

No. 14-124

IN THE
Supreme Court of the United States

GARY R. HERBERT, IN HIS OFFICIAL CAPACITY AS
GOVERNOR OF UTAH, ET AL,
Petitioners,

v.

DEREK KITCHEN, ET AL,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

**BRIEF OF THIRTY COMPANIES REPRESENTING EMPLOY-
ERS AS *AMICI CURIAE* IN SUPPORT OF A GRANT OF
THE PETITION FOR A WRIT OF CERTIORARI**

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INTEREST OF THE *AMICI CURIAE*¹

Amici include technology, materials, financial services, pharmaceutical, apparel, and entertainment companies; hoteliers and restaurateurs, service providers, consultants, and designers. *Amici* all share a desire to attract and retain a talented workforce. We are located or operate in states across the country, some of which recognize marriages of those of our employees whose spouses are of the same sex, and others that prohibit marriages between same-sex couples and refuse to recognize existing same-sex marriages. This dual and continuously shifting regime uniquely burdens *amici*. This legal uncertainty exposes us, as employers, to unnecessary cost, risk, and administrative complexity. In addition, this irresolution hampers our efforts to recruit and retain the most talented workforce possible, placing us at a competitive disadvantage. Our success depends upon the welfare and morale of all employees, without distinction. The burden—imposed by inconsistent state laws—of having to administer complicated schemes to account for differential treatment of similarly situated employees creates unnecessary confusion, tension, and ultimately, diminished employee morale. *Amici* write to advise the Court of the impact on employers of the disparate treatment mandated by these

¹ Pursuant to Rule 37.6, counsel for *amici* certify that no counsel for any party had any role in authoring this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of *amici*'s intention to file this brief. The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

conflicting legal regimes. *Amici curiae* are the following businesses:

Alcoa Inc.
Amazon.com, Inc.
Aspen Skiing Company
Ben & Jerry's
Bloomberg L.P.
CBS Corporation
Cisco Systems, Inc.
Cummins Inc.
Deutsche Bank AG
Eastern Bank Corporation
eBay, Inc.
General Electric Company
Intel Corporation
Jazz Pharmaceuticals, Inc.
Kimpton Hotel & Restaurant Group, LLC
Levi Strauss & Company
Massachusetts Mutual Life Insurance Company
NIKE, Inc.
Oracle America, Inc.
Outerwall Inc.
Pfizer Inc.
Qualcomm Incorporated
Staples, Inc.
State Street Corporation
SunLife Financial (U.S.) Services Company
Support.com
Symantec
Target
United Therapeutics Corporation
Viacom²

² The *amici* are identified more fully in Appendix A.

SUMMARY OF THE ARGUMENT

Although same-sex marriages are celebrated and recognized under some state laws, other states' laws and constitutions prohibit same-sex couples from marrying and withhold marital benefits from existing lawful same-sex marriages. In the latter, *amici* are required to differentiate among similarly situated employees to our business detriment. Courts have evaluated the constitutionality of same-sex marriage bans to varying effect, and *amici* now operate in a complicated and uncertain landscape of laws and human resources regulations that increase our administrative costs and level of risk. We are forced to implement inconsistent policies in the various jurisdictions in which we operate, and the mandated discrimination underlying these policies violates our stated corporate principles. Our ability to grow and maintain our businesses by attracting and retaining the best talent is hindered. This patchwork of state laws applicable to same-sex marriage impairs thus our business interests and employer-employee relations. Respectfully, we ask the Court to grant the petition for certiorari and consider a uniform principle that all couples share in the right to marry. Denying certiorari would only prolong an uncertain, unproductive, and unjust status quo.

ARGUMENT

In June 2013, this Court found Section 3 of the federal Defense of Marriage Act unconstitutional.³ As a result, the federal government now must recognize

³ *United States v. Windsor*, 133 S. Ct. 2675, 2693-96 (2013) (invalidating 1 U.S.C. § 7).

all couples “whom the State, by its marriage laws, sought to protect in personhood and dignity” as married.⁴ In the absence of a controlling statute or agency guidance to the contrary, the federal government respects same-sex couples as lawfully married if their marriage was performed in a state that authorizes such marriages.⁵

Nineteen states, the District of Columbia, and nine federally-recognized Indian tribes recognize the right of individuals to marry regardless of their partner’s sex.⁶ Each such jurisdiction also recognizes the

⁴ *Id.* at 2696.

⁵ *See, e.g.,* Jonathan Capehart, *Social Security agency shows why Supreme Court must act on gay marriage*, Wash. Post Blog (June 23, 2014), <http://www.washingtonpost.com/blogs/post-partisan/wp/2014/06/23/social-security-agency-shows-why-supreme-court-must-act-on-gay-marriage/> (“Unfortunately, ‘the Social Security Act requires the agency to follow state law in Social Security cases.’”).

⁶ Marriages between same-sex couples are licensed by California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, 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, the Little Traverse Bay Bands of Odawa Indians, the Pokagon Band of Potawatomi Indians, the Suquamish Tribe, and the Puyallup Tribe of Indians. *See* Nat’l Conference of State Legislatures, *Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage* (Aug. 26, 2014), [http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx#Current%20Status%20of%20Same-Sex; Freedom to Marry](http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx#Current%20Status%20of%20Same-Sex%20Freedom%20to%20Marry), *Why Marriage Matters to Native Americans*, <http://www.freedomtomarry.org/communities/entry/c/native-americans> (last visited Sept. 4, 2014).

validity of same-sex marriages lawfully celebrated elsewhere.

Thirty-one states prohibit recognition of same-sex marriages and categorically deny same-sex couples access to the myriad rights, benefits, and privileges—under both state and federal law—provided by marriage. Legal challenges to these states’ same-sex marriage bans are pending in federal and state courts across the country, and their outcomes will likely create an even larger inconsistency in state regulations. *Amici* conducting operations or doing business in both “recognition” and “non-recognition” states are burdened by this dual regime. Conducting business in today’s fractured landscape of conflicting state marriage laws stunts economic growth and innovation by forcing us to work harder and invest more to achieve the same return on our investment. Inconsistent laws defining marriage force us to divert substantial time and cost to complex administrative systems. A federal rule allowing same-sex couples to marry is better for our employees because it provides them with an unambiguous status under the law. That uniform recognition is better for our business operations because it reduces uncertainty and risk, removes significant administrative burdens, and improves employee morale and productivity.

I. Divisions Among Federal and State Courts Addressing the Constitutionality of Same-Sex Marriage Prohibitions Have Created Uncertainty and Confusion in the Applicable Laws.

Since the Court’s decision in *Windsor*, four United States Courts of Appeals have heard cases challenging state same-sex marriage restrictions. On June

25, 2014, a Tenth Circuit panel held in a 2-1 decision that Utah may not deny marriage to persons wishing to wed someone of the same sex, and may not refuse to recognize the marriages of same-sex couples lawfully married elsewhere.⁷ The Tenth Circuit recognized that same-sex couples have a fundamental right to “marry, establish a family, raise children, and enjoy the full protection of a state’s marital laws” no different than that of those who wish to marry a person of a different sex.⁸ Because none of the state’s arguments withstood heightened scrutiny analysis, Utah’s same-sex marriage ban (and similar statutes) violates the Constitutional guarantees of equal protection and due process.⁹ A Fourth Circuit panel recently reached a similar conclusion in a case arising out of Virginia,¹⁰ as have several federal district courts regarding their respective state prohibitions against same-sex marriage.¹¹

However, it is clear that federal circuit judges and the highest courts of several states remain divided on both the constitutionality of prohibiting same-sex marriages, and the legal analysis that should be used to examine state same-sex marriage restrictions. The Fourth and Tenth Circuit rulings conflict with a deci-

⁷ *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *1 (10th Cir. June 25, 2014).

⁸ *Id.* at *1, *32.

⁹ *Id.* at *21, *32.

¹⁰ *Bostic v. Schaefer*, No. 2:13-cv-00395, 2014 WL 3702493 (4th Cir. July 28, 2014).

¹¹ *See, e.g., De Leon v. Perry*, 975 F.Supp.2d 632 (W.D. Tex. 2013); *Wolf v. Walker*, 986 F.Supp.2d 982 (W.D. Wis. 2014); *Baskin v. Bogan*, No. 1:14-cv-00355, 2014 WL 2884868, at *1 (S.D. Ind. June 25, 2014).

sion by the Eighth Circuit upholding Nebraska’s same-sex marriage ban against a challenge under the Equal Protection Clause in *Citizens for Equal Protection v. Bruning*.¹² And the vigorous dissenting opinions in the Fourth and Tenth Circuits preview a legal analysis that could be adopted in one of the pending appeals. These dissents expose fault lines and unanswered questions regarding how to define the right under consideration; when and whether to apply the fundamental-rights analysis; whether the government’s classification is sexual orientation or gender discrimination; and whether heightened scrutiny applies.¹³

Dissenting from the Fourth Circuit panel majority, Judge Paul V. Niemeyer argued that the right asserted, under a “narrowest terms” formulation, was the right to “same-sex marriage.” This right is only “a recent development,” and thus not a fundamental right in his view.¹⁴ Judge Niemeyer then concluded that Virginia’s ban on same-sex marriage survived rational-basis scrutiny.¹⁵ Further, Virginia’s ban was discrimination on the basis of sexual orientation; as such, Judge Niemeyer opined, heightened scrutiny under the Court’s Equal Protection Clause precedent was unwarranted.¹⁶ Judge Paul Joseph Kelly, Jr., dissenting from the Tenth Circuit decision, also concluded that there “is no such fundamental right” as

¹² 455 F.3d 859, 866-68 (8th Cir. 2006).

¹³ *Bostic*, 2014 WL 3702493, at *21-25, *29-31; *Kitchen*, 2014 WL 2868044, at *35-38.

¹⁴ *Bostic*, 2014 WL 2868044, at *22-25.

¹⁵ *Id.* at *28.

¹⁶ *Id.* at *30-31.

“same-sex marriage,” and that Utah’s prohibition should be upheld under rational basis review.¹⁷ Judge Kelly further argued that same-sex marriage bans are not gender discrimination because they do not treat men and women differently “as a class,” and that sexual orientation discrimination does not trigger heightened scrutiny.¹⁸

Because the Fourth and Tenth Circuit majorities determined that same-sex marriage bans impinge on the fundamental right to marry and applied a heightened scrutiny analysis, they did not address whether sexual orientation discrimination requires heightened scrutiny as a “suspect classification.”¹⁹ The *Bostic* district court determined that the justifications articulated by proponents of Virginia’s ban failed the rational basis test. As a result, the court declined to address the heightened scrutiny question, as did the courts in *Bourke v. Beshear*,²⁰ *De Leon v. Perry*,²¹ and *Deboer v. Snyder*.²² Other courts, including the Second Circuit in *Windsor*²³ and the Ninth Circuit in *SmithKline Beecham Corp. v. Abbott Laboratories*,²⁴ have ruled that heightened scrutiny applies to sexual

¹⁷ *Kitchen*, 2014 WL 2868044, at *33.

¹⁸ *Id.* at *35.

¹⁹ *Bostic*, 2014 WL 3702493, at *8 n.6; *Kitchen*, 2014 WL 2868044, at *21.

²⁰ No. 3:13-CV-750-H, 2014 WL 556729, at *5-8 (W.D. Ky. Feb. 12, 2014).

²¹ 975 F. Supp. 2d 632, 656 (W.D. Tex. 2014).

²² 973 F. Supp. 2d 757, 769 (E.D. Mich. 2014).

²³ *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012).

²⁴ 740 F.3d 471, 481 (9th Cir. 2014).

orientation discrimination. Courts are similarly divided on whether same-sex marriage bans constitute gender discrimination. Some reject this conclusion because the prohibition applies equally to men and women.²⁵ Others have determined that the explicit invocation of gender—permitting marriage only between a “man” and a “woman”—triggers heightened scrutiny.²⁶

Following the Tenth and Fourth Circuit decisions, a Tennessee state trial court ruled that *Windsor* did not undercut Tennessee’s authority to deny recognition of same-sex marriages performed in other states because neither the Tennessee Supreme Court nor this Court had decided that the fundamental right of marriage “extends beyond the traditional definition” as “a union of one man and one woman.”²⁷ Because Tennessee’s same-sex marriage ban had a rational basis, it “should not be found invalid because another opinion [regarding ‘what unions are included in the definition of marriage’] is available.”²⁸ A Louisiana federal district court recently upheld that state’s marriage restriction under similar reasoning.²⁹ And

²⁵ See, e.g., *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1286 (N.D. Okla.), *aff’d on other grounds sub nom. Bishop v. Smith*, Nos. 14-5003 & 14-5006, 2014 WL 3537847 (10th Cir. July 18, 2014).

²⁶ See, e.g., *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013), *aff’d*, 2014 WL 2868044.

²⁷ *Borman v. Pyles-Borman*, No. 2014-cv-36, slip. op. at 4 (Tenn. Cir. Ct. Aug 5, 2014).

²⁸ *Id.* at 4-5.

²⁹ *Robicheaux v. Caldwell*, Nos. 13-cv-5090, 14-97 & 14-327 (D. La. Sept. 3, 2014).

several other state courts upheld state marriage bans in pre-*Windsor* decisions.³⁰

Many more challenges are in the appellate pipeline. The Sixth Circuit heard consolidated arguments on August 6 in appeals from cases invalidating bans in Kentucky,³¹ Michigan,³² Ohio,³³ and Tennessee.³⁴ The Seventh Circuit heard arguments on August 26 in appeals from cases striking down prohibitions in Indiana³⁵ and Wisconsin.³⁶ The Ninth Circuit will hear arguments on September 8 contesting the re-

³⁰ See, e.g., *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Standhardt v. Super. Ct. of Ariz. ex rel. Cnty. of Maricopa*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003); *Andersen v. King Cnty.*, 138 P.3d 963, 980 (Wash. 2006).

³¹ *Bourke*, 2014 WL 556729, at *5-8, *appeal docketed*, No. 14-5291 (6th Cir. argued Aug. 6, 2014); *Love v. Beshear*, 989 F. Supp. 2d 536, 548-49 (W.D. Ky. 2014), *appeal docketed*, No. 14-5818 (6th Cir. argued Aug. 6, 2014).

³² *Deboer*, 973 F. Supp. 2d at 774-75, *appeal docketed*, No. 14-1341 (6th Cir. argued Aug. 6, 2014).

³³ *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 997-98 (S.D. Ohio 2013), *appeal docketed*, No. 14-3057 (6th Cir. argued Aug. 6, 2014); *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014), *appeal docketed*, No. 14-3464 (6th Cir. argued Aug. 6, 2014).

³⁴ *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014), *appeal docketed*, No. 14-5297 (6th Cir. argued Aug. 6, 2014).

³⁵ *Baskin*, 2014 WL 2884868, *appeal docketed*, No. 14-2386 (7th Cir. June 26, 2014).

³⁶ *Wolf*, 986 F. Supp. 2d at 1026-27, *appeal docketed*, No. 14-2526 (7th Cir. July 11, 2014).

restrictions in Idaho,³⁷ Nevada,³⁸ and Hawaii.³⁹ And the Fifth Circuit will soon schedule argument in the appeal of a Texas district court’s decision invalidating that ban.⁴⁰ Each of these cases presents an opportunity for further differences in judicial opinion regarding the constitutionality of same-sex marriage restrictions and, as a result, for increased uncertainty on the part of *amici* in the operation of their businesses. Respectfully, this Court should establish a single, national rule to prevent further ambiguity.

II. The Shifting Legal Landscape Creates Harmful Uncertainty.

While “marriage is more than a routine classification for purposes of certain statutory benefits,”⁴¹ as a legal status, marriage touches numerous aspects of life, both practical and profound.⁴² Federal and state

³⁷ *Latta v. Otter*, No. 1:13-cv-00482, 2014 WL 1909999 (D. Idaho May 13, 2014), *appeal docketed*, Nos. 14-35420 & 14-35421 (9th Cir. May 14, 2014).

³⁸ *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1004-05 (upholding Nevada’s ban) (D. Nev. 2012), *appeal docketed*, No. 12-17668 (9th Cir. Dec. 4, 2012).

³⁹ *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1118-19 (D. Haw. 2012), *appeal docketed*, Nos. 12-16995 & 12-16998 (9th Cir. Sept. 10, 2012).

⁴⁰ *De Leon*, 975 F. Supp. 2d at 655-56, *appeal docketed*, No. 14-50196 (5th Cir. Mar. 1, 2014).

⁴¹ *Windsor*, 133 S. Ct. at 2692.

⁴² *Kitchen*, 2014 WL 2868044, at *17 (same-sex marriage restrictions “bring[] financial harm to children of same-sex couples ... raise[] the cost of health care for families by taxing health benefits provided by employers to their workers’ same-sex spouses’ and ‘den[y] or reduce[] benefits allowed to families upon the loss of a spouse and parent, benefits that are an inte-

laws provide the working family many benefits and protections relating to health care, protected leave, and retirement. These laws provide security and support to employees grappling with sickness, disability, childcare, family crisis, or retirement, thereby allowing them to devote more focus and attention to their work.

In states that prohibit same-sex marriage, same-sex couples have no access to the federal rights, benefits, and privileges that depend on marriage unless they leave and are legally wed elsewhere.⁴³ Even then, those couples—or married same-sex couples who later move to “non-recognition” states—will still be denied access to a host of state benefits. Today’s fractured landscape of conflicting state laws harms employers by forcing us to divert significant time and cost to complex administrative systems and creating a rift in the employer-employee relationship. The burden of a dual regime arises for employers like us that conduct operations or do business in jurisdictions that refuse to recognize same-sex marriages. Adopting a uniform rule allowing same-sex couples to marry would provide our employees with clear legal status. That recognition is also better for business, because it reduces uncertainty and risk, removes administrative obstacles, improves employee productivity, and encourages economic growth and innovation.

gral part of family security.” (quoting *Windsor*, 133 S. Ct. at 2695)).

⁴³ The U.S. General Accounting Office identified 1,138 rights, benefits, and privileges under federal law dependent 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>.

III. Uncertainty and Inconsistency Regarding the Status of Employees in Same-Sex Marriages is Detrimental to All Businesses, Particularly Those Operating on a Regional or National Scale.

A. The Inconsistency of State Laws and Local Government Policies Regarding Same-Sex Marriage Creates Complications and Difficulties in Administering Benefits and Compensating Employees Fairly.

The patchwork of inconsistent state laws complicates the administration of benefits for employees whose marriages are not recognized by the state. “Non-recognition” states force *amici* to administer dual systems of benefits and payroll, and impose on us the cost of the workarounds necessary to protect employees in same-sex marriages. In non-recognition states, *amici* must first determine where employees with same-sex spouses were married. If the couple wed in a “recognition” state, *amici* must simultaneously treat these employees as (1) married for all purposes under federal law, and (2) single for purposes of state law tax withholding, payroll taxes, workplace benefits under state law that turn on marital status, and state community property laws. Where, for example, a state’s tax code permits joint filing only by a “husband and wife,” and thus requires married same-sex couples to file state tax returns separately,⁴⁴ the employer must conduct two separate processes under state and federal tax laws. This includes “input[ing] income spent on benefits provided

⁴⁴ *See, e.g.*, Wis. Stat. § 71.03.

to a same-sex spouse for state tax purposes, but not [doing] so for federal tax purposes[.]”⁴⁵

Rather than adopting and implementing nationwide one set of business practices for our companies, the variety of applicable laws forces *amici* to maintain state-by-state systems capable of tracking married employees by spousal gender, and to consider gender when determining the scope and manner of benefits that may be extended to employees’ spouses (and the children of those spouses). The situation is complicated further when mobile employees live, work, file taxes, and receive benefits in multiple jurisdictions. This requires *amici*, in effect, to maintain two sets of books related to human resources, payroll, and benefits administration—one for married employees with different-sex spouses, and another for married employees with same-sex spouses. Our systems must closely monitor each of the latter employees’ states of residence and re-calculate tax and benefit treatments if the employee moves from a “non-recognition” state to a “recognition” state or vice versa. These multiple, mandatory, and ever-changing obligations result in significant burdens and expenses to *amici*.

B. Shifting Compliance Burdens Introduce Uncertainty in the Implementation of Human Resources and Benefits Systems, and Force Employers to Incur Vast Administrative Expense in Order to Operate on a National Level

⁴⁵ Joanne Sammer & Stephen Miller, *The Future of Domestic Partner Benefits*, Soc’y for Human Res. Mgmt. (Oct. 21, 2013), <http://www.shrm.org/hrdisciplines/benefits/articles/pages/domestic-partner-benefits.aspx>.

These dual regimes have spawned an industry of costly compliance specialists. Some *amici* have had to pay vendors to reprogram benefits and payroll systems, to add coding to reconcile different tax and benefit treatments, to reconfigure at every benefit and coverage level, and to revisit all of these modifications with every change in state or local law related to treatment of same-sex marriages, civil unions, and domestic partnerships. Attorneys and retirement plan specialists must be consulted. For every plan document, enrollment form, and administrative procedure that contains the word “spouse,” amendments and disclosures must be drafted to explain the numerous implications of a given benefits decision on the tax or healthcare coverage situation of an employee with a same-sex spouse. As laws change, human resources, benefits, and payroll personnel must be trained and retrained to explain the disparate and ever-changing treatment to employees whose benefits selections may carry significant unanticipated financial consequences. The complexity and uncertainty saps critical time, focus, and energy from our human resources and benefits administration functions.

In an attempt to alleviate the disparities and frustrations of inconsistent state benefit systems and other benefit-related matters, some employers determine that it is in their best business interest to incur the cost and administrative burden of “workarounds.” These employer-created benefit structures endeavor to compensate for the lack of recognized relationship status, and to provide benefits for those whose marriages are recognized at the federal, but not state, level. Many parallel benefits systems, for example, address taxability differences by “grossing up” benefit payments—*i.e.*, providing stipends—to individuals

with a same-sex spouse to offset the tax impact of imputed health-care benefits.⁴⁶ These and other workarounds offer employers a way to reduce the competitive disadvantage of doing business in a “non-recognition” state, but they also impose a cost on the employer beyond the direct cost of benefits.⁴⁷ The United States Office of Personnel Management 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.”⁴⁸ Thus, employers with a grossing up policy pay more to provide equivalent benefits.⁴⁹

Grossing up is a complicated process for employers, requiring careful consideration of appropriate tax rates, timing, coverage for dependents or a

⁴⁶ See generally, Movement Advancement Project et al., *A Broken Bargain: Discrimination, Fewer Benefits and More Taxes for LGBT Workers (Full Report)*, at 72-93 (May 2013), <http://outandequal.org/documents/brokenbargain/a-broken-bargain-full-report.pdf> [hereinafter *Broken Bargain*]; Human Rights Campaign, *Domestic Partner Benefits: Grossing Up to Offset Imputed Income Tax*, <http://www.hrc.org/resources/entry/domestic-partner-benefits-grossing-up-to-offset-imputed-income-tax> (last visited Sept. 4, 2014); Tara Siegel Bernard, *A Progress Report on Gay Employee Health Benefits*, N.Y. Times (Mar. 4, 2013), <http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits/>.

⁴⁷ 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 Sept. 4, 2014).

⁴⁸ *Id.*

⁴⁹ *Broken Bargain*, *supra* n.46, at 74.

partner's children, and the impact of marital status.⁵⁰ In addition, workarounds can raise concerns about possible adverse publicity, complexity in providing and administering domestic partner benefits, and potential legal liabilities.⁵¹ In short, workarounds themselves cause administrative burden, sometimes requiring *amici* to retain experts to craft the policies, structure systems to account for gross-up amounts, and educate human resources, benefits, and payroll administrators.

C. Establishing a National Rule for Same-Sex Marriage Recognition Would Result in a Unitary System of Benefits and Tax Treatment that Can Be More Accurately, Equitably, and Efficiently Administered, Thereby Lowering the Risk of Error and Litigation.

Our mandated compliance with inconsistent and shifting marriage recognition regimes adds another dimension—risk. Our human resources departments

⁵⁰ See, e.g., Todd Solomon & Brett 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 Solomon & Brian 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 Feng Li & Venky Nagar, *Diversity and Performance*, 59 Mgmt. Science 529, 531 (Mar. 2003).

are the first resource for employees confused about conflicting legal rules. As a result, benefits administrators may have to give advice and recommendations despite their own lack of legal knowledge. The wrong answer by a human resources professional may lead to harsh tax and financial consequences for the employee, further erosion of workplace morale, and the risk of litigation. These concerns become even more serious given the mobile nature of today's workforce; employees may work in several different states, where they must then file taxes and determine their eligibility for certain state benefits.⁵² The administrative burden of keeping up with the rapidly changing legal landscape is significant.

For companies operating nationwide, many of whom have centralized HR functions, these variables create a complicated labyrinth of rules, regulations, and internal policies needed to accommodate a wide variety of legal standards related to tax and benefit qualifications. These accommodations must often be incorporated manually—in an *ad hoc*, piecemeal fashion—into otherwise automated processes, a requirement that is both burdensome and more prone to human error. Establishing a single rule for marriage recognition nationwide would result in a unitary system of benefits and tax treatment that can be more efficiently, accurately, and equitably administered. Failure to manage benefits and other employment policies equitably could lead to high turnover, loss of talented employees, litigation, and bad publicity.⁵³

⁵² See, e.g., Richard Florida, *The Rise of the Creative Class—Revisited* 262 (2012).

⁵³ U.K. Dep't for Bus., Innovation and Skills & U.K. Gov't Equalities Office, *The Business Case for Equality & Diversity: A*

D. Amici are Competitively Disadvantaged in Attracting and Retaining Talented Employees When Those Employees are Uncertain as to the Varying Legal Statuses and Business Treatment of Their Marriages in the Numerous States in which We Operate.

In order to develop and grow a diverse organization, we must be able to recruit and retain the best talent.⁵⁴ The quality and breadth of employee benefits directly contributes to recruitment and employee loyalty,⁵⁵ and uncertainty surrounding employees' access to federal and state benefits, equitable compensation, and legal recognition of their marriages impairs our ability to compete for the best workforce. In

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.

⁵⁴ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (“[T]he skills needed in today’s increasingly global *marketplace* can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”).

⁵⁵ MetLife, *10th Annual Study of Employee Benefit Trends*, 20 (2012), http://benefitcommunications.com/upload/downloads/MetLife_10th-Annual-EBTS.pdf (60% of employees felt benefits were an important reason for remaining with the company); Paula Andrus, *How to Attract—And Retain—Staff When You Can’t Pay Big Bucks*, *Entrepreneur Magazine* (June 27, 2012), <http://www.entrepreneur.com/article/223516>; Max Messmer, *Four Keys to Improved Staff Retention*, *Strategic Fin.* (Oct. 2006), http://www.imanet.org/PDFs/Public/SF/2006_10/10careers.pdf (“[58%] of employees polled would prefer a job with excellent benefits over one with a higher salary.”).

2012, eighty-six percent of full-time American workers in private industry received medical benefits through their employer, and seventy-four percent had an employer-provided retirement plan.⁵⁶ Benefits packages—especially health-care and retirement benefits—can add thirty percent or more to compensation value on top of an employee’s salary. Through such plans, we foster a positive employer-employee relationship and retain satisfied and engaged workers, who are more productive and perform better than less-satisfied colleagues.⁵⁷

We must offer workplace benefits equitably, transparently, and with certainty—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.”⁵⁸ 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

⁵⁶ U.S. Bureau of Labor Statistics, *Employee Benefits in the United States—March 2013* (July 17, 2013), <http://www.bls.gov/news.release/ebs2.nr0.htm>.

⁵⁷ MetLife, *supra* n.55, at 20.

⁵⁸ Sophia Kerby & Crosby Burns, *The Top 10 Economic Facts of Diversity in the Workplace*, Ctr. for Am. Progress (July 12, 2012), <http://www.americanprogress.org/issues/labor/news/2012/07/12/1900/the-top-10-economic-facts-of-diversity-in-the-workplace/>; see also Janell Blazovich et al., *Do Gay-friendly Corporate Policies Enhance Firm Performance?* 8-9 (Apr. 29, 2013), <http://www.west-info.eu/files/gayfriendly1.pdf>.

as heterosexual Caucasian men.”⁵⁹ LGBT equality also matters to heterosexual employees. Seventy-two percent of non-LGBT respondents found it important that an employer offer equal benefits to LGBT co-workers.⁶⁰ Richard Florida, 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.⁶¹ The Williams Institute found that “creative-class” Massachusetts residents in same-sex relationships were 2.5 times more likely to have moved there in the three years after marriage equality than in the three years before.⁶²

Forty-four percent of Americans live in a jurisdiction that recognizes marriages between people of the

⁵⁹ Level Playing Field Institute, *The Corporate Leavers Survey: The Cost of Employee Turnover Due Solely to Unfairness in the Workplace* 4 (2007), <http://www.lpfi.org/sites/default/files/corporate-leavers-survey.pdf>.

⁶⁰ *Id.* at Executive Summary.

⁶¹ 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.

⁶² Gary J. Gates, Williams Institute, UCLA School of Law, *Marriage Equality and the Creative Class* 1 (May 2009), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-MA-Creative-Class-May-2009.pdf>.

same sex.⁶³ The opposite mandate in “non-recognition” states requires that, when dealing with state marital benefits, we single out employees with same-sex partners and treat them as a separate class than their heterosexual colleagues. Faced with the evidence above, we can only conclude that when operating in states that enforce marriage discrimination, we are at a disadvantage when looking to hire qualified, talented personnel. Married gay and lesbian job candidates may be reluctant to pursue opportunities within states where their marriages will not be recognized and they can expect to lose access to previously-enjoyed state-level benefits. Single gays and lesbians may believe the option of a future legally-recognized marriage warrants forgoing opportunities with employers in “non-recognition” states. Heterosexual individuals may decide that states hostile to marriage equality are not states in which they want to live and work.⁶⁴ And current gay and lesbian employees may leave marriage-inequality states so they can receive full federal and state benefits. Or, facing a transfer to such a state, an employee may quit rather than risk the detrimental effects of non-recognition. Inconsistent legal treatment of same-sex marriages nation-wide prevents our companies from reaching our full economic potential because it dis-

⁶³ Freedom to Marry, *States*, <http://www.freedomtomarry.org/states/> (last visited September 4, 2014).

⁶⁴ See Matt Motyl et al., *How Ideological Migration Geographically Segregates Groups*, 51 *J. Experimental Soc. Psychol.* 1 (2014), http://www.researchgate.net/publication/254929982_How_Ideological_Migration_Geographically_Segregates_and_Polarizes_Groups/file/60b7d52efea63cb4b3.pdf.

suades employees from living and working in jurisdictions where we do, or want to do, business.

E. Inconsistent State Laws Force Amici to Affirm Discrimination We Regard as Injurious to Our Corporate Missions and Contrary to Non-Discrimination Laws and Policies.

The injury that *amici* face as a result of inconsistent marriage laws runs deeper than administrative costs and litigation risk. Incongruous and discriminatory state laws do violence to the morale of institutions themselves. Like other persons, legal and natural, *amici* are motivated by core principles. As of 2014, ninety-one percent of Fortune 500 companies provide non-discrimination protection for their LGBT employees, and sixty-seven percent offer benefits to same-sex partners.⁶⁵ We invest time and resources to implement these principles because they yield tangible results. Our organizations are engaged in national and international competition—for talent, customers, and business. That competition demands teamwork. Our experience teaches us that teamwork thrives when the organization minimizes distracting differences, and focuses on a common mission. The mandate of inconsistent state same-sex marriage bans—that we single out some of our married colleagues, based on the gender of their spouses and their states of residence, and treat them as a lesser class—upsets this imperative.

⁶⁵ Human Rights Campaign, *2014 Corporate Equality Index*, 9 (2014), http://www.hrc.org/files/assets/resources/cei_2014_full_report_rev7.pdf.

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.”⁶⁶ Inclusive companies are more open to new ideas and opportunities, while reducing overconfidence regarding approaching challenges.⁶⁷ Companies that are diverse and inclusive obtain better profits and other outputs, thanks to improved team collaboration and commitment.⁶⁸ Working in an LGBT-supportive workplace results in “greater job commitment, improved workplace relationships, increased job satisfaction, improved health outcomes, and increased productivity” among LGBT employees.⁶⁹ A

⁶⁶ 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.

⁶⁷ Li & Nagar, *supra* n.51, at 529; Ulrike Malmendier & Geoffrey Tate, *CEO Overconfidence and Corporate Investment*, 60 J. Fin. 2661 (2005); Lu Hong & Scott Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 Proceedings of the Nat'l Acad. of Sci. of the U.S.A. 16385, 16385 (2004), <http://www.pnas.org/content/101/46/16385.full.pdf+html>.

⁶⁸ See Corporate Executive Board, *Diversity & Inclusion*, <http://www.executiveboard.com/exbd/human-resources/corporate-leadership-council/diversity-and-inclusion/index.page>; Forbes, *Global Diversity and Inclusion: Fostering Innovation Through a Diverse Workforce*, Forbes Insights, 5 (July 2011), http://www.forbes.com/forbesinsights/innovation_diversity/.

⁶⁹ M.V. Lee Badgett et al., Williams Institute, *The Business Impact of LGBT-Supportive Workplace Policies*, 1 (May 2013),

2013 study of 300 firms that adopted same-sex domestic partnership benefits between 1995 and 2008 showed a ten percent stock price increase—a performance better than ninety-five percent of all U.S. professional mutual funds—as well as “significant improvement in operating performance” relative to companies that did not adopt such policies.⁷⁰ Our clients also recognize the value of equitable policies. A 2011 study found that sixty-eight local governments require that their contractors have LGBT-supportive affirmative action policies, or policies granting same-sex partners equal benefits.⁷¹

By contrast, corporate cultures that are ambivalent or fail to confidently encourage “openness and inclusiveness leave employees feeling isolated and fearful[,]” and lose marketing potential in reaching out to LGBT consumers.⁷² Even “small differences in how people are treated ... convey strong messages about the perceived relative value” of our employees.⁷³ The end result is employee uncertainty, low morale, decreased productivity, and reduced profitability.

<http://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-LGBT-Policies-Full-Report-May-2013.pdf> [hereinafter “Williams Institute”].

⁷⁰ Li & Nagar, *supra* n.51, at 529, 538-541; *see also* Williams Institute, *supra* n.69, at 23 (“[T]he more robust a company’s LGBT-friendly policies, the better its stock performed ... compared to other companies in the same industry over the same period of time.”); Blazovich, *supra* n.58, at 35-36 (same).

⁷¹ Williams Institute, *supra* n.69, at 21.

⁷² Todd Sears et al., *Out on the Street, Thinking Outside the Closet: How Leaders Can Leverage the LGBT Talent Opportunity* 6 (2011).

⁷³ *Id.*

Nondiscrimination policies are crucial the recruitment and retention of excellent employees. In turn, hiring the best people helps us build teams and corporate cultures that allow us to create, innovate, and ultimately increase our profits and economic value. State laws alternately celebrating and condemning same-sex marriage conscript us, as the administrators of state benefits, to become the face of a law that demands we treat our employees in committed same-sex relationships in “non-recognition” states differently from employees married to different-sex spouses and same-sex spouses in “recognition” states, our stated policies notwithstanding. We must perpetuate the unequal effects of those laws, “in visible and public ways.”⁷⁴ Even if we take on the burden of developing workarounds to ameliorate disparate and uncertain state treatment, we are still placed in the role of intrusive inquisitor, imputer of taxable income, and withholder of benefits. We are required to place those employees “in an unstable position of being in a second-tier marriage,” thereby demeaning the couple and their relationship.⁷⁵ For all employees in same-sex marriages, we must propagate the message from “non-recognition” states that these employees and their relationships are not “worthy of dignity in the community equal with all other marriages.”⁷⁶

The current patchwork of state laws causes employees justifiable uncertainty about how their employers and governments will treat their familial relationships and economic resources. It also hinders

⁷⁴ *Windsor*, 133 S. Ct. at 2695.

⁷⁵ *Id.* at 2694.

⁷⁶ *Kitchen*, 2014 WL 2868044, at *15 (citing *Windsor*, 133 S. Ct. at 2692).

our ability to run our businesses efficiently and effectively, and to make our businesses as diverse and inclusive as possible, despite our stated policies and our recognized business case. In abiding by inharmonious and discriminatory state laws, we become complicit in our employees' injury—and our own.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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**APPENDIX A:
IDENTIFICATION OF *AMICI***

Alcoa Inc. is a corporation organized under the laws of the Commonwealth of Pennsylvania. Alcoa is a global leader in lightweight metals engineering and manufacturing. Alcoa pioneered the aluminum industry over 125 years ago, and today, approximately 60,000 people in 30 countries deliver value-add products made of titanium, nickel and aluminum, and produce best-in-class bauxite, alumina and primary aluminum products.

Amazon.com, Inc., based in Seattle, Washington, is one of the world's largest and best known online retailers. Amazon seeks to be the Earth's most customer-centric company, where customers can discover anything they might want to buy online at the lowest possible prices.

Aspen Skiing Company is a four-season resort in Colorado that owns and operates four ski areas (Aspen, Highlands, Snowmass and Buttermilk) two hotels, and eighteen restaurants. The resort employs 3,500 people in winter and hosts 1.4 million skiers annually.

Ben & Jerry's is a leading manufacturer of super-premium ice cream, yogurt and sorbet distributed in supermarkets, grocery stores, and Ben & Jerry's Scoop Shops in more than 35 countries around the world. Ben & Jerry's is Vermont corporation and a wholly-owned subsidiary of Unilever.

Bloomberg L.P., the global business and financial information and news leader, delivers data, news and analytics through innovative technology, quickly and accurately to its customers globally. Headquartered in New York, Bloomberg employs more than 15,500 people in 192 locations around the world.

CBS Corporation's operations span the media and entertainment industries and include a major television network (CBS), cable program services (including Showtime), television content production and distribution, motion pictures, radio stations, television stations, interactive businesses, and publishing (Simon & Schuster). CBS Corporation is headquartered in New York City with approximately 20,000 employees across the United States and worldwide.

Cisco Systems, Inc. is a publicly held a California corporation that designs, manufactures, and sells networking and communications products.

Cummins Inc., headquartered in Indiana, is a corporation of complementary business units that design, manufacture, distribute and service diesel and natural gas engines and related technologies. Cummins currently employs approximately 48,000 people worldwide, and serves customers in approximately 190 countries and territories through a network of 600 company- owned and independent distributor locations and approximately 6,500 dealer locations.

Deutsche Bank AG is a leading global investment bank headquartered in Frankfurt, Germany, with major hubs in London, New York, Sao Paulo, Dubai, Hong Kong and Tokyo. With 10,000 of its 100,000 employees in the United States, Deutsche Bank offers unparalleled financial services throughout the world.

Eastern Bank Corporation is the oldest and largest mutual banking company in the nation. Founded in 1818 in Salem Massachusetts, it is headquartered in Boston, Massachusetts, and has over 1,650 employees.

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.

General Electric Company is one of the largest and most diversified infrastructure and financial services corporations in the world. With products and services ranging from aircraft engines, power generation, oil and gas production equipment, and household appliances to medical imaging, business and consumer financing and industrial products, GE does business in more than 150 countries and employs approximately 307,000 people worldwide.

Intel Corporation is the world's largest semiconductor manufacturer and is also a leading manufacturer of

computer, networking, and communications hardware and software products. Intel's headquarters is located in Santa Clara, California.

Jazz Pharmaceuticals, Inc. is a specialty biopharmaceutical company that identifies, develops and commercializes innovative products. It has offices in California and Pennsylvania.

Kimpton Hotel & Restaurant Group, LLC operates hotels and restaurants in 27 cities throughout the United States. Kimpton and its subsidiaries employ approximately 8,100 employees. Kimpton is a Delaware limited liability company organized under the laws of Delaware and has its principal place of business in California.

Levi Strauss & Co. is one of the world's largest brand-name apparel marketers, with products sold under the Levi's®, Dockers®, Signature by Levi Strauss & Co.™ and Denizen™ brands. Based in San Francisco, California, it has thousands of employees worldwide.

Massachusetts Mutual Life Insurance Company is a life insurance company with its principal place of business in Massachusetts.

NIKE, Inc., based near Beaverton, Oregon, is the world's leading designer, marketer and distributor of authentic athletic footwear, apparel, equipment and

accessories for a wide variety of sports and fitness activities.

Oracle America, Inc. is a leading global technology company, delivering hardware, middleware, application software, database software, and operating systems that work together in the cloud and in the data center. Based in Redwood City, California, Oracle has over 115,000 employees worldwide.

Outerwall Inc. is a leading provider of automated retail kiosks (Redbox® entertainment, Coinstar® money services, and ecoATM® electronics recycling) in grocery stores, drug stores, mass merchants, malls, and other retail locations in the United States, Canada, Puerto Rico, the United Kingdom, and Ireland. The company, which has approximately 2,800 employees, is headquartered in Bellevue, Washington.

Pfizer Inc. is headquartered in New York and has 30,000 colleagues across the U.S. Pfizer is engaged in the discovery, development, manufacture and sale of many of the world's best-known prescription medicines and consumer healthcare products. We are committed to applying science and our global resources to improve health and well-being at every stage of life. We are also committed to maintaining a diverse and inclusive workplace for all colleagues, including LGBT colleagues.

Qualcomm Incorporated, based in San Diego, California, is a world leader in 3G, 4G and next-generation

wireless and digital communications technologies, products, and services.

Staples, Inc. is a corporation organized under the laws of Delaware. Through its world-class retail, online and delivery capabilities, Staples lets customers shop however and whenever they want, whether it's in-store, online, on mobile devices, or through the company's innovative buy online, pick-up in store option. Staples offers more products than ever, such as technology, facilities and break room supplies, furniture, safety supplies, medical supplies, and Copy and Print services. Headquartered outside of Boston, Staples currently employs approximately 85,000 people worldwide and operates throughout North and South America, Europe, Asia, Australia and New Zealand. In the United States alone, Staples has more than 50,000 employees in 49 states.

State Street Corporation is a global leader in providing financial services to institutional investors, delivering solutions across investment management, research and trading, and investment servicing. Headquartered in Boston, State Street operates in 29 countries and serves clients in more than 100 markets.

Sun Life Financial (U.S.) Services Company, Inc. has approximately 2,300 employees in 42 states who support the U.S. insurance operations of Sun Life Financial Inc., a leading international financial services company.

Support.com is a publicly traded company that provides cloud-based technology services and software. Headquartered in Redwood City, California, Support.com employs over 1,500 people in 47 states.

Symantec is an information protection expert that helps people, businesses, and governments seeking the freedom to unlock the opportunities technology brings -- anytime, anywhere. Symantec operates one of the largest global data-intelligence networks and provides leading security, backup, and availability solutions for where vital information is stored, accessed and shared.

Target is a corporation organized under the laws of Minnesota. It is an upscale discount retailer that provides high-quality, on-trend merchandise at attractive prices. The company has 361,000 Team Members worldwide.

United Therapeutics Corporation, based in Silver Spring, Maryland, is a biotechnology company focused on products to address the unmet medical needs of patients with chronic and life-threatening conditions worldwide.

Viacom Inc., headquartered in New York City, is home to premier entertainment brands that connect with audiences across television, motion picture, online and mobile platforms and consumer products in over 160 countries. Reaching approximately 700 million subscribers, Viacom's leading media network

brands include MTV, VH1, CMT, Logo, BET, CENTRIC, Nickelodeon, Comedy Central, TV Land, SPIKE, Tr3s, Paramount Channel and VIVA. Now over 100 years old, Paramount Pictures is a major global producer and distributor of filmed entertainment. As of September 30, 2013, Viacom employed approximately 10,000 full-time and part-time employees worldwide.