee's same-sex marriage, but may at the same time refuse to subsidize it, or otherwise to treat it as entirely the equivalent of traditional marriage on religious grounds. Before *Goodridge*, courts generally did not require employers to extend benefits to same-sex partners, absent specific language on the issue in state or municipal anti-discrimination statutes. But the reasoning in those cases suggests that, after the redefinition of marriage, decisions refusing to extend spousal benefits would be reconsidered.

For example, in *Lilly v. City of Minneapolis*, a lesbian couple claimed that they suffered illegal discrimination because their single status, combined with their homosexual orientation, precluded them from ever receiving state employee spousal health benefits.⁹ While the court found that the extension of such benefits was not required under the relevant anti-discrimination statutes, it noted that the definition of marriage was at the heart of the dispute:

Employers are particularly interested in whether the protection against discrimination in the workplace would change the marital status classification. Such a change would have a great impact on employer benefit plans, which might have to cover homosexual partners.

⁸ See CONN. GEN. STAT. § 46a-60. See e.g., *McClure v. Sports & Health Club*, 370 N.W.2d 844 (Minn. 1985) (holding that employer illegally discriminated on the basis of marital status when it refused to hire unmarried cohabiting applicants despite employer's sincere religious belief).

⁹ *Lilly v. City of Minneapolis*, 1994 WL 315620, at *6 (Minn. Dist. Ct. 1994) (holding that not providing benefits to homosexual couples did not violate the Minnesota Human Rights Statute), *aff'd by* 527 N.W.2d 107 (Minn. Ct. App. 1995).

Id. at *9. If legal marriage is changed to include same-sex couples, employers may be automatically required to provide insurance to all legal “spouses”—both traditional and same-sex—to comply with state and municipal anti-discrimination laws.

B. *Religious institutions that disapprove of same-sex marriage 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 other benefits attendant to legal marriage wherever else they are offered, such as at religious colleges and universities. Since most religious colleges and universities offer student housing (often subsidized) to married couples, conflict looms at those religious schools that oppose same-sex sexual conduct. At least some of those schools would refuse in conscience to subsidize or otherwise condone homosexual cohabitation on their campus by extending that housing 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.¹⁰ 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.

¹⁰ See *Smith v. Fair Employment & Housing Comm’n.*, 51 Cal.Rptr.2d 700 (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 (Alaska 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).

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.¹¹ If same-sex marriage becomes the law, courts would not need to construe sexual orientation protections as broadly as did the *Levin* court to achieve the same result—the much more common laws against marital status discrimination would more squarely cover the case.

Thus, the right of universities to follow their religious beliefs and give priority to married students was already being challenged as illegally discriminatory before the plaintiffs filed this suit. If this Court follows the reasoning of *Goodridge*, local bodies will be all the more willing to require religious schools to violate their beliefs by subsidizing and otherwise facilitating homosexual cohabitation, where sexual orientation and marital status discrimination in housing is prohibited, as in Connecticut.¹²

C. *Religious institutions that refuse to extend their services or facilities to same-sex couples as moral equivalents to married men and women risk suits under public accommodation laws.*

From soup kitchens, to hospitals, to schools, to counseling, to marriage services, religious institutions provide a broad array of services and facilities to their members and to the general public. Traditionally, religious institutions have enjoyed wide latitude in choosing what religiously-motivated services and facilities they will provide, and precisely to

¹¹ Curiously, it does not appear that Yeshiva, a Jewish university, raised any religious liberty defenses.

¹² CONN. GEN. STAT. § 46a-81e.

whom they will provide those services. However, the changing legal treatment of sexual orientation may require a reassessment of that understanding for three reasons.

First, states like Connecticut are adding (by statute or by judicial determination) sexual orientation as a protected category in anti-discrimination laws. Second, houses of worship are facing increased risk of being declared places of public accommodation, and thus being treated no different than secular businesses. Third, and most relevant here, the advent of legal same-sex legal marriage sets the stage for widespread litigation against religious institutions that refuse to treat married same-sex couples as moral equivalents to married men and women. This risk is especially acute for those religious institutions that have very open policies concerning membership and service provision. Specifically, the more widely available to the public, the less “strictly religious,” and the more similar to a commercial transaction are the services, the greater the risk that a service or facility will be regulated under public accommodation statutes. A few of the many religiously-motivated services that can potentially fall under this rubric include counseling services, soup kitchens, job training programs, health care services, day care, schooling, adoption services and conceivably even the use of wedding reception facilities.¹³

While nearly all states have laws banning sex discrimination in public accommodations, a subset, such as Connecticut, explicitly protect sexual orientation and marital status as well.¹⁴ Although some states exempt religious organizations from their anti-discrimination statutes generally, most limit that exemption only to certain kinds of

¹³ See e.g., *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).

¹⁴ CONN. GEN. STAT. § 46a-81d.

accommodations, or only to certain categories of discrimination. Other states, such as Maryland, have no religious exemptions at all.¹⁵ Moreover, whatever protection governments may grant by statute can be taken away just as easily by statute, and the current trend is to grant greater protection to homosexual conduct.

As mentioned earlier, the more that a private organization, even a religious one, appears “open to the public,” the greater the risk that the organization will be declared a public accommodation. As an example of these dangers, consider *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1 (D.C. Ct. App. 1987) (*en banc*). In that case, the D.C. Court of Appeals held that while the D.C. Human Rights Act, a public accommodations statute, did not require the university to give homosexual groups “university recognition,” it nevertheless required the university to allow them equivalent access to *all* university facilities.

The court reasoned that the ability of the university, a private religious actor, to express a point of view on homosexuality was absolute; thus, it could not be compelled to give the groups official recognition. However, the ability to act consistently with one’s religious beliefs was considered a different matter altogether. The university’s Free Exercise objections to giving equal access to homosexual groups were dismissed because the court found that eradicating bias against homosexuals represented a compelling government interest.

D. *Religious institutions that publicly express their religious disapproval of same-sex marriage risk potential lawsuits.*

¹⁵ For a complete listing of state antidiscrimination codes, see Brief *Amicus Curiae* of the Becket Fund for Religious Liberty at 4 n.5 in *Boy Scouts v. Wyman*, No. 03-956 (2004) (available at <http://www.becketfund.org/litigate/boyscoutsvwyman-amicus.pdf>).

Suits under increasingly numerous state hate crimes 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 46 states.¹⁶ Of those, currently 31 states, including Connecticut, have hate crimes laws referencing sexual orientation.¹⁷ Some states also include a ban on hate *speech* regarding sexual orientation in some form as well, such as in Massachusetts and Pennsylvania.¹⁸ No religious speaker has yet been convicted of a hate crime for publicly opposing gay rights, but arrests have been made on this basis.¹⁹ Foreign democracies have already demonstrated that trial-level convictions

¹⁶ See Christopher Chorba, *The Danger of Federalizing Hate Crimes*, 87 U. VA. L. REV. 319, 347–48 n.130–32 (April 2001) (cataloging hate crimes statutes and penalty enhancements in 46 states).

¹⁷ See Human Rights Campaign, “Statewide Hate Crimes Laws,” (2005) (available at http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19445) (last visited on March 15, 2007).

¹⁸ 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, see MASS. GEN. LAWS 151B §§ 1(5), 4(18).

¹⁹ In 2004, an organized group of Christians was arrested for “ethnic intimidation” under hate crimes laws for peacefully 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*, 2007 WL 172400, at *6 (E.D. Pa. 2007) (“once the City issued a permit to Philly Pride for OutFest, it was empowered to enforce the permit by excluding persons expressing contrary messages.”).

are possible,²⁰ and to the extent American courts look to precedents abroad, they will find support for intrusive regulations.²¹

Yet even without statutory hate-speech prohibitions, suits over religious speech are no longer strictly conjectural in the United States. In *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002), a plaintiff youth minister sued her church for sexual harassment for stating that homosexuality is a sin, idolatrous, and incompatible with Scripture. The church statements were made in the context of a parish meeting called in response to discovery of the youth minister's recent civil commitment ceremony with her homosexual partner.

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 Traditionally Married Men and Women.

As discussed above, same-sex marriage risks creating extensive litigation over the use of state anti-discrimination statutes in directly *regulating* the policies of religious

²⁰ See *Riksåklagaren v. ÅG*, No. B-1050-05, Högsta Domstolen [Supreme Court], Nov. 29, 2005 (Sweden) (overturning Swedish Pentecostal minister's sentence to prison for "inciting hatred" against homosexuals after reciting Biblical condemnations of homosexuality in a sermon).

²¹ In addition to Sweden, bans on "objectionable" religious speech exist in Canada, Britain and Australia. See *respectively, Stacey v. Campbell*, 2002 B.C.H.R.T. 35 (2002) (a pastor sued under hate crimes law and brought before the British Columbia Human Rights Tribunal for "express[ing] his view of religious teachings concerning homosexuality" in a paid newspaper ad); RACIAL AND RELIGIOUS HATRED ACT 2006 (c. 1) (outlawing "stirring up hatred against a person" on religious or racial grounds), available at <http://www.opsi.gov.uk/acts/acts2006/20060001.htm>.; *Islamic Council of Victoria v. Catch the Fire Ministries*, VCAT No. A392/2002 (Vict. Civ. Adm. Trib. December 17, 2004) (finding pastor liable for "vilifying" Islam during a religious seminar), vacated and remanded by *Catch the Fire Ministries Inc & Ors v. Islamic Council of Victoria Inc.* [2006] VSCA 284 (14 December 2006), available at <http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html>.

institutions regarding sexual orientation issues. A separate question is whether governments must provide *funding and access to programs* to religious organizations they might consider liable under anti-discrimination statutes (but for religious exemptions, if any). Governments will argue that they cannot support or (even be associated with) “discriminatory” organizations when providing government services and may move to ban such subsidies and cooperation.

Additionally, many government-funded programs require that the 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 perform state-sanctioned same-sex marriages could quickly lose their access to public fora, government funding, or tax exemptions. In states where courts and legislatures cannot force religious groups to accept same-sex marriage norms, revocation of privileges may prove just as effective. The potential losses of current government benefits are large enough currently, but they only stand 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 traditional tax-exempt status.*

Since the overwhelming majority of religious institutions are tax-exempt, the potential exists for staggering financial loss from state or federal retaliation against religious institutions that support traditional marriage through their policies. Although the political will to strip objecting religious groups of their tax exemptions currently does not exist—except perhaps in the most extreme local jurisdictions—constitutional defenses to that loss are unlikely to succeed when it does occur.

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 will reflect the determination that houses of worship that hold fast to traditional 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,” and must therefore have their state and federal tax exemptions revoked. And those institutions will probably be virtually defenseless in court under the First Amendment. But state and local taxing authorities need not go so far to instill conformity through fear: the mere potential for losing tax-exempt status would compel many religious institutions to conform rather than risk compromising so severely their ability to provide desperately needed social and spiritual services.²²

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

²² “[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.” Richard A. Epstein, *Same-Sex Union Dispute: Right Now Mirrors Left*, WALL ST. J., July 28, 2004 at A13.

Where houses of worship are not targeted as such, their religiously affiliated social service organizations could well be. As it stands, religious universities, charities and hospitals receive significant government funding, but that funding may one day be stripped away through lawsuits or 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.²³ Religious universities that reject same-sex marriage are open to similar attacks against the funding they may receive from state education agencies which choose to adopt an aggressive view of state law. This is especially so in Connecticut, which is demonstrably more likely to include sexual orientation and marital status protections in its anti-discrimination statutes.

A related concern exists for religious institutions in the adoption context. Will state governments force religious institutions to place orphan children under the care of same-sex couples? It has already happened. In Massachusetts, Catholic Charities, a large religious social-service organization, was forced to choose between placing foster children in their care with homosexual couples in violation of their religious beliefs, or losing their state adoption agency license.²⁴

²³ 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.

²⁴ Patricia Wen, *Archdiocesan agency aids in adoptions by gays; Says it's bound by antibias laws*, Boston Globe, October 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.").

Finally, gay rights advocates have successfully fought and won legal battles by using municipal laws that require outsourced government service providers not to discriminate based on sexual orientation.²⁵ Cooperation with government service agencies—if done on or through houses of worship, religious hospitals, or religious schools—may run afoul of these 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 forums 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’ 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 have lost long-standing leases to city campgrounds,²⁶ lost berthing rights given to “public interest” groups at a city marina,²⁷ lost equal access to

²⁵ 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.).

²⁶ See *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 Scout’s required belief in God).

²⁷ See *Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006) (affirming revocation of a boat berth subsidy at public marina due to Scout’s exclusion of atheists and homosexuals).

public after-school facilities (later restored),²⁸ and most relevantly here, lost the right to participate in Connecticut's state-facilitated charitable payroll deduction program.²⁹

Government's ostracism of the Boy Scouts is merely a foretaste of what awaits religious organizations that persist in their traditional opposition to same-sex marriage. These religious organizations must either change their policies and messages concerning same-sex marriage or risk an avalanche of lawsuits and targeted exclusions from public privileges and benefits.

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 religious definition, controversy will inevitably grow over exactly *how* a civil marriage is solemnized, and exactly *who* can do the solemnizing.

If clergy act "in the place of" civil servants when 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.³⁰ Already, at least 12 dissenting

²⁸ See *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 anti-gay viewpoint).

²⁹ See *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 homosexuals).

³⁰ *Brady v. Dean*, 173 Vt. 542, 547 (2001).

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 traditional marriages.³¹ Since clergy fulfill an important government function when legally solemnizing marriages, there may be a strong movement to strip all non-conforming clergy of their authority to perform that function, over Free Exercise objections, based on the Vermont and Massachusetts experience.

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, religion, or national origin.”³² Marriage codes such as Texas’ could easily be amended to include a prohibition on discrimination based on sex or sexual orientation and made to apply to *all* persons authorized to solemnize civil marriage, including clergy.

CONCLUSION

In short, if this honorable Court reverses the lower court’s decision, it would face a new wave of church-state litigation created by newly conflicting religious and legal definitions of “marriage;” if it affirms, those new conflicts would not arise.

REQUEST FOR RELIEF

For all the above reasons, the decision of the trial court should be affirmed.

³¹ Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004.

³² Tex. Fam. Code. § 2.205.

Respectfully submitted April 25, 2006,

The Becket Fund for Religious Liberty
AMICUS CURIAE

By their attorneys:

A handwritten signature in black ink, appearing to read "H. Wood", is written over a horizontal line. The signature is stylized and cursive.

Howard M. Wood, III*
Juris Number: 02560
773 Main Street
Manchester, CT 06040
Telephone: (860) 643-1136
Facsimile: (860) 643-5773

Anthony R. Picarello, Jr.
Derek L. Gaubatz
Roger T. Severino
1350 Connecticut Avenue, NW
Suite 605
Washington, DC 20036
Phone: (202) 955-0095
Facsimile: (202) 955-0090

Attorneys for Amicus Curiae
**Admitted in the State of*
Connecticut

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief in support of defendants-appellees complies with the requirements set forth in Practice Book § 67-2.

A handwritten signature in black ink, appearing to read "H. Wood", is written over a horizontal line. A vertical red line is positioned to the right of the signature.

Howard M. Wood, III*
Juris Number: 02560
773 Main Street
Manchester, CT 06040
Telephone: (860) 643-1136
Facsimile: (860) 643-5773