Case Nos. 13-4178, 14-5003, 14-5006

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DEREK KITCHEN, ET AL.
Plaintiffs-Appellees,
v.
GARY R. HERBERT, ET AL.
Defendants-Appellants.

Appeal from The United States District Court
for the District of Utah (No. 2:13-cv-00217)

MARY BISHOP, ET AL.
Plaintiffs-Appellees,
v.
SALLY HOWE SMITH, ET AL.
Defendants-Appellants.

Appeal from The United States District Court
for the Northern District of Oklahoma (No. 4:04-cv-00848)

BRIEF OF *AMICI CURIAE* BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM ("BALIF"), *ET AL.*, IN SUPPORT OF PLAINTIFFS-APPELLEES AND PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

None of *Amici Curiae* (identified in Appendix) has a parent corporation. No publicly held company owns more than 10% of stock in any of *Amici Curiae*.

STATEMENT OF INTEREST

Bay Area Lawyers for Individual Freedom ("BALIF") is a bar association of more than 700 lesbian, gay, bisexual, and transgender ("LGBT") members of the San Francisco Bay Area legal community. As the nation's oldest and largest LGBT bar association, BALIF promotes the professional interests of its members and the legal interests of the LGBT community at large. To accomplish this mission, BALIF actively participates in public policy debates concerning the rights of LGBT individuals and families. BALIF frequently appears as amicus curiae in cases, like this one, where it believes it can provide valuable perspective and argument that will inform court decisions on matters of broad public importance.

Additional *amici* include a broad array of organizations, including national, metropolitan, local, and minority bar associations and national and local non-profit organizations. Each organization supporting this *amicus* brief is dedicated to ensuring that its constituents and all others in this country, including gay men and lesbians, receive equal treatment under the law. *See* Appendix. All parties have consented to *Amici*'s submission of this brief.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 32, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Foundational to the Equal Protection Clause of the Fourteenth Amendment is the principle that "the Constitution 'neither knows nor tolerates classes among citizens.'" *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). In line with this principle, it has long been bedrock law that "separate but equal" treatment does not satisfy the federal Constitution. The very notion is a contradiction in terms: as the Supreme Court has emphasized since *Brown v. Board of Education*, the Constitution's promise of true equality is necessarily breached by government-sponsored separation of a disfavored class. The bans on same-sex marriage in Utah and Oklahoma ("the Marriage Bans") betray these longstanding values. They exclude a class of people—gay men and lesbians—from the venerated institution of marriage.

This brief explains the harm inflicted on gay men and lesbians as a result of the Marriage Bans' pernicious classification. It also explainshow nothing short of marriage rights equal to those of heterosexual couples can cure the constitutional violations of the Marriage Bans. Specifically, this brief discusses why neither civil unions nor domestic partnerships, which are available to same-sex couples in some states (though not Utah or Oklahoma), would be an appropriate constitutional remedy. Because the Marriage Bans exclude them from marriage, gay men and

lesbians and their families are stigmatized, deprived of benefits enjoyed by their heterosexual counterparts, and exposed to increased discrimination. These effects are repugnant to the Constitution's equality guarantee and are in no way mitigated by access to the separate and inherently inferior mechanisms of domestic partnership or civil union. *Amici* urge this Court to uphold the district courts' conclusions and find that the Marriage Bans disadvantage gays and lesbians without any legitimate justification. *Kitchen v. Herbert*, --- F.Supp.2d ----, 2013 WL 6697874 (D.Utah); *Bishop v. Oklahoma*, --- F.Supp.2d ----, 2014 WL 116013 (N.D. Okla. 2014).

ARGUMENT

I. CLASSIFICATIONS THAT SERVE ONLY TO DISADVANTAGE THE BURDENED GROUP FAIL RATIONAL BASIS REVIEW

The Equal Protection Clause of the Fourteenth Amendment is "a commitment to the law's neutrality where the rights of persons are at stake." *Romer*, 517 U.S. at 623. The Clause "requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination." *Loving v. Virginia*, 388 U.S. 1, 10 (1967). Even under the most deferential review—the rational basis test—a state law must be "rationally related to a legitimate state interest." *E.g.*, *City of Cleburne, Tex. v. Cleburne Living Ctr.*,

473 U.S. 432, 440 (1985).[2] "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446.

A law that classifies persons for no reason other than to confer disfavored legal status fails even rational basis review because it serves no legitimate governmental purpose. *See Romer*, 517 U.S. at 633-35. As the Supreme Court repeatedly has explained, "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.* at 634-35 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). Accordingly, in *Romer*, the Supreme Court struck down a Colorado constitutional amendment that prohibited governmental protection of gay and lesbian individuals. *Id.* at 636. The amendment, the Court found, was a "status-based enactment" that "impose[d] a special disability upon [gays and lesbians] alone." *Id.* at 631, 635. It "inflict[ed] on [gays and lesbians] immediate, continuing, and real injuries that outrun and belie any legitimate justifications that

[2] Plaintiffs-Appellees, Kitchen and Bishop amply demonstrate, and *amici* agree, that the Marriage Bans should be subject to heightened scrutiny. *See, e.g.*, *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480 (9th Cir. 2014) (holding that distinctions based on sexual orientation are subject to heightened scrutiny). However, as this brief explains, the Marriage Bans' failure to advance a legitimate governmental purpose causes them to fail under even the most deferential standard of review.

may be claimed for it." *Id.* at 635; *see also Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972) (law prohibiting distribution of contraceptives to unmarried individuals lacked a rational basis and violated the Equal Protection Clause).

So too here. The injuries that the Marriage Bans inflict upon gay men and lesbians, as *amici* explain below, "outrun and belie" any legitimate governmental purpose that might be claimed for them.

II. THE MARRIAGE BANS ESTABLISH AN UNEQUAL, TWO-TIERED REGIME AND HARM GAY AND LESBIAN INDIVIDUALS AND THEIR CHILDREN

The Marriage Bans' overt discrimination against same-sex couples in Utah and Oklahoma establishes a two-tiered regime in which same-sex couples hold second-class status. Further, as explained below, the availability of domestic partnership or civil unions as is the case under certain other states' laws — separate, plainly inferior options—would not cure the Marriage Bans' constitutional deficiency. By excluding same-sex couples from marriage, the Marriage Bans cause severe, actual harm to gay and lesbian individuals and their families.

A. The Legalistic Designation of Domestic Partnership Is Patently Inferior to the Revered Institution of Marriage

Time-honored precedent establishes that state-created, separate institutions for disfavored groups are inherently unequal. As the Supreme Court has repeatedly recognized since *Brown v. Board of Education*, 347 U.S. 483, 495

(1954), such separate institutions offend the guarantees of the Equal Protection Clause. *See, e.g.*, *Mayor & City Council of Balt. v. Dawson*, 350 U.S. 877 (1955) (public beaches and bathhouses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (public golf courses); *Gayle v. Browder*, 352 U.S. 903 (1956) (public transportation); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (public parks); *Peterson v. City of Greenville*, 373 U.S. 244 (1963) (restaurants); *Brown v. Louisiana*, 383 U.S. 131 (1966) (public libraries).

Even where separate institutions have the trappings of their more well-regarded counterparts, inequalities remain by definition. Though some distinctions may be intangible, their social significance is real, and they remain constitutionally impermissible. *See Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (noting, in striking down Texas's segregated law schools, that "the [all-white] Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school"); *United States v. Virginia*, 518 U.S. 515, 557 (1996) (holding that Virginia could not restrict women to a military program that lacked, among other features, the "prestige" of Virginia Military Institute).

Nor would the blatant and pernicious separation wrought by the Marriage Bans be cured by shunting same-sex couples into something short of real marriage, such as the legalistic apparatus of "dometic partnership" or "civil union" available

in certain other states. Domestic partnership is different from and inferior to marriage. Even if domestic partnership were available in Utah and Oklahoma, that would not remedy the harm caused by the exclusion from marriage but rather would provide a square peg for a round hole. As in *Sweatt,* "[i]t is difficult to believe that one who had a free choice" between domestic partnership and marriage "would consider the question close." *Sweatt*, 339 U.S. at 634.

1. Marriage Is a Uniquely Revered Institution in American Society

Marriage holds a hallowed status in our society. As courts repeatedly recognize, marriage is an essential aspect of the human experience. Far "more than a routine classification for purposes of certain statutory benefits," *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013), marriage is "an institution of transcendent historical, cultural and social significance," *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008), "an institution more basic in our civilization than any other." *Williams v. North Carolina*, 317 U.S. 287, 303 (1942). Its significance to the couple involved is unparalleled; it is "intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Furthermore, marriage is a time-honored demonstration to family, friends, and the community of a loving commitment between two people—and implies a return promise by society to respect that commitment. *See Turner v. Safley*, 482 U.S. 78, 95 (1987) (recognizing that marriage is an "expression[] of emotional support and public

commitment"). The institution is "a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003). The right to marry, accordingly, "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women]." *Loving*, 388 U.S. at 12; *see also Perez v. Lippold*, 198 P.2d 17, 18-19 (Cal. 1948) ("Marriage is . . . something more than a civil contract subject to regulation by the state; it is a fundamental right of free men."). The enormous personal and social significance of marriage is, indeed, a core premise of the decisions below. *See, e.g.*, *Jackson*, 884 F. Supp. 2d at 1108 (explaining that "the title 'marriage' has social benefits and cultural meaning").

As a result of the special significance of marriage in society, the institution has a critical "signaling" role, apart from the specific legal obligations it entails. Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 Va. L. Rev. 1901, 1917 (2000). The designation of marriage affects both how the two individuals in a married couple behave toward one another and how society behaves toward them.

First, married people understand how they are supposed to behave toward one another: they are to be emotionally and financially supportive, honest, and faithful. *See* KITCHEN ER CITE 273-74 (declaration of psychologist Letitia

Peplau, Ph.D.). Although married couples may modify their expectations and behavior over time, they benefit by beginning with a common understanding of the marital relationship, gleaned from a lifetime of participating in society, hearing about marriage, and observing married couples. *See* Jeffrey M. Adams & Warren H. Jones, *The Conceptualization of Marital Commitment: An Integrative Analysis*, 72 J. Personality Soc. Psychol. 1177 (1997). This shared understanding assists married individuals in meeting their own and their spouse's expectations and motivates them to work through temporary difficulties. *See* KITCHEN ER CITE 316 (Peplau declaration) ("The security of marriage often enables spouses to adopt a long-term perspective, putting off immediate rewards to build a future life together and encouraging mutual sacrifice.").

The institution of marriage likewise provides common ground for others in society to understand a couple's relationship. Because marriage is universally recognized, married couples are readily treated in a manner that reflects their legal and social status. *See* Kitchen ER CITE 281 (Cott declaration) (noting that excluding same-sex couples from marriage "mark[s] some citizens as unfit to join the national family because of their choice of loved one"). Spouses are immediately seen as family members. When a married couple opens a joint bank account, or checks into a hotel, or applies for a credit card, or attends a parent-teacher conference, or accompanies a child on a plane flight, or jointly rents a car,

there is no need for explanation or documentary proof of the relationship. *See generally Varnum v. Brien*, 763 N.W.2d 862, 883-84 (Iowa 2009) ("Iowa's marriage laws" are "designed to bring a sense of order to the legal relationships of committed couples and their families in myriad ways.").

For these reasons and others, many people regard getting married as the most important day in their lives—marriage is "the 'happy ending,' . . . reflected in and perpetuated through law, custom, literature, and even folk tales." Kitchen ER CITE 264 (Cott declaration)..

2. Statutory Schemes that Recognize Domestic Partnership and Civil Unions Are Legalistic Mechanisms That Lack the Significance, Stability, and Meaning of Marriage

Nor would shifting to a scheme that recognizes domestic partnership and civil unions remedy the harm caused by the exclusion of same-sex couples from the institution of marriage. Domestic partnership and civil unions plainly lack the status, cultural significance, and social meaning of marriage. Unlike marriage, these legalistic categories are not an effective marker of family relationships. And same-sex couples who have access only to domestic partnerships or civil unions are deprived of many of the tangible and intangible benefits that married couples enjoy.

First, the legal categories of domestic partnership and civil unions are novel and unstable. These categories were invented recently,[3] and their meaning is ever-shifting. Even the name of the category varies from state to state. *Compare* Nev. Rev. Stat. § 122A ("domestic partnership") *with* Haw. Rev. Stat. § 572B ("civil union"). For example, in Hawaii, both the names and legal contours of the second-tier protections for same sex couples have continued to shift in ways that perpetuate confusion and signify inferior status for same-sex couples.[4] Domestic partnership first began in California as a term used in local ordinances that conferred few legal benefits. It is now one of several labels available in different states to registered same-sex couples who are prohibited from marrying. In contrast, Nevada modeled its domestic partnership statute on California's revised domestic partnership statute, which provides that domestic partners must receive the same legal entitlements as married couples. In Hawaii, the civil union statute is

[3] The City of West Hollywood enacted the first domestic partnership ordinance in the mid-1980s.

[4] In 1997, Hawaii's legislature passed the Reciprocal Beneficiaries Act, which allowed any two individuals who were prohibited from marrying ("such as a widowed mother and her unmarried son") to obtain approximately 60 of the rights associated with marriage. *See* Haw. Rev. Stat. § 572C-2; *see also id.* at § 572C-6 ("Unless otherwise expressly provided by law, reciprocal beneficiaries shall not have the same rights and obligations under the law that are conferred through marriage . . . ."). Over a decade later, in 2011, "[a]fter several failed attempts," the legislature passed a civil unions law. *Jackson*, 884 F. Supp. 2d at 1076. That law gives the two members of a civil union all the legal rights given to married couples, except the title of "marriage." *See* Haw. Rev. Stat. § 572B.

intended to serve the same purpose, but using an entirely different name. These different and inconsistent labels further obscure the legal rights and responsibilities of same sex couples. *See Jackson,* 884 F. Supp. 2d. at 1077; *Sevcik*, 911 F. Supp. 2d at 1001.

Not surprisingly, in light of their novel and uncertain stature, domestic partnership and civil unions are not valued by society in a way that compares to marriage. People do not associate these legalistic relationships with the stability and permanence that characterize marriage. This is evident in the way government treats domestic partnership. In Nevada, for example, domestic partners need not solemnize their partnership, whereas marriage requires solemnization by a judge, justice or minister. *See Sevcik*, 911 F. Supp. 2d at 1000-01.

In turn, the registration of a domestic partnership is less meaningful to same-sex couples than getting married would be. The complex motions that people experience when they get married are well-established—as well as the joy and human closeness they feel when they attend a wedding—simply do not attach to the ministerial step of registering a domestic partnership or entering a civil union. Even when domestic partners celebrate their legal registration with a ceremony, the terrain is unfamiliar: Is the event a wedding? A commitment ceremony? Something else? The lack of a common vocabulary underscores the institution's lack of societal stature

These reminders continue throughout the relationship. Even the simple act of referring to one's "partner" can be wrought with embarrassment and misunderstanding: same-sex couples can be left searching for a manner to explain, no matter how uncomfortable the setting, whether they are referring to their *domestic* partner or their professional, athletic, or law partners. Subsequently, same-sex couples must often explain the intricacies of state family law to friends and potentially hostile strangers alike.

Such ambiguities, and the resulting risk of differential treatment, would be less likely if same-sex couples could accurately refer to themselves as "married" and as husband or wife, a vocabulary that is universally understood. *See* N.J. Civ. Union Rev. Comm'n, *The Legal, Medical, Economic and Social Consequences of New Jersey's Civil Union Law* 2, 16 (2008), *available at* http://www.nj.gov/lps/dcr/downloads/CURC-Final-Report-.pdf ("New Jersey Commission Report").

In sum, marriage has a unique status in American society. There is no dispute that marriage means far more than inheritance rights, powers of attorney, or community property. It is, instead, "the definitive expression of love, commitment, and family." Kitchen ER Cite (Cott declaration). Domestic partnership would be a patently inferior alternative. Simply put: "[N]o other

means of recognizing a freely-chosen intimate relationship has the same meaning, status, significance, and benefits as marriage." Kitchen ER Cite (Cott declaration).

B. Excluding Same-Sex Couples From the Institution of Marriage Causes Tangible Legal and Economic Harm

Exclusion of same-sex couples from the institution of marriage results in the denial of many real and concrete legal and economic benefits that are premised upon *married* status. *See generally* Kitchen ER Cite (Badgett declaration) ("The Amendment [banning same-sex marriage] imposes substantial economic harms on same-sex couples residing in Nevada and their children."). Because they are not married, same-sex couples may be denied employment-related benefits and may have limited access to affordable employment-based health insurance. Kitchen ER Cite (Badgett declaration) (explaining "that people with same-sex unmarried partners are much more likely to be uninsured than are married people"). Many same-sex couples eschew domestic partnerships due to their lesser status. *See id. at* 351-52. Those couples are denied even the limited economic and legal benefits that accrue to that designation.

More generally, marriage confers numerous economic benefits that stem from the unique commitment it represents. For example, marriage fosters greater specialization of labor, which can increase a couple's income and the time available for family. Kitchen ER Cite (Badgett declaration). Marriage also tends to reduce a couple's transaction costs: as a married couple's economic fortunes

change, the commitment and stability inherent in marriage permit them to avoid "renegotiat[ing] the terms of the legal relationship" between them. Kitchen ER Cite (Badgett declaration). Furthermore, married individuals may enjoy greater employment-related economic gains, whereas same-sex couples who cannot marry face discrimination that may adversely affect their work performance and related economic rewards. Kitchen ER Cite (Badgett declaration). Though difficult to quantify, these economic benefits of marriage are well-known and acknowledged in the field of economics. Kitchen ER Cite (Badgett declaration).

Even in states that recognize domestic partnerships, domestic partners are afforded fewer rights than those offered to married couples. For example, in Nevada, domestic partners receive some, but not all, of the rights and responsibilities afforded to married couples. For example, employers are not required technically to provide health care benefits for domestic partners of their employees. Nev. Rev. Stat. § 122A.210(1). The fact that domestic partnership in Nevada is also open to different-sex couples confirms that it provides a different set of rights from those afforded by marriage. Nev. Rev. Stat. § 122A.100. Similarly, Maine, which adopted a same-sex marriage provision by popular vote in November 2012, advises citizens to "remember that a registered domestic partnership is NOT the same as a marriage and does not entitle partners to rights other than those for which the registry was intended," namely "rights of

inheritance, as well as the rights to make decisions regarding disposal of their deceased partner's remains."[5] In New York City, domestic partners may enjoy, *inter alia*, visitation rights and city health benefits, but "[l]awfully married individuals, including individuals in same-sex marriages, are entitled to more New York State rights and benefits than those registered as domestic partners."[6]

C. In the Wake of the Supreme Court's Decision in *Windsor*, the Tangible Benefits Associated with Marriage Are Even More Substantial.

The availability of federal benefits to married couples further demonstrates that the Marriage Bans inflict real economic and legal harm on same-sex couples. Statutory schemes that recognize domestic partnerships and civil unions but not same-sex marriage result in the deprivation of federal benefits for same-sex couples because many federal agencies offer such benefits only to lawfully *married* same-sex couples. Now that the Supreme Court's decision in *Windsor* invalidated Section 3 of the federal Defense of Marriage Act ("DOMA"), which prohibited federal recognition of the validity of same-sex couples'

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[5] *See* Me. Dep't of Health and Human Servs., *Instructions and Information for Declaration of Domestic Partnership* 2 (2011), *available at* http://www.maine.gov/dhhs/mecdc/public-health-systems/data-research/vital-records/documents/pdf-files/dompartinst.pdf.

[6] *See* Office of the City Clerk, City of N.Y., Domestic Partnership Registration, *available at* http://www.cityclerk.nyc.gov/html/marriage/domestic_partnership_reg.shtml#disclaimer (listing rights of marriage that do not attach to domestic partnerships).

marriages, 133 S.Ct. at 2695, a growingchasm separates the protections available to same-sex couples who are lawfully married under their state's legal regime from those who are merely joined in domestic partnership or civil union.

The federal government uses "marriage" as a threshold for many federal protections and responsibilities. By defining "marriage" and "spouse" for federal purposes, Section 3 of DOMA effectively "control[ed] over 1,000 federal laws" where marital or spousal status is a factor. *Windsor,* 133 S.Ct. at 2683 (citing U.S. Gov't Accountability Office, GA0-04-353R, *Defense of Marriage Act: Update to Prior Report 1* (2004)). By denying same-sex couples the right to marry, Utah and Oklahoma have placed those federal protections and responsibilities entirely off-limits to them. *See generally Garden State Equality v. Dow,* No. M-208, slip op. at 15 (N.J. Oct. 18, 2013).

On the same day *Windsor* was decided, the President ordered a complete and comprehensive review of "all relevant federal statutes to ensure [the] decision, including its implications for Federal benefits and obligations, is implemented swiftly and smoothly." *Statement by the President on the Supreme Court Ruling on the Defense of Marriage Act,* whitehouse.gov (June 26, 2013). In striking down Section 3 of DOMA , the Supreme Court confined its holding to "lawful marriages." *Windsor,* 133. S.Ct. at 2696. Consistent with their existing benefits frameworks, the agencies that have taken action to date in response to the

President's directive have extended protections and responsibilities to *married* same-sex couples and many agencies explicitly *do not* extend protections to registered domestic partners.[7] For example, in its extensive guidance regarding federal benefits post-*Windsor*, the Office of Personnel Management expressly provided that "[b]enefits coverage is now available to a legally married same-sex spouse of a Federal employee or annuitant," but "same-sex couples who are in a civil union or other forms of domestic partnership . . . will remain ineligible for most Federal benefits programs." Office of Personnel Management, Benefits Admin. Letter at 1-2.

Likewise, on August 29, 2013, the Internal Revenue Service ("IRS") ruled that all legal marriages of same-sex couples will be respected for federal tax purposes. Rev. Rul. 2013-17, 2013-381.R.B. 201, 204 ("For Federal tax purposes, the terms 'spouse,' 'husband and wife,' 'husband,' and 'wife' include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term 'marriage' includes such a marriage between individuals of the same sex."). However, the Revenue Ruling also specifically held that marital

[7] To date, the federal government agencies extending protections based on lawful marriage include the Office of Personnel Management, the Department of Defense, the Department of Homeland Security, the Department of State, the Department of the Treasury and Internal Revenue Service, the Department of Labor, the Department of Health and Human Services, the Social Security Administration, the Department of Veterans Affairs, the Office of Governmental Ethics, and the Federal Elections Commission.

protections do not extend to persons "who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state . . . ." *Id.*

In the immigration context, whether a same-sex couple is lawfully *married* or merely in a domestic partnership or civil union could mean the difference between deportation and a valid basis for a family-based immigration visa. The United States Customs and Immigration Service has made clear that "same-sex marriages will be treated exactly the same as opposite-sex marriages" including, for example, with respect to eligibility for discretionary waivers of certain inadmissibility grounds based on marriage or status of a spouse, *id.* at QA 9, and to the residency period required for naturalization of non-citizens married to U.S. citizens, *id.* at QA 8. These benefits would not be available to same-sex couples in domestic partnerships or civil unions.[8]

[8] Certain governmental agencies, including the Immigration and Customs Service, have stated that "[a]s a general matter, the law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes. . . . The domicile state's laws and policies on same-sex marriages will not bear on whether USCIS will recognize a marriage as valid" This means that a same-sex couple living in a state with just civil unions or domestic partnership, as well as such couples living in states that lack even these procedures, would be required to bear the burden of travelling out of state, away from their friends and families, to qualify for the same federal benefits afforded to heterosexual married couples.

The guidance and policies issued by the Department of Homeland Security, Department of Defense and the Department of State further exemplify the primacy of lawful *marriage* in extending federal benefits to same-sex couples. On July 1, 2013, then-Department of Homeland Security Secretary Napolitano directed U.S. Citizen and Immigration Services (USCIS) to "review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse." *Statement by Secretary of Homeland Security Janet Napolitano on the Implementation of the Supreme Court Ruling on the Defense of Marriage Act,* dhs.gov (July 1, 2013), http:/ /www.dhs.gov/news/20 13/07/0 1/statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court.[9] The Department of State followed suit, beginning with Secretary Kerry's announcement that U.S. embassies and consulates would adjudicate visa applications based on a marriage of a same-sex couple in the same way that they adjudicate applications for different-sex spouses. *Same-Sex Couples,* state.gov (Aug. 2, 2013), http://www.state.gov/secretary/remarks/2013/08/212643.htm. Similarly, in August 2013, Secretary of the Department of Defense Chuck Hagel advised that "it is now the Department's policy to treat all married military

[9] That directive was formalized on July 26, 2013. *See* USCIS, *Same-Sex Marriages* (July 26, 2013), *available at* http://www.uscis.gov/portal/site/uscis/ (follow "Same-Sex Marriages" hyperlink) ("USCIS FAQ"). *See also U.S. Visas for Same-Sex Spouses,* travel.state.gov, *available at* http://travel.state.gov/visa/frvi/frvi 6036.html (last visited Oct. 23, 2013) (spousal eligibility based on valid marriage) ("Visa FAQ").

personnel equally. The Department will construe the words 'spouse' and 'marriage' to include same-sex spouses and marriages, and the Department will work to make the same benefits available to all military spouses, regardless of whether they are in same-sex or opposite-sex marriages." Department of Defense, Memo. From Sec'y Chuck Hagel, *Extending Benefits to the Same-Sex Spouses of Military Members* at 1 (Aug. 13, 2013), *available at* http://www .defense.gov/home/features/20 13/docs/Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf. Though the availability of federal benefits continues to evolve, agency guidance makes clear that the threshold requirement to attain many of these benefits is lawful *marriage* – not a civil union or domestic partnership.

D. Excluding Same-Sex Couples from Marriage Perpetuates Discrimination Against Gay Men and Lesbians

The Marriage Bans also cause real and intangible harms to same-sex couples and their families. Even to the extent that a domestic partnership or civil union may confer legal benefits of marriage, the two-tiered regime disadvantages same-sex couples in numerous ways. First, banning same-sex couples from the valued institution of marriage demeans and stigmatizes them. This stigma, in turn, affects their physical and emotional health and well-being and encourages further discrimination against gay and lesbian individuals.

It demeans and stigmatizes same-sex couples to bar them from the valued institution of marriage. The two-tiered regime effected by the Marriage Bans

sends an unmistakable, government-backed message that same-sex relationships are less worthy than different-sex relationships. This official disapproval, and the concomitant stigma, are damaging: gay and lesbian individuals suffer "minority stress" that harms their physical and emotional well-being, and face increased discrimination.

1. Excluding Same-Sex Couples from Marriage Expresses Government Disapproval of Same-Sex Relationships

The two-tiered regime that the Marriage Bans establish conveys official disapproval of same-sex relationships. As the California Supreme Court explained:

> [T]he statutory provisions that continue to limit access to [marriage] exclusively to opposite-sex couples—while providing only a novel, alternative institution for same-sex couples—likely will be viewed as an official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples.

In re Marriage Cases, 183 P.3d 384, 452 (Cal. 2008). To that end, the Court reasoned:

> [T]here is a very significant risk that retaining a distinction in nomenclature with regard to this most fundamental of relationships whereby the term 'marriage' is denied only to same-sex couples inevitably will cause the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship.

Id., 183 P.3d at 445; *see also Goodridge*, 798 N.E.2d at 962 (statutory bar on marriage for same-sex couples "confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect").

The government disapproval expressed through the Marriage Bans is exacerbated by the clear animus behind the measures. As was true of Section 3 of the federal Defense of Marriage Act, the Marriage Bans' "principal effect is to identify a subset of [relationships] and make them unequal. The principal purpose is to impose inequality." *Windsor*, 133 S. Ct. at 2694. Indeed, in Utah, Appellants concede that the express purpose of the prohibition on same-sex marriage was to afford "special privilege and status" to opposite-sex couples and their children, in order to send the message that they are the State's preferred families, *see* Aplt. Br. at 87, and to withhold protections from families headed by same-sex couples, in order to avoid sending the message that they "are on a par with traditional man-woman unions," *id*. at 73. In Oklahoma, the district court also confirmed that the "[the ban's] effect is to prevent every same-sex couple in Oklahoma from receiving a marriage license, and no other couple," Opn. at 42 and that "[e]xclusion of the defined class was not a hidden or ulterior motive; it was consistently communicated to Oklahoma citizens as a justification for [the ban]," *id.* at 46.

The Marriage Bans' disapproval of same-sex couples is stigmatizing. Both judicial decisions and social science have recognized that government action singling out a group for disfavored treatment stigmatizes that group. *See Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (stating that the "stigma" imposed by the Texas statute criminalizing "homosexual conduct" was "not trivial"); *Brown*, 347 U.S. at 494 (1954) (describing the "feeling of inferiority" that inevitably accompanies differential treatment); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879), *abrogated on other grounds by Taylor v. Lousiana*, 419 U.S. 522 (1975) (noting that exclusion of non-white citizens from juries was "practically a brand upon them, affixed by the law, an assertion of their inferiority"); KITCHEN ER CITE 319 (Peplau declaration) (discussing stigmatizing effects of discriminatory laws). In the same way, the dual system created by the Marriage Bans imposes "structural stigma" on gay and lesbian individuals: it sends the message that "a same-sex couple possesses an 'undesired differentness' and is inherently less deserving of society's full recognition." ER CITE 93:102 (declaration of psychologist Gregory Herek).

2. The Stigma Created by the Marriage Bans Causes Emotional and Physical Harm

The stigma resulting from the Marriage Bans' two-tiered regime has harmful consequences. That stigma can cause gay men and lesbians to suffer "minority

stress," which manifests itself through "prejudice events": expectations of rejection and discrimination; concealment of identity; and internalized homophobia. *See* Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psychol. Bull. 674 (2003).

Such stresses negatively affect the mental health and well-being of gay and lesbian individuals. *See, e.g.*, Gilbert Herdt & Robert Kertzner, *I Do, But I Can't: The Impact of Marriage Denial on the Mental Health and Sexual Citizenship of Lesbians and Gay Men in the United States*, 3 J. Sexuality Res. Soc. Policy 33 (2006). Effects include "an increased risk of psychological problems, especially those like anxiety and depression that are most closely linked to stress," as well as more subtle diminishment of well-being. Kitchen ER CITE 312 (Peplau declaration). Internalized homophobia, for example, can lead to lowered self-esteem, anxiety, substance abuse, and depression. Gregory M. Herek et al., *Correlates of Internalized Homophobia in a Community Sample of Lesbians and Gay Men*, 2 J. Gay Lesbian Med. Assoc. 17 (1997). "And the recent spate of suicides among LGBT youth has highlighted the personal consequences of the ostracism and demonization of gay men and lesbians in American society." Kitchen ER CITE (Chauncey declaration).

3. The Stigma Created by the Marriage Bans Perpetuates Discrimination Against Gay Men and Lesbians

By making sexual orientation a legally salient characteristic, the Marriage Bans also encourage and provide cover for those who seek to treat gay men and lesbians differently based on their sexual orientation. *See, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 979 (N.D. Cal. 2010) (describing how Proposition 8 sent "a message that gay relationships are not to be respected; that they are of secondary value, if of any value at all; that they are certainly not equal to those of heterosexuals"). Because the state provides for separate and lesser treatment of gay men and lesbians, individuals may logically conclude that it is permissible to treat them as inferior. *Cf. Lawrence*, 539 U.S. at 575 (criminalizing sexual conduct between same-sex couples was "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres"); *Strauder*, 100 U.S. at 308 (exclusion of non-white citizens from juries was "a stimulant to . . . race prejudice").

Moreover, designating same-sex couples as different can trigger unintentional discrimination. Due to confusion regarding legal requirements, hospitals may refuse to allow a same-sex partner to be by a loved one's side during a medical emergency, and doctors may not permit domestic partners to make medical decisions on behalf of an incapacitated partner. In an analogous context, the New Jersey Civil Union Review Commission received testimony that gay and

lesbian individuals who were legally entitled to hospital visitation rights were delayed in gaining access to their hospitalized partners. For example, a woman whose partner was admitted to the emergency room with a potentially fatal cardiac arrhythmia was temporarily prevented from getting information about her partner's condition because the doctor was unfamiliar with civil unions. *See* New Jersey Commission Report at 1; *see also id.* at 14-15 (providing additional examples). Furthermore, employers may be less understanding of an employee's need to take leave to care for a domestic partner. *Id.* at 21 (testimony explaining that Massachusetts' marriage equality law has had the effect that, "without the term 'civil union' or 'domestic partner' to hide behind, if [employers] don't give equal benefits to employees in same-sex marriages, these employers would have to come forth with the real excuse for discrimination"). Even family members may not understand either the level of commitment expected of a domestic partner towards the couple's child, or the degree of attachment of the child to a domestic partner.

Moreover, by segregating gay men and lesbians, the Marriage Bans cause society to focus on sexual orientation to the exclusion of other characteristics. As with segregation on the basis of race, separating gay men and lesbians based on their sexual orientation causes that aspect of their identity to eclipse other attributes. *See* Robin A. Lenhardt, *Understanding the Mark: Race, Stigma, and*

Equality in Context, 79 N.Y.U. L. Rev. 803, 818-19 (2004). Thus, when gay men or lesbians disclose that they are in a domestic partnership, others often see them *only* as gay—and treat them accordingly—rather than viewing them as full persons entitled to the same respect and dignity given to other members of society. *See generally* Marc R. Poirier, *Name Calling: Identifying Stigma in the "Civil Union"/ "Marriage" Distinction*, 41 Conn. L. Rev. 1425, 1429-30, 1479-89 (2009) (describing the way in which the nomenclature distinction perpetuates bias and facilitates discrimination).

CONCLUSION

At odds with time-honored constitutional commands, the Marriage Bans create a separate and unequal regime for a disfavored class of individuals. By excluding same-sex couples from the hallowed institution of marriage, the Marriage Bans inflict profound injury upon gay and lesbian individuals and their children. Because of the Marriage Bans, gay men and lesbians and their families are deprived of meaningful benefits; suffer from state-sanctioned stigma; and are exposed to further discrimination on the basis of their sexual orientation. There is no doubt that the Marriage Bans impose "immediate, continuing, and real injur[y]" on gay and lesbian individuals. *Romer,* 517 U.S. at635. The patently separate-but-unequal regime effected by the Marriage Bans fails any level of judicial scrutiny.

Marital regulations have long been a way of "draw[ing] lines among the citizenry" and "defin[ing] what kinds of sexual relations and which families will be legitimate." Nancy Cott, *Public Vows: A History of Marriage and the Nation* 4 (2000). Numerous racial and religious minorities have, at various times in history, faced restrictions on their privilege to marry. *See id.* But "[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *Virginia*, 518 U.S. at 557. Continuing to exclude, demean, and stigmatize gay and lesbian individuals is inconsistent with that constitutional tradition. *Amici* urge this court to find that the Marriage Bans are unconstitutional.

DATED: March 4, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7) and Tenth Circuit Rule 29(d), the undersigned attorney for the Amicus Curiae certifies that this brief is proportionally spaced, has a typeface of 14 points or more and contains 6,312 words, and therefore complies with the word limitation imposed upon amicus curiae briefs by Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(i). This brief was prepared using Microsoft Word 2010.

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DATED: March 4, 2014

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CERTIFICATION OF SERVICE

I hereby certify that on March 4, 2014, a true, correct and complete copy of the foregoing Brief of *Amici Curiae* _____ in Support of Plaintiffs-Appellees and Plaintiffs-Appellees/Cross-Appellants was filed with the Court and served on the following via the Court's CM/ECF system:

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APPENDIX: STATEMENTS OF AMICI

Amici respectfully submit the following statements regarding their interests in this matter: