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Testimony Regarding H.B. 36
February 20, 2017

Ohio House of Representatives
Community and Family Advancement Committee

Mr. Chairman, and Members of the Ohio House Community and Family Advancement Committee:

This testimony on H.B. 36¹ seeks to do three things. First, recognizing the terms of the debate over H.B. 36 to date, it acknowledges some of the perils for religious liberty that the Supreme Court’s decision in *Obergefell v. Hodges*² may be thought to raise. Second, the testimony sketches a line of argument about the constitutionality of H.B. 36 in the aftermath of *Obergefell*. And third, it highlights what *Obergefell* teaches about the proper legal forum for resolving the kinds of conflicts that H.B. 36 contemplates between the constitutional right to marry, on the one hand, and the religious liberty claims of the clergy, on the other.

Many have found it difficult to perceive any need for H.B. 36,³ “referred to by [its] sponsor as the Pastor Protection Act.”⁴ Part of the reason they have thought H.B. 36 unnecessary is that it is not widely understood how the U.S. Supreme Court’s decision in *Obergefell* opens up potential liability for the clergy who refuse to perform same-sex civil marriages against their religious beliefs. While they are ultimately right in their conclusions that, as to H.B. 36’s core concern with “pastor protection,” clergy have no good reason to fear liability for not solemnizing same-sex civil marriages,⁵ they do so while

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¹ H.B. 36, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

² *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³ See, e.g., *Testimony Regarding H.B. 36, Hearing on H.B. 125 Before the H. Cmty. & Family Advancement Comm.*, 132d Gen. Assembly, Reg. Sess. (Ohio 2017) (statement of Rev. Joseph Cherry, Unitarian Universalist Society of Cleveland) (“I am already free to marry a couple and free to refuse to marry a couple. I require no extra protection from this so-called Pastor’s Protection Act. This proposed change to the law does not protect me or my colleagues, because there is already written in our current law an option to refuse.”); *Testimony Regarding H.B. 36, Hearing on H.B. 125 Before the H. Cmty. & Family Advancement Comm.*, 132d Gen. Assembly, Reg. Sess. (Ohio 2017) (statement of Rev. Dr. J. Bennett Guess, Ordained Minister, United Church of Christ) (“I know that clergy already have constitutionally protected rights, both by the U.S. and Ohio constitutions, to exercise absolute freedom in performing a wedding—or not.”); *Testimony Regarding H.B. 36, Hearing on H.B. 125 Before the H. Cmty. & Family Advancement Comm.*, 132d Gen. Assembly, Reg. Sess. (Ohio 2017) (statement of Alana Jochum, Equality Ohio) (“So, again, to the extent that the bill claims to protect pastors from marrying people they do not wish to marry, HB36 essentially restates existing protections that clergy have now.”); *Testimony Regarding H.B. 36, Hearing on H.B. 125 Before the H. Cmty. & Family Advancement Comm.*, 132d Gen. Assembly, Reg. Sess. (Ohio 2017) (statement of Rev. Aaron Maurice Saari, First Presbyterian Church) (“There is no reasonable argument to be given that these legal protections are necessary.”); *Testimony Regarding H.B. 36, Hearing on H.B. 125 Before the H. Cmty. & Family Advancement Comm.*, 132d Gen. Assembly, Reg. Sess. (Ohio 2017) (statement of Lisa Wurm, Policy Manager, ACLU of Ohio) (“When the U.S. Supreme Court ruled in 2015 that marriage was a right now constitutionally granted to all couples, no matter who they love, nothing about the First Amendment right of clergy to marry according to their faith tradition was altered, nor has it been altered since then.”).

⁴ See *Testimony Regarding H.B. 36, Hearing on H.B. 125 Before the H. Cmty. & Family Advancement Comm.*, 132d Gen. Assembly, Reg. Sess. (Ohio 2017) (statement of Rep. Nickie J. Antonio, Ohio House of Representatives).

⁵ See, e.g., Brief of Amicus Curiae Douglas Laycock et al. in Support of Petitioners at 30, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574) [hereinafter Laycock Brief] (indicating that “broader principle” on which *Hosanna-Tabor*

missing some important aspects of what *Obergefell* means. When its teaching is understood, it becomes apparent that it *does* expose clergy to potential liability, but that after *Obergefell*, this is not a matter about which the state legislature is constitutionally authorized to legislate. In short, H.B. 36's pastor protections are unconstitutional. Those protections must await a ruling by the U.S. Supreme Court announcing that the federal Constitution both recognizes a right to marriage that protects same-sex couples and that accommodates the rights of clergy to refuse to take part in them.

To see *Obergefell*'s potential threat to the religious liberty of the clergy faithfully opposed to solemnizing same-sex civil marriages, begin with what *Obergefell* holds. At a bare minimum, *Obergefell* declares that the U.S. Constitution denies the State (here: the federal government and the individual states) the authority to discriminate against lesbians, gay men, and same-sex couples in the marriage setting.⁶ This denial of State authority binds the State itself as well as its agents, those it empowers to act on its behalf.⁷ This aspect of *Obergefell*, which hews to a basic constitutional norm,⁸ did not go unchallenged in *Obergefell*'s wake,⁹ but resistance to *Obergefell* was swiftly put down, even in cases in which agents of the State sought to oppose its mandate on religious grounds.¹⁰

For the most part, H.B. 36 accepts this state of affairs. It proceeds by understanding that *Obergefell*

Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694 (2012), “rests” “plainly covers [a] religious body’s definition of marriage and its willingness or unwillingness to solemnize or celebrate a marriage, or provide the space for doing so.”); Marci A. Hamilton, *The Space for Grace and the Space for Neutrality After Obergefell v. Hodges*, JUSTIA (June 30, 2015), <https://verdict.justia.com/2015/06/30/the-space-for-grace-and-the-space-for-neutrality-after-obergefell-v-hodges> (overserving, after *Obergefell*, that “[t]he exemptions for clergy to refuse to perform same-sex marriages and houses of worship to host them are . . . required by the Constitution.”); Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 84 UMKC L. REV. 749, 760 (2016) (“The Establishment Clause also assures that a member of the clergy would never be required to perform a same-sex marriage or any marriage that was contrary to his or her beliefs.”).

⁶ See *Obergefell*, 135 S. Ct. at 2607–08. Of course, *Obergefell*'s underlying justifications, particularly its formal equal protection ruling, *id.* at 2602–05, combined with the Court’s earlier decisions in *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Lawrence v. Texas*, 539 U.S. 558 (2003), indicate an even broader set of constitutional protections for lesbians, gay men, and same-sex couples beyond the marriage and even the family law setting.

⁷ This helps explain how the Court’s ruling arrived in a case involving suits that named agents of the various states that were being sued.

⁸ See *Marbury v. Madison*, 5 U.S. 137, 180 (1803); *Cooper v. Aaron*, 358 U.S. 1 (1958). Accord Hamilton, *supra* note 5 (observing, after *Obergefell*, that “[t]here is no debate that *Marbury v. Madison* establishes that the Supreme Court is the final word on the interpretation of the Constitution. Therefore, for those politicians . . . who are working assiduously to avoid abiding by *Obergefell*, think again.”). As the unanimous *Cooper v. Aaron* Court explained, constitutional rulings by the U.S. Supreme Court involving individual rights are binding upon the State, and necessarily by implication, its “officers or agents by whom [the State’s] powers are exerted.” *Cooper*, 358 U.S. at 17. Continuing, *Cooper* remarked:

Whoever, by virtue of public position under a State government, . . . denies or takes away [a constitutionally recognized right], violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State’s power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.

Id.

⁹ For discussion and illustrations, see generally Ruth Colker, *Religious Accommodations for County Clerks?*, 76 OSLJ: FURTHERMORE 87 (2015); Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), <https://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html>; Ryan Dunn, *Judge: Toledo Court Weddings Will Have ‘Dignity They Deserve’*, TOLEDO BLADE, <http://www.toledoblade.com/Courts/2015/07/10/Judge-Toledo-court-weddings-will-have-dignity-they-deserve.html>; Robert Higgs, *Ohio Judges Cannot Refuse to Perform Gay Weddings Based on Personal Views, State Board Advises*, CLEVELAND.COM (Aug. 10, 2015), http://www.cleveland.com/open/index.ssf/2015/08/ohio_judges_cannot_refuse_to_perform_gay_weddings_based_on_personal_views_state_board_advises.html. See also generally Knauer, *supra* note 5

¹⁰ For reporting on one example from Ohio, see Robert Higgs, *Ohio Judges Cannot Refuse to Perform Gay Weddings Based on Personal Views, State Board Advises*, CLEVELAND.COM (Aug. 10, 2015), http://www.cleveland.com/open/index.ssf/2015/08/ohio_judges_cannot_refuse_to_perform_gay_weddings_based_on_personal_views_state_board_advises.html.

defines civil marriage's scope as a constitutional matter and simply authorizes most of the State's agents to solemnize civil marriages on equal terms for all. After *Obergefell*, this is as it should be. Had H.B. 36 tried to give all the State's agents any kind of right to deny lesbians, gay men, and same-sex couples the right to marry, even on religious grounds, the measure would have been unconstitutional. The principle explaining why is simple: The State cannot constitutionally transfer to its agents authority that it itself constitutionally lacks.

Nevertheless, H.B. 36 attempts just this sort of transfer of power to pastors, formally referred to in the measure as "ordained or licensed minister[s]"¹¹ and "religious societ[ies]."¹² These members of the clergy—after being statutorily empowered to solemnize civil marriages permitted by law—are given by H.B. 36 a right to determine when they will exercise these powers.¹³ As to this religiously-defined group of State agents, H.B. 36 says: You may marry anyone permitted by law to marry, but you are not in any case required "to solemnize a marriage that does not conform to [your] . . . sincerely held religious beliefs."¹⁴ H.B. 36 then proceeds to say that clergy who exercise this right will be held legally harmless by providing them immunities—both civil and criminal—when they exercise their statutorily conferred right to refuse to perform civil marriages on sincere religious grounds.¹⁵

H.B. 36's creation of both permission and immunities for the clergy to choose not to solemnize marriages they are otherwise empowered to perform is by practical effect an authorization for discrimination on religious grounds. As a form of State action itself, it permits the clergy—here, the State's agents—to do what the State, their principal for civil marriage purposes, concretely must not: discriminate against lesbians, gay men, and same-sex couples by not marrying them on a religious scruple.¹⁶

¹¹ See H.B. 36, 132d Gen. Assemb., Reg. Sess. (Ohio 2017) ("Sec. 3101.08 . . . (A) The following persons or entities may solemnize any marriage allowed by law: (1) An ordained or licensed minister of any religious society or congregation within this state who is licensed to solemnize marriages[.]").

¹² See *id.* ("Sec. 3101.08 . . . (A) The following persons or entities may solemnize any marriage allowed by law: . . . (7) Any religious society in conformity with the rules of its church.").

¹³ *Id.* ("Sec. 3101.08 . . . (B)(1) No ordained or licensed minister described in division (A)(1) of this section or religious society described in division (A) (7) of this section is required to solemnize a marriage that does not conform to the ordained or licensed minister's or religious society's sincerely held religious beliefs."); *id.* ("Sec. 3101.08 . . . (C) If an ordained or licensed minister described in division (A)(1) of this section or a religious society described in division (A)(7) of this section refuses to solemnize a marriage or refuses to allow any building or property of the religious society to be used to host a marriage ceremony because of the ordained or licensed minister's or religious society's sincerely held religious beliefs, the ordained or licensed minister or religious society is immune from civil or criminal liability and neither the state nor a political subdivision of the state shall penalize or withhold any benefit or privilege from the ordained or licensed minister or religious society, including any governmental contract, grant, or license.").

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Of course, the terms of the authorizations found in H.B. 36 are more general. By their language they allow the clergy not to marry anyone when doing so would be in conflict with their "sincerely held religious beliefs." *Id.*; see also *supra* note 13. In this setting it seems worth recalling that in *Loving v. Virginia*, 388 U.S. 1 (1967), the trial judge who sentenced the Lovings under Virginia's miscegenation ban had this to say:

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages.

The fact that he separated the races shows that he did not intend for the races to mix."

Id. at 3. With others, Nancy Knauer has noted that "religious objections to interracial marriage" like this were not unknown. Knauer, *supra* note 5, at 778 n.233 (citing FAY BOTHAM, ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE, & AMERICAN LAW (2013)). Consistent with H.B. 36, so long as beliefs are religious and sincerely held, could they supply the basis for a member of the clergy authorized by its terms to refuse to marry an interracial couple with the legal immunities conferred by the bill? Is it to be believed that, after *Loving*, and other more recent cases involving the State's power to engage in race discrimination, see, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013), that the State has the

Merits of the policy aside, H.B. 36's pastor protections crucially depend on the assumption that the State has the authority to authorize this class of agents to engage in the discrimination H.B. 36 contemplates by law. Under *Obergefell*, however, the State does not have this power. Recall that *Obergefell* held that the State no longer has the authority to fix its rules of marriage law in relation to religious or moral convictions when it comes to discrimination against lesbians, gay men, and same-sex couples and the distribution of the right to marry.

What this means is that H.B. 36's promise to pastors that they have a right to not celebrate same-sex civil marriages is an empty one. The State cannot authorize and immunize this action because it does not, after *Obergefell*, hold the power of its own accord to give away. In this sense, H.B. 36's authorizations to discriminate are as beyond the State's constitutional authority as if H.B. 36 had attempted to grant all of the State's agents a similar permission to discriminate based on their sincerely held religious views. But *Obergefell*'s injunction against discrimination against lesbians, gay men, and same-sex couples is categorical. It is a flat bar on State action that discriminates against lesbians, gay men, and same-sex couples in the marriage realm.

It is at this point that *Obergefell*'s threat to clergy who refuse to perform civil marriages for same-sex couples should be coming into sight. Like other State agents, the clergy may, after *Obergefell*, be subject to legal liability as agents of the State for their refusal on religious grounds to solemnize same-sex civil marriages. That being so, it may be believed there is a need for a measure like H.B. 36. Here, though, is the rub: While *Obergefell* may open the door for potential liability for clergy acting in their official role as State agents in the civil marriage business, *Obergefell* also shuts the door on the political process as the proper venue for providing the legal immunities that some will see the decision calling out for.

Turning to address the clergy and those concerned about their religious liberties: Rest assured, matters are not so bleak as they for the moment may appear. For while *Obergefell* may open the door to making clergy authorized by State law to solemnize civil marriages liable as State agents for not participating in same-sex civil marriages on the same terms as all State agents must, and while *Obergefell* may deprive the State of the authority to reach a political resolution of this matter, the clergy, on a careful reading of *Obergefell*,¹⁷ are not without the promise of relief.

Because the conflict in this instance is of a constitutional character, the relief in this instance must also be constitutional and must come from the Supreme Court speaking in the U.S. Constitution's name. And so it is that Chief Justice Roberts's *Obergefell* dissent contains a prediction that *Obergefell*, having removed the right to marry for same-sex couples from the "vicissitudes" of the ordinary democratic political processes,¹⁸ will lead to cases "soon be[ing] before this Court"¹⁹ involving "people of faith

constitutional authority to confer upon members of the clergy a statutory permission backed by legal immunities to refuse to marry an interracial couple on faith-based grounds?

¹⁷ This is particularly so in conjunction with accepted principles of First Amendment religious law. *See, e.g., supra* note 5.

¹⁸ *See Obergefell*, 135 S. Ct. at 2605–06 ("The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'") (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943)). *Cf. id.* at 2606 ("The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry."). An important amicus brief filed in *Obergefell* prospectively put the point this way:

If this Court holds [in *Obergefell*] that same-sex marriage is constitutionally required, it must take responsibility for the resulting issues of religious liberty, because a constitutional decision will largely displace legislative efforts to address the issue. . . . When courts find a constitutional right to same-sex civil marriage, those who would add religious liberty provisions to a marriage bill are deprived of a legislative vehicle and deprived of bargaining leverage. . . . A constitutional decision by this Court will end legislative efforts to protect religious liberty as part of legislation enacting marriage equality.

Laycock Brief, *supra* note 5, at 2–3.

¹⁹ *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting).

exercise[ing] [their] religion in ways that may be seen to conflict with the new right to same-sex marriage.”²⁰ When a case involving the rights of the clergy to refuse to perform a same-sex civil marriage on religious grounds arrives at the Court, how, then, does *Obergefell* suggest it will be resolved?

To search in *Obergefell* for a clear and totally unambiguous answer is to search in vain. But while not providing any definitive answers, a close look at *Obergefell* indicates that the opinion contains some useful hints about how *Obergefell* would resolve the case of pastors’ rights. Here is the punchline before explaining it: The text of *Obergefell* offers reason to think that the Court would support the constitutional protection of the religious liberties of the clergy, even when, as statutory agents of the State, they refuse to perform same-sex civil marriages on religious grounds.

The evidence for this claim is, in part, more rhetorical than doctrinal. In different ways at different points in the decision, *Obergefell* interestingly recognizes that the right to marry is not only ever exercised as a matter of rational choice. It is regularly, *Obergefell* suggests, the product of a deeply spiritual choice.²¹ The majority’s sensitivity to the spiritual and highly personal aspects of the marriage decision suggests that, as a matter of consistency, the Supreme Court could hardly be insensitive to the obviously spiritual dimensions of the sincere religious beliefs of clergy who refuse to civilly marry same-sex couples.

This rhetorical sensibility is doctrinally concretized and given some voice by *Obergefell* when it openly affirms its deep respect for the constitutional values of religious liberty. Well into the opinion, in a paragraph where the Court explains that “[t]he Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex[.]”²² it also goes out of its way to observe—in evidently religious-liberty-friendly tones: “The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.”²³ To be sure, this language is a bit opaque, but it readily lends itself to an understanding that, through it, *Obergefell* is signaling that it would not, and has not, forgotten about, much less does it mean to disparage, the First Amendment and its protections of religious liberty.

But while *Obergefell* does not say exactly what kinds of religious liberties “religious organizations and persons”²⁴ will continue to receive after the decision, an important indication on this score is found in the Massachusetts Supreme Judicial Court’s decision in *Goodridge v. Department of Public Health*,²⁵ a ruling that *Obergefell* invokes with a strong sense of approval.²⁶ In an important footnote, the *Goodridge* court had no trouble making it clear that its decision recognizing a right to marry under the Commonwealth’s Constitution, “in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons.”²⁷ Nor is *Goodridge* the only lower court right-to-marry

²⁰ *Id.* at 2625.

²¹ *See, e.g., Obergefell*, 135 S. Ct. at 2593–94, 2599, 2607–08.

²² *Id.* at 2607.

²³ *Id.*

²⁴ *Id.*

²⁵ *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

²⁶ *See Obergefell*, 135 S. Ct. at 2599 (“As the Supreme Judicial Court of Massachusetts has explained, because ‘it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.’”) (quoting *Goodridge*, 798 N.E.2d at 955); *see also id.* at 2597 (citing *Goodridge* approvingly).

²⁷ *Goodridge*, 798 N.E.2d at 965 n.29.

opinion that *Obergefell* cites that makes this kind of direct declaration that it itself does not.²⁸ The California Supreme Court’s decision in *In re Marriage Cases*²⁹ puts the point even more boldly than *Goodridge* did, this way:

[A]ffording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.³⁰

The point being made here is not about how *Obergefell* cites judicial precedents, but rather how *Obergefell*’s reference to the persistence of First Amendment values in the regime that it is announcing should be understood as part of its affirmation of a larger and deeper constitutional outlook. *Obergefell* does not say nor did it have to say exactly what *Goodridge* and *In re Marriage Cases* do for its own general invocation of the First Amendment to be regarded as prospectively doing the same basic work as the more precise and demonstrative language of those opinions. This leaves *Obergefell*’s indications about the rights of the clergy to refuse to perform same-sex civil marriages in the realm of prediction, and while no prediction is absolutely certain, this one is certain enough. *Obergefell*’s sensitivities to the spiritual nature of decision-making in the marriage setting, its invocation of the First Amendment rights of religious organizations and persons in the course of its ruling, combined with its approval of decisions that themselves expressly recognize the religious liberties of clergy, taken together, amount to some good reasons for thinking that the Supreme Court would—given the right case—likewise protect as a constitutional matter the religious liberty of clergy who, on religious grounds, refuse to participate in the civil marriages of same-sex couples.³¹

All of this is to say that the sense animating H.B. 36, that there is potential liability for pastors who, after *Obergefell*, would refuse to solemnize a same-sex civil marriage that they are authorized by State law to celebrate, is not imaginary. But the same decision that may be thought to give rise to the need for pastor protections precludes the State from giving them statutorily, while itself holding out a future promise of constitutional relief. Though *Obergefell* did not declare itself as it might have on the rights of the clergy, there is little reason to be concerned, though there is reason to be troubled by a measure like

²⁸ See *Obergefell*, 135 S. Ct. app. A, at 2610 (citing *In re Marriage Cases*).

²⁹ *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), confirmed that “Proposition 8” superseded the California Supreme Court’s ruling.

³⁰ *In re Marriage Cases*, 183 P.3d at 451–52.

³¹ How the Supreme Court might write an opinion supporting this conclusion is a different, and far less certain, matter. Two possibilities immediate present themselves. One possibility would be for the Supreme Court to “balance” the right to marry that *Obergefell* recognizes against the First Amendment right to religious liberty that the clergy enjoy to practice their faith, and to declare openly that, in the conflict, the State has competing and equal obligations: It must not deny the right to marry to same-sex couples, but it must also not infringe the religious liberty of the clergy for refusing to perform same-sex civil marriages consistent with the teachings of their faith, giving the clergy an immunity from State action sanctioning them for doing what the State itself could not do. Alternatively, much the same conclusion could be expressed as a function of constitutional “state action” doctrine. A ruling along these lines could conceivably hold that the clergy, though legally agents of the State for purposes of solemnizing civil marriage under State law, are not “state actors” for purposes of the federal Constitution, and so cannot be held to violate the right to marry that lesbians and gay men and same-sex couples enjoy, because the only constitutionally cognizable violation of constitutional rights comes in cases where the prohibited discrimination is by the State or one of its constitutionally-recognized “state actors.” Different results might follow for analyzing the constitutionality of H.B. 36 under these different approaches. For engagements with some of the underlying complexities of state action doctrine, see, for example, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); Donald J. Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1 (2006); and John Dorsett Niles, Lauren E. Tribble, Jennifer N. Wimsatt, *Making Sense of State Action*, 51 SANTA CLARA L. REV. 885 (2011).

H.B. 36 that *Obergefell*, for the reason it does, casts constitutional doubt on.

That said, even if, as the argument here has suggested, H.B. 36 is unconstitutional, the measure is not an unimportant one. It productively brings into view the prospect of conflicts that, if they have not so far arisen, may yet arise, between civil liberties, including the right to marry, and the religious liberties of the clergy to practice their faith even when acting for certain purposes as agents of the State. H.B. 36 touches on a vitally important subject in our constitutional system: the institutional means by which the values that we, the American people, cherish, including marriage and religion, are expressed, preserved, and, where they come into conflict with one another, how they will be resolved. Who are the protectors and the keepers of our enduring values? What are those values and where do they come from? Who should resolve conflicts between and among these values if and when they surface? For now, the pastor protections contemplated by H.B. 36 are to be referred to the courts, including the Supreme Court, for final resolution. But the political debate that the measure has opened up, not dispositive of the constitutional question that H.B. 36 seeks to settle, and the community of political action and engagement and conversation it has inspired as reflections of our democratic processes of deliberation working mean that the measure, whatever its constitutional flaws, is scarcely for naught.

Thank you.