

Nos. 14-2526 & 14-2386

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IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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VIRGINIA WOLF, et al.,  
*Plaintiffs-Appellees.*

v.

SCOTT WALKER, et al.,  
*Defendants-Appellants,*

and

MARILYN RAE BASKIN, et al.,  
*Plaintiffs-Appellees.*

v.

PENNY BOGAN, et al.,  
*Defendants-Appellants,*

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Appeal from the United States District Court for the Western District of Wisconsin  
(3:14-cv-00064-BBC)

Appeal from the United States District Court for the Southern District of Indiana  
(1:14-cv-00355-RLY-TAB)

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BRIEF OF 23 EMPLOYERS AND ORGANIZATIONS REPRESENTING EMPLOYERS  
AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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August 5, 2014

Susan Baker Manning  
Michael L. Whitlock  
Jared A. Craft  
Katherine Moskop  
Jawad Muaddi  
John A. Polito  
Erik Wilson  
BINGHAM McCUTCHEN LLP  
2020 K Street, N.W.  
Washington, D.C. 20006  
202.373.6000

Attorneys for 23 Employers as *Amici Curiae*

*This brief is filed on behalf of the following businesses and cities:*

Alcoa Inc.

Amazon.com, Inc.

Bronze Optical

CBS Corporation

Cisco Systems, Inc.

City of Madison, Wisconsin

Cummins Inc.

Hanson Dodge Creative

Hinckley Design and Production

Levi Strauss & Co.

Marriott International, Inc.

Outerwall Inc.

Pfizer, Inc.

Rockwell Automation, Inc.

Staples, Inc.

Starbucks Coffee Company

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

Target Corporation

United Therapeutics Corporation

Viacom Inc.

Wellpoint, Inc.

Wisconsin Education Association Council

Witeck Communications, Inc.

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## **CORPORATE DISCLOSURE STATEMENTS OF CORPORATE AMICI**

**Alcoa Inc.** is a corporation organized under the laws of the Commonwealth of Pennsylvania. Alcoa is a global leader in lightweight metals engineering and manufacturing. 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 numerous plants and employees throughout the states covered by the Seventh Circuit, including manufacturing facilities in Evansville (Newburgh/Warrick), Lafayette & LaPorte Indiana; and Itasca & Danville Illinois.

**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 Seventh Circuit.

**Bronze Optical** is a limited liability company organized under the laws of the State of Wisconsin. Bronze Optical is an independently owned retail eyewear dispensary and has no parent company. No publicly held corporation owns any stock in the company. The vast majority of Bronze Optical's clients and employees live and work within the Seventh Circuit.

**CBS Corporation** ("CBS 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 one television station in Indianapolis, Indiana.

**Cisco Systems, Inc.** is a corporation organized under the laws of California. It designs, manufactures, and sells networking and communications products. It has no parent corporation and no publicly-held company owns 10% or more of its stock. The company has nearly 820 employees and contractors in the Seventh Circuit.

**Cummins Inc.** (“Cummins”) is a corporation organized under the laws of Indiana. Cummins does not have a parent company and no publicly held corporation owns 10% or more of its stock. Cummins is a corporation of complementary business units that design, manufacture, distribute and service diesel and natural gas engines and related technologies. Headquartered in Columbus, Indiana, Cummins currently employs approximately 48,000 people worldwide, and serves customers in approximately 190 countries and territories through a network of approximately 600 company- owned and independent distributor locations and approximately 6,500 dealer locations. In the 7th Circuit alone, Cummins has nearly 10,000 employees in Indiana, Wisconsin, and Illinois at more than 50 sites, including 11 manufacturing sites, several research and development sites and many distributor locations.

**Hanson Dodge Creative** is a Milwaukee, Wisconsin-based company with 75 employees. For more than 30 years, Hanson Dodge Creative has connected active lifestyle brands to the people who love them, delivering meaningful experiences that ultimately lead to brand sustainability.

**Hinckley Design and Production** is a Madison, Wisconsin-based company consisting of a small cast of camera operators and developers who work to integrate interactive web design and digital video both technically and artistically. Hinckley Design and Production does not have a parent corporation and no publicly traded company owns a 10% or more of its stock.

**Levi Strauss & Co.** is a corporation organized under the laws of Delaware. Levi Strauss & Co. is one of the world’s largest brand-name apparel companies and a global leader in jeanswear. Levi Strauss & Co. does not have a parent corporation and no public company 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 Illinois, Indiana, and Wisconsin.

**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. Marriott manages or franchises hotels and has thousands of employees throughout the Seventh Circuit. 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 the world.

**Outerwall Inc.** is a corporation organized under the laws of Delaware. Outerwall Inc. is a leader in automated retail providing kiosks in grocery stores, drug stores, mass merchants, malls, and other retail locations in the United States, Canada, Puerto Rico, the United Kingdom, and Ireland. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. It currently has employees and/or conducts business throughout the Seventh.

**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 Seventh 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.

**Rockwell Automation, Inc.** ("Rockwell Automation") 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 and 1,800 of those employees in Wisconsin alone.

**Staples, Inc.** ("Staples") 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 7th Circuit alone, Staples has more than 3,200 employees in Indiana, Wisconsin, and Illinois at more than 87 sites, including 81 retail stores and other distribution facilities and sales offices.

**Starbucks Coffee Company** 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, including all states in the Seventh Circuit, 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 Indiana and Wisconsin) 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.

**Target Corporation** 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 thousands in the states of Illinois, Indiana and Wisconsin.

**United Therapeutics Corporation** is a corporation organized under the laws of Delaware. It is a biotechnology company focused on the development and commercialization of unique medicinal products worldwide. It does not have a parent corporation. As of December 31, 2013, BlackRock, Inc., a publicly-traded investment management corporation, reported that it owns 14.1% of United Therapeutics Corporation. It has employees and consultants who reside and work within the Ninth Circuit and the company is involved in recruiting additional employees within the Ninth Circuit. In addition, its medicines are prescribed by physicians and distributed to patients throughout the Seventh 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 every state in the Seventh Circuit and distributes its creative content throughout the circuit.

**Wellpoint, Inc.** ("WellPoint") is one of the nation's leading health benefits companies. We believe that our health connects us all. So we focus on being a valued health partner and delivering quality products and services that give members access to the care they need. With nearly 69 million people served by our affiliated companies including more than 37 million enrolled in our family of health plans, we can make a real difference to meet the needs of our diverse customers. We're an independent licensee of the Blue Cross and Blue Shield Association. We serve members as the Blue Cross licensee for California; and as the Blue Cross and Blue Shield licensee for Colorado, Connecticut, Georgia, Indiana, Kentucky, Maine, Missouri (excluding 30 counties in the Kansas City area), Nevada, New Hampshire, New York (as the Blue Cross Blue Shield licensee in 10 New York City metropolitan and surrounding counties and as the Blue Cross or Blue Cross Blue Shield licensee in selected upstate counties only), Ohio, Virginia (excluding the Northern Virginia suburbs of Washington, D.C.), and Wisconsin. In most of these service areas, our plans do business as Anthem Blue Cross, Anthem Blue Cross and Blue Shield, Blue Cross and Blue Shield of Georgia and Empire Blue Cross Blue Shield, or Empire Blue Cross (in the New York service areas). We also serve customers in other states through our Amerigroup and CareMore subsidiaries. To find out more about us, go to [wellpoint.com](http://wellpoint.com).

**The Wisconsin Education Association Council** ("WEAC") is a labor organization comprised of tens of thousands of public employees. WEAC seeks to advance the interests of its members in a wide range of issues that affect the wages, benefits and working conditions of its members. WEAC and its affiliates employ 46 professional and associate staff located throughout the State of Wisconsin. WEAC is an equal opportunity employer and provides domestic partnership benefits to the extent allowed by law. WEAC recruits professional staff from throughout the United States. Wisconsin's same sex marriage ban places WEAC at a competitive disadvantage in recruiting and retaining the best qualified employees.

**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. Witeck Communications represents corporations with employees who live and work within the Seventh Circuit.



## INTEREST OF *AMICI CURIAE*<sup>1</sup>

This brief is submitted with the consent of all parties pursuant to Federal Rule of Appellate Procedure 29(a).

*Amici* include technology, materials, financial services, pharmaceutical, apparel, and entertainment companies; hoteliers and restaurateurs, service providers, consultants, designers, and municipalities, ranging from small businesses to Fortune 500 members, all of whom 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 Wisconsin and/or Indiana, both 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, placing 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 administer

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<sup>1</sup> 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.

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 Wisconsin and Indiana, 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 our ability to grow and maintain our business. 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 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 opinions in the above-captioned cases help 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

On June 26, 2013, the Supreme Court held unconstitutional Section 3 of the Defense of Marriage Act of 1996 (“DOMA”), because 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.”<sup>2</sup> 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.”<sup>3</sup>

Almost exactly one year later, on June 25, 2014, the United States Court of Appeals for the Tenth Circuit held that Utah may not deny marriage to persons wishing to wed someone of the same sex, and may not refuse to recognize the

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<sup>2</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013) (invalidating 1 U.S.C. § 7).

<sup>3</sup> *Id.* at 2689.

marriages of same-sex couples lawfully married elsewhere.<sup>4</sup> The Court recognized that same-sex couples have a fundamental right to “marry, establish a family, raise children, and enjoy the full protection of a state’s marital laws” no different than that of those who wish to marry a person of a different sex.<sup>5</sup> Utah’s same-sex marriage restriction and similar statutes thus violate the Constitutional guarantees of equal protection and due process.<sup>6</sup> The United States Court of Appeals for the Fourth Circuit has recently reached a similar conclusion in a case arising out of Virginia,<sup>7</sup> as have several federal district courts regarding their respective state’s prohibitions against same-sex marriage.<sup>8</sup>

As employers, we know operating in today’s fractured landscape of conflicting state laws on marriage stunts our economic growth and innovation by forcing us to work harder and invest more to achieve the same return on our

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<sup>4</sup> *Kitchen v. Herbert*, No. 13-4178 (RJS), 2014 WL 2868044, at \*1 (10th Cir. June 25, 2014).

<sup>5</sup> *Id.* at \*1, \*32.

<sup>6</sup> *Id.* at \*21, \*32.

<sup>7</sup> *Bostic v. Schaefer*, 2:13-cv-00395 (AWA-LRL), 2014 WL 3702493 (4th Cir. July 28, 2014).

<sup>8</sup> *See infra*, n.36; *De Leon v. Perry*, 975 F.Supp.2d 632 (W.D. Tex. 2013); *see also Wolf v. Walker*, 986 F.Supp.2d 982 (W.D. Wis. 2014); *Baskin v. Bogan*, No. 1:14-cv-00355-RLY-TAB, 2014 WL 2884868, \*1 (S.D. Ind. June 25, 2014).

investment.<sup>9</sup> 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.”<sup>10</sup> They are among our core principles—and we have confirmed their value through observation and rigorous analysis. We, and many of our peers, recognize that diversity is crucial to innovation and marketplace success. Members of the lesbian, gay, bisexual, and transgender (“LGBT”) community are one source of that diversity.<sup>11</sup> An April 2013 Small Business Majority survey reported that sixty-nine percent of small

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<sup>9</sup> While this brief is primarily written from the perspective of private corporate employers, and contains language specific to such employers, all arguments apply with equal force to governmental employers such as the City of Madison, Wisconsin.

<sup>10</sup> 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/](http://www.forbes.com/forbesinsights/innovation_diversity/) (a comprehensive study of 300 senior diversity officers at companies worldwide with revenues of at least \$500 million).

<sup>11</sup> *Id.* at 5.

business owners support non-discrimination laws protecting LGBT workers.<sup>12</sup> 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.<sup>13</sup>

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.”<sup>14</sup> Inclusive companies are more open to new ideas and opportunities, while reducing overconfidence regarding approaching challenges.<sup>15</sup> Companies that are diverse

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<sup>12</sup> 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>.

<sup>13</sup> Human Rights Campaign, *2014 Corporate Equality Index*, 9, [http://www.hrc.org/files/assets/resources/cei\\_2014\\_full\\_report\\_rev7.pdf](http://www.hrc.org/files/assets/resources/cei_2014_full_report_rev7.pdf)

<sup>14</sup> 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](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)).

<sup>15</sup> 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>.

and inclusive obtain better profits and other outputs, thanks to improved team collaboration and commitment.<sup>16</sup> 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.<sup>17</sup>

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” among LGBT employees.<sup>18</sup> 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

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<sup>16</sup> See 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). For examples, see Forbes Insights, *supra* n.11, at 5.

<sup>17</sup> Todd Sears et al., *Thinking Outside the Closet: How Leaders Can Leverage the LGBT Talent Opportunity*, 6, OUT ON THE STREET (2011).

<sup>18</sup> 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>.

in operating performance” relative to companies that did not adopt such policies.<sup>19</sup>

Diverse workforces also help capture new clients.<sup>20</sup> 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.<sup>21</sup> Despite the statewide prohibition of same-sex marriages, various cities and counties in Wisconsin<sup>22</sup> and Indiana<sup>23</sup> provide benefits to same-sex domestic partners or have established domestic partnership registries, some of which convey

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<sup>19</sup> Li & Nagar, *supra* n.16, at 529, 538-541; *see also* Williams Institute, *supra* n.19, 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.”).

<sup>20</sup> Forbes Insights, *supra* n.11, at 11.

<sup>21</sup> Williams Institute, *supra* n.19, at 21. California has similar state-wide requirements. *Id.* (citing CAL. PUB. CONT. CODE §§ 10295.3(a)(1), (e)(1)).

<sup>22</sup> Fair Wisconsin, *Employers Offering Domestic Partner Benefits*, <http://fairwisconsineducationfund.com/resources/employers-offering-domestic-partner-benefits/> and <http://fairwisconsin.com/about/fwinc/>; Catherine W. Idzerda, *Rock County OKs Benefits for Same-Sex Couples*, JANESVILLE GAZETTE (Jan. 23, 2014), available at <http://archive.today/qsIuM>.

<sup>23</sup> Katie Mettler, *Indy Passes Benefits for Domestic Partners*, INDIANA DAILY STUDENT (Aug. 15, 2012), available at <http://bl-ids-website.ads.iu.edu/news/story.aspx?id=87933>; *Mayor Signs Off on Domestic-Partner Ordinance*, INDIANAPOLIS BUSINESS JOURNAL (Aug. 23, 2012), available at <http://www.ibj.com/mayor-signs-off-on-domestic-partner-ordinance/PARAMS/article/36274>.



limited benefits. Wisconsin has established civil domestic partnerships, but the provision does not provide same-sex couples with married status for the purpose of federal benefits.<sup>24</sup>

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.<sup>25</sup> 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

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<sup>24</sup> See, e.g., U.S. Internal Revenue Serv., IR-2013-72, Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized For Federal Tax Purposes; Ruling Provides Certainty, Benefits and Protections Under Federal Tax Law for Same-Sex Married Couples (Aug. 29, 2013), available at <http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes%3B-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples>.

<sup>25</sup> “[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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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

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<sup>26</sup> 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).

<sup>27</sup> 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>.

<sup>28</sup> 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 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](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.”).

crucial.<sup>29</sup> Through such plans, we foster a positive employer/employee relationship and retain satisfied and engaged workers, who in turn are more productive and perform better than less-satisfied colleagues.<sup>30</sup>

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.”<sup>31</sup> 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.”<sup>32</sup> Of those gay and lesbian professionals who left, “almost half . . . said that if their employer offered more or better benefits they would have very

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<sup>29</sup> 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](http://outandequal.org/documents/2006_Workplace_Survey052306.pdf).

<sup>30</sup> MetLife, *supra* n.27, at 20; *see generally* Andruss, *supra* n.29; Messmer, *supra* n.29; C. Matthew Schulz, *Recruiting and retaining the best and brightest talent*, L.A. DAILY J., Dec. 26, 2013.

<sup>31</sup> 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.20, at 8-9.

<sup>32</sup> 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.”<sup>33</sup> 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.<sup>34</sup>

The mandate in Wisconsin and Indiana requires that, when dealing with state marital benefits, we single out colleagues with same-sex partners 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 companies from reaching our full economic potential because it dissuades 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.**

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

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<sup>33</sup> *Id.* at Executive Summary; *see also* Williams Institute, *supra* n.19, at 17 (“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 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).

<sup>34</sup> Level Playing Field Institute, *supra* n.33, at Executive Summary.

partner's sex.<sup>35</sup> Each such jurisdiction also recognizes the validity of same-sex marriages lawfully celebrated elsewhere.

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<sup>35</sup> Marriages between same-sex couples are licensed by California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, the District of Columbia, the Cheyenne and Arapaho Tribes of Oklahoma, the Coquille Tribe, the Confederated Tribes of the Colville Nation, Iipay Nation of Santa Ysabel, the Leech Lake Band of Ojibwe, the Little Traverse Bay Bands of Odawa Indians, the Pokagon Band of Potawatomi Indians, and the 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.*; *Geiger v. Kitzhaber*, 6:13-CV-01834-MC, 2014 WL 2054264 (D. Or. May 19, 2014); *Whitewood v. Wolf*, 1:13-CV-1861, 2014 WL 2058105 (M.D. Pa. May 20, 2014); 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. 2013-344.1&j; COQUILLE INDIAN TRIBAL CODE § 740.010; *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.

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.<sup>36</sup> 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.<sup>37</sup>

While “marriage is more than a routine classification for purposes of certain statutory benefits,”<sup>38</sup> as a legal status, marriage touches numerous aspects of life, both practical and profound.<sup>39</sup> Federal and state law provide the working family 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 work. Under federal law, individuals married to same-sex spouses benefit from equal treatment regarding health

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<sup>36</sup> *Windsor*, 133 S. Ct. at 2696 (invalidating 1 U.S.C. § 7).

<sup>37</sup> *Id.* at 2695-96.

<sup>38</sup> *Id.* at 2692.

<sup>39</sup> *Kitchen*, 2014 WL 2868044, at \*17 (statutes restricting marriage between same-sex couples “bring[] financial harm to children of same-sex couples . . . raise[] the cost of health care for families by taxing health benefits provided by employers to their workers’ same-sex spouses’ and ‘den[y] or reduce[] benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.’” (quoting *Windsor*, 133 S. Ct. at 2695)).

insurance, military benefits, taxes, and immigration law.<sup>40</sup> 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.<sup>41</sup>

However, gay and lesbian employees in committed relationships in Wisconsin and Indiana are categorically denied access to these rights and benefits—and to important rights and responsibilities at the state level. In Indiana, for example, only spouses—not unmarried partners—can be added as beneficiaries to many state benefit programs.<sup>42</sup> In Wisconsin, which recognizes domestic partnerships, domestic partners receive less than one-quarter of the benefits and

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<sup>40</sup> See Hon. Eric H. Holder, Jr., U.S. Attorney Gen., *Remarks at the Human Rights Campaign Greater New York Gala* (Feb. 10, 2014) <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140210.html> (summarizing federal rights and benefits).

<sup>41</sup> *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>.

<sup>42</sup> See, e.g., Indiana Public Retirement System, “Defense of Marriage Act (DOMA) FAQs,” available at <http://www.in.gov/inprs/2846.htm> (unmarried partners cannot, for example, receive any state-sponsored survivor benefits, be covered under a partner’s 401[h] Medical Benefit Account, or use FMLA leave to care for a sick or dying partner).



protections afforded to spouses.<sup>43</sup> In both states, the law only grants legal spouses the right to make certain medical decisions.<sup>44</sup>

In states where same-sex marriage 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 and are legally wed elsewhere.<sup>45</sup> Even then, those same couples—or legally married same-sex couples who later move to Wisconsin or Indiana—will still be denied access to the wide range of state benefits and mutual responsibilities available to married partners of different sexes. That bar works to the detriment of employees, and to employers

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<sup>43</sup> Christopher S. Krimmer, *Solutions: Federal Benefits for Married Same-Sex Couples*, WISCONSIN LAWYER, Jan. 2014, located at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=87&Issue=1&ArticleID=11280>; Fair Wisconsin, *Wisconsin Domestic Partnership Protections Reference Guide*, [http://assets3.percolatesite.us/w/005/images/0000/0676/dp\\_reference\\_guide\\_clerk\\_info.pdf?1269459763](http://assets3.percolatesite.us/w/005/images/0000/0676/dp_reference_guide_clerk_info.pdf?1269459763).

<sup>44</sup> Shannon Minter, *Marriage, Domestic Partnerships, and Civil Unions: An Overview of Relationship Recognition of Same-Sex Couples Within the United States* at 12 (March 22, 2012), available at [http://www.americanbar.org/content/dam/aba/events/labor\\_law/2012/03/national\\_conference\\_on\\_equal\\_employment\\_opportunity\\_law/mw2012eeo\\_minter.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/labor_law/2012/03/national_conference_on_equal_employment_opportunity_law/mw2012eeo_minter.authcheckdam.pdf) (in Wisconsin, domestic partners only receive “some [of the] medical decision-making” rights afforded to spouses); Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1461 (2012) (Indiana law “allows a same-sex couple to cohabit but renders them legal strangers for all other purposes”).

<sup>45</sup> 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>.



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.**

Forty-four percent of Americans—and over half of Seventh Circuit residents—live in a jurisdiction that celebrates or recognizes marriages between people of the same sex.<sup>46</sup> LGBT-friendly policies offer us competitive advantages in employee recruitment and retention.<sup>47</sup> 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 within those states where their pre-existing marriages will not be recognized, and they can expect to lose access to certain previously-enjoyed state level benefits. Single gays and lesbians may decide that the option of a future legally recognized marriage is enough to justify passing up employment opportunities in those states that deny marriage to same-sex couples. And heterosexual individuals may decide that states hostile to marriage equality are not

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<sup>46</sup> Freedom to Marry, *States*, available at <http://www.freedomtomarry.org/states/> (last visited July 15, 2014); U.S. Census Bureau, *State & County QuickFacts*, available at <http://quickfacts.census.gov/qfd/index.html> (last visited July 15, 2014) (calculated using the Bureau's 2013 population estimates for each state in the Seventh Circuit).

<sup>47</sup> See Blazovich, *supra* n.20, at 7.

states in which they want to live and work.<sup>48</sup>

Business, industry, and intellectual leaders have confirmed that this is not merely hypothetical. Richard Florida, a leading urban studies theorist, argues that members of the “creative class—the 40 million workers, a third of the American workforce—the scientists and engineers, innovator[s] and entrepreneurs, researchers and academics, architects and designers, artists, entertainers and media types and professionals in business, management, healthcare and law” use diversity as a proxy for determining whether a city would provide a welcoming home.<sup>49</sup> The Williams Institute found that “creative-class” Massachusetts residents in same-sex relationships were 2.5 times more likely to have moved there in the three years after marriage equality than in the three years before.<sup>50</sup>

Before *Windsor*, Goldman Sachs and Citigroup reported problems with recruiting qualified talent from outside the United States, as the then-operative

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<sup>48</sup> See Matt Motyl et al., *How Ideological Migration Geographically Segregates Groups*, 51 J. EXPERIMENTAL SOC. PSYCHOL. 1 (2014), available at [http://www.researchgate.net/publication/254929982\\_How\\_Ideological\\_Migration\\_Geographically\\_Segregates\\_and\\_Polarizes\\_Groups/file/60b7d52efea63cb4b3.pdf](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).

<sup>49</sup> 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](http://www.hrc.org/files/assets/resources/MEI-2012_rev.pdf).

<sup>50</sup> 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>.

immigration system made it difficult for same-sex partners to immigrate to the U.S.<sup>51</sup> 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.”<sup>52</sup> 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.<sup>53</sup> The same logic holds true for employee transfers and migration across states. Employees with same-sex spouses—and their employers—face similar costs and lost productivity when facing the prospect of hiring and transfers into non-recognition states.

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

We already have lost valued gay and lesbian faculty to

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<sup>51</sup> 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>.

<sup>52</sup> *Id.*

<sup>53</sup> 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>.

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.<sup>54</sup>

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, the antigay legal environment in Virginia did play a role in my job change.”<sup>55</sup> Indeed, Virginia’s governor lauded a 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.”<sup>56</sup>

This evidence suggests that gay and lesbian employees may decide to leave

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<sup>54</sup> 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](http://www.washingtonpost.com/lifestyle/magazine/outgoing-rector-warns-virginia-on-gay-marriage/2013/08/12/d250d466-e956-11e2-a301-ea5a8116d211_story.html).

<sup>55</sup> 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.13, 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”).

<sup>56</sup> *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)).

marriage inequality states so they can 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 Seventh Circuit marriage-inequality states. After *Windsor*, planning for retirement may be more straightforward in marriage equality jurisdictions, where spouses have clearer rights to benefits.

### **C. Marriage Discrimination Injures Our Businesses.**

By not permitting same-sex couples to marry, Wisconsin and Indiana impose significant administrative burdens on our businesses, which hamper our ability to attract and retain the most qualified workforce. 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 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 administration of benefits for employees whose marriages are not recognized by the state creates significant and unavoidable burdens that are a 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[.]”<sup>57</sup> The situation is complicated further when mobile employees live, work, file taxes, and receive benefits in multiple jurisdictions.

For example, consider Wisconsin’s tax code. Although the federal tax code now treats same-sex couples as married as long as the marriage was recognized in the state in which it was celebrated, the state’s code permits joint filing only by a “husband and wife” with no cross-reference to the federal tax code.<sup>58</sup> Thus, married same-sex couples must file state tax returns separately, as single status.<sup>59</sup> Indiana’s tax code requires the same result.<sup>60</sup> The employer must therefore: 1) treat an employee with a same-sex spouse as unmarried for state tax purposes; 2) treat

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<sup>57</sup> 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>.

<sup>58</sup> WIS. STAT. ANN. § 71.03 (WEST 2014).

<sup>59</sup> Wisconsin Dep’t of Revenue, “Tax Guidance For Individuals In A Same-Sex Marriage,” *available at* <http://www.revenue.wi.gov/taxpro/news/130906.html>.

<sup>60</sup> Indiana Dep’t of Revenue, “Same-Sex Marriage Tax Filing Guidance,” *available at* <http://www.in.gov/dor/4895.htm>.

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 non-recognition state.

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. 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 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.<sup>61</sup> The administrative burden on companies required to keep up with the rapidly changing legal landscape, and to then create equitable policies and benefits, is significant.

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<sup>61</sup> 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.”).

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 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.<sup>62</sup> 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.<sup>63</sup>

To illustrate: after the *Windsor* decision, state-level tax decisions regarding 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.”<sup>64</sup> 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

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<sup>62</sup> See generally, *Broken Bargain*, *supra* n.13, 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, <http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits/>.

<sup>63</sup> 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/>.

<sup>64</sup> 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>.

agency \$1,713.80.”<sup>65</sup> 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.<sup>66</sup> In other words, employers with a grossing up policy pay more to provide equivalent benefits.<sup>67</sup>

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.<sup>68</sup> In addition, workarounds can raise concerns about possible adverse publicity, complexity in providing and administering domestic partner benefits, and potential legal

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<sup>65</sup> U.S. Office of Pers. Mgmt., *supra* n.64 (using the following withholding rates: federal income tax, 28%; Medicare, 1.45%; Social Security, 6.2%; state income tax, 6%).

<sup>66</sup> Bernard, *supra* n.63.

<sup>67</sup> *Broken Bargain*, *supra* n.13, at 74.

<sup>68</sup> 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](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](http://www.mwe.com/info/pubs/solomon_tiemann_tax_gross_-up_for_employees.pdf).

liabilities.<sup>69</sup> In short, workarounds themselves cause administrative burden, sometimes requiring *amici* 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 attract attention from regulators or cause tension with certain shareholders or investors due to the administrative burdens and incremental costs, all of which consume 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 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 Wisconsin and Indiana goes against our core values and principles. As employers, we recognize the value of diversity, and we want to operate in jurisdictions that understand the need for a society that enables all married persons to “live with pride in themselves and their

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<sup>69</sup> Li & Nagar, *supra* n.16, at 531 (citing Hewitt Associates, *Benefit programs for domestic partners and same-sex spouses* (2005)).

unions,”<sup>70</sup> and that support us in honoring the “personal dignity and autonomy” of all of our married employees.<sup>71</sup>

We developed and implemented nondiscrimination policies both because they are the right thing to do, but also because these policies are crucial to our ability to recruit and retain excellent employees. In turn, 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 drastically different state 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 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.<sup>72</sup>

An organization’s policies toward its employees, whether an

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<sup>70</sup> *Windsor*, 133 S. Ct at 2689.

<sup>71</sup> *Kitchen*, 2014 WL 2868044, at \*21 (quoting *Lawrence v. Texas*, 539 U.S. 558, 574 (2003)).

<sup>72</sup> *Sears et al.*, *supra* n.18, at 6.

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.<sup>73</sup>

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.<sup>74</sup> In 2011, an interview study presented substantial anecdotal evidence that failure to manage diversity could lead to high turnover, loss of talented employees, litigation, and bad publicity.<sup>75</sup> 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

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<sup>73</sup> Li & Nagar, *supra* n.16, at 543 (internal citations omitted).

<sup>74</sup> 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](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/49638/the_business_case_for_equality_and_diversity.pdf).

<sup>75</sup> *Id.* (citing Mustafa F. Ozbilgin & Ahu Tatli, *Mapping out the field of equality and diversity: rise of individualism and voluntarism*, 64 HUM. RELATIONS 1229-1253 (2011), [https://www.academia.edu/562416/Mapping\\_out\\_the\\_field\\_of\\_equality\\_and\\_diversity\\_rise\\_of\\_individualism\\_and\\_voluntarism](https://www.academia.edu/562416/Mapping_out_the_field_of_equality_and_diversity_rise_of_individualism_and_voluntarism)).

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.<sup>76</sup> 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.”<sup>77</sup> 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.”<sup>78</sup>

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

## CONCLUSION

Employees with partners of the same sex should be permitted to marry if they so choose, and then should be treated identically to their married heterosexual counterparts. By requiring otherwise, Wisconsin and Indiana 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

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<sup>76</sup> *Windsor*, 133 S. Ct. at 2694.

<sup>77</sup> *Id.* at 2695.

<sup>78</sup> *Kitchen*, 2014 WL 2868044, at \*15 (citing *Windsor*, 133 S. Ct. at 2692).

the Court alleviates that harm, and *amici* respectfully urge that the judgment of the United States District Court be affirmed.

Respectfully submitted,

Dated: August 5, 2014

BINGHAM McCUTCHEN LLP

By: /s/ Susan Baker Manning

Susan Baker Manning

Michael L. Whitlock

Jared A. Craft

Katherine Moskop

Jawad Muaddi

John A. Polito

Erik Wilson

2020 K Street, NW

Washington, D.C. 20006

202.373.6000

*Attorneys for Amici Curiae*

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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 6,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: August 5, 2014

BINGHAM McCUTCHEN LLP

By: */s/ Susan Baker Manning*  
*Attorney for Amici Curiae*



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BINGHAM McCUTCHEN LLP

By: /s/ Susan Baker Manning  
*Attorney for Amici Curiae*