

Nos. 13-4178; 14-5003 & 14-5006

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DEREK KITCHEN, *et al.*,
Plaintiffs-Appellees,

v.

GARY R. HERBERT, *et al.*,
Defendants-Appellants,

Appeal from the United States District Court
for the District of Utah (No. 2:13-cv-00217)

MARY BISHOP, *et al.*
Plaintiffs-Appellees.

v.

SALLY HOWE SMITH, *et al.*,
Defendants-Appellants

Appeal from the United States District Court
for the Northern District of Oklahoma (No. 4:04-cv-00848)

BRIEF OF 46 EMPLOYERS AND ORGANIZATIONS REPRESENTING EMPLOYERS
AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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This brief is filed on behalf of the following businesses:

American International Group, Inc.	New Belgium Brewing Co., Inc.
Aspen Skiing Company LLC	Oracle America, Inc.
Cisco Systems, Inc.	Outerwall Inc.
Civitas Public Affairs Group LLC	Overstock.com, Inc.
Clean Yield Asset Management	Pfizer Inc.
eBay Inc.	Qualcomm Incorporated
Facebook Inc.	redditgifts
FoodArt LLC	Red Thread Creative Group LLC
Google Inc.	Rocky Mountain Personnel
Hackman Capital Partners, LLC	Recruiters, Inc.
Inspirato, LLC	Ruth Lewandowski Wines LLC
Intel Corporation	Sage Hospitality Resources, LLC
Jackson Hole Group LLC	SLC HEMP LLC
Jazz Pharmaceuticals, Inc.	Starbucks
The Jim Henson Company	Sun Life Financial (U.S.) Services
Kimpton Hotel & Restaurant	Company, Inc.
Group, LLC	Support.com, Inc.
Le Croissant Inc. LLC	TeleTech Holdings, Inc.
Levi Strauss & Co.	Third Sun Productions, Inc.
Liberty Heights, Inc.	Dr. Steven Tilliss D.D.S., M.S., P.C.
Massachusetts Mutual Life Ins. Co.	Tony Caputo's Market & Deli
Mod a-go-go LLC	United Therapeutics Corporation
National Gay and Lesbian Chamber	Urban Utah Homes and Estates LLC
of Commerce	Vail Resorts, Inc.
NCR Corporation	XMission LLC

CORPORATE DISCLOSURE STATEMENTS OF CORPORATE AMICI

American International Group, Inc. is a corporation organized under the laws of Delaware. It has no parent corporation, and to its knowledge, no publicly held corporation owns 10% or more of its stock. Subsidiaries of AIG, but not AIG itself, have employees in some of the states within the Tenth Circuit.

Aspen Skiing Company LLC is a limited liability company organized under the laws of Colorado and is owned by Bell Mountain Partners, L.P., an Illinois limited partnership, and Areljay, L.P., an Illinois limited partnership. It operates four ski resorts, two hotels, and seventeen restaurants in Colorado.

Cisco Systems, Inc. is a corporation organized under the laws of California. It designs, manufactures, and sells networking and communications products. It has no parent corporation and no publicly-held corporation company owns 10% or more of its stock. The company has nearly 1300 employees and contractors in the Tenth Circuit.

Civitas Public Affairs Group LLC is a limited liability company that provides issue advocacy, governmental affairs, and strategic planning across the country. It has no parent corporation and no publicly-held corporation company owns 10% or more of its stock. It provides consulting services for philanthropic foundations based in the Tenth Circuit and works there regularly.

Clean Yield Asset Management is corporation organized under the laws of Vermont. It is an SEC-registered investment advisory firm. It has no parent corporation and to its knowledge, no publicly held corporation owns 10% or more of its stock. Its clients include residents of Colorado and New Mexico.

eBay Inc. is a corporation organized under the laws of Delaware and headquartered in San Jose, California. Employing more than 33,000 people, it is a global commerce platform and payments leader, connecting millions of buyers and sellers through online platforms including eBay, PayPal, and eBay Enterprise. It has no parent corporation and no publicly-held corporation company owns 10% or more of its stock. It conducts business and employs people in the Tenth Circuit.

Facebook Inc. is a corporation organized under the laws of Delaware. It has no parent corporation and no publicly-held corporation owns 10% or more of its stock. Facebook is a technology company that builds products for making the world more open and connected. Facebook has an office in Denver, Colorado.

FoodArt LLC is a limited liability company organized under the laws of Utah. It is wholly owned by M. Kathie Chadbourne doing business as Avenues Bistro on Third in Salt Lake City, Utah. FoodArt has been named Best Neighborhood Restaurant by Salt Lake magazine and serves fresh (including garden to table) food made from the highest quality ingredients. FoodArt LLC was privileged to have Derek Kitchen as a server and offers outstanding Laziz – Middle Eastern Spread products created by Derek and Moudi Sbeity.

Google Inc. is a corporation organized under the laws of Delaware and headquartered in California, with a campus in Boulder, Colorado and operations in Oklahoma. Google is a global technology leader focused on improving the ways people connect with information. Google does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Hackman Capital Partners, LLC is a limited liability company organized under the laws of Delaware, and, together with its affiliated entities, owns property in approximately 35 states, including, but not limited to, Colorado. It has no parent corporation and to its knowledge, no publicly held corporation owns 10% or more of its stock.

Inspirato, LLC is a limited liability company organized under the laws of Delaware with its principal place of business in Denver, Colorado. It has no parent corporation and to its knowledge, no publicly held corporation owns 10% or more of its stock. Inspirato, LLC provides luxury hospitality through its villas, excursions and member only events to more than 7,000 members.

Intel Corporation is a corporation organized under the laws of Delaware. It is the world's largest semiconductor manufacturer and is also a leading manufacturer of computer, networking, and communications hardware and software products. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. Intel has facilities and employees all over the world, including in New Mexico and Colorado.

Jackson Hole Group LLC is a limited liability company organized under the laws of Delaware. It provides management consulting and advisory services to corporations, non-profit organizations, professional associations and privately held companies throughout the United States, including various client companies with operations in the Tenth Circuit. It has no parent corporation and no publicly held corporation holds any ownership interest in the company.

Jazz Pharmaceuticals, Inc. is a corporation organized under the laws of Delaware. It is a specialty biopharmaceutical company focused on improving patients' lives by identifying, developing and commercializing differentiated products that address unmet medical needs. It is a wholly owned subsidiary of Jazz Pharmaceuticals plc. It routinely does business throughout the United States, including Utah.

The Jim Henson Company is a corporation organized under the laws of New York. It is in the business of creating and distributing family entertainment throughout the United States and the world. It has no parent corporation and to its knowledge, no publicly held corporation owns 10% or more of its stock.

Kimpton Hotel & Restaurant Group, LLC is a limited liability company organized under the laws of Delaware and headquartered in California. Kimpton operates more than sixty hotels and restaurants in twenty-five major cities throughout the United States, including hotels and restaurants in Salt Lake City, Utah and in Denver and Aspen, Colorado. Kimpton and its subsidiaries employ approximately 8,100 employees. Kimpton is wholly-owned by Kimpton Group Holding, LLC, a privately-held limited liability company organized under the laws of Delaware. No publicly-traded company owns more than 10% of the ownership interests in either KGH or Kimpton.

Le Croissant Inc. LLC is a limited liability company organized under the laws of Utah. Doing business as Le Croissant Catering, it provides catering services, event planning and event design throughout Utah with an emphasis in Salt Lake City and Park City. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Levi Strauss & Co. is a corporation organized under the laws of Delaware. Levi Strauss & Co. is one of the world's largest brand-name apparel companies and a global leader in jeanswear. Levi Strauss & Co. does not have a parent corporation and no public company holds a 10% or greater ownership interest in Levi Strauss & Co. Levi's Only Stores, Inc., a Delaware corporation and wholly-owned subsidiary of Levi Strauss & Co., operates retail stores in Oklahoma, Kansas, New Mexico, Colorado and Utah.

Liberty Heights, Inc. dba Liberty Heights Fresh is a corporation organized under the laws of Utah. It is a retail merchant of good food. It has no parent corporation and to its knowledge, no publicly held corporation owns 10% or more of its stock.

Massachusetts Mutual Life Insurance Company is a mutual insurance company. It has no parent corporation and no publicly held corporation owns its stock.

Mod a-go-go LLC is a limited liability corporation organized under the laws of Utah. It is a corporation selling vintage furniture and original art, made by local, Utah artists. Mod a-go-go has no parent corporation or other holdings and is owned by Eric James Morley and Marcus Alan Gibby.

National Gay and Lesbian Chamber of Commerce is a not-for-profit advocacy organization headquartered in Washington, D.C. It is the national certification body for LGBT-owned businesses.

NCR Corporation is a corporation organized under the laws of Maryland. It provides hardware and software services to financial and other businesses throughout the United States, including states within the Tenth Circuit, and the rest of the world. It does not have a parent company and to its knowledge, no publicly held corporation owns 10% or more of its stock.

New Belgium Brewing Company, Inc. is a corporation organized under the laws of Colorado. It is the third-largest craft brewery in the United States. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. It distributes its products and has employees domiciled in the States of Colorado, Kansas, New Mexico, Utah and Wyoming.

Oracle America, Inc. is a corporation organized under the laws of Delaware. It is a wholly owned, privately held indirect subsidiary of Oracle Corporation. It is a publicly held corporation listed on The New York Stock Exchange and is a global provider of enterprise software and computer hardware products and services. It currently has employees and/or conducts business in all the states that comprise the Tenth Circuit.

Outerwall Inc. is a corporation organized under the laws of Delaware. Outerwall Inc. is a leader in automated retail providing kiosks in grocery stores, drug stores, mass merchants, malls, and other retail locations in the United States, Canada, Puerto Rico, the United Kingdom, and Ireland. It has no parent corporation and to its knowledge, no publicly held corporation owns 10% or more of its stock.

Overstock.com, Inc. is a corporation organized under the laws of Delaware. Overstock.com is an internet retailer based in Utah. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Pfizer Inc. is a corporation organized under the laws of Delaware. It is headquartered in New York and has colleagues across the U.S., including the Tenth Circuit. It is engaged in the discovery, development, manufacture and sale of many of the world's best-known prescription medicines and consumer healthcare products. It has no parent corporations, and no publicly held corporation holds a 10% or greater interest in it.

Qualcomm Incorporated is a corporation organized under the laws of Delaware. It is a fabless manufacturer of semiconductors for the wireless industry, and licenses its technology broadly. It does not have a parent corporation, and no publicly held corporation holds a 10% or greater ownership in it. Qualcomm has maintained an office in South Jordan, Utah.

redditgifts is a corporation organized under the laws of California and operates in Salt Lake City, Utah. redditgifts is a giant online gift exchange that started connecting internet stranger-friends around the world with one another in 2009. redditgifts's parent corporation is reddit.

Red Thread Creative Group LLC is a limited liability company organized under the laws of Colorado providing marketing and communication services across the Western United States. It has no parent corporation and to its knowledge, no publicly held corporation owns 10% or more of its stock.

Rocky Mountain Personnel Recruiters, Inc. dba Rocky Mountain Recruiters, Inc. is a corporation organized under the laws of Colorado and headquartered in Denver, Colorado. It has no parent corporation and to its knowledge, no publicly held corporation owns 10% or more of its stock. It is a provider of executive search and consulting services throughout the United States, Canada and internationally with most of its business in the Rocky Mountains region.

Ruth Lewandowski Wines LLC is a limited liability company. It has no parent corporation and to its knowledge, no publicly held corporation owns 10% or more of its stock. It is a winery with distribution in Northern/Southern California, the Pacific Northwest, Utah (from its winery location in Utah), New York City, Quebec and France.

Sage Hospitality Resources, LLC is a limited liability company organized under the laws of Delaware. It is headquartered in Denver, Colorado and is engaged in the management of hotels throughout the United States, including the Denver, Colorado metropolitan area. It is privately held, with a majority of its membership interests held by its founders through Sage Investment Holdings, LLC, a Delaware limited liability company. No publicly-held corporation holds any interest in Sage.

SLC HEMP LLC is a limited liability company organized under the laws of Utah. It is a retail store dedicated to natural products and fair trade. It is a privately owned company with no parent companies or corporate members or shareholders.

Starbucks is a corporation organized under the laws of Washington. Since 1971, Starbucks Coffee Company has been committed to ethically sourcing and roasting the highest quality arabica coffee. Today, with stores around the globe, the company is the premier roaster and retailer of specialty coffee in the world. It has no parent corporation and to its knowledge, no publicly held corporation owns 10% or more of its stock.

Sun Life Financial (U.S.) Services Company, Inc. is a corporation organized under the laws of Delaware. It employs approximately 2,200 employees in 41 states who work on behalf of its affiliated life insurance companies to distribute and administer those companies' employee-benefit products in all 50 states. Sun Life of Canada (U.S.) Holdings, Inc. is the parent corporation of Sun Life Financial (U.S.) Services Company, Inc. Each corporation is indirectly owned 100% by Sun Life Financial Inc., a publicly held corporation.

Support.com, Inc. is a corporation organized under the laws of Delaware. It is a leading provider of technology and services in the field of remote technology support for consumers and small businesses nationwide. It maintains an office with employees in Littleton, Colorado, and also has work-from-home remote technical support employees based in Oklahoma, Kansas, New Mexico, Colorado, and Utah. It has no parent corporation. BlackRock, Inc. reports holding 10.3% of Support.com's outstanding shares.

TeleTech Holdings, Inc. is a corporation organized under the laws of Delaware, listed on the NASDAQ Stock Market. The company is a leading global provider of analytics-driven, technology-enabled services that simplify the delivery of the customer experience for Fortune 200 and Global 1000 clients and their customers. It has no parent corporation and to its knowledge, no publicly held corporation

owns 10% or more of its stock. TeleTech is headquartered in Englewood, Colorado and has over 1500 employees working within the Tenth Circuit.

Third Sun Productions, Inc. is a corporation organized under the laws of Utah. Third Sun Productions, based in Salt Lake City, Utah, provides website design and related services primarily to businesses and nonprofit organizations in Utah. It has no parent corporation and to its knowledge, no publicly held corporation owns 10% or more of its stock.

Dr. Steven Tilliss D.D.S., M.S., P.C. is a corporation organized under the laws of Colorado. It has no parent corporation and to its knowledge, no publicly held corporation owns 10% or more of its stock. It supplies dental services with its principal place of business in Colorado.

Tony Caputo's Market & Deli is a corporation organized under the laws of Utah. It offers specialty food items in both a restaurant and retail setting. It has no parent corporation and to its knowledge, no publicly held corporation owns 10% or more of its stock.

United Therapeutics Corporation is a corporation organized under the laws of Delaware. It is a biotechnology company focused on the development and commercialization of unique medicinal products worldwide. It does not have a parent corporation. As of December 31, 2013, BlackRock, Inc., a publicly-traded investment management corporation, reports that it owns 13.7% of United Therapeutics Corporation. It has employees and consultants who reside and work within the Tenth Circuit and the company is involved in recruiting additional employees within the Tenth Circuit. In addition, its medicines are prescribed by physicians and distributed to patients throughout the Tenth Circuit.

Urban Utah Homes and Estates LLC is a limited liability company organized under the laws of Utah. It has no parent corporation and to its knowledge, no publicly held corporation owns 10% or more of its stock.

Vail Resorts, Inc. is a publicly held corporation organized under the laws of Delaware. Vail Resorts, Inc. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. Vail Resorts, Inc., through its subsidiaries, owns, develops, and/or operates various mountain resorts in Colorado, Utah, Wyoming, and other locations.

XMission LLC is a limited liability company organized under the laws of Utah. It provides Internet Services globally. XMission is a privately held company with no parent company.

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INTEREST OF *AMICI CURIAE*¹

This brief is submitted with the consent of all parties pursuant to Federal Rule of Appellate Procedure 29(a) and the Joint Notices of Consent to File Brief of *Amicus Curiae*, filed in both cases.

Amici are financial institutions, medical centers, providers of health care and of health care coverage, high technology businesses, manufacturers, insurers, pharmaceutical companies, media companies, professional firms, management and communications consultants, retailers and service providers, marketers, travel and hospitality providers, restaurants, and trade and professional associations. We are employers or associations of employers who share a desire to attract and retain a talented workforce. We are located in, do business in, or are actively preparing to begin operations in Utah, Oklahoma, and/or other states in the Tenth Circuit. All are states with laws or constitutions that prohibit marriages between couples of the same sex and refuse to recognize existing same-sex marriages.

State laws and constitutions that deny marriage to gay and lesbian citizens are bad for our businesses. *Amici* are forced to bear unnecessary costs, complexity, and risk in managing our companies, and we are hampered in our efforts to recruit

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person contributed money that was intended to fund, prepare, or submit this brief.

and retain the most talented workforce possible. This places us at a competitive disadvantage. Our success is dependent upon the welfare and morale of all employees, without distinction. This forced differential treatment—imposed by state law—of similarly situated employees interferes with our business and professional judgment and creates unnecessary confusion, tension, and ultimately, diminished employee morale. We write to advise the Court of the impact on employers of the disparate treatment mandated by states that refuse to permit or recognize marriages between same-sex couples.

SUMMARY OF THE ARGUMENT

As employers in a national and global economy, it is critical that we attract and retain the best employee talent. States like Utah, Oklahoma, and others whose laws or constitutions prohibit same-sex couples from marrying require us to differentiate among similarly situated employees, to our detriment. As a result, our ability to grow and maintain a diverse workplace is hampered, as is, in turn, our ability to grow and maintain our business. In addition, we find ourselves forced to take actions and implement policies inconsistent with our stated corporate principles. We must operate in a complicated landscape of laws and human resources regulations. These laws and constitutions prohibiting same-sex marriage increase our administrative costs and, in the end, do harm to our business.

Same-sex couples should have the same right to marry as opposite-sex

couples. Married same-sex couples should receive the same benefits and responsibilities appurtenant to marriage as any other couple. We recognize the importance of that equality to our employees, and we have seen the real world, positive impact that fostering diversity and inclusion has on our productivity and performance. The district court opinions in *Kitchen v. Herbert*, No. 13-4178, and the *Bishop* cases, Nos. 14-5003 & 14-5006, help establish a uniform principle that all couples share in the right to marry. Reversal of the district courts' opinions, by contrast, would serve only to prolong an unproductive, inequitable, and unjust *status quo*. We respectfully and strongly urge the Court to affirm the district court opinions.

ARGUMENT

On June 26, 2013, the United States Supreme Court held that Section 3 of the Defense of Marriage Act of 1996 (“DOMA”) was unconstitutional, in that it defined the word “marriage” to mean “only a legal union between one man and one woman,” and restricted the word “spouse” to mean “only a person of the opposite sex who is a husband or a wife.”² In so doing, the Court noted that some jurisdictions had determined that same-sex couples should have “the right to marry and so live with pride in themselves and their union and in a status of equality with

² *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013) (citing 1 U.S.C. § 7).

all other married persons.”³

As employers, we know that operating in the current fractured landscape of conflicting state laws stunts our economic growth and innovation. These inconsistent laws defining marriage force us to divert significant time and cost to complex administrative systems. This legal uncertainty also creates a rift in the employer-employee relationship. Allowing same-sex couples to marry is better for our employees because it provides them with unambiguous, clear status under the law. Ultimately, that recognition is better for our own business operations as well, because it improves employee morale and productivity, reduces uncertainty and risk, and removes significant administrative burdens.

A. Our Businesses Depend on Diversity and Inclusion.

“Today, diversity and inclusion . . . are a given.”⁴ They are among our core principles—and we have confirmed their value through observation and rigorous analysis. We, and many of our peers, recognize that diversity is crucial to innovation and marketplace success. Members of the lesbian, gay, bisexual, and

³ *Id.* at 2689.

⁴ *See, e.g.,* Forbes, *Global Diversity and Inclusion: Fostering Innovation Through a Diverse Workforce*, FORBES INSIGHTS, 11 (July 2011) (hereinafter “Forbes Insights”), http://www.forbes.com/forbesinsights/innovation_diversity/ (citing comments from Intel, AT&T, Mattel, Credit Suisse, & L’Oreal USA). Forbes Insights was a comprehensive study of 300 senior executives responsible for diversity at companies around the world; all of which had revenues of at least \$500 million.

transgender (“LGBT”) community are one source of that diversity.⁵ An April 2013 Small Business Majority survey reported that sixty-nine percent of small business owners support non-discrimination laws protecting LGBT workers.⁶ As of 2014, ninety-one percent of Fortune 500 companies provide nondiscrimination protection for their LGBT employees, and sixty-seven percent offer benefits to same-sex partners.⁷

We invest time and resources to implementing these principles because they yield tangible results. A diverse, inclusive workplace environment “increases the total human energy available to the organization. People can bring far more of themselves to their jobs because they are required to suppress far less.”⁸ Such companies are more open to new ideas and opportunities, while reducing

⁵ *Id.* at 5.

⁶ Movement Advancement Project, Center for American Progress, & Human Rights Campaign, *A Broken Bargain: Discrimination, Fewer Benefits and More Taxes for LGBT Workers (Full Report)*, ii (May 2013) (hereinafter “*Broken Bargain*”), <http://outandequal.org/documents/brokenbargain/a-broken-bargain-full-report.pdf>.

⁷ Human Rights Campaign, *2014 Corporate Equality Index*, 9, http://www.hrc.org/files/assets/resources/cei_2014_full_report_rev7.pdf

⁸ Deloitte, *Only skin deep? Re-examining the business case for diversity*, DELOITTE POINT OF VIEW, 7 (Sept. 2011), http://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Services/Consulting/Human%20Capital/Diversity/Deloitte_Only_skin_deep_12_September_2011.pdf (quoting FREDERICK A. MILLER & JUDITH H. KATZ, *THE INCLUSION BREAKTHROUGH* (2002)).

overconfidence.⁹ And companies that are diverse and inclusive obtain better profits and other outputs, thanks to improved team collaboration and commitment.¹⁰ The Williams Institute at the University of California at Los Angeles School of Law recently reviewed thirty-six research studies and found that working in an LGBT-supportive workplace climate resulted in “greater job commitment, improved workplace relationships, increased job satisfaction, improved health outcomes, and increased productivity” among LGBT employees.¹¹ A 2013 study of 300 firms that adopted same-sex domestic partnership benefits between 1995 and 2008 saw a ten percent stock price increase over the sample period, a performance better than ninety-five percent of all professional mutual

⁹ Feng Li & Venky Nagar, *Diversity and Performance*, 59 MGMT. SCIENCE 529, 529 (March 2003); Ulrike Malmendier & Geoffrey Tate, *CEO overconfidence and corporate investment*, 60 J. FIN. 2661 (2005); Lu Hong & Scott E. Page, *Groups of diverse problem solvers can outperform groups of high-ability problem solvers*, 101 PROCEEDINGS OF THE NAT’L ACAD. OF SCIENCES OF THE U.S.A., 16385, Nov. 16, 2004, <http://www.pnas.org/content/101/46/16385.full.pdf+html>.

¹⁰ See Corporate Leadership Council, *Diversity & Inclusion*, <http://www.executiveboard.com/exbd/human-resources/corporate-leadership-council/diversity-and-inclusion/index.page>, showing that a workforce with high levels of diversity and inclusion show marked improvement in team collaboration and team commitment (1.57 times and 1.42 times as much, respectively, as workforces low in diversity and inclusion). For representative examples, see Forbes Insights, *supra* n.4, at 5, which reflects similar results from a number of participating companies.

¹¹ M.V. Lee Badgett, Laura E. Durso, Angeliki Kastanis, & Christy Mallory, *The Business Impact of LGBT-Supportive Workplace Policies*, 1, Williams Institute, May 2013 (hereinafter “Williams Institute”), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-LGBT-Policies-Full-Report-May-2013.pdf>.

funds in the United States, as well as “significant improvement in operating performance” relative to companies that did not adopt such policies.¹²

Diverse workforces also help companies capture new clients.¹³ A 2011 study found that sixty-eight local governments require that their contractors have LGBT-supportive affirmative action policies, or policies granting same-sex domestic partners equal benefits.¹⁴ To take just one example from the Tenth Circuit, Salt Lake City’s procurement rules grant a preference to companies whose non-discrimination policies include LGBT employees.¹⁵

Our corporate principles are more than platitudes; they are our agenda for

¹² Li & Nagar, *supra* n.9, at 529, 538-541; *see also* Williams Institute, *supra* n.11, at 23 (“A . . . study found that the more robust a company’s LGBT-friendly policies, the better its stock performed over the course of four years (2002-2006), compared to other companies in the same industry over the same period of time.”) (citing Peng Wang & Joshua L. Schwartz, *Stock price reactions to GLBT nondiscrimination policies*, 49 HUMAN RES. MGMT. 195 (2010), <http://onlinelibrary.wiley.com/doi/10.1002/hrm.20341/abstract>); Janell Blazovich, Kirsten Cook, Janet Huston, & William Strawser, *Do Gay-friendly Corporate Policies Enhance Firm Performance?* 35-36 (Apr. 29, 2013), <http://www.west-info.eu/files/gayfriendly1.pdf> (“[F]irms with gay-friendly policies benefit on key factors of financial performance, which, in turn, increase the investor perception of the firm as proxied by stock-price movements.”).

¹³ Forbes Insights, *supra* n.4, at 11.

¹⁴ Williams Institute, *supra* n.11, at 21. California has similar state-wide requirements. *Id.* (citing CAL. PUB. CONT. CODE §§ 10295.3(a)(1), (e)(1)) (West 2014).

¹⁵ SALT LAKE CITY ADMIN. R., PROCUREMENT, §§ 19.3, 19.4, <http://www.slcinbase.com/PPAREO/default.htm#!WordDocuments/procurementchapter19valuebasedprocurementprogram.htm>.

success. In addition to knowing they are the right thing to do, we know that these values contribute to employee happiness and loyalty, greater productivity for our companies and, ultimately, significant returns for our shareholders and owners.

B. To Reap the Rewards of Diversity, We Need to Be Able to Recruit and Retain Top Talent, in Part Through Equitable and Competitive Benefits Packages.

In order to grow and develop a diverse organization, we must be able recruit and retain the best talent.¹⁶ We hire and promote our employees based on ability. In the long run, discrimination on any other basis impairs our ability to compete for business. Benefits are critical to our effort to compete for talent, as benefits directly contribute to recruitment and employee loyalty.¹⁷ In 2012, eighty-six percent of full-time American workers in private industry had access to medical benefits through their employer, and seventy-four percent to an employer-provided

¹⁶ “[T]he skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

¹⁷ MetLife, *10th Annual Study of Employee Benefit Trends*, 20 (2012), <http://www.metlife.com/assets/institutional/services/insights-and-tools/ebts/ml-10-Annual-EBTS.pdf> (sixty percent of its employees feel that benefits are important reason for remaining with the company). Sixty-six percent of polled employees agreed that health-care benefits were “very important for feelings of loyalty to the company,” fifty-nine percent agreed regarding retirement benefits, and fifty-one percent agreed regarding dental, disability, vision, and life insurance benefits. *Id.* at 26.

retirement plan.¹⁸ Benefits packages—especially health-care and retirement benefits—can add thirty percent or more of additional compensation value on top of an employee’s salary. In a 2011 Harvard Business Review Analytic Services survey of human resource leaders, sixty percent of respondents stated that an attractive benefits package was “very important” in recruiting and retaining quality employees.¹⁹ In 2006, eighty-nine percent of LGBT respondents said it was important that they work for a company with a written nondiscrimination policy that includes sexual orientation, and ninety-one percent said equal benefits were crucial.²⁰ It is through these plans that we can foster a positive employer/employee relationship and retain satisfied and engaged workers, who in turn are more productive and perform better across a variety of metrics than their less-satisfied

¹⁸ U.S. Bureau of Labor Statistics, *Employee Benefits in the United States—March 2013*, ECONOMIC NEWS RELEASE (July 17, 2013), <http://www.bls.gov/news.release/ebs2.nr0.htm>.

¹⁹ Paula Andruss, *How to Attract—And Retain—Staff When You Can’t Pay Big Bucks*, ENTREPRENEUR MAGAZINE, June 27, 2012, <http://www.entrepreneur.com/article/223516> (compared with thirty-eight percent who believed that only high base salary was “very important”); *see also id.* (citing MetLife, *supra* n.17); Max Messmer, *Four Keys to Improved Staff Retention*, STRATEGIC FIN. (Oct. 2006) http://www.imanet.org/PDFs/Public/SF/2006_10/10careers.pdf (“A 2005 survey conducted by the research firm Zogby International revealed that fifty-eight percent of employees polled would prefer a job with excellent benefits over one with a higher salary”).

²⁰ Out & Equal, *Majority of Americans: Companies Not Government Should Decide Benefits Offered to Same-Sex Employees*, FIFTH ANNUAL OUT & EQUAL/HARRIS INTERACTIVE/WITECK COMBS COMMUNICATIONS SURVEY 1 (May 22, 2006) http://outandequal.org/documents/2006_Workplace_Survey052306.pdf.

colleagues.²¹

We also know that we must offer workplace benefits equitably, particularly in a diverse workforce, because employees who are treated differently are more likely to leave as a result of perceived discrimination. These departures “result[] in avoidable turnover-related costs at the expense of a company’s profits.”²² In 2007, a national survey of people who had quit or been laid off since 2002 reported that “[g]ay and lesbian professionals and managers said workplace unfairness was the only reason they left their employer almost twice as often as heterosexual Caucasian men.”²³ “Almost half [of those who left]. . . said that if their employer offered more or better benefits they would have very likely stayed at their job.”²⁴

²¹ MetLife, *supra* n.17, at 20; *see generally* Andruss, *supra* n.19; Messmer, *supra* n.19; C. Matthew Schulz, *Recruiting and retaining the best and brightest talent*, LOS ANGELES DAILY J. (Dec. 26, 2013) (on file with counsel of record).

²² Sophia Kerby & Crosby Burns, *The Top 10 Economic Facts of Diversity in the Workplace*, Center for America Progress, July 12, 2012, <http://www.americanprogress.org/issues/labor/news/2012/07/12/11900/the-top-10-economic-facts-of-diversity-in-the-workplace/>; *see also* Blazovich, *supra* n.12, at 8-9.

²³ Level Playing Field Institute, *The Corporate Leavers Survey: The cost of employee turnover due solely to unfairness in the workplace*, 4 (2007), <http://www.lphi.org/sites/default/files/corporate-leavers-survey.pdf>.

²⁴ *Id.* at Executive Summary; *see also* Williams Institute, *supra* n.11, at 17 (“[Another study] found that those respondents who perceived more workplace discrimination reported significantly lower levels of job commitment and significantly higher levels of turnover intentions. [Others] found a similar relationship between discrimination.”) (citing Raymond N.C. Trau & Charmaine E.J. Härtel, *Contextual factors affecting quality of work life and career attitudes of gay men*, 19 EMPLOYEE RESPONSIBILITIES & RIGHTS J. 207-219 (2007)); Belle R.

Equality for LGBT employees matters to heterosexual employees as well. In the same 2006 poll, seventy-two percent of non-LGBT respondents found it important that an employer offer equal benefits to their LGBT co-workers.

The mandate in Utah, Oklahoma, and other states requires that we single out colleagues with same-sex partners and treat them as a separate and unequal class as compared to employees with heterosexual partners when dealing with state marital benefits. This mandate upsets our business philosophy and prevents our companies from reaching our full economic potential because it dissuades those employees from living and working in the jurisdictions where we do, or want to do, business.

1. Today Employees in Same-Sex Relationships Receive Varying Access, If Any, to the Rights, Benefits and Privileges That Different-Sex Couples Enjoy Under State and Federal Law.

Seventeen states, the District of Columbia, and eight federally recognized Indian tribes recognize the right of individuals to marry regardless of their

Ragins, Romila Singh, & John M. Cornwell, *Making the invisible visible: Fear and disclosure of sexual orientation at work*, 92 J. OF APPLIED PSYCH. 1102-1118 (2007); Corey S. Muñoz, *A multi-level examination of career barriers for sexual minorities [sic] employees*, unpublished doctoral dissertation (2005) (*cached version* http://webcache.googleusercontent.com/search?q=cache:eTzqcE9Iw7UJ:athenaeu m.libs.uga.edu/bitstream/handle/10724/8301/munoz_corey_s_200505_phd.pdf); Scott B. Button, *Organizational efforts to affirm sexual diversity: A cross-level examination*, 86 J. OF APPLIED PSYCH. 17-28 (2001)).

partner's sex.²⁵ Each such jurisdiction also recognizes the validity of same-sex

²⁵ Marriages between same-sex couples are licensed by California, Connecticut, Delaware, Hawaii, Illinois (currently in Cook County and state-wide beginning June 1, 2014), Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Washington, the District of Columbia, the Cheyenne and Arapaho Tribes of Oklahoma, the Coquille Tribe, the Confederated Tribes of the Colville Nation, Iipay Nation of Santa Ysabel, the Leech Lake Band of Ojibwe, Little Traverse Bay Bands of Odawa Indians, Pokagon Band of Potawatomi Indians, and Suquamish Tribe. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010), appeal dismissed sub. nom. *Perry v. Brown*, 725 F.3d 1140 (9th Cir. 2013); *Strauss v. Horton*, 207 P.3d 48, 68, 119 (Cal. 2009); CAL. FAM. CODE § 308(b); CONN. GEN. STAT. § 46b-20; DEL. CODE tit. 13, § 101; HAW. REV. ST. §§ 572-A through 572-E, 572-1, 572-3, 572-6, 572-13, 572B-4, 572B-9.5, 572C-2, 580-1; 750 ILL. COMP. STAT. 5/201, 209, 212, 213.1, 220 & 75/60, 65; *Edwards, et al. v. Orr*, Case No. 13-cv-8718, Dkt. No. 46, Memorandum Opinion & Order (N.D. Ill., Feb. 21, 2014); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); ME. REV. STAT. tit. 19-A, § 650A; MD. CODE ANN., FAM. LAW § 2-201; *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003); MINN. STAT. § 517.01 *et seq.*; N.H. REV. STAT. ANN. § 457:1-a; *Garden State Equality v. Dow*, 82 A.3d 336 (N.J. Super. 2013); *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013); N.Y. DOM. REL. LAW § 10-A; R.I. GEN. LAWS § 15-1-1 *et seq.*; VT. STAT. ANN. tit. 15, § 8; WASH. REV. CODE § 26.04.010; D.C. CODE § 46-401; CHEYENNE-ARAPAHO TRIBES OF OKLA. [LAW & ORDER CODE] § 1101; CONFED. TRIBES OF THE COLVILLE NATION, RES. 2013-344.1&j; Press Release, *California Native American Tribe Announces Support of Same-Sex Marriage: Santa Ysabel Tribe First in California to Make Proclamation*, WALL ST. J. (June 24, 2013), <http://online.wsj.com/article/PR-CO-20130624-907829.html>; LEECH LAKE BAND OF OJIBWE 6 TRIB. CODE CH. 2 & Oscar Raymundo, *Some Native American tribes support gay marriage*, SAN FRANCISCO EXAMINER, Nov. 25, 2013, <http://www.sfexaminer.com/sanfrancisco/some-native-americans-tribes-support-gay-marriage/Content?oid=2634562>; COQUILLE INDIAN TRIBE CODE § 740.010; LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS TRIB. CODE §§ 13.102-13.103 (as modified by WOS 2013-003); POKAGON BAND OF POTAWATOMI INDIANS MARRIAGE CODE §§ 2.01, 4.01; SUQUAMISH TRIB. CODE, tit. 9, ch. 9.1.

marriages lawfully celebrated elsewhere.²⁶

In late June 2013, the Supreme Court found DOMA Section 3 unconstitutional. As a result, the federal government now must recognize all couples “whom the State, by its marriage laws, sought to protect in personhood and dignity” as married.²⁷ In other words, absent a controlling statute providing otherwise, the federal government respects same-sex couples as lawfully married if their marriage was performed in a state that legally authorizes such marriages.²⁸

While “marriage is more than a routine classification for purposes of certain statutory benefits,”²⁹ as a legal status marriage touches on numerous aspects of life, both practical and profound. Federal and state law provide to the working family many benefits and protections relating to health care, protected leave, and retirement. These protections provide security and support to an employee grappling with sickness, disability, childcare, family crisis, or retirement, allowing

²⁶ Oregon also recognizes the validity of out-of-state marriages. *See* Letter from Mary H. Williams, Deputy Attorney General, Oregon Department of Justice, to Michael Jordan, Chief Operating Officer, Oregon Department of Administrative Services (Oct. 16, 2013); E-mail from Michael Jordan, Chief Operating Officer, Oregon Department of Administrative Services, to Agency Directors, re: Recognizing Out-of-State, Same-Sex Marriages and A. G. Opinion (Oct. 16, 2013), *both available at* http://www.doj.state.or.us/releases/pdf/geiger_answer_exhibit_a.pdf.

²⁷ *Windsor*, 133 S. Ct. at 2696.

²⁸ *Id.* at 2695-96.

²⁹ *Id.* at 2692.

the employee to devote more focus and attention to his work. Under federal law, individuals married to same-sex spouses benefit from equal treatment regarding health insurance, military benefits, tax treatment, and immigration law.³⁰ The United States Department of Justice, for example, has announced that same-sex married couples will receive equal federal death benefit and educational payments for federal public safety officers, victim compensation payments, equal treatment in bankruptcy cases, equal rights pertaining to inmates in federal prison, and equal access to the marital privilege in federal court.³¹

However, gay and lesbians employees in committed relationships in Utah, Oklahoma, and elsewhere in the Tenth Circuit are categorically denied access to these rights and benefits—and to important rights and responsibilities at the state level. In Oklahoma, for example, single parents can adopt, but an unmarried partner and *de facto* co-parent cannot be a legal parent.³² In both states, only spouses, not unmarried partners, can be added as beneficiaries to state benefit

³⁰ See Hon. Eric H. Holder, Jr., U.S. Attorney Gen., *Remarks at the Human Rights Campaign Greater New York Gala* (Feb. 10, 2014), <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140210.html> (summarizing federal rights and benefits).

³¹ *Id.*; see also Matt Apuzzo, *More Federal Privileges to Extend to Same Sex Couples*, N.Y. TIMES, Feb. 9, 2014, <http://www.nytimes.com/2014/02/09/us/more-federal-privileges-to-extend-to-same-sex-couples.html>.

³² In Utah, state law bars adoptions by persons who are cohabitating but not legally married. See Rosemary Winters, THE SALT LAKE TRIBUNE, Jan. 24, 2011, <http://www.sltrib.com/sltrib/home/51097053-76/parent-couples-sex-percent.html.csp>.

programs. Similarly, in both states only legal spouses have the right to make certain medical decisions. In states like Utah, Oklahoma, and others where marriage to a partner of the same-sex is prohibited, same-sex couples in committed relationships have no access to the myriad federal rights, benefits and privileges that depend on marriage unless they leave the state and are legally wed elsewhere.³³ And even then, those same couples—or legally married same-sex couples who later move to Utah or Oklahoma—will still be denied access to the wide range of state benefits and mutual responsibilities available to married partners of different sexes. That bar works to the detriment of employees, and to employers that seek to recruit and retain the best human capital.

2. Marriage Discrimination Drives Talented Individuals Away From the Jurisdictions in Which We Do Business.

Over thirty-eight percent of Americans live in a jurisdiction that celebrates or recognizes marriages between people of the same sex.³⁴ LGBT-friendly policies offer us a competitive advantage in employee recruitment and retention.³⁵ However, when faced with the evidence above, we can only conclude that in states

³³ In its most recent report on the topic, the United States Government Accountability Office identified 1,138 rights, benefits and privileges under federal law that depend on marital status. U.S. Gen. Accounting Office, GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* (Jan. 23, 2004), <http://www.gao.gov/assets/100/92441.pdf>.

³⁴ Freedom to Marry, *States*, <http://www.freedomtomarry.org/states/> (last visited March 2, 2014).

³⁵ See Blazovich, *supra* n.12, at 7.

that enforce marriage discrimination we operate at a disadvantage when looking to hire qualified, talented personnel. Married gay and lesbian job candidates may be reluctant to pursue job opportunities in the Tenth Circuit, where their pre-existing marriages will not be recognized, and they can expect to lose access to certain previously-enjoyed state level benefits. Single gays and lesbians may decide that the option of a future legally recognized marriage is enough to justify passing up employment opportunities in the Tenth Circuit. And heterosexual individuals may decide that a state hostile to marriage equality is not a state in which they want to live and work.

Business, industry, and intellectual leaders have confirmed that this scenario is not merely hypothetical. Richard Florida, a professor at the University of Toronto and a leading urban studies theorist, argues that members of the “creative class . . . the 40 million workers, a third of the American workforce, the scientists and engineers, innovator[s] and entrepreneurs, researchers and academics, architects and designers, artists, entertainers and media types and professionals in business, management, healthcare and law” use diversity as a proxy for determining whether a city would provide a welcoming home.³⁶ The Williams Institute found that creative-class Massachusetts residents in same-sex

³⁶ Human Rights Campaign, *2012 Municipal Equality Index: — A Nationwide Evaluation of Municipal Law and Policy*, 5 (2012), http://www.hrc.org/files/assets/resources/MEI-2012_rev.pdf.

relationships were 2.5 times more likely to have moved there in the three years after marriage equality than they were in the three years before.³⁷

Compare those findings to the warning from the former head of The College of William and Mary's Board of Visitors regarding that state's marriage ban:

We already have lost valued gay and lesbian faculty to our competitors who do not discriminate. With changes in federal benefits soon available to legally married gay couples, we will lose more. Two able individuals told me [recently] that they are leaving for another state—one a top professor [in a science-technology field] and another a university administrator just recruited to Virginia a few years ago.³⁸

Another professor recently wrote, “While a desire to live full time with my spouse was the main motivator in my move from a college in Virginia to one in Maryland, the antigay legal environment in Virginia did play a role in my job change.”³⁹ And

³⁷ Gary J. Gates, *Marriage Equality and the Creative Class 1*, Williams Institute (May 2009), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-MA-Creative-Class-May-2009.pdf>.

³⁸ Nick Anderson, *Outgoing rector warns Virginia may lose professors because of gay marriage ban*, THE WASHINGTON POST, Aug. 12, 2013, http://www.washingtonpost.com/lifestyle/magazine/outgoing-rector-warns-virginia-on-gay-marriage/2013/08/12/d250d466-e956-11e2-a301-ea5a8116d211_story.html.

³⁹ Marian Moser Jones, *Will Same-Sex-Marriage Rulings Lead to an LGBT Brain Drain in Some States?* CHRON. OF HIGHER EDUC., June 27, 2013, <http://chronicle.com/blogs/conversation/2013/06/27/will-same-sex-marriage-rulings-lead-to-an-lgbt-brain-drain-in-some-states/>; see also *Broken Bargain*, *supra* n.6, at 67 (immediately after Michigan eliminated domestic partner benefits for public employees, college professor “started applying for jobs at universities with comprehensive domestic partnership benefits”).

indeed, Virginia Governor Terry McAuliffe lauded the recent opinion of the United States District Court for the Eastern District of Virginia striking down that state's marriage ban. Governor McAuliffe noted that "to grow [Virginia's] economy and attract the best businesses, entrepreneurs, and families," the Commonwealth needed to ensure equality for all.⁴⁰

Before the Supreme Court's *Windsor* ruling, Goldman Sachs and Citigroup reported problems with recruiting qualified talent from outside the United States, as the then-operative immigration system made it difficult for same-sex partners to immigrate to the United States.⁴¹ Citigroup, in particular, noted that the hurdles posed "significant costs for companies that ha[d] to move workers out of the U.S. or in lost productivity from dealing with an employee's or partner's immigration status."⁴² Similarly, a 2013 survey by the American Council on International Personnel reported that forty-two percent of responding member organizations lost potential hires due to non-recognition of same-sex marriage at the federal level;

⁴⁰ Press Release, Virginia Governor Terry McAuliffe, *Governor McAuliffe Statement on Bostic v. Rainey Ruling* (Feb. 14, 2014), <https://governor.virginia.gov/news/newsarticle?articleId=3302> (commenting on *Bostic v. Rainey*, Case No. 2:13-cv-00395-AWA-LRL, Dkt. 136, Amended Opinion & Order (E.D. Va., Feb. 14, 2014)).

⁴¹ Michael J. Moore, *Same Sex Marriage Rules Hamper Wall Street's Recruiting*, WALL ST. J., Apr. 30, 2013, <http://www.bloomberg.com/news/2013-04-30/same-sex-marriage-rules-hamper-wall-street-s-recruiting.html>.

⁴² *Id.*

respondents also reported that they could not complete internal transfers, even at the executive level, for the same reason.⁴³

This evidence suggests that gay and lesbian employees may decide to leave Utah or Oklahoma so that they may receive full federal and state benefits, whether they are single and wishing to marry, married out of state and anticipating a need for benefits, or simply motivated by the need for certainty in their own life planning. Or, facing a possible transfer to a state that does not respect his or her marriage, an individual may choose to part ways with an employer rather than risk the potential detrimental effects of non-recognition. Other gay and lesbian workers may seek certainty and forego employment opportunities in the Tenth Circuit. After *Windsor*, planning for retirement may be more straightforward in marriage equality jurisdictions, where spouses have clearer rights to benefits.

C. We Cannot Mitigate All of the Negative Effects of Marriage Discrimination on Our Businesses.

By not permitting same-sex couples to marry, Utah and Oklahoma hamper our ability to attract and retain the most qualified workforce. Although we can and do attempt to lessen the burden that marriage discrimination places on our employees, those workarounds impose significant administrative burdens on us,

⁴³ Out on the Street & Immigration Equality, *The Cost of LGBT Exclusion: How Discriminatory Immigration Laws Hurt Business*, 9-10 (2013), <http://www.scribd.com/doc/124021795/Thinking-Outside-the-Closet-The-Cost-of-LGBT-Exclusion#fullscreen>.

adding unnecessary business expense and inhibiting our innovation and economic growth. While we are able, through this extra burden, to provide near-equivalents to some of the benefits afforded to legally married couples, we cannot entirely ameliorate the differential treatment of employees.

1. The State Bans Impose Significant Burdens on Our Employees and Our Businesses.

In an attempt to alleviate the disparities and frustrations of discriminatory benefit systems and many other benefit-related matters, businesses often incur the cost and administrative burden of “workarounds.” Workarounds are employer-created benefit structures attempting to compensate for the unavailability of a recognized relationship status, and to provide benefits for those whose marriages are recognized at the federal, but not state, level. To take one common example, many parallel benefits systems attempt to address taxability differences by providing stipends to offset the tax impact of imputed health-care benefits.⁴⁴ These and other workarounds offer us a way to offset the competitive disadvantage of doing business in a marriage discrimination state, but they also impose a cost on

⁴⁴ See generally, *Broken Bargain*, supra n.6, at 72-93; see also Human Rights Campaign, *Domestic Partner Benefits: Grossing Up to Offset Imputed Income Tax* (hereinafter “*Grossing Up*”), <http://www.hrc.org/resources/entry/domestic-partner-benefits-grossing-up-to-offset-imputed-income-tax>; see also Tara Siegel Bernard, *A Progress Report on Gay Employee Health Benefits*, N.Y. TIMES, Dec. 5, 2012, <http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits/>.

the employer beyond the direct cost of benefits.⁴⁵

To illustrate: after the *Windsor* decision, state-level tax decisions regarding individuals with same-sex spouses “affect[s] not only gross-up calculations for these employees, but also the taxability for state purposes of benefits made available to spouses of employees married to a person of the same sex.”⁴⁶ Many employers will “gross up” benefit payments to individuals with a same-sex spouse to ensure that the post-tax value of any workaround is equivalent to the cash value of the benefit received by heterosexual married individuals. The United States Office of Personnel Management, in a general study of grossing up, noted that this approach “raises costs considerably. . . . Under a grossing up policy, a \$1,000 net cash award would actually cost the agency \$1,713.80.”⁴⁷ The *New York Times* estimates that grossing up for an employee who incurred between \$1,200 and \$1,500 in extra taxes costs the employer between \$2,000 and \$2,500.⁴⁸ In other

⁴⁵ U.S. Office of Pers. Mgmt., *Grossing Up Awards, Why and Why Not*, <http://www.opm.gov/policy-data-oversight/performance-management/performance-management-cycle/rewarding/grossing-up-awards/> (last visited March 3, 2014).

⁴⁶ Peter K. Scott, *State Positions on Same-Sex Married Couple Filing Status Will Affect Employers*, Worldwide ERC (Feb. 3, 2014), <http://www.worldwideerc.org/Blogs/MobilityLawBlog/Lists/Posts/Post.aspx?List=c020aee5%2D48ad%2D47b2%2D8295%2Da4cf71ba9e34&ID=192>.

⁴⁷ U.S. Office of Pers. Mgmt., *supra* n.45 (using the following withholding rates: federal income tax, 28 percent; Medicare tax, 1.45 percent; Social Security tax, 6.2 percent; state income tax, 6 percent).

⁴⁸ Bernard, *supra* n.44.

words, if an employee is married to a same-sex spouse but living in a non-recognition state, employers must pay more so that each employee receives an equivalent result.⁴⁹

Grossing up is a complicated process for employers, requiring careful consideration of, *inter alia*, the appropriate tax rates, timing, coverage for dependents or a partner's children, and determination of whether marriage is requisite.⁵⁰ In addition, such workarounds raise concerns about, among other things, possible adverse publicity, complexity related to providing and administering domestic partner benefits, and various potential legal liabilities.⁵¹ In short, workarounds carry administrative burden, sometimes requiring *amici* to retain experts to craft the policies and structure systems that can record gross-up amounts, as well as educate human resources, benefits, and payroll administrators.

⁴⁹ *Broken Bargain*, *supra* n.6, at 74.

⁵⁰ For an overview of the complexities in structuring a gross-up program, *see, e.g.*, Todd A. Solomon & Brett R. Johnson, *Walking Employees Through the Regulatory Maze Surrounding Same-Sex Domestic Partner Benefits*, PROBATE & PROPERTY 14 (March/April 2012), http://www.americanbar.org/content/dam/aba/publications/probate_property_magazine/v26/02/2012_aba_rpte_pp_v26_2_mar_apr_solomon_johnson.authcheckdam.pdf; Todd A. Solomon & Brian J. Tiemann, *Issues to Consider in Providing a Tax Gross-Up for Employees Covering Same-Sex Spouses and Partners under the Employer's Medical, Dental, and Vision Plans*, 4 BLOOMBERG LAW REPORTS—EMPLOYEE BENEFITS (2011), http://www.mwe.com/info/pubs/solomon_tiemann_tax_gross-up_for_employees.pdf

⁵¹ Li & Nagar, *supra* n.9, at 531 (citing Hewitt Associates, *Benefit programs for domestic partners and same-sex spouses* (2005)).

Workarounds may attract attention from regulators or cause tension with certain shareholders or investors due to the administrative burden, all of which consumes time, resources and goodwill. However enlightened and necessary, such voluntary policies still perpetuate a stigma by according different treatment to those employees married out of state to a same-sex spouse or barred from such marriage by their resident state law vis-à-vis those married to a different-sex spouse. Unhelpful distinctions are inimical to teamwork and thus to the success of the entire organization.

Even if employers do not or cannot afford to implement such measures, the administration of benefits for those employees whose marriages are not recognized by the state can be more burdensome for employers.⁵² And the situation becomes even more complicated when mobile employees live, work, file taxes, and receive benefits in multiple jurisdictions.

As just one example, consider Utah's recent handling of state income tax filing status: In August 2013, Utah State Tax Commission Chairman Bruce Johnson stated that the state would "follow the federal government" and allow

⁵² See, e.g., Joanne Sammer & Stephen Miller, *The Future of Domestic Partner Benefits*, Society for Human Resource Management, Oct. 8, 2013, <https://www.shrm.org/hrdisciplines/benefits/Articles/Pages/Domestic-Partner-Benefits.aspx> ("In states that don't recognize same-sex marriages ("non-recognition states"), employers are still expected to impute income spent on benefits provided to a same-sex spouse for state tax purposes, but not to do so for federal tax purposes[.]").

same-sex couples to file jointly.⁵³ On October 9, 2013, however, the Utah Tax Commission stated that it would not allow same-sex married couples to file their state taxes jointly.⁵⁴ Three months later, the Tax Commission announced that same-sex couples could file joint state returns for 2013 only “if they are married as of the close of the tax year.”⁵⁵ The continued status of these couples beyond the 2013 tax year remains in question while the *Kitchen* case is pending, and may or may not be the same treatment required in 2014 even if the case remains unresolved.⁵⁶ Meanwhile, in Oklahoma, individuals in same-sex marriages must file state taxes singly, or as head of household, *Bishop* notwithstanding.⁵⁷

Our mandated compliance with a discriminatory regime adds another dimension. The employee confused about the conflicting legal rules typically inquires first to the human resources department. The result is that every benefits

⁵³ Ray Parker & Dan Harrie, *IRS to treat same-sex marriages equally for tax purposes*, SALT LAKE TRIBUNE, Aug. 29, 2013, <http://www.sltrib.com/sltrib/world/56799616-68/couples-court-federal-filing.html.csp>

⁵⁴ Press Release, Utah State Tax Commission, *Same-sex couples may not file joint state income tax returns* (Oct. 9, 2013), <http://tax.utah.gov/commission/releases/2013-10-09.pdf>

⁵⁵ Notice, Utah State Tax Commission, *Individual Income Tax Returns for Same-Sex Couples for Tax Year 2013* (Jan. 15, 2014), <http://tax.utah.gov/notice/2014-01-15.pdf>.

⁵⁶ *Id.* (“Filing information for future years will be provided as court rulings and other information become available.”).

⁵⁷ Notice, Oklahoma Tax Commission, *Oklahoma Income Tax Filing Status For Same Sex Couples* (Sept. 27, 2013), <http://www.tax.ok.gov/upmin092713.html>.

administrator must become an amateur constitutional scholar and risk giving uncertain advice. Even the best-informed human resources professional can provide only a general answer. The wrong answer may lead to harsh tax and financial consequences for the employee, and further erosion of workplace morale. These concerns become even more serious given the mobile nature of today's workforce, where employees may work in several different states, where they must then file taxes and determine their eligibility for certain state benefits.⁵⁸ The administrative burden on companies required to update their policies and systems to keep up with the rapidly changing legal landscape, and to then create equitable policies and benefits is significant.

The burden on the small employer is especially onerous, as they may not be capable of devoting limited resources to administering conflicting laws, let alone establishing workarounds. Administration of benefits for an employee with a same-sex partner is more likely to occur in an *ad hoc*, piecemeal fashion, increasing the potential for error.

2. The State Bans Require Us to Uphold and Affirm Discrimination Injurious to Our Corporate Cultures.

The denial of marriage rights to same-sex couples in Utah and Oklahoma goes against our core values and principles. As employers, we recognize the value

⁵⁸ See., e.g., Richard Florida, *THE RISE OF THE CREATIVE CLASS REVISITED* 262 (2012) (“[S]kills and skilled people are an incredibly mobile factor of production; they flow.”).

of diversity, and we want to do business in jurisdictions that similarly understand the need for a society that enables all married persons to “live with pride in themselves and their unions,”⁵⁹ and that supports us in honoring all of our married employees.

We developed and implemented our nondiscrimination policies both because we believe that it is the right thing to do, and because we recognize that these policies are crucial to our ability to recruit and retain excellent employees. In turn, the ability to hire the best human capital we can helps us create teams and corporate cultures that allow us to create, innovate, and ultimately increase our profits and economic value. Marriage bans conscript us, as the administrators of state benefits, to become the face of a law that requires us to deny benefits to our employees in committed same-sex relationships even as we grant them to married different-sex couples. We cannot, by law, treat all of our employees identically, even if we attempt to do so through workarounds. Thus we become the *de facto* face of the state’s discriminatory treatment, our stated policies notwithstanding.

An organization’s policies toward its employees, whether an inclusive healthcare policy or a discriminatory promotion and hiring policy, send latent signals to the entire organization regarding permissible biological and behavioral attributes. Such signals may then impact all employees, affecting their comfort, their unconscious projections of identity and gender in critical

⁵⁹ *Windsor*, 133 S. Ct at 2689.

interpersonal meetings.⁶⁰

The end result is employee uncertainty, low morale, decreased productivity, and reduced profitability.

The benefits of diversity are reaped only if diversity and inclusion can be well-managed within the organization.⁶¹ In 2011, an interview study presented substantial anecdotal evidence that the lack of an equality management policy could lead to high turnover, loss of talented employees, litigation, and bad publicity.⁶² Even if we take on the burden of developing workarounds to ameliorate disparate state treatment, we are still placed in the role of intrusive inquisitor, imputer of taxable income, and withholder of benefits—including but not limited to health insurance and state tax treatment. For employees who report themselves as married, we must determine the sex of their spouse and judge whether that marriage is recognized for state law purposes where the employee lives and works. We are required to place those employees “in an unstable

⁶⁰ Li & Nagar, *supra* n.9, at 543 (internal citations omitted).

⁶¹ U.K. Gov't Equalities Office, Dep't for Bus. Innovation & Skills, *The Business Case for Equality & Diversity: A survey of the academic literature*, BIS OCCASIONAL PAPER, No. 4, 27 (Jan. 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/49638/the_business_case_for_equality_and_diversity.pdf.

⁶² *Id.* (citing Mustafa F. Ozbilgin & Ahu Tatli, *Mapping out the field of equality and diversity: rise of individualism and voluntarism*, 64 HUM. RELATIONS 1229-1253 (2011), https://www.academia.edu/562416/Mapping_out_the_field_of_equality_and_diversity_rise_of_individualism_and_voluntarism).

position of being in a second-tier marriage,” thereby demeaning the couple and their relationship.⁶³ For couples unable to marry under the laws of their state, we must perpetuate the unequal effects of those laws, “in visible and public ways.”⁶⁴

As a result, we are hampered in our ability to make our businesses as diverse and inclusive as possible, despite our stated policies and our recognized business case. We become, in short, complicit in our employees’ injury—and our own.

CONCLUSION

Employees with partners of the same sex should be permitted to marry if they so choose, and then treated identically to their married heterosexual counterparts. By requiring otherwise, Utah and Oklahoma require our businesses to uphold discriminatory laws that run counter to our stated corporate values, harm our ability to attract and retain the best employees, and impose a significant burden on us. In the end, our ability to compete and to grow suffers. The district court decisions before the Court alleviate that harm, and *amici* respectfully urge that the judgments of the United States District Court for the District of Utah and of the United States District Court for the Northern District of Oklahoma be affirmed.

⁶³ *Windsor*, 133 S. Ct. at 2694.

⁶⁴ *Id.* at 2695.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,683 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 version 14.0.6129.5000 (32-bit) and Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 4, 2014, a true, correct, and complete copy of the foregoing Brief of 46 Employers and Organizations Representing Employers as Amicus Curiae in Support of Appellees was filed with the Court and served on the following via the Court's ECF system:

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