

Nos. 14-1167 (L), 14-1169, & 14-1173

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TIMOTHY B. BOSTIC, *et al.*,
Plaintiffs-Appellees,

CHRISTY BERGHOFF, *et al.*,
Intervenors

v.

JANET M. RAINEY, *et al.*,
Defendant-Appellant,

and

GEORGE E. SCHAEFFER, *et al.*,
Defendants,

and

MICHELE MCQUIGG
Intervenor/Defendant.

Appeal from the United States District Court
for the Eastern District of Virginia, Norfolk Division
(No. 2:13-cv-00395-AWA-LRL)

BRIEF OF 28 EMPLOYERS AND ORGANIZATIONS REPRESENTING EMPLOYERS
AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

Susan Baker Manning
Michael L. Whitlock
Margaret E. Sheer
Jared A. Craft*

Sara M. Carian*
Jessica C. Brooks*
Katherine R. Moskop*
John A. Polito*
Stephanie Schuster*

BINGHAM McCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006
202.373.6000

* Not admitted in this court.

Attorneys for 28 Employers and
Organizations Representing Employers as *Amici Curiae*

This brief is filed on behalf of the following businesses:

Amazon, Inc.

American International Group, Inc.

Blu Homes, Inc.

CBS Corporation

eBay, Inc.

Equality NC

Facebook Inc.

500 BC, Inc.

Google, Inc.

Intel Corp.

Jackson Hole Group LLC

Jazz Pharmaceuticals, Inc.

Kimpton Hotel & Restaurant Group LLC

Levi Strauss & Co.

Marriott International, Inc.

Massachusetts Mutual Life Insurance Co.

McKinstry Co., LLC and McKinstry Essention, LLC

Northrop Grumman Corporation

Pfizer, Inc.

Oracle America, Inc.

Qualcomm Inc.

Replacements, Ltd.

Starbucks

Sun Life Financial (U.S.) Services Company, Inc.

Support.com

United Therapeutics Corporation

Viacom Inc.

Witeck Communications, Inc.

CORPORATE DISCLOSURE STATEMENTS OF CORPORATE AMICI

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. Amazon.com, Inc. is a publicly traded corporation that has no parent corporation. No publicly held corporation owns 10% or more of its stock. Amazon.com, Inc. and its affiliates have facilities and employees in the Fourth Circuit.

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 states within the Fourth Circuit.

Blu Homes, Inc. is a corporation organized under the laws of Delaware and is headquartered in California. Blu Homes does not have a parent company and no publicly held company owns 10% or more of its stock. Blu Homes has operations in both Virginia and North Carolina.

CBS Corporation is a corporation organized under the laws of Delaware with a principal place of business in New York. National Amusements, Inc., a privately held company, owns a majority of the Class A voting stock of CBS Corporation. To CBS Corporation's knowledge without inquiry, GAMCO Investors, Inc., on March 15, 2011, filed a Schedule 13D/A with the Securities and Exchange Commission reporting that it and certain affiliates (any of which may be publicly traded) owned, in the aggregate, approximately 10.1% of the Class A voting stock of CBS Corporation. CBS Corporation is not aware of any other publicly-traded corporation that owns 10 percent or more of its stock. CBS Corporation's operations in the United States span the media and entertainment industries and include seven radio stations in Charlotte, North Carolina.

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 Fourth Circuit.

Equality NC is North Carolina's largest non-profit organization advocating for the rights of lesbian, gay, bisexual and transgender ("LGBT") individuals, with over 100,000 members and supporters. Originally founded in 1979 as the North Carolina Human Rights Fund, Equality NC is arguably the oldest state-wide LGBT equality organization in the United States. Equality NC does not have a parent company. There is no stock ownership of Equality NC. Equality NC has 5 employees in North Carolina.

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 facilities in Forest City, North Carolina.

500 BC, Inc. is a corporation organized under the laws of DE. It is in the business of entertainment media. It has no parent corporation and to its knowledge, no publicly held corporation owns 10% or more of its stock. It has operations in the Fourth Circuit states of Virginia and Maryland.

Google, Inc. is a corporation organized under the laws of Delaware and headquartered in California, with employees and operations in Virginia and North and South Carolina. 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.

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 Virginia and South Carolina.

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 Fourth 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 the states comprising the Fourth Circuit.

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 Alexandria, Virginia. 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.

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 owns a 10% or greater ownership interest in Levi Strauss & Co. Levi's Only Stores, Inc., a Delaware corporation and wholly-subsiary of Levi Strauss & Co., operates retail stores in Virginia, North Carolina, and South Carolina.

Marriott International, Inc. is a leading lodging company based in Bethesda, Maryland with reported revenues of nearly \$13 billion in fiscal year 2013. It operates and manages hotels and licenses vacation ownership resorts which, in total, include more than 4,000 properties in 79 countries employing approximately 330,000 people. Marriott maintains its global corporate headquarters within the Fourth Circuit and also manages or franchises approximately 415 hotels with just over 25,000 employees spread across each of the Circuit's five states. Marriott is consistently recognized as a top employer and for its superior business operations, which it conducts based on five core values: putting people first, pursuing excellence, embracing change, acting with integrity, and serving our world.

Massachusetts Mutual Life Insurance Company is a mutual insurance company organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent corporation and no publicly held corporation owns its stock.

McKinstry Co., LLC and **McKinstry Essention, LLC** (collectively “McKinstry”) are limited liability companies organized under the laws of the state of Washington with a principal place of business in Seattle, Washington. A majority of McKinstry’s membership interests are owned by McKinstry Holdings, Inc. and McKEss Holdings, Inc., respectively, both corporations organized under the laws of the state of Washington for the sole purpose of holding those membership interests. Neither McKinstry Holdings, Inc. nor McKEss Holdings, Inc. has a parent company and no publicly-held corporation owns any of their stock. McKinstry operates in North Carolina and Virginia.

Northrup Grumman Corporation is a corporation organized under the laws of Delaware. It is a leading global security company providing innovative systems, products and solutions in unmanned systems, cyber, C4ISR (Command, Control, Communications, Computers, Intelligence, Surveillance and Reconnaissance), and logistics and modernization to government and commercial customers worldwide. Northrop Grumman does not have a parent company. As of December 31, 2013, State Street Corp. and BlackRock, Inc., two publicly-traded investment management corporations, reported that they owned shares comprising 11% and 10%, respectively, of the outstanding common stock of Northrop Grumman. Northrop Grumman’s corporate headquarters and the headquarters for two of its four operating sectors are located in Virginia.

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 Fourth 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.

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 throughout the Fourth Circuit.

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 company holds a 10% or greater ownership in it. Qualcomm has maintained offices in North Carolina.

Replacements, Ltd. is a corporation organized under the laws of North Carolina. Replacements, Ltd. is the world's largest retailer of discontinued and active china, crystal, flatware, and collectibles. Replacements, Ltd. does not have a parent company. No publicly held corporation owns 10% or more of its stock. It does business in North Carolina.

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 Delaware privately held corporation. It employs approximately 2,300 employees in 42 states (including Virginia, North Carolina, and South Carolina) 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 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 has employees based throughout the Fourth Circuit. It has no parent corporation. BlackRock, Inc. reports holding 10.3% of Support.com's outstanding shares.

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 March 31, 2014, BlackRock, Inc., a publicly-traded investment management corporation, reported that it owns 13.7% of United Therapeutics Corporation. It has employees and consultants who reside and work within the Fourth Circuit and the company is involved in recruiting additional employees within the Fourth Circuit. In addition, its medicines are prescribed by physicians and distributed to patients throughout the Fourth Circuit.

Viacom Inc. is a publicly-held corporation organized under the laws of Delaware and headquartered in New York, New York. The company is home to premier entertainment brands offering content across television, motion picture, online and mobile platforms in over 160 countries. Viacom's leading brands include MTV, VH1, CMT, Logo, BET, CENTRIC, Nickelodeon, Nick Jr., TeenNick, Nicktoons, Nick at Nite, COMEDY CENTRAL, TV Land, SPIKE, Tr3s and Paramount Pictures. It has no publicly-held parent company and no publicly-held company owns 10 percent or more of its stock. Viacom does business across the Fourth Circuit and employs residents of Virginia, North Carolina and South Carolina.

Witeck Communications, Inc. is a corporation organized under the laws of Washington, D.C. Witeck Communications is an independently owned, strategic communications firm that provides counsel to U.S. corporations and nonprofits to build successful, trusted bridges with the LGBT community, and has no parent corporation. No publicly held corporation owns any stock in the company. All Witeck Communications' officers and employees live and work within the Fourth Circuit.

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
A. Our Businesses Depend on Diversity and Inclusion.....	4
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.....	8
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.....	11
2. Marriage Discrimination Drives Talented Individuals Away From the Jurisdictions in Which We Do Business.....	16
C. Marriage Discrimination Injures Our Businesses	21
1. The Commonwealth’s Ban Imposes Significant Burdens on Our Employees and Our Businesses.....	21
2. The Commonwealth’s Ban Requires Us to Uphold and Affirm Discrimination Injurious to Our Corporate Cultures	27
CONCLUSION.....	30
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF FILING AND SERVICE	

TABLE OF AUTHORITIES
(CONTINUED)

	Page(s)
Cases	
<i>Austin v. Austin</i> , 75 Va. Cir. 240 (2008)	15
<i>Bostic v. Rainey</i> , Nos. 14-1167 (L), 14-1169, and 14-1173	3
<i>Damon v. York</i> , 54 Va. App. 544 (2009)	15
<i>Lee v. Orr</i> , No. 13-cv-8710, 2014 WL 683680, at *2 (N.D. Ill. Feb. 21, 2014).....	12
<i>Garden State Equal. v. Dow</i> , 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013)	12
<i>Goodridge v. Dep't of Pub. Health</i> , 798 N.E.2d 941 (Mass. 2003)	12
<i>Griego v. Oliver</i> , 316 P.3d 865 (N.M. 2013)	12
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003).....	8
<i>Perry v. Brown</i> , 725 F.3d 1140 (9th Cir. 2013)	12
<i>Perry v. Schwarzenegger</i> , 704 F. Supp. 2d 921 (N.D. Cal. 2010).....	12
<i>Strauss v. Horton</i> , 207 P.3d 48 (Cal. 2009)	12
<i>United States v. Windsor</i> , 133 S. Ct. 2675 (2013).....	<i>passim</i>
<i>Varnum v. Brien</i> , 763 N.W.2d 862 (Iowa 2009)	12

TABLE OF AUTHORITIES
(CONTINUED)

	Page(s)
Statutes	
CAL. FAM. CODE § 308(b)	12
CHEYENNE-ARAPAHO TRIBES OF OKLA. [LAW & ORDER CODE] § 1101	12
CODE OF THE CITY OF CHARLOTTESVILLE, art. XV, Human Rights, § 2-431, http://www.charlottesville.org/Modules/ShowDocument.aspx?documentid=27858	8
CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, Res. 2013-344.l&j	12
CONN. GEN. STAT. § 46b-20.....	12
COQUILLE INDIAN TRIBAL CODE § 740.010	12
D.C. CODE § 46-401	12
DEL. CODE ANN., tit. 13, § 101	12
HAW. REV. STAT. §§ 572-A through 572-E, 572-1, 572-3, 572-6, 572-13, 572B-4, 572B-9.5, 572C-2, 580-1	12
750 ILL. COMP. STAT. §§ 5/201, 209, 212, 213.1, 220 & 75/60, 65	12
LEECH LAKE BAND OF OJIBWE TRIBAL CODE, tit. 6, Ch. 2.....	12
LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS TRIBAL CODE §§ 13.102-13.103 (as modified by WOS 2013-003)	12
MD. CODE ANN., FAM. LAW § 2-201	12
ME. REV. STAT., tit. 19-A, § 650A.....	12
MINN. STAT. § 517.01 <i>et seq.</i>	12
N.C. CONST. art. XIV, § 6	14
N.H. REV. STAT. ANN. § 457:1-a.....	12

TABLE OF AUTHORITIES
(CONTINUED)

	Page(s)
N.Y. DOM. REL. LAW § 10-a	12
POKAGON BAND OF POTAWATOMI INDIANS MARRIAGE CODE §§ 2.01, 4.01	12
R.I. GEN. LAWS § 15-1-1 <i>et seq.</i>	12
S.C. CODE ANN. § 20-1-15	14
S.C. CONST., art. XVII, § 15	14
SUQUAMISH TRIBAL CODE, tit. 9, ch. 9.1	12
VA. CODE § 20-45.3	15
VA. CODE § 58.1-301	22
VA. CODE § 63.2-1201	14
VT. STAT. ANN., tit. 15, § 8	12
W.VA. CODE §§ 48-2-104, 48-2-401, 48-2-603	14
WASH. REV. CODE § 26.04.010	12
 Rules	
Federal Rule of Appellate Procedure 29(a)	1
 Other Authorities	
Nick Anderson, <i>Outgoing rector warns Virginia may lose professors because of gay marriage ban</i> , WASH. POST, Aug. 12, 2013	19
Paula Andruss, <i>How to Attract—And Retain—Staff When You Can’t Pay Big Bucks</i> , ENTREPRENEUR MAGAZINE, June 27, 2012, http://www.entrepreneur.com/article/223516	9, 10
Matt Apuzzo, <i>More Federal Privileges to Extend to Same Sex Couples</i> , N.Y. TIMES, Feb. 8, 2014	14

TABLE OF AUTHORITIES
(CONTINUED)

	Page(s)
M.V. Lee Badgett, <i>et al.</i> , Williams Institute, UCLA School of Law, <i>The Business Impact of LGBT-Supportive Workplace Policies</i> , 1, May 2013, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-LGBT-Policies-Full-Report-May-2013.pdf	7
Tara Siegel Bernard, <i>A Progress Report on Gay Employee Health Benefits</i> , N.Y. TIMES, Dec. 5, 2012, http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits/	24, 26
Janell Blazovich, <i>et al.</i> , <i>Do Gay-friendly Corporate Policies Enhance Firm Performance?</i> , 35-36 (Apr. 29, 2013), http://www.west-info.eu/files/gayfriendly1.pdf	7, 10, 16
Scott B. Button, <i>Organizational Efforts to Affirm Sexual Diversity: A Cross-Level Examination</i> , 86 J. APPLIED PSYCHOL. 17 (2001)	11
Corporate Leadership Council, <i>Diversity & Inclusion</i> , http://www.executiveboard.com/exbd/human-resources/corporate-leadership-council/diversity-and-inclusion/index.page	6
Deloitte, <i>Only skin deep? Re-examining the business case for diversity</i> , 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	5
RICHARD FLORIDA, <i>THE RISE OF THE CREATIVE CLASS REVISITED</i> 262 (2012)	23
Forbes, <i>Global Diversity and Inclusion: Fostering Innovation Through a Diverse Workforce</i> , FORBES INSIGHTS, 11 (July 2011) (hereinafter “Forbes Insights”), http://www.forbes.com/forbesinsights/innovation_diversity/	4, 6, 7
Freedom to Marry, <i>States</i> , http://www.freedomtomarry.org/states/	16

TABLE OF AUTHORITIES
(CONTINUED)

	Page(s)
Gary J. Gates, Williams Institute, UCLA School of Law, <i>Marriage Equality and the Creative Class</i> 1(May 2009), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-MA-Creative-Class-May-2009.pdf	18
Hon. Eric H. Holder, Jr., U.S. Attorney Gen., <i>Remarks at the Human Rights Campaign Greater New York Gala</i> (Feb. 10, 2014). http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140210.html	13
Lu Hong & Scott E. Page, <i>Groups of diverse problem solvers can outperform groups of high-ability problem solvers</i> , 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	6
Human Rights Campaign, <i>2012 Municipal Equality Index: A Nationwide Evaluation of Municipal Law and Policy</i> , 5 (2012), http://www.hrc.org/files/assets/resources/MEI-2012_rev.pdf	17
Human Rights Campaign, <i>2014 Corporate Equality Index</i> , 9, http://www.hrc.org/files/assets/resources/cei_2014_full_report_rev7.pdf	5
Human Rights Campaign, <i>Domestic Partner Benefits: Grossing Up to Offset Imputed Income Tax</i> , http://www.hrc.org/resources/entry/domestic-partner-benefits-grossing-up-to-offset-imputed-income-tax	24
Iipay Nation of Santa Ysabel, Press Release, <i>California Native American Tribe Announces Support of Same-Sex Marriage: Santa Ysabel Tribe First in California to Make Proclamation</i> , WALL ST. J. June 24, 2013, http://online.wsj.com/article/PR-CO-20130624-907829.html	12

TABLE OF AUTHORITIES
(CONTINUED)

	Page(s)
Marian Moser Jones, <i>Will Same-Sex-Marriage Rulings Lead to an LGBT Brain Drain in Some States?</i> CHRON. 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/	19
Michael Jordan, COO, Or. Dep't Admin. Servs., e-mail to Oregon Agency Directors, re: Recognizing Out-of-State, Same-Sex Marriages and A. G. Opinion (Oct. 16, 2013, 12:58 PST), http://www.doj.state.or.us/releases/pdf/geiger_answer_exhibit_a.pdf	12
Sophia Kerby & Crosby Burns, Center for American Progress, <i>The Top 10 Economic Facts of Diversity in the Workplace</i> , July 12, 2012, http://www.americanprogress.org/issues/labor/news/2012/07/12/11900/the-top-10-economic-facts-of-diversity-in-the-workplace/	10
Level Playing Field Institute, <i>The Corporate Leavers Survey: The cost of employee turnover due solely to unfairness in the workplace</i> , 4 (2007), http://www.lpfi.org/sites/default/files/corporate-leavers-survey.pdf	10
Feng Li & Venky Nagar, <i>Diversity and Performance</i> , 59 MGMT. SCIENCE 529 (March 2003).....	6, 7, 26, 28
Ulrike Malmendier & Geoffrey Tate, <i>CEO overconfidence and corporate investment</i> , 60 J. FIN. 2661 (2005)	6
Max Messmer, <i>Four Keys to Improved Staff Retention</i> , STRATEGIC FIN. (Oct. 2006) http://www.imanet.org/PDFs/Public/SF/2006_10/10careers.pdf	9, 10
MetLife, <i>10th Annual Study of Employee Benefit Trends</i> , 20 (2012), http://www.metlife.com/assets/institutional/services/insights-and-tools/ebts/ml-10-Annual-EBTS.pdf	8, 9, 10

TABLE OF AUTHORITIES
(CONTINUED)

	Page(s)
Michael J. Moore, <i>Same Sex Marriage Rules Hamper Wall Street's Recruiting</i> , WALL ST. J., Apr. 30, 2013	18
Movement Advancement Project, Center for American Progress, & Human Rights Campaign, <i>A Broken Bargain: Discrimination, Fewer Benefits and More Taxes for LGBT Workers (Full Report)</i> , ii (May 2013), http://outandequal.org/documents/brokenbargain/a-broken-bargain-full-report.pdf	5, 19, 24, 26
Matt Motyl <i>et al.</i> , <i>How Ideological Migration Geographically Segregates Groups</i> , J. EXPERIMENTAL SOC. PSYCHOL. (forthcoming), http://ssrn.com/abstract=2158461	17
Corey S. Muñoz, <i>A Multi-Level Examination of Career Barriers for Sexual Minorities Employees</i> (unpublished Ph.D. dissertation, U. Georgia) (May 2005), https://getd.libs.uga.edu/pdfs/munoz_corey_s_200505_phd.pdf	11
Out & Equal, <i>Majority of Americans: Companies Not Government Should Decide Benefits Offered to Same-Sex Employees</i> , May 22, 2006, http://outandequal.org/documents/2006_Workplace_Survey_052306.pdf	9
Out on the Street & Immigration Equality, <i>The Cost of LGBT Exclusion: How Discriminatory Immigration Laws Hurt Business</i> 9-10 (2013), http://www.scribd.com/doc/124021795/Thinking-Outside-the-Closet-The-Cost-of-LGBT-Exclusion#fullscreen	18
Press Release, <i>Governor McAuliffe Statement on Bostic v. Rainey Ruling</i> (Feb. 14, 2014), https://governor.virginia.gov/news/newsarticle?articleId=3302	20
Belle R. Ragins, <i>et al.</i> , <i>Making the Invisible Visible: Fear & Disclosure of Sexual Orientation at Work</i> , 92 J. OF APPLIED PSYCHOL. 1103 (2007)	10

TABLE OF AUTHORITIES
(CONTINUED)

	Page(s)
Oscar Raymundo, <i>Some Native American tribes support gay marriage</i> , S.F. EXAM’R., Nov. 25, 2013, http://www.sfexaminer.com/sanfrancisco/some-native-americans-tribes-support-gay-marriage/Content?oid=2634562	12
Joanne Sammer & Stephen Miller, <i>The Future of Domestic Partner Benefits</i> , Society for Human Resource Management, Oct. 8, 2013, https://www.shrm.org/hrdisciplines/benefits/Articles/Pages/Domestic-Partner-Benefits.aspx/	21
C. Matthew Schulz, <i>Recruiting and retaining the best and brightest talent</i> , L.A. DAILY J., Dec. 26, 2013	10
Peter K. Scott, Worldwide ERC, <i>State Positions on Same-Sex Married Couple Filing Status Will Affect Employers</i> , Feb. 3, 2014, http://www.worldwideerc.org/Blogs/MobilityLawBlog/Lists/Posts/Post.aspx?List=c020aee5%2D48ad%2D47b2%2D8295%2Da4cf71ba9e34&ID=192	25
Todd Sears, Jonathan Saw, & Suzanne Richards, <i>Out on the Street, Thinking Outside the Closet: How Leaders Can Leverage the LGBT Talent Opportunity</i> (2011)	6, 28
Todd A. Solomon & Brett R. Johnson, <i>Walking Employees Through the Regulatory Maze Surrounding Same-Sex Domestic Partner Benefits</i> , 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	26
Todd A. Solomon & Brian J. Tiemann, <i>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</i> , 4 BLOOMBERG LAW REPORTS—EMPLOYEE BENEFITS (2011), http://www.mwe.com/info/pubs/solomon_tiemann_tax_gross-up_for_employees.pdf	26

TABLE OF AUTHORITIES
(CONTINUED)

	Page(s)
Mary H. Williams, Deputy A.G., Or. Dep't Justice, letter to Michael Jordan, COO, Or. Dep't of Admin. Servs. (Oct. 16, 2013), http://www.doj.state.or.us/release/pdf/geiger_answer_exhibit_a.pdf	12
U.K. Gov't Equalities Office, Dep't for Bus. Innovation & Skills, <i>The Business Case for Equality & Diversity: A survey of the academic literature</i> , 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	29
U.S. Bureau of Labor Statistics, Economic News Release, <i>Employee Benefits in the United States—March 2013</i> , July 17, 2013, http://www.bls.gov/news.release/ebs2.nr0.htm	9
U.S. Gen. Accounting Office, GAO-04-353R, <i>Defense of Marriage Act: Update to Prior Report</i> , Jan. 23, 2004, http://www.gao.gov/assets/100/92441.pdf	15
U.S. Office of Pers. Mgmt., <i>Grossing Up Awards, Why and Why Not</i> , http://www.opm.gov/policy-data-oversight/performance-management/performance-management-cycle/rewarding/grossing-up-awards/	25
Va. Dep't. of Taxation, Tax Bulletin 13-13, <i>Va. Income Tax Treatment of Same-Sex Marriage</i> , Nov. 8, 2013	22

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 Notice of Consent to File Brief of *Amicus Curiae*.

Amici are financial institutions, medical centers, providers of health care coverage, high technology businesses, manufacturers, insurers, pharmaceutical companies, media companies, professional firms, retailers and service providers, travel and hospitality providers, restaurants, and nonprofit organizations. We are 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 Virginia, West Virginia, North Carolina, and/or South Carolina. All are states in this Circuit that refuse to recognize existing same-sex marriages, and all but West Virginia have constitutional provisions that prohibit marriages between couples of the same sex.

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. The burden—imposed by state law—of having to administer complicated schemes designed to account for differential treatment 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 Virginia 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 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, just as we have seen the harm that denial of equality causes our businesses. The district court opinion in *Bostic v. Rainey*, Nos. 14-1167 (L), 14-1169, and 14-1173, helps establish a uniform principle that all couples share in the right to marry. Reversal of the district court's opinion, 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 opinion.

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 by forcing us to work harder and invest more to achieve the same return on our investment. 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

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.

innovation and marketplace success. Members of the lesbian, gay, bisexual, and 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 non-discrimination 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 By contrast, “corporate cultures that don’t encourage openness and inclusiveness leave employees feeling isolated and fearful[,]” and lose marketing potential in reaching out to the LGBT consumer demographic.¹¹

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

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>, demonstrating 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 Todd Sears, Jonathan Saw, & Suzanne Richards, *Thinking Outside the Closet: How Leaders Can Leverage the LGBT Talent Opportunity*, 6 (Out on the Street 2011).

outcomes, and increased productivity” among LGBT employees.¹² 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 funds in the United States, as well as “significant improvement in operating performance” relative to companies that did not adopt such policies.¹³

Diverse workforces also help companies capture new clients.¹⁴ 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.¹⁵ To take just one example from Virginia, the

¹² M.V. Lee Badgett, *et al.*, *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>.

¹³ Li & Nagar, *supra* n.9, at 529, 538-541; *see also* Williams Institute, *supra* n.12, 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.”); Janell Blazovich, *et al.*, *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.”).

¹⁴ Forbes Insights, *supra* n.4, at 11.

¹⁵ Williams Institute, *supra* n.12, at 21. California has similar state-wide requirements. *Id.* (citing CAL. PUB. CONT. CODE §§ 10295.3(a)(1), (e)(1)) (West 2014).

City of Charlottesville has an ordinance specifically prohibiting discrimination based on sexual orientation by employers.¹⁶

Our corporate principles are the right thing to do. Beyond that, they 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.¹⁷ We hire and promote our employees based on ability. In the long run, discrimination 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.¹⁸ 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 CODE OF THE CITY OF CHARLOTTESVILLE, ART. XV, HUMAN RIGHTS, § 2-431, <http://www.charlottesville.org/Modules/ShowDocument.aspx?documentid=27858>.

¹⁷ “[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).

¹⁸ 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).

retirement plan.¹⁹ 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.²⁰ 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.²¹ It is through these plans that we can foster a positive employer/employee relationship and retain satisfied and engaged workers, who in turn generally are

¹⁹ 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>.

²⁰ 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.18); 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.”).

²¹ Out & Equal, *Majority of Americans: Companies Not Government Should Decide Benefits Offered to Same-Sex Employees*, May 22, 2006, http://outandequal.org/documents/2006_Workplace_Survey052306.pdf.

more productive and perform better than their less-satisfied colleagues.²²

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.”²³ 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.”²⁴ “Almost half [of those gay and lesbian professionals who left] . . . said that if their employer offered more or better benefits they would have very likely stayed at their job.”²⁵ Equality for LGBT employees matters to heterosexual

²² MetLife, *supra* n.18, at 20; *see generally* Andruss, *supra* n.20; Messmer, *supra* n.20; C. Matthew Schulz, *Recruiting and retaining the best and brightest talent*, L.A. DAILY J., Dec. 26, 2013.

²³ 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.13, at 8-9.

²⁴ 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>.

²⁵ *Id.* at Executive Summary; *see also* Williams Institute, *supra* n.12, at 17 (reporting that “respondents who perceived more workplace discrimination reported significantly lower levels of job commitment and significantly higher levels of turnover intentions. [Other studies] found a similar relationship between discrimination and job commitment or turnover intentions.”); Belle R. Ragins, *et*

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 Virginia 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 partner's sex.²⁶ Each such jurisdiction also recognizes the validity of same-sex

al., Making the Invisible Visible: Fear & Disclosure of Sexual Orientation at Work, 92 J. OF APPLIED PSYCHOL. 1103 (2007); Corey S. Muñoz, *A Multi-Level Examination of Career Barriers for Sexual Minorities Employees* (unpublished Ph.D. dissertation, U. Georgia) (May 2005), https://getd.libs.uga.edu/pdfs/munoz_corey_s_200505_phd.pdf; Scott B. Button, *Organizational Efforts to Affirm Sexual Diversity: A Cross-Level Examination*, 86 J. OF APPLIED PSYCHOL. 17 (2001).

²⁶ Marriages between same-sex couples are licensed by California, Connecticut, Delaware, Hawaii, Illinois (currently in Cook County and state-wide beginning

marriages lawfully celebrated elsewhere.²⁷

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 ANN., tit. 13, § 101; HAW. REV. STAT. §§ 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; *Lee v. Orr*, No. 13-cv-8719, 2014 WL 683680, at *2 (N.D. Ill. Feb. 21, 2014); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); ME. REV. STAT., tit. 19-A, § 650-A; MD. CODE ANN., FAM. LAW § 2-201; *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); MINN. STAT. § 517.01 *et seq.*; N.H. REV. STAT. ANN. § 457:1-a; *Garden State Equal. v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Law Div. 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; CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, RES. 2013-344.l&j; COQUILLE INDIAN TRIBAL CODE § 740.010; Iipay Nation of Santa Ysabel, 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 TRIBAL CODE, tit. 6, ch. 2 & Oscar Raymundo, *Some Native American tribes support gay marriage*, S.F. EXAM'R, Nov. 25, 2013, <http://www.sfexaminer.com/sanfrancisco/some-native-americans-tribes-support-gay-marriage/Content?oid=2634562>; LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS TRIBAL CODE §§ 13.102-13.103 (as modified by WOS 2013-003); POKAGON BAND OF POTAWATOMI INDIANS MARRIAGE CODE §§ 2.01, 4.01; SUQUAMISH TRIBAL CODE, tit. 9, ch. 9.1.

²⁷ Oregon also recognizes the validity of out-of-state marriages. *See* Mary H. Williams, Deputy A.G., Or. Dep't Justice, letter to Michael Jordan, COO, Oregon Dep't Admin. Servs. (Oct. 16, 2013), http://www.doj.state.or.us/release/pdf/geiger_answer_exhibit_a.pdf; Michael Jordan, COO, Or. Dep't Admin. Servs., e-mail to Oregon Agency Directors, re:

In 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.²⁸ 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 legally authorizes such marriages.²⁹

While “marriage is more than a routine classification for purposes of certain statutory benefits,”³⁰ 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 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.³¹ The

Recognizing Out-of-State, Same-Sex Marriages and A. G. Opinion (Oct. 16, 2013, 12:58 PST), http://www.doj.state.or.us/releases/pdf/geiger_answer_exhibit_a.pdf

²⁸ *Windsor*, 133 S. Ct. at 2696.

²⁹ *Id.* at 2695-96.

³⁰ *Id.* at 2692.

³¹ See Hon. Eric H. Holder, Jr., U.S. Attorney Gen., *Remarks at the Human Rights Campaign Greater New York Gala* (Feb. 10, 2014).

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.³²

However, gay and lesbians employees in committed relationships in Virginia and other states in the Fourth Circuit that do not allow or recognize same-sex marriage³³ are categorically denied access to these rights and benefits unless they leave the state to marry—and likewise denied important rights and responsibilities at the state level. In Virginia, for example, single parents can adopt, but an unmarried partner and *de facto* co-parent cannot be a legal parent.³⁴ Only spouses, not unmarried partners, can be added as beneficiaries to state benefit programs. Similarly, only legal spouses have the right to make certain medical decisions.

<http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140210.html>
(summarizing federal rights and benefits).

³² *Id.*; see also Matt Apuzzo, *More Federal Privileges to Extend to Same-Sex Couples*, N.Y. TIMES, Feb. 8, 2014, <http://www.nytimes.com/2014/02/09/us/more-federal-privileges-to-extend-to-same-sex-couples.html>.

³³ In addition to Virginia, both North and South Carolina ban same-sex marriage. See N.C. CONST., art. XIV § 6 (as amended), S.C. CONST., art. XVII, § 15; S.C. CODE ANN. § 20-1-15. West Virginia's constitution does not ban same-sex marriage, but by statute bars the government from recognizing or performing same-sex marriages. W.VA. CODE §§ 48-2-104, 48-2-401, 48-2-603.

³⁴ See VA. CODE § 63.2-1201 (allowing adoption by any natural person, or by married persons).

Indeed, Virginia goes a step further, denying same-sex couples the right to use even contract law to create protections that “purport[] to bestow the privileges or obligations of marriage,” declaring any such “civil union, partnership contract or other arrangement” void, and any rights contractually created under such a contract “void and unenforceable.”³⁵ Thus, for example, Virginia state courts have refused to grant custody to the non-biological parent after the dissolution of a validly celebrated same-sex marriage and have denied “legal recognition of the termination of a civil union.”³⁶

In states like Virginia, 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 Commonwealth and are legally wed elsewhere.³⁷ And even then, those same couples—or legally married same-sex couples who later move to Virginia—will still be denied access to the wide range of state benefits and mutual

³⁵ VA. CODE § 20-45.3.

³⁶ *Damon v. York*, 54 Va. App. 544, 554 (2009) (“Damon's marriage to the child's mother in Canada created neither a family nor a stepparent relationship between Damon and the child. . . . [Rather,] Damon was a former girlfriend of the child's mother.”); *Austin v. Austin*, 75 Va. Cir. 240, at *3-4 (2008) (finding civil union void, but limiting that ruling to Virginia and refusing any other relief).

³⁷ In its most recent report on the topic, the United States General Accounting 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>.

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.³⁸ LGBT-friendly policies offer us a competitive advantage in employee recruitment and retention.³⁹ However, when faced with the evidence above, we can only conclude that in states 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 those states within the Fourth 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 such employment opportunities in the Fourth Circuit. And heterosexual individuals may decide that a state hostile to marriage equality is not

³⁸ Freedom to Marry, *States*, <http://www.freedomtomarry.org/states/> (last visited April 18, 2014).

³⁹ See Blazovich, *supra* n.13, at 7.

a state in which they want to live and work.⁴⁰ The situation in the Fourth Circuit is particularly problematic, as individuals living in a single metropolitan region (the greater Baltimore-Washington corridor) may commute, live, and work in jurisdictions with diametrically opposed marriage recognition approaches. Companies in Virginia, where marriage is not recognized, face additional recruitment challenges when competing with firms in marriage recognition states that are, quite literally, right across the Potomac River.

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.⁴¹ The Williams Institute found that creative-class Massachusetts residents in same-sex

⁴⁰ See Matt Motyl *et al.*, *How Ideological Migration Geographically Segregates Groups*, J. EXPERIMENTAL SOC. PSYCHOL. (forthcoming), <http://ssrn.com/abstract=2158461> (finding evidence that individuals are moving away from ideologically unfriendly communities and into congruent communities).

⁴¹ 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.⁴²

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.⁴³ 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."⁴⁴ 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; respondents also reported that they could not complete internal transfers, even at the executive level, for the same reason.⁴⁵ The same logic holds true for employee

⁴² 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>.

⁴³ 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>.

⁴⁴ *Id.*

⁴⁵ 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>.

transfers and migration across states. Employees with same-sex spouses—and the companies that need to maximize the benefit of those employees to their organizations—face similar costs and lost productivity when facing the prospect of hiring and transfers into non-recognition states.

Academic employers are also warning of the effects of Virginia's marriage ban. The former head of The College of William and Mary's Board of Visitors recently wrote:

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.⁴⁶

Another professor commented, “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.”⁴⁷ And

⁴⁶ Nick Anderson, *Outgoing rector warns Virginia may lose professors because of gay marriage ban*, WASH. 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.

⁴⁷ Marian Moser Jones, *Will Same-Sex-Marriage Rulings Lead to an LGBT Brain Drain in Some States?* CHRON. 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

indeed, Virginia Governor Terry McAuliffe lauded the district court's opinion below, noting that "to grow [Virginia's] economy and attract the best businesses, entrepreneurs, and families," the Commonwealth needed to ensure equality for all.⁴⁸

This evidence suggests that gay and lesbian employees may decide to leave Virginia 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 Virginia and other Fourth Circuit marriage-inequality states. After *Windsor*, planning for retirement may be more straightforward in marriage equality jurisdictions, where spouses have clearer rights to benefits.

public employees, college professor "started applying for jobs at universities with comprehensive domestic partnership benefits").

⁴⁸ Press Release, *Governor McAuliffe Statement on Bostic v. Rainey Ruling* (Feb. 14, 2014), <https://governor.virginia.gov/news/newsarticle?articleId=3302> (discussing *Bostic v. Rainey*, No. 2:13-cv-00395-AWA-LRL, 2014 WL 561978 (E.D. Va., Feb. 14, 2014)).

C. Marriage Discrimination Injures Our Businesses.

By not permitting same-sex couples to marry, Virginia imposes significant administrative burdens on our businesses, and, as discussed, hampers our ability to attract and retain the most qualified workforce. Although we can and often do voluntarily attempt to lessen the burden that marriage discrimination places on our employees, those workarounds impose additional unnecessary business expense, 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 Commonwealth's Ban Imposes Significant Burdens on Our Employees and Our Businesses.

For employers, the administration of benefits for those employees whose marriages are not recognized by the state creates significant and unavoidable burdens that are a functional result of the patchwork of inconsistent state law. “In [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[.]”⁴⁹ The situation becomes even more complicated when

⁴⁹ 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/>.

mobile employees live, work, file taxes, and receive benefits in multiple jurisdictions.

As just one example, consider the following discrepancy in Virginia's tax code. Although Virginia's code generally conforms to the federal tax code, which now treats same-sex couples as married as long as the marriage was recognized in the state in which it was celebrated,⁵⁰ the Commonwealth's recent Tax Bulletin 13-13 states that same-sex couples filing federal returns as married taxpayers must recalculate their adjusted gross income and file separately as either "single" or "head of household."⁵¹ The employer's HR department must therefore 1) treat an employee with a same-sex spouse as unmarried for state tax purposes; 2) treat the same employee as married for federal tax purposes; and 3) monitor every such employee's state of residence and change tax treatments if the employee moves from a non-recognition state to a recognition state or vice versa. These multiple, continual, and mandatory obligations result in significant burden and expense, which is further compounded by the need to apply multiple calculations for every similarly situated employee in every non-recognition state.

⁵⁰ VA. CODE § 58.1-301 ("Any term used in this chapter shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required.").

⁵¹ Va. Dep't. of Taxation, Tax Bulletin 13-13, *Va. Income Tax Treatment of Same-Sex Marriage*, Nov. 8, 2013.

Our mandated compliance with a discriminatory regime adds another dimension. Our human resources departments are the first resource for employees confused about conflicting legal rules. The result is that every benefits administrator must give uncertain advice and recommendations despite their own questions and lack of legal knowledge. 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.⁵² 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.

For companies operating nationwide, many of whom have centralized HR functions, all of these variables make for a complicated labyrinth of rules, regulations, and internal policies needed to accommodate a wide variety of legal standards related to employees' tax and benefit qualifications. These accommodations must often be incorporated manually into otherwise automated

⁵² 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.”).

processes, a requirement that is both burdensome and more prone to human error. The burden on the small employer is likewise 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. Establishing marriage equality nationwide would result in a unitary system of benefits and tax treatment that can be more efficiently and equitably administered.

In an attempt to alleviate the disparities and frustrations of discriminatory benefit systems and other benefit-related matters described above, some employers may determine that it is in their business interests to 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.⁵³ These and other

⁵³ 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*, <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,

workarounds offer many employers a way to offset the competitive disadvantage of doing business in a marriage discrimination state, but they also impose a cost on the employer beyond the direct cost of benefits.⁵⁴

To illustrate: after *Windsor*, state-level tax decisions “affect[s] not only gross-up calculations for [employees with same-sex spouses], but also the taxability for state purposes of benefits made available to spouses of employees married to a person of the same sex.”⁵⁵ 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 “raises costs considerably. . . . Under a grossing up policy, a \$1,000 net cash award would actually cost the agency \$1,713.80.”⁵⁶ The *New York Times* estimates that grossing

<http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits/>.

⁵⁴ 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).

⁵⁵ Peter K. Scott, Worldwide ERC, *State Positions on Same-Sex Married Couple Filing Status Will Affect Employers*, Feb. 3, 2014, <http://www.worldwideerc.org/Blogs/MobilityLawBlog/Lists/Posts/Post.aspx?List=c020aee5%2D48ad%2D47b2%2D8295%2Da4cf71ba9e34&ID=192>.

⁵⁶ U.S. Office of Pers. Mgmt., *supra* n.54.

up for an employee who incurred between \$1,200 and \$1,500 in extra taxes costs the employer between \$2,000 and \$2,500.⁵⁷ In other words, employers with a grossing up policy pay more to provide equivalent benefits.⁵⁸

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 the impact of marital status.⁵⁹ 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.⁶⁰ In short, workarounds carry administrative burden, sometimes requiring *amici* to retain experts to craft the

⁵⁷ Bernard, *supra* n.53.

⁵⁸ *Broken Bargain*, *supra* n.6, at 74.

⁵⁹ 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

⁶⁰ Li & Nagar, *supra* n.9, at 531.

policies and structure systems that can record gross-up amounts, as well as educate human resources, benefits, and payroll administrators.

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.

2. The Commonwealth's Ban Requires Us to Uphold and Affirm Discrimination Injurious to Our Corporate Cultures.

The denial of marriage rights to same-sex couples in Virginia goes against our core values and principles. As employers, we recognize the value 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,”⁶¹ 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,

⁶¹ *Windsor*, 133 S. Ct at 2689.

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 treat our employees in committed same-sex relationships differently from our employees married to different-sex spouses. Our need to accommodate drastically different state laws prevents us from treating 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.

Even “small differences in how people are treated . . . convey strong messages about the perceived relative value” of our employees.⁶²

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 interpersonal meetings.⁶³

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

⁶² Sears, *et al.*, *supra* n.11, at 6.

⁶³ Li & Nagar, *supra* n.9, at 543 (internal citations omitted).

well-managed within the organization.⁶⁴ A 2011 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.⁶⁵ 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 position of being in a second-tier marriage,” thereby demeaning the couple and their relationship.⁶⁶ 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.”⁶⁷

This hampers our ability to make our businesses as diverse and inclusive as possible, despite our stated policies and recognized business case. We become, in

⁶⁴ 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.

⁶⁵ *Id.*

⁶⁶ *Windsor*, 133 S. Ct. at 2694.

⁶⁷ *Id.* at 2695.

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, Virginia forces 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 decision before the Court alleviates that harm. *Amici* respectfully urge that the judgment of the United States District Court for the Eastern District of Virginia be affirmed.

Dated: April 18, 2014

BINGHAM McCUTCHEN LLP

By: /s/ Michael L. Whitlock

Susan Baker Manning

Michael L. Whitlock

Margaret E. Sheer

Jared A. Craft*

Sara Carian*

Jessica C. Brooks*

Katherine R. Moskop*

John A. Polito*

Stephanie Schuster*

2020 K Street, NW

Washington, D.C. 20006

202.373.6000

*Not admitted in this court

Attorneys for Amici Curiae

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 6,999 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.

Dated: April 18, 2014

BINGHAM McCUTCHEN LLP

By: /s/ Michael L. Whitlock

Michael L. Whitlock

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

The undersigned certifies that on April 18, 2014, I caused this Brief of 28 Employers and Organizations Representing Employers as *Amici Curiae* in Support of Appellees to be filed electronically with the Clerk of the Court using the CM/ECF system, which will serve such filing electronically on all registered CM/ECF users.

Dated: April 18, 2014

BINGHAM McCUTCHEN LLP

By: /s/ Michael L. Whitlock

Michael L. Whitlock

Attorney for Amici Curiae