

Nos. 14-14061-AA & 14-14066-AA

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JAMES BRENNER, *et al.*,
Plaintiffs-Appellees.

v.

JOHN ARMSTRONG, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Florida, No. 4:14-cv-107 (Hon. Robert L. Hinkle)

SLOAN GRIMSLEY, *et al.*,
Plaintiffs-Appellees.

v.

JOHN ARMSTRONG, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Florida, No. 4:14-cv-138 (Hon. Robert L. Hinkle)

**BRIEF OF 37 EMPLOYERS
AS AMICI CURIAE IN SUPPORT OF APPELLEES**

December 23, 2014

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENTS**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 - 26.1-3, Counsel for *Amici Curiae* certify that in addition to the parties and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement contained in the December 15, 2014 Brief of Plaintiffs-Appellees in *Brenner v. Armstrong*, No. 14-14061-AA, and the Certificate of Interested Persons and Corporate Disclosure Statement contained in the December 17, 2014 Brief of Plaintiffs-Appellees in *Grimsley v. Armstrong*, No. 14-14066-AA, the following persons have or may have an interest in the outcome of this case or appeal:

- Akamai Technologies, Inc. (NASDAQ: AKAM)
- Alcoa Inc. (NYSE: AA)
- Amazon Services Inc.
- AT&T Inc. (NYSE: T)
- Baker Manning, Susan
- Bloomberg L.P.
- Carian, Sara M.
- CBS Corporation (NYSE: CBS)
- Cox Enterprises, Inc.
- Delta Air Lines, Inc. (NYSE: DAL)
- Deutsche Bank AG (NYSE: DB)
- eBay, Inc. (NASDAQ: EBAY)
- Electronic Arts Inc. (NASDAQ: EA)
- First Equity VMD, Inc.
- Garvin Financial Group, LLC
- General Electric Company (NYSE: GE)
- Joel L. Sogol, Esq.
- Joint Force Management Group, Inc.
- Kimpton Hotel & Restaurant Group, LLC
- Levi Strauss & Co.
- Marriott International, Inc. (NASDAQ: MAR)

- MD/DO Recruiters, LLC
- Mindpower Inc.
- Muaddi, Jawad
- Oracle America, Inc.
- Oracle Corporation (NYSE: ORCL)
- Pfizer, Inc. (NYSE: PFE)
- Polito, John A.
- Pridelines Youth Services, Inc.
- Professional Asset Recovery of GA, LLC
- Reserva Wines LLC
- Rockwell Automation, Inc. (NYSE: ROK)
- SHS Management, LLC
- Staples, Inc. (NASDAQ: SPLS)
- State Street Corporation (NYSE: STT)
- Sun Life Financial Inc. (TSE: SLF)
- Sun Life Financial (U.S.) Services Company, Inc.
- Symantec Corporation (NASDAQ: SYMC)
- Target Corp. (NYSE: TGT)
- Team 7 Consulting, LLC
- United Therapeutics Corporation (NASDAQ: UTHR)
- Viacom Inc. (NASDAQ: VIAB)
- Whey Natural! USA LLC
- Whitlock, Michael L.

Corporate Disclosure Statements for Corporate *Amici Curiae*

Akamai Technologies, Inc. is an Internet content delivery network headquartered in Cambridge, Massachusetts. Akamai employees 5,000 people worldwide, including U.S. offices in Florida and Georgia. It has no parent corporation and no public corporation owns 10% or more of the company's stock.

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. We pioneered the aluminum industry over 125 years ago, and today, our 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. Alcoa Inc. is listed on the New York Stock Exchange, and does not have a parent corporation. As of March 31, 2014, no entity owns in excess of 10% of its shares. Alcoa has plants, employees and retirees in states covered by the Eleventh Circuit, including manufacturing facilities in Eastman & Savannah Georgia.

Amazon Services Inc. is a Florida corporation based in Miami. It is a full service commercial printing and promotional products company. Amazon Services has a wide range of clients, from Fortune 500 corporations to entrepreneurial start-ups, and it also contributes to local non-profit organizations. It has employees in Florida. Amazon Services has no parent corporation and no public corporation owns 10% or more of the company's stock.

AT&T Inc. is a premier communications holding company and one of the most honored companies in the world. Its subsidiaries and affiliates – AT&T operating companies – are the providers of AT&T services in the United States and internationally. AT&T is a leading provider of wireless, Wi-Fi, high speed Internet, voice and cloud-based services. A leader in mobile Internet, AT&T also offers the best wireless coverage worldwide of any U.S. carrier, offering the most wireless phones that work in the most countries. It also offers advanced TV service with the AT&T U-verse® brand. The company's suite of IP-based business communications services is one of the most advanced in the world. AT&T has no parent corporation and no public corporation owns 10% or more of the company's stock.

Bloomberg L.P. is a limited partnership organized under the laws of State of Delaware. Bloomberg Inc. is the general partner of Bloomberg L.P. No publicly held corporation owns 10% or more of Bloomberg L.P.'s limited partnership interests.

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, directly or indirectly 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 the ownership of three radio stations and one television station in Atlanta, Georgia, three radio stations and two television stations in Miami/Ft. Lauderdale, Florida, three radio stations in Orlando, Florida, and one television station in Tampa-St. Petersburg, Florida.

Cox Enterprises, Inc. is a leading communications, media and automotive services company. Its Cox Automotive division operates auctions in Alabama. The Cox Media Group division operates newspapers, television and radio stations in Florida and Georgia, and its Cox Communications division operates cable systems in both states. The company's major national brands include AutoTrader.com, Kelley Blue Book, Manheim, Savings.com and Valpak, which have customers in all three states. There is no parent company and no public company owns 10% or more of the company's stock.

Delta Air Lines, Inc. serves nearly 165 million customers each year. With an industry-leading global network, Delta and the Delta Connection carriers offer service to 319 destinations in 59 countries on six continents. Headquartered in Atlanta, Delta employs nearly 80,000 employees worldwide and operates a mainline fleet of more than 700 aircraft. Delta has no parent corporation, and no public company owns more than 10% of its shares.

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. Deutsche Bank AG does not have a parent company and no publicly held company holds 10% or more of Deutsche Bank stock.

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 owns 10% or more of its stock. It conducts business and employs people in the Eleventh Circuit.

Electronic Arts Inc. is a corporation organized under the laws of Delaware. It is a leading global interactive entertainment software company that delivers games, content and online services for Internet-connected consoles, personal computers, mobile phones and tablets. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. Electronic Arts has employees all over the world, including in Florida.

First Equity VMD, Inc. is a Florida corporation that is involved in the real estate brokerage business. It employs contractors and does business in the Miami, Florida area. It has no parent corporation and no public corporation owns 10% or more of the company's stock.

Garvin Financial Group, LLC is a Florida limited liability company that offers a broad range of financial services to clients. It has employees based in Florida. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

General Electric Company is one of the largest and most diversified infrastructure and financial services corporations in the world. It has no parent corporation and no publicly-held corporation owns 10% or more of its stock. 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. GE has offices, facilities, and employees in the Tenth Circuit.

Joint Force Management Group, Inc. is a Florida corporation doing business in North Palm Beach, Florida. It has no parent corporation and no public corporation owns 10% or more of the company's stock.

Kimpton Hotel & Restaurant Group, LLC is a limited liability company organized under the laws of Delaware and headquartered in California. Kimpton operates more than sixty hotels and restaurants in twenty-seven major cities throughout the United States, including hotels and restaurants in Miami and Vero Beach, Florida and Savannah, Georgia. Kimpton and its subsidiaries employ approximately 8,200 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 Florida, Georgia, and Alabama, and Levi Strauss & Co. operates offices in Florida.

Marriott International, Inc. is a publicly traded (NASDAQ listing: MAR) global lodging company based in Bethesda, Maryland. It does not have a parent company and no publicly traded company owns more than 10% of its shares. Marriott operates, manages or franchises more than 4000 hotel properties in 79 countries employing approximately 330,000 people in total. This includes 478 managed or franchised hotels employing over 32,800 people within the states of the Eleventh Circuit. Marriott is consistently recognized 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 the world.

MD/DO Recruiters, LLC is a Delaware limited liability company. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock. MD/DO Recruiters places physicians and mid-level providers in all 50 states, and it has operations nationwide, including within the Eleventh Circuit.

Mindpower Inc. is a corporation organized under the laws of Georgia. It is a brand strategy and branding execution agency specializing in education, healthcare and professional services. Mindpower Inc. does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

Oracle America, Inc. is a corporation organized under the laws of Delaware. It is a wholly owned, privately held indirect subsidiary of Oracle Corporation. Oracle Corporation 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.

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 Eleventh 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.

Professional Asset Recovery of GA, LLC is a limited liability company organized under the laws of Georgia. It is a collection and repossession service corporation with over 20 years of experience in the legal recovery industry. Professional Asset Recovery of GA, LLC, does not have a parent corporation, and no publicly held corporation owns 10% or more of the company.

Reserva Wines LLC d/b/a Terroir Wine Group (TWG) is located in and does business in Tampa, FL. TWG is a producer and importer of high quality wines. TWG's wines are available in New York, New Jersey, Maine, Massachusetts, Pennsylvania, Florida, Georgia, Texas, Illinois, Montana, California, Virginia, Maryland, Washington, DC, Iowa, South Carolina, North Carolina, Alabama, and Mississippi. It does not have a parent corporation, and no publicly held corporation owns 10% or more of the company.

Rockwell Automation, Inc. is incorporated in Delaware and is headquartered in Milwaukee, Wisconsin. Rockwell Automation is the world's largest company dedicated to industrial automation. We improve the standard of living for everyone by making the world more productive and sustainable. For decades, our customers have relied on us to help them improve their productivity, quality, safety and sustainability. Rockwell Automation is a publicly traded company on the New York Stock Exchange under the ticker symbol "ROK." There is no parent company for Rockwell Automation and no publicly held corporation owns ten percent (10%) or more of its stock. Rockwell Automation has a total of approximately 23,000 employees, with about 8,700 in the United States, including employees in Florida and Georgia.

SHS Management, LLC is a Florida Limited Liability Company. SHS Management, LLC is wholly owned by Student Housing Solutions, LLC. No public corporation owns 10% or more of SHS Management, LLC or Student Housing Solutions, LLC. Student Housing Solutions, LLC has over 125 employees and manages over 20 different student apartment and multifamily housing communities. Student Housing Solutions, LLC is one of the largest providers of off-campus student housing in Tallahassee.

Staples, Inc. is a corporation organized under the laws of Delaware. Staples does not have a parent company and no publicly held corporation owns 10% or more of its stock. 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 breakroom 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 corporation organized under the laws of Massachusetts. State Street is a global leader in providing financial services to institutional investors, delivering solutions across investment management, research and trading, and investment servicing. It does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock. State Street has employees all over the world, including in Alabama, Florida, and Georgia.

Sun Life Financial (U.S.) Services Company, Inc. is a Delaware privately held corporation. It employs approximately 2,300 employees in 42 states (including Alabama, Florida, and Georgia) 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.

Symantec Corporation is a corporation organized under the laws of Delaware. Employing more than 20,000 people, 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. Symantec does not have a parent company and no publicly held company owns 10% or more of its stock. Symantec has facilities and employees in the Eleventh Circuit.

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. It has no parent company and no publicly-held corporation owns 10% or more of its stock. The company has 361,000 Team Members worldwide, including across the Eleventh Circuit.

Team 7 Consulting, LLC is a Georgia Limited Liability Company. Team 7 Consulting has no parent company, and no public corporation owns 10% or more of the company. Team 7 Consulting is based in Atlanta and primarily operates as a management consulting firm specializing in information technology engagement. Team 7 Consulting has customers throughout the world.

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 September 30, 2014, BlackRock, Inc., a publicly-traded investment management corporation, reported that it owns 12.5% of United Therapeutics Corporation. It has employees and consultants who reside and work within the Eleventh Circuit and the company is involved in recruiting additional employees within the Eleventh Circuit. In addition, its medicines are prescribed by physicians and distributed to patients throughout the Eleventh 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 employs residents of both Georgia and Florida, where it maintains offices. It distributes its creative content throughout the Eleventh Circuit.

Whey Natural! USA LLC is a limited liability company organized under the laws of Florida. It manufactures an all-natural whey protein concentrate and through the Chill-Right® process utilizing Amish pastureland fed dairy cows. Whey Natural! USA LLC does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE ISSUE

Whether Florida's statutory and constitutional bans on same-sex marriage are unconstitutional.

INTEREST OF *AMICI CURIAE*¹

Amici include technology, materials, airline, financial services, pharmaceutical, apparel, and entertainment companies, hoteliers, restaurateurs, service providers, and retailers, ranging from small businesses to Fortune 100 members, all of whom share a desire to attract and retain a talented workforce. We are located and/or do business in Florida, Georgia, or Alabama, all of which prohibit marriages between couples of the same sex and refuse to recognize existing same-sex marriages.

State laws and constitutions denying 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 and retain the most talented workforce possible—all of which places us at a competitive disadvantage. Our success depends upon the welfare and morale of all employees, without distinction. The burden—imposed by state law—of having to

¹ This brief is submitted with the consent of all parties. 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 intended to fund preparing or submitting this brief, and no person contributed money intended to fund, prepare, or submit this brief.

administer complicated schemes designed to account for differential treatment of similarly situated employees interferes with our business 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 Florida, Georgia, and Alabama, whose constitutions prohibit same-sex couples from marrying—and whose laws discriminate against those couples in myriad additional ways—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 our ability to grow and maintain our businesses. We find ourselves forced to implement policies inconsistent with our stated corporate principles. Unlike companies in a majority of states, we are required to operate in a complicated landscape of laws and human resources regulations that increase our administrative costs and, in the end, harm our businesses.

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 the above-captioned case helps establish a uniform principle that all couples share in the right to marry. Reversal would serve only to prolong an unproductive, inequitable, and unjust *status quo*. We respectfully and strongly urge the Court to affirm.

ARGUMENT

In *United States v. Windsor*,² the Supreme Court held that the federal government may not, consistent with the Constitution, refuse to recognize valid marriages between persons of the same sex. The Court noted that some jurisdictions had determined 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 all other married persons.”³ The Court concluded:

The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as

² *United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating Section 3 of the Defense of Marriage Act of 1996).

³ *Id.* at 2689.

living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.⁴

Although *Windsor* did not decide whether the Constitution requires that same sex couples be allowed to marry, numerous courts subsequently have taken up that issue. Four out of the five United States Courts of Appeal,⁵ and the vast majority of the United States District Courts⁶ that have heard the issue have rendered decisions supporting same-sex marriage. The Tenth Circuit, for example, held 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.”⁷ The Fourth Circuit held that “[o]ver the decades, the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate

⁴ *Id.* at 2696.

⁵ *Kitchen v. Herbert*, 755 F.3d 1193, 1199 (10th Cir. 2014) (invalidating ban on marriage between persons of the same sex) *cert. denied*, No. 14-124, 2014 WL 3841263 (U.S. Oct. 6, 2014); *Bostic v. Schaefer*, 760 F.3d 352, 377 (4th Cir. 2014) (same) *cert. denied sub nom. Rainey v. Bostic*, No. 14-153, 2014 WL 3924685 (U.S. Oct. 6, 2014 & No. 14-225, 2014 WL 4230092 (U.S. Oct. 6, 2014), *and sub nom. McQuigg v. Bostic*, No. 14-251, 2014 WL 4354536 (U.S. Oct. 6, 2014); *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir. 2014) (same) *cert. denied*, No. 14-277, 2014 WL 4425162 (U.S. Oct. 6, 2014), *and cert. denied sub nom. Walker v. Wolf*, No. 14-278, 2014 WL 4425163 (U.S. Oct. 6, 2014); *Latta v. Otter*, No. 12-17668, 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (same); *but see DeBoer v. Snyder*, No. 14-1341, 2014 WL 5748990 (6th Cir. Nov. 6, 2014) (reversing district court opinions declaring marriage discrimination unconstitutional).

⁶ *Marriage Rulings in the Courts* <http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts> (last visited Nov. 12, 2014).

⁷ *Kitchen*, 755 F.3d at 1199.

changing societal norms . . . [and] is not circumscribed based on the characteristic of the individuals seeking to exercise that right.”⁸ Similarly, the Seventh Circuit held that “discrimination against same-sex couples is irrational and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny.”⁹

On October 6, 2014, the Supreme Court denied *certiorari* in all appeals from the Fourth, Seventh and Tenth Circuit decisions.¹⁰ The next day, the Ninth Circuit joined its sister Circuits in declaring marriage discrimination unconstitutional.¹¹ It observed:

The lessons of our constitutional history are clear: inclusion strengthens, rather than weakens, our most important institutions. When we integrated our schools, education improved. When we opened our juries to women, our democracy became more vital. When we allowed lesbian and gay soldiers to serve openly in uniform, it enhanced unit cohesion. When same-sex couples are married, just as when opposite-sex couples are married, they serve as models of loving commitment to all.¹²

⁸ *Bostic*, 760 F.3d at 377.

⁹ *Baskin*, 766 F.3d at 656 (“[T]he only rationale that the states put forth with any conviction—that same-sex couples and their children don’t need marriage because same-sex couples can’t produce children, intended or unintended—is so full of holes that it cannot be taken seriously.”).

¹⁰ *See supra*, nn. 6, 9 & 10.

¹¹ *Latta*, 2014 WL 4977682.

¹² *Id.* at *11 (citations and quotation marks omitted).

Those principles also ring true for American companies: diversity and inclusion strengthen, not weaken, our businesses.

Thirty-three states and the District of Columbia now make marriage equally available to couples regardless of the sex of the partners, and recognize the validity of same-sex marriage performed elsewhere; eighteen states do not.¹³ As employers, we know firsthand that operating in today's fractured landscape of conflicting state laws on marriage stunts our economic growth and impedes innovation by forcing us to work harder, and invest more, to achieve the same return on our investments. Inconsistent laws defining marriage force us to divert significant time and cost to complex administrative systems and create a rift in the employer-employee relationship. Allowing same-sex couples to marry is better for our employees because it provides them with an unambiguous, clear status under the law. That recognition is better for our 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.”¹⁴ They are among our core

¹³ See *infra* n.39.

¹⁴ 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/ (a

principles—and we have confirmed their value through observation and rigorous analysis. We, and many of our peers, recognize that diversity is crucial to innovation and marketplace success. Members of the lesbian, gay, bisexual, and transgender (“LGBT”) community are one source of that diversity.¹⁵ An April 2013 Small Business Majority survey reported that sixty-nine percent of small business owners support non-discrimination laws protecting LGBT workers.¹⁶ 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.¹⁷

We invest time and resources to implement 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.”¹⁸ Inclusive

comprehensive study of 300 senior diversity officers at companies worldwide with revenues of at least \$500 million).

¹⁵ *Id.* at 5.

¹⁶ Movement Advancement Project et al., *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>.

¹⁷ Human Rights Campaign, *2014 Corporate Equality Index*, 9, http://www.hrc.org/files/assets/resources/cei_2014_full_report_rev7.pdf.

¹⁸ 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/Di>

companies are more open to new ideas and opportunities, while reducing overconfidence regarding approaching challenges.¹⁹ Companies that are diverse and inclusive obtain better profits and other outputs, thanks to improved team collaboration and commitment.²⁰ 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 LGBT consumers.²¹

The Williams Institute at the UCLA School of Law recently reviewed thirty-six research studies and found that working in an LGBT-supportive workplace climate resulted in “greater job commitment, improved workplace relationships, increased job satisfaction, improved health outcomes, and increased productivity”

versity/Deloitte_Only_skin_deep_12_September_2011.pdf (quoting Frederick A. Miller & Judith H. Katz, *THE INCLUSION BREAKTHROUGH* (2002)).

¹⁹ 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>.

²⁰ Corporate Executive Board, *Diversity & Inclusion*, <http://www.executiveboard.com/exbd/human-resources/corporate-leadership-council/diversity-and-inclusion/index.page> (workforces with high diversity and inclusion show marked improvement in team collaboration and commitment). *See also* Forbes Insights, *supra* n.10, at 5 (giving examples).

²¹ Todd Sears et al., *Thinking Outside the Closet: How Leaders Can Leverage the LGBT Talent Opportunity*, 6, *OUT ON THE STREET* (2011).

among LGBT employees.²² A 2013 study of 300 firms that adopted same-sex domestic partnership benefits between 1995 and 2008 showed a ten percent stock price increase over the sample period—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.²³

Diverse workforces also help capture new clients.²⁴ 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.²⁵ Despite the statewide prohibition of same-sex marriages, various cities and

²² 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>.

²³ Li & Nagar, *supra* n.15, at 529, 538-541; *see also* Williams Institute, *supra* n.18, 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 . . . increase the investor perception of the firm as proxied by stock-price movements.”).

²⁴ Forbes Insights, *supra* n.10, at 11.

²⁵ Williams Institute, *supra* n.18, at 21. California has similar state-wide requirements. *Id.* (citing CAL. PUB. CONT. CODE §§ 10295.3(a)(1), (e)(1)).

counties in Florida²⁶ and Georgia²⁷ provide benefits to same-sex domestic partners or have established domestic partnership registries. No city or county in Alabama recognizes, or provides benefits to, domestic partners.²⁸

Our corporate principles are the right thing to do. Beyond that, they contribute to employee happiness and loyalty, greater company productivity 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 develop and grow a diverse organization, we must be able recruit and retain the best talent.²⁹ We hire and promote our employees based on ability. In the long run, discrimination impairs our ability to compete for the best workforce. Benefits are critical to our effort to compete for talent, as benefits directly

²⁶ Equality Florida, “*Families First*” Bill Moves Domestic Partnership Forward, <http://www.eqfl.org/history> (noting that five Florida counties and seven cities have domestic partnership registries).

²⁷ Human Rights Campaign, *City and County Domestic Partner Registries*, <http://www.hrc.org/resources/entry/city-and-county-domestic-partner-registries> (noting that Athens-Clarke and Fulton counties, and the City of Atlanta offer domestic partnership registries).

²⁸ Unmarried Equality, *Legal Information and Resources by State*, <http://www.unmarried.org/legal-information-resources-by-state/> (last accessed Oct. 23, 2014).

²⁹ “[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).

contribute to recruitment and employee loyalty.³⁰ In 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.³¹ Benefits packages—especially health care and retirement benefits—can add thirty percent or more to compensation value on top of an employee’s salary. In a 2011 Harvard Business Review survey, sixty percent of human resources leaders stated that an attractive benefits package was “very important” in recruiting and retaining quality employees.³² In 2006, eighty-nine percent of LGBT respondents found it important to work for a company with a written nondiscrimination policy that includes sexual orientation, and ninety-one percent said equal benefits were crucial.³³ Through such plans, we foster a positive employer-employee relationship

³⁰ 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> (60% of employees felt benefits were an important reason for remaining with the company).

³¹ 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>.

³² 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> (compared with 38% who believed only high base salary was “very important”); 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 [Zogby International] survey . . . revealed that [58%] of employees polled would prefer a job with excellent benefits over one with a higher salary.”).

³³ Out & Equal, *Majority of Americans: Companies Not Government Should Decide Benefits Offered to Same-Sex Employees*, May 22, 2006,

and retain satisfied and engaged workers, who in turn are more productive and perform better than less-satisfied colleagues.³⁴

We also know 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.”³⁵ 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.”³⁶ Of those gay and lesbian professionals who left, “almost half . . . said that if their employer offered more or better benefits they would have very

http://www.google.com/url?url=http://www.dentons.com/~media/pdfs/insights/2014/january/dentons%2520dj%2520122613.ashx&rct=j&frm=1&q=&esrc=s&sa=U&ei=bV7JU6rxCsW-sQTH3oHQAg&ved=0CBQQFjAA&sig2=mHs2G_kgDfVtwe3OCETPmA&usg=AFQjCNEjRYIKXHNOsN9J1P92K2qzD5KR8Q

³⁴ MetLife, *supra* n.25, at 20; *see generally* Andruss, *supra* n.27; Messmer, *supra* n.27; C. Matthew Schulz, *Recruiting and retaining the best and brightest talent*, L.A. DAILY J., Dec. 26, 2013.

³⁵ Sophia Kerby & Crosby Burns, *The Top 10 Economic Facts of Diversity in the Workplace*, CENTER FOR AMERICAN 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.19, at 8-9.

³⁶ 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>.

likely stayed at their job.”³⁷ LGBT equality also matters to heterosexual employees. In the same 2006 poll, seventy-two percent of non-LGBT respondents found it important that an employer offer equal benefits to LGBT co-workers.³⁸

The mandate in Florida, Georgia, and Alabama requires that, when dealing with state marital benefits, we single out colleagues with same-sex partners or registered domestic partnerships and treat them as a separate and unequal class, as compared to employees with heterosexual partners. This mandate upsets our business philosophy and prevents our businesses from reaching their full economic potential because it discourages highly-qualified employees from living and working in the jurisdictions where we do, or want to do, business.

1. 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.

Marriage equality is the law in most of the United States. Thirty-three states and the District of Columbia now acknowledge the right of individuals to marry

³⁷ *Id.* at Executive Summary; *see also* Williams Institute, *supra* n.18, at 17 (“[R]espondents 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 al., *Making the Invisible Visible: Fear & Disclosure of Sexual Orientation at Work*, 92 J. OF APPLIED PSYCHOL. 1103 (2007); Scott B. Button, *Organizational Efforts to Affirm Sexual Diversity: A Cross-Level Examination*, 86 J. OF APPLIED PSYCHOL. 17 (2001).

³⁸ Level Playing Field Institute, *supra* n. 32, at Executive Summary.

regardless of their partner's sex.³⁹ An additional state, Missouri, recognizes same-sex marriages lawfully celebrated elsewhere, although it does not yet issue same-sex marriage licenses itself.⁴⁰

After *Windsor*, the federal government now must recognize all couples “whom the State, by its marriage laws, sought to protect in personhood and dignity” as married.⁴¹ 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.⁴²

While “marriage is more than a routine classification for purposes of certain statutory benefits,”⁴³ as a legal status, marriage touches numerous aspects of life, both practical and profound.⁴⁴ Federal and state law provide the working family

³⁹ Marriages between same-sex couples are licensed by Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the District of Columbia. *States*, <http://www.freedomtomarry.org/states/> (listing states in which same-sex couples may marry) (last accessed Oct. 27, 2014).

⁴⁰ Where State Laws Stand, <http://www.freedomtomarry.org/pages/where-state-laws-stand> (last accessed Oct. 27, 2014).

⁴¹ *Windsor*, 133 S. Ct. at 2696 (invalidating 1 U.S.C. § 7).

⁴² *Id.* at 2695-96.

⁴³ *Windsor*, 133 S. Ct. at 2692.

⁴⁴ *Kitchen*, 755 F.3d at 1215 (statutes restricting marriage between same-sex couples “‘bring[] financial harm to children of same-sex couples . . . raise[] the

many benefits and protections relating to health care, protected leave, and retirement. These 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 or her work.

However, gay and lesbian employees in committed relationships in the Eleventh Circuit are categorically denied access to these rights and benefits—and to important rights and responsibilities at the state level. All three states have constitutional amendments banning same-sex marriage, expressly denying any and all state benefits to same-sex couples.⁴⁵ This results in same-sex couples being denied spousal rights most Americans take for granted, including adoption and parental rights, as well as the rights to make medical decisions for an incapacitated spouse, access to health insurance and retirement benefits, property protections, and inheritance.⁴⁶ In Alabama, for example, a same-sex spouse (even if legally married in other parts of the country) cannot adopt his or her spouse’s children—unless the birth parent relinquishes all parental rights to his or her child before 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 integral part of family security.’”) (quoting *Windsor*, 133 S. Ct. at 2695).

⁴⁵ FL. CONST. ART. I, § 27; GA. CONST. ART. I, § 4, PARA. 1; ALA. CONST. OF 1901 AM. 744, PARA (b)-(g).

⁴⁶ Freedom to Marry, *Protections Denied to Same-sex Couples and Their Kids*, <http://www.freedomtomarry.org/pages/from-why-marriage-matters-appendix-b-by-evan-wolfson>.

adoption occurs.⁴⁷ A Florida statute explicitly bars an otherwise qualified person from adopting “if that person is a homosexual.”⁴⁸ In addition to basic state benefits appurtenant to marriage, these states’ constitutional bans also prevent same-sex couples from receiving myriad federal benefits, such as those relating to health insurance, military benefits, taxes, and immigration law.⁴⁹ The U.S. Department of Justice, for example, has announced that same-sex married couples will receive equal federal death benefits and educational payments for federal public safety officers, equal victim compensation payments, equal treatment in bankruptcy cases, equal rights for inmates in federal prison, and equal access to the marital privilege in federal court.⁵⁰

In the Eleventh Circuit, same-sex couples seeking access to federal benefits must leave and wed elsewhere.⁵¹ Even then, those same couples—and legally

⁴⁷ *In re Adoption of K.R.S.*, 109 So. 3d 176, 177 n.1 (Ala. Civ. App. 2012).

⁴⁸ FLA. STAT. § 63.042 (West 2014).

⁴⁹ Hon. Eric H. Holder, Jr., U.S. Attorney Gen., *Remarks at the Human Rights Campaign Greater New York Gala* (Feb. 10, 2014) <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140210.html> (summarizing federal rights and benefits).

⁵⁰ *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>.

⁵¹ The U.S. Government Accountability 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>.

married same-sex couples who later move to the Eleventh Circuit—will still be denied access to the wide range of state benefits, mutual responsibilities, and parental rights available to married partners of different sexes. That bar not only works to the detriment of employees, but also 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.

Sixty-two percent of Americans live in a jurisdiction that celebrates or recognizes marriages between people of the same sex.⁵² LGBT-friendly policies offer us tangible competitive advantages in employee recruitment and retention.⁵³ When faced with the evidence above, we can only conclude that we operate at a distinct disadvantage when looking to hire qualified, talented personnel in the states that do not allow same sex couples to marry. Married gay and lesbian job candidates may be reluctant to pursue job opportunities within the Eleventh Circuit, where their pre-existing marriages will not be recognized, and they can expect to lose access to certain previously-enjoyed state level benefits.⁵⁴ Single

⁵² Freedom to Marry, *States*, <http://www.freedomtomarry.org/states/> (last visited Nov. 13, 2014).

⁵³ Blazovich, *supra* n.19, at 7.

⁵⁴ Moving to a state that does not recognize same-sex marriages may even imperil preexisting parental rights over the children of same-sex couples. *See Matter of Seb C-M*, NYLJ 1202640083455 (Jan. 6, 2014) (denying adoption application of same-sex spouse because she already appeared on her child's birth

gays and lesbians may decide that the option of a future legally recognized marriage is enough to justify passing up employment opportunities in the Eleventh Circuit. And heterosexual individuals may decide that states hostile to marriage equality are not states in which they want to live and work.⁵⁵

Business, industry, and intellectual leaders have confirmed that these concerns are not hypothetical. Richard Florida, a leading urban studies theorist, states 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.⁵⁶ The Williams Institute found that “creative-class” Massachusetts residents in same-sex

certificate, but acknowledging that other jurisdictions may not recognize such a birth certificate, and that without formal adoption papers, the non-birth parent may lose all parental rights in those jurisdictions).

⁵⁵ 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 (individuals are moving from ideologically unfriendly communities to congruent communities).

⁵⁶ 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 in the three years before.⁵⁷

Before *Windsor*, Goldman Sachs and Citigroup also 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 U.S.⁵⁸ 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.”⁵⁹ 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.⁶⁰ The same logic holds true for employee transfers and migration across states. Employees with same-sex spouses—and their employers—face

⁵⁷ 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>.

⁵⁸ 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>.

⁵⁹ *Id.*

⁶⁰ 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>.

similar costs and lost productivity when facing the prospect of hiring and transfers into non-recognition states. Notably, as the rest of the country moves toward marriage equality, our hiring and retention problems in the Eleventh Circuit only increase: with more states providing marriage on equal terms, the less likely lesbian and gay employees will feel the need to live and work in states that do not.

These findings have been confirmed across the country, including in Virginia, where the former head of The College of William and Mary's Board of Visitors warned of this exact problem regarding Virginia's since-overturned marriage ban:

We already have lost valued gay and lesbian faculty to our competitors who do not discriminate. With changes in federal benefits soon available to legally married gay couples, we will lose more. Two able individuals told me [recently] that they are leaving for another state—one a top professor [in a science-technology field] and another a university administrator just recruited to Virginia a few years ago.⁶¹

Another professor commented, “[w]hile 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,

⁶¹ 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.

the antigay legal environment in Virginia did play a role in my job change.”⁶² Indeed, Virginia’s governor lauded the initial district court opinion overturning his state’s ban on same-sex marriage, noting the Commonwealth needed to ensure equality “to grow [Virginia’s] economy and attract the best businesses, entrepreneurs, and families.”⁶³

This evidence suggests that gay and lesbian employees may decide to leave the Eleventh Circuit for one of the many other states in which they can receive full federal and state benefits—whether they are single and wishing to marry, married out-of-state and desiring equal access to state and federal benefits, or simply motivated by the need for certainty in their own life planning. Or, facing a possible transfer *into* the Eleventh Circuit, an individual may choose to part ways with an employer rather than risk the detrimental effects of non-recognition upon themselves and their families. Other gay and lesbian workers may seek certainty and forego employment opportunities in the Eleventh Circuit altogether.

⁶² 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.12, at 67 (immediately after Michigan eliminated domestic partner benefits for public employees, college professors “started applying for jobs at universities with comprehensive domestic partnership benefits”).

⁶³ *Governor McAuliffe Statement on Bostic v. Rainey Ruling* (Feb. 14, 2014), <https://governor.virginia.gov/news/newsarticle?articleId=3302> (discussing 970 F. Supp. 2d 456 (E.D. Va. 2014)).

C. Marriage Discrimination Injures Our Businesses.

By not permitting same-sex couples to marry, Florida, Georgia, and Alabama impose significant administrative burdens on our businesses. Although we can, and often do, voluntarily attempt to lessen the burden on our employees, those workarounds impose additional unnecessary business expense, inhibiting our innovation and stunting our economic growth. While we can, through this extra burden, construct reasonable facsimiles of some marital benefits, we cannot entirely ameliorate the differential treatment of employees.

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

For employers, the patchwork of inconsistent state law creates significant burdens in the administration of benefits for employees whose marriages are not recognized by the state. For example, “[i]n [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[.]”⁶⁴ The situation is complicated further when mobile employees live, work, file taxes, and receive benefits in multiple jurisdictions.

Consider Georgia’s tax code. Although the federal tax code now recognizes

⁶⁴ Joanne Sammer & Stephen Miller, *The Future of Domestic Partner Benefits*, SOC’Y FOR HUM. RES. MGMT. (Oct. 21, 2013), <http://www.shrm.org/hrdisciplines/benefits/articles/pages/domestic-partner-benefits.aspx>.

valid marriages between same-sex couples, Georgia's state constitution states that "no union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage."⁶⁵ As a result, Georgia's Revenue Secretary has stated that same-sex married couples must file state tax returns separately, as single status.⁶⁶ The employer 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 burdens and expenses to us, which are further compounded by the need to apply multiple calculations for every similarly situated employee in every remaining non-recognition state.

Our mandated compliance with a discriminatory regime adds another dimension. Our human resources departments are the first stop for employees confused about conflicting legal rules. As a result, benefits administrators may have to give advice and recommendations despite their own questions and lack of legal knowledge. Even the best-informed human resources professional can

⁶⁵ GA. CONST. ART. I, § 4, PARA. 1.

⁶⁶ Georgia Dep't of Revenue, *Revenue Information Bulletin No. T-2013-10-25*, Oct. 25, 2013, https://etax.dor.ga.gov/TaxLawandPolicy/DOMA_bulletin_10-25-2013.pdf.

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.⁶⁷ This creates a significant administrative burden on companies to keep up with the rapidly changing legal landscape, and to then create and maintain complicated equitable policies and benefits.

For companies operating nationwide, many of whom have centralized HR functions, all of 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 into otherwise automated processes, a requirement that is both burdensome and more prone to human error. The burden on small employers is likewise onerous, as they may not be capable of devoting limited resources to administering conflicting laws, let alone establishing workarounds. Benefit administration 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

⁶⁷ 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.”).

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, some employers determine that it is in their business interest to incur the cost and administrative burden of “workarounds.” These employer-created benefit structures attempt 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. 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.⁶⁸ These and other 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.⁶⁹

To illustrate: after the *Windsor* decision, state-level tax decisions regarding

⁶⁸ See generally, *Broken Bargain*, *supra* n.12, 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>; Tara Siegel Bernard, *A Progress Report on Gay Employee Health Benefits*, N.Y. TIMES, Dec. 5, 2012, <http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits/>.

⁶⁹ 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 July 18, 2014).

individuals with same-sex spouses now “affect not only gross-up calculations for these employees, but also the taxability for state purposes of benefits made available to spouses of employees married to a person of the same sex.”⁷⁰ 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 U.S. 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.”⁷¹ It is estimated that grossing up for an employee who incurred between \$1,200 and \$1,500 in extra taxes costs the employer between \$2,000 and \$2,500.⁷² In other words, employers with a grossing up policy pay more to provide equivalent benefits.⁷³

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

⁷⁰ Peter K. Scott, *State Positions on Same-Sex Married Couple Filing Status Will Affect Employers*, WORLDWIDE ERC (Feb. 3, 2014), <http://www.worldwideerc.org/Blogs/MobilityLawBlog/Lists/Posts/Post.aspx?List=c020aee5%2D48ad%2D47b2%2D8295%2Da4cf71ba9e34&ID=192>.

⁷¹ U.S. Office of Pers. Mgmt., *supra* n.63.

⁷² Bernard, *supra* n.60.

⁷³ *Broken Bargain*, *supra* n.12, at 74.

or a partner's children, and the impact of marital status.⁷⁴ In addition, workarounds can raise concerns about possible adverse publicity, complexity in providing and administering domestic partner benefits, and potential legal liabilities.⁷⁵ In short, workarounds themselves cause administrative burden, sometimes requiring employers with grossing up policies to retain experts to craft the policies and structure systems to account for gross-up amounts, as well as to educate human resources, benefits, and payroll administrators.

Workarounds may also attract attention from regulators or cause tension with certain shareholders or investors due to the administrative burdens and increased costs. Resolving these problems 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 those barred from such marriage by their resident state

⁷⁴ For an overview of the complexities of grossing-up, *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

⁷⁵ Li & Nagar, *supra* n.15, at 531.

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 States’ Bans Require Us to Uphold and Affirm Discrimination Injurious to Our Corporate Cultures.

The denial of marriage rights to same-sex couples in Florida, Georgia, and Alabama goes against our core values and principles. As employers, we recognize the value of diversity, and we want the jurisdictions in which we operate to recognize the need for a society that enables all married persons to “live with pride in themselves and their unions,”⁷⁶ and that support us in honoring the “personal dignity and autonomy” of all of our married employees.⁷⁷

We develop and implement nondiscrimination policies not only because they are the right thing to do, but also because these policies are crucial to our ability to recruit and retain excellent employees. The ability to hire the best human capital 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 Florida,

⁷⁶ *Windsor*, 133 S. Ct at 2689.

⁷⁷ *Kitchen*, 755 F.3d at 1218 (quoting *Lawrence v. Texas*, 539 U.S. 558, 574 (2003)).

Georgia, and Alabama’s laws prevents us from treating all of our similarly situated employees identically, even if we attempt to do so through workarounds. Thus we become the *de facto* face of these states’ discriminatory laws, our stated policies notwithstanding.

Our employees are our most valuable assets—and yet we are forced to treat many of them as second-class citizens. The reality is that even “small differences in how people are treated . . . convey strong messages about the[ir] perceived relative value.”⁷⁸

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.⁷⁹

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

Diversity provides benefits only if it can be well-managed within the organization.⁸⁰ In 2011, an interview study presented substantial anecdotal

⁷⁸ Sears et al., *supra* n.17, at 6.

⁷⁹ Li & Nagar, *supra* n.15, at 543 (internal citations omitted).

⁸⁰ 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),

evidence that failure to manage diversity could lead to high turnover, loss of talented employees, litigation, and bad publicity.⁸¹ 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. 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.⁸² 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.”⁸³ We must propagate the State’s message that these employees and their relationships are not “worthy of dignity in the community equal with all other marriages.”⁸⁴

As a result, we are hampered in our ability to make our businesses as diverse and inclusive as possible, despite our stated policies and our recognized business

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/49638/the_business_case_for_equality_and_diversity.pdf.

⁸¹ *Id.* (citing Mustafa F. Ozbilgin & Ahu Tatli, *Mapping out the field of equality and diversity: rise of individualism and voluntarism*, 64 HUMAN RELATIONS 1229-1253 (2011)).

⁸² *Windsor*, 133 S. Ct. at 2694.

⁸³ *Id.* at 2695.

⁸⁴ *Kitchen*, 755 F.3d at 1213.

case. We become, in short, complicit in our employees' injury—and our own.

CONCLUSION

Employees with partners of the same sex should be permitted to marry if they so choose, and then should be treated identically to their married heterosexual counterparts. By requiring otherwise, Florida, Georgia, and Alabama force 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, and amici respectfully urge that the district court judgment be affirmed.

Respectfully submitted,

Dated: December 23, 2014

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: December 23, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that all registered attorneys in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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