Nos. 10-2204, 10-2207, 10-2214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF-APPELLEE,
v.
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
DEFENDANTS-APPELLANTS.

DEAN HARA,
PLAINTIFF-APPELLEE/CROSS-APPELLANT,
NANCY GILL, et al.,
PLAINTIFFS-APPELLEES,
v.
OFFICE OF PERSONNEL MANAGEMENT, et al.,
DEFENDANTS-APPELLANTS/CROSS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF *AMICI CURIAE* ANTI-DEFAMATION LEAGUE · ANDOVER NEWTON THEOLOGICAL SCHOOL · CALIFORNIA COUNCIL OF CHURCHES · CALIFORNIA FAITH FOR EQUALITY · CENTRAL CONFERENCE OF AMERICAN RABBIS · GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST · HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA · HINDU AMERICAN FOUNDATION · INTERFAITH ALLIANCE FOUNDATION · JAPANESE AMERICAN CITIZENS LEAGUE· JEWISH ALLIANCE FOR LAW & SOCIAL ACTION · JEWISH RECONSTRUCTIONIST FEDERATION · MA CONFERENCE OF THE UNITED CHURCH OF CHRIST · NATIONAL COUNCIL OF JEWISH WOMEN · PEOPLE FOR THE AMERICAN WAY FOUNDATION · SOCIETY FOR HUMANISTIC JUDAISM · UNION FOR REFORM JUDAISM · UNITARIAN UNIVERSALIST ASSOCIATION · UNITARIAN UNIVERSALIST LEGISLATIVE MINISTRY CALIFORNIA · THE UNITARIAN UNIVERSALIST MINISTERS ASSOCIATION · THE UNIVERSAL FELLOWSHIP OF METROPOLITAN COMMUNITY CHURCHES · WOMEN OF REFORM JUDAISM IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT BELOW

Harvey J. Wolkoff*
COA# 7378
Jessica M. Lindemann
COA# 1143607
Russell P. Plato
Samuel P. Bickett
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, Massachusetts 02199
(617) 951-7000

*Counsel of Record

Robert O. Trestan
Steven C. Sheinberg
Steven M. Freeman
Deborah Bensinger
ANTI-DEFAMATION LEAGUE
605 Third Avenue
New York, New York 10158
(212) 885-7700

CORPORATE DISCLOSURE STATEMENTS

The Anti-Defamation League is a 501(c)(3) non-profit corporation organized under the laws of Washington, D.C. and headquartered in New York, New York. It has no parent corporation and issues no stock.

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Jewish Reconstructionist Federation is a non-profit corporation organized under the laws of the State of New York and headquartered in Pennsylvania. It has no parent corporation and issues no stock.

The Massachusetts Conference of the United Church of Christ is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts and headquartered in Framingham, Massachusetts. It has no parent corporation and issues no stock.

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People for the American Way Foundation is a nonprofit corporation organized under the laws of the State of Delaware and headquartered in Washington, D.C. It has no parent corporation and issues no stock.

The Society for Humanistic Judaism is a 501(c)(3) non-profit corporation organized under the laws of the State of Michigan and headquartered in Farmington Hills, Michigan. It has no parent corporation and issues no stock.

The Union for Reform Judaism is a non-profit corporation organized under the laws of the State of New York and headquartered in New York. It has no parent corporation and issues no stock.

The Unitarian Universalist Association is a religious denomination and 501(c)(3) non-profit corporation organized under the laws of the Commonwealth of Massachusetts and headquartered in Boston, Massachusetts. It has no parent corporation and issues no stock.

The Unitarian Universalist Legislative Ministry California is a 501(c)(3) non-profit corporation organized under the laws of the State of California and headquartered in Sacramento, California. It has no parent corporation and issues no stock.

Unitarian Universalist Ministers Association is a 501(c)(3) non-profit corporation organized under the laws of the Commonwealth of Massachusetts and headquartered in Boston, Massachusetts. It has no parent corporation and issues no stock.

The Universal Fellowship of Metropolitan Community Churches is a 501(c)(3) non-profit corporation organized under the laws of the State of California and headquartered in California. It has no parent corporation and issues no stock.

Women of Reform Judaism is a nonprofit corporation organized under the laws of New York and headquartered in the State of New York. It has no parent corporation and issues no stock.

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IDENTITY AND INTEREST OF *AMICI*

Amicus curiae Anti-Defamation League (the "ADL") was founded in 1913 to combat anti-Semitism and other forms of discrimination and to advance goodwill and mutual understanding among Americans of all creeds and races. Today, ADL is one of the world's leading civil and human rights organizations combating anti-Semitism, all types of prejudice, discriminatory treatment, and hate. ADL is committed to protecting the civil rights of all persons and to assuring that each person receives equal treatment under the law.

Amicus curiae Andover Newton Theological School is the nation's oldest graduate school of theology. Since its founding over 200 years ago, its faculty and graduates have upheld the essential rights embodied in the concept of the separation of church and state. In order for us to have the freedom to express our faith we cannot deny or restrict that freedom to another faith. This is not a "one size fits all" country. When clergy perform marriages they do so in the name of God and the church. The government only authorizes a marriage; it does not and cannot sanctify it.

Amicus curiae California Council of Churches is an organization of California's Christian churches representing the State's mainstream and progressive communities of faith. Its membership comprises more than 6,000 California congregations, with more than 1.5 million individual members drawn

from 21 denominations spanning the mainstream Protestant and Orthodox Christian communities. The Council's position on marriage between same-sex couples is pro-religious freedom, and pro-church autonomy. Commitment to religious liberty and equal protection of law strongly supports federal recognition of same-sex couples' lawful marriages. The Council accordingly has a strong interest in this case.

Amicus curiae California Faith for Equality is a coalition of congregations, organizations, and faith leaders working to win full lesbian, gay, bisexual and transgender equality and to safeguard religious freedom. As a multi-faith organization, it respects and values the wisdom and perspectives of every faith tradition, including both those that recognize marriage between same-sex couples as a religious rite, and also those that do not. California Faith for Equality has a strong interest in supporting federal recognition of same-sex couples' lawful marriages.

Amicus curiae General Synod of the United Church of Christ ("UCC") is the representative body of the national setting of the United Church of Christ, which was formed in 1957 by the union of the Evangelical and Reformed Church and The General Council of the Congregational Christian Churches of the United States. UCC churches have a rich heritage of standing with the marginalized and oppressed, and for more than three decades have set a clear course of welcome,

inclusion, equality, and justice for LGBT people. The UCC currently has 5,200 churches in the United States, with approximately 1.2 million individual members. More than 1,300 of those churches are in states where same-sex couples may legally marry, including 375 in Massachusetts, 243 in Connecticut, 177 in Iowa, 140 in New Hampshire, 250 in New York, 144 in Vermont, and 9 in the District of Columbia. Many of Massachusetts's oldest congregations are members of the UCC, which has a strong interest in the legal recognition accorded to marriages between same-sex couples solemnized by its clergy and celebrated in its churches.

Amicus curiae Hadassah, The Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's Zionist membership organization in the United States, with over 300,000 Members, Associates, and supporters nationwide. In addition to Hadassah's mission of initiating and supporting pace-setting health care, education, and youth institutions in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah vigorously condemns discrimination of any kind and, as a pillar of the Jewish community, understands the dangers of bigotry. Hadassah strongly supports the constitutional guarantees of religious liberty and equal protection and rejects discrimination on the basis of sexual orientation. Hadassah supports government action that provides civil status to committed same-sex couples and their families equal to the civil status provided to

the committed relationships of men and women and their families, with all associated legal rights and obligations, both federal and state.

Amicus curiae The Hindu American Foundation ("HAF") is an advocacy group providing a progressive voice for over two million Hindu Americans. The Foundation interacts with and educates leaders in public policy, academia, and the media about Hinduism and issues concerning Hindus both domestically and internationally, including religious liberty; the portrayal of Hinduism; hate speech; hate crimes, and human rights. HAF has both litigated and participated as *amicus* curiae in numerous cases involving issues of separation of church and state as well as the right to free exercise and subscribes to the view that all religions and adherents thereof should be treated equally and with dignity by the state.

Amicus curiae Interfaith Alliance celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance has 185,000 members across the country made up of 75 different faith traditions as well as from no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy. Interfaith Alliance also seeks to shift the perspective on LGBT equality from that of problem to solution, from a scriptural argument to a religious freedom agreement, and to

address the issue of equality as informed by our Constitution. *Same-Gender Marriage and Religious Freedom: A Call to Quiet Conversations and Public Debates*, a paper by Interfaith Alliance President, Rev. Dr. C. Welton Gaddy, offers a diversity of ideas based on Interfaith Alliance's unique advocacy for religious freedom and interfaith exchange.

Amicus curiae The Japanese American Citizens League, founded in 1929, is the nation's largest and oldest Asian-American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry and others. It vigilantly strives to uphold the human and civil rights of all persons. Since its inception, JACL has opposed the denial of equal protection of the laws to minority groups. In 1967, JACL filed an amicus brief in *Loving* v. *Virginia*, urging the Supreme Court to strike down Virginia's anti-miscegenation laws, and contending that marriage is a basic civil right of all persons. In 1994, JACL became the first API non-gay national civil rights organization, after the American Civil Liberties Union, to support marriage equality for same-sex couples, affirming marriage as a fundamental human right that should not be barred to same-sex couples. JACL continues to work actively to safeguard the civil rights of all Americans.

Amicus curiae The Jewish Alliance for Law and Social Action is a voice within the Jewish community working on issues of social and economic justice,

civil rights, and protection of constitutional guarantees. JALSA has contributed extensively to *amicus curiae* briefs in state and federal courts in freedom of religious worship and religious establishment cases, and in cases involving equal protection of the laws.

Amicus curiae The Jewish Reconstructionist Federation ("JRF") was founded in 1955 as the congregational branch of the Reconstructionist Movement. Today it is comprised of over 100 congregations in the United States, as well as communities internationally. JRF is committed to leading and supporting congregations in social justice, and the healing and repair of the individual person and the world at large. As part of its mission, JRF and its member communities are committed to protecting the civil rights of all persons and to assuring that each person receives equal treatment under the law.

Amicus curiae The Massachusetts Conference of the United Church of Christ is 375 churches with over 73,000 members, making it the largest Protestant denomination in Massachusetts. Its roots go back to the Puritans and Pilgrims, making it the Commonwealth's oldest denomination. The Massachusetts Conference is one of 39 regional bodies of the United Church of Christ. Approximately two-thirds of members have come to the UCC from other denominations, or from no denomination. The UCC is generally known as a progressive denomination, having been on the forefront of securing rights for

African-Americans, women, and LGBT people. It was the first mainline denomination to ordain a gay man (1972). In 1984, the Massachusetts Conference was the first UCC conference nationwide to pass a resolution advocating for the rights of gay people. The national body passed a similar resolution the following year.

Amicus curiae The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Laws and policies that provide equal rights for same-sex couples." Its principles state that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society" and "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation, or gender identity must be eliminated." Consistent with its Principles and Resolutions, NCJW joins this brief.

Amicus curiae People for the American Way Foundation ("PFAWF") is a nonpartisan citizens' organization established to promote civil and constitutional rights and joins this brief on behalf of its African American Ministers Leadership

Council, which is comprised of more than 700 ministers in 35 states. Founded in 1981 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF has been actively involved in litigation and other efforts nationwide to combat discrimination and promote equal rights, and its AAMLC program supports efforts to secure the right of same-sex couples to marry while preserving the freedom of religious institutions to define marriage for themselves.

Amicus curiae Society for Humanistic Judaism ("SHJ") mobilizes people to celebrate Jewish identity and culture, consistent with Humanistic ethics and a nontheistic philosophy of life. Humanistic Jews believe each person has a responsibility for their own behavior, and for the state of the world, independent of any supernatural authority. The SHJ is concerned with protecting religious freedom for all, and especially for religious, ethnic, and cultural minorities such as Jews, and most especially for Humanistic Jews, who do not espouse a traditional religious belief. Humanistic Jews support the right and responsibility of adults to choose their marriage partners. The Society for Humanistic Judaism supports the legal recognition of marriage and divorce between adults of the same sex, and affirms the value of marriage between any two committed adults with the sense of obligations, responsibilities, and consequences thereof. SHJ congregations in

Connecticut, Massachusetts, New York, and the District of Columbia, where their rabbis and madrikhim solemnize same-sex couples' lawful marriages, have a compelling interest in this litigation, which bears directly on legal recognition to be accorded those marriages.

Amicus curiae The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, *amicus curiae* the Central Conference of American Rabbis (CCAR), whose membership includes more than 1,800 Reform rabbis, and *amicus curiae* the Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, share a common commitment to ensuring equality for all of God's children, regardless of sexual orientation. As Jews, we are taught in the very beginning of the Torah that God created humans B'tselem Elohim, in the Divine Image, and therefore the diversity of creation represents the vastness of the Eternal (Genesis 1:27). We oppose discrimination against all individuals, including gays and lesbians, for the stamp of the Divine is present in each and every human being. Thus, we unequivocally support equal rights for all people, including the right to a civil marriage license. Furthermore, we whole-heartedly reject the notion that the state should discriminate against gays and lesbians with regard to civil marriage equality out of deference to religious tradition, as Reform

Judaism celebrates the unions of loving same-sex couples and considers such partnerships worthy of blessing through Jewish ritual.

Amicus curiae Unitarian Universalist Association ("UUA") comprises than 1,000 congregations nationwide, with more than 280 in states where Unitarian Universalist clergy regularly solemnize many legal marriages of same-sex couples. These include 140 congregations in Massachusetts, 19 in Connecticut, 14 in Iowa, 24 in New Hampshire, 64 in New York, 22 in Vermont, and 3 in the District of Columbia. Many of Massachusetts's founding churches are members of the UUA, including the First Parish Church in Plymouth (gathered 1606/1620), First Church in Boston (gathered 1629), First Parish Church in Dorchester (gathered 1630), First Parish Church in Duxbury (gathered 1632), First Church in Hingham (gathered 1635), and First Parish in Cambridge (gathered 1636). The UUA has a strong interest in the legal recognition accorded to marriages between same-sex couples solemnized by its clergy and celebrated in its churches.

Amicus curiae Unitarian Universalist Legislative Ministry California ("UULM CA") is a statewide justice ministry. As a matter of human dignity, Unitarian Universalist congregations and clergy in California have long supported same-sex couples' freedom to marry. More than 18,000 same-sex couples lawfully married in California between June 17, 2008, and November 4, 2008, when California Proposition 8 took effect, with many of those marriages solemnized by

Unitarian Universalist clergy. UULM CA has a strong interest in the legal recognition accorded these marriages, which are valid under California law.

Amicus curiae Unitarian Universalist Ministers Association is an organization comprising ministers granted fellowship by the Ministerial Fellowship Committee of the UUA, and other ministers serving Unitarian Universalist institutions. It has a strong interest in the legal recognition accorded to the many marriages between same-sex couples that its members solemnize.

Amicus curiae The Universal Fellowship of Metropolitan Community Churches ("MCC"), with 250 congregations and 43,000 adherents, is the largest Christian denomination ministering primarily to the LBGT community. MCC for decades has made marriage equality an integral part of its spiritual commitment to social justice and Christian ministry. The MCC churches, whose clergy regularly officiate over members' legal marriages in MCC churches of Massachusetts, Connecticut, Iowa, New York, and the District of Columbia, have an extraordinary interest in the recognition accorded to those marriages.

* * *

All parties have consented to the filing of this *amicus* brief. No party's counsel authored the brief in whole or in part, and no party, party's counsel, or other person contributed money intended to fund its preparation or submission.

SUMMARY OF ARGUMENT

Amici religious organizations support the district court's rulings invalidating Section 3 of the Defense of Marriage Act ("DOMA"). The district court's decisions assure full access to civil marriage, while allowing religious groups the freedom to choose how to define marriage for themselves. Many religious traditions, including those represented by *amici*, value marriage as an important religious event. *See Turner* v. *Safley*, 482 U.S. 78, 96 (1987) (''[M]any religions recognize marriage as having spiritual significance . . . .''). But religious understandings of marriage differ and must remain separate from civil law in order to guard religious liberty for all. In the past, Congress and the federal courts have recognized the importance of this distinction by deferring to state-based civil schemes for marriage that are separate from religious marriage. DOMA, however, departs from this longstanding separation between religious and civil definitions of marriage by incorporating, for the first time, a single, religious definition into federal law—a definition inconsistent with the decision of many religious groups, including the undersigned *amici*, to embrace an open view of marriage—with no legitimate secular purpose.

DOMA's failure to further any legitimate government interest also dooms it to fail an equal protection analysis. The district court's rulings recognize that, under *Lawrence* v. *Texas*, 539 U.S. 558 (2003), moral condemnation of a group

alone is an inadequate rational basis for a law. *Amici* recognize the role that religious and moral beliefs have in shaping the public policy views of citizens and legislators, but those beliefs, standing alone and directed toward the disparagement of a single identifiable group, cannot satisfy the rational basis test. This principle, articulated in *Lawrence*, has implications for cases brought under both the Equal Protection and Due Process Clauses. DOMA was passed out of a bare desire to harm gays and lesbians and lacks any other rational basis. It thus violates the Equal Protection Clause.

ARGUMENT

I. The District Court's Decisions Implicitly Maintain the Important Distinction Between Religious and Civil Marriage and Ensure that Federal Law Does Not Favor a Particular Religious Understanding of Marriage.

Religious groups have always varied as to those marriages they choose to solemnize. Indeed, the First Amendment protects their right to define marriage as they wish. But it also precludes the government from incorporating a religious definition of marriage into civil law. Federal law has traditionally reflected this important distinction between religious practices and civil laws regarding marriage. DOMA is a stark departure from this tradition. Members of Congress openly advocated for adoption of their religious understanding of marriage into federal law, resulting in a law that favors one religious viewpoint above all others with no valid secular purpose.

A. Civil and Religious Marriage Are Distinct, as the Constitution Requires.

Different religious groups have different views on marriage. Some religious groups, including many of the undersigned *amici*, welcome religious marriage between same-sex couples, while others oppose it.[1] In most religious communities,

[1] The fact that some religious groups welcome marriage between same-sex couples does not demonstrate that gay and lesbian individuals have "political power" as that term is used in the context of heightened scrutiny. *See Kerrigan* v. *Comm'r of Pub. Health*, 289 Conn. 135, 187-214, 957A.2d 407, 439-54 (2008); *see also* Segura Aff. ¶ 62. In any case, many religious groups historically have been—and

there is disagreement among individual congregations, and, within congregations, disagreement among individual parishioners about how to approach marriage. This diversity of approaches is not new. Even within unified religious groups, restrictions on religious marriage have changed over time. Under our constitutional scheme, these groups have a fundamental right to adopt and modify the requirements for marriage within their own individual religious communities. But they do not have the right to demand that civil law reflect their particular religious view, *see Amicus* Br. of U.S. Conf. of Catholic Bishops et al. at 1 (statement of interest noting that signatories' "theological perspectives . . . converge to support the proposition that the traditional, opposite-sex definition of marriage in the civil law is . . . vital . . ."), particularly where, as in the context of marriage, many religions (including many of the undersigned *amici*) welcome same-sex couples to their community's definition of marriage.

Many religious groups, including many of the *amici* who seek to limit the definition of marriage in this case, *see Amicus* Br. of U.S. Conf. of Catholic Bishops et al., have at times recognized the benefit inherent in ensuring that their own rules on marriage are distinct from those embodied in civil law, because it provides them with autonomy to determine who to marry and under what circumstances. *See* Southern Baptist Convention, *Position Statement on the*

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apparently continue to be—strong opponents of equal marriage rights for same-sex couples. *See generally* Chauncey Aff.

Separation of Church and State, http://www.sbc.net/aboutus/pschurch.asp (last visited Feb. 24, 2011) ("We stand for a free church in a free state. Neither one should control the affairs of the other."); Joseph F. Smith et al., *Presentation of the First Presidency to the April 1896 Conference of the Church of Jesus Christ of Latter Day Saints*, *reprinted in* U.S. Congress, *Testimony of Important Witnesses as Given in the Proceedings Before the Committee on Privileges and Elections of the United States Senate in the Matter of the Protest Against the Right of Hon. Reed Smoot, A Senator from the State of Utah, to Hold His Seat*, at 106 (1905) ("[T]here has not been, nor is there, the remotest desire on our part, or on the part of our coreligionists, to do anything looking to a union of church and state."); *cf. McCollum* v. *Bd. of Educ.*, 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."). A review of practices surrounding interfaith, interracial, and post-divorce remarriage demonstrates this important distinction.

Interfaith Marriage: Some churches historically have prohibited (and some continue to prohibit) interfaith marriage, while others accept it. For example, the Roman Catholic Church's *Code of Canon Law* proscribed interfaith marriage for most of the twentieth century. Michael G. Lawler, *Marriage and the Catholic Church: Disputed Questions* 118-19 (2002) ("The church everywhere most

severely prohibits the marriage between two baptized persons, one of whom is Catholic, and the other of whom belongs to a heretical or schismatic sect." (quoting Canon 1060, *Code of Canon Law* (1917))). Although this restriction was relaxed in 1983, modern Catholic doctrine still requires the Church's "express permission" to marry a Christian who is not Catholic and the Church's "express dispensation" for a Catholic to marry a non-Christian. Canons 1086, 1124, *Code of Canon Law* (1983); *Catechism of the Catholic Church* 1635. Similarly, Orthodox and Conservative Jewish traditions both tend to proscribe interfaith marriage, *see* David S. Ariel, *What Do Jews Believe?: The Spiritual Foundations of Judaism* 129 (1996), as do many interpretations of Islamic law, *see, e.g.*, *Bandari* v. *INS*, 227 F.3d 1160, 1163-64 (9th Cir. 2000) (Iran's official interpretation of Islamic law forbids interfaith marriage and dating).

Despite these religious traditions prohibiting or limiting interfaith marriage, American civil law has never prohibited or limited marriage to couples of the same faith, or any faith at all, and doing so would be patently unconstitutional. *See Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *cf. Bandari*, 227 F.3d at 1168 ("[P]ersecution aimed at stamping out an interfaith marriage is without question persecution on account of religion." (citation and internal quotation marks omitted)).

Interracial Marriage: As with interfaith marriage, religious institutions in the past have differed markedly in their treatment of interracial relationships. For example, some fundamentalist churches previously condemned interracial marriage. *See Bob Jones Univ.* v. *United States*, 461 U.S. 574, 580-81 (1983) (fundamentalist Christian university believed that "the Bible forbids interracial dating and marriage"). The Church of Jesus Christ of Latter-day Saints ("LDS Church") discouraged interracial marriage.[2]

In the context of its policy on excluding African-Americans from the priesthood, however, the LDS Church expressly recognized (which it fails to do here) that its position on treatment of African-Americans was "wholly within the category of religion," applying only to those who joined the church, with "no bearing upon matters of civil rights." The First Presidency, *Statement on the Status of Blacks*, Dec. 15, 1969, *reproduced in* Appendix, *Neither White Nor Black: Mormon Scholars Confront the Race Issue in a Universal Church* (Lester E. Bush, Jr. & Armand L. Mauss eds., 1984). And notwithstanding the fact that certain religions continued to support anti-miscegenation laws at the time *Loving* v.

[2] *See Interracial Marriage Discouraged*, Church News, June 17, 1978, at 2 ("Now, the brethren feel that it is not the wisest thing to cross racial lines in dating and marrying." (quoting President Spencer W. Kimball in a 1965 address to students at Brigham Young University)).

Virginia, 388 U.S. 1 (1967), was decided, the Supreme Court held that such restrictions on *civil* marriage were unconstitutional. *Id.* at 12.[3]

Marriage Following Divorce: Finally, the Catholic Church does not recognize marriages of those who have divorced and remarried, viewing those marriages as "objectively contraven[ing] God's law." *Catechism of the Catholic Church* 1650, 2384. However, civil law has never reflected this position, and doing so would interfere with the fundamental right to marry. *See Boddie* v. *Connecticut*, 401 U.S. 371, 376 (1971) (connecting the right of access to court to obtain a divorce with the fundamental right to remarry).

* * *

In all three instances, individual religious groups have adopted particular rules relating to marriage, yet those rules have not been allowed to dictate the confines of civil marriage law. Similarly, the religious institutions identified by *amici* pro-DOMA religious groups may have a "long and vibrant history of upholding traditional marriage," *Amicus* Br. of U.S. Conf. of Catholic Bishops et al. at 26, but that tradition is separate from, and cannot be allowed to dictate, civil

[3] In stark contrast to the Catholic Bishops' position here, *see Amicus* Br. of U.S. Conf. of Catholic Bishops et al. at 26, several Catholic groups submitted an *amicus* brief to the Supreme Court in *Loving*. In that brief, the groups argued that the right to marry is a component of religious liberty and that civil marriage can be restricted "only to prevent 'grave and immediate danger to interests which the state may lawfully protect.'" *See* Br. for Nat'l Catholic Conf. for Interracial Justice et al. as *Amici Curiae* Supporting Appellants at 12, *Loving*, 388 U.S. 1 (No. 395) (quoting *Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 639 (1943)).

law. A religious group cannot be forced to open its doors or its sacraments to nonbelievers, but neither can the government restrict access to civil marriage to align with any particular religious beliefs. Such interference should not and cannot be permitted, particularly when it undermines the decision by other religious groups, including many of the undersigned *amici*, to recognize religious marriage for same-sex couples.

B. DOMA Favors One Form of Religious Marriage over Another Without a Secular Purpose.

Religious belief can play an important role in the formation of some individuals' public policy preferences. But that role must be tempered by principles of religious liberty, as "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Comm. for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 796 (1973) (quoting *Lemon* v. *Kurtzman*, 403 U.S. 602, 622 (1971)). DOMA runs afoul of these longstanding Establishment Clause principles because its purpose was to write one particular religious understanding of marriage, an understanding directly at odds with the position taken by other religious traditions, into federal law without a legitimate secular rationale.

1. *The Establishment Clause Prohibits Laws that Endorse or Favor a Particular Religious Viewpoint.*

Since the Founding, the concept of religious liberty has, at a minimum, included the equal treatment of all faiths without discrimination or preference. *See Larson* v. *Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). As the Supreme Court explained in *Larson*:

> Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference. Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.

Id. at 245; *see also* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1636 (1989) ("The . . . proposition, that government may not prefer one religion over any other, receives overwhelming support in the American tradition of church and state.").

Applying these principles, the Supreme Court has consistently invalidated laws that have the purpose or primary effect of advancing certain religious denominations over others. *See Edwards* v. *Aguillard*, 482 U.S. 578 (1987) (holding that law requiring teaching of creationism was unconstitutional because it

lacked a secular purpose); *Larson*, 456 U.S. at 244. In *Lemon*, the Court laid out an Establishment Clause test that remains instructive: a law must have a secular purpose; its primary effect cannot be to advance or inhibit religion; and it must not result in excessive government entanglement in religion. 403 U.S. at 612-13.

2. *DOMA Has No Secular Purpose, Has the Primary Effect of Advancing One Religious Viewpoint, and Limits Access to Civil Marriage Based on Particular Religious Beliefs.*

The Supreme Court recently discussed at length the requirement that a statute have a secular purpose, noting that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cnty.* v. *ACLU of Ky.*, 545 U.S. 844, 864 (2005). Furthermore, the relevant question is whether Congress *at the time legislation was passed* was acting with a proper purpose. *See Edwards*, 482 U.S. at 594-95. The *McCreary* Court emphasized that this test has "bite"; legislation will not survive scrutiny under the Establishment Clause simply because "some secular purpose" is constructed after the fact. 545 U.S. at 865 & n.13. In examining congressional purpose, courts look to a variety of sources, including legislative history, statements on the record, and testimony given by supporters. *Edwards*, 482 U.S. at 587, 591-92.

Numerous members of Congress noted that an express purpose of DOMA was to incorporate their interpretation of Judeo-Christian religious beliefs about

marriage into civil law. Congress made no secret of its intentions: DOMA's legislative history is replete with religious sentiments. *See* Defense of Marriage Act, H.R. Rep. 104-664, at 15-16 (1996); *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 33 (1996) (hereinafter "*House Hearing*") ("Traditional heterosexual marriage . . . has been the preferred alternative by every religious tradition in recorded history.") (statement of Rep. Sensenbrenner); 142 Cong. Rec. H7442 (daily ed. July 11, 1996) ("[M]arriage is a covenant established by God.") (statement of Rep. Hutchinson); *id.* at H7446 (daily ed. July 11, 1996) ("[T]he institution of marriage is not a creation of the State. . . . [Rather] [i]t has been sanctified by all the great monotheistic religions and, in particular, by the Judeo-Christian religion which is the underpinning of our culture.") (statement of Rep. Talent); 142 Cong. Rec. H10113 (daily ed. Sept. 10, 1996) ("The definition of marriage is not created by politicians and judges . . . It is rooted in our history, in our laws and our deepest moral and religious convictions, and in our nature as human beings.") (statement of Sen. Coats); 142 Cong. Rec. S10,109 (daily ed. Sept. 10, 1996) ("One only has to turn to the Old Testament and read the word of God to understand how eternal is the true definition of marriage.") (statement of Sen. Byrd).

As one example, a DOMA sponsor admitted that DOMA was enacted based on "God's principles," stating that:

> We as legislators and leaders for the country are in the midst of a chaos, an attack upon God's principles. God laid down that one man and one woman is a legal union. That is marriage, known for thousands of years. That God-given principle is under attack. It is under attack. There are those in our society that try to shift us away from a society based on religious principles to humanistic principles; that the human being can do whatever they want, as long as it feels good and does not hurt others.
>
> When one State wants to move towards the recognition of same-sex marriages, it is wrong. . . . We as a Federal Government have a responsibility to act, and we will act.

142 Cong. Rec. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer). Religious witnesses also testified before Congress on both sides of the debate. *House Hearing*, *supra*, at 211 (testimony of Rabbi Saperstein); *id.* at 216-17 (testimony of Jay Alan Sekulow); *see also Edwards*, 482 U.S. at 591-92 (use of religious experts in support of legislation indicated that purpose was religious). Indeed, the comments of members of Congress reflect the very sort of "political division along religious lines [that] was one of the principal evils against which the First Amendment was intended to protect." *Lemon*, 403 U.S. at 622.

Moreover, as the district court held, there is no legitimate interest that would justify the federal government's wholesale disregard of state marriages, which

makes the religious commentary surrounding DOMA's enactment all the more constitutionally suspect. While it dealt with the similar but distinct issue of the constitutionality of a state constitutional amendment limiting marriage to one man and one woman, the Northern District of California's decision in *Perry* v. *Schwarzenegger* deconstructs many of the rationales often set forth for state-level prohibitions on marriage between same-sex couples. *See Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 997-1004 (N.D. Cal. 2010). Many of those same rationales are offered in support of DOMA. *Amici* note that those rationales are even more illogical with respect to DOMA than state-level prohibitions because they are being applied to couples who are already married. They fail for the reasons discussed in *Perry*, by the district court in its decisions below, and by the Appellees and other *amici* in this case. *Amici* will not rehash each purported rationale here, but note that the absence of legitimate, secular rationales offered in support of DOMA coupled with the religious sentiments expressed by legislators renders DOMA constitutionally suspect under the Establishment Clause.

If measured at the time of enactment, DOMA also had no effect except to express the religious preference of the members of Congress who proffered these religious justifications for the law, as no state then licensed marriages between same-sex couples. Even if measured after states began to recognize marriage equality, DOMA's effect was to put the entire weight of the federal government

behind a particular religious understanding of marriage. DOMA should thus be viewed with suspicion.

II. Under *Lawrence v. Texas*, Moral Disapproval Alone Is Not an Adequate Rational Basis for DOMA.

Some opposition *amici* argue that the district court erred in ruling that moral condemnation of a group cannot justify a law under the rational basis test. *E.g.*, *Amicus* Br. of U.S. Conf. of Catholic Bishops et al. at 9-16. These *amici* misunderstand the district court's ruling. Lawmakers unquestionably have foundational religious and moral beliefs that guide their legislative decisions.[4] But under a long line of cases culminating in the Supreme Court's decision in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), a law must have a purpose beyond the desire to disadvantage a group on the basis of moral or religious conviction. DOMA lacks such other purpose. The law is thus unconstitutional.[5]

A. Moral Disapproval Without More Is Not a Valid Rational Basis Under the Equal Protection Clause.

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[4] Separate from the constitutional and public policy issues involved, it should be noted that *amici* do not believe that homosexuality or marriage between same-sex couples is immoral. *See, e.g.*, Rev. Dr. C. Welton Gaddy, President, Interfaith Alliance, *Same-Gender Marriage & Religious Freedom: A Call to Quiet Conversations and Public Debates* (Aug. 2009), http://www.interfaithalliance.org/equality/read.

[5] *Amici* support the Government's conclusion with which the Plaintiffs agree that DOMA should be scrutinized under a heightened level of review. Def. U.S. Dep't of Health & Human Servs. Superseding Br. 25-45. However, this brief analyzes the issue under rational basis review to show that DOMA cannot withstand even that more relaxed form of review, much less heightened scrutiny.

In *Lawrence*, the Supreme Court held that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting that practice." *Lawrence*, 539 U.S. at 577 (2003) (quoting *Bowers* v. *Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (internal quotation marks omitted). As Justice O'Connor observed in her concurrence, "[m]oral disapproval of [a particular group], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id.* at 582. Justice O'Connor further observed that the Court had "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Id.*

Lawrence is consistent with a series of cases in which the Supreme Court invalidated laws that reflect a "bare . . . desire to harm a politically unpopular group." *E.g.*, *Romer* v. *Evans*, 517 U.S. 620, 634-35 (1996) (alteration in original) (citation omitted); *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973). In these cases, the Court has stripped away the rationales proffered in support of such laws to uncover the fact that "animus," "negative attitudes," "unease," "fear," "bias," or "unpopular[ity]" actually motivated the legislative action at issue. *E.g.*, *Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (holding that "irrational prejudice" against mentally disabled is not a legitimate interest);

Moreno, 413 U.S. at 534 (invalidating restriction on households receiving food stamps based on unpopularity of "hippies"); *Romer*, 517 U.S. at 634 (finding that law targeting gays and lesbians "raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected").

In *Moreno*, for example, the Court struck down a federal law excluding from the food stamp program "any household containing an individual who is unrelated to any other member of the household." *Moreno*, 413 U.S. at 529. The Court first determined that the stated purpose of the law—"to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households," *id.* at 533 (citation omitted)—was not furthered by the challenged provision. Looking for other possible rationales, the Court found, based primarily on statements in the congressional record suggesting that the law was animated by dislike of "hippies" and "hippy communes," that the law's true purpose was to harm these groups. *Id.* at 534. The Court then found the law unconstitutional, holding that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.* (citation omitted).

Underlying this line of cases is an awareness that allowing condemnation of a politically unpopular group to satisfy the rational basis test would effectively eviscerate the equal protection clause:

> [T]here is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Ry. Express Agency, Inc. v. *New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). This risk is hardly theoretical: Some of the most notable violations of equal protection were justified by moral condemnation, from interracial marriage prohibitions, *Loving*, 388 U.S. at 3 (trial judge justified 25 year sentence by invoking God's separation of the races), to gender discrimination, *Bradwell* v. *Illinois*, 83 U.S. 130, 141-42 (1872) (Bradley, J. concurring) (upholding state law prohibition on practice of law by women because it was consistent with "the law of the Creator" and "the general constitution of things").

This Court's opinion in *Cook* v. *Gates*, 528 F.3d 42 (1st Cir. 2008), does not alter this result. In *Cook*, the Court suggested that the laws at issue in *Lawrence* would have been upheld under rational basis review because the Supreme Court has "acknowledg[ed] . . . morality as a rational basis." *Id.* at 53. *Cook* relied for

this point on *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560 (1991), where the Supreme Court held that "a 'legislature [can] legitimately act . . . to protect the societal interest in order and morality.'" *Cook*, 528 F.3d at 52-53 (quoting *Barnes*, 501 U.S. at 569) (alterations in original). But the *Barnes* Court used the term "morality" differently than it was used in *Lawrence* and differently than the way in which it is invoked by *amici* who argue that DOMA is constitutional.[6]

In *Barnes*, the Court upheld restrictions on nude dancing as a valid expression of the state's "moral disapproval of people appearing in the nude among strangers in public places." 501 U.S. at 568. But *Barnes* upheld a law expressing moral disapproval of a particular *practice*, not a class; it bars particular conduct practiced by a wide range of people, not just a single disfavored minority. DOMA, on the other hand, expresses moral disapproval of gays and lesbians; it is targeted at gay and lesbian people as a class, not just at certain conduct—a distinction that the court has repeatedly held to be critical. *See Christian Legal*

[6] Contrary to the assertion of the pro-DOMA religious *amici*, Br. of U.S. Conf. of Catholic Bishops et al. at 10-11, *Cook*'s comment on morality does not bind the Court here. Under well-established principles of *stare decisis*, "an issue of law must have been heard and decided; . . . if an issue is not argued . . . the decision does not constitute a precedent to be followed." *Gately* v. *Massachusetts*, 2 F.3d 1221, 1226 (1st Cir. 1993) (quoting *EEOC* v. *Trabucco*, 791 F.2d 1, 4 (1st Cir. 1986)). In *Cook*, the morality rationale was neither briefed nor argued by the parties. *See* Br. of Pls., Br. for the Appellees, Reply Br. of Pls., *Cook* v. *Gates*, 528 F.3d 42 (1st Cir. 2008). Moreover, the court's statement merely served to support the court's broader conclusion that *Lawrence* used some form of heightened scrutiny in its due process liberty analysis. *Cook*, 528 F.3d at 52.

Soc'y v. *Martinez*, 130 S. Ct. 2971, 2990 (2010) (noting that "[o]ur decisions have declined to distinguish between status and conduct in" the context of sexual orientation) (citing *Lawrence*, 539 U.S. at 575 ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." (emphasis in original))). Unlike the nude dancing law at issue in *Barnes*, DOMA thus reflects "[m]oral disapproval of [a particular group]," *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring), and cannot be sustained simply because "the governing majority . . . has traditionally viewed [that] particular practice"—which involves only one minority group of citizens—"as immoral," *id.* at 577 (majority opinion) (internal quotation marks and citation omitted).

B. *Lawrence* Has Equal Protection Implications.

While *Lawrence* was decided on due process grounds, *id.* at 578, the fact that the liberty interest that *Lawrence* protected is practiced by gays and lesbians, an insular and often stigmatized minority, cannot be ignored. The *Lawrence* Court spoke not only of a protected interest in the conduct prohibited by the Texas law—homosexual sodomy—but also of its opposition to laws that "demean[]" gay people and "stigma[tize]" a group that deserves "respect." *Id.* at 571-75; *see also* Nan D. Hunter, *Living with Lawrence*, 88 Minn. L. Rev. 1103, 1124 (2004).

Lawrence must be read to apply not only to due process cases, but also to equal protection cases involving laws that disadvantage gays and lesbians as a class.

The holding in *Lawrence* is sweeping in scope. The majority opinion notes that its implications touch not only on due process, but on equal protection as well, stating that the Equal Protection Clause theory "is a tenable argument," but that it does not go far enough. *Lawrence*, 539 U.S. at 574-75 ("[T]he instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause, some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."). The Court then declares that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." *Id.* at 575. The Court thus made it clear that the principles it was espousing pertain to any laws that treat gays and lesbians as an unequal class, not just those challenged under the Due Process Clause.

The Court's recent decision in *Christian Legal Society* further buttresses this point by noting that in the context of sexual orientation, conduct is closely tied to the status itself. 130 S. Ct. at 2990 ("Our decisions have declined to distinguish between status and conduct in this context."). Thus, any law targeting conduct that

is closely linked with sexual orientation will have both a due process and an equal protection component. *Id.* Of particular import, the Court in *Christian Legal Society* cited *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring), for the proposition that "[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."

These cases, taken together, reflect a clear intent by the Supreme Court that the due process and equal protection inquiries are interconnected when laws single out conduct closely aligned with status, particularly conduct associated with gays and lesbians. *Lawrence* cannot be read as limited to the due process context. It has implications for equal protection as well.

C. DOMA Was Motivated by Moral Disapproval and Is Therefore Unconstitutional.

As Attorney General Holder noted in a recent letter to Congress expressing the Executive Branch's belief that DOMA is unconstitutional, "[t]he [Congressional Record underlying DOMA] contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships—precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against." Letter from Eric Holder, Attorney General, to John Boehner, Speaker, U.S. House of Representatives (Feb.

23, 2011). The Record shows that DOMA was motivated by moral disapproval of gays and lesbians. H.R. Rep. No. 104-664, at 15-16; 142 Cong. Rec. H7444 (daily ed. July 11, 1996) ("[N]o society . . . has lived through the transition to homosexuality and the perversion which it lives and what it brought forth.") (statement of Rep. Coburn); *id.* at H7482 (daily ed. July 12, 1996) ("The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society . . . .") (statement of Rep. Barr); *id.* at S10068 (daily ed. Sept. 9, 1996) ("[DOMA] will safeguard the sacred institutions of marriage and the family from those who seek to destroy them and who are willing to tear apart America's moral fabric in the process.") (statement of Sen. Helms).

Tellingly, in 76 pages of briefing, Defendant-Intervenor Bipartisan Legal Advisory Group ("BLAG") never once mentions moral disapproval, which was an expressly stated congressional purpose of DOMA. Yet, as the Congressional Record statements make clear, the purported rationales for DOMA only mask the true congressional purpose of morally condemning gays and lesbians. In fact, DOMA's enactment had no effect *except* to express religious and moral disapproval, as at the time of its passage, no state licensed marriages between same-sex couples, a fact that BLAG would prefer to forget. Under *Lawrence*, such a purpose is unconstitutional.

CONCLUSION

For the reasons stated herein, *amici* respectfully submit that the district court's decisions should be upheld.

Respectfully submitted:
This 3rd day of November 2011

ROPES & GRAY LLP

s/ Harvey J. Wolkoff
Harvey J. Wolkoff
COA# 7378
Jessica M. Lindemann
COA# 1143607
Russell P. Plato
Samuel P. Bickett
Prudential Tower
800 Boylston Street
Boston, Massachusetts 02199

ANTI-DEFAMATION LEAGUE

Robert Trestan
Steven C. Sheinberg
Steven M. Freeman
Deborah Bensinger
605 Third Avenue
New York, New York 10158

CERTIFICATE OF COMPLIANCE

This brief is accompanied by a motion to file an oversize brief because it contains 7,923 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

This 3rd day of November 2011

s/ Harvey J. Wolkoff
Harvey J. Wolkoff

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on November 3, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

This 3rd day of November 2011

s/ Harvey J. Wolkoff
Harvey J. Wolkoff