

Case Nos.: 14-2386, 14-2387, 14-2388, & 14-2526

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MARILYN RAE BASKIN, et al.,

Plaintiffs-Appellees,

v.

PENNY BOGAN, in her official capacity as Boone County Clerk, et al.,

Defendants-Appellants,

and

VIRGINIA WOLF, et al.,

Plaintiffs-Appellees.

v.

SCOTT WALKER, in his official capacity as Governor of Wisconsin, et al.,

Defendants-Appellants.

On Appeal from the United States District Courts

for the Southern District of Indiana

Case Nos. 1:14-cv-355-RLY-TAB, 1:14-cv-404-RLY-TAB, and

1:14-cv-406-RLY-MJD

The Honorable Richard L. Young, Chief Judge

and

for the Western District of Wisconsin

Case No. 14-cv-64-bbc

The Honorable Barbara B. Crabb

BRIEF OF AMICI CURIAE

**BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM (“BALIF”), ET AL.
IN SUPPORT OF PLAINTIFFS-APPELLEES**

MUNGER, TOLLES & OLSON LLP

Jerome C. Roth

Nicole S. Phillis

560 Mission Street, Twenty-Seventh Floor

San Francisco, CA 94105-2907

Telephone: (415) 512-4000

Facsimile: (415) 512-4077

Attorneys for *Amici Curiae* BALIF, et al.

TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT	1
STATEMENT OF INTEREST	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. CLASSIFICATIONS THAT SERVE ONLY TO DISADVANTAGE THE BURDENED GROUP FAIL RATIONAL BASIS REVIEW	5
II. THE MARRIAGE BANS ESTABLISH AN UNEQUAL, TWO- TIERED REGIME AND HARM GAY AND LESBIAN INDIVIDUALS AND THEIR CHILDREN	7
A. The Legalistic Designation of Domestic Partnership Available in Some States Is Patently Inferior to the Revered Institution of Marriage	7
1. Marriage Is a Uniquely Revered Institution in American Society	9
2. Statutory Schemes that Recognize Domestic Partnership and Civil Unions Are Legalistic Mechanisms That Lack the Significance, Stability, and Meaning of Marriage	12
B. Excluding Same-Sex Couples From the Institution of Marriage Causes Tangible Legal and Economic Harm	15
C. In the Wake of the Supreme Court’s Decision in <i>Windsor</i> , the Tangible Benefits Associated with Marriage Are Even More Substantial	17
D. Excluding Same-Sex Couples from Marriage Perpetuates Discrimination Against Gay Men and Lesbians	23
1. Excluding Same-Sex Couples from Marriage Expresses Government Disapproval of Same-Sex Relationships	24

TABLE OF CONTENTS
(continued)

	<u>Page</u>
2. The Stigma Created by the Marriage Bans Causes Emotional and Physical Harm	28
3. The Stigma Created by the Marriage Bans Perpetuates Discrimination Against Gay Men and Lesbians	29
CONCLUSION.....	31
APPENDIX: STATEMENTS OF AMICI.....	A-1

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

<i>Baskin, et al. v. Bogan, et al.</i> , No. 14-2386, Dkt. 20 (7th Cir. July 1, 2014)	7
<i>Baskin v. Bogan</i> , Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 1:14-cv- 00406-RLY-MJD, 2014 WL 2884868 (S.D. Ind. June 25, 2014)	passim
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954).....	3, 7, 27
<i>Brown v. Louisiana</i> , 383 U.S. 131 (1966).....	8
<i>City of Cleburne, Tex. v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).....	5, 26
<i>Dep't of Agric. v. Moreno</i> , 413 U.S. 528 (1973).....	6
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972).....	6
<i>Gayle v. Browder</i> , 352 U.S. 903 (1956).....	8
<i>Golinski v. v. U.S. Office of Pers. Mgmt.</i> , 824 F. Supp. 2d 968 (N.D. Cal. 2012).....	26
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965).....	9
<i>Holmes v. City of Atlanta</i> , 350 U.S. 879 (1955).....	8
<i>Jackson v. Abercrombie</i> , 884 F. Supp. 2d. 1065 (D. Haw. 2012).....	13
<i>Kitchen v. Herbert</i> , No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014)	5
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	27, 29

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967).....	5, 10
<i>Mayor & City Council of Balt. v. Dawson</i> , 350 U.S. 877 (1955).....	8
<i>New Orleans City Park Improvement Ass’n v. Detiege</i> , 358 U.S. 54 (1958).....	8
<i>Perry v. Schwarzenegger</i> , 704 F. Supp. 2d 921 (N.D. Cal. 2010).....	29
<i>Peterson v. City of Greenville</i> , 373 U.S. 244 (1963).....	8
<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896) (Harlan, J., dissenting)	3
<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	passim
<i>Sevcik v. Sandoval</i> , 911 F. Supp. 2d 996 (D. Nev. 2012).....	13, 14
<i>SmithKline Beecham Corp. v. Abbott Labs.</i> , 740 F.3d 471 (9th Cir. 2014), reh’g en banc denied, No. 11-17357 (9th Cir. June 24, 2014).....	5
<i>Strauder v. West Virginia</i> , 100 U.S. 303 (1879).....	27, 29
<i>Sweatt v. Painter</i> , 339 U.S. 629 (1950).....	8, 9
<i>Taylor v. Louisiana</i> , 419 U.S. 522 (1975).....	27
<i>Turner v. Safley</i> , 482 U.S. 78 (1987).....	10
<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	8, 31

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>United States v. Windsor</i> , 133 S. Ct. 2675 (2013).....	9, 17, 18, 25
<i>Williams v. North Carolina</i> , 317 U.S. 287 (1942).....	9
<i>Windsor v. United States</i> , 699 F.3d 169 (2d Cir. 2012), aff'd, 133 S. Ct. 2675 (2013).....	5, 17, 18
<i>Wolf v. Walker</i> , 986 F. Supp. 2d 982 (W.D. Wis. 2014)	passim

STATE CASES

<i>Garden State Equal. v. Dow</i> , 216 N.J. 314 (2013)	18
<i>Goodridge v. Dep't of Pub. Health</i> , 798 N.E.2d 941 (Mass. 2003).....	10, 11, 25
<i>In re Marriage Cases</i> , 183 P.3d 384 (Cal. 2008)	24, 25
<i>Kerrigan v. Comm'r of Pub. Health</i> , 957 A.2d 407 (Conn. 2008)	9
<i>Perez v. Lippold</i> , 198 P.2d 17 (Cal. 1948).....	10
<i>Varnum v. Brien</i> , 763 N.W.2d 862 (Iowa 2009)	11

CASES - OTHER

<i>Fujii et al. v. Commissioner of the Indiana State Dept. of Revenue, et al.</i> , No. 14-2387	3
<i>Lee et al. v. Abbott</i> , No. 14-2388	3

FEDERAL STATUTES

38 U.S.C. § 103(c) (2012).....	22, 23
--------------------------------	--------

TABLE OF AUTHORITIES
(continued)

	Page(s)
42 U.S.C. § 416(h)(1)(A)(i)	23
STATE STATUTES	
Act of June 29, 2009, ch. 770, 2009 Wis. Act 28	9
Cal. Fam. Code § 297(b)(4) (2014)	13
Defense of Marriage Act § 3.....	5, 17, 18, 25
STATUTES - OTHER	
Haw. Rev. Stat. § 572B (2013).....	13
Haw. Rev. Stat. §§ 572B, 572C-2 (2013).....	13
Haw. Rev. Stat. §§ 572C-2, 572C-4 (2013).....	13
Indiana Code § 31-11-1-1	3
Nev. Rev. Stat. § 122A.210(1) (2013).....	16
Wis. Stat. § 770 (2014)	13
Wis. Stat. § 770.001	17
Wis. Stat. § 770.05(5)	13
FEDERAL RULES	
Fed. R. App. P. 32.....	2
FEDERAL REGULATIONS	
29 C.F.R. 825.122(b)	23
Rev. Rul. 2013-17, 2013-381.R.B.	19
CONSTITUTIONAL PROVISIONS	
Wis. Const. art. XIII, § 13.....	3, 27

TABLE OF AUTHORITIES**(continued)****Page(s)****OTHER AUTHORITIES**

Adam W. Fingerhut, Letitia Anne Peplau, & Shelly L. Gable, <i>Identity, Minority Stress and Psychological Well-Being Among Gay Men and Lesbians</i> , 1 <i>Psychol. & Sexuality</i> 101, 105 (2010)	28
Def., <i>Extending Benefits to the Same-Sex Spouses of Military Members</i> at 1 (Aug. 13, 2013), available at http://www.defense.gov/home/features/2013/docs/Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf	22
Elizabeth S. Scott, <i>Social Norms and the Legal Regulation of Marriage</i> , 86 <i>Va. L. Rev.</i> 1901, 1917 (2000)	10
Evan Wolfson, <i>Why Marriage Matters: America, Equality, and Gay People's Right to Marry</i> 6 (2004).....	15
Gilbert Herdt & Robert Kertzner, <i>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</i> , 3 <i>J. Sexuality Res. & Soc. Policy</i> 33 (2006).....	28
Gregory M. Herek et al., <i>Correlates of Internalized Homophobia in a Community Sample of Lesbians and Gay Men</i> , 2 <i>J. Gay & Lesbian Med. Assoc.</i> 17 (1997)	28
Howard A. Sweet, <i>Understanding Domestic Partnerships in Wisconsin</i> , 82 <i>Wis. Law.</i> 6, 56 (Nov. 2009)	17
Ilan H. Meyer, <i>Prejudice, Social Stress, and Mental Health in Lesbian, Gay and Bisexual Populations: Conceptual Issues and Research Evidence</i> , 129 <i>Psychol. Bull.</i> 674 (2003)	28
Jeffrey M. Adams & Warren H. Jones, <i>The Conceptualization of Marital Commitment: An Integrative Analysis</i> , 72 <i>J. Personality & Soc. Psychol.</i> 1177 (1997).....	11
Lisa C. Connolly, <i>Anti-Gay Bullying in Schools--Are Anti-Bullying Statutes the Solution?</i> , 87 <i>N.Y.U. L. Rev.</i> 248, 249 (2012).....	29
M.V. Lee Badgett, <i>The Economic Value of Marriage for Same-Sex Couples</i> , 58 <i>Drake L. Rev.</i> 1081 (2010)	15, 16

TABLE OF AUTHORITIES**(continued)**

	Page(s)
Marc R. Poirier, <i>Name Calling: Identifying Stigma in the “Civil Union”/ “Marriage” Distinction</i> , 41 Conn. L. Rev. 1425, 1429-30, 1479-89 (2009)	31
Memorandum from Attorney Gen. Eric Holder to President Barack Obama (June 20, 2014) [hereinafter “Holder Memorandum”], <i>available at</i> http://www.justice.gov/iso/opa/resources/9722014620103930904785.pdf	19
N.J. Civ. Union Rev. Comm’n, <i>The Legal, Medical, Economic and Social Consequences of New Jersey’s Civil Union Law</i> at 14-15 (Dec. 10, 2008), <i>available at</i> http://www.nj.gov/lps/dcr/downloads/CURC-Final-Report-.pdf	30
Nancy Cott, <i>Public Vows: A History of Marriage and the Nation</i> 4 (2000)	31
News Release from Office of Pub. Affairs, U.S. Dep’t of Veterans Affairs (June 20, 2014) [hereinafter “VA News Release”], <i>available at</i> http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2562	23
Office of Personnel Management, Benefits Admin. Letter, <i>Coverage of Same-Sex Spouses</i> , No. 13-203, at 1-2 (July 17, 2013)	19
Robert A. Burt, <i>Belonging in America: How to Understand Same-Sex Marriage</i> , 25 BYU J. Pub. L. 351, 357 (2011)	10
Robin A. Lenhardt, <i>Understanding the Mark: Race, Stigma, and Equality in Context</i> , 79 N.Y.U. L. Rev. 803, 818-19 (2004)	31
State, <i>Announcement on Visa Changes for Same-Sex Couples</i> (Aug. 2, 2013), <i>available at</i> http://www.state.gov/secretary/remarks/2013/08/212643.htm	21
<i>Statement by the President on the Supreme Court Ruling on the Defense of Marriage Act</i> (June 26, 2013), <i>available at</i> http://www.whitehouse.gov/doma-statement	18
<i>Statement by Secretary of Homeland Security Janet Napolitano on the Implementation of the Supreme Court Ruling on the Defense of Marriage Act</i> (July 1, 2013), <i>available at</i> http://www.dhs.gov/news/2013/07/01/statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court	21

TABLE OF AUTHORITIES
(continued)

	Page(s)
Thomas B. Stoddard, <i>Why Gay People Should Seek the Right to Marry</i> , Out/Look: Nat'l Gay & Lesbian Q. (Fall 1989)	12
U.S. Gov't Accountability Office, GAO-04-353R, <i>Defense of Marriage Act: Update to Prior Report 1</i> (2004)	18
<i>U.S. Visas for Same-Sex Spouses</i> , Dep't of State, available at http://travel.state.gov/content/dam/visas/DOMA/DOMA%20FAQs.pdf (last visited July 16, 2014)	21
USCIS, <i>Same Sex Marriages</i> , at QA 8-9 (updated Apr. 3, 2014) [hereinafter USCIS FAQ], available at http://www.uscis.gov/family/same-sex-marriages	20

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 statutory and constitutional bans (collectively, “the Marriage Bans”) that prohibit same-sex couples from marrying in Indiana and Wisconsin betray these longstanding values.² They exclude a class of people—gay men and lesbians—from the venerated institution of marriage.

² The lower court in *Baskin v. Bogan* held unconstitutional Indiana Code Section 31-11-1-1, which “defines marriage as between one man and one woman and voids marriages between same-sex persons.” *Baskin v. Bogan*, Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 1:14-cv-00406-RLY-MJD, 2014 WL 2884868, at *1 (S.D. Ind. June 25, 2014). The *Baskin* decision also disposed of two other consolidated cases: *Fujii et al. v. Commissioner of the Indiana State Dept. of Revenue, et al.*, No. 14-2387 and *Lee et al. v. Abbott*, No. 14-2388. *Id.* References to the lower court’s decision in *Baskin* herein refer to the disposition of all cases.

The lower court in *Wolf v. Walker* held unconstitutional a provision in the Wisconsin Constitution which states that “[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall

This brief explains the harm inflicted on gay men and lesbians as a result of the Marriage Bans' pernicious classification. It also explains how nothing short of or different from marriage itself can cure the constitutional violations. Specifically, this brief discusses why neither civil unions nor domestic partnerships, which are available to same-sex couples in some states (though not in Indiana)—would be an adequate or appropriate constitutional remedy. Because the Marriage Bans exclude committed same-sex couples from access to the institution of marriage, these couples and their families are separated out, stigmatized, deprived of benefits and responsibilities 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 systems 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. *See Baskin*, 2014 WL 2884868, at *1; *Wolf*, 986 F. Supp. 2d at 1028.

not be valid or recognized in this state.” Wis. Const. art. XIII, § 13; *see Wolf v. Walker*, 986 F. Supp. 2d 982, 1028 (W.D. Wis. 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.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).³ “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.

³ The decision of the district court in *Wolf* correctly found that the Wisconsin marriage ban is subject to heightened scrutiny under the Equal Protection Clause of the Constitution. *Wolf*, 986 F. Supp. 2d at 2014; *accord Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *21-22 (10th Cir. June 25, 2014) (applying strict scrutiny to Utah Constitution and statutes prohibiting same-sex marriage when evaluating due process and equal protection claims); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480 (9th Cir. 2014), *reh’g en banc denied*, No. 11-17357 (9th Cir. June 24, 2014) (applying heightened scrutiny to preemptory strike of juror based on sexual orientation); *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013) (applying intermediate scrutiny to equal protection review of Section 3 of the federal Defense of Marriage Act). 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.

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 635-36. 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 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 Indiana and Wisconsin establishes a regime in which same-sex couples are not simply relegated to second-class status, but rather are not recognized – and therefore do not “count” – at all. Further, as explained below, the availability of domestic partnership or civil union as exists in some other states would not cure the Marriage Bans' constitutional deficiency. Whether or not such options are available, by excluding same-sex couples from marriage itself, the Marriage Bans cause severe, actual harm to gay and lesbian individuals and their families.⁴

A. The Legalistic Designation of Domestic Partnership Available in Some States 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

⁴ This Court's interim order holding that Indiana must immediately recognize the validity of the out-of-state marriage of a plaintiff same-sex couple, one of whom suffers from a severe terminal illness and only has weeks to live, highlights—in especially heartbreaking circumstances—the irreparable harm suffered by gay and lesbian couples and their families when their marriages are not immediately recognized by their state of residence. Emergency Order, *Baskin, et al. v. Bogan, et al.*, No. 14-2386, Dkt. 20 (7th Cir. July 1, 2014).

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 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 "domestic partnership" or "civil union," such as that available in Wisconsin. Both of these are different from and inferior to marriage.

Even though Wisconsin law provides for domestic partnership, and even if domestic partnership were made available in Indiana, that cannot remedy the harm caused by the exclusion from marriage but rather provides a square peg for a round hole.⁵ As in *Sweatt*, “[i]t is difficult to believe that one who had a free choice” between domestic partnership and true marriage “would consider the question close.” *See* 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 can be 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 and mutual responsibility between two people

⁵ In 2009, Wisconsin established a statewide domestic partnership registry that grants same-sex couples limited spousal benefits. *See* Act of June 29, 2009, ch. 770, 2009 Wis. Act 28.

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.”). 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 establishes norms for how the two married individuals conduct themselves and how society behaves toward them.

First, married people understand they are to be emotionally and financially supportive, honest, and faithful to one another. *See Robert A. Burt, Belonging in America: How to Understand Same-Sex Marriage*, 25 BYU J. Pub. L. 351, 357 (2011) (noting that “[t]his faithfulness has always been at the core of the marital status for mixed-sex couples”). 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. *Id.*

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 personal commitment and concomitant legal and social status. *See Goodridge*, 798 N.E.2d at 955 (“Because [marriage] fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.”). Spouses are understood 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—indeed, marriage “is the centerpiece of our entire social structure.” Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, *Out/Look: Nat’l Gay & Lesbian Q.* (Fall 1989).

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 and responsibilities that come with the marital commitment.

First, the legal categories of domestic partnership and civil union are novel and unstable. These categories were invented recently,⁶ and their meaning is ever-

⁶ The City of West Hollywood enacted the first domestic partnership ordinance in the mid-1980s.

shifting.⁷ Even the name of the category varies from state to state. *Compare* Wis. Stat. § 770 (2014) (“Domestic Partnership”) *with* Haw. Rev. Stat. § 572B (2013) (“Civil Union”). In addition, state law varies as to which individuals are permitted to enter a domestic partnership or civil union. In Wisconsin, for example, domestic partnerships are available only to members of the same sex. *See* Wis. Stat. § 770.05(5). In California, opposite-sex couples in which one member is more than sixty-two years old are also eligible to apply for a domestic partnership. *See* Cal. Fam. Code § 297(b)(4) (2014). And in Hawaii, any couple that cannot legally marry (“such as a widowed mother and her unmarried son”) may enter a civil union. *See* Haw. Rev. Stat. §§ 572C-2, 572C-4 (2013). These different and inconsistent labels further obscure the legal rights and responsibilities of same-sex couples. *See Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1077 (D. Haw. 2012); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1001 (D. Nev. 2012).

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

⁷ For example, in 1997, Hawaii’s statutory scheme granted same-sex couples sixty specific rights associated with marriage but recently expanded that number. *See* Haw. Rev. Stat. §§ 572B, 572C-2 (2013).

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 emotions that people experience when they get married—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: members of 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 to their professional, athletic, or law partner. Consequently, same-sex couples must often explain the intricacies of state family law to friends and potentially hostile strangers alike. Such ambiguities, and the likelihood of differential treatment, would be reduced if same-sex couples could accurately refer to themselves as “married” or could refer to each other as “husband” or “wife,” a vocabulary that is universally understood.

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 ultimate symbol of “unequaled commitment.” Evan Wolfson, *Why Marriage Matters: America, Equality, and Gay People’s Right to Marry* 6 (2004). Domestic partnership would be a patently inferior alternative. Simply put: “No matter what language people speak—from Arabic to Yiddish, from Chinook to Chinese—*marriage* is what we use to describe a specific relationship of love and dedication to another person. It is how we explain the families that are united because of that love. And it universally signifies a level of self-sacrifice and responsibility and a stage of life unlike any other.” *Id.* at 3 (emphasis added).

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* M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 Drake L. Rev. 1081 (2010). 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. *Id.* at 1084 (explaining that “coverage for same-sex domestic partners is still relatively rare”). Many same-sex couples eschew the institution of domestic partnership due

to its lesser status. These couples are denied even the limited economic and legal protections 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. *Id.* at 1102. Marriage also tends to reduce a couple's transaction costs: marriage "promotes economic efficiency by reducing transaction costs for couples, mainly by removing the need to renegotiate the terms of the legal relationship as couples experience changed circumstances." *Id.* at 1101. Furthermore, married individuals enjoy greater employment-related economic gains, whereas same-sex couples who cannot marry face uncertainty and pressures that may adversely affect their work performance and reduce their economic rewards. *Id.* at 1102-03. Though difficult to quantify, these economic benefits of marriage are well-known and acknowledged in the field of economics. *Id.*

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: among other things, employers there are not legally required to provide health care benefits for domestic partners of their employees. Nev. Rev. Stat. § 122A.210(1) (2013). In Wisconsin, the

legislature granted only a set of limited rights to domestic partners. *See* Howard A. Sweet, *Understanding Domestic Partnerships in Wisconsin*, 82 Wis. Law. 6, 56 (Nov. 2009). In enacting the State’s domestic partnership statute, the Wisconsin legislature made clear that “the legal status of domestic partnership” was specifically designed *not* to be “substantially similar to that of marriage.” Wis. Stat. § 770.001.

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 allow same-sex couples to enter domestic partnerships or civil unions but that do not allow them to marry result in the deprivation of federal benefits because many federal agencies offer such benefits only to lawfully *married* couples. Now that the Supreme Court’s decision in *Windsor* has invalidated Section 3 of the Defense of Marriage Act (“DOMA”), which prohibited federal recognition of the validity of same-sex couples’ marriages, *Windsor*, 133 S. Ct. at 2695, a growing chasm 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[led] 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, GAO-04-353R, *Defense of Marriage Act: Update to Prior Report 1* (2004)). By denying same-sex couples the right to marry, Indiana and Wisconsin have placed those federal protections and responsibilities entirely off-limits to them. *See generally Garden State Equal. v. Dow*, 216 N.J. 314 (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* (June 26, 2013), available at <http://www.whitehouse.gov/doma-statement>. However, 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,⁸ but many agencies have stated explicitly that they *will not* extend protections to registered domestic partners.

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, *Coverage of Same-Sex Spouses*, No. 13-203, at 1-2 (July 17, 2013). 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. However, the Revenue Ruling also specifically held that marital 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.*

⁸ To date, many federal government agencies have extended protections based on lawful marriage, including the Department of Defense, the Department of Education, the Department of Homeland Security, the Department of Justice, and the Internal Revenue Service. *See* Memorandum from Attorney Gen. Eric Holder to President Barack Obama (June 20, 2014) [hereinafter “Holder Memorandum”], *available at* <http://www.justice.gov/iso/opa/resources/9722014620103930904785.pdf>.

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 Citizenship and Immigration Services (“USCIS”) 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, and to the residency period required for naturalization of non-citizens married to U.S. citizens. USCIS, *Same Sex Marriages*, at QA 8-9 (updated Apr. 3, 2014) [hereinafter USCIS FAQ], *available at* <http://www.uscis.gov/family/same-sex-marriages>. These benefits would not be available to same-sex couples in domestic partnerships or civil unions.⁹

The guidance and policies issued by the Department of Homeland Security, Department of Defense and the Department of State further exemplify the primacy

⁹ Certain governmental agencies, including the USCIS, 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.” USCIS FAQ, at QA 3. This means that a same-sex couple living in a state that provides only for civil unions or domestic partnerships, as well as such couples living in states that lack even these provisions, would be required to bear the burden of travelling out of state—and marrying far away from their friends and families—to qualify for the same federal benefits afforded to heterosexual married couples.

of lawful *marriage* in extending federal benefits to same-sex couples. On July 1, 2013, then-Secretary of Homeland Security Janet Napolitano directed the 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* (July 1, 2013), available at <http://www.dhs.gov/news/2013/07/01/statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court>.¹⁰ The Department of State followed suit, beginning with Secretary John 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. John Kerry, Sec’y of State, *Announcement on Visa Changes for Same-Sex Couples* (Aug. 2, 2013), available at <http://www.state.gov/secretary/remarks/2013/08/212643.htm>. Similarly, in August 2013, Secretary of Defense Chuck Hagel advised that “[i]t is now the Department’s policy to treat all married military personnel equally. The Department will construe the words ‘spouse’ and ‘marriage’ to include same-sex spouses and

¹⁰ That directive was formalized on July 26, 2013. See USCIS FAQ; see also *U.S. Visas for Same-Sex Spouses*, Dep’t of State, available at <http://travel.state.gov/content/dam/visas/DOMA/DOMA%20FAQs.pdf> (last visited July 16, 2014) (spousal eligibility based on valid marriage).

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.” Chuck Hagel, Sec’y of Def., *Extending Benefits to the Same-Sex Spouses of Military Members* at 1 (Aug. 13, 2013), available at <http://www.defense.gov/home/features/2013/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.

Even married same-sex couples who now reside in states that do not permit marriage of same-sex couples cannot enjoy all of the protections afforded by federal law. Federal statutes that explicitly link federal benefits to place of domicile inevitably prohibit some legally married couples—including the married plaintiffs in these cases—from enjoying these benefits because they live in a state (like Indiana and Wisconsin) that prohibits marriage of same-sex couples. *See Baskin*, 2014 WL 2884868, at *1; *Wolf*, 986 F. Supp. 2d at 988; Holder Memorandum, at 3. For example, 38 U.S.C. § 103(c) (2012) requires the Department of Veterans Affairs (“VA”) to define “spouse” according to the law of “place of residency rather than the place of celebration” of the marriage, rendering couples who traveled to other states to obtain a legal marriage license and then

returned to their state of residency ineligible for all veterans' benefits. News Release from Office of Pub. Affairs, U.S. Dep't of Veterans Affairs (June 20, 2014) [hereinafter "VA News Release"], *available at* <http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2562>; *see also* 38 U.S.C. § 103(c) (defining spouse according to "the law of the place where the parties resided at the time of the marriage or . . . when the right to benefits accrued"). Thus, despite complying with the President's post-*Windsor* order, the VA is required by statute to discriminate against some Indianans and Wisconsinites in otherwise legal same-sex marriages, treating them only "as equally *as possible* under the law." VA News Release (emphasis added). The same is true of other critical federal benefits, such as Social Security benefits, the availability of which depend on the laws of the state where a same-sex couple resides. *See, e.g.*, 42 U.S.C. § 416(h)(1)(A)(i) (Social Security old-age, survivors, and disability insurance benefits available to applicants who are or were "validly married" according to the courts of the state "in which [the] insured individual is . . . or . . . was domiciled"); 29 C.F.R. 825.122(b) (definition of "spouse" in Family Medical Leave Act based on laws of the state "where the employee resides").

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 immediate and extended 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 makes them “other,” and 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. This in turn causes “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 in finding that domestic partnership was not a constitutionally adequate substitute for marriage:

[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. at 445; *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 likewise constitutionally suspect in light of the motivations that underlie the statutes and constitutional provision. As was true of Section 3 of DOMA, 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. Although Appellant contends that the purpose of the Marriage Ban is to promote procreation and responsible child-rearing, the district courts below properly found that these arguments provide no legitimate basis for denying same-sex couples the right to marry. *Baskin*, 2014 WL 2884868, at *13; *Wolf*, 986 F. Supp. 2d, at 1020-1024.

As the district courts in both cases rightly concluded, the Marriage Bans fail to advance the State’s interest in child-rearing because same-sex couples also raise children. Thirty years of scholarship has “overwhelmingly demonstrated that

children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents.” *Golinski v. v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 991 (N.D. Cal. 2012); *Wolf*, 986 F. Supp. 2d at 1022 (“it is ‘beyond scientific dispute’ that same-sex parents are equally capable at parenting as opposite-sex parents”) (citing *Golinski*, 824 F. Supp. 2d at 991). As the district court in *Wolf* noted, non-recognition of same-sex marriages actually harms children by “stigmatizing [children of same-sex parents] and depriving them of the benefits that marriage could provide.” *Wolf*, 986 F. Supp. 2d at 1023.

Given the absence of any rational justification, the Marriage Bans are motivated by nothing other than a “bare . . . desire to harm a politically unpopular group.” *See Romer*, 517 U.S. at 634. For example, the district court in *Baskin* properly recognized that animus against same-sex couples prompted Indiana’s marriage ban, especially since Indiana grants full faith and credit to *other* types of out-of-state marriages. *Baskin*, 2014 WL 2884868, at *14. Indiana and Wisconsin single out same-sex marriage for special, unfavorable treatment—by refusing to recognize such marriages even when they were validly performed in another state. “The constitutional issue is clear[]” when a state treats one group differently from all the others: the law must be based on “irrational prejudice.” *See City of Cleburne, Tex.*, 473 U.S. at 447, 450.

As the district court in *Baskin* found, the Marriage Bans express a clear purpose “to single out [same-sex relationships] for disparate treatment.” *Baskin*, 2014 WL 2884868, at *14. That purpose is made even clearer in Wisconsin by the fact that its marriage ban there prohibits the state legislature or any political subdivision within the state from creating or recognizing “a legal status identical or substantially similar to that of marriage for unmarried individuals.” Wis. Const. art. XIII, § 13 (2014); *see also Wolf*, 986 F. Supp. 2d at 1018 (Wis. Const. art. XIII, § 13 “represents a rare, if not unprecedented, act of using the Wisconsin Constitution to *restrict* constitutional rights rather than expand them and to require discrimination against a particular class.”).¹¹

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 (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. Louisiana*, 419 U.S. 522 (1975) (noting that exclusion

¹¹ The Indiana Constitution does not contain an equivalent provision prohibiting the creation or recognition of a legal status approximating that of marriage.

of non-white citizens from juries was “practically a brand upon them, affixed by the law, an assertion of their inferiority”).

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). “Greater exposure to discrimination and perceptions of stigma have been linked with poorer mental health in sexual minority individuals.” Adam W. Fingerhut, Letitia Anne Peplau, & Shelly L. Gable, *Identity, Minority Stress and Psychological Well-Being Among Gay Men and Lesbians*, 1 *Psychol. & Sexuality* 101, 105 (2010). 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 frequent suicides by gay teenagers “has drawn national attention to the insidious peer harassment that lesbian, gay, bisexual, and transgender (LGBT) youth face on a daily basis.” Lisa C. Connolly, *Anti-Gay Bullying in Schools--Are Anti-Bullying Statutes the Solution?*, 87 N.Y.U. L. Rev. 248, 249 (2012).

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. *See* N.J. Civ. Union Rev. Comm'n, *The Legal, Medical, Economic and Social Consequences of New Jersey's Civil Union Law* at 14-15 (Dec. 10, 2008), available at <http://www.nj.gov/lps/dcr/downloads/CURC-Final-Report-.pdf>. For example, a woman whose partner was admitted to the emergency room with a potentially fatal cardiac arrhythmia was prevented for a time from getting information about her partner's condition because the doctor was unfamiliar with civil unions. *See id.* at 1. Furthermore, employers may be less understanding of an employee's need to take leave to care for a domestic partner. *See id.* at 21. 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

Numerous racial and religious minorities have, at various times in history, faced restrictions on their privilege to marry. *See* Nancy Cott, *Public Vows: A History of Marriage and the Nation* 4 (2000). 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. The Marriage Bans create a separate and unequal regime for a disfavored class. By excluding same-sex couples from the hallowed, state-sponsored institution of marriage, the Marriage Bans inflict “immediate, continuing, and real injur[y]” on

gay and lesbian individuals. *Romer*, 517 U.S. at 635. 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. The patently separate-but-unequal regime effected by the Marriage Bans fails any level of judicial scrutiny. *Amici* urge this court to find that the Marriage Bans are unconstitutional.

DATED: August 5, 2014

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP
JEROME C. ROTH
NICOLE S. PHILLIS

s/ Jerome C. Roth

MUNGER, TOLLES & OLSON, LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105-2907
Telephone: (415) 512-4000
Email: Jerome.Roth@mto.com
Nicole.Phillis@mto.com

Attorneys for *Amici Curiae*, BALIF, et al.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,928 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

DATED: August 5, 2014

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP
JEROME C. ROTH
NICOLE S. PHILLIS
560 Mission Street, 27th Floor
San Francisco, CA 94105-2907
Telephone: (415) 512-4000
Email: Jerome.Roth@mto.com
Nicole.Phillis@mto.com

s/ Jerome C. Roth

Attorneys for *Amici Curiae*, BALIF, et al.

CERTIFICATION OF SERVICE

I hereby certify that on August 5, 2014, I electronically filed the foregoing Brief of Amici Curiae Bay Area Lawyers for Individual Freedom (“BALIF”), et al. in Support of Plaintiffs-Appellees with the Clerk of the Court using the CM/ECF System and served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

DATED: August 5, 2014

MUNGER, TOLLES & OLSON LLP
JEROME C. ROTH
NICOLE S. PHILLIS

560 Mission Street, 27th Floor
San Francisco, CA 94105-2907
Telephone: (415) 512-4000
Email: Jerome.Roth@mto.com
Nicole.Phillis@mto.com

s/ Jerome C. Roth

Attorneys for *Amici Curiae*, BALIF, et al.

APPENDIX: STATEMENTS OF AMICI

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

Austin LGBT Bar Association (“Austin LGBT Bar”)

The Austin LGBT Bar Association (“Austin LGBT Bar”) is a membership organization comprised of over 100 attorneys, judges, and law students located in Austin, Texas. It has a voting member on the Board of Directors of the Austin Travis County Bar Association. The Austin LGBT Bar conducts bi-monthly certified continuing legal education programs on the laws and statutes that impact the lives of LGBT persons and implements mentoring programs for law students. In addition to promoting education on issues relating to LGBT law, one of the stated purposes of the Austin LGBT Bar is to help raise the profile and acceptance of LGBT individuals within the legal community and to serve as examples for professionalism. The Austin LGBT Bar works hard to educate Texas attorneys on how to best represent their gay and lesbian clients in the extremely difficult climate that exists due to a disparate and unequal treatment of LGBT persons under the law – particularly with regard to gay and lesbian families.

Freedom to Marry

Freedom to Marry is the campaign to win marriage nationwide. Freedom to Marry works with partner organizations and individuals to win marriage in more

states, solidify and diversify the majority for marriage, and challenge and end federal marriage discrimination. Freedom to Marry is based in New York, and has participated as amicus curiae in several marriage cases in the United States and abroad.

Indiana Equality Action (“IE Action”)

Indiana Equality Action ("IE Action"), a lobbying and advocacy organization, is an Indiana non-profit corporation dedicated to advancing equal rights for all Hoosier citizens regardless of sexual orientation or gender identity. A coalition of statewide and regional organizations and individuals, IE Action is also committed to fighting discrimination based upon sexual orientation and gender identity and provides financial assistance for expenses of litigants in litigation involving sexual orientation or gender identity, including *Lee v. Abbott*.

Lambda Law Society, Indiana University School of Law – Indianapolis (“McKinney LLS”)

The Lambda Law Society of the Indiana University Robert H. McKinney School of Law (“McKinney LLS”) is a student, faculty, and staff organization dedicated to promoting the civil rights of LGBTQ citizens in Indiana and throughout the United States. The amicus brief prepared by attorneys Jerome C. Roth and Nicole S. Phillis of Munger, Tolles & Olson on behalf of the Bay Area Lawyers for Individual Freedom expresses the reasoning and shared ideals of our

organization regarding the legalization of marriage equality in the State of Indiana and beyond. At the LGBT Bar Association Lavender Law Conference last August, several McKinney LLS students witnessed firsthand evidence of the hard work undertaken by BALIF in its unwavering support of LGBTQ rights in California and across the United States. Therefore, McKinney LLS proudly joins BALIF's amicus brief wholeheartedly and without reserve. McKinney LLS adds its support to document the widespread conviction that the rights protected by the United States Constitution extend to all citizens, including LGBTQ Americans. McKinney LLS stands with BALIF and other organizations, confident that true equality for all Hoosiers will become a reality through inclusive debate and just enforcement of U.S. law.

LGBT & Allied Lawyers of Utah Bar Association

LGBT & Allied Lawyers of Utah is a non-profit organization of associated legal professionals and members of the Utah State Bar, whose mission is to promote education, advocacy, and equality with regard to sexual orientation, gender identity, and gender expression.

LGBT Bar Association of Maryland

The Lesbian, Gay, Bisexual and Transgender (LGBT) Bar Association of Maryland is a state association of lawyers, judges and other legal professionals,

law students, activists, and affiliate lesbians, gay, bisexual, and transgender legal organizations.

Love Honor Cherish (“LHC”)

Love Honor Cherish (“LHC”) is the largest grassroots marriage equality organization in Southern California. Founded in May 2008 to defend the California Supreme Court’s decision *In re Marriage Cases*, 43 Cal. 4th 757 (2008), LHC has strategically moved marriage equality forward since its inception. In 2010 and 2012, LHC launched efforts to gather signatures to put repeal of Proposition 8 on the ballot in California due to its unwavering dedication to restore marriage equality in California as soon as possible. While those efforts were unsuccessful due to the prohibitive cost of funding a signature gathering campaign, LHC’s volunteers had more than one million conversations about the importance of marriage equality with California voters. LHC continues to advance marriage equality through public education, community empowerment and outreach in collaboration its coalition partners.

Marriage Equality USA (“MEUSA”)

Marriage Equality USA is a national, not-for profit, volunteer-based organization, comprised of over 40,000 same-sex couples, lesbian, gay, bisexual, and transgender people, their families, friends, supporters, and allies. The organization leads nonpartisan, community-based educational efforts to secure the

freedom to marry for all loving, committed couples without regard to sexual orientation or gender identity and to have those marriages fully recognized by the federal government.

Minnesota Lavender Bar Association (“MLBA”)

The Minnesota Lavender Bar Association (“MLBA”) is a voluntary professional association of LGBT attorneys and allies, promoting fairness and equality for the LGBT community within the legal industry and for the Minnesota community. The MLBA envisions a Minnesota where LGBT attorneys, clients, and community members are treated equally and without discrimination. The MLBA’s mission is to promote equality and justice in the legal profession and the LGBT community in Minnesota.

National Asian Pacific American Bar Association (“NAPABA”)

The National Asian Pacific American Bar Association (“NAPABA”) is the national association of Asian Pacific American attorneys, judges, law professors, and law students. NAPABA represents the interests of over 40,000 attorneys and 62 local Asian Pacific American bar associations, who work variously in solo practices, large firms, corporations, legal services organizations, non-profit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has been at the forefront of national and local activities in the areas of civil rights. Equal access to the fundamental right to marry is one such right which

Asian Pacific Americans were long denied through anti-miscegenation laws, and NAPABA joins amici to continue the defense of equal access to the fundamental right to marry.

OGALLA: LGBT Bar Association of Oregon

OGALLA: The LGBT Bar Association of Oregon is a voluntary organization of legal practitioners – including attorneys, judges, paraprofessionals, and educators – dedicated to the promotion of the fair and just treatment of all people under the law regardless of sexual orientation, gender identity or gender expression, to providing visibility for LGBT persons in the law, to educating the public, the legal profession and the courts about legal issues of particular concern to the LGBT community, to identifying and eliminating the causes and conditions of prejudice in society, and to promoting a spirit of unity, while valuing the diversity of our community.

OUTLaws, S.J. Quinney School of Law at the University of Utah

The OUTLaws is an association of LGBT and allied students at the S.J. Quinney School of Law at the University of Utah. We seek to educate law students and the community about issues facing the LGBT community, and partner with existing local organizations to improve the legal standing of Utah's LGBT citizens and families. As such, we have a strong interest in the outcome of *Baskin et al. v. Bogan*, *Fujii et al. v. Commissioner of the Indiana State Dept. of Revenue*,

et al., and *Lee et al. v. Abbott*. We join the signatories of this brief in support of the plaintiff-appellees.

QLaw: The GLBT Bar Association of Washington

QLaw, the GLBT Bar Association of Washington, is an association of gay, lesbian, bisexual, and transgender (GLBT) legal professionals and their friends. QLaw serves as a voice for gay, lesbian, bisexual, and transgender lawyers and other legal professionals in the state of Washington on issues relating to diversity and equality in the legal profession, in the courts, and under the law. The organization has five purposes: to provide opportunities for members of the GLBT legal community to meet in a supportive, professional atmosphere to exchange ideas and information; to further the professional development of GLBT legal professionals and law students; to educate the public, the legal profession, and the courts about legal issues of particular concern to the GLBT community; to empower members of the GLBT community by improving access to the legal and judicial system and sponsoring education programs; and to promote and encourage the advancement of lesbian, gay, bisexual, and transgender attorneys in the legal profession.

Stonewall Law Association of Greater Houston (“SLAGH”)

Stonewall Law Association of Greater Houston is a voluntary professional association of gay, lesbian, bisexual and transgender attorneys, judges, paralegals,

law students and allies who provide a LGBT presence within the greater Houston legal community. SLAGH encourages the recognition of civil and human rights, promotes sensitivity to legal issues faced by LGBT community and those living with HIV, assures the fair and just treatment of members of the LGBT community, provides opportunities for LGBT attorneys, judges, law students and their allies to interact in a professional setting, builds alliances with other minority bar associations and legal organizations, and enhances the practice and professional expertise of lawyers who serve or are members of the LGBT community.