No. 14-124

In The
Supreme Court of the United States

GARY R. HERBERT, Governor of Utah, et al.,

Petitioners,

v.

DEREK KITCHEN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Courts Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* COLAGE; EQUALITY FEDERATION; FAMILY EQUALITY COUNCIL; FREEDOM TO MARRY; AND PARENTS, FAMILIES & FRIENDS OF LESBIANS & GAYS, INC. IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae ("*Amici*") are organizations dedicated to securing our nation's promise of liberty, equality, and the pursuit of happiness for all American families. Some *amici* focus on working with the children of lesbian, gay, bisexual, and transgender ("LGBT") parents and with LGBT youth. *Amici*'s constituents are typical American families, with the same joys, challenges, and responsibilities as other families. Yet these families also must overcome official governmental opprobrium in the form of laws that tangibly harm them and that stigmatize and de-legitimize their family relationships socially, psychologically, and legally.

COLAGE is the only national organization for and by people who have an LGBT parent. COLAGE approaches its work with the understanding that living in a world that discriminates against and treats these families differently can be isolating and challenging for children. Founded in 1990, COLAGE has online networks, local chapters, published resources,

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[1] Pursuant to Rules 37.3 and 37.6 of the Rules of the Supreme Court, all parties have consented to the filing of this *amici curiae* brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *Amici*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no persons or entities other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

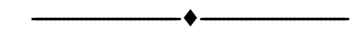
and direct programming and provides youth empowerment and leadership training on the myriad issues important to LGBT families. Based on its 25-year experience working directly with thousands of people nationwide with LGBT parents, COLAGE can attest to the critical importance for children of having their parents' relationships recognized and respected on every social, institutional, political, and legal level.

Since 1997, Equality Federation has partnered with state-based organizations that work to improve the lives of LGBT people in their own communities. Equality Federation provides resources, trainings, and collaborative opportunities to maximize the efficacy of such organizations. Equality Federation supports partner organizations on a wide spectrum of issues and concerns, including securing the freedom to marry, ensuring that all LGBT people are protected from discrimination in employment, housing, and public accommodations, and building leaders who can propel their organizations forward.

Family Equality Council is a community of parents and children, grandparents and grandchildren that reaches across the country, connecting, supporting, and representing LGBT parents and their children. Family Equality Council works extensively with the children of LGBT parents, including through its Outspoken Generation program, which empowers young adults with LGBT parents to speak out about their families, share their own stories, and become advocates for family equality.

Freedom to Marry is the campaign to win marriage nationwide. Freedom to Marry has worked with partner organizations to drive its national strategy to fulfillment throughout the country, building a critical mass of states and support to set the stage for ending marriage discrimination once and for all. Freedom to Marry is based in New York and has participated as *amicus curiae* in several marriage cases in the United States and abroad.

Parents, Families & Friends of Lesbians & Gays, Inc. ("PFLAG") is a national nonprofit organization that promotes the health, well-being, and civil rights of LGBT persons, as well as their families and friends. PFLAG has more than 200,000 members and supporters, with 385 affiliates. PFLAG provides support services to LGBT individuals, their families, and friends to assist in coping with discrimination and hostility and is engaged in education and advocacy efforts to create a society where all citizens enjoy full civil and legal equality. PFLAG's members are parents, children, grandparents, siblings, and friends of LGBT individuals who believe that their family members should have the same right to marry as different-sex couples and have first-hand knowledge of how marriage discrimination harms not only same-sex couples themselves, but also their family members. PFLAG has participated as *amicus curiae* in several marriage equality cases.



INTRODUCTION AND SUMMARY OF ARGUMENT

Every day that same-sex couples are denied the freedom to marry, they and their families suffer new and continuing injuries to their financial security, their access to legal protections, and their fundamental dignity. A strong national consensus has evolved – expressed not just in opinion polls but in a remarkable, virtually unbroken string of judicial decisions – that these injuries are unnecessary, unjust, and inconsistent with basic American values of fairness and equality. Every day of denial causes real harm; it matters whether the discrimination ends in a year, two years, or ten. Prompt review by this Court in one or more of the cases now before it is warranted to affirm this conclusion and halt this harm once and for all.

The injuries caused by marriage discrimination are great and small, tangible and dignitary, ongoing and recurring. Every day, same-sex partners arrive, frantic, at emergency rooms, forced to explain their legal right to see their partners based on legal statuses such as civil union, affording no substitute for the clarity and equal dignity of marriage itself, while couples living in too many states lack even that partial respect. By contrast, married people say "that's my spouse" and are admitted immediately. Every day, parents barred from marrying die with no legal relationship to children adopted or conceived by their partners, depriving those children of Social Security benefits that would be automatic if their parents had

been able to marry. Every day, children are humiliated by the knowledge that society views their parents' relationships as less worthy of respect and protection than those of their friends' different-sex parents. Every day of denial takes its toll on too many families across the country.

This Court observed last year that the decision of states to respect the right of same-sex couples to marry "enhanced the recognition, dignity, and protection of the class in their own community." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). The Court held that Congress's denial of federal recognition to those marriages inflicted needless tangible harm through loss of federal benefits and protections, as well as grievous dignitary harm by creating a class of "second-tier marriage[s]" that "humiliates tens of thousands of children now being raised by same-sex couples." *Id.* at 2694.

Over the last fourteen months, twenty-seven federal court decisions from twenty-four cases across sixteen states have applied *Windsor*'s reasoning to strike down marriage and marriage recognition bans in individual states.[2] Thirteen additional state court opinions have upheld the freedom to marry.[3]

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[2] *See, e.g.*, *Pending Marriage Equality Cases*, Lambda Legal (Sept. 2, 2014), *available at* http://www.lambdalegal.org/pending-marriage-equality-cases.

[3] *Marriage Rulings in the Courts*, Freedom to Marry (*updated* Sept. 3, 2014), *available at* http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts.

Of the forty marriage decisions issued since *Windsor*, only two have held otherwise.[4] As one court has observed, a "flood of cases" has embraced the "increasingly obvious" conclusion that

> [p]reventing couples from marrying solely on the basis of their sexual orientation . . . serves only to hurt, to discriminate, to deprive same-sex couples and their families of equal dignity, to label and treat them as second-class citizens, and to deem them unworthy of participation in one of the fundamental institutions of our society.

Pareto v. Ruvin, Case No. 14-1661 CA 24, slip op. at 34 (Fla. Cir. Ct. July 24, 2014).

Despite this emerging national consensus, absent a definitive ruling by this Court, marriage bans that persist in many states will continue to harm millions of Americans – same-sex couples, their children, and their extended families – on a daily basis. This harm falls into three broad categories.

First, as demonstrated below, exclusion from civil marriage inflicts a wide array of tangible injuries, ranging from denial of access to spousal health insurance coverage to loss of crucial state and federal public benefits to interference with access during medical emergencies and with burial and funeral decisions. Many of these injuries have direct and grievous impact on the children of LGBT parents –

[4] *Id.*

including the loss of public benefits and even the risk of ending up with no legal guardian where an adoptive or biological parent dies and the state views the surviving parent as a legal stranger to the child. Moreover, many private actors rely on marital status in providing benefits and services, leading to further day-to-day harm for couples denied the freedom to marry.

Second, these tangible injuries are exacerbated by severe dignitary injury – the impact of being treated as second-class citizens whose relationships are deemed unworthy of equal status, rights, and protections under the law. Such injuries can actually be quite "tangible" in and of themselves, particularly the severe psychological harm to children of being told by society that their families are less worthy of recognition and respect than those of heterosexual parents. And the harm of total exclusion from civil marriage is worse even than the severe harm identified in *Windsor*, where couples who were, in fact, married were denied federal recognition for their marriages.

Finally, even couples who *are* able to marry in their home states – or who travel to another state to marry – are exposed to significant harm as a result of the confusing patchwork of laws either affirming or denying the freedom to marry from state to state. Couples traveling to another state may suddenly find themselves treated as "unmarried" under state law and face a wide range of complications involving such matters as divorce, child custody, estate administration, and access to state and federal benefits.

Marriage is not a single event. It is the framework for and the backbone of a lifetime shared. Many same-sex couples have been together for decades, while others are just beginning their lives together. Like all couples, same-sex couples assume myriad responsibilities to each other and to their children and experience immeasurable joys, daunting challenges, triumphs and tragedies large and small – all on a daily basis. Those excluded from civil marriage face these stresses with one hand tied behind their back – forced to negotiate social, economic, medical, and regulatory frameworks that neither protect nor honor them.

This is not an abstract problem. Every single day, denial of the right to marry and refusal to respect lawful marriages result in concrete injury to LGBT families and their children. The harms occurring daily cannot be undone; they can only be stopped, and only this Court can stop them nationwide. We respectfully request that the Court grant *certiorari* to affirm the freedom to marry and the guarantee of equal protection, and end marriage discrimination and the harms it continues to inflict.

ARGUMENT

I. The Continuing Denial of the Freedom to Marry Imposes Severe Legal Burdens and Detriments on Millions of Americans Every Day for No Good Reason

Review of the decisions below is necessary to end systemic discrimination that every day imposes significant legal burdens and detriments on millions of Americans. It is now widely understood that marriage discrimination causes direct, tangible harm by excluding same-sex couples from hundreds of protections and responsibilities triggered by marriage in the areas of parenting, inheritance, taxes, access to government benefits, and duties of support, among many others. This harm extends to the private sector, where many decision-makers rely on marital status to determine, for example, whether employees qualify for benefits. As court after court has now held, there is no reason to perpetuate and prolong these injuries.

In *Windsor*, this Court found that the Defense of Marriage Act ("DOMA"), by barring federal recognition for same-sex couples' lawful marriages, unconstitutionally inflicted a wide range of tangible financial and legal harms on these couples and their families. "Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways" because the statute "touches many aspects of married and family life, from the mundane to the profound." 133 S. Ct. at 2694. Among other things, the Court observed that "[DOMA] prevents same-sex married couples from

obtaining government healthcare benefits they would otherwise receive. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. It forces them to follow a complicated procedure to file their state and federal taxes jointly." *Id.* (citations omitted). The Court further noted that DOMA "brings financial harm to children of same-sex couples" because "[i]t raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses" and "denies or reduces [Social Security] benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security." *Id.* at 2695.

In the wake of *Windsor*, a virtually unbroken line of federal authority – including three Court of Appeals rulings – holds that state laws excluding same-sex couples from civil marriage are similarly unconstitutional.[5] While noting that *Windsor* decided only the constitutionality of DOMA, the Tenth Circuit, for example, observed that the tangible harms suffered by LGBT residents of Utah under its marriage ban are strikingly similar to those identified in *Windsor*. *Kitchen v. Herbert,* 755 F.3d 1193, 1207 (10th Cir. 2014). The court pointed out that, like DOMA, outright marriage bans harm children by, among other things, raising the cost of health care and limiting or denying Social Security benefits upon

[5] *See Marriage Rulings in the Courts*, *supra* note 3.

the loss of a spouse and parent. *Id.* at 1215 (citing *Windsor*, 133 S. Ct. at 2695).

But the litany of harms flowing from federal non-recognition is actually more than *doubled* in states where same-sex couples are excluded from marriage entirely – and thus denied all *state* as well as *federal* benefits and protections. Thus, for example, Florida's marriage ban excludes same-sex couples from (among many other things) duties of financial support (enforced by criminal penalties); presumptions of parentage for children born during marriages; the automatic right to make medical decisions for an incapacitated spouse; the right to spousal insurance coverage and benefits (where otherwise available); the right to court-ordered equitable distribution of property on marriage dissolution; various rights of inheritance and election upon the death of a spouse; and a host of *federal* benefits available to married couples only when the state of residence recognizes the couple's marriage, including those related to Social Security and veterans' benefits. *Pareto*, slip op. at 24-25.

These exclusions harm same-sex couples and their children *every day*. In case after case, citizens of states denying equal marriage rights have volunteered accounts of the often irreparable hardships they regularly suffer as a result of their home state's discriminatory marriage ban and refusal to recognize the valid out-of-state marriages of same-sex couples. Some illustrative accounts from the cases are summarized below.

Shana Carignan and Megan Parker

Shana and Megan were barred from marriage in their home state of North Carolina, but legally married in Massachusetts and returned home. *See* Carignan Aff., ¶¶ 3, 7, *Fisher-Borne v. Smith*, Civil Action No. 12-cv-00589 (M.D.N.C. Apr. 8, 2014), Docket No. 78. Their son, J.C., suffers from cerebral palsy and is therefore unable to walk and has only "limited ability to control his limbs or communicate verbally." *Id.* ¶ 3. Because of his condition, J.C. often faces serious medical emergencies. *Id*. J.C. is covered only by Medicaid, for which he is eligible because he was adopted through foster care. *Id.* ¶ 13. Shana has a health insurance plan that would provide J.C. with better care during these critical developmental years, and J.C. could receive premium assistance from a state program to help pay for it, but North Carolina's marriage recognition ban bars Shana from being treated as J.C.'s parent. *Id*. ¶¶ 13, 17.

J.C. is now six years old, and Shana has been informed that this is a critical time in his development. *Id.* ¶ 5. Every day, J.C. is missing opportunities that could help his physical and intellectual development because the law prevents him from benefitting from his mother's medical insurance. *Id.* ¶ 12. The harm J.C. suffers as a result of the North Carolina law is irreparable, as Shana observes: "[T]he care and attention he receives now will shape the rest of his life, and determine his overall health, his ability to successfully cope with his disabilities and his well-being for the rest of his life. Providing the care later

from which J.C. can now benefit is not a substitute." *Id.* ¶ 6.

James Obergefell and John Arthur

James is a resident of Ohio who was in a committed relationship with his partner, John, for more than 20 years. Obergefell Compl. ¶ 8; *see also Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 975 (S.D. Ohio 2013). In 2011, John was diagnosed with ALS, a fatal muscular disease. Obergefell Compl. ¶ 9. Because Ohio excludes same-sex couples from civil marriage, the couple's friends and family came together to help the couple finance a trip to Maryland, on a plane equipped with medical equipment for James's needs, so that James and John could marry there. *Id*. ¶ 11. They were married in the plane as it sat on the airport tarmac in Baltimore, Maryland and returned home to Cincinnati that same day. *Id*. ¶ 12-13.

Although James and John were legally married, Ohio's ban on recognizing the marriages of same-sex couples denied them access to hundreds of federal and state benefits enjoyed by different-sex married couples in Ohio. *Id*. ¶ 20.

When John passed away, Ohio law required that his death record list his status as "unmarried" and did not allow James to be listed as John's surviving spouse. *Obergefell*, 962 F. Supp. 2d at 997. John and James were in love and together for over two decades, and they both "want[ed] the world to officially remember and record their union as a married couple."

Obergefell Compl. ¶ 22. James ultimately obtained an appropriate death certificate only as a result of his lawsuit challenging application of Ohio's recognition ban.

Dawn Carver and Pam Eanes

Dawn and Pam are Indiana residents who have been in a loving, committed relationship for seventeen years. Baskin Compl. ¶ 20, *Baskin v. Bogan*, Civil Action No. 1:14-cv-0355 (S.D. Ind. Mar. 10, 2014), Docket No. 1. Pam has two children from prior relationships, and both children regard Pam and Dawn as their mothers. *Id*. ¶ 21. Both mothers are active in their local community. *Id*. Dawn works as a patrol officer for the Oak Park Police Department and Pam is a Captain in the Calumet City Fire Department. *Id*. Pam and Dawn have a civil union, but because their state does not recognize this union, neither would be eligible for surviving spouse benefits for public employees in the event the other were fatally injured from her inherently dangerous work. *Id*. ¶¶ 22, 33(b).

Roy Badger and Garth Wangemann

Roy and Garth are Wisconsin residents who have been a couple for 37 years and registered as domestic partners in 2009. Wolf Am. Compl. ¶¶ 49, 52, *Wolf v. Walker*, Case No. 14-cv-64 (Feb. 27, 2014), Docket No. 26. Although domestic partner status provides only limited protections, Roy and Garth have hesitated to

leave the state to marry because of fear of prosecution under Wisconsin's criminal marriage evasion law. *Id.* ¶ 52.

Roy and Garth have been exposed to multiple harms as a result of Wisconsin's marriage ban. Among other things, when Garth was laid off last year, he was forced to pay for health insurance through COBRA for eight months until Roy was able to add him to his insurance as a domestic partner. The financial hardship of meeting Garth's COBRA payments forced the couple to sell many of their belongings on eBay in order to make ends meet. *Id.* ¶ 54. Even then, Garth's coverage remained more expensive because unlike married couples Roy is likely to be taxed on the value of the insurance. *Id.* ¶ 60.

Roy and Garth also live with ongoing anxiety about whether health care providers will honor the decision-making authority that each has given to the other. During a health crisis when Garth was in a medically induced coma for nearly a month, Roy made medical decisions pursuant to a signed power of attorney. But that did not prevent Garth's father from attempting to override Roy's authority and have Garth taken off life support. If Roy and Garth had been able to marry in Wisconsin, Roy's authority to make end-of-life decisions is unlikely ever to have been questioned. *Id.* ¶¶ 55-59.

Shelia and Andrea Altmayer

Andrea and Shelia are Idaho residents who have been in a loving, committed relationship for sixteen years. Altmayer Decl. ¶ 6; *see also Latta v. Otter*, No. 1:13-cv-00482-CWD, 2014 U.S. Dist. LEXIS 66417, at *15 (D. Idaho May 13, 2014). After several years of trying to become pregnant through artificial insemination and one heartbreaking miscarriage, Andrea gave birth to their son in 2009. Altmayer Decl. ¶ 7. Andrea's nurse helped Andrea and Shelia fill out their son's birth certificate and listed Shelia as a parent. *Id*. at 8. However, when the birth certificate was returned from the State of Idaho, Shelia's name was removed, which Andrea remembers was "very sad and frustrating for both of us." *Id*.

Andrea and Shelia continue to experience substantial harms because Idaho state law excludes them from marriage. *Id*. ¶ 9. Shelia cannot fully participate in raising her son because she is not allowed parental rights, and the family is denied the benefits of laws designed to support and recognize the importance of strong families. *Id.* For example, Shelia cannot consent to medical treatment on behalf of her son. *Id*. Neither Andrea nor her son can obtain medical insurance coverage from Shelia's employer, and Shelia cannot take family leave in the event her son becomes ill. *Id*. ¶¶ 9, 11. Idaho law views Shelia as a legal stranger to her son, even though she has raised him since birth. *Id*. Shelia and Andrea would not have the right to visit one another, or to direct one another's care, in the event of a medical emergency.

Id. ¶ 11. Shelia and Andrea are forced to take additional, costly legal steps to protect each other and their son in the event one of them were to pass away. *Id*.

In short, it cannot be disputed that denial of the freedom to marry inflicts substantial, tangible harms on same-sex couples and their children – and will continue to do so every day until full equality is recognized. Indeed, some plaintiffs have already died waiting for affirmation of their right to marry in their home state.[6] No purpose is served by permitting such harms to continue.

II. Marriage Discrimination Also Inflicts Ongoing Injury to the Dignity and Emotional Well-Being of Millions of Children, Parents, and Other Family Members

Review is necessary to end a further type of ongoing harm previously recognized by this Court – denial of the right to equal dignity under the law when same-sex relationships are singled out for official disrespect and disfavor. This "dignitary" harm is not merely abstract or symbolic. It includes significant

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[6] *See, e.g.*, Cary Aspinwall, *Couple, Together 20 Years, Runs Out of Time Waiting for Oklahoma Marriage Law to Change*, Tulsa World, *available at* http://m.tulsaworld.com/homepage3/couple-together-years-runs-out-of-time-waiting-for-oklahoma/article_7b1fdb08-c123-552e-aaf9-d7b9e523dcce.html?mode=jqm; *Security, Comfort & Happiness in OK*, Freedom to Marry, *available at* http://www.freedomtomarry.org/story/entry/security-comfort-happiness-in-ok.

psychological and emotional injuries flowing from being treated as a second-class citizen in a second-tier relationship. This harm affects couples whose relationships are disrespected as well as all members of their extended families who love and celebrate their relationships. But the harm is particularly severe and irreparable for the children of couples denied the freedom to marry.

As the Court held in *Windsor*, differentiating between different-sex and same-sex relationships "demeans the couple, whose moral and sexual choices the Constitution protects" and "humiliates tens of thousands of children now being raised by same-sex couples." *Windsor*, 133 S. Ct. at 2694. A law denying same-sex couples the rights and benefits afforded different-sex couples "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id*. The Court found that "DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id.* at 2696.

State laws entirely excluding same-sex couples from marriage likewise inflict severe dignitary injury, and federal courts have cited such harms in striking down state marriage bans since *Windsor*. *See, e.g.*, *Bostic v. Schaefer*, Case No. 14-1167, 2014 U.S. App. LEXIS 14298 at *65 (4th Cir. July 28, 2014) ("[B]y preventing same-sex couples from marrying, the

Virginia Marriage Laws actually harm the children of same-sex couples by stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters."); *Kitchen*, 755 F.3d at 1215 (state marriage bans "prohibit the grant or recognition of any rights to [same-sex couples and their] famil[ies] and discourage [their] children from being recognized as members of a family by their peers"); *Obergefell*, 962 F. Supp. 2d at 997 ("Dying with an incorrect death certificate that prohibits the deceased [same-sex partner] from being buried with dignity constitutes irreparable harm.").

There are six million Americans with at least one parent who identifies as lesbian, gay, bisexual, or transgender[7] and nearly 650,000 same-sex couples, of which twenty percent are raising children.[8] The psychological and emotional harms these families and their children experience are palpable in the stories many have shared about the ways in which exclusion from civil marriage has affected them. As one young woman with two mothers explained to the Family Equality Council, the state's exclusion of same-sex

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[7] Gary J. Gates, *LGBT Parenting in the United States*, Williams Institute (2013), *available at* http://williamsinstitute.law.ucla.edu/research/census-light-demorgraphics-studies/lgbt-parenting-in-the-United States.

[8] *See e.g.*, Gary J. Gates, *Same Sex and Different Sex Couples in the American Community Survey: 2005-2011*, Williams Institute (Feb. 2013), *available at* http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/ss-and-ds-couples-in-acs-2005-2011/.

couples from civil marriage "felt like a slap in the face from my country. I had never asked for validation, but blatant exclusion hurts."[9]

Evidence presented to courts in marriage cases shows how the exclusion of same-sex couples from civil marriage creates anxiety and distress among children of same-sex couples:

- Clint McCormack and Bryan Reamer's son was upset to discover that only one of his fathers was legally his parent: "'When our fifteen year-old son Keegan realized that both his dads weren't legal[ly] [his parents], he felt like the rug was pulled out from under him. The distress he felt . . . it was like the state was punishing my child and I couldn't do anything about it.'"[10]
- As one youth described to a Nevada Assembly Committee on Legislative Operations and Elections, "'My brother and I deserve to feel safe and secure that [both of our moms] can pick us up from school, take us to the doctor, or make decisions about our well-being,

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[9] Statement from Tsipora Prochovnick to Our Family Coalition (Feb. 5, 2013) (on file with Family Equality Council), *cited in Amici Curiae* Brief of Family Equality Council, et al., *Latta v. Otter*, Case Nos. 14-35420 and 14-35421 at 22-23 (9th Cir. July 25, 2014), ECF No. 109.

[10] *300 Families For Marriage Equality*, ACLU of Michigan, *available at* http://www.aclumich.org/300Families; *see also* Complaint at 16-17*, Caspar v. Snyder*, Case No. 2:14-cv-11499-MAG-MKM (E.D. Mich. Apr. 14, 2014), ECF No. 1.

without facing unnecessary obstacles. Just like all my friends' parents.'"[11]

- And as one ten-year-old told the Family Equality Council, "[s]ometimes at school if we're talking about our families, someone will bring up the fact that I have two moms and they aren't allowed to be married. It hurts my feelings and it makes me feel insecure. It makes me feel like I'm not supposed to be there and I don't fit in."[12]

The preceding accounts show that dignitary harms cause real hurt every day, augmenting the legal and financial harms outlined in Part I, above, by underscoring that same-sex couples are disdained by the state as second-class citizens. Every day this official disrespect persists is an affront to the Constitution – and needlessly harms the well-being of families and their pursuit of happiness.

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[11] Testimony of 11-year-old before the Nevada Assembly Committee on Legislative Operations and Elections. Minutes of the Meeting of the Assembly Committee on Legislative Operations and Elections (May 9, 2013), Hearing on Senate Joint Resolution 13 (1st Reprint), *available at* www.leg.state.nv.us/Session177th2013/Minutes/Assembly/LOE/Final11120.pdf (statement of D. Z. and K. Z.) (*cited in Amici Curiae* Brief of Family Equality Counsel, et al., *Sevcik v. Sandoval*, Case Nos. 12-17668, 12-16995, and 12-16998 (9th Cir. Oct. 25, 2013)), ECF No. 59.

[12] Statement from R.K.N. of Utah to Family Equality Council (Jan. 21 2014) (on file with Family Equality) (*cited in Amici Curiae* Brief of Family Equality Council, et al., *Kitchen v. Herbert*, No. 13-4178 at 18 (10th Cir. Mar. 4, 2014)).

III. Even for Couples Able to Marry in Their Home States, the Patchwork of State Laws Recognizing and Denying the Freedom to Marry Inflicts Ongoing Injury Daily

Finally, review is necessary to resolve inconsistency in the law caused by some states' continued denial of the freedom to marry, which causes a host of burdens and practical injuries, great and small, even for same-sex couples able to marry in their home states. These harms disrupt the lives of couples and their families in a wide range of circumstances.

Windsor spoke to the complications caused by DOMA creating "two contradictory marriage regimes . . . forc[ing] same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations" and "plac[ing] same-sex couples in an unstable position of being in a second-tier marriage." 133 S. Ct. at 2694. The current inconsistent regime imposes a similar lack of stability and predictability on married same-sex couples and those they deal with.

After *Windsor*, same-sex couples who live and marry in one of the twenty U.S. jurisdictions that uphold the right to marry are treated as married for both federal and state purposes – but when they travel to a state that refuses to recognize the lawful marriages of same-sex couples, they may be treated as unmarried for state law purposes and face the harms discussed above in Point I. For example,

although legally married in their home state, they may be unable to divorce if they move to a non-recognition state.[13]

Kris and Jason Morley-Nikfar present another such example. Kris and Jason have been in a loving and committed relationship for twelve years and married for ten. *Amicus Curiae* Brief of Parents, Families and Friends of Lesbians and Gays, Inc. at 9-10, *Bostic v. Harris*, Case. Nos. 14-1167(L) (4th Cir. Apr. 18, 2014), Docket No. 153-1. Like many couples, upon marrying in Massachusetts, they legally changed their last names, combining their names as "Morley-Nikfar." *Id.* at 10.

After moving to states with marriage bans, Kris and Jason have experienced repeated harm from official refusal to recognize their marriage. For example, when they moved to Atlanta and sought Georgia drivers' licenses, DMV officials refused to accept their marriage license as valid proof of their name change, loudly berating them and saying they would have to go to court and obtain a "real" name change if they wanted accurate drivers' licenses. *Id.* at 10-11. Later, upon moving back to Kris's home state of Virginia, they faced legal obstacles to becoming parents when they learned that Virginia permitted adoptions only

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[13] *See Borman v. Pyles-Borman*, Case No. 2014-CV-36 (Tenn. Cir. Ct. Aug. 5, 2014) (marriage of same-sex couple legally married in Iowa could not be dissolved in Tennessee because marriage was "void and unenforceable" under Tennessee law).

by single people and those with recognized different-sex marriages. *Id.* at 11-12.

Meanwhile, couples who live in a non-recognition state but travel to another state to marry face a different constellation of complications upon returning home – for example, loss of certain Social Security and veterans' benefits that by law are determined based on current domicile[14] and the need to engage in burdensome procedures to file state tax returns as unmarried persons.[15] Such couples also may face denial of the full panoply of state law protections available automatically to their married different-sex neighbors. *See* above at 12-14.

Post-*Windsor* decisions have identified such complications as another unnecessary harm flowing from marriage discrimination. In *Kitchen*, the Tenth Circuit upheld a district court decision invalidating Utah's ban on both the performance and recognition of marriages of same-sex couples, in part because of interstate complications: "In light of *Windsor*, we agree with the multiple district courts that have held that the fundamental right to marry necessarily includes *the right to remain married.*" 755 F.3d at 1213 (emphasis added).

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[14] *See Implementation of* United States v. Windsor, Memorandum to the President, Office of the Attorney General at 3 (June 20, 2014).

[15] *8 Things Same-Sex Couples Need to Know About Taxes*, Lambda Legal (Feb. 7, 2014), *available at* http://www.lambdalegal.org/blog/20140207_8-things-to-know-about-taxes-2014#2.

Not knowing whether one will be treated as married when one moves or travels constitutes both tangible and dignitary injury. The inconsistency from state to state in respecting the freedom to marry forces married couples to anticipate traumatic events, such as illness or death, that might occur while traveling and to take additional costly and burdensome legal steps to try to replicate family rights that would travel with them automatically as a different-sex married couple – for example, obtaining a step-parent or second parent adoption or preparing living wills and powers of attorney.[16]

Couples who fail to take such steps may face grievous consequences. A harrowing example is presented in the story of a woman from Washington who collapsed while vacationing with her partner in Miami:

> Although her partner had documentation of her relationship and a power of attorney, she claims hospital officials told her she wasn't a family member under Florida law. The woman spent hours talking with hospital personnel in an effort to visit her partner's bedside. Although she eventually prevailed, her partner's condition had already deteriorated and the woman died. Because of the problem, the children the patient had

[16] *See Hawaii Marriage Law*, Lambda Legal, *available at* http://www.lambdalegal.org/publications/hawaii-marriage-faq.

> adopted and been raising with her partner weren't able to see her before she died.[17]

The threat of such treatment hangs over every married same-sex couple who travels to a discriminating state – disrupting their marriage not just while traveling, but also at home, by forcing them to confront and guard against hypothetical realities that could befall them, the kind of realities that haunt all parents and spouses. This renders the marriages of same-sex couples unequal even in states that have affirmed the freedom to marry because they remain vulnerable to discrimination that persists elsewhere in the nation.[18]

All of the harms discussed above are unnecessary. Court after court has recognized such harms and found no rational (much less compelling) state interest in inflicting them. These harms continue every day, complicating and burdening the lives of millions of Americans. Declining to review these cases would serve no purpose in light of the remarkable – and remarkably uniform – body of case law amassed in the last year holding that same-sex couples are entitled to the same freedom to marry as different-sex couples as a matter of equal protection and basic

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[17] Tara Parker-Pope, *How Hospitals Treat Same-Sex Couples*, The New York Times (May 12, 2009), *available at* http://well.blogs.nytimes.com/2009/05/12/how-hospitals-treat-same-sex-couples.

[18] *See, e.g.*, *Tools for Parents*, Family Equality Council, *available at* http://www.familyequality.org/get_informed/parent_resources/tools_for_families/.

fairness. To leave this question unresolved nationwide would simply inflict continued unnecessary harm.

CONCLUSION

For the reasons stated above, *Amici* respectfully urge the Court to grant *certiorari* in one or more of the pending marriage equality cases.

Respectfully submitted,

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