

Case No. 13-4178

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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DEREK KITCHEN, *et al.*, *Plaintiffs-Appellants*,

v.

GARY R. HERBERT, *et al.*, *Defendants-Appellants*,  
and  
SHERRIE SWENSEN, *Defendant*.

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On Appeal from the United States District Court for the District of Utah  
The Honorable Robert J. Shelby presiding, Case No. 2:13-CV-0217-RJS

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AMICI CURIAE BRIEF OF FAMILY EQUALITY COUNCIL, COLAGE,  
VOICES FOR UTAH CHILDREN, AND THE CHILDREN'S  
CENTER OF SALT LAKE CITY  
In Support of Plaintiffs and To Affirm the District Court Order

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**CORPORATE DISCLOSURE STATEMENT**  
**F.R.A.P. 26.1**

None of the amici is a corporation that issues stock or has a parent corporation that issues stock.

## **STATEMENT OF CONSENT TO FILE**

All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a).

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**STATEMENT PURSUANT TO F.R.A.P. RULE 29(c)(5)**

No counsel for a party authored this brief, in whole or in part, and no party, party’s counsel, or person other than amici curiae, their members, and their counsel made any monetary contribution to fund the preparation or submission of this brief.

**STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE**

Amici curiae are organizations dedicated to promoting equality among our country’s diverse families (with a special focus on working with the children of lesbian, gay, bisexual, and transgender (“LGBT”) parents) and organizations advocating for the interests of LGBT youth. Each of the amici has heard from its constituents that, despite myths to the contrary, their families are typical American families, with the same joys and challenges as other American families. Yet these families must also overcome official governmental opprobrium in the form of laws that stigmatize and de-legitimize their family relationships on a legal, social, and psychological level. Amici curiae share these stories in this brief.<sup>1</sup>

Family Equality Council (“Family Equality”) is a community of parents and children, grandparents and grandchildren that reaches across the country, connecting, supporting, and representing lesbian, gay, bisexual, and transgender parents and their children. Family Equality works extensively with the children of

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<sup>1</sup> Many of the statements included in this brief were made as testimony before various public bodies or in published literature. Others come from the personal knowledge of the amici and their constituents.

LGBT parents, including through its Outspoken Generation program, which empowers young adults with LGBT parents to speak out about their families, share their own stories and become advocates for family equality. Family Equality submits this brief on behalf of all of the young people and their parents and grandparents with whom it has worked.

COLAGE is the only national youth-driven network of people with a lesbian, gay, bisexual, transgender, or queer parent. COLAGE approaches its work with the understanding that living in a world that discriminates against and treats these families differently can be isolating and challenging for children. COLAGE, which was founded in 1990, has 15 active chapters and provides networks, programs, and support to thousands nationwide. Based on its direct experience in working with thousands of youth being raised in lesbian, gay, bisexual, transgender, and queer families over the past 20 years, COLAGE can attest to the critical importance to children of having their parents' relationships recognized and respected on every level—socially, institutionally, politically, and legally.

Voices for Utah Children (“Voices”) is a statewide, nonpartisan child advocacy organization whose mission is to raise awareness of issues affecting children in Utah, influence policy for the betterment of Utah’s children, and unite the community to help identify and solve the problems that face Utah’s children. Voices focuses on five key issues – health, school readiness, safety, economic

stability and diversity, and approaches all these issues with the same question: “Is it good for Utah’s kids?” With this theme in mind, Voices effectively and successfully has been able to ensure that the needs of children are always considered in every policy debate. Through this work, Voices sees first-hand the importance of ensuring that every family has the opportunity to enjoy the benefits, both socially and economically, that accompany marriage.

The Children’s Center of Salt Lake City’s (the “Center”) mission is to provide comprehensive mental health care to enhance the emotional and well-being of infants, toddlers, preschoolers, and their families. The Center provides a number of treatment services, including working with families going through divorce, children experiencing difficulty at school, or families having difficulty managing a learning disability or a complex developmental need. The Center’s staff, including psychiatrists, psychologists, social workers and counselors with unparalleled experience, always put the child first when providing these services. Through their work, the Center understands the profound effect marriage inequality has on Utah’s families and their children, and the feelings of otherness such state-sanctioned conduct generates.

## INTRODUCTION

*Family is really important in Utah and [Governor Herbert and the state of Utah] claim to want to protect families, but it hurts me and my brother to not be able to have married parents. It also makes me very sad because it shows me that there is still a lot of prejudice in the world. My parents are good moms and are patient with me and are just regular people.*

R.H.P., age 12, as told to Family Equality.<sup>2</sup>

The State maintains that this case is about what is “best for children,” arguing that excluding same-sex couples keeps marriage focused “first and foremost on the welfare of the children rather than the emotional interests of adults.”<sup>3</sup> This brief is offered to allow children whose welfare is directly affected by these marriage limitations – children of same-sex parents and LGBT youth – to speak.

Children being raised by same-sex parents are uniquely qualified to describe how their families look, feel, and function and how the availability – or unavailability – of marriage for their parents colors their daily lives. These children are also among those persons most powerfully impacted by their parents’

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<sup>2</sup> The individuals whose stories appear in this brief do not seek anonymity, but pursuant to Fed. R. App. P. 5.2, 10th Cir. L.R. 25, and this Court’s February 27, 2014 Order, minors are identified by initials only.

<sup>3</sup> *Kitchen v. Herbert*, No. 13-4178, Opening Brief of Appellants Gary H. Herbert and Sean D. Reyes (“Utah OB”), February 3, 2014, at 2, 25.

inability to marry. Indeed, the U.S. Supreme Court in *U.S. v. Windsor*, 133 S.Ct. 2675 (2013) recognized that laws like Amendment 3 “humiliate[] tens of thousands of children now being raised by same-sex couples. [It] makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” *Id.* at 2694.

Similarly, LGBT youth can best describe how withholding marriage from same-sex couples informs them that they, and any future relationship they intend to form, are unworthy of recognition by their government and unworthy of the status and dignity that accompanies the right to marry. LGBT youth are in the best position to explain how this type of state-sanctioned disapproval profoundly affects them.

By considering the voices of children of same-sex parents and LGBT youth in deciding this case, the Court will ensure that it is truly focusing “first and foremost” on the welfare of children.<sup>4</sup>

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<sup>4</sup> Utah OB at 25 (marriage should be “focused first and foremost on the welfare of children”).

## SUMMARY OF ARGUMENT

The amici and the Proponents<sup>5</sup> of Amendment 3 and its counterparts<sup>6</sup> (collectively “Amendment 3”) agree that marriage is good for children.<sup>7</sup> However, where the Proponents and amici part ways is in the amici’s belief that marriage should be available to ALL families – not just those headed by different sex couples. The children of same-sex parents feel their families are no different from any other family they know. And by precluding marriage for same-sex couples, Amendment 3 treats children in Utah who are being raised by same-sex parents as invisible and unworthy of protection. It denigrates the individual children and their families, tells them they are inferior, and subjects them to second class status.

The Proponents of Amendment 3 recognize that “[s]ociety has an existential need . . . to foster the hope, self-sacrifices and civic virtue that come only from a

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<sup>5</sup> The parties seeking to maintain marriage limitations in this case – Governor Gary R. Herbert, Attorney General Sean D. Reyes, and Salt Lake County Clerk Sherrie Swenson – are referred to collectively herein as the “Proponents.”

<sup>6</sup> The laws at issue in this appeal include two statutory prohibitions on same-sex unions – Sections 30-1-2 and 30-1-4.1 of the Utah Code, and Amendment 3, which became Article 1, § 29 of the Utah Constitution.

<sup>7</sup> *See, e.g.*, Utah OB, at 26 (marriage encourages “selfless parenting” which carries “enormous benefits to children”), 52 (marriage is necessary because “although sex between men and women naturally – and often accidentally – produces children, it does not necessarily produce stable families dedicated to protecting and nurturing those children”), 74 (marriage brings “stability” to children’s lives).

culture that treasures children as its greatest asset.”<sup>8</sup> Yet, far from treasuring the children of Utah who are being raised by same-sex parents, the Proponents would stigmatize and de-legitimize their families, withholding from them the recognition, encouragement and support conferred on families headed by different-sex parents. And, as the stories relayed to amici confirm, this stigmatization and de-legitimization is profoundly felt by the children. These children have known happy, healthy, and “selfless”<sup>9</sup> upbringings, and are confused and saddened by the societal and governmental disapproval of their families. They are no less deserving of the respect, dignity, and legal marital protections afforded to families headed by different-sex couples, and the issues before the Court cannot be properly understood without considering their first-hand accounts.

The harms inflicted by these laws also extend to LGBT youth. By denying same-sex couples the right to marry, these laws undermine the proffered governmental interest in “educating, socializing, and preparing . . . future citizens to become productive participants in civil society.”<sup>10</sup> The denial of marriage rights for same-sex couples forces LGBT youth to “tragically question their own self-

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<sup>8</sup> Utah OB, at 50.

<sup>9</sup> *Id.* at 26.

<sup>10</sup> *Id.* (citation omitted).

worth and their rightful place in a society that fails to recognize their basic human dignity.”<sup>11</sup>

## ARGUMENT

### I. SAME-SEX PARENTS ARE SELFLESSLY AND SUCCESSFULLY RAISING THE NEXT GENERATION.

Families headed by same-sex couples are successfully raising our next generation, and any argument otherwise is directly rebutted by the voices of children growing up in households with same-sex parents.

*I am not different than a straight family's kid. I am a good kid. I don't drink or smoke. I have morals and always open the door for girls. My moms have raised me to be polite, be a gentleman, and have good character. My family is no different than any other family and it makes me mad that people try to tell the courts and the judges that gay people can't get married because they can't raise kids[;]that is just not true. I am who I am because of my moms.*

Ben Farrar, 18, as told to Family Equality (Jan. 28, 2014).<sup>12</sup>

*As a young kid, I didn't understand that some folks might think of my family as something different or out of the ordinary. I never kept my family a secret. To me, families come in many different shapes and sizes. And mine, different by some standards but similar in most ways, was just another one of those. My parents – my two moms – go to work every day, like other parents. They cook dinner and mow the yard. They take care of the house. Volunteer in the community. Pay their bills. Do the thousands of little things that keep a household running. And they love me, unconditionally. But it didn't take me*

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<sup>11</sup> Anthony Michael Kreis, *Is Marriage Equality Inevitable*, HUFFPOST GAY VOICES, Sept. 13, 2012, 6:22PM, at 1, [http://www.huffingtonpost.com/anthony-michael-kreis/is-marriage-equality-inev\\_b\\_1876010.html](http://www.huffingtonpost.com/anthony-michael-kreis/is-marriage-equality-inev_b_1876010.html) .

<sup>12</sup> Statement from Ben Farrar of Utah to Family Equality (Jan. 28, 2014) (on file with Family Equality).

*long to realize that my mom and her partner didn't have the same rights as other people. They are treated differently by the law and can't do many of the things that other families take for granted.*

Brian Arsenault, college student, writing in *Portland Press Herald*.<sup>13</sup>

As Brian Arsenault writes, “families come in many different shapes and sizes.” Families differ in the number of children, the ages of both children and parents, religion, and the activities they enjoy doing together. Some children, regardless of their parents’ sexual orientation, come from divorced or blended families, or are being raised by single parents. And some children have parents living in committed and loving same-sex relationships. In both same-sex and different-sex-parented families, the parents may have married, joined through civil unions or commitment ceremonies, or chosen not to seek any governmental or ceremonial recognition of their relationship. However, only for same-sex-parented families has Utah denied the right to marry.

Families in which LGBT parents are raising children, particularly in Utah, are neither an oddity nor a rarity. Six million Americans have at least one parent

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<sup>13</sup> Brian Arsenault, Op-Ed, *Maine Voices: Young man's wish for his moms on Mother's Day: the right to marry. Families come in different shapes and sizes, but what matters is the love they show each other*, PORTLAND PRESS HERALD, May 11, 2012, available at [http://www.pressherald.com/opinion/young-mans-wish-for-his-moms-on-mothers-day-the-right-to-marry\\_2012-05-11.html](http://www.pressherald.com/opinion/young-mans-wish-for-his-moms-on-mothers-day-the-right-to-marry_2012-05-11.html).

who has identified as lesbian, gay, or bisexual.<sup>14</sup> And because nearly 20 percent of the 650,000 same-sex couples living in the U.S. are currently raising children,<sup>15</sup> there are approximately a quarter of a million children who are being raised in same-sex-parented families. In Utah, there are thousands of same-sex couples and over 20 percent of these couples are raising children.<sup>16</sup> In fact, at 26 percent, Salt Lake City tops the list of metro areas in the United States with the highest percentage of same-sex couples raising children.<sup>17</sup>

Utah is a state that prides itself on the values of marriage and family, and LGBT parents share these values. Joanna Barney, a lesbian mother of two, who was raised in a Mormon family of six, explained: “Clearly, here in Salt Lake, I

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<sup>14</sup> Gary J. Gates, *LGBT Parenting in the United States*, Williams Institute (2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>

<sup>15</sup> Gary J. Gates and Abigail M. Cooke, *United States Census Snapshot: 2010*, Williams Institute, UCLA School of Law, at 3 (Sept. 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf>.

<sup>16</sup> Gary J. Gates and Abigail M. Cooke, *Utah Census Snapshot: 2010*, Williams Institute, UCLA School of Law, at 3 (Sept. 2011), available at [http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot\\_Utah\\_v2.pdf](http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Utah_v2.pdf).

<sup>17</sup> Laura Rodriguez and Donald Gaitlin, *Metro Areas with the Highest Percentages of Same-Sex Couples Raising Children Are in States with Constitutional Bans on Marriage*, (May 20, 2013) available at <http://williamsinstitute.law.ucla.edu/press/press-releases/metro-areas-with-highest-percentages-of-same-sex-couples-raising-children-are-in-states-with-constitutional-bans-on-marriage/>.

think we have one of the highest gay families per capita. Most of us come from big families. Those values are instilled in us. . . . There's probably a lot more families you'll see down here than other places because that's our culture and that's what important to us.”<sup>18</sup>

Amici, and the children of LGBT parents whom amici represent, dispute the Proponents' notion that the only families worthy of protection are those headed by different-sex parents who are both biologically related to their children. A family is not defined by the genders of those who appear in the family portrait. It is defined by its everyday experiences, the “thousands of little things that keep a household running.”<sup>19</sup> The testimonials offered here demonstrate that same-sex parents are raising their children to love their country, stand up for their friends, treat others the way they would like to be treated, and tell the truth. They care about the same things all parents do—hugs and homework, bedtime and bath time. They want bright, secure, and hopeful futures for their children.

At a rally in support of marriage equality at Utah's capital, R.H.P., age 12, told the crowd:

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<sup>18</sup> Hunter Schwarz, *What Marriage Equality Means In A Red State Obsessed With Marriage And Family*, December 23, 2103, available at <http://www.buzzfeed.com/hunterschwarz/what-marriage-equality-means-in-a-red-state-obsessed-with-ma>.

<sup>19</sup> Brian Arsenault, Op-Ed, *supra* note 13.

*Some people do not believe that I am from a loving family because my moms are gay. They are wrong. I love my moms and my moms love me and my brother unconditionally. . . .*

C.H.P., R.H.P.’s seven year old brother, described to Family Equality how his family is no different than any other – that he loves his moms and loves doing things with them:

*I like having two moms. My Mama Ruth is the best mom to play games with and to read with while we cuddle. My Mama Kim is the best mom to take me to piano lessons, help me with math, and to take care of me when I am sick. Both my moms are good to cook with. I like to help them by chopping vegetables and by making smoothies. Both my moms are great to garden with.<sup>20</sup>*

Similarly, R.F. told Family Equality: “I’m a 14 year old girl. I love to draw, play soccer and participate in plays. I have a 3.9 grade average and love spending time with my family. That includes my gay dads. My dads were married in Utah . . . and it was an amazing experience!”<sup>21</sup>

Zach Wahls, a University of Iowa engineering student who was raised by two moms, described his family to the Iowa House of Representatives in 2011: “I guess the point is our family really isn’t so different from any other Iowa family. [W]hen I’m home we go to church together, we eat dinner, we go on vacations.

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<sup>20</sup> Statement of C.H.P. of Utah to Family Equality (February 3, 2014) (on file with Family Equality).

<sup>21</sup> Statement of R.F. of Utah as told to Family Equality (Feb. 4, 2014) (on file with Family Equality).

But, you know, we have our hard times too, we get in fights.’”<sup>22</sup> Zack went on to explain that:

*[T]he topic of same-sex marriage comes up quite frequently in classroom discussions. The question always comes down to, well, “Can gays even raise kids?” The conversation gets quiet for a moment because most people don’t really have any answer.*

*And then I raise my hand and say, “Actually, I was raised by a gay couple, and I’m doing pretty well.” I scored in the 99th percentile on the ACT. I’m actually an Eagle Scout. I own and operate my own small business. If I was your son, Mr. Chairman, I believe I’d make you very proud. I’m not really so different from any of your children. My family really isn’t so different from yours.”*<sup>23</sup>

Importantly, LGBT parents model positive and committed relationships—not just positive same-sex relationships. As Ella Robinson said of the relationship between her father, Bishop Gene Robinson, and his partner:

*Their relationship, which started when I was 7 years old, was such an important example of what a loving, committed relationship should look like that I never thought to question it. I never knew to be embarrassed if someone looked at our family differently, or to worry if my friend coming to my Dad’s with me for the weekend would be uncomfortable. I just knew we’d have fun, watch the Golden Girls and play some board games (competitively).*<sup>24</sup>

And as Brian Arsenault wrote in his editorial to the *Portland Press Herald*:

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<sup>22</sup> *Hearing on HJR 6 Before the Iowa House of Representatives* (Jan. 31, 2011) (statement of Zach Wahls), available at [http://www.familyequality.org/equal\\_family\\_blog/2011/02/04/1001/abc\\_news\\_son\\_of\\_iowa\\_lesbians\\_fights\\_gay\\_marriage\\_ban](http://www.familyequality.org/equal_family_blog/2011/02/04/1001/abc_news_son_of_iowa_lesbians_fights_gay_marriage_ban) (“Zach Wahls”).

<sup>23</sup> *Id.*

<sup>24</sup> Ella Robinson, *How and Why I Am Outspoken*, Family Equality Council Family Room Blog (June 19, 2012) (on file with Family Equality Council) .

*My moms have been together for a long time, through thick and thin, and they've made it through the good times and the bad times together, as a team. They have shown me and the world what a lasting, loving relationship can look like. And when I think of my own wedding someday, should I be lucky enough to find a girl I want to spend the rest of my life with, I can't imagine two better role models to base a family around than my moms.*<sup>25</sup>

As made clear from their stories, children raised by same-sex parents are in happy, healthy, and loving environments, and these children are therefore confused by why their loving and supportive families would be treated as inferior and denied the ability to marry. As Ben Farrar explained to Family Equality, “I am who I am because of my moms. They supported me in my dream to play college baseball. . . . It’s really frustrating to hear people talk bad about my family because we are not what they want us to be. My family is loving, giving, and kind, and is super close.”<sup>26</sup> Similarly, C.F. told Family Equality that “I wish my parents could get married because they love each other! They also love me and my sister, and me and her both have the right to claim those who RAISED US as parents!”<sup>27</sup> Kelsey Cook told amici: “I do not understand why people want to destroy love, to break a bond between two people that they themselves would not give up. The

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<sup>25</sup> Brian Arsenault, Op-Ed, *supra* note 13.

<sup>26</sup> Statement from Ben Farrar, *supra* note 12.

<sup>27</sup> Statement from C.F. of Utah to Family Equality (Feb. 5, 2014) (on file with Family Equality).

government has no right in the choice of who people love, and that should include marriage.”<sup>28</sup>

The Proponents emphasize throughout their brief that their fundamental interest in marriage “lies in maximizing the welfare of children – present and future.”<sup>29</sup> If this is true, then the families of Ben, Brian, R.H.P. and C.H.P., R.F., C.F., Zach, and Ella advance that public interest as fully as families of different-sex parents.

The experiences of these young people are consistent with the hard data: children of same-sex parents fare just as well academically, psychologically, and socially as children of different-sex parents. Research has shown that LGBT parents are active and involved in their children’s education, a factor which results in better academic achievement for children.<sup>30</sup> A study by the Gay, Lesbian and Straight Education Network revealed that LGBT parents are more likely to attend their children’s parent-teacher conferences and volunteer in schools than a national

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<sup>28</sup> Statement from Kelsey Cook of Utah to Family Equality (January 22, 2013) (on file with Family Equality).

<sup>29</sup> Utah OB, at 57.

<sup>30</sup> *Involved, Invisible, Ignored: The Experiences of Lesbian, Gay, Bisexual and Transgender Parents and Their Children in our Nation’s K-12 Schools*, Gay, Lesbian and Straight Education Network (2008) at 25, available at [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/000/001/1104-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1104-1.pdf).

sample of parents.<sup>31</sup> Nearly all of the LGBT parents surveyed (94 percent) reported attending parent-teacher conferences, as compared to 77 percent of the national sample of parents.

The same study showed that LGBT parents are also more likely to stay involved in their children's schooling as children progress through the educational system, with 89 percent of LGBT parents attending a high school parent-teacher conference or back-to-school night as compared to 56 percent of the parents in the national sample.<sup>32</sup> LGBT parents also reported greater than average communication with their children's school regarding their child's future education, their child's school program, information on doing schoolwork at home, their child's positive or negative behavior at school, and about doing volunteer work at school.<sup>33</sup> In sum, LGBT parents are invested and involved in their children's academics and welfare, just like (and sometimes even more than) different-sex parents.

Decades of social science research also confirms that children of same-sex parents have similar levels of psychological adjustment and are no more likely than

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<sup>31</sup> *Id.* at 27.

<sup>32</sup> *Id.* at 27–28.

<sup>33</sup> *Id.* at 28–32.

their peers raised by heterosexual parents to report behavioral issues.<sup>34</sup> All of the leading national child welfare and social service organizations agree that children raised by lesbian, gay, and bisexual parents are just as happy, healthy, and well-adjusted as children raised by different-sex parents. The American Academy of Child and Adolescent Psychiatry, American Academy of Pediatrics, American Psychiatric Association, American Psychological Association, Child Welfare

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<sup>34</sup> Several studies have even suggested that children raised by same-sex parents are better adjusted psychologically than their peers. Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, APPLIED DEVELOPMENTAL SCIENCE, 16:2, 98-111, 104 (2012) (“[N]umerous studies of children and adolescents raised by same-sex parents conducted over the past 25 years by respected researchers and published in peer-reviewed academic journals conclude that they are as successful psychologically, emotionally, and socially as children and adolescents raised by heterosexual parents.”); see also Ian Rivers, V. Paul Poteat and Nathalie Noret, *Victimization, Social Support, and Psychological Functioning Among Children of Same-Sex and Opposite-Sex Couples in the United Kingdom*, DEVELOPMENTAL PSYCHOLOGY, 1:127–134 (2008); Stephen Erich, Patrick Leung and Peter Kindle, *A Comparative Analysis of Adoptive Family Functioning with Gay, Lesbian, and Heterosexual Parents and Their Children*, JOURNAL OF GLBT FAMILY STUDIES, 1:43-60 (2005); Jennifer L. Wainright, Stephen T. Russell and Charlotte J. Patterson, *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, CHILD DEVELOPMENT, 75:1886-1898 (2004); Fiona MacCallum and Susan Golombok, *Children Raised in Fatherless Families From Infancy: A Follow-Up of Children of Lesbian and Single Heterosexual Mothers at Early Adolescence*, JOURNAL OF CHILD PSYCHOLOGY AND PSYCHIATRY, 8:1407–1419 (2004). Several studies have even suggested that children raised by same-sex parents are better adjusted psychologically than their peers. Henny M.W. Bos, Frank van Balen and Dymph van den Boom, *Child Adjustment and Parenting in Planned Lesbian-Parent Families*, AMERICAN JOURNAL OF ORTHOPSYCHIATRY, 77:38–48 (2007); Richard W. Chan et al., *Division of Labor Among Lesbian and Heterosexual Parents: Associations with Children's Adjustment*, JOURNAL OF FAMILY PSYCHOLOGY, 12:402–419 (1998).

League of America, and National Association of Social Workers all have published organizational statements confirming that lesbian, gay, and bisexual people make excellent parents who raise developmentally healthy children.<sup>35</sup>

When amici speak to these children and hear their stories, it is obvious that same-sex parents are “maximizing the welfare of the children”<sup>36</sup> and raising the next generation of Utah’s leaders – like Ben, a future collegiate athlete and a teacher’s aide in the special education class at his high school, or Madison, Ben’s sister, a collegiate honor student majoring in biochemistry, or C.F., an eagle scout and violinist in the local chamber strings orchestra, or R.F., a soccer player with a 3.9 GPA, or R.H.P., who had not only the desire, but the poise and eloquence at

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<sup>35</sup> American Academy of Child and Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement* (revised and approved 2009), [http://www.aacap.org/cs/root/policy\\_statements/gay\\_lesbian\\_transgender\\_and\\_bisexual\\_parents\\_policy\\_statement](http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement); American Academy of Pediatrics, *Policy Statement: Coparent or Second Parent Adoption by Same Sex Couples*, PEDIATRICS, 109(2):339–340 (2002), reaffirmed May 2009; American Psychiatric Association, *Position Statement on Adoption and Co-parenting of Children by Same-sex Couples* (2002), <http://www.psychiatry.org/advocacy--newsroom/position-statements>; American Psychological Association, *Sexual Orientation, Parents, & Children* (2004), <http://www.apa.org/about/policy/parenting.aspx>; Child Welfare League of America, *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, <http://www.cwla.org/programs/culture/glbtposition.htm> (last visited March 4, 2013); SOCIAL WORK SPEAKS: NATIONAL ASSOCIATION OF SOCIAL WORKERS POLICY STATEMENTS, 2003–2006, 146–150, available at <http://www.socialworkers.org/pressroom/features/policy%20statements/146-153%20Foster.pdf>.

<sup>36</sup> Utah OB, at 57.

only twelve years old to speak in front of hundreds of people at a rally in support of his mothers' right to marry. The issues before the Court cannot be properly understood without considering the interests of these children.

## **II. AMENDMENT 3 LEGALLY AND SOCIALLY DE-LEGITIMIZES FAMILIES HEADED BY SAME-SEX PARENTS AND DOES NOTHING TO BENEFIT THEIR CHILDREN**

The Proponents of Amendment 3 are quick to argue, “Utah is the most child-centric of all States,”<sup>37</sup> a state with a “culture that values marriage, family, and child-rearing.”<sup>38</sup> Yet, Amendment 3 does the opposite of this: (1) it de-legitimizes loving and stable homes and is an expression of the inferiority of children raised by same-sex couples; and (2) precludes families from enjoying the benefits and rights associated with marriage that different-sex couples enjoy. Rather than protecting and affirming Utah’s children, Amendment 3 tells children of same-sex parents that they and their families are not good enough in the eyes of society and the law. Utah’s interest in “maximizing the welfare of children”<sup>39</sup> should apply to all children. Denying the social and legal benefits and responsibilities of marriage to

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<sup>37</sup> *Kitchen v. Herbert*, Motion of the Governor and Attorney General for Summary Judgment, Oct. 11, 2013, Dkt. No. 33, at x.

<sup>38</sup> What Marriage Equality Means In A Red State Obsessed With Marriage And Family, *supra* note 18.

<sup>39</sup> *Id.* at 57.

Utah's same-sex couples tells their children that they and their families are less worthy of recognition and protection.

**A. Marriage Discrimination Laws Can Cause Children Of Same-Sex Families To Be Humiliated, Insecure, and Fearful.**

Most often, the biggest challenge same-sex parented families face is the societal and governmental disapproval that Amendment 3 represents. While same-sex parents feel the effects of Amendment 3, it also critically and profoundly impacts their children, without serving any legitimate purpose. As the District Court observed, “[i]t defies reason to conclude that allowing same-sex couples to marry will diminish the example that married opposite-sex couples set for their unmarried counterparts,” and “[t]here is no reason to believe that Amendment 3 has any effect on the choices of couples to have or raise children, whether they are opposite-sex couples or same-sex couples.” *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at \*25, 26 (D. Utah Dec. 20, 2013).

The former program director of amicus COLAGE told the New Jersey Civil Union Review Commission that many children with whom she has worked have had their peers “question[] the validity of their families because their parents aren’t able to get married.”<sup>40</sup> This in turn can lead children to have insecurity

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<sup>40</sup> *Transcript of Hearing on Civil Union Act Before N.J. Civil Union Review Comm’n* at 38 (April 16, 2008) (statement of Meredith Fenton) (“Fenton Testimony”), available at <http://www.nj.gov/oag/dcr/downloads/Transcript%20CURC-and-Public-Hearing-04162008.pdf>.

about their parents' relationship, including the fear that somebody is going to come and break up their family."<sup>41</sup> They do not understand the distinction that Amendment 3 makes between their families and other families headed by different-sex couples, leaving them feeling vulnerable and confused.

R.K.N., age 8, told Family Equality that her mothers' inability to get married made her feel "really sad" and that "it hurts my feelings. I'm mad because I think everyone should be able to marry who they love. A family is a family."<sup>42</sup> At a marriage equality rally at the Utah State capital, R.H.P. spoke to the crowd about his fears: "Sometimes I felt really scared that my moms weren't married. I imagined being taken away from one of my moms." R.F., age 14, told Family Equality that she feels "like [her parents'] marriage could be taken away at any moment" and that she wants her parents' marriage to be recognized so that it "would feel more permanent and real."<sup>43</sup> And when W.K.N., 10, was playing with neighborhood kids who told him his moms could not marry because it was illegal,

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<sup>41</sup> *Id.* at 76:4–5.

<sup>42</sup> Statement from R.K.N. of Utah to Family Equality (Jan. 21, 2014) (on file with Family Equality).

<sup>43</sup> Statement from R.F., *supra* note 21.

he was “worried [his] parents would go to jail. I was mad and didn’t want to play with them again. We’re a normal family and my parents love each other.”<sup>44</sup>

In *U.S. v. Windsor*, the U.S. Supreme Court explicitly recognized the harmful effect such state sanctioned stigmatization can have on children, in holding that DOMA humiliates children and causes them to question their own family. 133 S.Ct. 2675, 2694 (2013). This stigma is no different from that felt as a result of racial segregation. In *Brown v. Board of Education*, the U.S. Supreme Court unanimously announced that “[t]o separate [kids] from other[s] of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” 346 U.S. 483, 494 (1954) (quoting lower court). Like the victims of racial segregation, children of same-sex parents experience feelings of inferiority, insecurity, and condemnation. These feelings are a common theme heard by the amici who work every day with children being raised by same-sex parents.

The Proponents claim that there is no intent to “demean other family structures, any more than giving an ‘A’ to some students demeans other

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<sup>44</sup> Statement from W.K.N. of Utah to Family Equality (Jan. 21, 2014) (on file with Family Equality).

[students].”<sup>45</sup> However, the Proponents’ “intent” does not mitigate the adverse impact of the policy on children of same-sex couples, who are informed that their families are undeserving of an “A” only because they do not have a mom and a dad as though that factor alone – not the love, commitment, dedication of the parents and the parents and children – is the one essential ingredient of a family.

The Proponents’ Motion for Summary Judgment and Opening Brief are flush with the implication that children growing up in same-sex households - indeed, growing up in any household not headed by two biological parents – will grow up to be inferior members of society.<sup>46</sup> Children with whom amici work feel this disapproval from others and understand that marriage inequality is an expression of moral condemnation of their families. To these children, marriage inequality sends the message that their family is not “marriage worthy,”<sup>47</sup> and it makes them feel “ashamed,”<sup>48</sup> “really sad,”<sup>49</sup> and that their family is not viewed as “equal – that they look down upon us as we are not the same or less than different-

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<sup>45</sup> Utah OB, at 2.

<sup>46</sup> *Cf. id.* at 68 (citing research regarding delinquency of boys with absent fathers, statistics related to unwed young mothers who grew up outside of intact marriages).

<sup>47</sup> Email from Madison Farrar of Utah sent to Family Equality (Jan. 28, 2014) (on file with Family Equality).

<sup>48</sup> Statement from Kelsey Cook, *supra* note 28.

<sup>49</sup> Statement from R.K.N., *supra* note 42.

sex couples.”<sup>50</sup> It tells them that their families are “not legitimate” and “not welcome.”<sup>51</sup> It creates an insecurity – “a coercive feeling of doubt” in their perceived stability in their family.<sup>52</sup> R.K.N., 10, told Family Equality that “[s]ometimes at school if we’re talking about our families, someone will bring up the fact that I have two moms and they aren’t allowed to be married. It hurts my feelings and it makes me feel insecure. It makes me feel like I’m not supposed to be there and I don’t fit in.”<sup>53</sup> In another example, the young son of two gay men was compelled to ask, “Dad, are we a family?” after overhearing a hospital staff say that one of his fathers was not able to sign the other’s medical paperwork because they were not a “family.”<sup>54</sup>

This is especially troublesome in Utah, where family and marriage are such closely-held values. C.F. told amici it was a “dream of mine” to see his dads get married, and that he “was sobbing” at their wedding because he was “so happy for

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<sup>50</sup> Statement from Ben Farrar, *supra* note 12.

<sup>51</sup> *Honoring All Maine Families: Gay and Lesbian Partners and their Children and Parents Speak About Marriage*, Center for Prevention of Hate Violence (Apr. 2009) (“*Honoring All Maine Families*”) at 5, available at <http://www.preventinghate.org/wp-content/uploads/2011/03/Honoring-All-Maine-Families-2009.pdf>

<sup>52</sup> *Id.* at 4.

<sup>53</sup> Statement from R.K.N., *supra* note 42.

<sup>54</sup> “Jeff, Josh, and Andrew,” Family Stories, Family Equality (March 21, 2013), available at [http://www.familyequality.org/equal\\_family\\_blog/2013/03/21/1576/jeff\\_josh\\_and\\_andrews\\_family\\_story](http://www.familyequality.org/equal_family_blog/2013/03/21/1576/jeff_josh_and_andrews_family_story).

them and the fact that we were finally a family.”<sup>55</sup> C.F.’s sister, R.F., felt “overwhelmed, happy and surprised.”<sup>56</sup> R.K.N. felt “happy inside,”<sup>57</sup> and W.K.N. felt like “our family was more together.”<sup>58</sup> W.R.B., 11, said “it makes me happy and excited for them because others would now see us a legal family,”<sup>59</sup> and L.R.B. told Family Equality that “it was a beautiful sight to see your parents get married after 21 years where they couldn’t before.”<sup>60</sup>

Utah’s attempts to preclude these families from enjoying the same benefits and rights as other families, and from being recognized as a “legal family,” indicates to children of same-sex parents that the most important relationships in their lives are inferior, unworthy of state validation and protection, and subjects them to second class status. This differentiation, which “makes it . . . difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives,” should not be permitted. *Windsor*, 133 S. Ct. at 2694.

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<sup>55</sup> Statement from C.F., *supra* note 27.

<sup>56</sup> Statement from R.F., *supra* note 21.

<sup>57</sup> Statement from R.K.N., *supra* note 42.

<sup>58</sup> Statement from W.K.N., *supra* note 44.

<sup>59</sup> Statement from W.R.B. of Utah to Family Equality (Jan. 22, 2014) (on file with Family Equality).

<sup>60</sup> Statement from L.R.B. of Utah to Family Equality (Jan. 22, 2014) (on file with Family Equality).

**B. Marriage Discrimination Laws Cause Insecurity In Children Of Same-Sex Parents By Depriving Them of Important Benefits Available to Married Different-Sex Parents.**

Not only does Amendment 3 belittle families headed by same-sex parents, but also it deprives them of practical benefits and rights extended to different-sex parents who are able to marry. For example, same-sex couples cannot file joint federal tax returns or maximize dependency exemptions, education deductions, child tax credits, and children and dependent care credits. Barring marriage for same-sex couples in Utah deprives these families of all federal benefits to which they would be entitled if state law considered them married. *See, e.g., id.*, at 2694-95 (discussing various federal benefits dependent on marital status).

Take R.K.N. and W.K.N.'s family, for example. Their moms have been together for over 13 years. They always wanted children and chose to adopt R.K.N. and her brother, W.K.N. Unfortunately, because Utah does not allow same-sex couples to adopt a child together, each mother had to individually adopt one child. The impact of this is far-reaching and detrimental to the family. For example, when R.K.N. and W.K.N. go to the hospital, their moms are not both recognized as "parents." The family has to have two separate insurance plans. And the family has had to pay expensive attorney fees to ensure both parents have legal guardianship over R.K.N. and W.K.N.

This experience - typical for families in Utah headed by same-sex parents - makes it all the more important and impactful to these children that their parents have the right to marry. As the Supreme Court has recognized, “[r]esponsibilities, as well as rights, enhance the dignity and integrity of the person.” *Windsor*, 133 S.Ct. at 2694.

**III. LAWS BANNING SAME-SEX COUPLES FROM MARRIAGE ALSO HARM LGBT YOUTH IN UTAH BY INFORMING THEM THAT THEIR GOVERNMENT CONSIDERS THEM, AND ANY COMMITTED RELATIONSHIPS THEY MAY FORM AS ADULTS, TO BE INHERENTLY INFERIOR TO THOSE OF THEIR HETEROSEXUAL PEERS.**

Amendment 3 also hurts another group of young people in Utah – LGBT youth. State-sanctioned disapproval of same-sex relationships informs LGBT youth that they are second class citizens, not deserving of the “dignity and status” that comes with marriage. *Windsor*, 131 S. Ct. at 2692. This disapproval is deeply felt by the LGBT youth, but it is one that, unfortunately, receives little attention.

As one young man wrote:

*Like many other Americans, I dream of finding the love of my life and raising a family with them, passing on many of the values that my parents taught me when I was young. Yet this dream is currently denied to me on many levels, simply because my spouse and I would be the same sex. Despite many claims to the contrary by vocal opponents of marriage equality, I don't want to destroy or alter American society and values; I want to take part in them, too.*<sup>61</sup>

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<sup>61</sup> Kathryn Brightbill, Brian W. Kaufman, Margaret Riley, and Nick Vargo, LGBT Youth/Young Adult Survey, EMORY CHILD RIGHTS PROJECT, *available at*

Or in the words of a high school student:

*I've known I was gay since I was in 6th grade but I also knew that if I was gay I wouldn't be able to get married with that one I truly loved, therefore I wouldn't be able to share those moments [that] my parents enjoyed[.] I thought that the bond of marriage is what keeps two people together through thick and thin [but] was not for me, and thus my adult life would not be the haven [that I had thought] as a kid.<sup>62</sup>*

These comments illustrate how LGBT youth's perceptions of their futures are powerfully influenced by what the government tells them about the validity of the committed relationships they hope to form as adults. Officially sanctioning their exclusion from marriage exacerbates feelings of hopelessness about the future and perpetual "different-ness" that many LGBT youth already feel. A college student described how these types of laws affect him: "I am a second-rate citizen. . . My expectation is that while the rest of my community may disengage me because of my orientation, my government would not."<sup>63</sup>

The stories and experiences of Utah's LGBT youth further illustrate that Utah's attempt to justify Amendment 3 is both irrational and inconsistent with reality. Barring millions of young people from full participation in the institution of marriage and informing them that they are a "second-rate citizen" through state-sanctioned exclusion of marriage cannot be reconciled with the Proponents'

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[http://www.law.emory.edu/fileadmin/NEWWEBSITE/Centers\\_Clinics/Barton/Emory-DOMA-study.pdf](http://www.law.emory.edu/fileadmin/NEWWEBSITE/Centers_Clinics/Barton/Emory-DOMA-study.pdf) (compiled Jan. 29, 2013) ("Child Rights Project Survey").

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

argument that Amendment 3 is important for and beneficial to the next generation of children of Utah.

### **CONCLUSION**

While the Proponents allege that Utah's laws banning marriage for same-sex couples are good for children, children raised by same-sex parents and their families are directly undermined by those laws. Amendment 3 imposes on the thousands of children currently being raised by same-sex couples in Utah both stigma and illegitimacy, and the children are here to say that their families are just as deserving of recognition, respect, and protection as those of children with different-sex parents. And, far from promoting social order, the LGBT youth who have personally experienced the harm these laws engender and perpetuate, know otherwise.

Based on the foregoing, amici urge this Court to affirm the Utah district court order.

Respectfully submitted this 4<sup>th</sup> day of March, 2014.

BRYAN CAVE LLP

*s/Kathryn R. DeBord*

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**ATTORNEYS FOR AMICI CURIAE**

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,878 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 word processing software in 14-point regular Times New Roman type style.

*s/Kathryn R. DeBord*

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Kathryn R. DeBord

***ATTORNEYS FOR AMICI CURIAE***

## **CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Trend Micro OfficeScan Client 10.0 Service Pack 1, 3/4/14, and according to the program are free of viruses.

*s/Kathryn R. DeBord*

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Kathryn R. DeBord

***ATTORNEYS FOR AMICI CURIAE***

## CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2014, I electronically filed the foregoing **AMICI CURIAE BRIEF OF FAMILY EQUALITY COUNCIL, COLAGE, VOICES FOR UTAH CHILDREN, AND THE CHILDREN'S CENTER OF SALT LAKE CITY** using the Court's CM/ECF system which will send notification of such filing to the following:

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